Tape 32 - Side 2 - 1 to end
Tape 33 - Side 1 - 1 to 220 (Tape begins p. 11)

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

August 17, 1972

Minutes

Members Present: Representative Norma Paulus, Chairman
Mr. Donald Blensly

Excused: Judge Charles S. Crookham

Absent: Mr. Donald Clark

Staff Present: Mr. Donald L. Paillette, Project Director

Agenda: Work Session
Review of ORS chapters 137, 138, 143, 144, 145, 146, 147, 148, 149

The meeting was called to order at 7:30 p.m. by Chairman Norma Paulus in Room 315 State Capitol.

Mr. Paillette reported that the major part of the recommendations of the Corrections Division deal with ORS chapter 137 and the subcommittee referred its attention to the letter and recommendations of the Division, attached to these minutes as Exhibit A, commencing with ORS 137.015 and the position of the Division with respect to crime prevention funds.

Mr. Blensly noted that there had been given little or no support for this recommendation at the subcommittee meeting of August 11 and the subcommittee agreed not to accept this recommendation.

ORS 137.072. Diagnostic examination of defendant. Mr. Paillette reported that when he met with the Corrections Division policy committee it had been his feeling that the section did not create a problem to the Division because the statute reads the court "may request the Corrections Division to cause the defendant to be given an examination" and at this time the Division could make its decision. He pointed out, however, that it was indicated to him by the Division that it was not quite that simple because they still have to process the request and contended they were not geared up to do this. He said that Oregon law has had this statute since 1967 and diagnostic evaluations are just now becoming the mode and other states are starting to move in this direction. This is recommended by the ABA although the ABA is concerned about after conviction and this statute covers evaluation before conviction. Still, it would seem to be a step backwards to follow the

Division's recommendation to repeal the statute unless there is an alternative procedure proposed.

Mr. Blensly believed there was such an alternative and that is in the presentence report. Processing before sentencing seemed to him to be involving many unnecessary steps and he had no objection to deleting the section as recommended by the Corrections Division.

Chairman Paulus remarked that she would not object to its deletion if the subcommittee or Commission could come up with an alternative with respect to presentence. Mr. Blensly was of the opinion this would not have to be statutory; there is provision for presentence, he said, and it is a matter of emphasis on their part on getting information as far as sentence alternatives. It would seem to him that the presentence report would be the more appropriate stage to be considering this type of situation, rather than having evaluation permissive before the man has even been convicted. Mr. Blensly thought this is only another means for the defense attorney in attempting to stall the particular case.

The Chairman recalled the discussion at the previous meeting wherein the objection of the Division was not merely the funds involved but it was also that the Division did not feel it was something they could work with.

Mr. Paillette reported that the Division wished to repeal ORS 137.075 as well as 137.072. There is a related statute which would require amending, he said, if these were repealed because ORS 161.725 and 161.735 incorporates the immunities which are set forth in 137.075, as well as the other statutes mentioned in subsection (3). It would have to be made certain that these are retained in order to have the immunity in those other areas. He said it must be kept in mind that the dangerous offenders provisions require mandatory psychiatric evaluation as well as the presentence.

Mr. Blensly said that as a practical matter the psychiatric evaluation is not done through the Corrections Division but through the State Hospital. Mr. Paillette agreed and said that the dangerous offenders would not go through this diagnostic procedure and ORS 161.735 would have to be amended to write in these immunities covered by ORS 137.075 (3).

Mr. Blensly moved the adoption of the recommendation of the Division that ORS 137.072 and 137.075 be repealed, with the preservation of the immunity aspect. Motion carried.

ORS 137.124. Commitment of defendant to Corrections Division; place of confinement; transfer of inmates. With respect to misdemeanants, Mr. Paillette said he was in agreement with the Division's statement in that they were not meant to be sent to the state penal institutions but that he conferred with Mr. Sullivan at OCI and the Attorney General's office and they did not feel there was any ambiguity. Mr. Paillette suggested that subsection (3) be amended to delete "penal or" and "institution" and insert "facility." He believed that the reference to

misdemeanants is needed and said that after he had met with the Division's policy committee they were in agreement with him. The reason it was placed in the criminal code, he said, was because the individual crimes do not say where a judge is to send a misdemeanant.

Mr. Blensly moved the adoption of ORS 137.124 with the substitution of the phrase "Corrections Division Facility" in lieu of "penal or correctional institution" in subsections (1) and (2) and the amendment to subsection (3), deleting "penal or" and "institution" and the insertion of "facility." Motion carried.

The Chairman questioned the words "male person" in subsection (2). Mr. Paillette reported that the wording is placed in the subsection because there is only one place where a female can be committed although Mr. Blensly and the Chairman believed that the females could be sent to the State Hospital for purposes of diagnostic study.

Mr. Paillette referred to ORS 137.130 and 137.140 and questioned having a need for both statutes. ORS 137.140 talks about "no sufficient jail in the proper county" whereas 137.130 talks about "no jail in a county." Mr. Blensly remarked that the requirements in 137.130 must be that it is an adjoining county whereas 137.140 allows the court to direct the defendant to be placed in any jail in the state. He believed there were two different purposes for the two statutes, one for security reasons and the other to keep the defendants as close to the county as possible, although he said his county now accepts prisoners from Lake County.

Chairman Paulus expressed the view that ORS 137.130 was unnecessary and said the only justifiable reason behind the section would be to keep the inmate as close to his family and community as possible and if this is not being done as a matter of practice, she could not see any purpose in retaining the statute.

No action was taken by the subcommittee with respect to ORS 137.130 and 137.140.

ORS 137.225. Order setting aside conviction; prerequisites; limitations. Mr. Paillette reported that the Corrections Division desired notification sent to it and Mr. Blensly referred to his proposed amendment of August 11 wherein a new sentence would be inserted in subsection (1) stating: "The clerk of the court shall forward to the keeper of such records a certified copy of said order."

Mr. Paillette called attention to the last sentence of the statute relating to sealing an order and asked if the words "and other official records" would include those records of the Division. Mr. Blensly believed that it would.

Mr. Paillette inquired of Mr. Blensly whether this statute is being used in his county and was told that it had been used once and that he believed it to be a desirable statute.

ORS 137.225 was amended by the subcommittee in accordance with Mr. Blensly's proposed amendment.

ORS 137.240. Effect of felony conviction on civil and political rights; restoration of civil rights; exceptions. Mr. Paillette reported that the Corrections Division defers to the recommendations of the Oregon Bar Committee on Detention and Corrections which report, he said, makes other recommendations for amendments to ORS 44.230 and 44.240 with respect to the order of deposition or production of prisoner. Inasmuch as there will be a bill submitted to the next legislature from the Bar, he said the section should be deferred entirely to this but believed a policy decision should be made by the Commission.

The Chairman asked if the Bar is recommending that marriage be at the discretion of the Administrator rather than just a right and Mr. Paillette answered affirmatively. He said that the important change is with respect to their ability to sue and be sued, etc.

Chairman Paulus suggested that the section contain all the Bar recommendations, not merely the marriage provision, and be presented to the Commission for consideration. She asked if this marriage provision would be included as another subsection and was told by Mr. Paillette that the Bar Committee had made minor amendments to each paragraph and had added a new subsection. Mr. Blensly referred to the recommendations and was of the opinion that paragraph (f) was all encompassing and Mr. Paillette explained that it was trying to take into account all the administrative procedures, but that it was not essential to stay with the Bar Committee's recommendations if this was not the desire of the subcommittee. The Chairman remarked that she was eager to expand the prisoner's rights as far as child custody and allow the marriage concept as it was her opinion that this is the whole theory of rehabilitation - she said she had not given much thought about the right to defend a prosecuted civil action.

ORS 137.360. Duty of judge and sheriff to appoint woman officer to accompany woman ordered to institution. Mr. Blensly referred to this section and Mr. Paillette's earlier recommendation that subsection (2) be repealed.

ORS 137.450. Enforcement of money judgment in criminal action. Mr. Paillette recalled an earlier discussion on this section as to whether or not it was necessary to write into the statute the provision that the unsatisfied judgement would not prevent a release, and that it was the consensus of the Parole Board the amendment was unnecessary.

ORS 137.520. Power of committing magistrate to parole and arrange for employment of persons confined in county jail. Mr. Blensly referred to HB 1608 relating to the work release program and which was tabled in committee during the last session. He proposed it be recommended to the Commission that it be incorporated into this section.

Chairman Paulus asked if the phrase "for any period under six months" in subsection (1) should be deleted and Mr. Paillette responded

that before meeting with the Corrections staff he was of the opinion this provision should be taken out of Corrections and be left at a local level because to put misdemeanants into the Corrections program when they don't have enough personnel to take care of the felons would not seem advisable but it was pointed out to him that a situation may arise where the Division may wish to use this provision in an isolated case. Mr. Paillette explained that when talking about a court parole, it is really the judge who is making the decision and sets the terms and conditions. Subsection (5) breaks it down so that if the prisoner is sentenced under six months it is a bench parole and if over six months, he is paroled to the Corrections Division.

ORS 137.520 was approved by the subcommittee, amended as follows: the substitution of "Corrections Division" for "State Board of Parole and Probation" and the incorporation of HB 1608.

Mr. Blensly remarked that in all the probation cases the defendants are placed on probation to the State Board of Parole and Probation rather than the Corrections Division, although the probation officers are under the Corrections Division. Mr. Paillette responded that changes will be made so that the name "Corrections Division" will be used if it is a probationary function and "State Board of Parole" if it is a parole function.

ORS 137.530. Investigation and report of probation officers. The Corrections Division had recommended adoption of HB 1170 which would provide for a mandatory presentence investigation.

Mr. Paillette recommended that the bill be introduced separately because of the fiscal implication and the subcommittee concurred.

ORS 137.090. Proof of circumstances; presentence investigation. An earlier discussion with respect to the section generally, Mr. Paillette related, concerned itself with the question of the presentence report and whether or not the defense attorney should receive a copy of it. This provision would be dealt with in ORS 137.090, he said.

The Chairman wondered if it should be made mandatory that the defense counsel receive the copy and Mr. Paillette referred to section 4.3 of the ABA recommendations which goes into much more detail. It states that the report should not be a public record; available only to the sentencing court for the purpose of assisting it in determining the sentence; to all judges who are to participate in a sentencing council discussion of the defendant; to persons or agencies such as a physician or psychiatrist appointed to assist the court in sentencing; an examining facility; a correctional institution or a probation or parole department; to the reviewing courts and to the parties under conditions stated in section 4.4.

With respect to disclosure, Mr. Paillette continued, the recommendations would allow the court to exclude certain information. He reported that the Corrections people are quite apprehensive about providing presentence reports to the defense attorneys although there is great variation in this in the different counties.

Chairman Paulus was of the opinion it would be better to have a mandatory provision that the defense counsel have the opportunity to inspect the report rather than merely state that a copy shall be made available to him. She believed the expense and administrative hassle would be less this way and the defendant would get the advantage. Mr. Blensly stated there is no problem furnishing the copy but expressed concern that if a judge is given a report not subject to review and which contains something damaging which would be excluded from the defendant and the sentence is based on it, there would be no opportunity for the defendant to rebut it. On the other hand, he believed there should be such a provision whereby the judge under certain circumstances could exclude parts of the report.

Mr. Paillette reported that the ABA also provides that the record is available on review. Mr. Blensly expressed agreement with most of the ABA recommendations but believed the drafting of such would be difficult. He commented that he did not agree with their recommendation that if information is received as a result of a promise of confidentiality it will not be revealed. This would seem to him to be too broad and that it should be left in the discretion of the judge. If he believes good cause exists for the exclusion he may do so, but it could be available for appellate review. As a practical matter Mr. Blensly did not think this route would be taken too often.

Mr. Paillette referred to Bouche v. Sullivan, 94 Adv Sh 1693, where it talks about part of the presentence relating to the prior record. Justice Tongue's concurring opinion in the case reads, among other things, "This is a subject which should be more properly defined and provided for by statute or by rule of the court. It is a most proper subject for consideration of the Criminal Law Revision Commission. Until that Commission has completed its report and it has been accepted by the legislature, this is a subject which should be left to the judicial discretion of the trial courts as provided now, subject to review."

Mr. Paillette remarked that this should not be bypassed without taking a stand on it, one way or the other. Mr. Blensly asked if standards could be set.

Chairman Paulus asked if the judge seals the original presentence report it may only be opened if it goes up for review. Mr. Paillette reported that the ABA recommends:

> "In extroadinary circumstances the court shall be permitted to except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program or rehabilitation, or sources of information which have been obtained on a promise of confidentiality. In all cases where parts of the report are not disclosed under such authority, the court should be required to state for the record the reasons for its action and to inform the defendant and his attorney that information has not been disclosed. The action of the court in excepting information from disclosure should be subject to appellate review."

Mr. Blensly reiterated his concern with respect to excepting the sources of information obtained on a promise of confidentiality. Mr. Paillette observed that the language could be changed to read: " . . . information which was obtainable only on a promise of confidentiality." It would stand to reason, he said, that not everyone will be apprehensive about talking to the investigators and require this promise. He suggested that a standard similar to the protective order concept in the Discovery draft could be inserted for the court to follow.

The Chairman asked if the protective order would be the only reason for exclusion and Mr. Blensly commented that another proper exclusion would be that it could seriously disrupt a program of rehabilitation.

Mr. Paillette pointed out the minority report contained in the ABA Standards and Mr. Blensly maintained that if the court is using information to send the defendant to prison, he should be made aware of what is being used. Mr. Paillette agreed and said that in Lane County the defense attorneys receive a copy, although they are required to return them after the case is completed. One of the matters brought up at the policy board discussion, he said, was that presentence reports would end up with nothing in them. The Chairman believed that the trial judges would not accept this type of report but Mr. Blensly remarked that they do not have much control over the presentence reports. They order it and can direct it toward a specific area, but it is then given to the probation officer to complete but if he consistently received bad reports he would undoubtedly complain to the officer, he said.

Mr. Blensly moved to amend ORS 137.090 as follows:

> In the last sentence delete "may" and insert "shall".
>
> Exception provisions to be drafted by the staff and similar to that of the ABA plus language proposed by Mr. Paillette relating to the confidentiality concept; the information can be excluded based on the protective and rehabilitation concepts; a procedure to be provided that it be placed on the record that certain information is excluded, the reason for such exclusion and that it is subject to appellate review; that it is not a public record.

Motion carried.

Mr. Paillette referred to letters received by Senator Yturri in which two individuals had been placed in jail in Malheur County awaiting presentence reports ordered by the J.P. One of the men had been confined for 50 days awaiting the report and the other for 20 days at the time of writing. Each letter inquired of Senator Yturri as to whether the J. P. could order this presentence investigation. The persons were,

in effect, serving time without being sentenced. Mr. Paillette asked if the subcommittee wished to examine the statute about this provision. Mr. Blensly referred to ORS 137.530 wherein it is stated "when directed by the court" and indicated this would be in the jurisdiction of the J.P. court. Mr. Paillette believed there is nothing in the statute to prevent this but wondered if the matter should be taken up by the subcommittee as to whether it should be ordered by the J.P. court. The subcommittee took no further action on this matter.

ORS 137.550. Period of probation; discharge from probation; proceedings in case of violation of conditions. Mr. Paillette called attention to subsection (2) which he said is poorly constructed from a drafting standpoint but was uncertain if an effort should be made to break it down so as to be more clear.

ORS 137.560. Copies of certain orders to be sent to Director of Parole and Probation. The subcommittee approved the recommended changes offered by the Corrections Division.

ORS 137.570. Authority to transfer probationer from one officer to another; procedure. The word "officer" in lines 3 and 4 was deleted by the subcommittee and "agency" inserted in its place.

Mr. Paillette recalled Mr. Wiseman's earlier statement with respect to the deletion of subsections (1) and (2) in that there could be probation in which the individual was placed in custody of someone not connected with the Corrections Division. Because of volunteer programs, the court in those instances should have the authority to make changes from one probation officer to another but otherwise if it is a probation that involves Corrections, then it would be an agency decision and not the court's.

Mr. Paillette wondered why the statute is needed by the Agency and Mr. Blensly believed the only need would be that it gives specific statutory authority for setting up, for instance, the volunteer program.

ORS 137.590. Appointment of probation officers and assistants; chief probation officer; compensation. Mr. Blensly moved the recommendation of the Corrections Division to delete the last eight lines be adopted. Motion carried.

ORS 137.620. Powers of probation officers; oath of office; bond; audit of accounts. With respect to the oath of office discussed at the last meeting of the subcommittee, Chairman Paulus was of the opinion that this is an important item and should remain in the statute.

Mr. Blensly moved to delete "to be administered by the court making the appointment" in the first sentence and the adoption of the amendments proposed by the Corrections Division. Motion carried.

ORS 137.990. Penalties. Mr. Blensly moved the deletion of subsection (2). Motion carried. This was later repealed in its entirety by the subcommittee.

ORS 137.080. Consideration of circumstances in aggravation or mitigation of punishment. ORS 137.110. Other evidence of circumstances not admissible. Mr. Blensly referred to ORS 137.080 and presented a hypothetical circumstance where a man pleads guilty and the court receives a summary by the state of the facts and the man's past record; the defense counsel then makes his plea as to his family ties, employment, etc. Mr. Blensly asked if these were not factors that are "aggravation or mitigation of the punishment" and wondered if ORS 137.110 is being violated by not having the formal hearing or having the facts verified by the employer, etc. This does not seem to him to provide for informally telling the facts and circumstances to the court.

Mr. Paillette read from the Criminal Law Handbook, section 13.5:

> "Under the provisions of ORS 137.080, the court is authorized to consider circumstances in aggravation or mitigation of punishment upon the suggestion of either party . . . The "circumstances" contemplated by ORS 137.080 are not limited to those attendant upon the crime itself but include information as to the defendant's background, age, education, environment, criminal record and any other material matters which would assist the court in imposing an appropriate sentence. 27 Ops Atty Gen 208 (1954-56). The statute provided that the court may hear the moving party summarily at a specified time and after notice has been given to the adverse party, but as a practical matter both parties are generally heard at the time set for sentencing."

Section 13.6 reads:

> "There are two methods authorized by statute to present information to the court in aggravation and mitigation: by sworn testimony or by a presentence report. However, the right to have the court hear only sworn testimony in aggravation or mitigation is waived when the party does not request it of the court. Barber v. Gladden, 228 Or 140, Coffman v. Gladden, 229 Or 99. The common practice is to waive the right to hear sworn testimony only and to proceed with the presentation by statements of counsel."

Mr. Blensly stated that it would seem to be a violation of ORS 137.110. Mr. Paillette responded that the Criminal Law Handbook does not refer to this section. Mr. Blensly said that ORS 137.110 states "except as provided in ORS 137.080 to 137.100"and that there is no provision in these sections for the informal statement of counsel rather than the sworn testimony. ORS 137.090, he said, states the circumstances shall be presented by the testimony of witnesses examined in open court.

Mr. Paillette referred to Coffman v. Gladden which says "The formal procedure of taking sworn testimony in considering circumstances in aggravation and mitigation of punishment is only mandatory when demanded by either party."

Barber v. Gladden states: "Where the defendant fails to request the court to consider evidence in aggravation or mitigation by sworn testimony alone and fails to object to unsworn statements, he waives any objections he has to the failure of the court to hear only sworn testimony."

Mr. Blensly commented that this talks about prejudice to the defendant but this is separate and apart from the statute which says you are in contempt of court for doing it that way. As a practical matter, he said, no one has been cited for contempt thereunder and suggested repealing ORS 137.110. If this is repealed there would be no doubt about the informal statements. Mr. Paillette suggested repealing ORS 137.990.

Mr. Blensly moved that ORS 137.110 and ORS 137.990 be repealed. Motion carried.

ORS 143.040. Notice of intention to apply for pardon, commutation or remission; proof of service. It had been the recommendation of Edward Branchfield, the Governor's legal counsel, that the 20 day provision be deleted and it was the consensus of the subcommittee that this provision remain in the statute. As discussed at the subcommittee's earlier meeting, the decision had been made to provide a notice to both the State Board of Parole and the Corrections Division as well as the District Attorney.

The statute was amended and approved by the subcommittee as outlined above.

ORS 144.005, etc. In all cases, the title is changed to the State Board of Parole, rather than the State Board of Parole and Probation. The subcommittee adopted the proposal recommended by the Corrections Division.

ORS 144.040. Power of board to determine parole violations. Mr. Blensly stated the recommendation of the Corrections Division will eliminate the conditional pardon, probation or other conditional release which the Parole Board does not consider.

Mr. Blensly moved the adoption of the recommendations of the Corrections Division. Motion carried.

ORS 144.060. Acceptance of funds, grants or donations; contracts with Federal Government and others. The word "board" in line 7 of subsection (2) was deleted and "Corrections Division and State Board of Parole" inserted.

There being no objections, ORS 144.060 was adopted as amended.

ORS 144.075. Expenses of returning violators of parole, conditional pardon or commutation to penitentiary, how paid. The subcommittee approved the adoption of the statute, amended as follows: the words "State Penitentiary" in lines 4 and 5 amended to read "Corrections Division" and the last two lines of the statute amended to read "such [the] transportation [of convicts to the penitentiary].

ORS 144.210 to 144.400. Mr. Paillette advised that recommendations for revision of these statutes will be submitted to the Commission by the State Board of Parole.

ORS 144.410. Definitions for ORS 144.410 to 144.525. The subcommittee adopted the recommendations of the Division with respect to subsection (3).

ORS 144.420. Corrections Division to administer work release program; purposes of release. The recommendations of the Division with respect to amendments made to the statute were adopted by the subcommittee.

ORS 144.430. Duties of division in administering program; all state agencies to cooperate. Mr. Blensly referred to the proposed amendment to subsection (2) and was of the opinion that "services" should be defined as those included within the framework of the work release statute.

Mr. Paillette questioned the possibility of a fiscal implication with respect to the proposed subsection (1) (e) and the Chairman presented the situation where an individual might set up a halfway house and give the authority to the Division to utilize the center without cost. She then referred to subsection (2) and expressed the view that the new language proposed by the Division could be inserted in place of the existing language rather than having a continuance of the sentence.

ORS 144.430 was amended to conform to the proposed amendments presented by the Corrections Division relating to subsection (1) (e); the deletion of subsection (2) with the insertion of the new language: "The Corrections Division may enter into agreements with other public or private agencies for providing services relating to work release programs."

Tape 33 - Side 1

ORS 144.450. Approval or rejection of recommendations; rules for program; specific conditions; Administrative Procedures Act not applicable. The recommendation of the Corrections Division to delete "Subject to the approval of the board," approved by the subcommittee.

ORS 144.460. Contracts for quartering of enrollees; suitable facilities required. Mr. Blensly moved the adoption of the recommendation by the Corrections Division to delete subsection (2). Motion carried.

ORS 144.470. Disposition of enrollee's earnings under program. Mr. Blensly moved the deletion of "from secure custody" in subsection (2) (a). Motion carried.

ORS 144.515. Release terminates enrollment; continued employment to be sought. Mr. Blensly voiced disagreement with the Division's proposed amendment to the statute, and suggested the word "secure" be deleted in line 4 as in many of these programs the person is not actually confined. Mr. Paillette noted that ORS 137.010 states the person is "sentenced to the custody of the Corrections Division" and is considered to be in their custody. Mr. Blensly asked if they were in custody when on parole - if this is the case, then "custody" would still be inappropriate. Mr. Paillette explained that this is a work release statute

and if persons are on parole they are not on work release and Mr. Blensly questioned the time as to when they go off work release and go on parole.

Mr. Paillette remarked that whereas, the parole officers are Corrections personnel, the Parole Board is not part of the Corrections Division. Mr. Blensly referred to his earlier suggestion to amend the statute by deleting "secure" in line 4 and asked Mr. Paillette to inquire if the Parole Board would still consider the defendant to be in custody of the Corrections Division and if so, the word "confinement" might be used, although he doubted this term would be appropriate either.

Mr. Paillette believed that the only persons on work release are those in confinement and the Chairman suggested the section read "from confinement or assigned quarters." Mr. Blensly commented that the person could be released from the assigned quarters to somewhere else. Mr. Paillette advised that he would contact Terry Johnson of the Parole Board with respect to this question.

ORS 144.710. Cooperation of public officials with State Board of Parole and Probation. The proposed amendment offered by the Corrections Division to state the "State Board of Parole and Corrections Division" was adopted by the subcommittee.

Mr. Blensly expressed disapproval of the recommendation by the Division to insert in chapter 144 "Community Centers administered by the Corrections Division may, in the discretion of the administrator, receive parolees in accordance with good rehabilitation practices and approved treatment plans." and moved that no action be taken by the subcommittee on this proposal. Motion carried.

ORS chapter 138. Appeals; Post-conviction Relief. Mr. Blensly asked if Mr. Paillette had received a reply from the Supreme Court and was told that Justice O'Connell had some thoughts on the subject but was not ready to make any specific recommendations with respect to petitions for rehearing and review and that he wished to speak to Loren Hicks regarding this and contact Mr. Paillette after that time. The other recommendation of the Public Defender was that ORS 138.050, with respect to appeal on a guilty plea, be repealed as he believed it to be adequately handled under the Post-conviction Act, to which the Chairman agreed. Mr. Blensly spoke in opposition to this, especially now since there has been added the provision of the judge not showing part of the probation report. He believed there might be some element of cruel and unusual punishment under those circumstances even though it might be within the provisions allowed by the statute. It could be that it might have to be done by post-conviction because there would have to be a hearing on it, but he wondered how a hearing on it could be held when the records are sealed - it could be done better by direct appeal. Mr. Blensly did believe the advantage of repealing this statute would be that they would go immediately to post-conviction rather than having to go through appeal and then post-conviction later on.

Mr. Paillette read in part the letter received from Gary Babcock presenting his arguments with respect to repealing ORS 138.050:

> "I strongly suggest the subcommittee recommend the abolishment of the provisions of 138.050. Any contentions with regard to whether or not the fine or punishment is excessive can be adequately handled under the provisions of ORS 138.530 (1) and (2). I think that if ORS 138.050 is abolished the language used in it with reference to the grounds for the appeal should be tied in with that subsection under chapter 138."

It was the decision of the subcommittee that ORS 138.050 be retained.

ORS 138.090. Signature to notice of appeal. The Chairman referred to this section and suggested Attorney General Johnson be contacted regarding the fact that when the state takes an appeal, the notice of appeal is to be signed by the district attorney and the case could be that the district attorney does not wish to appeal although the Attorney General would. Mr. Paillette could not envision why the Attorney General's office would wish to take a state's appeal on a case if the district attorney did not and Mr. Blensly believed it should be up to the district attorney to make this decision.

ORS 138.060. Appeal by state. Mr. Paillette advised this section will be discussed at the meeting of Subcommittee No. 1 in connection with a proposal being considered with respect to former jeopardy. It will be recommended that it not be handled as a plea, he said, but to be dealt with as a motion to dismiss on grounds of former jeopardy, although it would still be appealable by the state. The section, he reported, was amended in 1961 as a result of the Garrett case which had held that an order sustaining a plea of double jeopardy was not appealable by the state.

ORS chapter 147. Extraditions. With respect to this chapter, Mr. Paillette advised of a recommendation received by Mr. Branchfield whereby ORS 147.010 be repealed and another section written in its place stating the Governor can appoint a responsible individual to act in his behalf when absent from the state.

Mr. Paillette suggesting dividing 147.010 into two subsections, one "Definitions" and the other "Appointment of person to act in Governor's absence."

Subsection (1) would read:

> "Where appearing in this chapter, the term "Governor" includes any person performing the extradition functions of Governor by authority of [the law of this state] an appointment under subsection (2) of this section."

Subsection (2) is proposed as follows:

> "The Governor may appoint a person to act in his behalf under this chapter, performing the extradition functions of the Governor during any absence of the Governor from the state. The appointment shall be in writing and shall be filed with the Secretary of State."

Mr. Blensly expressed approval of this language but believed the Governor would be excluded from acting on his own behalf in subsection (1). Mr. Paillette responded that under the laws of the state, "Governor" is a self-defining term.

Mr. Blensly asked if it is desired to broaden the statute so that the Governor can appoint a person to act on his behalf as an extradition agent, even though he may be in the state. Mr. Paillette replied that the suggestion by Mr. Branchfield was that the person would act only when the Governor is absent from the state. This would be for signing warrants, requisitions, etc.

The subcommittee adopted the proposed amendment to ORS 147.010.

ORS 147.110. Penalty for disobedience to ORS 147.100. Mr. Paillette advised that the penalty provision in the statute does not fit either a Class A or Class B misdemeanor. The six months imprisonment would fit into the Class B category whereas the fine would be Class A. Mr. Paillette's intention was to write into the statute that this is a Class B misdemeanor.

The subcommittee agreed to the above proposal amending the section to read that it is a Class B misdemeanor and carries a $500 fine.

ORS 147.230. Application for requisition; filing and forwarding of papers. Mr. Paillette proposed the deletion of "offense" on line 5 and insert "crime" as he did not believe there would be any attempt to extradite on a violation.

Mr. Paillette next referred to the words in subsection (1) " . . . and certifying that in the opinion of the said district attorney the ends of justice require the arrest and return . . . . " and spoke of a letter under date of July 28, 1972 from Mr. Floyd Gould, Legislative Fiscal Officer wherein it stated:

> "The Emergency Board at its July meeting had a request from the Executive Department for emergency fund allocation of $118,500 because of increased costs for the arrests and return of fugitives. Testimony presented to the Emergency Board indicated that the Executive Department has no control over the expenditures for this purpose. It was also indicated that quite often individuals are returned for relatively minor offenses and in some instances the actual cost of returning the fugitives are greater than the fine assessed as a result of the trial.

"The members of the Emergency Board requested that I write to you and ask if it would be possible for your Commission to review the provisions of the law relating to the arrest and return of fugitives, and determine whether or not it would be advisable to place more restrictions and/or control upon district attorneys relating to the arrest and return of fugitives."

Mr. Paillette was uncertain as to how to approach a problem such as this, as a dollars' and cents' label realistically, can't be placed on law enforcement and extraditions. He did believe that to tighten it a little, the words "ends of justice" could be deleted and substitute the language "interest of the public in the effective administration of criminal justice." "Effective administration", he said, carries with it some implication that the district attorney should take into account other things than the fact that a crime has been committed.

Mr. Blensly indicated that the monies allocated by the state during the last biennium with respect to extradition was about 60% of what had been spent the two years prior to that. Mr. Blensly observed that where Mr. Gould speaks of "increased costs" he would question that he is actually saying what has happened; there might be an increase over the allocations but the allocations were much less than what they had received the prior two years and the increase in crime was not taken into consideration.

Mr. Blensly was also bothered by the remark that in many instances the fine imposed is less than the costs for bringing the man back. In most situations when bringing the man back, the fine is not considered, he said, only the crime. In his county, after the man has been brought back and served his time there is always a court order requiring him to pay the state the amount it cost for his return as a condition for probation.

With respect to the language proposed by him, Mr. Paillette said he was not certain if this would satisfy the Emergency Board but at least it would be a little more definitive. The language is from ABA Standards on Plea Bargaining, he said.

Chairman Paulus expressed reluctance to propose any change if the basis of the Emergency Board's request is not factual. Mr. Paillette replied that the letter is a factual account of what was told to the Emergency Board but he would have no way of knowing the validity of the statements made. The letter did not state names of those testifying and Mr. Paillette indicated that he would request a copy of the minutes for review at the Commission meeting.

ORS chapter 148. Special Law Enforcement Officers. Mr. Paillette advised that he had requested Mr. Branchfield to examine this area and has not yet received any recommendation from him.

ORS chapter 149. Rewards. Mr. Blensly was of the opinion that nothing should be done with this chapter although he may discuss it before the Commission.

ORS chapter 146. Investigations of Deaths and Injuries. Mr. Paillette explained that a separate bill, not part of the Commission's proposals, will be presented with respect to medical investigators.

ORS chapter 145. Prevention of Crime and Security to Keep Peace. Mr. Paillette indicated that the staff will recommend that the Commission repeal the provisions relating to security to keep the peace.

The meeting was adjourned at 10:30 p.m.

Respectfully submitted,

Norma E. Schnider, Clerk
Criminal Law Revision Commission

137.015 It is recommended that an assessment also be considered and implemented for "crime prevention" funds to be administered by the Oregon Law Enforcement Council for purposes outlined in ORS 423.210.

137.072 It is recommended this statute be repealed. It is considered a punitive measure to send an untried man to a maximum security institution. Tried and untried prisoners should be separated. Mental Hospital Resources should be utilized when mental competence is the issue. (OSCI has experienced expenditure of as much as $4,000 on one individual for diagnostic examination--the statute does not provide an ability to recover reimbursement.)

137.075 Repeal. Related to 137.072 above.

137.124 Sections 1 and 2. Substitute the phrase "Corrections Division Facility," instead of "the Penal or Correctional Institution."

Section 3. Delete. It is not intended that misdemeanants shall be committed to a State penal institution.

137.-25 When individuals convicted of a Class C Felony have been committed to the care of the Corrections Division, officials should contact the Corrections Division as well as the prosecuting attorney when there is an application for setting aside a conviction. It is recommended this change is made.

1 .240 The Corrections Division defers to the Oregon Bar Association on this statute. It is understood they are developing a proposal for change in this area.

Re: Marriage. Proposed HB 1164 which was introduced in the last Legislature Assembly proposed a change in ORS 137.240 to permit marriage of inmates, at the discretion of the Administrator. We continue to recommend adoption of this legislation.

137.250 Section 2. This section should be changed to read--"commitment to the Corrections Division and placement in a Corrections Division Facility," instead of the words "commitment to the penitentiary or correctional institution."

137.380 Change 1st sentence as follows: "A judgment of commitment to the Corrections Division need only specify the duration of confinement." Change 2nd sentence to read as follows: "Thereafter the manner of the confinement and the treatment and employment of a person shall be regulated and governed by whatever law is then in force prescribing the discipline, treatment and employment of persons committed."

137.520 Section 5. The words "Corrections Division" should be substituted for the current wording, "State Board of Parole and Probation."

137.530 We recommend adoption of HB 1170 which was introduced during the last Legislative Assembly. A supporting position statement submitted by Amos Reed to the Judges Sentencing Institute is attached. HB 1170 requested presentence investigations as follows: "In all felony cases unless the court directs otherwise, and in a misdemeanor case if the Corrections Division and the court first agree to an investigation and report."

137.560 Change "Director of Parole and Probation" to "Corrections Division Administrator."

137.570 1st sentence. Change the words "A court" to "The Corrections Division," and change the words "probation officer" to "probation office." Change "such court" to "the Corrections Division" in the second sentence.

Sections 1 and 2. Delete

137.580 Substitute "Corrections Division" for the words "court making it" and delete the words "of such court."

137.590 Delete the last eight lines of this statute: "A copy of each order of appointment shall be filed in the office of the State Board of Parole and Probation. No probation officer or clerical assistant appointed by the court under this section shall receive any compensation from the state, any county or any municipality."

137.620 Insert the words "of the Corrections Division and those appointed by the court," after the words "probation officers" in the 1st line of the statute. Insert the words "appointed by the court" in the 3rd line following the words "probation officer."

143.040 Notice concerning the intention to apply for a pardon must currently be served on the District Attorney and the Director of Parole and Probation. It is recommended this be changed and notice be provided the "District Attorney and Corrections Division Administrator."

144.005 Since the Parole Board does not have any probation functions, it is suggested the title be changed to "State Board of Parole." This change should be made in the following statutes:

144.005	144.210	144.310
144.015	144.220	144.330
144.025	144.228	144.340
144.040	144.260	144.400
144.050	144.270	144.710

144.040 Change to read as follows: "The State Board of Parole shall determine whether violations of conditions of parole exist in specific cases."

144.060 Section 2. Change the word "Board" in the seventh line to "Corrections Division."

144.075 In the 4th and 5th lines, the words, "State Penitentiary" should be changed to read "Corrections Division."

In the last line of this statute, delete the words, "of convicts to the penitentiary."

144.240 This change is recommended.

"Standards for Parole. No prisoners in a Corrections Division facility shall be paroled unless it is the opinion of the Parole Board that such release is not incompatible with the welfare of society. Factors to be considered shall include, but not be limited to:

a) good conduct,

b) efficient performance of duties in the state's correctional facilities,

c) initiative demonstrated in his or her own self-improvement,

d) projected release program, and

e) availability of appropriate community resources."

144.250 If the above recommended change in 144.240 is accepted, we recommend deleting 144.250.

144.260 In lines 4 and 5, the words "a Corrections Division facility" should be substituted for the words "state penitentiary or correctional institution."

144.374 Line 8, delete the word "probation, " section 2, line 5, delete the word "probation."

144.400 The words, "and without recommitment" should be deleted from the title.

The words "a Corrections Division facility" should be inserted in place of "Oregon State Penitentiary" in lines 7 and 8.

144.410 Section 3, this wording is suggested:

"Penal and correctional institution means any Corrections Division facility, including the Oregon State Penitentiary, the Oregon State Correctional Institution, the Oregon Women's Correctional Center, their satellites, and community centers."

144.420 On lines 7 and 8, the existing words, "be granted the privilege of leaving secure custody" should be amended to read: "be authorized to leave assigned quarters."

In section 1 (a), delete the superfluous words at the end of the sentence, "for such purpose."

In section 2, line 3, delete the words, "and approved by the Board," an obsolete referense to the Board of Control.

In section 2, lines 4 and 5, delete the words, "for the purpose of seeking employment," and insert: "for purposes consistent with good rehabilitation practices."

144.430 It is recommended a section (1), (e), be added, to read: "Establish and maintain community centers."

Section 2, to be added at the end of the existing section: "The Corrections Division may enter into agreements with other public or private agencies for the provision of services."

144.450 Section 2. Delete the words "subject to the approval of the Board,"--an obsolete reference to the Board of Control.

144.460 Section 2, delete.

144.470 Section 2 (a), delete the words,"from secure custody."

144.515 In lines 4 and 5, the words "from secure custody" should be amended to read: "from confinement."

144.710 Change to read as follows:

"All public officials shall cooperate with the State Board of Parole and Corrections Division, and give to the Board and Division, officers and employees, such information as may be necessary in the performance of functions.:

It is requested thatthe following provision be added in Chapter 144, or another chapter which may be deemed more appropriate. "Community Centers administered by the Corrections Division may, in the discretion of the administrator, receive parolees in accordance with good rehabilitation practices and approved treatment plans."