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Side 2 - 1 to end (Begins on p. 7)
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OREGON CRIMINAL LAW REVISION COMMISSION

Thirty-Third Meeting, July 24, 1972

Minutes

Members Present: Senator Anthony Yturri, Chairman
Mr. Donald R. Blensly
Mr. Robert W. Chandler
Mr. Donald E. Clark
Representative George F. Cole
Judge Charles S. Crookham
Mr. John W. Osburn representing Attorney General Lee Johnson
Mr. Bruce Spaulding

Excused: Senator John D. Burns, Vice Chairman
Senator Wallace P. Carson, Jr.
Representative Leigh T. Johnson
Representative Norma Paulus
Representative Robert M. Stults

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel

Also Present: Mr. Richard Barton, Chief Criminal Deputy, Multnomah County District Attorney's Office
Capt. Eugene W. Daugherty, Oregon State Police
Mr. Jim Hennings, Metropolitan Public Defender, Portland
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Scott Parker, Clackamas County District Attorney's Office

Agenda:

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

Pre-Trial Discovery; Preliminary Draft No. 2; July 1972

Mr. Paillette pointed out that Mr. John Osburn, Solicitor General of the Department of Justice, had drafted the Pre-Trial Discovery Article on today's agenda. Chairman Yturri asked Mr. Osburn to proceed with his explanation of the draft.

Mr. Osburn reported that the law in Oregon on Pre-trial Discovery in criminal cases was fairly easy to summarize because there was so little of it. Basically, the Oregon discovery procedure at the present time provided that the defendant was entitled to receive copies of statements which he made to the police or to the prosecution and to receive or to examine anything taken from him or which belonged to him. There were also some federal requirements, one of which involved the question of due process, and arose from the case of Brady v. Maryland, 373 US 83 (1963), where a conviction was reversed because the prosecution had evidence which they suppressed that was favorable to the defendant. As a result of the Brady case, the rule had developed that if the prosecution had evidence which was either exculpatory or which would tend to mitigate punishment, due process of law required that it be disclosed to the defense at some time, but it did not necessarily require pre-trial disclosure.

The third major area of discovery in Oregon criminal cases involved cross examination and arose from the case of State v. Foster, 242 Or 101, 407 P2d 901 (1965), where a prosecution witness was called to testify. The court held that if he had made prior statements which had been recorded or reported in any way, the defense was entitled to see those written statements prior to beginning cross examination so they could cross examine the witness on his prior statements. However, prior written statements were not at the present time required to be disclosed pre-trial.

Despite the fact that very little disclosure was required in Oregon, as a practical matter the volume of handling criminal cases had caused most district attorneys' offices to utilize more widespread discovery than the statute presently required. Many district attorneys maintained a so-called open file system in which the defense was given an opportunity to see what the state had.

Mr. Osburn said that in looking at various proposals in other state jurisdictions and at the ABA Standards, the justification for pre-trial discovery appeared to be twofold: it enabled the state and the defense to evaluate their cases more properly before going to trial and, secondly, it eliminated unnecessary trials.

Chairman Yturri pointed out that a recent Oregon case, State v. Hansen, had reversed a conviction because the prosecution had failed to introduce and make known evidence that was exculpatory in nature. Mr. Osburn replied that the case hinged on failure to disclose witnesses which might have been relevant.

Mr. Osburn noted that the draft was not intended to cover every problem that might arise but was primarily intended to assist the court and the system in keeping things going, shortening trials and eliminating unnecessary trials.

He outlined another aspect of Brady v. Maryland and the exculpatory evidence rule. In one of the death penalty cases the U. S. Supreme

Court said that the requirement of disclosure of exculpatory evidence only applied where the defense had made a demand for it.

Chairman Yturri asked how that rule would apply to a post-conviction proceeding where the defense discovered for the first time that the state had three witnesses that would have absolved the defendant but had not introduced them. Mr. Osburn replied that Moore v. Illinois, 40 L.W. 5071 (June 27, 1972), seemed to indicate that the defense must make a demand at trial, and generally the courts had taken the position that the defense must specify what they want. If the defense asked the state if they had any evidence or witnesses that would be favorable to the defendant, that would not be a sufficient basis to require the state to disclose anything.

Judge Crookham asked if the draft fell short of the requirements of Brady and was told by Mr. Osburn that the draft did not include everything in Brady. It was not specifically directed at exculpatory evidence, one reason being that to do so raised a problem as to the time at which disclosure must be made. The Commission, however, might want to broaden the draft to include exculpatory evidence, he said. Mr. Paillette commented that it raised innumerable problems to attempt to reconcile the Brady holding with pre-trial discovery because Brady was concerned with statements requested by the state during trial.

Chairman Yturri asked if there was a place in this draft where the holding in State v. Hansen could be added. Mr. Osburn replied that section 2 indicated the things the district attorney must disclose and to that section could be added, "Any information in the possession of the prosecution which is exculpatory or which would tend to mitigate punishment."

Mr. Clark was concerned about cases where a number of theories were investigated before the ultimate conclusion was drawn by the investigating agency. He objected to requiring the police to disclose information they had obtained in the course of investigating a particular theory because the theory might be, and often proved to be, completely erroneous. It could well be a theory favorable to the defense because the police could be conducting their investigation on the belief that someone other than the defendant committed the crime. That type of information could be most unfair to someone who was completely innocent, yet who had been under suspicion pending the outcome of the investigation.

Mr. Blensly said he assumed that if the discovery requirements were in the statute, the district attorney would be required to throw all the files open as a matter of protection to himself. Mr. Clark commented that as a practical matter, it would then mean that police would be less inclined to put anything in written form until they were sure they were operating on the correct theory. He said the officers could be working on four or five separate theories at one time, and he did not want to require disclosure of all those theories just to cloud the issue because the police would wash out many of those theories themselves following a probe into the facts of each one.

Judge Crookham pointed out that section 8 dealt with protective orders and would act as a safety valve for the situation Mr. Clark was discussing.

Mr. Osburn remarked that the problem faced by the prosecution in dealing with Brady v. Maryland type information and information regarding evidence of other theories was that after the prosecution had presented its case, if the defense later found out about their theories, the prosecution was taking a chance that the conviction might be overturned because that information was not disclosed. He said that would probably always be true unless the discovery requirement were made so broad as to require the prosecution to disclose everything they knew or ever thought about. As the draft was written, the defense could not make a demand for all the file cabinets full of reports, etc., involving a particular theory such as Mr. Clark was discussing.

Section 1. Applicability. Mr. Osburn advised that section 1 was the section that made this draft different from most discovery procedures. Typically, pre-trial discovery statutes required the defendant to file a motion which triggered some sort of discovery process. Frequently the pre-trial discovery provision said that if the defense made a demand for discovery, then the defense must disclose evidence similar to that which the prosecution had disclosed to them.

The draft under consideration provided that the provisions of this Article were automatically applicable to every major criminal prosecution, i.e., in all cases in which an indictment was found in circuit court or in which an information was filed in circuit court. Disclosure requirements then applied automatically to both sides. The basis for this approach was that if discovery was good, it was good in all cases.

Judge Crookham asked why it should not then apply in all courts. Mr. Osburn replied that the second provision in section 1 was that in other criminal prosecutions the provisions of the Article were applicable if the defense requested discovery. The reason for the distinction was that in the ordinary traffic cases where hundreds were processed every day, if there were a mandatory pre-trial procedure, the prosecution would be required to serve upon the defense, prior to trial, the names and address of witnesses, what they intended to say, etc. The justification for pre-trial discovery, he said, was to make cases go more smoothly, not just to aid investigations, and the draft therefore suggested that in the ordinary, routine, petty case, pre-trial discovery would obstruct rather than speed the criminal justice system.

Mr. Chandler indicated that there was a constant push in this state to broaden the jurisdiction of the district courts, both civilly and criminally. He suggested that the draft might accomplish the same objective, namely, confining discovery to relatively serious prosecutions, by naming the degree of the offenses to which it would apply rather than limiting it to the circuit court. That procedure, he said, would not require a revision in the statute in case of future changes in jurisdiction of courts.

Chairman Yturri expressed the view that the approach in the draft was preferable. In most of the misdemeanors, he said, there was no reason to impose upon either side the burden of disclosure and discovery. If the defendant wanted disclosure, he could make a request to that effect.

Mr. Osburn outlined that one further aspect of the draft was that even in the case where discovery was not automatic, the defense was not required to file anything in court; all he had to do was serve a notice on the prosecuting attorney, the effort being to try to keep the courts from having to get involved in every situation.

Mr. Paillette pointed out that the ABA Standards went further in the area of requiring discovery than any other state statute and contained a section that said discovery was applicable to all "serious" criminal cases. The approach in this draft would go even beyond that and would allow discovery upon request in the nonserious criminal cases.

Mr. Blensly said his understanding of the draft was that a request would not necessarily open the whole file but would require disclosure only of the specific thing requested. Mr. Osburn confirmed that this assessment was correct.

Mr. Barton said he was speaking in part for the District Attorneys' Association, in part for the police agencies in Multnomah County and in part for the Multnomah County District Attorney's office. All groups had considered both Preliminary Draft Nos. 1 and 2 on discovery and had found a great deal of practical problems with the ABA draft regarding matters that had to be disclosed to the defendant. In those situations where discovery was considered important to the defendant, the draft placed the entire burden upon the prosecution to disclose everything.

Under section 1, Mr. Barton said, it was impossible for the prosecution to know which witnesses he intended to call at trial and if one name were omitted, the court could refuse to permit the state to call that witness. He believed this was a tremendous penalty to impose upon the state.

Chairman Yturri asked Mr. Barton if he thought the court would prohibit the state from using a witness if the prosecution for the first time discovered a certain witness, even on the morning of trial, and immediately made known that fact to the court and to the defendant. Mr. Barton replied affirmatively.

Chairman Yturri next asked Mr. Barton if he thought the court should permit the state to put on a witness about whom the state was aware but whose name they had failed to disclose to the defense until the morning of trial. Mr. Barton drew an analogy in answer to the question. He said that in civil cases no duty existed in Oregon law at the present time for either party to disclose anything. He suggested that the criminal and civil procedures should be parallel. Chairman Yturri pointed out that it would prolong the criminal process to inject

depositions into it and that would be the result if the two procedures were to be made analagous. Judge Crookham said he did not believe it was possible to analogize civil and criminal practices.

Mr. Chandler said he would be interested in hearing Judge Crookham's answers to the two questions the Chairman had asked Mr. Barton. In answer to the Chairman's first question, Judge Crookham said that if the matter of a new witness came up in good faith, he was satisfied that his own ruling would be, after an inquiry, to allow a continuance or whatever was necessary. In answer to the Chairman's second question to Mr. Barton, he said he might very well apply the sanction of exclusion if the facts showed that there was reason to believe that the witness could have been disclosed earlier. He would so rule, he said, for two reasons: (1) on the issue in that particular case and (2) in the hope that the next time the district attorney would look to his files earlier and make a more thorough investigation of the material disclosed.

Chairman Yturri's next question to Mr. Barton was to ask what was wrong with the procedure just outlined by Judge Crookham. Mr. Barton's position was that he favored the concept of Preliminary Draft No. 1 over the draft being considered today. He believed the inclusion of a neutral magistrate in the discovery proceeding was critical to both sides.

Mr. Chandler commented that the essential difference between the two drafts was that one would add another motion for each felony case whereas the other attempted to eliminate that possibility. Mr. Barton said he believed that reciprocal discovery in Preliminary Draft No. 2 was primarily illusory because of the fact that the sanctions the court could apply under this draft were illusory and as a practical matter would not occur.

Mr. Barton stated that one of the main reasons that police reports were in summary form was because of time pressures. If a policeman talked to someone at the scene of a crime, made brief notes of the conversation and later reduced that to written form, it would constitute a statement which the state must disclose to the defense, yet the witness had not vouched for the accuracy of the statement nor had he even seen it. Mr. Blensly pointed out that this was the information being given to the defense at the present time, as a matter of policy.

Mr. Osburn commented that there appeared to be a feeling that the judges would turn the prosecution down for capricious reasons if it developed that they needed to call a witness they didn't think they would have to call. That, he said, was against the backdrop of the suggestion that the court should be the one supervising the procedure because he was the impartial magistrate who always called balls and strikes fairly. He said it could not be both ways. Courts were accustomed to making rulings on whether people had given notice of their intentions where notice was required and they ruled on such motions all the time. As far as practicability of the draft was concerned, Mr. Osburn said that the procedure in the draft regarding witnesses

was the same procedure that had been in effect in the state of Washington for many years. The names and addresses of witnesses were disclosed and if other witnesses turned up later, notice was then given of those witnesses. This had caused no big problem, even in populous King County.

Mr. Chandler moved approval of section 1. Motion carried unanimously. Voting: Blensly, Chandler, Clark, Cole, Crookham, Osburn, Spaulding, Mr. Chairman.

Section 2. Disclosure to defendant. Mr. Osburn explained that the provisions of section 2 were essentially taken from the ABA Standards.

Subsection (1). Subsection (1), he said, included relevant written or recorded statements made by witnesses and would make available to the defense reported statements prior to trial which at the present time needed to be given only at the end of the direct examination. It also included memoranda of any oral statements made by such persons, the theory being that if the provision required only written or recorded statements to be disclosed, it might defeat the ability of one side or the other to procure information based upon the possibility that people would not write things down after this provision became law.

Mr. Clark, in connection with the objection he had raised earlier, asked if this would let in statements of everyone made in connection with the investigation of a number of theories. Mr. Osburn replied that the only names that would have to be divulged were witnesses the state intended to call at trial. Mr. Blensly noted that the subsection said "relevant written or recorded statements" and the relevancy related to what the state intended to offer as evidence at the trial. Mr. Osburn added that it was not intended to require the divulgence of all police reports. If the police officer who had interviewed a witness wrote in his report what the witness said, it would be a memorandum of an oral statement of a witness and it would be subject to discovery if the state intended to call that witness. The alternative, he said, was to limit the prior statements to written or recorded statements and not include the memoranda of oral statements.

Mr. Paillette advised that the ABA discussed the scope of statements as limited by the use of "relevant." They recognized that the word was not very precise, but it was the best they could suggest and the subcommittee had agreed. It was intended to indicate that the state did not have to disclose everything a witness may have said unless it had some bearing on the case. Mr. Paillette also noted that section 6 contained an exclusion for work products, legal theories, etc.

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Mr. Chandler said that the point Mr. Clark was making centered around a hypothetical situation where someone shot A. The police, operating on the theory that B had done the shooting, investigated the facts and decided correctly that B did not commit the crime. They then decided C had shot A and made a case against C. When C's case came up for trial, the defense had not been told about all the work the police had done investigating the case against B. C said he was

entitled to know about the investigation concerning B because it tended to prove his innocence. Mr. Chandler asked Judge Crookham how he would rule in that situation and was told that he would rule that the investigation of B was relevant because it would tend to cast reasonable doubt on the guilt of the accused.

Mr. Clark said that people should be protected from needles embarrassment when the police conjured up a theory that involved an innocent person. That information should not be exposed when the police themselves washed the case out because it had no basis in fact. Mr. Spaulding replied that those who washed it out did so based on their own judgment; they were not an ultimate judge of the facts and they could be wrong. Mr. Clark was concerned that the provision would result in altering police procedure to the point where the work product before the court would be diminished because the police would not do a good job of keeping accurate written records.

Chairman Yturri advised that there were two ways out of the dilemma that was being discussed. One was to attempt to make the term "relevant" more specific and the other was to exclude the work products of police officers from the draft.

Mr. Paillette pointed out that Preliminary Draft No. 1 defined "exempt property" as:

> "Reports, memoranda or other internal documents or work papers made by or at the direction of a district attorney, peace officer or other law enforcement agent, or by a defendant or his attorney or agent in connection with the investigation, prosecution or defense of a criminal action."

He suggested that type of approach might meet Mr. Clark's objection. Mr. Clark and others agreed that it would.

Judge Crookham pointed out that the preamble of section 2 referred to "district attorney" and said there were cases where the Attorney General also prosecuted. Mr. Osburn noted that the commentary on page 2 of the draft said that the term, "district attorney," included a city attorney and also encompassed the "attorney general in those criminal prosecutions within his jurisdiction." Mr. Paillette added that the subcommittee had discussed this point and decided the definition of "district attorney" could be placed in this draft or it could be added to the general definition section that would be applicable throughout the procedure code. Mr. Chandler said he would prefer it to be in the general definition section. Chairman Yturri pointed out that if it were placed in this Article, the implication would be that the definition would not apply to the rest of the criminal procedure code.

Mr. Paillette commented that the proposed definition might cause a problem in the search and seizure Article and he would have to examine that draft more closely to see if there would be any conflict.

Judge Crookham moved to include a definition of "district attorney" as set forth on page 2 of the commentary and let Mr. Paillette use his judgment as to whether it should go in the general definitions of the code or in this Article. Motion carried.

Mr. Blensly pointed out that section 3 defined "disclose" and that too should be in the definition section. Mr. Paillette indicated that he and Mr. Osburn had discussed that point and both agreed that definition should go at the beginning of the draft.

Mr. Blensly moved that the definition of "disclose" in subsection (2) of section 3 be transferred to the beginning of this Article. Motion carried unanimously.

Mr. Osburn indicated that the definition should be changed to refer to the "adverse party" rather than to the "defendant" and the Commission adopted that amendment by unanimous consent.

Mr. Paillette said it was important to make it clear that this draft did not require the district attorney or the defense to make copies of everything for the other party. The fiscal burden alone would be tremendous, he said, and the definition of "disclose" was intended to point up the fact that they were only required to make the information available. Chairman Yturri directed that a statement to that effect be included in the commentary.

Judge Crookham noted that subsection (1) did not contemplate that the names and addresses of witnesses had to be given in written form; oral notice would be sufficient. Mr. Paillette said that as long as the names were disclosed, the objective of the draft would be met.

The Chairman then asked if subsection (1) was satisfactory assuming that the work papers of the peace officer were protected the same as those of the district attorney, in line with the suggestion made earlier by Mr. Paillette, and that the word "relevant" would remain in the subsection. This approach was adopted by unanimous consent.

Rep. Cole asked if the provision in subsection (1) referring to "recorded statements" could be interpreted to mean that the state could provide a transcript of that record rather than a copy of the tape. Mr. Osburn replied that if the state had some physical evidence, the defendant was entitled to look at it, but there was a question as to whether he was also entitled to have his experts examine it. The definition of disclosure was very general and said "an opportunity to inspect or copy." However, there was also a provision in section 5 permitting the court to "supervise the exercise of discovery to the extent necessary to ensure that it proceeds properly and expeditiously." He said that if the defendant were given an opportunity to hear the tape recording and the prosecution refused to permit him to make a copy or a transcript of it, that would raise a question the court should rule on.

Judge Crookham asked if the state would be required to produce a transcript of a court reporter's notes. Chairman Yturri replied that

it would depend upon the length and content and the court would have to determine whether the reporter, simply reading the material to the defense, was sufficient to provide the information or whether a transcript should be made. He was of the opinion that it was better to leave the draft less specific in areas such as this and Mr. Osburn agreed.

Rep. Cole raised another problem concerning costs and asked who would bear the cost of providing copies of these materials when the defendant was indigent. Mr. Blensly replied that the court would have to order them and pay for them.

Subsection (2). Mr. Osburn explained that subsection (2) of section 2 paralleled the present Oregon provision whereby the defense may inspect any written or recorded statements or memoranda of any oral statements made by the defendant. It also included a provision taken from the ABA Standards which would permit the defendant to obtain statements of a codefendant if the trial was to be a joint one. If the statement was made by a codefendant and there was not going to be a joint trial, the reason did not exist for requiring discovery of the codefendant's statement because the prosecution in a joint trial would be introducing the statements made by the codefendant whereas they would not be introducing his statements in separate trials. Mr. Spaulding said they might be.

Mr. Osburn replied that the ABA was thinking about a confession when they inserted this provision. If a codefendant's confession were obtained, that would be admissible at a joint trial.

Mr. Blensly suggested that subsection (2) be amended to read, "or made by a codefendant and intended to be offered in evidence at the trial." Mr. Spaulding said the accused persons wouldn't necessarily have to be codefendants. The state could get around that circumstance by issuing two indictments so they would not be codefendants even though they were both charged exactly the same. The same reasoning, he said, was applicable to both situations so far as discovery was concerned.

Mr. Osburn asnwered that where there were separate trials, usually the codefendant's statement would not be admissible. If it were a confession, it would not be admissible because the conspiracy would ordinarily have ended. Mr. Spaulding said that the statement of one coconspirator tended to prove the charge against the other. Mr. Osburn replied that it was hearsay at that point and a statement against a punitive interest was not admissible. Even a confession by a third person was not admissible by either side, he said.

Mr. Hennings commented that conspiracy was coming in at nearly every trial, whether or not it was charged. Also, there was a problem involving juveniles who were tried in a different court or when someone who had been given protection was involved, although he was not really a codefendant. He suggested that the language be amended to read, "written or recorded statements made by a codefendant or a coconspirator" and omit the requirement relating to statements that were intended to be used at trial.

Chairman Yturri asked Mr. Paillette if he would approve of Mr. Hennings' proposal. Mr. Paillette said he would like to give the matter some thought before expressing an opinion.

Following the discussion of subsection (5), the Commission returned to a consideration of subsection (2). Mr. Paillette advised that the ABA had a precise reason for framing subsection (2) as it appeared in the draft and had a lengthy commentary on the subject, a part of which he read:

> "The requirement that the defendant be allowed to inspect statements made by a codefendant rests on different grounds, which make it even more imperative that there be pretrial disclosure. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that it was constitutional error to try one defendant under conditions where a codefendant's statement implicating the first defendant was before the jury, even under careful instructions that the statement was only admissible against the codefendant. If an adequate motion for severance is to be made or if the question of whether the codefendant's statement can be altered to remove the prejudice is to be decided at the appropriate time, it is clear that defense counsel must be able to examine it before trial . . . . To limit the disclosure requirement to its purpose, the standard is confined to statements made by a codefendant which are to be used at a joint trial. If the prosecution should decide against a joint trial and the former codefendant's statement would tend to negate the guilt of the accused, it may still have to be turned over, however, under [this subsection], which is based upon the requirements of Brady v. Maryland, 373 U. S. 83 (1963)."

Mr. Paillette explained that the subcommittee's decision was not to codify Brady because it would apply in any event. However, there was a sound reason for limiting the provision in subsection (2) to the joint trial concept and he suggested that the language remain undisturbed.

Mr. Spaulding moved to adopt subsection (2) without revision. Motion carried.

Subsection (3). Mr. Osburn noted that in subsection (3) the subcommittee presented an alternative for the Commission's consideration. Generally the prosecution was required to disclose statements of experts, results of examinations, etc. The defense, however, in a later section was only required to disclose those things which they intended to offer in evidence, the rationale being that it was difficult constitutionally to require the defendant to present incriminating evidence which he did not intend to offer. The question posed in this subsection was whether the section should be limited to those statements, test results, etc. which the district attorney intended to offer in evidence at the trial or whether the district attorney should be required to disclose them even though he did not intend to offer them in evidence.

Mr. Chandler moved that subsection (3) be limited to matters which the district attorney intended to offer in evidence at the trial by adopting the bracketed language in that subsection.

Chairman Yturri said that adoption of that motion might be getting away from the true purpose of discovery. Mr. Blensly thought it would not because it would still not eliminate the duty on the district attorney to disclose that which might be favorable to the defendant. To illustrate, he said if a mental examination had no relevance to the case and was not favorable to the defendant, it should remain in a closed file instead of broadcasting the results of an examination which could ruin the subject's reputation.

Judge Crookham asked Mr. Blensly if he was satisfied that Brady was an underlying factor in this section even though it was not being codified and received an affirmative reply.

Vote was then taken on Mr. Chandler's motion to include the bracketed material in subsection (3). Motion carried.

Chairman Yturri asked if there was any objection to having the minutes show that in subsection (3) the reason for permitting the language, "which the district attorney intends to offer in evidence at the trial," was in part at least based upon the Commission's assumption that Brady v. Maryland would govern in those situations covered by that subsection had the language been deleted. There was no objection and it was so ordered.

Subsection (4). Mr. Osburn explained that subsection (4) included physical exhibits. Mr. Chandler moved to approve subsection (4) and the motion carried.

Subsection (5). Mr. Osburn outlined that subsection (5) dealt with the question of prior criminal conviction records of witnesses. The ABA Standards called for the state to disclose the FBI record or the CII record of the defendant or any witnesses and in some statutes the suggestion was made that the defense should have the prosecution also run record checks on all their witnesses so the defendant would not call someone who might embarrass him. This section was more limited than that and would not require the prosecution to obtain FBI records or other record checks routinely. What was required was that if the district attorney had knowledge of the prior criminal record of a witness he intended to call, that fact would be disclosed to the prosecution and the disclosure would include what was in the record.

Judge Crookham noted that the FBI required that the rap sheet not be disclosed beyond the agency to whom it was given. Mr. Barton confirmed that this was true and added that the FBI could cut an agency off from obtaining their rap sheets if they found outside agency examination of that information. He advised that an FBI rap sheet contained many unsubstantiated entries and was not a document constituting a record of prior convictions that would meet the requirements for impeaching witnesses.

Captain Daugherty informed the Commission that the CII in Sacramento was in the process of formulating policy on dissemination of the confidentiality of rap sheets or other criminal record type data. In light of some of the federal projects undertaking the modernization of criminal history files, he thought that in the future police departments would not be able to give out this type of data to a district attorney's office because they could not then control the dissemination of that information.

Mr. Clark advised that there was a great debate, when NCIC was being put together, between J. Edgar Hoover and the study committee. The committee felt that any citizen should be able to find out what the FBI record said about him at any time. The FBI, however, won out and supposedly their information was confidential and the citizen had no right of access to it. His personal opinion was that at least a defendant in a criminal case and his counsel should have access to that information.

Mr. Hennings expressed agreement with Mr. Clark and said he hated the specter of a federal computer keeping everyone's record and not permitting anyone to see it. It gave a tremendous tool to the police and could be completely overbearing for the defense. The simple way to handle the problem by legislation would be to exclude any impeachment by prior record.

Chairman Yturri summed up the discussion thus far by reciting that if the statute required the prosecution to notify the defendant of prior criminal convictions, the state or the prosecuting agencies could lose the tool they now have of obtaining this information from the FBI. The decision to be made was whether it was better to deny the defendant this information or to provide him with it, thereby drying up the source of information for the prosecution.

Mr. Hennings commented that it posed an interesting due process question when the district attorney could ask for and receive rap sheets on witnesses when the defense attorney could not do the same thing and in some cases could not even find out the prior convictions of his own defendant.

Judge Crookham noted that records of convictions were public records, and he questioned whether disclosing information which was already a public record was a violation of the FBI rules forbidding disclosure of information contained on the rap sheet.

Chairman Yturri indicated that Mr. Paillette had informed him that the new proposed federal rules of procedure, which had not yet been adopted, contained almost the precise language of the draft requiring disclosure of prior convictions of witnesses intended to be called by the prosecution.

Mr. Clark commented that the Commission would be ill advised to adopt the position that they should be tied down because of the strength of the recently deceased Director of the FBI who made every effort to defend FBI records from any kind of disclosure whatsoever.

Judge Crookham moved adoption of subsection (5). Motion carried.

Mr. Chandler moved approval of section 2. Motion carried unanimously. Voting for the motion: Blensly, Chandler, Clark, Cole, Crookham, Osburn, Spaulding, Mr. Chairman.

Section 3. Other disclosure to defendant; special conditions. Mr. Osburn explained that if statements made by the defendant were to be submitted as evidence by the prosecution, the court ordinarily held a Miranda hearing prior to ruling on the admissibility of the statements. A frequent problem for the prosecution was that if the defense did not raise a motion to suppress prior to trial, then the prosecution was in the position of saying that they had waived it and they could not therefore raise the question on appeal. A number of such cases had gone up on appeal and the Court of Appeals had held that when the motion had not been raised at time of trial, it was too late. The cases were then taken to federal court where the rule is somewhat different. Under Fay v. Noia, 372 US 391 (1963), the rule is that matters involving constitutional rights are not waived by failure to raise them at the time of trial.

The purpose of section 3, Mr. Osburn said, was to serve as a reminder to defense counsel and to require the prosecution to disclose information regarding Fourth and Fifth Amendment questions so that the trial court would have an opportunity to rule on them. The draft said that if there had been a search or seizure, which might conceivably be the subject of a motion to suppress evidence, the prosecution would advise the defense that there had been a search or seizure and the defense could then request information regarding the search or seizure so he could determine whether or not a motion to suppress would be appropriate.

Representative Cole asked if the provision required a motion by the defendant and was told by Mr. Osburn that it required only a request, not a motion.

Representative Cole next asked why the disclosure should not be of all material rather than just relevant material. Mr. Osburn replied that there were procedures for getting other property back under the search and seizure provisions.

Mr. Blensly commented that the purpose of this particular draft did not go to the point raised by Representative Cole. The search and seizure draft contained provisions for telling the defendant everything that was taken whereas this draft was only intended to be directed toward that information that was necessary for the defense attorney to prepare his defense. If it were relevant to the case, the information would be given to him through this draft; if it were relevant only to getting his property returned, that was dealt with in the search and seizure draft.

Judge Crookham noted that the provision was dependent upon an act by the defendant, and if that were taken out and the disclosure were

made mandatory, the judge would be in a better position to say that the defendant's constitutional rights had been waived through disclosure by the district attorney.

Chairman Yturri pointed out that none of the material set forth in section 2 required a request on the part of the defendant, yet in section 3 the only thing that was not preceded by a written request was the fact that a search and seizure had occurred. Mr. Osburn explained that ordinarily what the prosecution was required to disclose was the information they had but not necessarily the circumstances under which they acquired it.

Judge Crookham advised that the information required by paragraph (a) was more apt to be filed in the trial court than was the information required in paragraph (b), yet (a) was mandatory whereas (b) contained a condition. Mr. Blensly said that in his county he, as district attorney, would have in his file a report by the officer, but he would not have the details of how that search warrant was executed.

Chairman Yturri stated that in the case of an indictment where the district attorney had a written statement of a witness but there had been no search and seizure, the district attorney would be required to provide that information to the defendant without his written request. If the written statement had been obtained as a result of a search and seizure, he asked why in that case the defendant should have to make a written request before he could obtain it. He was of the opinion that there was an inconsistency between section 2 (1) and section 3 (1) (a). Mr. Blensly contended that at no place in the draft was it required that the defendant be apprised of the circumstances under which a statement was obtained from a witness, and that information was not normally in the file of the district attorney even when it was obtained as the result of a search and seizure. All the police prepared was a report stating that a search was made but they did not go into detail regarding the procedure of entry.

Judge Crookham moved to delete from paragraph (a) of subsection (1), "upon written request by the defendant,". This motion was subsequently withdrawn.

Mr. Paillette indicated that this problem was discussed by the subcommittee. [See Minutes, Subcommittee No. 3, 6/2/72, pp. 19 and 20.] He read a portion of the minutes:

> "Mr. Carnese asked if the subcommittee wanted to require disclosure of all information relating to a search or seizure or merely the fact that there was a search or seizure and require the defendant to come back with a request for further information . . . The prosecutor might thereby be prohibited from introducing evidence he failed to disclose, and he could very easily overlook something under the broad language of the proposed statute.

"Chairman Burns proposed to specify that the prosecutor must disclose the fact of search or seizure and the acquisition of Miranda statements and the fact of identification procedures and then require that upon request of the defendant, he must provide relevant written or recorded material or information as to those things the defendant specifies in his request.

" . . . Chairman Burns said that as he understood the proposed statute, the prosecutor would only need to turn over that material in the file if the defendant asked for the relevant information."

For those reasons, Mr. Paillette said, the subcommittee retained the provision for the request by the defendant and it was also included in the ABA Standards. After further discussion, the Chairman commented that it might be better to retain the phrase "upon written request by the defendant," simply because the language of the section was so nebulous.

Mr. Paillette remarked that in any event the defendant would be made aware that a search or seizure had been made and he was put on notice to come forward. The major concern of the subcommittee was that immediately following a search or seizure, and until such time as the issues could be honed down, the district attorney was not in a position to know exactly what to disclose.

Judge Crookham said that his basic concern was that for Noia purposes the defendant should be put on notice as early as possible of the fact that there was a search and seizure and, once that was done, the district attorney had complied with the statute. If the defendant wanted anything further, he could then make the request.

Judge Crookham withdrew his motion to delete from paragraph (a) of subsection (1) the phrase, "upon written request of the defendant." He said that paragraph (b) was redundant. The occurrence had to be noted and then the written request would refer to the relevant material obtained thereby. Perhaps, he said, the best way to draft the subsection would be to end paragraph (a) after "seizure" and add a new paragraph (b) relating to the request so it would be clear that the written request applied only to the relevant material and information obtained thereby.

Mr. Blensly suggested adding "and the circumstances of the search or seizure" after "thereby" at the end of paragraph (a). He urged retention of paragraph (b) but proposed to amend it to read, "The circumstances of the acquisition of any specified statements from the defendant."

Judge Crookham then moved to amend subsection (1) of section 3 to read:

"(a) The occurrence of a search or seizure; and

"(b) Upon written request by the defendant, any relevant material or information obtained thereby, the circumstances of the search or seizure, and the circumstances of the acquisition of any specified statements from the defendant."

Motion carried.

Judge Crookham suggested that the commentary should recognize the problem under Noia and say that it was the intention of the Commission to apprise the defendant at the earliest possible moment of the existence of the material covered by the section. The Commission agreed that the commentary as written covered Judge Crookham's recommendation.

Mr. Chandler moved that section 3 be approved as amended. Motion carried unanimously. Voting: Blensly, Chandler, Clark, Cole, Crookham, Osburn, Spaulding, Mr. Chairman.

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

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

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

Staff Present: Mr. Donald L. Paillette
Mr. Bert Gustafson
Mr. John W. Osburn

Also Present: Mr. Jim Hennings
Mr. M. Chapin Milbank
Mr. Scott Parker

Section 4. Disclosure to the state. Mr. Osburn explained that section 4 confined itself to those things which the defendant intended to offer in evidence at the trial. Each of the three subsections provided for disclosure by the defense of items similar to those required to be disclosed by the prosecution. The justification for this rationale was indicated in the commentary to section 4 which set out the remarks of Justice Traynor on pages 8 and 9 of the draft. The Commission should decide, he said, whether the defendant should have to state whether or not he himself intended to testify, particularly when he had made a memorandum of oral statements.

Mr. Blensly asked if section 4 was intended to supplant the alibi statutes; if not, the Commission should consider whether alibi should be included in the section. Mr. Osburn replied that his guess would be that section 2 requiring the state to supply notice of witnesses it intended to call would modify the rule in State v. Wardius, 93 Adv Sh 147, ___ Or App ___, 487 P2d 1380 (1971). Section 4 requiring the defendant to disclose witnesses whom he intends to call would parallel the coverage of the alibi statute. Mr. Blensly next asked if there was any intent to repeal the statute relating to introduction of evidence regarding mental incapacity. Mr. Paillette said his recollection was that the subcommittee did not intend to repeal either of those statutes.

Mr. Chandler asked if those statutes were redundant in view of the provisions of subsections (1) and (2) of section 4. Mr. Osburn agreed that they were redundant to the extent that the names of alibi witnesses must be disclosed, but section 4 would not supplant the requirement for notice of intention to rely on that defense. Under section 4 the

defense just gave the names of witnesses without going into what the witnesses were going to say. Mr. Blensly observed that the obvious result would be that they wouldn't make written memoranda of oral statements.

Mr. Spaulding asked if the term "witnesses he intends to call" included the defendant himself. Mr. Osburn replied that presumably it would. Mr. Blensly said that in subcommittee the statement was made that the phrase did not include the defendant, but the matter was not discussed in detail.

Mr. Spaulding moved to insert "other than himself" after "The names and addresses of persons" in subsection (1). He said the defendant should not have to decide whether he would take the stand until the time came for him to actually get on the stand. Mr. Blensly observed that the provisions of section 4 would require discovery of what he was going to testify to when he took the stand.

Judge Crookham remarked that even though the defendant said he was going to testify, there was nothing to require him to do so. He could not be impeached and there was no collateral estoppal. The section gave the prosecution early warning plus the statements, and it was a discovery matter.

Mr. Blensly said that one of the main objections of those who opposed discovery was that it permitted the defendant to fabricate a story favorable to his defense. He was not aware of any real objection to discovery by anyone if the defendant could be made to stick to a story and thereby eliminate the possibility of fabrication. If his statements were disclosed to the prosecution, at least he would be tied down to a story for the purpose of impeachment at the same time the state was tied down.

Mr. Osburn suggested that an alternative might be to require the defense to give the names of witnesses he intended to call, including himself, together with written statements not including his own. Mr. Chandler observed that such a provision would accomplish nothing.

Mr. Osburn explained that "memoranda of oral statements" did not mean that either side had the obligation to summarize anything that the defendant said or that any witness said. It merely stated that written or recorded statements or memoranda and notes of conversations, if they existed, must be disclosed.

Chairman Yturri contended that if that were the case, the defendant would probably be protected because the inference was that if no memoranda of his oral statements existed, they would not have to be disclosed.

Representative Cole said he would like to see an exclusion in the statute pertaining to the attorney-client relationship. He pointed out that the exclusion in section 6 (1) (a) did not extend to oral

statements made by the defendant to his attorney. Mr. Osburn confirmed that section 6 (1) (a) was not intended to exclude statements given to lawyers.

Mr. Spaulding commented that the purpose of requiring each side to disclose its witnesses was to eliminate the element of surprise, and the district attorney certainly would not be surprised to see the defendant appear in court. He was of the opinion that the district attorney had no right to any of the defendant's statements under any circumstances.

Mr. Chandler said that if the defendant listed himself as a possible witness, he was neither waiving a right nor telling the other side anything. However, if he failed to list himself and then toward the end of the trial decided to testify, he asked if he would then have waived his right to testify. Mr. Spaulding answered that some court might so hold, but there would certainly be a constitutional issue involved.

Mr. Johnson indicated approval of Mr. Osburn's suggestion that the defendant provide the district attorney with information as to whether he would be called. He would still not be forced to go on the stand but one of the purposes of discovery was to speed up trials and the proposed procedure would save time. He was not in favor of furnishing the district attorney with his statements, however.

Chairman Yturri said he could not conceive of a court saying that the defendant's failure to list his name would constitute a waiver of his constitutional right to testify if he later changed his mind. Mr. Blensly agreed that probably the best that could be hoped for by the state was that they would have a strong argument for a continuance.

Mr. Chandler then moved adoption of Mr. Osburn's earlier suggestion to amend subsection (1) of section 4 to read:

> "The names and addresses of persons, including himself, whom he intends to call as witnesses at the trial, together with]~~their~~] relevant written or recorded statements or memoranda of any oral statements of such persons other than himself;"

Motion carried.

Mr. Osburn advised that subsection (2) paralleled the requirement of disclosure on the part of the state and subsection (3) of section 2 had been amended to make it parallel to this provision.

Mr. Clark moved approval of subsection (2). Motion carried.

Mr. Chandler moved approval of subsection (3). Motion carried.

Representative Cole said he was concerned about notes made by attorneys while interviewing witnesses. Often, he said, they were extensive and they could be completely illegible except to the attorney. Section 4, he said, appeared to impose upon defense attorneys the duty of putting their notes in a form that was readable so they could be presented to the prosecution.

Mr. Johnson commented that the ABA Standards talked about requiring a summary of everyone's testimony and the feeling of the subcommittee was that such a requirement was too burdensome. He said he read section 4 to say that if all the attorney had was his handwritten notes, he should turn them over. Chairman Yturri told Representative Cole that here again the question could become an issue to be determined by the court.

Mr. Chandler moved approval of section 4 as amended. Motion carried. Voting for the motion: Chandler, Clark, Crookham, Johnson, Mr. Chairman. Voting no: Blensly, Cole, Spaulding.

Section 5. Time of disclosure. Mr. Osburn explained that section 5 contained three principal provisions. The first one set the time at which disclosure must be made, namely, as soon as practicable following the filing of charges. In the case of a felony it would be as soon as practicable following the filing of an indictment or information and did not include disclosure at the district or justice court level where the purpose of the court's jurisdiction was for a preliminary hearing. The second principal provision was that the court may supervise the exercise of discovery if motions needed to be made and ruled on in order to insure that discovery proceeded expeditiously. The third provision said that the duty to disclose was continuous and it was understood that the prosecution and the defense could release some information but it did not necessarily mean they would stop their investigation at that point. If additional information were discovered, that too would be disclosed.

Mr. Clark said the defense could come up with a witness and all he would have to reveal would be that he had another witness. Mr. Osburn said that perhaps subsection (2) should read, " . . . notify the other party of the additional material or information" rather than requiring disclosure of another witness without disclosing that witness's identity.

Mr. Chandler moved to strike "existence thereof" in subsection (2) and substitute "additional material or information."

Judge Crookham asked if the draft anywhere contained a statement of general policy that the Commission was in favor of the broadest possible discovery. Chairman Yturri replied that the minutes would reflect that policy, but a motion to that effect would be in order.

Following a discussion of the best way to accomplish Judge Crookham's objective, Judge Crookham moved that the staff insert in the commentary a statement to the effect that it was the concensus of the Commission that the provisions of Article 7 should be interpreted to provide broad bilateral discovery. Motion carried unanimously.

Vote was then taken on Mr. Chandler's motion to amend subsection (2) with respect to after discovered evidence to provide that the other side would not only be notified of the existence of such evidence but also to provide that the other side was to be notified of such "additional material or information." Motion carried. At Mr. Paillette's request the Chairman directed that the staff be given whatever editorial license was necessary in adapting subsection (2) to embrace the intent of the Commission.

Mr. Chandler moved approval of section 5 as amended. Motion carried unanimously. Voting: Blensly, Chandler, Clark, Cole, Crookham, Attorney General Johnson, Representative Johnson, Spaulding, Mr. Chairman.

Section 6. Propert not subject to discovery. Mr. Osburn advised that section 6 excluded certain items from discovery, the first one being limited basically to the things lawyers said in memoranda to each other, notes in the file, theories about the case and theories by police officers, none of which were included under discovery by this definition. In line with previous discussion, he said the Commission might want to broaden the work product provision. The second item not subject to discovery was the identity of a confidential informant where all the confidential informant did was supply probable cause for the issuance of a search warrant or probable cause for an arrest. It could involve the person who gave tips, an underground police officer, etc. His identity need not be disclosed unless the witness was going to be disclosed at trial. He said this was generally consistent with present law.

Mr. Osburn reported that paragraph (c) of subsection (1) might tend to conflict with some other general provisions of the grand jury Article.

Subsection (2) provided that when there was a police report that contained some information subject to discovery and some not, to the extent possible those items that were discoverable should be made available and other parts of the report could be excised.

Mr. Chandler inquired if the defendant at the present time was entitled to receive his own statements made before the grand jury. Mr. Blensly replied that he was not. Mr. Chandler asked why he should not be entitled to that information if the district attorney had a transcript and Mr. Spaulding replied that the defendant did not have

to go before the grand jury and he should know what he said. Mr. Chandler was of the opinion that if what he said before the grand jury was going to be used to impeach him, he should have as much time to reflect upon his words as would the district attorney. If a transcript were available, he should be as entitled to it as anyone else; if there were no transcript, it would make no difference in any event.

Mr. Blensly reported that very few grand jury proceedings were recorded at the present time. Further, the problem being discussed went to the basic question of whether grand jury proceedings should be invaded by allowing transcripts to be made. If the draft were to go one step in that direction, then questions would arise as to whether the testimony of all the other witnesses before the grand jury should also be disclosed or just the ones favorable to the defendant, etc.

Chairman Yturri said that when the defendant testified before the grand jury, in most cases it would be recorded or reported and he could see no reason why the state should not provide the defendant with a transcript of his testimony.

Mr. Hennings pointed out that the prosecution called the grand jury "an investigative tool" and that was precisely what it was. If the district attorney had material on which to base perjury and false swearing charges to impeach the defendant, that same information should be available to the defense. To deny testimony to the defense was to give a loophole to the prosecution, he said, because as soon as the state had a sensitive case, the testimony of all witnesses would be taken only in the grand jury and the defense would never see or hear of it until the time of trial.

Mr. Paillette observed that just because a case was before the grand jury did not mean that statements of witnesses made outside the grand jury and material otherwise subject to discovery would not be discoverable.

Mr. Clark moved that the staff draft language stating in essence that where a recorded or transcribed statement existed that the defendant had made before the grand jury on the case involved, that statement be made available to the defense. If the state did not have such a statement, they would not have to make it available. This motion was later withdrawn.

Chairman Yturri asked how much expense would be involved if the draft specifically required that when the defendant testified before the grand jury, that testimony would be recorded and made available to both sides. Mr. Parker pointed out that such an approach would create problems because in some cases the state would not know who the defendant would be. In order to abide by that rule, a court reporter would have to be standing by in all such cases.

Mr. Chandler moved to amend subsection (1) (c) of section 6 by adding after "jury," "excepting statements by the defendant."

Mr. Blensly pointed out that adoption of that motion would refer back to section 2 and would require disclosure of written or recorded statements which would also include minutes of the grand jury. Judge Crookham said that if paragraph (c) were amended to read, "Transcripts, recordings or memoranda of testimony . . . . " it would clearly take the provision out of section 2. Mr. Blensly said that "memoranda" should be omitted so as to exclude the minutes of the grand jury.

Mr. Chandler withdrew his motion and Judge Crookham moved to amend paragraph (c) of subsection (1) to read:

> "Transcripts, recordings or memoranda of testimony of witnesses before the grand jury, except transcripts or recordings of statements by the defendant."

Motion carried unanimously. The Chairman directed that the commentary should clearly point out that "recordings" was not intended to include memoranda such as grand jury minutes.

Mr. Clark withdrew his earlier motion.

Representative Cole asked if "legal staffs" as used in paragraph (a) would include private investigators hired by either the prosecutor or the defense. Mr. Blensly said that point was discussed by the subcommittee and it was his recollection that the members agreed that the term would include private investigators.

Mr. Paillette pointed out that "exempt property" was defined in Preliminary Draft No. 1 as:

> "Reports, memoranda or other internal documents or work papers made by or at the direction of a district attorney, peace officer or other law enforcement agent, or by a defendant or his attorney or agent in connection with the investigation, prosecution or defense of a criminal action."

Chairman Yturri was of the opinion that the language of the first draft was an improvement over paragraph (a).

Mr. Clark pointed out that "police officer" had been used in other portions of the procedure code and the Commission should be sure they were using the correct term in this draft. Chairman Yturri questioned the necessity of including the term, "other law enforcement agent," and Mr. Paillette replied that "peace officer" would be adequate.

Mr. Paillette indicated that what was needed was a combination of a part of the language he had cited above together with most of paragraph (a). He suggested paragraph (a) be amended to read:

> "Work product, legal research, records, correspondence, reports or memoranda to the extent that they contain the

opinions, theories or conclusions of the attorneys, peace officers or their agents in connection with the investigation, prosecution or defense of a criminal action."

Chairman Yturri explained that the intent of the amendment was to bring within the exclusion the work papers of peace officers and their agents as well as agents working for the district attorney and for the defense.

Mr. Johnson moved adoption of the language set forth above as proposed by Mr. Paillette. Motion carried.

Mr. Chandler moved approval of section 6 as amended. Motion carried unanimously. Voting: Blensly, Chandler, Clark, Cole, Crookham, Attorney General Johnson, Representative Johnson, Spaulding, Mr. Chairman.

Section 7. Effect of failure to comply with discovery requirements. Mr. Spaulding questioned the meaning of the last clause of section 7, "or enter such other order as it considers appropriate." Chairman Yturri explained that it meant just what it said and embodied "the open door policy." Mr. Osburn asked if the Commission believed the clause was broad enough to include contempt, and the Commission was in unanimous agreement that it was.

Representative Cole suggested that section 7 contain a provision permitting the court to order material to be duplicated. Mr. Spaulding replied that anything that was lawful would be covered by the last clause. The Commission was in agreement that the last clause of section 7 would include authorization for the court to order duplication of materials. Mr. Blensly pointed out also that section 5 contained a provision allowing the court to supervise the exercise of discovery to the extent necessary.

Mr. Chandler moved approval of section 7. Motion carried unanimously. Voting: Blensly, Chandler, Clark, Cole, Crookham, Attorney General Johnson, Representative Johnson, Spaulding, Mr. Chairman.

Section 8. Protective orders. Mr. Osburn explained that section 8 permitted a party to show cause before the court why specific disclosures should not be made. Ordinarily such a protective order was sought by the prosecution, he said, although conceivably there could be circumstances where the defense might make such a request. It would usually involve a situation where there was some reason to believe that if disclosure of the name of a particular witness were made, that witness would be harmed. It provided that the court was to review the showing made without necessarily disclosing the basis for the showing to the other side. A record would be kept of the proceedings and, if the defendant was convicted, that record may at the discretion of the court be unsealed in the event of further proceedings such as post-conviction or appellate review.

Judge Crookham inquired as to the reason for stating "unsealed for defendant" in subsection (3). Mr. Osburn replied that "for defendant" should be deleted because the intent was not to limit it to one side.

Judge Crookham moved to delete "for defendant" after "unseal" in subsection (3) of section 8. Motion carried.

Mr. Johnson pointed out that this provision varied from similar suggestions in this area requiring that the grounds for a protective order be specified. Mr. Osburn agreed that it was an open ended provision.

Mr. Parker commented that the court's decision in the type of motion that would fall under section 8 would be final. Appellate review would be virtually nonexistent because the state could not appeal if they lost. He suggested this would be an appropriate spot for the Commission to set some more definitive guidelines as to the meaning of "cause." Chairman Yturri replied that there was precedent for "good cause shown" throughout the law and it would be virtually impossible to foresee the variety of circumstances under which resort to this section might arise. Mr. Clark agreed that an escape valve should be left in the draft to allow the court wide discretion in this area.

Mr. Spaulding moved to add "good" before "cause" in the two places it appeared in section 8 consistent with the use of that term throughout the draft. Motion carried.

Mr. Chandler moved to approve section 8 as amended. Motion carried unanimously. Voting: Blensly, Chandler, Clark, Cole, Crookham, Attorney General Johnson, Representative Johnson, Spaulding, Mr. Chairman.

Mr. Chandler moved approval of Article 7 as amended. Motion carried without opposition. Voting: Blensly, Chandler, Cole, Crookham, Attorney General Johnson, Representative Johnson, Spaulding, Mr. Chairman.

Arrests; Preliminary Draft No. 2; July 1972

Mr. Paillette reported that the draft on arrests proposed to amend ORS chapter 133 by amendments to existing statutes and, by means of section 1, would add sections 2, 3, 9 and 11 to that chapter. The subcommittee had adopted a different approach to this area and at its first meeting on this subject had conducted a hearing rather than discussing a staff draft. Invitations to the hearing were mailed to every district attorney in the state, every police department, all sheriffs' offices and to the State Police. He indicated he had received a number of suggestions, particularly from law enforcement officers, about problems in the area of arrest and also several bills were before the last session of the legislature concerning this subject.

The two problems police officers were particularly concerned about were (1) the question of authority of a peace officer to make an arrest outside his own jurisdiction and (2) the question of probable cause arrests for misdemeanors. This draft attempted to deal with both.

The Multnomah County district attorney's office was represented at the subcommittee hearing and made recommendations with respect to what they felt were problems under the new criminal code in the case of citizen's arrests. The sections submitted to the Commission today dealing with that subject were without recommendation by the subcommittee.

Section 2. Definitions. Mr. Paillette pointed out that the definition of "accusatory instrument" in subsection (1) was one that the Commission had discussed previously. It could be taken out of this draft and placed in the general definition section if the members wished. To do so would make the same type of procedural requirements apply generally to complaints in a justice or district court as would be required under a grand jury indictment. For the purposes of this draft, only information and complaint were essential in the definition.

The definition of "arrest" in subsection (2), Mr. Paillette advised, was a boiled down version of the definition in the existing statutes. It also peeled off the definition of "stop" in the stop and frisk draft and indicated that a stop was not an arrest. He indicated that Mr. Osburn had raised a problem in subcommittee concerning the questioning of witnesses and he said he was undecided whether that problem had been resolved by this draft. The subcommittee did not want to imply that the questioning of a witness at the scene of a crime was an arrest even though there was some restraint in detaining him for questioning. He believed it was desirable to delete the phrase "held to answer for a crime" that appeared in the existing definition of arrest in ORS 133.210 and 133.250, one reason being that "held to answer for a crime" was used in connection with a bindover in the grand jury draft and he didn't want to use the same term in two different contexts.

Chairman Yturri suggested that the commentary contain a statement that the intent of the definition of "arrest" was the same as in ORS 133.210 and 133.250 but the Commission had not used "held to answer for a crime" because it was used in connection with indictments. Mr. Blensly said that such an important issue was at stake that this should be made clear in the statute rather than in the commentary.

Chairman Yturri proposed that the first sentence of subsection (2) be amended to read:

> " . . . place a person under actual or constructive restraint or to take a person into custody, for the purpose of charging him with an offense."

Mr. Blensly moved adoption of the language suggested by the Chairman. Motion carried.

Mr. Paillette reported that he had received a number of inquiries from police officers who entertained some doubt as to whether they could arrest for a violation. The intent was to allow an arrest in that situation and the language just adopted, "for the purpose of charging him with an offense," would serve to make that point more clear.

Judge Crookham asked if the "stop" exception in the second sentence of subsection (2) was necessary in view of the amendment just adopted. Chairman Yturri replied that the person was not necessarily being stopped for the purpose of charging him with an offense but that might be the case. Inclusion of that sentence would eliminate any question.

Mr. Paillette explained that the balance of section 2 dealt with complaints and informations and attempted to draw a distinction between the two. He was of the opinion that the definition of an information contained in ORS 133.010 was inadequate for the purposes of a felony information filed in circuit court in lieu of a grand jury indictment. Also, the two terms were used interchangeably in many instances and the draft attempted to draw a distinction based in part on the approach taken in the New York Procedure Code.

Subsection (3), therefore, began with a definition of "complaint" and under this definition a complaint would be used only in a misdemeanor or violation situation. It would serve to commence the action and would also be the underlying document for the prosecution of the charge. The complaint would be used by a complainant other than the district attorney. In other words, under this draft the district attorney would not file a complaint but an information.

The definition of "information" was further refined through a two-part approach by use of the terms "complainant's information" and "district attorney's information." The "complainant's information," defined in subsection (5), was one that would be filed with the magistrate charging a person with an offense punishable as a felony. It would serve to start the action but not as a basis for the prosecution of the charge. A complainant's information filed in district court charging a felony would start the action and after a probable cause hearing or some other action to remove the case to the circuit court, another document would then come into play which could be either a grand jury indictment or a district attorney's information.

Mr. Paillette went on to explain that the definition of "district attorney's information" contained three parts. Under subsection (b) the district attorney's information would serve to commence the action but here again there would have to be a later document for prosecution of the charge, which could be an indictment. In subsection (c) he had inserted the phrase, "as is otherwise authorized by law," to permit the district attorney to file an information in circuit court under the proposed grand jury Article.

Mr. Blensly cited a hypothetical situation where an arrest was made on probable cause and the district attorney had to file a charging document the following morning so he charged the defendant with a misdemeanor. Once that district attorney's information was filed, it would serve not only to commence the action but also as a basis for the prosecution. Mr. Blensly's question was whether at that point the case could be taken to the circuit court if the district attorney wanted to do so for one reason or another.

Mr. Paillette advised that one of the things the grand jury draft attempted to do was to recognize that in misdemeanor cases if the district attorney wanted to go into circuit court, he could do so. The proposed amendment to the Constitution that had been approved by the Commission eliminated any reference to misdemeanors. One of the questions he had therefore tried to answer in subsection (6) (c) was to tell the district attorney how to charge misdemeanors because under the amendments proposed by the Commission to the grand jury statutes it would not be necessary to have a bindover or an indictment to go into circuit court.

Mr. Blensly indicated that this alternative method of getting to circuit court satisfied the question he had raised.

Mr. Blensly then remarked that under existing law there was a statute that said dismissal of a misdemeanor was a bar to further prosecution. Repeal of that statute, he said, would solve a great many problems. Police officers frequently made a technical mistake on the citation and the case had to be dismissed if, for example, the officer wrote "A.M." instead of "P.M." on the citation.

Mr. Osburn explained that the philosophy behind that statute was that when a citizen was charged with a misdemeanor, he should be able to go to court and have the matter finished; the state should not be allowed to later decide they were going to take the case to the grand jury or follow some other course. The theory the courts appeared to follow was that the charge involved only a misdemeanor and therefore the inconvenience to the citizen overbalanced the damage to society. Mr. Blensly said that as the areas covered by misdemeanors increased, that theory came into serious question.

Judge Crookham asked if there would be any violence done to the system if resubmission of misdemeanors were left to the approval of the court as in the case of felonies. He said he believed the general attitude of the courts would not be to allow a resubmission unless there were a serious reason for doing so. If the officer made an error on a $10 traffic ticket, that would probably be the end of it.

Mr. Blensly disagreed that such a traffic ticket should be dismissed when the officer admitted that he made a mistake. If he wrote the wrong street down and wanted to serve a corrected citation prior to trial, there would be no additional inconvenience to the person charged and he believed the officer should be allowed to do that.

Mr. Blensly moved that the staff be directed to prepare an amendment providing that dismissal of a misdemeanor would not be a bar to further prosecution at the discretion of the court of jurisdiction. His proposal would give the court of jurisdiction authority to allow the filing of a corrected complaint for the same offense.

Mr. Hennings urged that if that course were adopted, the statute should also set forth the standards as to when the case should be resubmitted. The problem with the resubmission statute at the circuit court level, he said, was that the standards were somewhat nebulous as to when resubmission should be denied. Mr. Hennings urged that a case should be resubmitted only for a substantial error, not just for carelessness on the part of the district attorney.

Mr. Chandler noted that the reason for the amendment was to take care of the insubstantial error where an officer put "A.M." instead of "P.M." on the citation. Mr. Blensly concurred and added that it struck him as wrong that an offender could be exonerated because of a minor error on the part of the police officer.

Chairman Yturri commented that it might be advisable to tie into the revision something with respect to the time when a correction could be made. Mr. Blensly said it might be a good idea but it was too easy to overlook something when the statute began setting specific guidelines. He was of the opinion that in this situation there would be no serious abuses of discretion because all the cases would involve lesser crimes.

Vote was then taken on Mr. Blensly's motion. Motion carried.

Representative Cole pointed out that the present practice in his county was that all complaints were sworn to before the judge. The draft indicated that a complaint or information may be verified by oath and filed with the magistrate. Mr. Blensly replied that practices varied from county to county. Multnomah County, for example, allowed complaints to be sworn to before a notary public. Mr. Paillette commented that verification was the important thing. Judge Crookham pointed out that a judge might not always be available and the procedure in the draft was therefore preferable to requiring that complaints be sworn to before a judge.

Mr. Paillette indicated that the definition of "reasonable cause" in subsection (7) was based on the Model Code of Pre-Arraignment Procedure and was a definition that was needed in the statute to give some guideline as to what constituted reasonable cause. It could ultimately be placed in the general definition section because it would have equal validity in other areas of the procedure code. The definition, he said, was consistent with case law and with the general practice throughout the state.

Judge Crookham asked if the term "substantial objective basis" applied to a reasonably prudent police officer rather than the standard of what that particular officer himself knew by his own prior experience.

Mr. Paillette replied that it would be applicable to a reasonably prudent police officer and called attention to the quotation from the ALI commentary set forth on page 5 of the draft which answered Judge Crookham's question in greater detail.

In explanation of subsection (8), Mr. Paillette pointed out that the new criminal code contained a very broad definition of "peace officer" because it included the phrase, "such other persons as may be authorized by law." The search and seizure Article, on the other hand, used a more restricted definition of "police officer." For the purposes of arrest, the draft went back to the old definition from the statute prior to enactment of the new criminal code. It would not, therefore, authorize arrest by "such other persons as may be authorized by law" and was the same definition submitted in the proposed criminal code before it was amended by the legislature.

Chairman Yturri pointed out that by the use of this definition the procedure code would contain three different definitions of virtually the same term. Mr. Chandler said there would actually only be two in the procedure code because the search warrant Article used "police officer" and the arrest Article used "peace officer." The other definition of "peace officer" was in the substantive criminal code. He advised that the subcommittee did not feel that persons such as railroad guards and campus police should be included in this section for the purposes of making an arrest.

Mr. Paillette agreed that it was something of a paradox to use various definitions of the same term, but the subcommittee's decision was that railroad guards, etc. should be excluded from the arrest draft. Those persons could still make arrests but they could only do so as private citizens.

Chairman Yturri was critical of the approach taken by the subcommittee and Mr. Blensly concurred with the Chairman. He added that the legislature had expressed its desires with respect to the definition of "peace officer" when it enacted Senate Bill 40 and the definition in this draft should be parallel.

There was further discussion of the policy to be adopted following which Mr. Blensly moved that subsection (8) be amended to conform to the definition of "peace officer" in the substantive criminal code. Motion carried. Mr. Chandler voted against the motion. Subsection (8) was further amended during the discussion of section 9. See page 38 of these minutes.

Judge Crookham moved the adoption of section 2 as amended. Motion carried unanimously. Voting: Blensly, Chandler, Cole, Crookham, Osburn, Spaulding, Mr. Chairman.

Tape 14 - Side 1

Section 3. Information and complaint; form and content. Mr. Paillette explained that section 3 set out the form and content for informations and complaints and, in accordance with the approach taken by the New York Procedure Law, drew a distinction between the factual part and the accusatory part. It specified that each complaint or information shall

contain those two parts, and the verification applied only to the factual part. Subsection (2) relating to the accusatory part incorporated the rules in ORS chapters 132 and 136. He noted with respect to subsection (3) that the New York provision regarding the factual part of the instrument referred to alleging facts "of an evidentiary character" and this phrase was deleted by the subcommittee to avoid conflict with the requirements for indictments contained in ORS chapter 132.

Senator Burns arrived at this point.

Mr. Blensly asked the reason for the distinction between the two parts and was told by Mr. Paillette that when a complaint was verified, particularly one that was filed by a private citizen or peace officer, the principal concern was the allegations of fact that were being sworn to. The person was not necessarily swearing that an individual committed, for example, theft in the second degree but that he had sufficient information on which to base the alleged facts of the crime.

Mr. Blensly asked if the facts referred to in subsection (3) were the facts that were at the present time placed in an affidavit rather than in a pleading form and received an affirmative reply from Mr. Paillette.

Mr. Spaulding asked if this section required the filing of two documents -- a complaint and an affidavit. Mr. Paillette replied that the intent was that it would all be contained in the complaint. He explained that the accusatory part was the designation of the offense, i.e., the name of the crime, while the factual part would contain a statement of the alleged facts of the crime.

Mr. Blensly commented that the section could be interpreted to require that all the facts presently set out in an affidavit would have to be in the complaint. He pointed out that subsection (3) required "facts supporting or tending to support the charge" but at the present time a complaint did not contain facts supporting the charge.

Judge Crookham remarked that if the purpose of the draft was to simplify procedure, this provision went 180 degrees in the opposite direction. Senator Burns and Mr. Spaulding concurred.

Mr. Paillette pointed out that without this section the draft would not contain any guidelines as to form and content. Mr. Blensly said they should be basically the same as the guidelines for an indictment. Mr. Paillette replied that there was a distinction between a complaint filed on the oath of a complainant and an indictment returned by the grand jury. Chairman Yturri commented that he could see no objection to using language comparable to that which set out the contents of an indictment.

Mr. Blensly recommended that the amended section should retain most of the language of subsection (1) of section 3, delete the

sentence referring to the accusatory and factual parts and the last part could read, "A complainant's verification of the information or complaint shall apply to the facts set forth. In all other respects the information or complaint shall conform to the requirements of section ____ [the section concerning contents of an indictment]." That suggestion, he said, would eliminate the part he found most objectionable, namely, the language in subsection (3) about alleging facts supporting or tending to support the charge.

Senator Burns said that in the subcommittee he had expressed the view that requirements for indictments, informations and complaints should be consolidated to make the procedure more simple. He recalled that Mr. Spaulding had said that when he was a prosecutor, he always considered a complaint to be a charge relating to a misdemeanor and verified by a complainant whereas an information related to a felony or an indictable misdemeanor. Mr. Paillette's draft appeared to be about halfway between those two positions and lumped informations and complaints together. Mr. Paillette agreed that they were lumped together in section 3 but were defined separately in section 2. The terms, "information" and "complaint," were bandied about a great deal and what one district attorney meant by an information might not mean the same in another county. He believed it was advisable to be precise and to distinguish between the two.

Chairman Yturri recommended that the approach taken in the grand jury Article with respect to contents of an indictment be followed in this draft by treating informations and complaints separately and eliminating any reference to accusatory parts and factual parts.

Mr. Paillette pointed out that section 22 of Tentative Draft No. 1 on Grand Jury and Indictments set forth requirements for testing the sufficiency of the indictment and section 23 of that draft set out a list of things that went into an indictment.

Mr. Spaulding moved to rerefer section 3 to the staff for redrafting so that both informations and complaints would follow the form set out in sections 22 and 23 of the Grand Jury Article with whatever appropriate modifications were necessary. Motion carried.

ORS 133.020 and 133.030. No change was made in these two sections.

Section 4. ORS 133.037. Detention and interrogation of persons suspected of theft committed in a store; reasonable cause. Mr. Paillette advised that one of the revisions in section 4 was housekeeping in nature and deleted existing references to ORS chapter 133 sections that would be picked up in other provisions of this Article. It also added "or attempted theft" in order to allow reasonable detention or interrogation of a person who attempted to commit theft.

Judge Crookham asked if section 4 was intended to be limited to certain types of commercial establishments. To clarify his question, he asked if it would cover a situation where a person was walking off with the silverware from a restaurant. Mr. Paillette replied that there

was no intent to change the thrust of the present law, and it would not have any application in that situation.

Representative Cole pointed out that "or attempted theft" should be added to subsection (2) after "a person has committed theft" in order to conform to the revision in subsection (1). Mr. Paillette agreed and Representative Cole so moved. Motion carried.

Mr. Chandler moved approval of section 4 as amended. Motion carried unanimously. Voting: Blensly, Burns, Chandler, Cole, Crookham, Johnson, Osburn, Spaulding, Mr. Chairman.

ORS 133.045 to 133.070 and 133.080. Mr. Chandler commented that all these statutes had been enacted relatively recently by the legislature. No change was made in any of the sections at this point in the meeting. ORS 133.045 was subsequently amended in connection with the discussion of section 7. See page 35 of these minutes.

Section 5. ORS 133.075. Penalty for failure to appear on citation. Mr. Paillette outlined that section 5 amended ORS 133.075 to add "Class A" misdemeanor. Under the new criminal code, he said, the range of penalties under this section would be the same as a Class A misdemeanor. The amendment, therefore, made no substantive change but was merely added for clarity.

Mr. Chandler moved approval of section 5. Motion carried unanimously with the same members voting as voted on section 4.

Section 6. ORS 133.100. Citations for certain littering violations. Mr. Paillette advised that section 6 deleted reference to a statute that was no longer in existence.

Mr. Chandler moved approval of section 6. Motion carried unanimously with the same members voting as voted on the previous motion.

Section 7. ORS 133.110. Issuance; citation. Mr. Paillette explained that section 7 set out the reasonable cause foundation on which a magistrate would issue an arrest warrant. It also added a violation to the area in which the court could direct a citation in lieu of an arrest warrant which presently related only to misdemeanors.

Mr. Blensly noted that the amended language, "crime complained of," should read "offense complained of" and Mr. Paillette agreed.

Mr. Chandler moved to amend section 7 in line with Mr. Blensly's suggestion. Motion carried.

Mr. Blensly indicated that his office put out an affidavit on all warrants of arrest and it was a real burden so far as staff time was concerned. He asked if there was any possibility of providing that when a district attorney's information was filed, the information itself would be considered as sufficient reasonable cause for the arrest warrant because the district attorney was verifying that there was reasonable

cause to believe that the facts set forth therein were correct. The district attorney, of course, would need to have some sort of basis on which to issue the arrest warrant. The Commission was unable to offer a solution to the problem Mr. Blensly raised.

Chairman Yturri left the meeting at this point and Vice Chairman Burns presided.

Mr. Spaulding questioned the meaning of the last sentence of section 7. He asked if the phrase "in the discretion of the court" applied to some future time or if it was meant to be applicable to the present. He assumed it would mean after sentence was imposed, but those words were stricken.

Judge Crookham called attention to ORS 133.045 set forth on page 10 of the draft which contained language parallel to that in section 7, "or on a felony charge which may be deemed a misdemeanor charge after sentence is imposed." Mr. Paillette explained that he had amended ORS 133.110 to incorporate reasonable cause and while the section was being revised, he had made an attempt to get rid of the language, "may be deemed." Judge Crookham expressed the view that the two sections should read the same.

In line with Mr. Spaulding's suggestion and to make the meaning of section 7 more clear, Mr. Blensly moved to amend the last sentence of section 7 to read:

> " . . . on a felony charge which in the discretion of the court may be considered a misdemeanor charge at the time sentence is imposed he may authorize a peace officer to issue and serve a citation . . . . "

Motion carried.

Mr. Blensly then moved to amend ORS 133.045 to conform the language to the amendment just adopted. ORS 133.045 would read:

> " . . . to arrest on a misdemeanor charge or on a felony charge which in the discretion of the court may be considered a misdemeanor charge at the time sentence is imposed and:"

Motion carried.

Mr. Chandler moved to approve section 7 as amended. Motion carried unanimously. Voting: Blensly, Chandler, Cole, Crookham, Johnson, Osburn, Spaulding, Chairman Burns.

ORS 133.045 was approved as amended by unanimous consent.

ORS 133.120. Authority to issue. Judge Crookham pointed out that the last phrase in ORS 133.120 said "triable within his county" whereas it should say "county or district" to cover the multiple county circuit.

He moved to add "or district" at the end of the section and before the period. Motion carried.

Mr. Spaulding moved to substitute "offense" for "crime" in the two places "offense" was used in ORS 133.120. Motion carried.

ORS 133.120 was approved as amended by unanimous consent.

Section 8. ORS 133.140. Form. Mr. Paillette pointed out that subsection (5) of section 8 would require an editorial change to substitute "offense" for "crime." The amendment was approved by unanimous consent.

Mr. Paillette explained that section 8 deleted the old warrant form and listed the contents of a warrant of arrest. The section would repeal ORS 133.130 which allowed the "John Doe" warrant. He also noted that subsection (7) would be subject to change depending upon Commission action on the draft dealing with the subject of bail.

Mr. Blensly said that oftentimes persons were arrested and bail was set in the amount on the warrant of arrest but there was no statutory provision permitting the accused to be taken to a magistrate in another county when the warrant was issued in a county different from the county of arrest. As a practical matter, however, this was done and he asked if there was a provision in the bail draft authorizing bail to be set in another county after the arrest. Mr. Paillette replied that the approach in that draft was not in terms of bail but in terms of release.

Mr. Spaulding suggested the problem might be resolved by deleting "in the same county" from subsection (6). Mr. Blensly was of the opinion that such a provision should be in the bail sections rather than in this section which had to do with arrest warrants, and Judge Crookham concurred.

A recess was taken at this point. When the meeting reconvened, Mr. Chandler presided in the temporary absence of Vice Chairman Burns.

Judge Crookham suggested that the commentary to section 8 contain a statement to the effect that the Commission approved the policy that it should be possible for a defendant to post bail and be released in the county where the warrant was issued when that county was different from the county of arrest.

Judge Crookham moved adoption of section 8 with the amendment approved earlier in subsection (5) and with the understanding that the commentary would be revised as indicated above. It was also understood that subsection (7) would be subject to change later depending on the Commission's decision on the bail draft. Motion carried.

ORS 133.220. Who may make. No change was made in ORS 133.220.

Section 9. Arrest by a peace officer; when and how made. Judge Crookham pointed out that here again "crime" should be changed to "offense." The suggestion was approved by unanimous consent.

Mr. Paillette said that contrary to the search warrant area where the Commission had limited searches to daytime unless expressly otherwise allowed, section 9 permitted a peace officer to make an arrest at any hour of the day or night.

Subsection (2), he said, made a substantial policy change. This was one of the areas the peace officers were extremely interested in and one that was before the last session of the legislature. Law enforcement personnel had indicated to the subcommittee that they felt they could not now act as peace officers outside their own area of employment. The provision attempted to deal with the probable cause arrest situation under those circumstances. No change was made in the warrant arrest area because under present law when a warrant was outstanding from another county and the peace officer knew about it, he could make the arrest.

Subsection (2) addressed itself to the situation where the officer was outside his own county and had probable cause to make an arrest. It would allow him to make that arrest and extended the same rights, privileges and immunities he would have were he in his own area of employment.

Mr. Paillette advised that the question of interdepartmental agreements was not dealt with in this section. The subcommittee believed that the responsibility for enforcing the law in certain geographical areas was a matter that law enforcement personnel should work out among themselves.

Judge Crookham was critical of the phrase, "geographical area of his employment," and moved to amend subsection (2) of section 9 by deleting "geographical area" and substituting "jurisdiction." Motion carried.

Mr. Spaulding said he was not certain that "jurisdiction" was the correct word because it ordinarily was applied to the court's authority to act. Judge Crookham replied that the jurisdiction of a Portland police officer was within the city limits of Portland and the jurisdiction of the city of Portland was defined in the city charter. Mr. Paillette said the principal consideration in choosing the term should be to use the one that would be clearest to police officers.

Judge Crookham pointed out that the problem oftentimes was that police officers were unable to determine precisely where their jurisdiction ended or began, and the provision was intended to say that when he was outside of his jurisdiction, he still had these powers. Mr. Spaulding maintained that under the amendment he would still be in his jurisdiction even when he was outside of the area that used to be his area of employment. In other words, he was being given authority outside the county or outside of what was once his jurisdiction.

Chairman Chandler pointed out that "geographical area" appeared in two places in subsection (2) and if one was changed to "jurisdiction," both should be changed. The Commission agreed to the revision in both places.

Mr. Osburn inquired as to the meaning of the second sentence of subsection (2). Chairman Chandler explained that it granted the immunities provided by law when he was acting in the jurisdiction of his employment. Mr. Osburn was critical of the phrase, "in so doing," and questioned whether the meaning of the sentence was clear.

Mr. Paillette was of the opinion that the second sentence accomplished its intent, but it might be clearer if it were amended to read, " . . . as are otherwise provided by law when the peace officer is making an arrest in his own jurisdictional area without a warrant."

Mr. Spaulding and Judge Crookham concurred with Mr. Paillette that such an amendment was unnecessary.

Mr. Paillette indicated that subsection (3) was a restatement of ORS 133.330. Subsection (3) was approved by unanimous consent.

Mr. Paillette explained that subsection (4) required the warrant to be shown to the arrested person upon request and replaced ORS 133.270. Mr. Spaulding moved the adoption of subsection (4). Motion carried.

Mr. Paillette reported that subsection (5) picked up the justification provisions in the criminal code which allowed reasonable force and deadly force under certain circumstances. It did not change existing law. Mr. Spaulding moved approval of subsection (5). Motion carried.

Mr. Paillette advised that subsection (6) contained the knock and announce requirements. It allowed a police officer to enter the premises when he had reason to believe that the person to be arrested was present. The second sentence was similar to the search warrant provisions, he said, and essentially retained the knock and announce provisions of ORS 133.290 and 133.320.

Subsection (6), Mr. Paillette said, needed to be considered in conjunction with subsections (7) and (8). Subsection (7) provided for exceptions and was the same as had been written into the search and seizure Article. Subsection (8) contained a change from present law, as pointed out in the commentary, and provided that the officer was authorized to enter without giving notice if, after giving notice, he was not admitted. To illustrate, he said that the officer could enter if he heard footsteps running away from the door.

Mr. Spaulding said that if no one was home, the officer would not have been admitted so he could break in. Mr. Paillette confirmed that statement. Mr. Spaulding was of the opinion that the provision was an improvement over existing law.

Chairman Chandler suggested that "is" at the end of the second line of subsection (6) should be changed to "to be." Judge Crookham so moved and the motion carried.

Judge Crookham asked if a Clark County, Washington, deputy living in Portland would be cloaked with the immunities granted under subsection (2). Chairman Chandler replied that the Oregon legislature could only

legislate for the state of Oregon. Judge Crookham commented that Oregon could recognize the rights of police officers from other jurisdictions and suggested that "of the state of Oregon" be inserted after "peace officer." That, he said, would make it very clear that such a person could not come into Oregon under the grant of immunity and act in any capacity other than as a private citizen.

Mr. Spaulding suggested that the problem be taken care of in the definition of "peace officer" and Mr. Paillette said that could be done if the Commission felt there was a problem.

Section 2, subsection (8). After further discussion, Judge Crookham moved to amend subsection (8) of section 2 to read:

> "'Peace officer' means a member of the Oregon State Police or a sheriff, constable, marshal or municipal policeman, of the state of Oregon."

Motion carried.

Section 9. Mr. Spaulding moved to approve subsections (6), (7) and (8) of section 9. Motion carried.

Judge Crookham moved the adoption of section 9 as amended. Motion carried unanimously.

Section 10. ORS 133.310. Authority of officer to arrest without warrant. Mr. Paillette advised that section 10 was a departure from the traditional law in this state. As structured, it said that a police officer may arrest without a warrant if he has reasonable cause to believe that the person has committed (a) a crime or (b) a violation in the officer's presence. The current "in presence" requirement was thereby watered down considerably and under this draft would apply only to violations. Reasonable cause would apply both to the offense as well as to the officer's belief that the person arrested had committed it. This differed from the requirement in ORS 133.310 (3) where reasonable cause related to the individual and to the person making the arrest but still required a showing that a felony had in fact been committed. The amendment would change that requirement and would apply a reasonable cause test straight across the board. The principal change was to allow a reasonable cause arrest for misdemeanors.

Subsection (2) retained the provisions of ORS 133.310 (4). The new subsection (3) provided that in determining whether reasonable cause exists the police officer may "take into account all information that a prudent officer would judge relevant to the likelihood that an offense has been committed." This was an extension of the reasonable cause definition in subsection (1).

Mr. Spaulding asked why subsection (3) was limited, on the second line on page 24, to "expert" knowledge. Mr. Paillette replied that the LI had used "expert" to indicate that it referred to a policeman's knowledge -- the kind of knowledge he would have as a law enforcement officer.

Judge Crookham suggested that "professional" might be a better word to use in that context since it referred to the things he knew as a result of his professional training.

Judge Crookham moved to substitute "professional" for "expert" in subsection (4) of section 10. Motion carried.

Judge Crookham next asked if "crime" in subsection (1) would include the major traffic violations and received an affirmative reply from Mr. Paillette.

Mr. Hennings objected to expanding the area of probable cause arrests by allowing all misdemeanors to fall into that category and questioned the advisability of adopting such a drastic change in policy.

Vice Chairman Burns returned at this point and presided over the meeting.

Mr. Paillette advised that when the crimes were graded during the course of the substantive revision, many of the crimes that had been low grade felonies were made high grade misdemeanors so there were now many more misdemeanors than there were in the past. He also pointed out that some of the high grade misdemeanors were fairly serious crimes. For this reason some of the crimes that were currently misdemeanors would have fallen under the probable cause arrest statute when they were felonies, but the officers could not now make a probable cause arrest for those same crimes simply because they had been downgraded to misdemeanors.

Mr. Paillette noted also that citizen's arrests had been curtailed considerably under the new criminal code. There the attempt was to discourage citizen's arrests which, he submitted, was a sound policy. Mr. Paillette said that when citizen's arrests were discouraged on the one hand and felonies were downgraded into the misdemeanor category on the other, the facts and realities of the problems faced by law enforcement officers should be recognized and they should be allowed to make reasonable cause arrests for misdemeanors.

Mr. Spaulding suggested that Mr. Hennings' objections might be met by revising subsection (1) to read:

> "(a) A felony, Class A misdemeanor or major traffic offense; or
>
> "(b) Other offense or violation in the officer's presence."

Representative Cole commented that such an approach would be asking the officer to make a decision that should be the district attorney's because the officer would have to make a determination of the class of the crime at the time he made the arrest. Judge Crookham noted that he had to do that under the old code, and Representative Cole agreed but said that in that situation he only had to distinguish between a felony and a misdemeanor.

Mr. Paillette agreed that there was a decided distinction between expecting the officer to know the difference between a felony and a misdemeanor as opposed to the difference between a Class A and Class B misdemeanor.

Judge Crookham moved adoption of subsection (1) as drafted. Motion carried. Voting for the motion: Chandler, Cole, Crookham, Johnson, Osburn. Voting no: Spaulding, Chairman Burns.

Judge Crookham moved the adoption of subsection (2). Motion carried.

With respect to the term "prudent officer" in subsection (3), Judge Crookham asked where the word "prudent," standing alone, came from. He remarked that "reasonably prudent" was the usual term. Mr. Paillette replied that because "reasonable cause" was defined at the beginning of the section, it seemed redundant to use "reasonable" in the section twice.

Judge Crookham moved to insert "reasonably" before "prudent" in subsection (3). There was no objection and the amendment was ordered by unanimous consent.

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

Mr. Chandler moved to approve section 10 as amended. Motion carried unanimously. Voting: Chandler, Cole, Crookham, Johnson, Osburn, Spaulding, Chairman Burns.

ORS 133.340. Magistrate's authority to order arrest for crime in his presence. "Offense" was substituted for "crime in ORS 133.340 by unanimous consent.

ORS 133.360 to 133.440. No change was made in these ORS sections.

Section 11. Arrest by a private person. Section 12. ORS 161.255. Use of physical force by private person making citizen's arrest. Mr. Paillette advised that sections 11 and 12 were submitted to the Commission without the approval of the subcommittee. They embodied a policy question which the subcommittee believed should be decided by the Commission.

Section 11 was drafted to authorize an arrest for a crime committed in the presence of a citizen if he had reasonable cause to believe the arrested person committed the crime. In this section, he said, use of the word "crime" was intentional and it should not be changed to "offense." Section 11 would repeal ORS 133.350.

Section 12 amended ORS 161.255 to change the type of circumstance in which the arrest could be made. The provision under the new criminal code allowed an arrest and the use of reasonable force if two things were present: (1) he reasonably believed the person had committed a felony and (2) the person had in fact committed a felony. This, he said, was a very stiff test. Deadly force, however, was not authorized even in that circumstance and this was not changed under this draft. The

discussion in subcommittee revolved around the question of whether it was advisable to have a broad standard for citizen's arrests or whether a more limited standard should be imposed.

Mr. Chandler recalled that the subcommittee had agreed that some right of a citizen to make an arrest should be maintained, but they believed it should be a very narrow authority. Chairman Burns added that at the subcommittee meeting Representative Cole was opposed to permitting a private person to use force of any kind in making an arrest.

Representative Cole related that a law enforcement officer from Multnomah County had told the subcommittee that he felt it was necessary to allow a private person to use some degree of force in making an arrest. He used the example of the neighbor who saw someone break a window next door. The neighbor arrested him and the offender tried to run away so the neighbor had to use force to hold him until the police arrived.

Judge Crookham said the sections were really concerned with civil liability when a person was charged in a civil case with using unreasonable force to do something he was not supposed to do.

Mr. Spaulding commented that if a citizen couldn't use some force to effect an arrest, he might as well not have any right to make an arrest. Representative Cole expressed disagreement with Mr. Spaulding's position and said there would be many instances where the arrested person would not try to run away. He questioned the wisdom of inviting a greater crime by giving the citizen authority to use force. Chairman Burns said he was inclined to agree with Representative Cole, but that bridge had been crossed when ORS 161.255 was adopted by the legislature.

Mr. Spaulding agreed and said that if force were not permitted, a person who saw a serious felony committed could not use force to hold the offender except in defense of himself or his home. Mr. Chandler remarked that neither the person making the arrest nor the one being arrested was likely to know the provisions of either statute in any event. The citizen was likely to try to stop the perpetrator of the offense, and Mr. Chandler believed it would be poor policy to leave a citizen open to a civil suit in that situation.

Judge Crookham moved the adoption of section 11. Motion carried. Voting for the motion: Chandler, Crookham, Johnson, Osburn, Spaulding. Voting no: Cole, Chairman Burns.

Judge Crookham moved the adoption of section 12. Motion carried with the members voting as they did on the previous motion.

Judge Crookham moved adoption of Article 4 as amended. Motion carried unanimously. Voting: Chandler, Cole, Crookham, Johnson, Osburn, Spaulding, Chairman Burns.

The meeting was adjourned at 5:30 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission