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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

July 26, 1972

Minutes

Members Present: Senator Wallace P. Carson, Jr., Chairman
Representative Leigh Johnson

Excused: Attorney General Lee Johnson
Representative Robert Stults

Others Present: Mr. John Osburn, representing Attorney General Lee Johnson
Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Ms. Melinda Woodward, Corrections Division, Feasibility Study
Ms. Tanya Enders, Multnomah County recognizance officer
Mr. Stephen A. Moen, Multnomah County District Attorney's office
Mr. John Hawkins, Capital Journal
Mr. John Johns, Salem
Mr. Robert A. Parks, Salem

Agenda: Release of Defendants
Preliminary Draft No. 1; May 1972

Senator Wallace P. Carson, Jr., Chairman, called the meeting to order at 10:30 a.m. in Room 315 State Capitol.

Mr. Paillette explained that the draft on today's agenda was mailed to the members after the preparation of the reference papers relating to the bail projects and the summary which delves into the rationale of the ABA standards, both of which contain some of the concepts in the draft. He said that to his knowledge, Multnomah County is the only county which, on a fulltime basis, utilizes recognizance personnel. The draft represents a significant change and is a complete departure from the old bail concept.

Mr. Gustafson explained the origin of the draft which, he said, goes back to the Vera Foundation founded by Mr. Louis Schweitzer and which then led to the Manhattan Bail project in conjunction with the New York University Law School. Following this, other bail projects across the nation were implemented, some of which dealt only with recognizance releases. Oregon, he said, has no guidelines for the release of the defendant--it is merely within the discretion of the judge.

ORS chapter 140 contains provisions for recognizance release but primarily the form for release is monetary.

Mr. Gustafson stated that Melinda Woodward of the Corrections Division has presented him with data which tend to show that two to three times as many people are jailed prior to trial as are jailed after conviction and the draft aims to remedy this situation. There has been organized support for change of the bail laws in Oregon, he said, with the Vera Foundation and Judicial Council in Salem recommending a 10% deposit system and pretrial investigation in 1967. In 1968 the Portland City Club recommended a 10% deposit system, pretrial release investigation and prompt release decision and review. The Judicial Council initially dealt with bail with two recommendations contained in its 1966 report, one that personal recognizance should be given more publicity and also that experimental recognizance programs be implemented. Recently, the Oregonian in an editorial recommended the 10% deposit system.

Mr. Paillette referred to the statistics compiled by Ms. Woodward and the fact that the ROR system was not widely used and said that on a county by county analysis the figures are shockingly low. Ms. Woodward stated that the highest percentage using this system is about 15% and this is in Multnomah County. The bulk of the people going to court are going through lower court and although the higher courts use the system, the J.P. and municipal courts rarely utilize it.

Chairman Carson asked if this percentage is broken down into crimes. He believed the type of crime would lend itself to the possibility for release. Ms. Woodward explained that the persons held for drunk related crimes were held until they went to court although in some places they are releasing DUIL offenders. This seems to be done on the initiative of the sheriff, she said, and not so much the court.

Mr. Gustafson explained that the draft contains concepts carried in the Illinois 10% deposit system, the Manhattan Bail Project and reliance on the ABA Pretrial Release.

Section 1. Release of defendants; definitions. The conditional release as outlined in subsection (1) is authorized in section 7, Mr. Gustafson pointed out. Chairman Carson asked if "Magistrate" in subsection (2) applies to all categories of law enforcement and Mr. Gustafson replied affirmatively. With respect to subsection (3), the Chairman asked if, in Mr. Gustafson's research, there had been any other terminology used in lieu of "personal recognizance." This term, he believed, was confusing to the average defendant.

Mr. Gustafson replied that the ABA speaks to this in its commentary to Pretrial Release wherein it states that " . . . contemporary usage has so far departed from original concept that clarity is promoted by conforming to common understanding." He suggested that the term could be changed to "personal release," or "non-security release" as pointed out by Mr. Paillette. Representative Johnson favored the term remain as is as he believed all persons understand the meaning. Chairman Carson

disagreed and said this is used heavily in cases where the person has not been in court frequently, and after the term has been used, an explanation of its meaning must then be given. Any other term would have to be explained to the defendant also, Representative Johnson contended.

Subsection (6). Mr. Gustafson believed this to be one of the more important parts of the draft as it sets forth for the first time the criteria for the release. The Manhattan Bail Project found that through verification and simulation of data of the person's community ties they could predict with better accuracy whether or not the defendant would appear in court at the appropriate time.

Paragraph (h), he said, is a general provision for bringing in whatever is relevant. Chairman Carson believed this was the conclusion upon which the release is made and suggested this paragraph be incorporated into subsection (6), thus making it more operative. The decision the court will attempt to reach, he said, is based upon what is contained in paragraph (h).

Mr. Paillette agreed with the Chairman's proposal and also pointed out that the phrase "but is not limited to" in subsection (6) was unnecessary in that paragraph (h) gives the court discretion to move into anything other than what has been mentioned in paragraphs (a) to (g).

The phrase "but is not limited to" in subsection (6) was deleted by the subcommittee.

Mr. Osburn asked if the subcommittee was suggesting that the factors in paragraph (h) are the summary of the rest. Chairman Carson answered affirmatively. Mr. Osburn then asked if the subcommittee believed that it was the tie to the community that would make the defendant appear or simply the likelihood that he would appear at the time when he is required to. For example, a person lives in San Francisco and has had the same job for 17 years with no prior difficulty with the law, but no strong ties to the community. He asked if this person would be likely to be subject for release.

Ms. Woodward remarked that as the draft now reads, the basis on which the decision will be made is not spelled out. The judge may consider all these factors, but not systematically. She believed it wise to have this spelled out in the draft and contain the escape clause to allow the judge to use discretion when needed. The problem with bail decisions now, she said, is that they tend to be quite subjective and the aim of the Bureau project was to make that decision as objective as possible.

Chairman Carson pointed out that paragraph (h) contains two parts, (1) any other facts tending to indicate that the defendant has strong ties to the community and (2) that he is not likely to flee the jurisdiction. Subsection (2) of section 4, he said, states that the defendant shall be released upon his personal recognizance unless release criteria show the defendant is not reasonably likely to appear in court. He therefore suggested paragraph (h) be divided into two paragraphs.

Inasmuch as the defendant could have strong ties to the community and still be likely to flee the jurisdiction, or have no ties to the community and be not likely to flee, the subcommittee amended subsection (6), paragraoh (h) to read:

"(h) Any [other] facts tending to indicate that the defendant has strong ties to the community; and

"(i) Any other facts tending to indicate the defendant is [not likely to flee the jurisdiction] likely to appear."

Ms. Woodward referred to paragraph (f). She commented that municipal court judges who are responsible for both arraignment and trial have said they did not wish to be made aware of the person's prior criminal record when they are making the bail schedule. The problem of being exposed to the prior record of the defendant could influence them when trying the case, she said.

Mr. Paillette responded that this is a legitimate inquiry and believed that many judges do wish to know the record. The argument would be whether or not they were required to do so, and he did not believe the draft does this.

Subsection (8). The manner in which the security is deposited is embodied in sections 7 and 8 of the draft, Mr. Gustafson reported, and is the traditional type of bail as is used today.

Representative Johnson moved the adoption of section 1 as amended. The motion carried.

Section 2. Release assistance agency. This section authorizes the circuit court to establish a release assistance agency, Mr. Gustafson explained, and the entire purpose of the agency is to assist the court in verifying and collecting the data of the release criteria, determining where the person lives, his employment, family relationships, etc. The agency's recommendation to the court is then made based on this data. The word "may" on line 2 is used in the section because some smaller counties may not need this agency.

Mr. Paillette pointed out that there may be some fiscal implications in establishing this agency.

Mr. Gustafson remarked that the intent of the draft was to allow the use of the agency in all cases where someone is in custody. Subsection (1) states that the offense is within the jurisdiction of the circuit court and inasmuch as some will be tried in district or municipal court, he suggested the deletion of the words "The circuit court" in line 1.

Chairman Carson was concerned about the necessity of establishing an agency and would foresee that in a small county an officer of the court could very easily be the release assistance officer. In the larger counties an agency could be established, but he worried that it

would frighten away the smaller counties from designating a person to act in this position. The Chairman wondered if the draft could state that each court may designate a release assistance "officer."

Mr. Paillette referred to the program in Multnomah County where there are two recognizance officers who sit in during the arraignments and at which time the arraigning judge refers the question of ROR or bail to one of these officers. In many cases, he said, they are able to inform the judge of their findings on that same day, and his decision can then be made.

Chairman Carson reiterated his concern for forming another agency and believed the same thing could be done by allowing any court to designate an individual to be a release assistance officer, thus refraining from the word "Agency."

Mr. Paillette asked Ms. Woodward what the recognizance officers in Multnomah County were doing with respect to district courts. It was her understanding that these officers were located at the jail and interviewed people regardless of their court destination.

Chairman Carson proposed section 2 be amended to read:

> "(1) [The circuit court] Any magistrate may [establish] designate a Release Assistance [Agency that] officer who shall, except when impractical, interview every person detained pursuant to law and charged with an offense [within the jurisdiction of the circuit court].
>
> "(2) The Release Assistance [Agency] officer shall [be composed of one or more persons who shall] verify release criteria information and timely submit a written report to the [appropriate] magistrate containing, but not limited to, an evaluation of the release criteria and a recommendation for the form of release."

The Chairman was inclined to believe that there should be one officer in each court who may have as many deputies as he needs, and the staff was directed to include this concept in the draft.

Mr. Gustafson asked if the words "Any magistrate" would mean municipal court and up. Mr. Osburn wondered if it might be preferable to have the circuit court make the appointment and have the services made available to the persons within the jurisdiction of any court in the county. Chairman Carson was of the opinion this would not work from the fiscal standpoint.

Mr. Osburn moved the adoption of section 2 with the Chairman's proposed amendments. The motion carried.

Section 3. Releasable offenses. Subsection (1) of the section states in statutory form the constitutional right to bail as contained in Oregon Const. Art I s. 14. Subsection (2) contains the exceptions,

murder or treason. The words "a fair likelihood of conviction" come from Connell v. Roth, 258 Or 428, 482 P2d 740 (1971), in which case the district attorney presented the grand jury indictment for murder as sufficient proof or strong presumption that the person is guilty and therefore should not be released on bail. The court held that was not enough and stated that bail should be denied when the circumstances disclosed indicate "a fair likelihood" that the defendant is in danger of being convicted, thus Mr. Gustafson's reasoning for including this phrase in the draft.

Mr. Osburn asked what effect the criminal homicide statute has as far as distinguishing murder and if there are any complications regarding bail. Mr. Paillette replied that crimes that previously would have been bailable would now be restricted because they were now included in the definition of murder.

Representative Johnson was disturbed in that a man could be bailable for attempted murder and after his release could complete his prior intention.

Chairman Carson asked if the subcommittee was satisfied in trying to combine the constitutional statement with case law.

Mr. Osburn moved to delete the words "circumstances indicate a fair likelihood of conviction and" in subsection (2). The motion carried. Mr. Osburn believed it appropriate to include these deleted words in the commentary as it is the Supreme Court's commentary to the Constitution.

Section 3, as amended, was adopted.

Mr. Gustafson pointed out that the term "release" in the section will refer back to section 1 wherein release also includes release after judgment of conviction and which would be discretionary with the magistrate.

Chairman Carson asked if a defendant convicted of murder would be entitled to release, even under the discretion of the court. Subsection (2) states the defendant shall be denied release when the proof is evident and, although a conviction is strong evidence of guilt, he believed it advisable to state that there is no release pending an appeal.

Mr. Paillette asked if the defendant can now be released pending appeal, after a murder conviction. Mr. Osburn replied that he was not aware of anyone being released under these circumstances.

Chairman Carson commented that in order to show that release is barred it may be advisable to continue subsection (2) to read "the person is guilty or has been convicted."

No action was taken on the above proposal.

Section 4. Release decision. Subsection (1) was amended to read as follows:

"[All defendants] A defendant in [lawful] custody . . . . "

Mr. Gustafson commented that subsection (1) reads that the defendant shall be brought before any magistrate during the first 24 hours. If this were in effect, the availability of the magistrate on the weekends would be necessary.

Mr. Osburn asked if it would be possible to obtain a magistrate, for example, in Jordan Valley on a Friday night. Chairman Carson asked if there was any reason why the magistrate could not be contacted by telephone.

As the subsection reads that the defendant "shall be brought before a magistrate," Mr. Paillette suggested the phrase "shall be brought" be deleted and the section framed in terms of the release decision being made.

Mr. Gustafson pointed out that the draft, as presently written, does not authorize a peace officer to release a defendant unless he has been given authority by the magistrate and no provision is contained for a bail schedule.

Mr. Paillette suggested subsection (1) be amended to read:

"A release decision shall be made within 24 hours after a defendant is taken into custody."

Chairman Carson agreed to this suggestion and added that the question arises as to who, in lieu of a magistrate, may make this decision and under what circumstances. The draft, he said, should also state what the release decision alternatives are, such as (1) the defendant be brought before the magistrate and (2) if the magistrate is not available, a bail schedule could be implemented.

Mr. Gustafson commented that section 10 states that a peace officer may only take the security which has been set by the magistrate for the defendant's release. The position taken in that section, he said, was that there would be no bail schedule in order to foster the recognizance release, but the section could be amended to allow the magistrate to set a release schedule for certain offenses. If there was an offense committed not under a release schedule and no magistrate available, a telephonic procedure could be provided.

Chairman Carson favored a two-step approach, with the magistrate to be contacted and in his absence, the use of the telephone. He was not in favor of the bail schedule.

The subcommittee recessed for lunch, reconvening at 1:30 p.m.

At this point in the meeting, Tanya Enders, recognizance officer from Multnomah County and Mr. Stephen Moen, Multnomah County District

Attorney's office arrived and were asked to join the discussion and present their views to the subcommittee.

Ms. Enders explained that under the present structure the staff must be at the arraignments, be requested to undertake the interview, conduct it and verify the information before 4:45 p.m. and with the workload involved, the 24 hour provision appears to be unrealistic.

Mr. Osburn wondered if the subcommittee should work on getting a speedy arraignment which would be a judicial problem and not a release problem. Chairman Carson said that the release could then be within 24 hours of the arraignment.

Mr. Osburn asked if any changes had been made in the arraignment procedures which would require a particular time other than what is now practiced. Mr. Paillette replied that a rough draft is in the preparation but the staff is awaiting the results of the arrest draft and also this draft before continuing.

Mr. Gustafson commented that there were two problems to the speedy arraignment, (1) the person should know what he is being charged with and be allowed to plead and (2) if the defendant is not in custody the problem of the speedy arraignment is not as acute. He believed that if a speedy release could be implemented, then a speedy arraignment would not be of great consequence. The 60-day provision applies only when the defendant is in custody, he said, although Ms. Enders commented that many judges will ignore this and want the 60-day rule adhered to.

Subsection (2), Mr. Gustafson said, would put a burden on the district attorney by releasing the defendant on personal recognizance unless the release criteria show he is not likely to appear. The district attorney, if ready for arraignment, could be ready for a release decision at the same time, he said.

Mr. Moen advised that the district attorney's office in Portland does not take any part in the release decision. This is done by the judge and the recognizance staff. The problem is that there should be an attorney at hand to advise the defendant of his rights and the judges are trying to get the attorney worked in the system as early as possible. If the defendant is arraigned on Monday, for instance, the attorney is appointed that day and generally will see the defendant on Tuesday which brings about another 24 hour delay.

Ms. Woodward was of the belief that the defendant's release was more important than the convenience of the attorney in this situation. She agreed the system was better if the attorney were able to contact his client before his release but she did not feel it necessary that the recognizance interview be requested as was reported by Ms. Enders, as the draft seems to make this interview mandatory. By eliminating the request situation the delay in the release would be shorter.

Ms. Enders said that by receiving this request, she is also given automatic information on the defendant. With respect to the "convenience

of the attorney," as Ms. Woodward stated, she said the attorney is required to see the defendant as quickly as possible and normally, an attorney will be appointed who is in the courtroom at that time. If this is not feasible, it will be set over until the next morning and the attorney will appear with the defendant. Without knowing anything about the defendant, the case or the district attorney's stand, she said she needs the chance to examine the information thoroughly and this is where the 24 hour concept is not feasible.

Chairman Carson asked Ms. Enders if, with Multnomah County leading the way in this system, she could give the subcommittee her views as to how she felt this system should work. Miss Enders stated that the release decision is not made in every case. If a request is not received, generally because the attorney knows the defendant cannot make ROR or bail, a decision is not forthcoming. If it is an appointed attorney, for instance, the judge will not permit the defendant to make bail unless he is also prepared to pay for his own attorney.

The Chairman pointed out that the subcommittee is trying to determine at what point the decision should be made for the three types of releases, i.e., security, ROR or conditional.

Mr. Osburn remarked that subsection (2) establishes a presumption that the defendant is entitled to release on personal recognizance unless release criteria show he is unlikely to appear in court. It would be his assumption that if the defendant is not brought before the magistrate, or a decision is not made, the defendant is entitled to be released on his own personal recognizance within 24 hours. He asked if there was any encouragement whatever for the defendant to put any information before the court at all.

Ms. Enders replied that other things are taken into consideration other than whether he is likely to appear in court. The charge itself is just as important, as well as the relationship to the alleged victim. If the defendant is an addict, the fact that he may return to his habit while on release is evident and the chances of releasing him are unlikely. Mr. Paillette observed that this would be done, as the release criteria in section 1 sets out all the other aspects to be taken into consideration.

Mr. Osburn asked Ms. Enders if the decision her office makes is based in part upon information which the defendant is required to supply if he is even to be considered for release. She replied that the motion the defense attorney is to file with them carries information which he has received by the defendant. She said that ideally, the defendant should be brought before the judge and be made aware of the charge, and he should have an attorney to explain this and tell him of his rights. If a larger staff were available, they could cover the city jails so that when the defendant appears at arraignment, the interview and investigation would have been completed and the recommendation presented to the judge. Then at this time, when the defense attorney makes his motion for ROR, the judge has this recommendation before him.

Mr. Paillette referred to subsection (1) and asked for suggestions as to whether an arbitrary time should be in the draft or if it should be approached from the standpoint of recognizing that a speedy arraignment is the important item. He did not believe it advisable to intermingle the two. If the defendant is released, he said, then the requirement of the speedy arraignment is not as important but it must be recognized that if the court is going to make intelligent decisions on ROR, it must have the type of information the release officers furnish to them.

Ms. Enders said it is more in the defendant's favor when the judge does not have to make this speedy decision. Chairman Carson said that if the quick decision is made, which probably would seldom be recognizance release but a bail set which may not be agreeable to the defendant, the defendant could move to reduce the bail.

Mr. Gustafson said that section 12 of the draft provides for a review of the release decision after two days if the defendant has failed to secure his release. If there was a hurried release decision and not sufficient data regarding the defendant, the draft would provide it be reviewed automatically, which may provide a remedy to the situation. Ms. Enders remarked that the section would then give an opening to almost anyone to reapply and this would take the time away from the staff in helping other people.

Mr. Moen was of the opinion section 4 was a preliminary release decision and that section 12 would have the more thorough analysis. With a preliminary decision made in a clear cut case, many people could be released quickly, he said, and then section 12 could be implemented in order to make the decisions on the more difficult cases. Ms. Enders advocated the draft read in subsection (1) that the defendant shall be brought before the magistrate during the first 48 hours, rather than the 24 hour provision.

Ms. Woodward explained that in New York, where there is a 24 hour arraignment law, it is all part of the booking process. The defendant is brought to the central booking area, mugged and fingerprinted and interviewed by the district attorney, who then decides what to charge him with. The defendant is brought to the recognizance officer for an interview of approximately 10 minutes; he then verifies the information and by the time arraignments start the interviewer has at least some verified and this information is brought to the judge. The New York system, she said, excludes certain charges, such as if a weapon is involved. Ms. Woodward reported that the form used by the officer is a simple one, as is the case in Lane County, but in that county the officer does not make any recommendations to the judge. Ms. Enders commented that in Multnomah County the information sheet is quite extensive and that this information is filed and also used for presentence investigation.

Chairman Carson referred to the two-stage release process as was discussed earlier, one for those who can be released within the 24 or 48 hour period and who are obviously available for recognizance release

and the other for those who may disagree with the decision of the judge and the release hearing could be reinstituted two days later. Two things are being attempted, he said, (1) to speed up the process and (2) to encourage more ROR. Ms. Woodward remarked that if the defendant spent more pretrial time in jail before the recognizance decision is made and no bail schedule is offered, she felt it might encourage more recognizance releases.

No action was taken by the subcommittee on section 4.

Section 5. General conditions of release agreement. The section is taken directly from the Illinois bail provisions and sets forth the general conditions of a release agreement that would be signed and agreed to by the defendant who is released before trial or after conviction. Existing law contains no explicit conditions of release, Mr. Gustafson reported.

Mr. Milbank called attention to paragraphs (c) of subsections (1) and (2) whereby the defendant is not to depart the state without leave of the court. He said the bondsmen have no objection to this and it is not now required to inform the court of this departure. Mr. Moen commented that the judge may wish the defendant to go to another state if he has a job and believed this should be the option of the court.

Mr. Osburn spoke to paragraphs (d) of subsections (1) and (2) and for editorial purposes, the paragraphs were amended to read:

"Comply with such other reasonable conditions . . . . "

Mr. Osburn next asked if there were any separate provisions on release pending appeal contained in the draft. Mr. Gustafson replied they were incorporated in the draft and left to the judge's discretion. It was the intent to repeal ORS 140.030, he said.

Mr. Osburn said that if the section were to have the effect of repealing ORS 140.030, the present provision should be retained that release prior to trial is a matter of right, but that after conviction release is discretionary and under the conditions the court may impose.

Mr. Gustafson referred to subsection (3) of section 12 which states:

> "After conviction, the court may order that the original release agreement, and if applicable, the security, stand pending appeal or deny, increase or reduce the release agreement and the security."

Subsection (2) of section 5, as well as subsection (3) of section 12, could contain this provision, he said, and asked if this would accomplish Mr. Osburn's purpose. Mr. Osburn replied it would, so long as it makes it clear that the danger posed by release is a factor in addition to the likelihood that he will appear if the judgment is affirmed.

Chairman Carson indicated that a positive statement should be inserted in the draft to follow the format of ORS 140.030.

Referring to Mr. Milbank's earlier remark relating to departing the state without leave, Chairman Carson asked the consensus of the subcommittee as to whether it should be retained or deleted. It was agreed that the paragraphs remain in the draft but that the subject be brought to the attention of the Commission.

Chairman Carson was of the opinion that section 5 should be amended to build into the section a clear indication that the right exists to admission to bail under certain circumstances prior to conviction and that after conviction it is solely left to the discretion of the judge.

Mr. Paillette asked if this statement should be contained in section 5. He stated that a separate section could be written, setting it apart as it was not really a release condition. This was agreeable to the subcommittee.

Representative Johnson moved the adoption of section 5 as previously amended. The motion carried.

Section 6. Personal recognizance. Mr. Gustafson explained that the draft initially provided for the personal recognizance form of release but after drafting the section the staff believed the words "personal recognizance" should be deleted inasmuch as any defendant who is released, whether it be on a security, recognizance or conditional release, will sign an agreement with the general conditions and whatever other conditions the magistrate imposes.

The words "on his personal recognizance" were deleted by the subcommittee in line 2 of subsection (1).

Mr. Milbank was of the opinion it should be stipulated that the judge waive the filing fee. Ms. Enders reported that at the present time there was a $5 filing fee on recognizance releases.

Section 7. Conditional release. Mr. Gustafson advised the section provides another tool for the magistrate to release the defendant which would be through a qualified person or an organization, such as the Salvation Army, and provides regulations on activities and other restrictions designed to assure the defendant's appearance. The primary thrust of the section would be to help the person who could not qualify for a recognizance release and also unable to pay the security amount set by the judge. There is no requirement that money be paid if the defendant fails to appear, however section 13 contains provisions in which the supervisor, if he knowingly aids the defendant in breach of the conditional release, is punishable by contempt.

Ms. Enders remarked that the areas in which her department uses the conditional release system are marijuana or alcoholic problems, where the persons are released to an alternative program, or where there is concern for the victim and the defendant is then restricted from going within a certain radius of the victim's home.

Mr. Milbank referred to the latter situation and asked the consequences if the defendant remarks that he does not intend to abide by

this regulation. Ms. Enders replied that there would be no recommendation for recognizance release. When asked if bail would then be set, she said it would have already been set relating to the charge. If, for instance, the bail had been set at $10,000, if the judge felt it could be increased he would do so in order to hold the defendant in custody.

Mr. Osburn remarked that the draft is imposing conditions which have nothing to do with the likelihood of the defendant's appearance. A defendant, he said, might be required to be with former associates through necessity and may not wish to make his reasons known to the court. Under these circumstances, Mr. Osburn asked if the draft then provides that the court deny the conditional release and establish bail. Bail, he said, was previously unconditional.

Mr. Gustafson replied that the intent of the section was that it is offering ROR for those who can apply and release to those who are not good ROR risks for a variety of reasons.

Mr. Paillette stated that the ABA's rationale was that "Standards seek to make the preference for non-monetary condition on release sharper by clearly separating those petitions from any form of bail, thereby encouraging supervised release . . . Also, it need no longer be assumed that the defendant must either be released or detained continuously, thereby allowing for a release during certain periods for work and custody during other periods."

The problem is that a person is not kept in jail traditionally to keep him from committing other crimes, Mr. Osburn remarked. Mr. Paillette agreed and said the defendant should be either released on his recognizance or security. The conditional release is fine after conviction, Mr. Milbank said, because then it has been established that the person needs help and can receive it.

Mr. Osburn believed the terms of conditional release are satisfactory and if the defendant preferred a bail system there could be one available for him.

Chairman Carson recapitulated the situation in that if the Agency making the investigation determines the defendant is not eligible for ROR but recommended the conditional release which was not acceptable to the defendant, he could then go to the third alternative which would be the security.

Mr. Milbank was of the opinion the current bail system is an incredibly bad system and believed that conditional release was nothing more than preventive detention to which he was opposed. His position was that every defendant should be released on his own recognizance.

The Chairman asked if there was any support from the subcommittee to recommend to the Commission that all defendants should go on ROR and received a negative reaction. Mr. Milbank believed the attorneys would approve of this, even without any information as to whether or not the defendant is a good risk.

Ms. Woodward reported that whatever conditions are put on the person's release, those on ROR or bail continue to appear at the same rate.

Chairman Carson remarked that if there were two choices, ROR and security, he believed the court would take the safe course, which is the security. This section was attempting to be the middle ground for the indigent and get him back out on the street.

Representative Johnson moved the adoption of section 7. The motion carried.

Section 8. Security release. Mr. Osburn suggested that subsection (1) state the security amount shall be set in the event the court does not order personal recognizance or conditional release and the subsection was amended to read:

"If the defendant is not released on his personal recognizance under section 6 or 7, the magistrate . . . . "

Subsection (2) sets forth the Illinois 10% system. The concept of the section, Mr. Gustafson explained, is that if the defendant appears as he promises, 90% of his fee will be returned to him. This would eliminate the 90% going to the bondsman. The subsection contains one change from the Illinois law in that it provides for the higher amount to be retained by the court. The section lists this as $100.

Mr. Osburn noted that subsection (2) also refers to conditions in the release agreement and the court may impose these conditions even with respect to the security release.

Mr. Gustafson responded that the subsection could be looked upon as building blocks setting up the release procedure. The first would be the personal promise, the second would be conditions on associations and what the defendant possesses, and followed by the security. These could all be part of the agreement but do not necessarily have to be conditions as this could be up to the court. Now the court has the discretion to order whatever it deems fit.

The court, Mr. Osburn said, does not ordinarily impose conditions in addition to bail. Mr. Milbank agreed and said he did not believe most judges would read ORS 140.100 as a release to a person.

Chairman Carson was of the opinion section 8 should state that no other conditions may be imposed on the security release other than the forfeiture provision.

Mr. Osburn referred to subsection (3) and asked if it was the intent of the subsection that if the judge were to set bail at, for example, $10,000, the defendant could post the entire amount in cash, securities, etc., whereas under subsection (2) he could deposit $1,000 with the clerk of the court. Mr. Gustafson replied that the defendant has the option to do this. If he wishes to deposit the $10,000, the entire amount is refundable when he appears in court, under the provisions

of subsection (5), section 9.

Mr. Gustafson reported that the experience in Illinois was that there were more cash deposits than the 10% deposits. The argument in Schilb v. Kuebel, 10 Cr L 3043, ___ US ___, (Dec 20, 1971), was that the 10% deposit system discriminated against the poor as they could not afford the 100% deposit and therefore had to pay 1% as the fee. The Supreme Court held this did not violate equal protection and there was no denial of due process by retention of the 1% administration fee.

Mr. Osburn was of the opinion that subsection (3) may provide sufficient protection for the client who would not wish to be subject to the conditional release requirements.

Chairman Carson asked if the subcommittee members were of the opinion the security release should be made free of conditions other than the forfeiture provisions.

Mr. Gustafson stated that no other conditions were contemplated in the section but the terms of paragraph (d) of section 5 would suggest this to be the case. Paragraph (a) of that section would actually appear to be the only condition which should be imposed.

The second sentence of subsection (2), section 8 was amended as follows:

> "Upon depositing this sum the defendant shall be released from custody subject to the conditions [of the release agreement] that he appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until discharged or final order of the court."

Ms. Woodward referred to the fourth sentence in subsection (2) wherein 90% of the deposited sum shall be returned to the defendant "unless the court orders otherwise." She asked the reason for this escape clause. Mr. Gustafson replied that this could provide for any fine imposed or it could be used to pay the attorney's fee.

Mr. Milbank called attention to the last phrase of subsection (3) "double the amount of security." He did not believe this to be a necessary step and would create a practical hardship. Mr. Milbank recommended the section merely state "securities set by the magistrate." The Chairman pointed out that this refers to the personal sureties who must be worth double the amount of security and Mr. Paillette advised that "double the amount" does not qualify the entire paragraph.

Mr. Gustafson reported the term was taken from the Illinois draft and surety is defined as "one who executes a bail bond and binds himself to pay the bail if the person in custody fails to comply with all the conditions of the bail bond." It is not the intention in the draft that the surety would lose double the amount, only that he must be worth this amount.

Mr. Osburn noted that when dealing with the assets of sureties, there would not be a hardship in too many cases and the protection was worth it.

There was no further action taken on section 8 by the subcommittee.

The meeting adjourned at 3:15 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission