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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

December 29, 1971

Minutes

Members Present: Mr. Robert W. Chandler, Chairman
Senator John Burns
Mr. Bruce Spaulding

Excused: Representative George F. Cole

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

Also Present: Dr. William Brady, State Medical Investigator
Mr. John Moore, ODAA Liaison Committee
Mr. Gene Murphy, Lane County District Attorney's Office

Agenda: FORMER JEOPARDY
Preliminary Draft No. 3; December 1971

Proposed Revision of State Medical Investigator Laws

STOPPING OF PERSONS
Preliminary Draft No. 1; November 1971

Mr. Robert Chandler, Chairman, called the meeting to order at 11:15 a.m. in Room 315 State Capitol.

Chairman Chandler moved dispensing with the reading of the minutes of the October 14, 1971 meeting. Mr. Spaulding seconded and the motion carried.

Former Jeopardy, Preliminary Draft No. 3; December 1971

Chairman Chandler asked Mr. Paillette for any comments he may wish to make regarding the draft which had been returned to the subcommittee for further revision. Mr. Paillette was of the opinion there was a basic misunderstanding relating to what was meant by the jurisdiction of a single court, but could see no serious problem in redrafting. The major concern, he said, seemed to be the scope of "criminal episode" as it would relate to a requirement of joinder for prosecution. A revised definition of this term has been drafted, he reported, although he was in doubt that it would meet all the questions which were raised.

Chairman Chandler remarked that the subcommittee made a basic policy decision at its last meeting that it would push toward more rather than less joinder, and require joinder in almost every case where there was any connection in a series of events. In discussing this at the Commission meeting, the requirement was not favored unanimously, he said. Mr. Paillette replied that from statements made by Mr. John Moore, the district attorneys felt it was too restrictive as far as what they might be required to know, and that they might be prevented later on from prosecuting a case where they did not have sufficient information about the commission of a related offense. He added that Preliminary Draft No. 3 may have helped this situation, which is contained in subsection (4) of section 1 and its commentary.

Mr. Paillette advised the subcommittee that it was current in its drafts; that Subcommittee No. 2 is working on search and seizure and Subcommittee No. 3 will soon have a draft on negotiated pleas. He reported that the Bar Committee is concentrating on the areas of pre-trial discovery and negotiated pleas and that a subcommittee has been assigned to each of these subjects.

Stopping of Persons

Chairman Chandler called attention to a copy of a letter under date of December 9, 1971 directed to Mr. Robert Lucas, District Attorney of Columbia County from Mr. Desmond Connall, District Attorney from Multnomah County relating to Stopping of Persons; Preliminary Draft No. 1. In his letter Mr. Connall stated that:

> "...an attempt to formalize this area of the law by incorporating it into statutory form is an error. The entire area of the law is developing so rapidly, on a case by case basis, that it would not be wise to attempt to guess which way the courts are going to go and incorporate that guess by structured statutory scheme."

The letter continued to say that if Mr. Lucas concurred with him, they should contact Mr. Paillette and others and discuss the problems which could be created.

Chairman Chandler asked Mr. Paillette if he had heard from Mr. Lucas and Mr. Paillette replied he had not. Chairman Chandler pointed out that the subcommittee was faced with the decision of whether it should abandon the draft and report to the Commission that it agreed with Mr. Connall's position that it is a case law matter or decide otherwise and begin work on the draft.

Mr. Spaulding said he was in agreement with Mr. Connall's stand on the matter.

Mr. Paillette remarked that this draft was similar to search and seizure in some of the policy considerations and some of these objections had already been discussed in the subcommittee, and that there was a great difference of opinion as to whether or not the Commission should try to codify some of these rules. He did not believe the case law was as unsettled in stop and frisk and it is in search and seizure. With respect to the early drafts, he said, there is value derived from gathering up the law in the area and checking to see what the other states are doing, whether or not it goes beyond the subcommittee. By doing this there is some basis on which to make an intelligent decision. Mr. Paillette said there are three major considerations: what kind of grounds will be required or allowed to make a stop; when a stop has been made, what can the police officer do with respect to a frisk; and what happens beyond the frisk with respect to items found during the frisk. He agreed with Mr. Connall in that there is always a risk in trying to codify case law.

Chairman Chandler said this particular area, with the exception of the initial arrest, calls for more judgment on the part of the police officer than anything else he is asked to do in the conduct of his duty. He was of the opinion that trying to get some general rules and principles into a statute which the officers could read and understand would be of considerable value to them.

Mr. Paillette commented that there is legislative interest in the stop and frisk area and this was placed in the outline as the result of an inquiry from the House Judiciary Committee during the 1969 session as to whether or not the Commission would try to draft a stop and frisk proposal. He said the Terry case had just been decided then and there was concern about having some specific guidelines.

Mr. Paillette added that even though the Commission may decide to do something in this area, it may want an entirely different draft, but Preliminary Draft No. 1 does show the kinds of policy questions and issues to be dealt with. Mr. Spaulding indicated that this would be a good reason to go ahead with the draft.

Proposed Revision of State Medical Investigator Law

William Brady, M.D., Chief Medical Investigator for the Oregon State Board of Health appeared before the subcommittee with a suggested revision of the statutes applying to medical investigators. Dr. Brady had appeared before the Commission at its meeting of December 16, 1971, which in turn referred Dr. Brady's proposal to this subcommittee for review.

Dr. Brady reported it was his hope the Commission would present his proposal, revised by the subcommittee if necessary, as a Commission bill at the next legislative session. Although he agreed it would

not normally be a part of the Criminal Code, he said that occasionally certain crimes are investigated by the medical investigators. Dr. Brady was of the opinion that a number of areas in the law should be examined and revised because the circumstances at the time it was written now differ from the present operation and because a large number of areas were carried over from the old coroner's code and have caused definite problems. He presented to the subcommittee an outline of the areas containing the problems and suggested changes. Dr. Brady said his answers to these problems may not be right and should be looked at by people with a different viewpoint and more experience than he has. Whether this should be done by the Commission or the Attorney General's office, which had offered to assist, he did not know, but it was his preference to present this proposal to the Commission.

Chairman Chandler said the general tenor of the discussion at the Commission meeting was that there is so much in this that is not criminal law, such as the organization of the office and the creation of the Medical Investigator's Advisory Committee, even though there are some areas relating to the powers and authority of the office that did have some bearing on criminal investigations.

Mr. Paillette asked Dr. Brady to summarize the changes his proposal would make as compared to the existing ORS chapter 146.

Dr. Brady explained that the first section would change the present Advisory Board, reducing its number and giving it the power to designate the qualifications and make the appointments. This is presently being done by the State Board of Health. The Advisory Board, he said, would consist of people who are familiar with the problems who, in turn, would be given more authority than they presently have. This Board would work closely with Dr. Brady.

Mr. Spaulding remarked that at present there is an Advisory Board consisting of seven people. Dr. Brady replied that this seven-man board is almost functionless. The Board is appointed by the Governor and at the present time there are two vacancies. The office now is completely under the Board of Health and the State Health Officer, Dr. Edward Press, has complete control of the Medical Investigator's office by statute.

In answer to Chairman Chandler's inquiry, Dr. Brady said each of the seven offices is designated as to who shall fill the position such as a district attorney, pathologist, funeral director and county sheriff. At the present time, he said, the county sheriff and the district attorney's positions are vacant. Dr. Brady said that he is now responsible for performing certain duties although he does not have clear authority in his office enabling him to do these - he is assuming this authority. He has no control over his budget.

Dr. Brady related that he is constantly receiving requests from district attorneys concerning given areas of responsibility or authority, and contained in the outline is an organization restructuring of the present responsibilities and duties. These are now scattered throughout ORS, he said.

Mr. Paillette asked if the adoption of this proposal or something similar to it would improve Dr. Brady's working capabilities with respect to the duties he has in the area of criminal investigation. Dr. Brady replied it would not, because at the present time there is no excessive limitation on his ability to help the district attorney's office on criminal investigation. The authority he has is entirely adequate.

Chairman Chandler asked Dr. Brady if his proposal had been reviewed by Mr. Tanzer. Dr. Brady replied that he referred his proposal to Mr. Tanzer who did make some suggestions relative to the district attorneys' position and expressed support of this proposal. He reported that he has since spoken to Mr. Tanzer relative to whether or not the Criminal Law Revision Commission should be the vehicle to propose this, and Mr. Tanzer was of the opinion this was not in the Commission's field.

Senator Burns commented that Dr. Brady's intentions were to realign the law governing the State Medical Investigator and make it a comprehensive set of laws in one part of the statutes. He then asked Dr. Brady if, except for the structural reorganization, he was seeking any powers beyond what he now has. Dr. Brady replied he was not seeking any additional powers except some increase in administrative authority.

Senator Burns asked if this structural reorganization would be of assistance to someone else in the future. Dr. Brady replied that the present law would be somewhat of a barrier to another qualified person in that he can see that although it works well, existing law contains no statutory authority for his position. With his proposed changes, Dr. Brady said, Oregon should be able to attract the best medical-legal talent available.

Senator Burns asked what Dr. Brady's proposal has done with the inquest statute. Dr. Brady said this has been deleted because he did not think the medical investigator has any role in the inquest other than to be called by the district attorney. He was of the opinion it was confusing to have it in the statute and what should be done with inquests is obviously a decision which should be made by the Commission.

In answer to Senator Burns' inquiry, Mr. Spaulding said it was about 25 years since he had appeared at an inquest. Chairman Chandler remarked that he had not heard of one in his area for approximately 20 years. Senator Burns contended that as a medical investigator's role

is concerned, the inquest is an important factor and something the Commission must resolve. He asked Mr. Paillette how it was proposed to get into this area in the procedure outline. Mr. Paillette replied that in the outline the inquest is not listed, but it could come under the area of Investigation of Crime, Article 2. Mr. Paillette added that all statutes in the criminal procedure code will be examined.

Mr. Spaulding asked what Dr. Brady's responsibilities are regarding an inquest. Dr. Brady said he has none.

Chairman Chandler remarked that the opinions expressed at the Commission meeting showed serious doubts about undertaking what amounted to a revision of an executive department that was not solely involved in the criminal process when it wasn't undertaking similar reviews of district attorneys, state police and other agencies which have greater or lesser duties in this field, and Dr. Brady's proposal was sent to the subcommittee on that basis.

Mr. Paillette remarked that the minutes of the Commission meeting showed a lack of enthusiasm, not for the proposal, but for the Commission's participation in it.

Senator Burns commented that he wished to learn more about the proposal and speak to Mr. Tanzer. He asked the subcommittee to delay its decision until its next meeting, to which the members agreed. Senator Burns asked Dr. Brady if this proposal was drafted solely by him. Dr. Brady replied that he had not consulted anyone in connection with the drafting but he obtained all the laws from all 50 states. The proposal was drafted by him incorporating the ideas and suggestions of Dr. Harris, Chairman of the Medical Investigator's Advisory Board.

Stopping of Persons, Preliminary Draft No. 1; November 1971

Mr. Gustafson outlined the draft which contains five sections. Section 1 sets forth the definitions; section 2 is the operative section for a stop of a person; section 3 considers the frisk of the person; section 4 relates to a report of the person stopped if there was not an arrest; and section 5 is an exclusionary rule excluding all evidence obtained as a result of a frisk, except for deadly weapons.

The draft was divided into the five sections, Mr. Gustafson explained, to make clear the distinction between a stopping procedure and a frisk procedure. Oregon does not have statutes dealing with stopping of persons, although there are statutes in other jurisdictions, New Hampshire and Vermont, which have existed since 1935 and 1941. The entire concept is based on Terry v. Ohio, a 1968 U. S. Supreme Court case. The draft essentially recognizes the police procedure which occurs during their investigation of a crime, and is not quite an arrest but is more than questioning witnesses. Mr. Gustafson contended that it seemed desirable to clarify this area between the

citizen and the policeman, and that by codification this would be elevated to full view so the officer could understand his rights and duties, as well as the citizen.

Section 1. Stopping of persons; definitions

Section 1, Mr. Gustafson said, defines seven terms, four of which are incorporated by reference from the Criminal Code. He pointed out that the ORS sections in the draft are the new sections assigned to the 1971 Code. New terms in this section are "frisk," "reasonably suspects" and "stop." A frisk, he said, is defined to indicate the manner of the frisk which is the external patting of a person's outer clothing. This is to be distinguished from a full-blown search. The manner of the frisk is taken from Terry v. Ohio, 392 US 1 (1968), and in essence is limited because the purpose of the frisk is to find weapons which may harm the officer during the investigation.

"Stop," Mr. Gustafson continued, is a temporary restraint in a public place. If it were more than a temporary restraint it would take the form of an arrest.

Mr. Spaulding questioned if this should be limited to a public place and if it limits a police officer from protecting himself in a private place.

Mr. Moore asked why the words "public place" are included in the draft. Mr. Gustafson replied that by using these words the officer, even with reasonable suspicion cannot go into a home, thereby protecting the citizen's rights.

Senator Burns observed that the whole theory of stop and frisk is that there is a suspicious person, and the statute in Terry v. Ohio gives the cloak of legality to stopping that person and giving the officer the right to stop and frisk without any liability attaching, but, he asked, should this right extend to a police officer entering a home and frisking a person?

Mr. Spaulding said this should probably not be the case but that he felt the term "public place" is too limited.

Mr. Moore presented a hypothetical situation where an officer on patrol observes an individual lurking in someone's yard. He does not have probable cause to arrest the person for anything but he does want to stop and question him. The draft allows stopping only in a public place and the officer therefore would not have the right to stop the individual as a person's yard is not a public place.

Mr. Paillette said that under the loitering statute, the officer would have the right to make a reasonable inquiry because of the circumstances.

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Section 2. Stopping of persons

The legal basis for stopping a person, Mr. Gustafson explained, is the reasonable suspicion held by the officer that criminal activity may be afoot and this criminal activity is limited to be a felony. There are two things to consider, he said, (1) the concept of reasonable suspicion and (2) limiting this to a felony. "Reasonable suspicion," therefore, is something less than a belief that a crime occurred. If the officer has reason to believe a crime occurred, then he can arrest.

Mr. Paillette reported that when preparing the draft the staff felt the verb form should be used rather than the noun because this way a basic test can be applied, not only to the officer's judgment in making the stop, but also the same type of test can be used for the frisk. Although the Terry case does not use this language, the Oregon Court has used the term "reasonable suspicion."

Mr. Moore, referring to the letter written by Mr. Connall, was in disagreement with Mr. Connall's position and it was his opinion that this is an appropriate subject for legislation. The citizens, he said, have a right to know what a police officer's rights are in detaining or frisking an individual. What the draft is trying to accomplish is to protect the safety of the police officer from the standpoint of being shot at unexpectedly in circumstances that might not amount to probable cause, and to formally recognize the fact that an officer can, when he sees something suspicious, do something about it.

Mr. Moore expressed concern over the use of the word "felony" in subsection (1) of section 2. The Code, he said, contains various misdemeanors and some are serious offenses. For the reason that much criminal activity of a serious nature the patrolman is likely to encounter is a misdemeanor under the new Code, he asked the sub-committee to consider using the word "crime" rather than "felony." To him, the word "felony" would require a different approach by the officer between first, second or third degree assault. If an officer does not have probable cause to make an arrest, would he have enough information under this "reasonable suspicion" test to know that he is dealing with the felony assault situation or theft in the first degree as opposed to the second degree? It was Mr. Moore's opinion that it is the situation the officer was in that would put him in jeopardy and not necessarily the crime that may or may not be committed at that moment.

Mr. Gustafson remarked that Mr. Moore was responding to the person who has committed a crime, but what about the person who has not committed any crime but the officer reasonably suspects he has. If

he reasonably suspects the individual has committed a misdemeanor, he would be able to stop that person. If he were stopped and found not to have committed the misdemeanor he would be deprived of his liberty. Mr. Gustafson's argument was that the stop which could be made on less than probable cause for arrest grounds should be allowed when there is serious harm to society, to which Mr. Moore replied that under existing law a person can be stopped in a department store if suspected of theft in the store.

Senator Burns commented that there are very serious policy considerations to be made on codification of what has become case law. By codifying existing case law, the legislature runs the risk of having to change the statutes as the Supreme Court changes the applicability of those to the Constitution. Referring to Mr. Moore's suggestion, Senator Burns stated that by liberalizing the Criminal Code to the point that many former felonies are now misdemeanors, it may have as much application to misdemeanors as felonies, particularly in terms of remedial effects upon the person involved.

Mr. Paillette stated that the new Code now contains some misdemeanors that were low grade felonies under the old code, but not as many as Mr. Moore suggests. These are Class C felonies that would end up ultimately being treated as a misdemeanor but for the purposes of stop and frisk, they would be felonies. In looking at what is expected of the police officer and the type of decision he is expected to make, the officer must know what kind of crime he is dealing with, Mr. Paillette said. By following Mr. Moore's proposal and inserting "crime," the draft would be scooping in all misdemeanors, including Class C misdemeanors. By saying the officer can stop for a felony or a Class A misdemeanor, which is the New York approach, the chances are that people will not be stopped who should be because the officer is not sure of the classification of the crime. The draft should use the term "crime" or "felony" but not try to include just certain misdemeanors.

Chairman Chandler noted that the Illinois statute allows a stop for a suspected violation of any penal statute; New York allows a stop only for a suspected felony or Class A misdemeanor and the Model Code of Pre-Arraignment Procedure limits the stops only to a felony or a misdemeanor involving danger of forcible injury to persons or of appropriation of or damage to property.

Mr. Moore replied that the officer, in determining whether it is a felony or a misdemeanor, will have to be thinking in terms of elements of the offense and whether or not they are reasonably suspected to be present. He did not feel the reasonable suspicion test was geared in this direction.

Mr. Paillette, in answer to Chairman Chandler's question, stated the word "offense" includes crime and violations whereas a crime would include only felonies and misdemeanors.

Mr. Spaulding remarked that the draft now implies that the officer does not have any right to stop a person if he doesn't suspect he has committed a felony or is about to do so.

Mr. Moore presented a hypothetical situation where an officer on a foot patrol passes an open market and hears a call to stop a thief. He stops an individual although he has no knowledge of the amount of money stolen. How would an officer know, he asked, in a reasonable suspicion situation, the amount of money taken, in order for him to determine if it was a felony or a misdemeanor?

Senator Burns moved to amend subsection (1) of section 2, deleting the word "felony" and inserting "crime" in place thereof. The motion carried.

Subsection (2), Mr. Gustafson explained, concerns the place of detention and inquiry which shall be conducted in the vicinity of the stop and for no longer than a reasonable time.

Senator Burns expressed concern over the use of the words "in the vicinity" contained in subsection (2). In lieu of this wording, Senator Burns suggested the subsection read: "The detention and inquiry shall be conducted where the person is stopped [in the vicinity]...."

Mr. Spaulding said the concept of the draft says the officer has the right to stop the person, but no place does it say the person is committing a crime if he doesn't stop. Mr. Gustafson said the intent is to require the person to stop and Mr. Spaulding contended that this is then an arrest.

Mr. Paillette said that under existing statutes this was not an arrest and Mr. Moore remarked that he did not feel this was necessarily an arrest as it is not taking a person into custody to hold him to answer to any charge.

Senator Burns asked if there was a penalty provision included in the draft and Mr. Paillette replied there was not. Senator Burns then asked if a person is liable for escape from official detention if he has been told by an officer to stop and refuses? Assume, he said, that the officer draws his gun on the individual and forces him to stop, is he then liable to be committing an assault? Mr. Gustafson replied that assuming this was law, he did not feel the officer would be committing an assault because he has authority to make a stop. It has not been made a crime for the person not to stop but the draft could provide that the officer could use reasonable force to make the stop.

Mr. Moore said that a penalty provision could be inserted in the draft stating that it is an arrest for the purpose of the prosecution

in the resisting arrest section of the Code. A stop would be deemed to be an arrest for that purpose. In this way, if a person refused to comply with the request to stop, he could be prosecuted for resisting arrest.

Senator Burns, referring to the Model Code of Pre-Arraignment Procedure, section 2.02 (1) and page 20 of the draft, was of the opinion it was more specific. The words "a law enforcement officer, lawfully present in any place,...." he contended, avoid the question raised earlier with respect to what is or what is not a public place. The subsection continues to read that the officer "may, in the following circumstances order a person to remain in the officer's presence near such place for such period as is reasonably necessary" and sets forth limitations with respect to the circumstances, including a definite length of time. This delineates it with some particularity, he said. The MCPP goes on to speak that the officer can use force, other than deadly force, as is reasonably necessary and gives him authority to frisk and question the suspect.

Senator Burns asked Mr. Gustafson what factors persuaded him to depart from the Model Penal Code. Mr. Gustafson replied that his main reason for not following this was because it was too lengthy and difficult to understand who had what rights. The Code states that an officer may not question the person for more than 20 minutes whereas, Mr. Gustafson said, the draft uses the term "reasonable time" because an officer may need more time for questions under certain circumstances and it would be unrealistic to set an arbitrary time limitation. Mr. Gustafson said the MCPP text includes provisions on roadblocks and witnesses which he felt was too broad. The purpose of the draft is to stop persons from criminal activity, not to stop witnesses as the officer already has authority to question them, and by adding "stopping of witnesses" under the section of stopping of persons would confuse the initial problem.

Senator Burns was of the opinion that the phrase "in the vicinity of the stop" was ambiguous. The Commission's responsibility, he said, was to clarify the law and this may create the need for more judicial interpretation.

Mr. Gustafson agreed the words "in the vicinity" can be ambiguous and said this could be modified by inserting "<u>immediate</u> vicinity."

Mr. Paillette commented that it can only be defined so far; there still must be some elbow room. By limiting it to one spot would be writing in a loophole and "in the vicinity" would give some guidelines and still give the officer the ability to move from one place to another, such as the middle of the street to the sidewalk, or as Mr. Moore added, from a hostile atmosphere in a tavern by stepping outside the door.

Mr. Spaulding said the draft means that the inquiry can take place where the person is stopped or reasonably close to that place, depending upon the circumstances. The person cannot be taken into the police station, however, even if he is 20 feet from it because there is no legitimate reason for going there.

Senator Burns asked that the minutes reflect this to be the intent of the draft and then moved the adoption of subsection (2) of section 2. The motion carried.

Senator Burns moved the approval of subsection (3) of section 2. The motion carried.

Section 3. Frisk of stopped persons

This section, Mr. Gustafson explained, is the second prong of stopping of persons, the first being the stop and this being the frisk. There are separate reasons for both. Under the frisk, he said, the officer reasonably suspects the person he stops is armed and presently dangerous to the officer or others present. Terry states that the entire reason for a frisk is the present danger of the officer and those around him, and the officer has to point to articulable facts which lead him to this conclusion, he said.

Subsection (2) states that not only must the officer reasonably fear danger when he pats the outer surface of the clothing, he must reasonably suspect the object to be a deadly weapon.

Senator Burns asked that, in the course of the frisk if the officer comes upon the fruits of a crime or an instrumentality of a crime which could rise beyond the dignity of a stop and frisk and graduate into an arrest, can this evidence be seized? He said this is an inevitable question which will arise. Mr. Gustafson replied that the draft deals with it by saying no, that the evidence is not admissible because it is not a weapon and the reason for the original stop.

Chairman Chandler spoke of a situation where a gun was seized during a frisk. The outcome is that the gun was stolen. Could this be admitted into evidence only to show the person was armed?

Mr. Paillette said that the weapon would be admissible for any purpose.

Senator Burns stated that he was referring to marijuana or stolen credit cards. Mr. Gustafson replied the frisk is expressly limited to a deadly weapon.

Mr. Moore, referring to section 5, expressed the view that an officer who reasonably suspected that the person had a deadly weapon, and upon patting him down felt an object and found hashish, should certainly be able to use it in evidence.

Senator Burns referred to subsection (4) of section 1 relating to the "totality of the circumstances" with respect to what is reasonable suspicion. He asked if, within the "totality of circumstances" the subsection would include the situation where the individual was a known criminal. This would be one of the elements of the totality of the circumstances, he said.

Mr. Paillette agreed that this was the concept of the subsection. He said this language was purposely added to the draft, coming directly from amended Senate Bill 40. It allows the officer to take into account everything, including what information he has heard concerning the person, what he personally knows, and anything that has bearing on the situation.

Senator Burns, referring to section 3, asked why the word "deadly" rather than "dangerous" was inserted in the draft; why should the draft not apply to both?

Chairman Chandler said the definition of a dangerous weapon means "any instrument, article or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury." A deadly weapon, he said, means "any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury."

Mr. Moore suggested the subcommittee consider amending section 3 to include the word "dangerous."

Senator Burns moved the deletion of "deadly" and the insertion of the word "dangerous" to subsections (1) and (2) of section 3. The motion carried. Senator Burns then moved the adoption of section 3 as amended. The motion carried.

Section 4. Report of persons stopped

This section, Mr. Gustafson reported, was taken partially from the MCPP and the idea that when a person is stopped and later released without an arrest, there is actually no record which tells how many stops have been made. The idea of the report, he said, would be if the local police force for some reason decided to use stopping of persons more than what it was intended for, such as harming minorities, for example. If complaints arise from such a minority, the police would have a record to show whether or not this was true.

Mr. Spaulding said that on the other hand, this would be giving a record to some who do not wish this on file, although Mr. Moore commented this is now being done by the major agencies but now would require all officers to make this report. Mr. Paillette said this does not, however, require the officer to add the person's name to the report. Chairman Chandler said that from the officer's own knowledge of the stop the only thing he would not know would be the person's name, as the remainder of the report refers to the time, date, location and reason for the stop.

Mr. Moore commented he could see a problem resulting from section 4 in that people could get a record built up from numerous stops even though they might have a legitimate reason for being in a certain place.

Chairman Chandler then asked if this section would make the report a public record within the meaning of the Oregon Public Record statute. He said that as he reads section 4, it would be dictating the internal operation of the police department more than he feels necessary, to which Mr. Spaulding agreed.

Mr. Spaulding moved the deletion of section 4. The motion carried.

Section 5. Admissibility of items seized during frisk

Senator Burns moved section 5 be amended to read "Section 4" and in line 2 the word "deadly" be deleted and "dangerous" inserted in place thereof.

Mr. Paillette remarked that inasmuch as both the terms "deadly" and "dangerous" are defined, that for legislative clarity both should be included in the draft.

Senator Burns then moved subsections (1) and (2) of section 3 and amended section 4 be further amended to include the words "dangerous or" so as to read "dangerous or deadly weapons." The motion carried.

Mr. Spaulding then moved the deletion of amended section 4. He said that if something is seized other than a dangerous or deadly weapon, he was of the opinion this evidence should be admissible.

In answer to Mr. Spaulding's motion, Mr. Gustafson said that reasonable suspicion is less than probable cause and therefore the frisk should be less than a full search. Also, he said, a frisk as stated in Terry is for the express purpose of preventing any harm to the officer or those present. The effect of allowing any evidence found in a frisk is to invite an abuse of the original stopping procedure.

Mr. Spaulding contended that if an officer was in the performance of a legal investigatory act and has not violated the rights of the

suspected person, and during this act does run into important evidence which he had no reason to believe was there, this evidence should be admissible even though it is something other than a dangerous or deadly weapon. Mr. Gustafson argued that this was violating the person's right, because there was not probable cause to begin with - there is only suspicion. This draft, he said, makes certain that stop and frisk does not go beyond the limited frisk into a complete search of the person stopped.

Mr. Spaulding replied that his thoughts were that whenever an officer lawfully observes evidence, he runs across this evidence legitimately and the fact that he happens to run across it while he was doing a lawful frisk should not make that inadmissible as evidence. Mr. Moore agreed with Mr. Spaulding's assessment. If, while patting a person the officer finds something that reasonably felt like a dangerous or deadly weapon but was not, this still should be admissible.

Mr. Gustafson pointed out that by adding the words "dangerous or deadly weapons" there has now been opened up a larger spectrum of what that officer can reasonably suspect is in the pocket and what can come in as evidence of contraband. The question is should this be done under the theory that this could be less than probable cause?

Section 5, as written, Mr. Moore pointed out, could be a haven under the right set of circumstances for the individual engaged in criminal activity. He could benefit in some ways by an officer taking something from his pocket that he had reasonable suspicion was a dangerous or deadly weapon and turns out to be neither, but is contraband or evidence of a commission of a crime.

Mr. Paillette agreed with Mr. Moore's observation but said there should be some type of restraint for getting in all types of evidence that otherwise would not be admissible. If there is no cause to arrest but only reasonable suspicion to stop the person, this is no reason for other evidence found to be admissible.

Mr. Moore contended that if an officer makes a search of a person for a deadly weapon and comes across a hard object which could be a deadly weapon but turns out to be a capsule containing amphetamines, there was no doubt at all that this would be admissible in evidence today and why should the legislature go back and undo it.

Mr. Gustafson replied that the Ninth Circuit said that if it wasn't reasonable that it was a weapon then it was not admissible, but the courts have not ruled on this set of circumstances. Mr. Moore said there was no argument about the soft objects and was of the opinion the courts would suppress this regardless of section 5 because there were no reasonable grounds.

Senator Burns commented that he did not feel the draft has gone far enough because there should be an additional section to provide

for forfeiture of seized contraband. Mr. Paillette said that under existing law this is forfeited to the state, and this would be perpetuated.

A vote was taken on Mr. Spaulding's motion to delete amended section 4. Voting no, Chairman Chandler, Senator Burns. The motion failed. Senator Burns stated the reason for his negative vote was to bring the amended section before the Commission for further consideration.

Mr. Spaulding referred to the phrase "in any criminal proceeding" found on line 3 of amended section 4. He observed that the draft, as written, would mean the evidence found could not be used against someone else, even though it related to another crime.

Mr. Moore asked if the section could be rewritten to allow the use of items that are reasonably seized as evidence. If it is an item that was reasonably thought to be a dangerous or deadly weapon, then it should be admitted; if not, then it should not be used in evidence. This would undoubtedly be the decision of the court in any case, he said.

Mr. Paillette remarked that the section could read: "Except for dangerous or deadly weapons, or items which reasonably appear under the circumstances to be dangerous or deadly weapons...."

Chairman Chandler moved to reconsider his no vote on amended section 4, and voted aye, thereby deleting the section.

Chairman Chandler then referred to section 1 of the draft. Senator Burns moved the deletion of the word "Felony" in subsection (1) and the insertion of "Crime" in place thereof. The motion carried.

Senator Burns moved the insertion of the words "dangerous weapon" in subsection (3), with the appropriate definition to be contained in the commentary. The motion carried.

Mr. Spaulding questioned the use of the words "public place" in subsection (5). Senator Burns moved the incorporation of the language of MCPP section 2.02 (1).

Chairman Chandler suggested the subsection be amended to read:

> "A stop is a temporary restraint of a person's liberty by a peace officer lawfully present in any place [in a public place by a peace officer].

Senator Burns moved the adoption of this language. The motion carried.

Senator Burns moved the approval of section 1, as amended. The motion carried.

Former Jeopardy; Preliminary Draft No. 3

It was the decision of the subcommittee to review Preliminary Draft No. 3 via conference call. The subcommittee was of the opinion that little difficulty would be encountered in the review of this draft and perhaps a meeting would not be necessary.

The meeting adjourned at 3:10 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission