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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

January 18, 1972

Minutes

Members Present: Senator Wallace P. Carson, Jr., Chairman
Attorney General Lee Johnson
Representative Robert Stults

Excused: Representative Leigh Johnson

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

Others Present: Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Jackson L. Frost, ODAA Liaison Committee
Mr. William Snouffer, Chairman, American Civil Liberties Union

AGENDA: Search and Seizure, Preliminary Draft No. 2; November 1971

Chairman Wallace P. Carson, Jr., called the meeting to order at 2 p.m. in Room 315 State Capitol.

Mr. Paillette, at the request of Chairman Carson, explained the reason for having the sections on search and seizure in two separate drafts. Preliminary Draft No. 1 was drafted before the Commission had started any other work on the procedural code and was distributed to the subcommittee before the 1971 legislative session. This is a departure from regular drafting procedure, he said, but because of the many sections involved, Professor Platt was asked to place the sections not covered in the first draft in Preliminary Draft No. 2. This avoided duplicating a large amount of material. After subcommittee action has been completed on the two drafts, they will be incorporated into Preliminary Draft No. 3.

Professor Platt remarked that Preliminary Draft No. 1 contains areas which were chosen by him at random because of their interest. These areas will be organized and integrated with Preliminary Draft No. 2 in a more cohesive manner after its approval, he said.

Search and Seizure, Preliminary Draft No. 2; November 1971

Section 1. Issuance of search warrant. The section is not unusual, Professor Platt reported, but does contain matters for policy discussion.

The magistrate is defined in ORS 133.030 to mean Oregon Supreme Court, Court of Appeals, circuit, district and county judges, a few municipal court judges and justices of the peace, and who would have the authority to issue the warrants.

Subsection (2) allows either a prosecuting attorney or an "officer" to apply for the search warrant. There is some argument made, he said, that only the prosecutor should be allowed to apply for the warrant because he is ultimately responsible for the processing and prosecution of the case. Professor Platt said he did not choose to follow present practice as it is better to encourage the officer to do this directly.

Chairman Carson asked if the word "officer" is defined elsewhere. If it is used, it should be defined, he said. Professor Platt replied it is not defined in the draft but he assumed it would be defined generally in the Code.

Mr. Paillette pointed out "peace officer" is defined in the new Criminal Code.

Mr. Snouffer was of the opinion problems could ultimately arise if only the word "officer" was stated in the draft and favored using the words "peace officer." He spoke of a civil case in which an officer was a security guard for Southern Pacific. The officer now claims he is entitled to all the statutory rights to which a peace officer would be entitled.

Professor Platt remarked that some jurisdictions allow private citizens to apply for search warrants. He did not believe this is warranted in practice or policy, and it should be made clear the draft speaks to law officers.

Chairman Carson was of the opinion the statute was broadened to allow guards to become peace officers. Mr. Paillette said it was broadened only to state: "or as otherwise designated by law." A specific statute would be needed to make the guard a peace officer, he said.

Professor Platt favored limiting peace officer to only those identified with a regular police organization. A semi-official officer such as a railroad detective or plant guard would not have enough knowledge in the area, he said, and he would hesitate to extend this authority beyond the police officer circle.

Mr. Paillette said that peace officer is defined as meaning sheriff, constable, marshall, municipal policeman or member of the Oregon State Police. The amendment of the legislature was made to include "and such other persons as may be designated by law" which, he said, would include OLCC inspectors, parole and probation officers and others specifically designated by statute.

Professor Platt suggested inserting "police officer" in the draft and giving it the definition of peace officer with the exception of the existing amendment.

Mr. Milbank referred to brand and livestock inspectors and health inspectors. Professor Platt said the section dealing with inspectorial searches covers this type of search.

To tighten this language, Mr. Paillette commented, a term other than "peace officer" should be used. A term distinguishing it from the Criminal Code definition of a peace officer and defining it within this particular section would be advisable, he said.

Chairman Carson was in favor of using the words "police officer" and defining this to mean sheriff, constable, marshall, municipal policeman or member of the Oregon State Police.

Representative Stults commented that in many of the outlying areas the sheriffs use reserves who have the commission of a Deputy Sheriff, and are still qualified, he believed, as a law enforcement officer. Representative Stults did not believe they should be allowed to secure warrants for searches.

Professor Platt said this could be corrected by stating "the sheriff or his designated officer" or words to that effect.

Mr. Snouffer, referring to section 4, said the expression "executing officer" is used throughout the section. He expressed the view that it may be advisable to define the executing officer and make him the person who obtains the affidavit and charge him with the responsibility of executing the warrant. This definition, he said, may take care of the execution section as well as the application for the warrant section.

Mr. Frost disagreed with this statement. He did not feel there were many instances where the executing officer and the person who actually makes the application are the same person. Mr. Milbank said this is true in Marion County. On many occasions it is not the one who applies who will execute the warrant. Mr. Paillette said Mr. Snouffer's suggestion would make it too restrictive.

Professor Platt referred to the magistrate who shall issue the warrant. The magistrate, he did not believe, should include the justice of the peace, and favored limiting this to the district ccurts and above. Mr. Paillette said there would be other parts of the Code in which the Commission would wish "magistrate" to go beyond that definition. Professor Platt remarked that the magistrate could be called the "issuing officer or judge" with a definition in which the lesser judicial officers would be eliminated.

Article 27, providing for wiretap warrants, contained a narrow definition of "judge" which was defined as meaning only circuit judges, Mr. Paillette remarked. Professor Platt said the subcommittee could consider using the word "judge" and define it for this article only. The words "police officer" could also be defined in the same manner. This, he said, is a good place to take some authority away from the justices of the peace and if they could not show that this authority is needed in eastern Oregon, this would be another step taken in eliminating an undesirable part of Oregon's judicial system.

Representative Stults said special provisions have been made for eastern Oregon in other instances and this could be done again as far as the issuance of warrants are concerned, if it became necessary.

Mr. Johnson stated the legislature has made the policy decision to retain justices of the peace and perhaps the subcommittee should not concern itself with this decision.

Chairman Carson agreed that they are authorized by the legislature but this may be one area the subcommittee may disengage them, he said.

Continuing with subsection (2) of section 1, Professor Platt asked the subcommittee if it wished to incorporate all those included within the definition of police officer or to include only the sheriff, municipal policeman and State police.

Chairman Carson and Mr. Johnson were in agreement only these three should be authorized to apply for the warrants in addition to the prosecuting attorney.

Representative Stults remarked he would agree to this also if the issuing authority would be limited to the district court and above.

Mr. Paillette doubted that the district attorneys in eastern Oregon would accept this concept because, in those counties not having a district judge, they would be required to wait for a circuit judge in order to obtain a search warrant.

Professor Platt said this could be taken into account by stating "in counties of less than 5,000 inhabitants", thereby not opening up the entire state.

Mr. Paillette said this could be accomplished in the same way as the jurisdictional limits of the justice of the peace are handled and that is to increase their jurisdiction in those counties without a district judge.

Chairman Carson referred to the telephone type of situation which was discussed at the subcommittee's meeting of January 12 and asked if this would help solve the situation.

Professor Platt referred to a letter directed to him under date of January 13, 1972 from Mr. Snouffer, which letter contained a copy of section 1526 of the California Penal Code relating to taking and subscribing affidavits and transcribed statements in lieu of written affidavit.

Mr. Johnson asked what the procedure would be to handle the telephone communication. Mr. Snouffer said the statute requires the magistrate who is getting the information from the affiant to place him under oath over the telephone and record the conversation. This is then typed and made into a transcript and is filed along with the warrant. He believed a warrant was also filled out in blank to be filled in later. Mr. Snouffer was not certain this procedure was adequate in all respects but wanted to place this before the sub-committee for consideration.

Professor Platt remarked that the California Code is not clear as to the blank warrant.

Subsection (3), Professor Platt explained, covers the Fourth Amendment requirement for specificity and what the affidavit must contain. It could be more definite, he said, as far as directing the police officer as to what is expected of him, but if spoken generally, it allows the courts, in an area that is heavily subject to Supreme Court decisional law, to have play in the joints and perhaps permit some type of a central agency to develop administratively the kind of rules an officer would follow, which would include how the informer's credibility is established.

Mr. Snouffer referred to line 3 of subsection (3) where the application shall describe with particularity the individuals to be seized. In seizing an individual, does the draft talk about an arrest situation or a search warrant where the officer may try to seize a person who is a hostage in a house, he asked. Professor Platt said the latter is the intention of the draft but he did not recall this being referred to in the commentary.

Mr. Snouffer asked if it were necessary to refer to the individual to be seized. It would seem to him that this would invite much confusion. If the draft talks about individuals to be seized, he would worry that it would be construed as, in effect, an arrest warrant.

This is again followed up by saying "and the individuals or things to be seized" in line 5, Representative Stults remarked.

The word "individual" in line 2 of the subsection should remain in the draft, Mr. Paillette said, because there it is describing the individual to be searched.

It was suggested by Professor Platt to delete the words "individuals or" in lines 3 and 5, to which the subcommittee agreed.

Section 2. The hearing. Subsection (1) of this section raises policy questions, Professor Platt said. The section would require the issuing magistrate to make and keep a "fair summary" and a record of any testimony. This, he said, goes beyond what is now required; it does not have to be a written record, but a recording could be made. The only record of this at the present time is the affidavit itself which, in Professor Platt's opinion, may exclude much valuable information where there may be quite an exchange of conversation between the magistrate and the officer who is applying for the warrant, and perhaps even with the witness who may accompany the officer. This, then, would be very beneficial as the information would then become useful on a motion to suppress. The procedure does have a disadvantage, Professor Platt reported, in that it would slow the process somewhat.

Mr. Johnson asked the reason for the use of the words "authorized official" in subsection (2), and "magistrate" in subsection (1). This was an inconsistency in the draft, Professor Platt replied, and that this would now be "issuing authority" with the definition of district judge and above, and will be changed throughout the draft.

Mr. Paillette remarked that if the issuing authority would be the judge, perhaps the word "judge" should be used throughout the draft with this definition. If the Commission wishes this term changed, only the definition section would have to be changed.

Mr. Snouffer referred to the first meeting of the subcommittee which held the general consensus that the draft would contain the word "magistrate" throughout. The principle reason for retaining this, he said, was that the word has been in use since the first Code and the cases all speak of the magistrate.

Professor Platt said he would wish to avoid using a word that does have many case decisions behind it. The draft does not want to imply the old case laws and statutes have any connection with this draft. For this same reason he would also be inclined not to use the word "judge."

Subsection (2), Professor Platt reported, does not contain any policy problems.

Chairman Carson referred to line 4 of the subsection where "individuals or" is again repeated. This would get back to the hostage question again, he said.

To be consistent with the change made in section 1, the subcommittee deleted "individuals or" in subsection (2) and inserted the word "the" in place thereof.

Subsection (3) contains no change regarding secrecy with respect to the hearing, Professor Platt said, and that he was of the opinion there should not be secrecy on the return as once it is executed there is no reason for providing for it.

Mr. Milbank was more concerned about the defense attorney getting the return. He spoke of cases where the return has been hidden for at least a week's time.

Mr. Frost said it is within the keeping of the rules agreed on by the Bar Association regarding pre-trial publicity, not to give this information to the papers.

The newspapers do create a problem, Chairman Carson said, but what can be done to overcome this, he asked. Professor Platt said this was a concern and any officer repeating this information should be disciplined, but he would hesitate to impose a secrecy requirement impinging on the freedom of the press. Freedom of the press, Mr. Frost replied, is not freedom to interfere with justice in the courts.

Chairman Carson then referred to section 1 for the purpose of action by the subcommittee.

Representative Stults moved the approval of section 1 subject to the following amendments:

Subsection (1): delete "magistrate" and insert an appropriate term such as "issuing authority" or "judge", with the definition to mean district judges and above.

Subsection (2): delete "an" in line 4 and insert "a police", with the definition of police officer to mean sheriff, municipal policeman or State police.

Subsection (3): delete "individuals or" in lines 3 and 5.

The motion carried.

Mr. Frost said he was concerned about the phrase in subsection (3), lines 8 and 9, which states "as far as possible, the means by which the information was obtained." There would be times where he would not try to obtain a search warrant if he would have to place an informant's personal safety in jeopardy, he said.

Professor Platt said section 32 contains a specific provision which allows the courts to require that the informant's name be divulged, but this information can be kept under seal and there would be no disclosure made of the informant's identity beyond the court.

If there is this provision, and other information may be taken under oath, Mr. Frost argued, why must the affidavit set forth this information.

Mr. Snouffer was of the opinion this phrase was designed to get at the Aguilar and Spinelli requirements that the affidavit state how the informant obtained his information.

Mr. Frost was concerned the phrase "as far as possible" could be misconstrued by the judge and suggested section 1 make reference to section 32. Representative Stults' motion was further amended to contain this provision.

Section 2. The hearing. Chairman Carson asked for a motion to adopt section 2 subject to the following amendment:

Subsection (2): delete "individuals or" in line 4 and insert "the" in place thereof.

Section 2 was adopted as amended.

Section 3. Contents of search warrant. Subsection (2) specifically lists what must be in the warrant, Professor Platt explained. This does not depart from Oregon practice, but existing law does not specify this in detail and it would be more helpful to the officer, he said.

The phrase "unless otherwise provided under subsection (3) of this section" in paragraph (g) he said, was an error of the draftsman and should be deleted.

Nothing in the subsection is of a policy matter except perhaps paragraph (g) relating to the period of time not to exceed five days. If the officer returns the warrant seven or ten days after execution, it is a violation of the statute, Professor Platt said, but he was of the opinion the exclusionary rule should not necessarily apply. The draft attempts to give the defendant some defense against the effect of not being able to challenge the list.

Representative Stults said he was not in favor of this type of approach. If this five day limitation is not going to be enforced, the draft should state "a reasonable time."

Mr. Johnson said his interpretation was that this must be done within the five days, and if this is not the case he agreed with Representative Stults' suggestion.

Mr. Johnson moved the deletion of paragraph (c) in the subsection; this language, in his opinion, was not necessary.

Mr. Snouffer said one reason for keeping it in the draft would be that when the officer comes to the house he could show that the judge has made the finding based on sufficient grounds and the person would be more likely to acquiesce, but he was in agreement the paragraph was not really needed.

Professor Platt asked the subcommittee's wishes as to paragraph (g) with regard to the period not to exceed five days for the return of the executed warrant.

Existing law, Mr. Frost commented, states a search warrant must be executed and returned to the magistrate within ten days from its date unless the magistrate allows an extension of five days.

Subsection (3) would provide that the warrant must be executed within five days from the date of issuance, unless additional time is granted by the magistrate. Professor Platt called attention to an error in line 3 of the subsection. The word "execution" should be deleted and "issuance" substituted.

Subsection (4), Professor Platt explained, requires the warrant to be executed in accordance with the provisions of section 9 if it concerns intermingled documents.

Mr. Snouffer asked if the word "issuing" contained in line 6 of subsection (4) would be deleted. Mr. Paillette said this would be changed throughout the draft.

Mr. Snouffer referred to the last phrase of the subsection, "shall be impounded under appropriate protection where found." He said section 9, subsection (2), states that if the documents are manageable they shall be taken and sealed. He asked if subsection (4) should be written to be more consistent with section 9 (2).

Professor Platt remarked that this is done by reference.

Chairman Carson said that if subsection (2) of section 9 states the executing officer shall not examine the documents but shall either impound them or seal them, perhaps subsection (4) should continue to read: "...shall be impounded under appropriate protection where found,or removed pursuant to section 9." This proposal was agreeable to the subcommittee.

Mr. Snouffer inquired as to the language "reasonable cause to believe that the place to be searched is difficult of speedy access" contained in subsection (3) of the section (page 10, line 1). He asked if any determination had been made by the subcommittee as to whether the words "probable cause" and "reasonable cause" will be used interchangeably. Professor Platt said the draft should be changed to read "probable cause."

Chairman Carson proposed the phrase be restated to say the place to be searched is "not readily accessible."

Mr. Frost referred to the warrant being served during the daytime or nighttime. The magistrate, he said, now signs a warrant which

states it may be served at any time. Professor Platt replied the purpose of the draft is to exclude the nighttime search where there would be no necessity for it. If the judge allows a search during the nighttime without any consideration as to there being the necessity for an emergency search, this warrant would be suppressible. The object is to get away from the terroristic nighttime search where the officer himself may be in danger.

Mr. Snouffer asked the meaning of the phrase in subsection (3) "or under circumstances the occurrence of which is difficult to predict with accuracy." This is an attempt to give the officer some flexibility in an exceptional circumstance where he is unable to say for certain whether it will be a daytime or nighttime search, and the phrase could also relate to the extension allowance of the five day period, Professor Platt replied.

Mr. Frost contended that if the officer gets the warrant in the middle of the night, it is because this is the time he feels it should be served. Otherwise, he would wait until the morning.

Mr. Snouffer said in his experience as a district attorney he probably had 50 to 75 search warrants and not once did anyone give consideration as to whether it ought to be daytime or nighttime. He said approximately 75 percent of these warrants were executed at night. The language does serve a purpose, he felt, as it requires the judge to at least ask the officer for a reason and his determination for making the search at night would be inserted in his summary as required in section 2.

Representative Stults moved the adoption of section 3 with the following amendments:

Subsection (2): delete paragraph (c);

Delete "unless otherwise provided under subsection (3) of this section" in paragraph (g).

Subsection (3): delete "execution" and insert "issuance" in line 3, page 9;

Delete "reasonable" and insert "probable, line 1, page 10;

Delete "difficult of speedy access" and insert "not readily accessible" in line 2, page 10.

Subsection (4): Continuation of last sentence to read: "...or removed pursuant to section 9."

Mr. Snouffer referred to the phrase in subsection (1) of the section, "A search warrant issued pursuant to section 1...." Section 1, he said,

does not speak about the issuance, only the application. Section 2 speaks to the issuance.

Mr. Johnson moved the deletion of "section 1" and the insertion of "this Article" in subsection (1). The motion carried.

Representative Stults' motion to adopt section 3,as amended,was approved.

Chairman Carson asked Professor Platt to point out the discussion of the daytime-nighttime problem to the Commission at the time the draft is presented to it.

The subcommittee recessed at 3:15 p.m., reconvening at 3:30 p.m.

Section 4. Execution of warrant. Professor Platt said the change would be made in the draft in subsection (1) to delete "peace" and insert "police" in the two instances on line 3.

In subsection (2) the no-knock provision comes into play, he said. Line 4 of the subsection states the notice of the officer's authority may be given to the person in "apparent" control and is consistent with the consent provisions in the draft.

Subsection (3) provides that if the officer, upon reasonable cause determined by him, and not the issuing authority, knows the notice would endanger the successful execution of the warrant, he may execute the warrant without such prior notice. This will then fall back, without stating, the recent decisional law in Oregon on no-knock, e.g., State v. Mitchell.

Representative Stults asked if changing "reasonable cause" to "probable cause" would apply in this subsection. Professor Platt replied this is not the same problem because this is the objective determination of the police officer.

Mr. Johnson was in favor of spelling out in the draft what a successful execution would be. The draft is supposed to be a guideline, he said.

Professor Platt replied that what could be done is to allow the district attorneys or a central authority to state administratively what the officers should be aware of and what the rules are. These rules would be much easier to change should there be developments later, constitutionally and statutorily.

Representative Stults commented that this was an area of changing law and if the draft gets too specific it may create an out-of-date statute.

Professor Platt was of the opinion there are some areas that should be more general than others and this is one which should be subject to administrative help. The general exceptions to knock and announce are when (1) the police possess information which would lead them to reasonably believe the evidence would be destroyed, or (2) reasonably believe a culprit might escape, or (3) reasonably believe the police might face increased peril.

Mr. Johnson said his preference would be to insert these three rules in subsection (3).

Representative Stults referred to the phrase "If the executing officer has reasonable cause to believe...." and suggested the deletion of "has reasonable cause to believe" and the insertion of "reasonably believes." Professor Platt agreed with this proposal and said this reflects the language of the courts.

Subsection (4). Representative Stults asked how the subsection would relate to the no-knock situation, where the officer shall read and give a copy of the warrant to the person to be searched. Professor Platt replied the warrant should be read to the person although this would be a simultaneous type of rule. The officer would grab the evidence and then read the warrant.

Mr. Frost proposed changing the first word of the subsection, "Before" to "Upon." There was no objection from the subcommittee to this change.

Mr. Snouffer referred to subsection (2) relating to the "appropriate notice of his authority." Is this construed to mean the same as "identity", he asked. Mr. Snouffer commented that knock and announce seems to cover the identity of the officer who could be in plain clothes, for example, and the private citizen should be told how he stands with relation to the person attempting to execute the warrant.

The subcommittee acted on this proposal and inserted the word "identity," following "his" in line 3 of subsection (2).

Mr. Snouffer called attention to a grammatical error in line 4 of subsection (2). Lines 4 and 5 of the subsection should read "...searched or to the person in apparent control... [, as the case may be]. The phrase "as the case may be" should also be deleted in lines 4 and 5 of subsection (4), he said.

Referring to the next sentence of subsection (4), "If the premises are unoccupied by anyone in apparent and responsible control...", Mr. Snouffer said this is inconsistent with subsection (2) where it only refers to "apparent control." The subcommittee agreed to delete the words "and responsible" in the subsection.

Mr. Snouffer asked if the term "executing officer" in subsection (2) will be defined. At times, he said, several officers will be entering a home and the question arises if the "executing officer" would be the one in charge or the one who holds the warrant. Professor Platt said it was not his intention to single out a particular officer as the executing officer. Mr. Paillette was of the opinion the draft should be stated in terms that only a police officer shall execute a search warrant and go on to say that he may be assisted by others.

After further discussion, Mr. Johnson suggested that when such language problems arise, the problem should be referred back to the staff rather than taking the subcommittee's time in trying to reword the draft.

Chairman Carson moved section 4 be adopted with the following amendments:

Subsection (1): Delete "peace" in two instances in line 3, and insert "police".

Subsection (2): Line 3 amended to read "...give appropriate notice of his identity, authority and...."

Lines 4 and 5 amended to read "...to be searched [,] or to the person...[, as the case may be]".

Subsection (3): In lines 1 and 2 delete "has reasonable cause to believe" and insert "reasonably believes", and continuation of the subsection to state the three grounds for the no-knock search.

Subsection (4): In line 1, delete "Before" and insert "Upon";
Lines 4 and 5: Delete ", as the case may be";
Lines 5 and 6: Delete "and responsible".

The motion carried.

Section 5. Scope of the search. Professor Platt referred to the last sentence of the section. This is the application of the plain view rule, he said, limited however, by Coolidge v. New Hampshire.

Mr. Snouffer said that State v. Alexander, a case which he had recently argued before the Court of Appeals dealt with a search without a warrant. The officer arrested the person in his apartment and the evidence was beyond some room dividers and thus beyond the holding in Chimel. When the officer went into the apartment, he started looking around for evidence instead of just arresting the person and he finally did see something. Mr. Snouffer was trying to make the point that he was actually conducting a visual search from where he stood. The case

was reargued on the basis of the Coolidge rule, and four of the judges who joined together on the discussion of the plain view rule tried to distill all the prior U. S. Supreme Court cases. It was urged that there must be emergency circumstances to justify the immediate seizure of things within plain view and the discovery must be inadvertent. If there is reason for the police to believe beforehand there will be such evidence in the apartment, they must have a search warrant.

In view of the Alexander case, Mr. Snouffer was of the opinion the last sentence in section 5 has some definite problems as presently drafted. He commented that the decision in the case would probably be handed down in about two months and perhaps the subcommittee should delay action on the section. Mr. Snouffer spoke of the recent Garrett decision where a search warrant authorized seizure of narcotics. In looking through a drawer, the officers found a bank book and envelopes showing the defendant's name. This they seized as identification and even though it was not identified in the warrant, the Court said this was allowed. The Court did not address themselves to the emergency necessity of seizing it and they didn't discuss the inadvertency requirement either, because it was fairly apparent in the case that the evidence was discovered inadvertently.

Professor Platt suggested the sentence might be amended to read: "If in the course of such search, the officer discovers things, not specified in the warrant, in which he could not reasonably have anticipated having discovered...." In other words, he was trying to build in the basic rule that seems to appear in Coolidge, namely that the plain view rule is not unlimited, he said, but perhaps the section should remain as drafted until the decision comes down from the Court of Appeals in the Alexander case.

Mr. Paillette was of the opinion this should not be written into the section at this time, and the subcommittee adopted section 5 as written, subject to redrafting later, if necessary.

Section 6. List of things seized. If possible, Professor Platt said, the officer prepares the list before the person from whom he seizes the items and if no one is available, he is to secure the presence of one or more apparently credible persons to witness the preparation of the list. This could be a passerby, he said. The last sentence may go too far, he remarked, but was inserted in the draft for the subcommittee's consideration.

Mr. Paillette was in agreement as to the first sentence but was concerned with the last sentence in the section.

Mr. Snouffer was of the opinion there is a valid reason for this kind of language. It has apparently been taken from the Model Code and its commentary would undoubtedly say that by involving an independent

witness, the police officer, as well as the individual from whom the things are being seized, is being protected. If, for some reason, the person would attempt to sue the police department, it can use the independent witness to verify the list. This, he felt, would be a way of not using the assisting officers as witnesses, as they would all be the defendants if the person sued them for conversion.

Mr. Johnson objected to this requirement being set out in the statute and moved the deletion of the last sentence in the section.

The concern goes beyond the protection of the police, Professor Platt remarked. It would force the officer to describe the items more precisely with an independent witness.

Chairman Carson referred to a grammatical error in subsection (4) of section 4 and also contained in the last sentence of section 6, "If the premises are unoccupied by anyone in apparent control...." This should read, he said "If the premises are unoccupied or there is no one in apparent control...." and the staff was instructed to insert the proper language in both sections.

Mr. Johnson withdrew his motion to delete the last sentence of the section, and stated it was his desire only to eliminate the witness requirement.

Section 6 was then approved by the subcommittee, subject to the following amendments:

Line 5: Delete ", as the case may be".

Lines 7 through 11 amended to read: "If the premises are unoccupied or there is no one [by anyone] in apparent [and responsible] control, the executing officer shall [, if possible, secure the presence of one or more apparently credible persons to witness the preparation of the list, and shall] leave the receipt suitably affixed to the premises."

Next Meeting:

The subcommittee's next meeting on Search and Seizure, Preliminary Draft No. 2, beginning with section 7, was scheduled for Thursday, January 27, 1972 at 7 p.m.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission