Tape 12 - Side 1 - 105 to end
Side 2 - 1 to end (Tape begins p. 16)
Tape 13 - Side 1 - 1 to 487 (Tape begins p. 35)

OREGON CRIMINAL LAW REVISION COMMISSION

Thirty-Second Meeting, July 14 and 15, 1972

Minutes

July 14, 1972

Members Present: Senator Anthony Yturri, Chairman
Mr. Donald R. Blensly
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Judge Charles S. Crookham
Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

Excused: Senator John D. Burns, Vice Chairman
Representative Leigh T. Johnson

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter
Mr. Bert Gustafson, Research Counsel

Also Present: Lt. Harold R. Berg, Oregon State Police
Judge James M. Burns, United States District Court
Mr. Jim Hennings, Metropolitan Public Defender Portland
Lt. Roger Herendeen, Oregon State Police
Sgt. Charles E. Hill, Portland Police Bureau
Mark Johannessen, Chief of Police, Springfield
Ms. Helen Kalil, Multnomah County District Attorney's Office
Mr. Dennis Miller, Clackamas County District Attorney's Office
Capt. John E. Nolan, Chief of Detectives, Portland Police Bureau
Mr. John W. Osburn, Solicitor General, Department of Justice, representing Attorney General Lee Johnson until his arrival
Mr. Scott Parker, Clackamas County District Attorney's Office
Sheriff John Truett, Douglas County, representing Oregon Sheriffs' Association
Mr. Charles Wuergler, Oregon Association Chiefs of Police

Agenda: SEARCH AND SEIZURE
Preliminary Draft No. 3; May 1972

Senator Anthony Yturri, Chairman, called the meeting to order at 9:30 a.m. in Room 315 State Capitol.

Chairman Yturri introduced and welcomed as a member of the Commission Judge Charles S. Crookham who had been appointed to replace Judge James M. Burns. The Chairman also announced that he had designated Representative Norma Paulus as Chairman of Subcommittee No. 3 to fill the vacancy created by Judge Burns' resignation.

Approval of Minutes of Commission Meeting of June 15 and 16, 1972

Mr. Clark moved that the minutes of the Commission meeting of June 15 and 16, 1972, be approved as submitted. Motion carried.

Search and Seizure; Preliminary Draft No. 3; May 1972

Sections 13 through 29. Warrantless searches. Chairman Yturri recapitulated the discussion on sections 13 through 29 at the June meeting of the Commission and pointed out that, although everyone agreed the drafting was well done, there were nevertheless relatively few supporters for the sections dealing with warrantless searches. The decision to be made by the Commission today was whether they should attempt to codify the warrantless search aspect of search and seizure.

Chairman Yturri indicated he had received a copy of a letter written by Judge Burns to the Project Director stating that it would be better to permit this area to be developed by decisional law rather than to codify and freeze the state of the present law. Judge Burns' letter also indicated that Judge Richard Unis, who had a great deal of expertise in this area, was of the same opinion.

The Chairman outlined that the Commission was faced with three choices: (1) Retain warrantless searches in the procedural code; (2) delete sections 13 through 29 and permit decisional law to develop in this field; or (3) submit the sections to the legislature in a separate bill. Chairman Yturri indicated that Mr. Paillette had pointed out to him that this latter choice could pose some drafting difficulties in coordinating the bill with the procedure code inasmuch as this portion of the draft was interrelated in certain respects with other sections in the draft.

At the Chairman's request, Mr. Paillette read the letter he had received from Judge Richard L. Unis, Presiding Judge of the District Court for Multnomah County:

> "I understand that the criminal law revision commission soon will be considering the question whether to codify the area of law dealing with warrantless searches and seizures. I have read the preliminary drafts prepared by Professor Platt of the University of Oregon and other material which you have forwarded to me relating to the subject.

"Although the area of search and seizure is a complex and technical one, Professor Platt and your commission has done an excellent job in drafting the proposed legislation. I do not believe, however, that codification of the areas dealing with warrantless searches and seizures is desirable. The law regulating warrantless searches and seizures should be permitted to develop through decisional law rather than being 'frozen' through codification.

"During the last five years, I have heard numerous suppression motions relating to search and seizure questions. I have observed that whenever a significant U.S. Supreme Court decision or Oregon Appelate court decision is rendered, immediately thereafter there is an adjustment made by the law enforcement people and prosecuting attorneys to comply with the decision and take other appropriate measures to accomplish their obvious goal within the boundaries specified. The result has been a healthy development and improvement of the enforcement of the law in this area and the protection of the rights of the citizens.

"I had hoped to personally appear before your commission and state my views in more detail, but because of a previous committment, I will be out of the state on July 14th when I understand a decision on this question of codification will be made."

Judge Burns indicated he was attending the meeting today as an individual and as a former state circuit judge. He urged the Commission to give special weight to the opinion of Judge Unis for two reasons. The first was that he probably had a greater number of search and seizure cases in his court than all the other judges in Oregon combined. Secondly, Judge Burns said that in his opinion Judge Unis knew the cases in this area better than any other person in the state. Having spent more than three months as Chief Criminal Judge in Multnomah County, Judge Burns said he too had handled a sizeable number of search and seizure cases and was satisfied that Judge Unis' recommendation was a sound one, i.e., to let the appellate courts work the matter out.

Judge Burns expressed the view that it would be an excellent idea for the Commission to present sections 13 through 29 as a separate bill so the legislature could make its own value judgment on the subject.

He took a different view of the succeeding sections dealing with inspectorial searches because that was an area that peculiarly lent itself to legislative treatment and codification. He added that Judge Unis had specifically authorized him to relay his opinion that he too recommended that this area should be codified by the Commission.

Senator Carson indicated he had worked with both Judge Unis and Judge Burns and they were outstanding jurists, but he nevertheless

disagreed with their position. In an area that was in a state of flux he did not believe that the Commission or the legislature should necessarily feel that they had to wait until the judges made up their minds as to the course to be adopted. He pointed out that the judiciary was in a state of flux in a variety of areas that were codified during the course of the substantive revision and this was also true with respect to other areas in the procedure code.

The question to be decided, Senator Carson said, was whether the Commission should exert its legislative prerogative in an area fraught with problems. If the decision was that this area did not belong in the procedure code, he believed the Commission should say so and not take the "cop-out" approach by submitting it as a separate bill.

Professor Platt stated that when he attended the Judicial Conference three or four years ago, the judges met with outraged indignation his suggestion that the legislature should move into the area of search and seizure. From his observation of judges and in talking with them, he said they apparently considered search and seizure their private preserve.

He pointed out that Judge Burns had conceded that the Commission should enact legislation in the warrant search area, and Professor Platt submitted that warrant searches were just as much a subject of the Fourth Amendment as warrantless searches. Probably one of the reasons the opponents of the codification of warrantless searches advocated that warrant search material be retained in the procedure code was because the legislature had traditionally operated in that area. The conclusion he drew was that the reason there was so much opposition to the legislature entering the other area was that the legislature had up to this point not inserted inself into warrantless searches.

He concluded by saying he would be very disappointed if the Commission shunted sections 13 to 29 off into a separate bill. He would prefer to see the sections die entirely if they were not to become a part of the procedure code.

Mr. Chandler said he was not persuaded that warrantless searches should be removed from the code. He agreed it would be difficult to enact the sections in view of the type of opposition that had developed, but the Commission several years ago had made the decision that opposition was not the deciding factor in the Commission's position on a particular matter. He was of the opinion that the opposition to the passage of the procedure code with sections 13 through 29 in it would cause no more difficulty than the opposition which met some of the controversial provisions of the substantive code at the last session of the legislature.

Mr. Paillette indicated a parallel could not be drawn between search and seizure in the procedural code and any of the controversial areas in the substantive code. He admitted that it was difficult for him to be objective on the subject because he could look ahead to

January and see that he would be faced with the task of shepherding the code through the legislature, explaining it, answering questions, attempting to meet the objections and in many cases compromising in order to secure passage, which was all a part of the legislative process in the passage of any bill. Despite the controversial aspects in Senate Bill 40, the bill had the united support of many individuals and groups such as law enforcement, district attorneys, the Oregon State Bar and, by and large, the endorsement of the judiciary. This was not true with respect to the sections under discussion.

Mr. Paillette said he was personally opposed to submitting sections 13 through 29 as a separate bill and earnestly recommended that the Commission not adopt that route. If the Commission was firmly convinced, in spite of all the objections that had been heard, that this was a proper matter not only for the Commission but for the legislature, it should be left in the bill. He cited some of the difficulties in excising those sections from the draft and expressed the opinion that if two bills were submitted and both passed, the ultimate product would only contribute to the confusion that already existed in this very confused area.

Chairman Yturri requested expressions of opinion from the other Commission members.

Mr. Spaulding indicated he was in favor of retaining sections 13 through 29.

Mr. Blensly said when the Commission first began work in the search and seizure area, he was hopeful that it would be possible to have a more definitive rule for everyone to follow in the field, but after studying the matter, and despite the fact that it was as well drafted as was humanly possible, there were so many problems inherent in the drafting, that he was afraid it would create more difficulties than it would solve to leave those sections in the code.

Representative Stults spoke of the lack of expertise in search and seizure in many of the counties as compared to that available in Multnomah County. He said he had some concern about the difficulty of making the procedure understandable but was of the opinion that it should be codified.

Judge Crookham said he was persuaded by Judge Burns' opinion as well as by others he had talked to who were knowledgeable in the field. He was, he said, reluctant to get locked into present case law and believed it would only be buying further difficulties to codify the warrantless search area.

Mr. Clark said he was convinced that the sections should either be in or out but should not be submitted as a separate bill. He was also impressed with the need to have an understandable guideline for practicing policemen. However, he had been talking with Mr. Hennings who opposed the codification and asked that he be given an opportunity to express his views to the Commission.

Representative Cole said he would prefer to leave the sections in the code and submit it as a total package to the legislature.

Mr. Osburn said he agreed that the legislature should speak to important issues even though those issues had heretofore been considered problems of the courts, and he had approved the notion that the Commission should at least make an effort to speak on this subject. That effort had been made, and it now appeared obvious that there was not adequate time to give the matter a review that would be thorough enough to meet all the objections raised. The opposition to the proposal by law enforcement officers, district attorneys and defense attorneys indicated that those involved continually in criminal law did not believe this was the expression the legislature should make in this area. He shared this view and therefore believed that it should not be a part of the code at this point in time.

Representative Paulus commented that this was a matter of public policy and of concern to the legislature. If the draft needed more work, the Commission should somehow find the time to do the job properly. She urged that the warrantless search area be codified as a part of the procedure code.

Mr. Hennings, Metropolitan Public Defender, stated that his office would be handling about 75% of the felony and misdemeanor cases in Multnomah County this fiscal year -- about 1,400 in all. He believed most of the police officers had a good understanding of what was reasonable in the search and seizure area and that was the only basis they needed to be concerned about at the present time. He was of the opinion that the warrantless search area was not really a procedural matter. It was a judicial decision, not a legislative decision, to determine whether a search was reasonable in each individual case.

If better guidelines were to be drawn, Mr. Hennings believed it should be accomplished by teaching police officers rather than by statute. Each fact situation was different, he said, and each one went back to whether the search or seizure was reasonable under the Constitution. This was essentially a judicial decision and not a procedural decision.

Sgt. Hill of the Portland Police Bureau indicated that the Board of Police Standards and Training kept officers apprised of the changes occurring in the law. Most police officers, he said, were quite well versed in the law in the area of search and seizure. He expressed agreement with Mr. Hennings that warrantless searches should not be codified inasmuch as it was extremely difficult to cover all of the possible eventualities. The courts were always available to review police activities and should be the ones to make the ultimate decisions in this area, he said.

Captain Nolan, Chief of Detectives of the Portland Police Bureau, agreed that it was advisable to have definite policies and guidelines for police and prosecutors to follow, but he believed that flexibility to deal with changing court decisions was preferable to codifying this

area of the law. The chief concern of the Commission, he said, should be to make it less difficult for law enforcement officers to combat crime and to protect citizens.

Attorney General Johnson arrived at this point and, in response to a question by the Chairman, indicated that his position was the same as that expressed earlier by Mr. Osburn.

After further discussion, Mr. Chandler moved that the Commission proceed to a further consideration of sections 13 through 29 and that they be incorporated into the search and seizure draft, whether in their present form or in an amended form. Motion carried. Voting for the motion: Carson, Chandler, Cole, Paulus, Spaulding, Stults. Voting no: Blensly, Clark, Crookham, Johnson, Mr. Chairman.

Chairman Yturri directed that the Commission begin with consideration of section 30 and return to sections 13 to 29 following discussion of the balance of the draft.

INSPECTORIAL SEARCHES

Sections 30 through 34. Professor Platt explained that inspectorial searches were of two kinds. The first four sections under this portion of the draft dealt with inspections where licenses to conduct a business or an activity were not involved and typically would be inspections pursuant to fire safety laws, zoning ordinances, etc. The United States Supreme Court, he said, had recently handed down a decision requiring search warrants of a lesser kind for such inspections, and this draft codified that opinion. The second aspect of inspectorial inspections was embodied in section 34 and related to searches by local and state officials pursuant to the so-called implied consent doctrine involving a license to do business or a license to hunt and fish or a license that had been issued by a governmental unit to conduct some particular kind of activity. The scant law in this area had suggested that there was an implied consent for the police, with certain restrictions, to search without a warrant. This draft reflected that policy and set out some of the details, switching the thrust of the searches to administrative rules rather than specific legislative guidelines.

Section 30. Definitions. Professor Platt explained that the definitions in section 30 existed for the purpose of defining terms used in sections 30 through 34.

Representative Cole asked if "vehicles," as used in subsection (1), would include vessels and was told by Professor Platt that it would probably be so construed but it would do no harm to add "vessels."

There being no objection, the following amendment was adopted by unanimous consent: In subsection (1) after "premises" insert ", aircraft, boats".

Mr. Paillette indicated that the Bar Committee on Criminal Law and Procedure had met the previous Saturday to discuss inspectorial

searches. One of the questions raised pertained to the use of the word "magistrate" as opposed to "judge." "Judge" was defined in the general definition section of this Article to have a limited application to a district judge or above. The question posed by the Bar Committee was whether "magistrate" was meant to authorize a judge below the district court level to act in this area.

Professor Platt indicated that his intent when drafting the Article was to limit the exercise of any search warrant activity to a district judge or above. In the area of inspectorial searches, he said, the decision was basically the same as any other kind of search warrant, namely, the insertion of the government into a private area.

Mr. Chandler pointed out that there were several counties in this state where no judicial officer above the level of a justice of the peace was in the county oftener than every three or four months. Professor Platt replied that the telephonic warrant system adopted at the last meeting would be responsive to that problem.

Mr. Blensly pointed out that many of these inspections would be conducted under city ordinances and the basic decision the magistrate would be required to make was whether a situation existed that authorized the official to make the inspection under the city ordinance. He asked what the ultimate consequence of a violation of this type would be. Professor Platt answered that a discovered violation could result in a jail sentence and, furthermore, once the police officer was admitted to the home and spied evidence of a more serious crime in plain view, the search could easily turn into a sentence for imprisonment of a year or more. This was one of the reasons he believed it was as important for a district judge or above to make the decision in this area as in any other search warrant area.

Judge Crookham asked if the tax judge had been deliberately excluded from the definition of "judge" and noted that there could be times when he would be the only judicial officer in the county. Professor Platt replied that that point had not been discussed in subcommittee but added that the tax judge would not normally be exposed to the problems of search and seizure. Senator Carson said he would not be in favor of the tax judge being troubled by inspectorial search warrants when the official could telephone another judge who was more familiar with the area and get a warrant.

Mr. Chandler moved that "magistrate" be retained in subsection (3) of section 30 which would mean that justices of the peace or other judges under the definition of "magistrate" in the substantive code would be able to issue inspectorial search warrants. Motion failed.

Mr. Spaulding moved to substitute "judge" for "magistrate" in subsection (3) of section 30. Motion carried.

Mr. Johnson moved that section 30 as amended be approved. Motion carried unanimously. Voting: Blensly, Carson, Chandler, Clark, Cole, Crookham, Johnson, Paulus, Spaulding, Stults, Mr. Chairman.

Section 31. Inspectorial search by consent. Professor Platt explained that subsection (1) of section 31 allowed the search to be conducted voluntarily when the inspection officer obtained consent from the person who reasonably appeared to be in control. Subsection (2) required the officer to show some authority for making the search and also required him to advise the person of a very minimal right to refuse to give his consent. This reflected a lesser requirement than that required in cases such as Miranda. Subsection (3) provided that the searches must be conducted according to the convenience of the occupants and not at times when people would not normally expect them.

Mr. Blensly said he was thinking of building code inspections where the owner would not normally be on the premises during the course of construction. In many instances the foreman would not be there either, and sometimes no one would be on the premises. He asked if the building inspector would have to get a warrant in such cases. Professor Platt replied that a telephone call to the chief construction engineer, for example, would suffice. It did not necessarily have to be the owner of the building who gave consent. It was intended, he said, to be an informal procedure. Only when consent was refused would an inspection order be required, and he was fairly confident that those instances would constitute a small minority.

Judge Crookham noted that subsection (1) used the term "places" twice whereas "premises" was used in subsection (3). Because aircraft and boats had been added to the definition, the section was concerned with more than places. He therefore moved that "places or things" be used in all three instances. Motion was adopted by unanimous consent.

Representative Cole inquired if the general definition section contained a definition of "daytime." Chairman Yturri replied it did not, but he assumed daytime would be from sunrise to sunset.

Mr. Blensly pointed out that the search was only being made by consent under subsection (3) and there was no reason to restrict the search to daytime. He moved to delete from subsection (3) all language following the word "occupants" on the third line. Motion failed.

Mr. Chandler moved approval of section 31 as amended. Motion carried. Voting for the motion: Blensly, Carson, Chandler, Cole, Crookham, Johnson, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Clark.

Further discussion of section 31 will be found on page 11 and on page 46.

Section 32. Inspection orders. Professor Platt explained that when consent was not given, the procedure and regulations for obtaining an inspection order were set out in section 32.

Mr. Johnson pointed out that "magistrate" was again used in this section and was told that an editorial revision changing "magistrate" to "judge" would be made by the staff throughout the draft in accordance with the Commission's earlier decision in section 30.

Mr. Spaulding called attention to subsection (2) and noted that an official was not entitled to apply for an inspection order unless consent had been refused. Professor Platt explained that the provision was meant to apply either when consent had been refused or when the owner was otherwise unobtainable. The latter situation would not be a refusal but the same result would obtain; a showing would have to be made to the court.

Judge Crookham pointed out that subsection (3) said "owner and the person in apparent control" and suggested that the terms should be in the disjunctive. Professor Platt concurred and the proposal was approved by unanimous consent. This revision was moot, however, as the subsection was subsequently deleted.

Mr. Johnson commented that subsection (3) was creating a right to have a hearing and this was going a long way in this area. The question posed, he said, was whether an agency had the legal authority to make the inspection, and if consent had not been given or the owner was unavailable, he could not see why there should be a hearing on that question.

Professor Platt explained that the section involved a search not related to crime or even to an anticipated charge of a crime but was nonetheless an invasion of privacy. The citizen should have a right to challenge a bureaucratic official who demanded that the door be opened to him because he had a right to search a person's home.

Judge Burns commented that in view of the widespread nature of business regulation these days, the Commission should recognize that many of the people who were going to be searched inspectorially would usually have a lawyer advising them of their rights and they would quickly learn that the way to slow the inspector down was to refuse consent to inspect. He said he would hope that someone on the sub-committee had made an estimate of what this hearing procedure would do to the courts' caseloads in the metropolitan areas. Judge Burns said the proposed hearing was particularly ironic in view of the fact that many of the members of the Commission had felt that overcrowded courts posed a serious problem and they had sought to remove some of the matters from the criminal area to ease the burden on the courts.

Mr. Blensly said that if he were making a decision in this area where a building inspector, for example, came to him and said consent had been refused to make an inspection, he would get a warrant for the police officer and send the building inspector with him. That would be a much simpler procedure, he said.

Mr. Clark was of the opinion that a more substantial issue was involved when someone's home was being invaded than when a business

of some sort was being inspected. He believed that special protections should be built in for inspection of a person's home but the necessity was far less for other types of properties.

After further discussion, Judge Crookham moved to delete subsection (3). Motion carried unanimously.

Discussion of section 32 is continued on page 12 of these minutes.

Section 31, subsection (2). Representative Paulus moved that the Commission reconsider the vote by which section 31 was passed in order to revert to a reconsideration of subsection (2) of that section. Speaking on the motion, she indicated that she was of the opinion that the last sentence of that subsection should be deleted. If every tax assessor or building inspector were required to show his identification and tell the owner that he didn't have to let him in, it would encourage everyone to refuse consent.

Mr. Spaulding suggested that a compromise position would be to leave the provision in to apply only to inspection of premises actually being occupied as a residence.

Professor Platt contended that it was important to retain the provision for a number of reasons, the most important being that the courts, including the U. S. Supreme Court and the Oregon Supreme Court, were moving in the direction of insisting that police give Fourth Amendment warnings before any search. This provision might be a little ahead of its time but was within the general tenor of the courts' approach.

Mr. Blensly agreed with Representative Paulus that the requirement to advise the person that he had a right to refuse to give consent served no useful purpose.

Representative Paulus recalled that Professor Platt had stated that this was an informal procedure and there was no intent by this draft to formalize it. She was of the opinion that the sentence being discussed would have the opposite effect. In most instances the building inspector would be well known to the builders and an informal situation would prevail where the inspector wandered in and out of the premises at will. If he should put a stop order on the construction, the owner could say that the inspector violated this statute by not advising him that he had a right to refuse consent.

Chairman Yturri commented that he could not see that it made any difference whether or not the sentence was included. The relatively few who would refuse would do so regardless of this provision and if they did refuse, the official would obtain an inspection order.

Mr. Clark indicated that the warning was important to the homeowner and particular so to the poor, undereducated person who should be advised that he had the right to refuse to give his consent.

Senator Carson indicated he would vote against Representative Paulus' proposal. It was a small thing, he said, to ask of government officials that they tell the individual citizen the law in this area.

Vote was taken on Representative Paulus' motion to reconsider the vote by which section 31 was passed. Motion was defeated. This decision was reversed on the following day. See page 46 of these minutes.

Section 32. The Commission returned to a discussion of section 32 and Judge Crookham noted that the same problem encountered in section 31 with respect to premises, places and things cropped up again in section 32, subsections (3) and (4). Chairman Yturri directed that the staff make the editorial changes necessary to conform those subsections to the previous amendment, and the directive applied also to including "airplane, boat or vehicle" wherever "vehicle" appeared in the section.

Mr. Spaulding pointed out that the Commission's decision was to retain the requirement that the official must tell the owner that he had the right to refuse to consent to the inspection, but the hearing requirement had been deleted. He asked what the result would be under the amended version of the draft if a person refused consent. Professor Platt explained that the official would then go back and apply for the warrant without the necessity for a hearing.

Mr. Chandler moved approval of section 32 as amended. Motion carried unanimously. Voting: Blensly, Carson, Chandler, Clark, Cole, Crookham, Johnson, Paulus, Spaulding, Stults, Mr. Chairman.

Section 33. Emergency inspectorial searches. Professor Platt explained that section 33 covered the situation where there was not sufficient time to get a consent or a warrant in an emergency situation requiring an immediate inspection and set out the standards which would apply to excuse seeking either a consent or an inspection order.

Mr. Chandler said he was bothered by a provision granting the use of deadly force in a situation involving a building inspection or a plumbing inspection. Professor Platt advised that such force had to be related to imminent danger of death or serious physical injury. He admitted that the section contemplated an extremely unusual situation but if one did arise, the officers should have that authority.

Chairman Yturri asked what would happen if an official made an emergency inspectorial search, then made a prompt report as required by subsection (1) (c), and the judge later decided that no emergency existed. Professor Platt replied that the judge would throw it out. Chairman Yturri asked what he would throw out inasmuch as the inspection had already been made. He also asked why the official should be required to make a report and was told by Professor Platt that it appeared to be good practice to make the officials publicly and of

record explain why they acted in that particular manner. Chairman Yturri said he assumed the requirement was inserted for informational purposes and to provide a basis for a civil action, and this statement was confirmed by Professor Platt.

Judge Crookham said paragraph (c) of subsection (1) requiring the report was an exercise in futility and moved to delete it. Motion failed.

Mr. Chandler moved to delete subsection (2) of section 33 and make the necessary conforming revisions in subsection (1) (b). In support of the motion he said he could not imagine a situation that would require the use of deadly force in an inspectorial search.

Mr. Paillette said that deadly force did not necessarily mean that someone had to be shot. Merely drawing a revolver would constitute a display of deadly force. He said there could be a situation where a dog had bitten someone and the dog was suspected of being rabid yet the owner refused to let anyone on the premises. In that instance drawing a revolver would be persuasive evidence of the officer's authority to remove the dog.

Mr. Clark was in favor of retaining the provision because of the possible consequences of developing technology that might involve future danger to massive numbers of people.

Representative Paulus commented that the officer would be exonerated in any event if he used deadly force in an emergency situation because of the reasonable exercise of his police power.

Vote was then taken on Mr. Chandler's motion to delete subsection (2) of section 33. Motion failed.

Mr. Johnson moved to approve section 33. Motion carried unanimously. Voting: Blensly, Carson, Chandler, Clark, Cole, Crookham, Johnson, Paulus, Spaulding, Stults, Mr. Chairman.

The Commission recessed for lunch and reconvened at 1:00 p.m.

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Judge Charles S. Crookham
Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding
Representative Robert M. Stults

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter
Mr. Bert Gustafson, Research Counsel

Also Present: Mr. Jim Hennings, Metropolitan Public Defender, Portland
Lt. Roger Herendeen, Oregon State Police
Sgt. Charles E. Hill, Portland Police Bureau
Ms. Helen Kalil, Multnomah County District Attorney's Office
Capt. John E. Nolan, Chief of Detectives, Portland Police Bureau
Sheriff John Truett, Douglas County, representing Oregon Sheriffs' Association

Section 34. Miscellaneous special searches and seizures. Professor Platt indicated that section 34 was the most innovative section in the draft because he knew of no similar statutory law in the United States and no judicial decision that followed the policy set forth therein. The revised page 88 inserted in the draft reflected technical changes to conform with the present status of the Administrative Procedures Act.

Professor Platt explained that section 34 provided for activities where premises were operated under a license -- fishing license, hunting license, tavern license, food handling license, etc. -- any activities conducted pursuant to some governmental license either from a state, county or city agency.

Professor Platt continued that the problems in this area were brought to the subcommittee's attention by a representative of the Oregon State Police who explained the difficulties they had encountered in deciding what licensed premises they could search. For instance, if they knew someone had some short trout in his creel but the creel happened to be in the person's house trailer, they were uncertain whether they could go in under the licensing authority and search the fish or game bag in what was the person's temporary home. Another situation where authority was unclear involved road blocks where the police routinely stopped cars to check for driver's licenses.

Section 34 required the licensing agency to draft a set of administrative rules, and the rules would be drafted by the agency enforcing those rules because they were best acquainted with the kinds of problems involved. It required that the state agency must submit the rules to the Attorney General for approval before they were published under ORS chapter 183. The local agencies, cities and counties, would draft their rules and submit them to the district attorney of the appropriate county for approval.

Chairman Yturri was of the opinion that subsection (3) should contain something with respect to purpose in addition to the time, place, manner and intensity of the inspection. Professor Platt agreed that anything more that the Commission wished to designate with respect to purpose would be in line with the intent of the section.

Chairman Yturri said that despite the safeguards included in the section, it disturbed him to leave to an administrative agency the authority to make rules with respect to search and seizure in license cases when everyone was aware that even though the rules were published, 99% of the ordinary citizens in the state who were likely to be affected by those rules had no knowledge of the hearing that preceded publication. He said he had no particular objection in the field of fish and game violations, but it was impossible for the Commission to foresee the number of agencies a section such as this would affect nor the problems that could arise under it. Moreover, he said, no search and seizure problem existed at the present time with respect to the majority of the licensing agencies.

Mr. Johnson replied that the proposed statute attempted to deal with those licensing agencies which authorized a search of some sort and to impose some standards as to how the search was to be conducted. It was not designed to allow searches not already permitted by the enabling statute. One possibility, he said, would be to require that the agencies' rules would only be effective until the end of the next legislative session, and they would be submitted to that session for review.

Mr. Chandler commented that he would approve of that suggestion providing the rules would be effective after the legislative session ended if the legislature neither amended nor approved them.

Professor Platt asked how such a provision would operate with respect to city and county agencies and was told that the rules would have to be submitted for approval either to the city council or the board of county commissioners.

Mr. Paillette indicated that he was disturbed by the provisions of section 34 because there had been no opportunity to conduct any research or to coordinate or discuss the provisions with agencies on either the state or local level. The staff, he said, was not prepared to advise the Commission as to what statutes were going to be affected by this section nor the agencies that would be affected. He was opposed to submitting this to the legislature without realizing the full implications of it.

There was a lengthy discussion concerning section 34 following which Judge Crookham moved that the section be deleted. Motion carried. Voting for the motion: Blensly, Burns, Clark, Cole, Crookham, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Chandler, Johnson.

Mr. Johnson pointed out that the Commission was being inconsistent in codifying the laws pertaining to search and seizure but refusing to set guidelines in an area which probably had a direct effect on a vastly larger number of citizens.

Mr. Johnson then moved to resubmit section 34 to the subcommittee to prepare guidelines relating to fish and game laws plus any other areas where searches and seizures were routinely conducted by specific agencies. Motion failed.

DISPOSITION OF THINGS SEIZED

Section 35. Scope. Mr. Chandler moved that section 35 be approved. Motion carried. Voting for the motion: Blensly, Burns, Chandler, Clark, Cole, Crookham, Paulus, Spaulding, Stults, Mr. Chairman. Voting no: Johnson.

Section 36. Notice of seized items; disposition of stolen goods.

Section 37. Motions for the return or restoration of seized things. Professor Platt explained that the purpose of sections 36 and 37 was to clearly separate things seized from the issue of suppression of evidence. The two were intermingled in concept, but the present statutes did not deal clearly with the aspect of returning evidence to the person who lawfully possessed it.

Tape 12 - Side 2

With respect to the last sentence of subsection (1) of section 36, Mr. Blensly said he could think of any number of situations where there would be no defendant involved. Professor Platt said the provision was intended to be effective only if applicable; obviously, the list could not be given to someone who did not exist.

Mr. Blensly asked if subsection (3) of section 36 was intended to authorize an officer to return stolen goods without any court determination. Professor Platt confirmed that it authorized the return in a summary fashion when the officer was certain of the lawful owner. If he was in doubt, as a protection to himself, he would not want to return the goods. However, any evidence to be introduced at trial could not be returned to the owner but would be held until it was no longer needed.

Mr. Clark asked if section 36 would be applicable to things that came into the control of a police agency not as a result of a search or seizure--for example, found property. Professor Platt replied that it was not meant to apply to such property, and Chairman Yturri pointed out that it would not be applicable because of the opening phrase, "In all cases of seizure."

Mr. Clark commented that there was a tremendous need to provide for some unified system of disposing of property that came into the

hands of police agencies through a variety of sources, the majority of which was not seized by the police and in many instances where no arrest had been made.

Senator Burns recalled that Mr. Clark had made a recommendation to the legislature a few years ago that proposed a realignment of the laws pertaining to disposal of that type of property. Mr. Clark confirmed the accuracy of that statement and explained that Multnomah County had adopted a procedure similar to the one he proposed, but the problem remained in other counties throughout the state. Senator Burns concurred that the procedure should be uniform throughout the state and suggested that Mr. Clark resurrect his proposal and submit it to the next session of the legislature. Chairman Yturri expressed agreement, noting that such a proposal was not actually a part of the criminal procedure code.

Mr. Blensly moved to strike "Recently" from the opening sentence of subsection (3) of section 36 and also to delete "promptly" in the two places it appeared in that subsection. Motion carried.

Mr. Blensly asked if it was clear that all the subsections of section 36 spoke to items seized other than under a search warrant. Chairman Yturri was of the opinion that it was not sufficiently clear inasmuch as the opening subsection was independent of the other two. He suggested that the section begin with the opening phrase of subsection (1), "In all cases of seizure other than under a search warrant if an arrest is made:" and follow that statement with subsections (1), (2) and (3) so that the opening clause would preface each subsection. Professor Platt agreed that it should be clarified and suggested another way of accomplishing the same thing would be to begin the section with "Pursuant to the provisions of sections 36 and 37."

Chairman Yturri commented that this was an editorial aspect that would be left to the staff.

Professor Platt then explained that section 37 contained detailed provisions specifying who may file and the grounds for filing. A safety valve was included to provide that even if a person won on his motion to have the goods returned, the court could withhold the goods as long as they were needed for evidence in the case.

Chairman Yturri asked if "arraigning magistrate" was the proper term as used in subsection (2) (a) of section 37 and was told by Mr. Paillette that in this instance "magistrate" was correct.

Mr. Blensly was of the opinion that the court having trial jurisdiction over the criminal charge should be the only court having authority to make the final disposition of items seized. Senator Burns concurred and pointed out that, as drafted, the section would lend itself to a "shopping" situation between courts. Professor Platt agreed and said the provision was analagous to the suppression situation where the district court could not suppress evidence that would be used in the circuit court. In that instance the draft provided that the court which ultimately tried the case was the only court having authority to make the decision on suppression. This section should be amended to include a parallel provision.

Mr. Blensly suggested that the draft be revised to provide that if charges are filed, the court having jurisdiction over that crime would be the one that could release seized things and if no charge is filed, the court from which the warrant issued would be the one having that authority.

Professor Platt asked Mr. Blensly how he would handle the situation where there was a seizure of items and the storekeeper knew they belonged to him. He had a legitimate need to have his merchandise returned but the state had not yet made an arrest and the court of jurisdiction had therefore not yet been determined. He asked whether the state should be able to request the court to postpone its decision until there was a charge filed or until some disposition had been made of the case.

Mr. Blensly replied that the state had 30 days in which to charge. He added that there should also be provision for a stipulation of parties. Things would be seized for evidence purposes where it would later develop that the goods were not needed. Professor Platt agreed that the draft should also contain provision for a stipulation by the district attorney and the person from whom property was seized so the property could be returned upon approval of the court.

Mr. Hennings commented that 30 days probably would not be enough time from the defense standpoint because it could be 30 days before the defendant would know if he was to be charged. The way the draft was written, he said, it appeared to say that the person not filing a claim within 30 days would be out of luck as far as getting his property back. Mr. Blensly expressed agreement and said he could see no particular purpose in the 30 day limitation. There was no reason why property should not be returned six or eight months later providing there was still good grounds for doing so.

Mr. Clark recalled an incident in Multnomah County where slot machines were seized which under Oregon law were contraband on their face, and the judge of the district court ordered them returned to the owner. He asked if such a situation could again occur under this draft. Mr. Paillette replied that gambling contraband was not dealt with in this draft but it was treated under the gambling statutes.

Mr. Blensly pointed out that subsection (3) of section 36 applied only to stolen items and asked how the owner of items seized as evidence, that were not stolen and not contraband, would go about getting those items back when they were not seized under a search warrant. Professor Platt conceded that there was no need to require that things seized had to be stolen before they could be returned to the owner by the officer.

Mr. Blensly moved to strike "stolen" from subsection (3) of section 36. Motion carried by unanimous consent.

The Commission returned to consideration of the 30 day requirement in section 37. Mr. Blensly suggested that perhaps there should be a time limit before a motion for the return of seized things could be filed. The seizing agency would need a period of time to gather the evidence, to put the case together, present it to the grand jury, etc. If an agressive defense counsel were permitted to come in immediately, he could be making all sorts of motions in the initial instance. Representative Stults pointed out that paragraph (d) of subsection (2) gave the court discretion to determine whether the things were still needed for evidentiary purposes.

Senator Carson's concern was the opposite of Mr. Blensly's, namely, that the seized things would languish in an evidence locker for an interminable amount of time. He indicated that the subcommittee had attempted to expedite the process in the situation where the police threw out a dragnet and picked up items not needed along with items that would be used in evidence. There should, he said, be a time where the district attorney must decide what is evidence and what is not, although he was not particularly concerned that the period remain at 30 days. He was under the impression that the subcommittee had built enough flexibility into the draft so that the state could be granted additional time when it was needed. He did not believe it was the citizen's responsibility, after his property was picked up by the sheriff, to have to keep hounding the district attorney to return something he needed when the prosecutor had no use for it. Mr. Blensly concurred.

Mr. Hennings pointed out that section 36 (2) said that if no claim to rightful possession had been made pursuant to section 37, the court must order the things turned over to the sheriff or some other officer so he could sell it or destroy it. This was where the time limitation should be, he said, rather than in section 37. Officers should be given some direction as to how long they had to keep unclaimed items before they could dispose of them.

Mr. Blensly noted that subsection (2) of section 36 referred to things the district attorney was keeping as evidence which was a different problem from unclaimed items.

Mr. Blensly questioned whether section 37 related only to things seized under a search warrant and was told by Professor Platt that "or actual notice of a seizure" was intended to make it applicable to non-warrant arrests also. Mr. Blensly said it appeared to him that the phrase, "or within 30 days after actual notice of a seizure," modified "upon the return of a search warrant." Judge Crookham suggested that "any seizure" rather than "a seizure" would clarify the intent and other members concurred.

After further discussion, Senator Burns moved to amend subsection (1) of section 37 to read:

"Within 60 days after actual notice of any seizure or at such later date as the court in its discretion may allow:"

No vote was taken on this motion.

Mr. Blensly advised that he would vote against the motion because he was opposed to including a specific time limitation. His position was that there should be a motion filed before disposition was allowed.

Judge Crookham was of the opinion that the term "actual notice" was self-contradictory.

Captain Nolan informed the Commission that the Portland city ordinance permitted the police to dispose of unclaimed goods after 90 days without court order, and the 60 days proposed in section 37 would be in conflict with that ordinance.

Mr. Hennings advised that frequently when a person was arrested, his money was seized which raised a serious question as to whether that money was loot from the robbery, for example. If a man was picked up for selling marihuana and had $1,000 in his car, the police needed time to determine whether that money was relevant to the case, and the defendant would probably not claim the money until after the trial.

In view of the many problems raised, Mr. Clark moved to rerefer sections 35, 36 and 37 to subcommittee. Motion carried.

Mr. Blensly advised that Clackamas County had prepared an extensive memorandum regarding disposition of property that might be helpful to the subcommittee when it reconsidered these sections.

EVIDENTIARY EXCLUSION

Section 38. Motions to suppress evidence. Section 38, Professor Platt explained, dealt with the defendant's motions to suppress evidence seized against him. Subsection (1) provided that the motions were to be filed in the circuit court if the offense charged was a felony and in the district court if the offense charged was a misdemeanor. He called attention to the last paragraph of the commentary on page 103 of the draft which the subcommittee had asked the staff to include as legislative history.

Mr. Spaulding pointed out that the last sentence of the commentary said that the "district attorney, after losing on the motion to suppress, cannot use the suppressed evidence if he later charges the defendant with a felony." The district attorney, he said, might charge the defendant with another misdemeanor and the commentary appeared to limit the further charge to a felony. Professor Platt replied that the legislative intent was that he could not use the evidence at any later time if he lost on the motion to suppress, but he did not mean to imply that the same evidence could not be used against another defendant.

Chairman Yturri directed the staff to amend the commentary to incorporate the statement that when evidence was used or attempted to be used against a particular defendant, it could not be used against him again once the state had lost on the motion to suppress.

Judge Crookham asked what provision had been made for a misdemeanor where exclusive jurisdiction was in the circuit court. To illustrate, he used the example of an assault case where the victim was under 15 and the exclusive jurisdiction would therefore be in the circuit court. Professor Platt expressed approval of amending the language of section 38 to provide for that circumstance.

Judge Crookham next pointed out that the draft did not answer the question of how to handle the defendant who asked for an immediate motion to suppress before the case was submitted to the grand jury. In that instance he asked if the draft contemplated that even though the circuit court had not obtained jurisdiction, the case should be moved directly into the circuit court or whether the circuit court should wait until it acquired jurisdiction before hearing the motion to suppress. Professor Platt replied that the subcommittee had not directed its attention to that aspect.

Mr. Johnson said a problem also arose when a misdemeanor was charged by an indictment in which case the jurisdiction would be lodged in the circuit court. Judge Crookham added that this raised another question in connection with indictable misdemeanors where there was concurrent jurisdiction but, by virtue of the indictment, the case was shifted over to the circuit court.

There were a number of proposals for amending subsection (1) to resolve the problems discussed above, none of which was entirely acceptable.

Mr. Blensly was of the opinion that subsection (1) was unclear and suggested that it be amended to read, " . . . things seized under the provisions of this Article shall . . . . "

Senator Burns suggested that a more concise way of amending subsection (1) than some of the earlier proposals would be to state: "Objections to the use in evidence of things seized in any violation of the provisions of this Article shall be filed in the court having ultimate trial jurisdiction of the offense charged." The commentary could then recite that in the instance of misdemeanors, the section was intended to mean the lower courts, in the instance of indictable misdemeanors it was intended to mean the circuit court, and in the instance of misdemeanors which by statute were in the circuit court, it was intended to mean the circuit court.

Mr. Blensly pointed out that even though the draft did not allow a magistrate to issue the initial warrant, Senator Burns' proposal would allow him the right to make a determination on the motion to suppress. Senator Carson said his understanding was that the subcommittee was attempting to provide that the judge who granted the warrant would be the same one who ruled on the evidence. The intent

was to limit the section to district judges and above. Mr. Blensly commented that a real problem would be encountered in justice courts because the draft required a record to be made of the proceeding.

Professor Platt said that in State v. Stahley, 492 P2d 295, ___ Or App ____ (1971), the Oregon Court of Appeals held that the district court proceedings on the motion must be of record, and the state, as well as the defendant, was given a right to appeal to the circuit court. The draft attempted to respond by requiring a record to be kept in the first instance.

Chairman Yturri called for a ten minute recess and asked that during that period Judge Crookham, Professor Platt and Mr. Paillette confer and try to find answers to some of the problems that had been raised with respect to section 38.

Following the recess, Judge Crookham indicated that Mr. Hennings and Ms. Kalil had raised several practical problems. Mr. Hennings was of the opinion that a high percentage of cases were washed out early in the system because of the right to have the motion to suppress in conjunction with the original preliminary hearing. Ms. Kalil wanted to make sure that the state was not precluded, when suppression was allowed, from taking that same evidence into the grand jury and later offering it in the circuit court.

Mr. Hennings expressed the view that the district attorney should not be bound by the decision of the lower court but should be allowed to reraise the issue de novo. The proposed statute, he said, would eliminate the right of a motion to suppress at the district court level on the preliminary hearing. This, he said, could not be done by statute for constitutional reasons. The judge would have to decide whether evidence was constitutionally seized before he could even conduct the preliminary hearing and for that reason he said he would have to raise that issue in behalf of his client and, if unsuccessful in district court, he would feel he would have to raise it again by habeas corpus. That procedure would not be in the best interest of judicial economy because in some cases the same evidence would have to be heard twice, first in district court and again in circuit court. However, at that point police officers were uncoached by the district attorney and were only a few days away from the incident so it was much more likely that the court would be able to determine exactly what the facts were. Mr. Hennings concluded by saying that he would see nothing wrong with stating in the statute that the ultimate decision should be made in the court with original ultimate jurisdiction. As far as suppression at the preliminary hearing, he believed that decision should be made by the district court.

Professor Platt commented that it was the desire of the subcommittee to economize on judicial time and that was one of the reasons for trying to eliminate the repetition of the motion to suppress. Neither did they wish to interfere with the discharge at the earliest possible time of an accused person. If the preliminary hearing showed no probable cause, the man would be out of the system before there was any further entanglement with the law.

Mr. Paillette advised that the subcommittee had heard the opposite point of view from the district attorney of Coos County whose recommendation was that any motion seeking the suppression of evidence should be filed in circuit court, thus preventing a defendant from turning a preliminary hearing into a suppression of evidence hearing.

Senator Carson advised that the subcommittee had been persuaded by the experts who testified before them and they were principally from Multnomah County. It was obvious that the practice in Marion County was not the same as in Multnomah County. The subcommittee had tried to change the present system that really worked because of its weaknesses rather than because of its strengths. He suggested that perhaps any attempt on the part of the legislature to correct the system as long as justice of the peace courts and minor courts remained was shouting in the teeth of a gale. The intent of the draft was to reduce judicial time and he was not convinced that it would have the opposite effect in Multnomah County.

Mr. Stults, in order to get an expression of opinion, moved that section 38 be adopted.

Section 5. The hearing. Mr. Blensly pointed out that section 5 of the Article gave the court authority to hold a hearing separate and apart from the affidavit presented to him in support of the request for a search warrant. The cases generally held that the courts in considering motions to suppress were to look only to the four corners of the affidavit presented. He said he knew of no cases interpreting statutory language holding that the courts could place a person under oath and have him sign the statement. However, if that were ever done, it should be admissible at the time of the motion to suppress. He was of the opinion there should be something in the statute to say that the testimony presented to the court under oath under the provisions of section 5 would be admissible with a motion to suppress. Professor Platt commented that Mr. Blensly's proposal defined the intent of the subcommittee but it was not stated specifically in the draft because they believed it was self-evident.

Mr. Blensly moved that the Commission reconsider the vote by which section 5 was approved and that the following sentence be added to subsection (1) of section 5:

> "The summary or other record shall be admissible as evidence in any subsequent motion to suppress."

Motion was adopted by unanimous consent.

Section 38. Mr. Blensly then asked if subsection (3) of section 38 requiring notice to be given was parallel with the notice requirement in the Discovery Article. Mr. Paillette replied that the Discovery Article required the state to advise the defendant of any search or seizure made and allowed him an opportunity to inspect any evidence that was in the possession of the state as a result of the search or seizure. Mr. Blensly said that the same requirement should be included

in section 38 as in the Discovery draft. Chairman Yturri directed the staff to flag Mr. Blensly's suggestion and make certain the two requirements were parallel.

Chairman Yturri indicated that if there was no objection, Representative Stults' motion to approve section 38 would be held in abeyance pending resolution of some of the problems that had been raised in connection with the section. There was no objection.

With respect to subsection (1), Mr. Blensly expressed the view that there was nothing wrong with the present law and suggested that the draft retain that approach by deleting the second sentence of subsection (1).

Judge Crookham indicated there was one possible problem with the statute giving the state the right to appeal the motion to suppress. Defendants were taking the position that if the state did not appeal and there was a subsequent conviction which was appealed de novo, the state could not then reraise the motion to suppress ruling. The Court of Appeals, he said, may be called upon to rule on that issue, but suggested it be clarified in this draft.

Senator Carson recalled that the suggestion had been made to delete the second sentence of subsection (1) which would return the law to its present status. He moved to make that deletion.

Mr. Paillette pointed out that the draft wrote out of the law the motion to quash which was in the present statute. Under this draft objections to evidence could not be raised under a motion to quash because that statute would be repealed.

Vote was then taken on Senator Carson's motion to delete the second sentence of subsection (1) of section 38. Motion carried.

Senator Carson next suggested that since the Commission had decided to return to the old system, the first sentence of subsection (2) should be deleted and the questions raised by Judge Crookham should then be considered so the draft would state the specific intent in that area.

Judge Crookham said he did not believe the motion to suppress should be appealable from the district court on up. If the defendant lost the motion to suppress and there was a bind-over, the matter would then be in the circuit court and the defendant was free to raise the issue again, so in effect he had the right to a de novo appeal. If the state lost and the motion to suppress was allowed, the state could then by-pass the district court by going directly to the grand jury and the matter would then be in circuit court.

Judge Crookham moved to delete subsection (2) which would perpetuate the present law and give both sides "two shots."

Senator Carson was of the opinion that the rules should be written into the statute to ease the burden on circuit judges. One of the questions to be decided, he said, was whether to treat the preliminary hearing function as totally different from the trial in the lower court.

Judge Crookham believed that the state should not be barred from raising the issue at the preliminary hearing stage in the circuit court. He proposed to sever the concept of the district court preliminary hearing from the district court trial and said he would preserve for the state the right to appeal an exclusionary ruling in a district court trial; otherwise the state was barred because of the double jeopardy problem whereas the defendant could always appeal. He added that there was no necessity to talk about an appeal of an exclusionary ruling at the preliminary hearing because the state could always go to the grand jury.

Senator Burns recapitulated his understanding of Judge Crookham's proposal -- if there was a trial in the district court on a misdemeanor charge where the defense attorney moved to suppress evidence and the motion was granted, the proposal would permit the state to appeal the ruling on the suppression to the circuit court, and if reversed, remand the case back to the district court. However, on a preliminary hearing if the defendant moved to suppress and was successful, the district attorney could take the question to the grand jury.

Mr. Spaulding indicated that he believed there was good reason for the state to be allowed to appeal whether at a preliminary hearing or at trial in the lower court.

Mr. Blensly asked if it would cause problems if the state were given the right to appeal from the ruling at the preliminary hearing in that the defendant would have to be held during the time of the appeal.

Senator Burns thought the procedure would cause problems, particularly in the outlying counties. If the state appealed an adverse ruling made at a preliminary hearing in a county where the circuit judge would not be back for two months, he asked what would be done with the defendant in the meantime. Mr. Spaulding conceded that it would create a difficult situation and if the judge allowed the motion to suppress, probably the justice of the peace would not find grounds to hold the defendant anyway.

Mr. Paillette suggested that the state be prohibited from appealing an adverse ruling on a motion to suppress at a preliminary hearing and then provide that a subsequent indictment by a grand jury would not be considered to be an appeal.

Senator Carson proposed that there be no appeal by either side from an adverse ruling at a preliminary hearing. Mr. Blensly said that would be all right if the statute also provided that such ruling would not preclude such evidence from being introduced at the grand jury to make it clear that the ruling at the preliminary hearing was not the

final ruling. He suggested that the statute provide that any motion to suppress granted at a preliminary hearing be limited to the purposes of that hearing.

Mr. Hennings recommended that the state have the right of an interlocutory appeal which would be especially useful in the smaller counties where they might want to hold a dangerous person. He would not, however, limit the state to that type of appeal but would also allow them to go by means of a secret indictment or a district attorney's information.

Judge Crookham noted that ORS 157.020 provided that that the state may take an appeal to the circuit court from "an order made prior to trial suppressing evidence." He commented that if subsection (2) of section 38 were deleted and ORS 157.020 remained as the only appeal mechanism for motions to suppress in lower courts, it would solve the problem.

Judge Crookham then moved to delete subsection (2) of section 38. Motion carried.

Ms. Kalil was concerned about the situation where the state had succeeded in having evidence suppressed in district court at the time of the preliminary hearing and the case subsequently went to the grand jury. She wanted to make certain that the evidence could be presented by way of secret indictment. Chairman Yturri directed that the commentary to section 38 should indicate that although ORS 157.020 was to be the only appeal mechanism provided for on a motion to suppress, a secret indictment and use of the evidence before the grand jury was not to be barred and the procedure would not be considered an appeal.

Subsection (3). Mr. Paillette advised that section 3 of Preliminary Draft No. 2 on Pre-Trial Discovery which would be before the Commission at its next meeting provided that "the district attorney shall disclose to the defendant the occurrence of a search or seizure, and upon written request by the defendant, any relevant material or information obtained thereby" and there was a continuing affirmative duty to disclose under that draft.

Mr. Blensly raised the question of whether the district attorney would have to give notice of everything he seized under the requirements of the Search and Seizure Article plus everything he intended to use at trial as required by the Discovery Article. Chairman Yturri was of the opinion that the two requirements were not in conflict except that subsection (3) imposed an additional requirement.

Judge Crookham asked if subsection (3) was intended to require written notice or an informal notice of some kind. Professor Platt replied that the intent was to eliminate as many formalities as possible, but the subcommittee had not directed its attention to that aspect.

Chairman Yturri and Judge Crookham were of the opinion that written notice should be required.

Mr. Blensly proposed to state that notice may be given to the defendant or his attorney and was told by Mr. Paillette that "defendant" encompassed his attorney without specifically stating so.

Senator Burns suggested that the notice required by the subsection be filed with the court to eliminate any misunderstanding that might arise between the district attorney and the defense attorney. Mr. Johnson said the simpler procedure would be to let them work their problems out themselves rather than to involve the court in every instance. Mr. Chandler agreed that the procedure should be kept as simple as possible.

Judge Crookham expressed concern over the loose timing contemplated by subsection (3). He noted there was precedent for a specific time limitation in the requirement for notice of alibi defense to be given a specified number of days before trial. He suggested that parallel language be used in this subsection and cast that same burden on the state.

The Commission discussed the advisability of inserting a specific number of days in place of the "reasonable time" requirement in subsection (4) and ultimately decided that it would be better to leave the statute flexible and handle the time question by court rule to fit the mechanics of the particular court involved.

Judge Crookham moved to insert "written" before "notice" in subsection (3). Motion carried.

Mr. Spaulding moved to approve subsection (3) as amended. Motion carried.

Subsection (4). Mr. Chandler moved approval of subsection (4). Motion carried.

Subsection (5). Ms. Kalil indicated that subsection (5) was unclear as to whether it meant another judge on a different level or the same judge. Chairman Yturri said that it would be the same court and Mr. Blensly suggested that "same" be inserted before "court." Senator Burns remarked that the word "renewed" implied that the motion had to be made again in the same court.

The suggestion was made that the matter with reference to the identity of the court to which subsection (5) was directed be taken care of by commentary.

Mr. Chandler moved that subsection (5) be approved with the understanding that the commentary would show that the reference to "court" was intended to mean the same court. Motion carried.

Mr. Chandler moved approval of section 38 as amended. Motion carried unanimously. Voting: Blensly, Burns, Carson, Chandler, Clark, Cole, Crookham, Johnson, Paulus, Spaulding, Stults, Mr. Chairman.

Further discussion of section 38 begins on page 30 of these minutes.

Section 39. Appellate review of order denying motion to suppress evidence. Professor Platt explained that section 39 gave the defendant a right to appeal prior to trial when his motion to suppress had been denied. In other words, he would not have to wait until after trial to appeal the ruling on the motion to suppress.

Senator Burns objected to giving the defendant the right to go to the Court of Appeals before trial on a motion to suppress ruling.

Professor Platt advised that the purpose behind the section was that if the defendant lost on his motion to suppress, and if he felt certain that the appellate court would make the same ruling, then he would not go to trial because he would be willing to give up at that point and plead guilty. If he were uncertain, however, he would have to go to trial to keep his motion to suppress alive. The provision, he said, was concerned only with situations where the whole case rested on the motion to suppress. Whether or not the evidence was admissible would dictate to the defendant whether or not he would plead guilty. In such a case it was conceivable that a lengthy trial could be saved by allowing the defendant to take his appeal prior to trial.

Senator Burns said that if he were defending a case where the motion to suppress was the only issue, he would waive the jury trial, plead guilty and appeal the decision.

After further discussion, Mr. Blensly moved to strike section 39. Motion carried.

Section 40. Standing to file motion to suppress. Section 40, Professor Platt said, raised a basic issue of who should have standing to suppress, and this section applied no restrictions in that regard. He advised that the present law was far more restrictive and held that unless the things were seized from the defendant's possession, he had no right to move to suppress. In other words, if the evidence to be used against him was seized in someone else's home, the defendant could not presently move to suppress that evidence, but under section 40 he could. The object of the section was to make consistent the exclusionary rule. The basic idea of that rule was to deter the police from doing things illegal with respect to the seizure of evidence and was basically a penalty against the police. It was inconsistent, he said, to let them use evidence seized illegally against the defendant, and the defendant should have the right to raise the issue.

Mr. Blensly said he opposed section 39 from the standpoint that he did not agree with Professor Platt's statement that it was basically a penalty against the police. It came down to the question of how far the exclusionary rule should be applied. He did not believe that broadening the statute in this manner would prevent one illegal search and seizure by the police, but it would allow the various persons who were quite obviously guilty of a given crime to escape trial because of a suppression ruling. The problems created, he said, would outweigh the intended purpose of the section.

Mr. Spaulding commented that the chief purpose of the exclusionary rule was to deprive the state of the benefit of ill-gotten evidence and that would include the situation where the police broke into someone's home and obtained evidence against a third person who did not live there.

Mr. Spaulding moved the adoption of section 40. Motion carried on a seven to five vote.

An amendment was subsequently made to section 40. See below.

Section 41. Determination of substantiality of motion to suppress. Professor Platt explained that although the Mapp v. Ohio exclusionary rule was still in existence, there seemed to be a dissatisfaction among enough judges on the United States Supreme Court to suggest that perhaps the Mapp rule would in the near future be amended if not abolished. Section 41 would allow courts to admit evidence where there was an insubstantial error by the police and was an attempt to mitigate the exclusionary rule.

To illustrate its effect, Professor Platt pointed out that an earlier section in the draft created the right of a person to be given a warning that he had a right to refuse to give consent to a search. If the policeman in giving that warning did not do the job thoroughly and the warning was not clearly given, but if he did give enough of the warning so that a judge, in reviewing the motion to suppress, could say that he had substantially complied with that provision, the court could refuse to suppress because there was substantial compliance with the warning requirement. The material set forth on page 108 of the commentary was originally part of the proposed statute, but the subcommittee had decided it was better to keep the section short and to place this material in the commentary to give the court some guidelines in determining the meaning of "substantial."

Mr. Clark moved adoption of section 41. Motion carried unanimously.

Section 40. Judge Crookham noted that section 40 was talking about motions to suppress evidence of things and asked if there was a similar procedure in the draft for handling motions to suppress inculpatory statements. They should be, he said, subject to exactly the same sort of rules.

Professor Platt replied that the section was viewed only in the context of Fourth Amendment rights whereas statements were involved with Fifth Amendment rights.

Judge Crookham said he also had a question with respect to subsection (2) of section 40. It was not, he said, limiting in any way and asked what it added inasmuch as the defendant would have the right bestowed by that provision plus any other constitutional grounds. The Chairman agreed that it served no purpose and Professor Platt indicated he would have no objection to deleting it.

Judge Crookham moved to reconsider the vote by which section 40 was approved and to delete subsection (2) thereof. If the motion

carried, he said, motions to suppress would not then be limited to this Article. Chairman Yturri suggested that the commentary should so state.

Vote was then taken on the motion and it carried.

Section 38. With respect to Judge Crookham's earlier suggestion to add "statements" to section 40, Representative Paulus proposed that this provision might more properly be included in section 38. The Chairman expressed agreement and suggested that the opening clause be amended to read, " . . . use in evidence of things seized or statements made . . . . "

Mr. Blensly suggested also that section 38 be revised to read "in any violation of this code" rather than "in any violation of the provisions of this Article 5."

Mr. Blensly next pointed out that if "statements" were inserted into section 38, the notice requirements in that section would also be applicable to statements.

Mr. Paillette recommended that inasmuch as subsection (2) of section 40 was deleted, the reference to violation of the provisions of this Article should be completely omitted. In that way a Miranda question could be raised.

Representative Paulus moved that the first sentence of subsection (1) of section 38 be amended to read:

> "Objections to the use in evidence of things seized or statements made shall be made by a motion to suppress."

Her motion also included direction to the staff to make any other amendments in the balance of the section and in section 41 to conform to the above revision. No vote was taken on this motion.

Mr. Blensly asked if "statements made" referred only to statements made by the defendant or if it referred to other statements as well. Judge Crookham replied that it would be applicable to anything that was suppressible consistent with full discovery.

Mr. Blensly again pointed out that the amendment would require the state to give notice that they would introduce the statements, and it would cause problems when hearsay was involved, some of which was admissible and some not. Mr. Spaulding commented that they would be material and admissible if properly obtained.

Mr. Paillette called attention to the fact that the proposed amendment would add to this section a provision relating to Fifth Amendment rights which were not intended to be included in this Article.

Judge Crookham replied that frequently both statements and things were considered in one motion. He said he could see no reason to conduct two separate hearings. Chairman Yturri explained that Mr.

Paillette's point was that Fifth Amendment and Fourth Amendment rights should be treated separately in the code but added that he could not see where anything would be gained by treating them in two separate sections or two separate Articles. If section 38 were confined to things and statements were omitted, he said the case law would apply to statements and he was of the opinion that it could result in an inconsistency to codify the situation with respect to things and not parallel the situation with respect to statements.

Mr. Paillette conceded that it might be inconsistent but where statements were concerned there was a fairly limited body of law and it was more narrowly drawn. Search and seizure on the other hand covered a broader spectrum of legal issues.

Mr. Paillette recalled that the subcommittee had voted to submit subsection (2) of section 3 of this draft to the Commission with the recommendation that it be deleted. The effect of that subsection would have been to exclude personal diaries from seizure under the provisions of the Article. The argument made, which carried in the subcommittee and was ultimately approved by the Commission, was that the draft should not provide for that exception to the list of permissible objects that could be seized because diaries related to the Fifth Amendment right and the Commission did not want to include the Fifth Amendment in the search and seizure law. It was inconsistent, he pointed out, to now say that statements would be covered in this Article.

After further discussion, the Commission recessed at 5:00 p.m. until the following morning.

July 15, 1972

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Judge Charles S. Crookham
Mr. Tom Denney representing Attorney General Lee Johnson
Representative Norma Paulus
Mr. Bruce Spaulding

Excused: Representative Leigh T. Johnson
Representative Robert M. Stults

Staff Present: Mr. Donald L. Paillette, Project Director
Professor George M. Platt, Reporter
Mr. Bert Gustafson, Research Counsel

Also Present: Mr. Jack Frost representing District Attorneys' Association
Mr. Jim Hennings, Metropolitan Public Defender, Portland
Lt. Roger Herendeen, Oregon State Police
Ms. Helen Kalil, Multnomah County District Attorney's Office
Capt. John E. Nolan, Chief of Detectives, Portland Police Bureau

Senator Anthony Yturri, Chairman, called the meeting to order at 9:30 a.m.

Section 38 (Cont'd). Chairman Yturri indicated that when the Commission recessed the previous evening, they were discussing the incorporation of Fifth Amendment rights into section 38 by adding "statements made" to the use in evidence of things seized.

Professor Platt commented that his inclination was to leave statements out of section 38 and rely on the existing law to cover them, and he was sure it would. Chairman Yturri asked if the commentary should show the Commission's intent and was told by Professor Platt that he did not believe even that was necessary although it could be added if the Commission so desired.

Mr. Clark moved that section 38 not be amended to include "statements made" but that the commentary note the discussion of the Commission with respect to the inclusion of Fifth Amendment rights in this Article. Motion carried.

Section 42. Fruits of prior unlawful search. Professor Platt explained that section 42 provided that if the police seized things in an illegal manner which were subject to suppression and as a result of that search discovered other evidence which would be used either to get a search warrant or for any other purpose of conviction, they would not be able to use the fruits of the illegal search in the first instance. It was, he said, the "fruit of the poisonous tree" doctrine laid down in Silverthorne Lumber Co. v. United States, 251 US 385 (1920).

Judge Crookham called attention to the phrase, "unless the prosecution establishes that such evidence," and asked if the evidence was to be established by a preponderance or by reasonable doubt. Professor Platt replied that that question had not been dealt with by the subcommittee, but it would be the present rule.

Chairman Yturri asked what the rule was at the present time, but no one was certain of the degree of proof required. Mr. Paillette indicated that the section was based on section 8.02 (2) of the Model Code of Pre-Arraignment where the language was the same, but their commentary was silent on the question of the standard on proof.

Mr. Spaulding was of the opinion that in this situation the degree of proof to be presented should be by a preponderance of the evidence, and both Judge Crookham and the Chairman expressed agreement.

Judge Crookham moved to amend section 42 to state " . . . unless the prosecution establishes by a preponderance of the evidence that such evidence . . . . "

Senator Burns proposed to delete "probably" from that same sentence. Chairman Yturri concurred that it was unnecessary in view of the amendment Judge Crookham proposed.

Vote was then taken on a motion to amend section 42 to read:

> " . . . unless the prosecution establishes by a preponderance of the evidence that such evidence would have been discovered by law enforcement authorities . . . . "

Motion carried.

Mr. Clark moved approval of section 42 as amended. Motion carried unanimously. Voting: Blensly, Burns, Carson, Chandler, Clark, Cole, Crookham, Denney, Paulus, Spaulding, Mr. Chairman.

Section 43. Evidence of probable cause unlawfully obtained. Professor Platt outlined that section 43 was similar to the fruit of the poisonous tree rule but extended beyond it. It provided that where the police obtained evidence in a trespassory or other illegal fashion and then used that evidence as a basis for a warrant for arrest or as probable cause for a search warrant or even for some sort of a warrantless arrest, that evidence was subject to suppression. He noted that the commentary to the section on page 111 of the draft pointed out that

there was a split of the cases on this subject and the U. S. Supreme Court had never squarely decided the issue. The rule adopted by this section was more restrictive on the state, and the suppression was based on the police conducting themselves in an illegal fashion. It was therefore consistent with the previous section.

Judge Crookham asked what the result would be if the illegal part of the evidence was only 5% of the total. Professor Platt replied that this question was what had caused the cases to be in such disarray -- a technical trespass, for instance, where there was nothing wilful about the police action but where they happened to walk in some place they were not supposed to be and came upon evidence which they ultimately used to "bootstrap" themselves into a probable cause position. The choice the Commission would have to make, he said, was whether they wanted to extend the fruit of the poisonous tree rule into this area.

Chairman Yturri recalled that on the previous day the Commission had approved the section on substantial compliance, and Professor Platt said that section would be of some help in this area if there was a technical trespass. Chairman Yturri expressed the view that section 43 was a departure from that section and said he would be inclined to delete it.

Mr. Blensly commented that if the police performed an unlawful act, there were criminal sanctions to take care of that situation and those sanctions would act as a deterrent without the requirement in this section.

After further discussion, Mr. Blensly moved to delete section 43. Motion carried by a vote of six to five.

Section 44. Challenge to truth of the evidence. Professor Platt explained that section 44 raised the issue of whether or not the defendant could go behind the warrant in attacking the truthfulness of the person who swore out the warrant. The good faith test, he said, was not as extreme as it could be because the subcommittee was persuaded that the statute should be drawn on the basis of the officer's good faith that he believed what he said to be true rather than on the direct question of whether what he said was in fact true.

Mr. Clark expressed his concern about certain practices of the police, particularly in the narcotics enforcement area. He said he had reason to believe that there were a substantial number of cases of planting evidence, fraud, trickery and other completely unethical and unlawful police activities. He believed it was important to include a public policy statement in the Search and Seizure Article to make it clear that the legislature did not condone that kind of conduct.

Senator Burns said the only way to accomplish Mr. Clark's objective would be to attach a sanction to such conduct on the part of an officer or anyone else who was caught in a lie. He said he had seen a case

where an officer lied and the district attorney dismissed the indictment, but the officer should actually have been prosecuted because by his act he demeaned the entire police department.

Approval of section 44 as finally amended appears on page 38 of these minutes.

Reliable informants. Judge Crookham commented that one of Mr. Hennings' cases had recently gone up from his court to the Court of Appeals that concerned a problem inherent in vice prosecutions. When the vice officer went in to get his search warrant, typically he would tell the judge he had a reliable informant and he knew the informant was reliable because he had made 17 buys for him that had resulted in the prosecution of 14 cases and 11 convictions. Judge Crookham said there was no mechanical means of cross examining that officer because there was a policy decision of the courts to allow confidentiality for the protection of the identity of the informant. Mr. Hennings had proposed that in light of the Dooley case, the judge in chambers without the benefit of counsel but with a reporter, should be permitted to make inquiry into the confidential area, make a determination as to whether he believed from that evidence that the informant was in fact reliable and then seal that record to be reviewed only by an appellate court. The state refused to go along with that proposal. Judge Crookham therefore allowed the motion to suppress and the decision was now being appealed.

Ms. Kalil indicated that the position of the Multnomah County district attorney's office with respect to the proposal explained by Judge Crookham was that once a record existed, even though it was sealed, sooner or later someone would open it. The proposed procedure would destroy the confidence of the reliable informant and would result in fewer informants, she said.

Professor Platt pointed out that in Preliminary Draft No. 2 on Search and Seizure the subcommittee was presented with a section that was very close to Judge Crookham's suggestion. It was a limited disclosure of the informant but not a total one. He read the summary of section 32 on page 89 of that draft and added that it was closer to the federal procedure than the present state procedure. It was not, however, approved by the subcommittee.

Mr. Hennings commented that the policy behind the proposal he had presented to Judge Crookham would assure honesty in the police department because the police would know they would have to go into the judge's chambers, sit down with their records and there would be someone other than their own commander looking over their shoulder.

Mr. Hennings said he was willing to trust the judges to make the decision as to whether or not the informants were reliable, because there was a good policy reason not to divulge the identity of informants. The police obviously needed informants but the defendant also needed a method of testing whether the informants really were reliable. He said he had prepared a list of recommended questions for the judge to

use in examining the officer which related to the areas he felt were important, i.e., the judge should know exactly when the informant was used in the past, exactly what the result was, etc.

Chairman Yturri asked if there would be a record made and Judge Crookham answered affirmatively. The three persons participating, he said, would be the reporter, the officer and the judge. It was very much like the Dooley case where the judge was given the right to review in camera the prosecution's file to determine if there was any evidence that should be given over to the defense. The record would be sealed and at no time would the defendant or the defense attorney have access to it.

Senator Burns said that if the informant was not brought in, he could not see how the state's fear of the proposal was justified. If he were a police commander, he said he would not object to permitting the judge to question one of his officers.

Mr. Blensly asked how the state would appeal the judge's decision to suppress the evidence, following an in camera hearing, without going into the question of the identity of the informant. While the appeal procedure might not divulge the name of the informant, he submitted that there would be a great danger that the information presented would divulge his identity.

Mr. Spaulding asked if there would be any support for a section that would provide for an in camera hearing without a record, sealed or unsealed. Judge Crookham replied that the suggestion was feasible if the Commission wanted to rely entirely on the judge to make the finding. Chairman Yturri commented that there would be no right of appeal from an in camera hearing where no record was kept. Mr. Blensly said he would object to such a provision because of the denial of the appeal right.

Section 32 of Preliminary Draft No. 2. Identity of informants. Mr. Clark moved that the Commission consider adding section 32 of Preliminary Draft No. 2 to the Search and Seizure Article. Motion carried.

Professor Platt explained that section 32 went beyond Judge Crookham's suggestion in that the judge could insist at his own discretion on actually having the informant brought before him, and there appeared to be substantial opposition to that aspect in the Commission.

At the Chairman's request, Professor Platt read the proposed section to the Commission:

> "In any proceeding on a motion to suppress evidence wherein, pursuant to section 31, the truthfulness of the testimony presented to establish probable cause is contested, and wherein such testimony includes a report of information furnished by an informant whose identity is not disclosed in the testimony, the moving party shall be entitled to be informed of such identity unless:

"(1) The evidence sought to be suppressed was seized by authority of a search warrant and the informant testified in person before the issuing authority; or

"(2) There is substantial corroboration of the informant's existence and reliability, independent of the testimony, with respect to such existence and reliability, of the person to whom the information was given, and the judge hearing the motion finds that the issue of probable cause can be fairly determined without such disclosure. For purposes of such finding the judge may, in his discretion, require the prosecution, in camera, to disclose to him the identity of the informant, or produce the informant for questioning. If the judge does so require, the information or testimony so obtained shall be kept securely under seal and made part of the record in the event of an appeal from the judge's disposition of the motion."

Mr. Clark asked if it would be possible to eliminate any information being forwarded on appeal and leave it totally to the discretion of the trial judge as to whether the informant was or was not reliable. Professor Platt replied that this could be done. Mr. Spaulding commented that such a finding would almost never be overturned by the appellate court anyway, and Judge Crookham concurred.

Mr. Chandler asked Judge Crookham if he believed that the mere existence of this section would make judges spend more time questioning officers before warrants were issued as to whether their informants were reliable. Judge Crookham replied that he was not involved in the procedure before warrants were issued, but he was impressed with the proposal as a safeguard. He did not anticipate that it would particularly increase the load on the courts because in the high percentage of cases everyone was satisfied that the officer was acting properly, but it would cover the occasional case where that might not be the situation.

Senator Carson commented that the only thing that was held back at the present time was the name of the informant. He asked what more the judge could find out, other than the informant's name, at an in camera hearing than he presently was permitted to ask in open court. Mr. Blensly said that the judge could determine the precise dates of previous buys by the informant, the identity of persons previously arrested, etc. It would not accomplish too much, he said, but it would have a great chilling effect on informants coming forward if they knew this type of proceeding was going to be held.

Senator Carson said that at the present time if the judge decided that the affiant did not have sufficient information and he refused to rely on it, the district attorney then decided whether to "blow the cover" on the affiant. The comments before the subcommittee were that if the in camera hearing procedure were adopted, it would encourage the judge to go a step beyond the present procedure. The subcommittee had concluded that if the defendant was really worried about the truthfulness of the affiant, he had an adequate method of challenging him at the present time and the court also had a right to challenge.

Judge Crookham replied that the proposal under discussion was an attempt to protect the identity of the informant. He had drafted a substitution for subsection (2) of section 32 which he read to the Commission:

> "The judge in camera determines from the affiant by a preponderance of the evidence that such confidential informant exists and is reliable."

Professor Platt noted that the opening sentence of section 32 used the term "truthfulness" and that should be changed to "good faith."

Chairman Yturri asked if section 32 should be added to section 44 and was told by Mr. Paillette that from a drafting standpoint, the provisions should be in a separate section. He added, however, that he did not subscribe to or approve of including the section in the draft at all.

Judge Crookham stated that his understanding of section 32 if it were adopted with the proposed amendments was that it would require the identity of the informant unless one of two conditions existed: (1) the witness testified before the issuing magistrate; or (2) the court determined that he was a reliable informant. He also understood this to be the present rule.

Section 44. After further discussion, Senator Burns moved to amend section 44 in subsections (3) and (4) to provide that the burden be by a preponderance of the evidence in each instance. Adoption of the motion, he said, would make a policy change from truth to good faith and he expressed approval of that revision. Motion carried.

Senator Burns then moved that section 44 be adopted as amended. Motion carried unanimously.

Section 32. Senator Burns next moved that section 32 of Preliminary Draft No. 2 of the Search and Seizure Article be added as a new section 45 with the amendment proposed by Judge Crookham to be inserted as subsection (2). The section should also be amended to conform to the good faith policy adopted in section 44 and was to provide that only the judge and the police officer would be present at the in camera hearing with no reporter and no record. Chairman Yturri indicated that the language of subsection (2) under Senator Burns' motion would be:

> "(2) The judge, alone and in camera, determines from the affiant by a preponderance of the evidence that such confidential informant exists and is reliable."

Mr. Paillette asked if he was correct in his understanding of the motion that all of subsection (2) as presently drawn would be eliminated. He received an affirmative reply from the Chairman.

Representative Paulus asked if any confusion existed concerning the meaning of "in camera." Senator Burns replied that it was the

Commission's position that "in camera" as used in this section meant in the judge's chambers with only the judge and the affiant present, no reporter and no record.

Judge Crookham pointed out that the proposed amendment said "the judge alone" and obviously the affiant would have to be there. Chairman Yturri replied that the commentary would take care of that point.

Motion carried to adopt section 32 with the amendments set forth above.

Following a recess, the Commission returned to further consideration of section 32 by unanimous consent.

Mr. Chandler explained the mechanics of section 32 as adopted by the Commission. If someone challenged the reliability of the informant, the judge would go into chambers with the officer and would talk to him. Should he decide that the officer was lying or that the informant was not reliable, as the section was adopted, it said that the judge would then go back into court and announce that the informant was unreliable and his name was Joe Jones.

Mr. Spaulding said Mr. Chandler was right and suggested that the last clause of the opening paragraph be amended to read:

> " . . . the moving party shall be entitled to prevail on the motion to suppress unless:"

Mr. Blensly pointed out that the motion to suppress might cover areas other than the one relating to the identity of the informant and it should be limited to things, statements, etc. that were seized based upon the information given by the informant.

Various methods of accomplishing the purpose stated by Mr. Blensly were discussed. Ultimately the Commission adopted Mr. Paillette's suggestion to amend the section in an appropriate manner by adding:

> "Evidence obtained as a result of the information furnished by the informant shall be suppressed."

Vote was then taken on the motion to amend section 32 as set forth above. Motion carried.

Senator Burns moved that section 32 as further amended be approved. Motion carried.

Section 13. Permissible purposes. Section 14. Things subject to seizure. Following a discussion of the philosophy involved in sections 13 through 29, Mr. Chandler moved approval of sections 13 and 14, neither of which were amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 15. Intermingled documents. Mr. Paillette indicated that section 15 was not amended by the Commission at the previous meeting, but section 6, subsection (3), was amended to include specific language with respect to daytime searches, and subsection (4) of that section was deleted. [See Commission Minutes, 6/16/72, pp. 47, 48.]

Mr. Chandler moved that section 15 be approved. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Judge Crookham asked if the no votes on these sections were based on the policy decision to retain the provisions in the draft rather than on the statements of law contained in each section. Chairman Yturri said his negative votes were based on the policy decision. Mr. Blensly indicated his no vote on section 15 was not based on the policy decision but on his objection to the provision itself.

Section 16. Search incidental to arrest for minor offense. Mr. Paillette advised that the Commission had added the crime of driving with .15 blood alcohol level to the list of traffic offenses in section 16. [See Commission Minutes, 6/15/72, pp. 15-17.]

Mr. Chandler moved adoption of section 16.

Judge Crookham commented that of all the sections the Commission had thus far approved in this draft, section 16 would be most subject to alteration by the courts and, if approved, it might establish a higher standard than the courts would approve in the future.

Vote was then taken on Mr. Chandler's motion to approve section 16. Motion failed. Voting against the motion: Blensly, Burns, Clark, Crookham, Denney, Mr. Chairman. Voting for the motion: Carson, Chandler, Cole, Paulus, Spaulding.

Section 17. Custodial search. Mr. Paillette read section 17 as amended by the Commission on June 15. [See Commission Minutes, pp. 18-20.] He also noted that the staff was directed to draft language to permit an inventory search of a car which was to be submitted to the Commission for further consideration.

Senator Carson moved to approve that portion of section 17 that appeared in the draft, as amended earlier, excluding the inventory car search provision which would be considered by the Commission later. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 18. Search of the person incident to arrest. Mr. Paillette explained the amendments approved earlier to subsections (4) and (6) of section 18. [See Commission Minutes, 6/15/72, pp. 20-22.]

Senator Carson moved to approve section 18 as amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 19. Search of vehicle incident to arrest. Mr. Paillette advised that a subsection (3) was added to section 19 to include an exception to ORS 471.660. The section was also amended in subsection (1) to delete "readily moveable" in the second line and to revise the language relating to the reasonable belief of the officer in the fifth line.

Representative Cole moved to insert "airplane, boat or" before "vehicle" in section 19 to conform this section to identical amendments made in other sections of the draft. There being no objection, it was so ordered.

Senator Burns suggested the better way to handle the amendments relating to "vehicle" in this draft would be to define that term in the general definition section as including boats and aircraft so that only the word "vehicle" would need to be used throughout the draft. Chairman Yturri indicated that this would be an editorial decision for the staff to make.

Mr. Chandler moved that section 19 be adopted as amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 20. Search of premises incidental to arrest. Mr. Paillette indicated that the only revision in section 20 was to amend paragraph (c) to begin, "Are likely to be removed . . . . " [See Commission Minutes, 6/15/72, pp. 23, 24.]

Representative Cole pointed out that the wording in section 20 should be amended to conform to the revision just approved in section 19 relating to a reasonable belief on the part of the officer. The Chairman agreed that the two sections should be parallel.

Mr. Chandler moved to amend subsection (1) of section 20 to conform to the amendment adopted in section 19 so that the last clause of that subsection would read:

> " . . . provided that the arresting officer reasonably believes that the premises or part thereof contain things that:"

Motion carried unanimously.

Mr. Chandler then moved that section 20 be approved as amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 21. General authorization to search and seize pursuant to consent. Mr. Paillette advised that subsection (2) of section 21 had been amended to read, " . . . 'consent' means conduct or a statement . . . . " [See Commission Minutes, 6/16/72, pp. 25, 26.]

Mr. Spaulding said that "conduct" should be modified to explain what kind of conduct the section was referring to. Mr. Paillette pointed out that the provision referred to conduct giving the officer permission to make a search. Mr. Spaulding was satisfied by this explanation.

Mr. Chandler moved the approval of section 21 as amended. Motion carried with the members casting their votes in the same manner as on the previous section.

Section 22. Persons from whom effective consent may be obtained. Mr. Blensly expressed his objection to section 22 not only from the standpoint of the general policy question involved but also because it required consent of a parent or guardian if the person was under 16 years of age. He was of the opinion that the child should be allowed to give consent or lack of consent and the court should make the determination as to whether the child had sufficient capacity to make that decision. Mr. Spaulding expressed agreement and asked what would happen if the court found that the child was not capable of giving consent. Mr. Blensly replied that the court would then make the decision that the consent was not given knowingly, freely and voluntarily, and therefore there would be no consent.

Representative Cole moved to delete from subsection (1) all the language following the word "question."

Chairman Yturri asked what would happen when a six year old gave consent if Representative Cole's motion were adopted. Mr. Blensly replied that it would be advisable to have some provision to cover such a situation, perhaps to the effect that if the person to be searched lacked sufficient mental capacity to consent, then consent would be given by the parent or guardian.

Professor Platt commented that such a provision would place on the officer the burden of determining a given person's mental capacity. Mr. Paillette added that subsection (1) as it appeared in the draft was consistent with the holding in the Little case, whereas the proposed amendment provided very sketchy guidelines. The theory of the draft was that when the person was not mentally capable of giving consent but his incapacity was not reasonably apparent and the person gave consent, the officer should be able to rely on that consent.

Mr. Clark said there would be no great harm done to the state if the draft allowed a five year old to refuse to be searched. He was in favor of adopting the proposed amendment.

Representative Paulus advised that, as she recalled, the juvenile code revision committee was planning to offer a specific provision that a minor would be emancipated at 15. The age of 16 in this draft would therefore be in conflict with that provision if both were adopted by the legislature.

Senator Carson said that there were two aspects to be considered in connection with this discussion. One was that, regardless of what the child wanted, under the draft as presently drawn the parent could consent, and he could see no harm in depriving the parent of that authority over of the child. The second consideration was that regardless of the age of the child, the court would always have to determine whether the consent was freely and voluntarily given on a motion to suppress. Adoption of Representative Cole's motion, he said, would resolve both problems.

Senator Burns commented that on the other side of the coin was the 14 year old who was frightened of the officer, his badge and his gun and who gave consent because of his fright. The section as drafted would give him some protection by requiring parental consent in that situation.

Judge Crookham said that a real problem would be raised in the circumstance of a runaway child where the parents were unavailable to give consent. Senator Burns remarked that the argument of the runaway child persuaded him that the determination should be made by the court.

Mr. Paillette said that the effect of the proposed amendment would be that if the child refused consent, that would be the end of it, but if he gave his consent to the search, it would be subject to challenge because he was a child. That, he said, struck him as wrong because the child was getting the best of both sides. On the one hand the amendment was saying that he had the capacity to refuse to give consent but on the other was questioning his capacity to give consent.

After further discussion, vote was taken on Representative Cole's motion to amend subsection (1) to read:

"Search of a person, by the person in question; or"

Motion carried.

Senator Burns noted that subsections (2) and (3) of section 22 were in the disjunctive. If a person loaned his car to his cousin who was subsequently picked up by the police after he had put some loot in the car, the cousin would be the person in control of the car. Instead of asking him for consent to search, the police might call the owner of the car because they were reasonably sure the cousin would refuse consent. He asked if the owner in that situation could constitutionally waive another person's Fourth Amendment right by giving his consent to the search of his car.

Mr. Spaulding said a further problem would be raised if a person sold his car to someone and the registration had not been changed.

Senator Burns was not sure that an appellate court would say that the owner of a car had the right to give consent to search that car when another person was in control.

Chairman Yturri commented that the subcommittee probably did not intend the result suggested by Senator Burns. He was inclined to think that what was intended was that if the person in possession was the registered owner, he could give consent. If he was not the registered owner, he could give consent if he were in apparent control. The Chairman's assessment was confirmed by Mr. Paillette.

Mr. Blensly suggested that the better approach might be to leave consent to a case-by-case determination because this was one of the areas that was extremely difficult to codify. Chairman Yturri remarked that if the draft were confined to the person in apparent control, that would impose some restriction and case law could take over from that point forward.

Mr. Spaulding moved to strike "registered as its owner or" from subsection (2).

Senator Carson moved to insert "airplane, boat or" before "vehicle" in subsection (2).

Vote was then taken on the two motions to amend subsection (2) of section 22 to read:

> "Search of an airplane, boat, or vehicle, by the person in apparent control at the time consent is given; or"

Motion carried.

Judge Crookham moved to approve section 22 as amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 23. Required warning preceding consent search. Mr. Chandler moved the adoption of section 23. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Senator Burns called attention to the language in paragraph (c) of subsection (2) of section 23 which referred to a defendant who was unable to obtain or afford an attorney. That phrase, he said, could be construed to mean that the state would be required to provide an attorney for a person who was unable to obtain one even though he could afford to retain his own attorney.

Following a discussion, Senator Burns moved to delete "obtain or" from subsection (2) (c) and the motion was adopted by unanimous consent. The amendment was intended to make clear that if a person could afford counsel, he was entitled to hire one and if he could not afford one, he was entitled to have an attorney provided at public expense.

Section 24. Permissible scope of consent search and seizure. Mr. Chandler moved approval of section 24. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 25. Emergency and other searches; general. Senator Carson moved that section 25 be adopted. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Burns, Denney, Mr. Chairman. Abstaining: Blensly. Section 25 was discussed further following approval of section 26.

Section 26. Vehicular searches. Mr. Paillette advised that paragraph (b) of subsection (1) of section 26 was deleted by the Commission. [See Commission Minutes, 6/16/72, pp. 27-29.] Mr. Paillette noted that "vehicle" as used throughout the section would be subject to the amendment adopted earlier to insert "airplane or boat" before the word in each instance.

Mr. Spaulding moved to adopt section 26 as amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 25. Mr. Blensly said he still had not voted on section 25 because he was reading the minutes of the June meeting regarding that section. [See Commission Minutes, 6/16/72, pp. 26-27.] They indicated that the Commission had discussed amending section 9 to conform to subsection (3) of section 25. Actually, the problem was in section 25 (3) rather than in section 9 and he was of the opinion that a mistake had been made because section 9 without amendment already required that a receipt for things seized be affixed to the premises. That same provision should be added to section 25 (3), he said.

Chairman Yturri asked why the provision was needed in section 25 so long as it was included in section 9. Mr. Blensly replied that the sections were discussing two different situations -- section 9 discussed search under a warrant whereas section 25 was concerned with search in an emergency situation, and the two should be parallel.

Mr. Blensly then moved that the staff prepare appropriate language to carry out the intent stated above, i.e., to place a provision in section 25 (3) parallel to that in section 9 requiring that if no one claimed possession of the property, notice would be given of the property taken by means of a receipt affixed to the premises. Motion carried.

Section 25 was further discussed. See page 46.

Section 27 was deleted by action of the Commission at the June meeting.

Section 28. Search of open lands. Mr. Paillette explained the amendments made by the Commission to section 28. [See Commission Minutes, 6/16/72, pp. 29-30.]

Mr. Clark asked if one of the amendments required the officer to have lawful authority to be on the open lands and was told by Senator Burns that he would implicitly have that authority.

Professor Platt explained that the officer would not fall within the term "trespasser." General law would take care of that situation, he said; where an officer responded to an emergency, he would be legally entitled to be on those premises and if he did in fact see evidence of crime, he was entitled to seize that evidence.

Mr. Spaulding moved approval of section 28 as amended. Motion carried. Voting for the motion: Carson, Chandler, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman. Abstaining: Clark.

Section 25. Judge Crookham suggested that subsection (3) of section 25 was rendered moot by the deletion of section 27 inasmuch as section 27 was the only provision that purported to relate to search of a person. Professor Platt replied that section 29 could relate to search of a person. He agreed that not all the sections referred to in section 25 (2) would be relevant but it did no harm to include the cross reference and it might avoid future problems. No further action was taken on section 25.

Section 29. Seizure independent of search. Mr. Blensly recalled that the Commission had discussed deletion of the phrase "and which therefore can be seized without a search." [See Commission Minutes, 6/16/72, p. 31.] He moved that the phrase be deleted because the meaning was clear without it.

Judge Crookham pointed out that the word "otherwise" in the second line of section 29 created a redundancy. Professor Platt explained that the word was inserted because it reflected by nuance that the officer was typically doing something else when he came across the evidence of crime which ultimately became the object of the prosecution. It referred to a circumstance where he was otherwise lawfully engaged in an activity and then found something he was not really looking for.

Judge Crookham moved to delete the first "otherwise" in section 29.

Mr. Spaulding asked what the result would be if the officer were engaged in an unlawful activity such as speeding in his automobile for no good reason. Professor Platt replied that such a situation would be outside the concept of the plain view rule. The section did not intend to suggest that the officer should be disqualified from seizing evidence in plain view because he was doing something illegal that was completely unconnected with his duties of investigating crime.

Mr. Clark suggested that the sentence be amended to say "in the course of his duties," and Captain Nolan said that revision might cause a problem if the officer were off duty at the time.

No vote was taken on Judge Crookham's motion to delete "otherwise."

Vote was taken on Mr. Blensly's motion to delete "and which therefore can be seized without a search,". Motion carried.

Mr. Chandler moved to approve section 29 as amended. Motion carried. Voting for the motion: Carson, Chandler, Clark, Cole, Crookham, Paulus, Spaulding. Voting no: Blensly, Burns, Denney, Mr. Chairman.

Section 31. Mr. Clark said he was deeply concerned in the inspectional search area that there should be a higher demand for conduct

on the part of the official when he was inspecting someone's domicile than for inspections in other areas. He believed the warning required by subsection (2) was needless in the situation where a building inspector was working continuously with a contractor. However, when the inspector appeared at the front door of someone's home, it was a very necessary requirement and he would like to see the warning restricted only to a person's domicile.

Professor Platt replied that it was clear from the Camara and See cases that the Fourth Amendment rights applied to all these types of inspections and contended that there was a need to give a warning for consent.

Judge Crookham asked what sanction was imposed by section 31 other than a motion to suppress. Mr. Blensly replied that if the inspector went in to inspect the plumbing and found that improper material was being used, he could file a civil action or even an action for criminal fraud at a later time. Representative Paulus added that there was a whole spectrum of ways in which section 31 could be used, examples being a stop work order to halt construction and damages for delay in performance.

Mr. Paillette advised that there was some feeling in subcommittee that section 41 relating to the substantiality of the motion to suppress might be a mitigating factor. Substantiality of the error would come into play in circumstances such as those being discussed. The trouble there was that it would not always be a question of suppressing evidence because in many of these types of inspections no evidence would be obtained.

Mr. Clark proposed to amend section 31 to require that when the inspection was conducted in a domicile, the officer shall advise the person that he has a right to refuse to give his consent. The approach he suggested would not place a positive requirement on the officer to give that advice in any place other than a person's home.

Senator Carson pointed out that section 31 not only required the officer to inform the person that he had a right to refuse consent but also required him to get consent to go on the premises and then, upon demand, to "exhibit a badge or document evidencing his authority to make such inspections." He urged that the Commission at least retain that part of the provision requiring the officer to identify himself and to request permission to enter the premises.

Mr. Clark moved to reconsider the action by which section 31 was approved. Motion carried.

Chairman Yturri asked how Mr. Clark's suggestion would operate in an apartment building and was told that it would be considered a domicile because people were living in it. If the building were under construction, however, and no one was living in it, the warning would not be necessary.

After further discussion, Mr. Clark moved to amend subsection (2) of section 31 to read:

> " . . . and shall, upon demand, exhibit a badge or document evidencing his authority to make such inspections. If such inspection requires his entry into a dwelling, the officer shall also advise such person that he has a right to refuse to give his consent."

Motion carried.

Mr. Clark moved approval of section 31 as amended. Motion carried.

Future Meetings of the Commission

The members agreed to hold the August meeting in Bend on August 28 and 29.

Mr. Paillette advised that on July 24 and 25 the Commission would consider the drafts on Pre-Trial Discovery and Arrests. He asked if the three sections of the Search and Seizure draft that had been rereferred should also be added to that agenda. The Chairman replied that if it was possible to have the sections ready for the meeting on July 24, the Commission could reconsider them at that time without the necessity of sending them back to subcommittee.

The meeting was adjourned at 1:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission