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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 2

February 9, 1972

Minutes

Members Present: Senator Wallace P. Carson, Jr., Chairman
Representative Robert Stults

Excused: Representative Leigh Johnson
Attorney General Lee Johnson

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

Others Present: Captain Walter S. Hershey, Oregon State Police
Lt. Roger Herendeen, Oregon State Police
Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. John W. Osburn, Solicitor General, Department of Justice
Mr. Jackson L. Frost, Oregon District Attorneys' Association Liaison Committee
Mr. William Snouffer, Chairman, American Civil Liberties Union

Agenda: SEARCH AND SEIZURE
Preliminary Draft No. 2; January 1971

Senator Wallace P. Carson, Jr., Chairman, called the meeting to order at 1:30 p.m. in Room 315 State Capitol.

Mr. John Osburn, Solicitor General of the Department of Justice, represented Attorney General Lee Johnson at the meeting.

Chairman Carson moved that the minutes of the subcommittee meeting of January 18, 1972 be approved as submitted. The motion carried.

Search and Seizure; Preliminary Draft No. 2; January 1971

Section 7. Use of force in executing warrant. This section, Professor Platt explained, takes on a different approach than the one with respect to the use of force in executing an arrest. Force is not to be used except where it would be in self-defense or where the things to be seized will suffer or cause death or serious physical injury if the seizure is delayed. Deadly force, with respect to arrest warrants,

he said, is equated in the present Code with the severity of the crime for which the arrest is being made, and would not be the case here unless the above conditions applied.

Mr. Osburn asked what requirement would be envisioned of the officer in determining whether there is a substantial risk, where he will not be able to see the property he seeks to seize. If the officer is refused entrance and has a gun pointed at him, this section would not authorize him to use deadly force unless he makes some factual determinations. Where the officer knows no more than this, how will he make the determination, he asked.

Professor Platt replied the officer would make the initial decision as to whether he would have the right to self-defense in this type situation. A harder choice would be if the gun were absent but the person clearly implicates it will take more than physical force to execute the warrant. This would have to be left to the discretion of the officer.

Representative Stults commented that this decision would be based somewhat on what the officer believes he will be able to find. Professor Platt said if it were a case where the officer expects to find bombs, he certainly should be able to use deadly force, as these materials would be used for killing, but the officer's choice should be in favor of retreating rather than trying to overcome the force.

Chairman Carson asked if the definition of "executing officer" had been resolved. Mr. Paillette replied that the staff was directed to select a term and to standardize it throughout the draft.

Chairman Carson pointed out that the subcommittee had previously agreed there was no need to make application to "individuals or" and "suffer or cause or" in the draft and suggested this wording be deleted in line 9 of the section.

Mr. Snouffer asked if "serious physical injury" in line 10 applied to the officers who were executing the warrant. This is not the case, he was told, and it would relate to anyone.

Mr. Snouffer questioned the language in lines 3 and 4, "or to effect an entry or open containers." He suggested the language be changed to read "to enter or to open containers" but Mr. Paillette said this would change the meaning of the draft somewhat. Representative Stults remarked that it would be his interpretation that "effecting an entry" would be talking about getting into a building.

The subcommittee agreed to change the language to read: "...against persons, or to effect an entry, or to open containers...."

Mr. Paillette referred to the language in line 3, "deadly force" and suggested the language be changed to read "deadly physical force" throughout the draft in order to be consistent with the wording in the substantive code. Professor Platt replied this would be done.

Representative Stults moved the adoption of section 7, subject to the following amendments:

Lines 3 and 4 amended to read: "...against persons, or to effect an entry, or to open containers....";

Line 9: Delete "individuals or" and "suffer or cause or".

The motion carried.

Section 8. Return of the warrant. This section, Professor Platt reported, contains the details of the return of the warrant and the inter-court dealings with those records.

Subsection (1) states that the officer return the warrant to the issuing magistrate if it is not executed by the expiration time specified in the warrant. A written report detailing the reasons why the warrant was not executed must also be given, which, Professor Platt said, is new and oriented toward the problem of future litigation in the way the police are operating and the warrants are being issued. This would give the defendant some "tracks" in the case where the warrants are not being executed. Existing law, he said, only states that after the time has expired in which the warrants may be served, they become void. There is no requirement of the written report. This report, he believed, is advantageous to the potential defendant, especially if it is unexecuted, as there may be civil liability involved stemming from over-zealous execution of warrants, and would have implications in any criminal litigation as well.

Representative Stults asked if it becomes a matter of public record when a return is made. If this is the case, he felt that this would be the place where objections would come from police authorities and prosecutors.

Mr. Frost disagreed with this observation. He said he did not believe it is the business of the criminal procedure to build civil cases. This type of information is available in civil cases by the usual discovery methods, and he did not see that it serves the purpose of proper criminal procedure, to which Professor Platt replied that Oregon's civil discovery procedures are about the least productive of any of the systems presently in the United States.

Mr. Osburn asked what is being served by making this report. Protecting the defendants, Professor Platt replied. There is no reason for unexplained warrants left dangling. This could be due to the inefficiency of the police or the district attorney's office in getting

warrants and then finding out they can't be served. This could cause trouble in the courts, he said, by going to the judge and getting the warrant - the court itself may be interested in why it hasn't been executed and this, in addition to the defendant's rights, is his reasoning for the justification of the reports.

Mr. Frost spoke of a hypothetical situation where a potential defendant had moved, taking his drugs with him. He asked why a public record should be made of this when it would be very likely the investigation may be continued.

Professor Platt replied that the judge has the authority to keep any details in the record secret and in a case where they may be a continuing investigation which may entail more warrants, certainly the judge would want to keep these files sealed. The police will be protected on this score, he said.

Mr. Frost said that as a matter of police record there is always someone who reports back. He did not see what purpose is being served by setting up what standards must go into the explanation of the report. The judge can inquire into this if he has any questions. Professor Platt repeated that existing statutes state only that the warrant is void and it does not give the court or anyone authority to find out what has happened.

Mr. Frost argued that judges feel they have this authority because when a warrant is out for a certain period of time, they contact the district attorney and inquire as to the progress being made. The draft, he said, contains requirements which he did not feel serve the purpose of procedure in criminal cases.

Chairman Carson asked Mr. Frost if it is the last phrase in subsection (1) which he finds objectionable. Mr. Frost replied that if this were eliminated and the record would only show who returned the unexecuted warrant, he would be in agreement. This way the magistrate could go to the officer and find out the answers, he said, and maintained there was no purpose to be served by filing it with the clerks of the court.

Professor Platt remarked that if the report requirement were deleted, it would not serve the purpose of the continuing interest the defendant might have because he cannot discover the reason why the warrant was not executed.

Chairman Carson observed that, in building a case for a civil litigation, if the return has been made without being executed the plaintiff would probably want to take depositions and he would have a place to start by checking the records.

Mr. Frost expressed concern as to how far the report goes, and who decides whether or not it is sufficient. Unless some standards are set

up as to specificity, the officer and the prosecutor will try to do it as simply as possible. This could bring on a relatively worthless report unless it is defined what the report should say and he said this would be getting into an area that is difficult to administer.

Mr. Snouffer remarked that all the officer would be required to do is submit a report stating the defendant had moved and taken his drugs with him, and this would be the reason for the unexecuted warrant. He said the filing of reports could be a very effective deterrent against so-called harassment situations.

Mr. Osburn moved the deletion of the last phrase of subsection (1).

Professor Platt said it might be appropriate to add, in the commentary to the section, the observation that the judge himself may make inquiries and that these inquiries and responses to them may be made of record.

Subsection (2) relates to the execution of the warrant. Professor Platt stated that ORS 141.130 requires that the officer executing the warrant shall return it "forthwith." The draft specifies a time within which the warrant should be returned. If the warrant was not returned within this period, the exclusionary rule would not automatically be tripped unless there is a very long delay, he said. Section 28 of the draft comes into play here and consists of a number of guidelines to aid the court in deciding whether or not to grant the motion to suppress. This gives a more flexible approach to the exclusionary rule application than now exists and has the impact of allowing the courts to admit the evidence seized, even though the warrant was returned later than the required date.

Subsection (3). The subcommittee agreed to delete ", pursuant to subsections (1) and (2) of this section,".

Subsection (4). Professor Platt explained that this is a requirement for the issuing magistrate, if he does not have jurisdiction to hear the case, to transmit the warrant and the records of proceedings to the clerk of the appropriate court having jurisdiction over the offense. The practice in Lane County, he said, is that the district judge holds the warrant until the circuit judge requests it, but the draft is a more positive way to get them into the proper court files.

Mr. Frost stated that the problem is that if there is no case pending in the court which would hear it, the clerk would not know what to do with it. A better answer to the problem, he said, might be to submit the records when the case is in the other court.

Chairman Carson said the draft speaks to the clerk of the court and in many cases he is the clerk of both courts. Professor Platt contended that even though there is only one clerk, it should be in the circuit court file, rather than district.

Mr. Osburn commented that the general rule for the warrant transmittal to the circuit court file is by motion to suppress evidence. Copies are brought from the district court and become part of the circuit court file, with the original remaining in the district court files. Frequently, he said, no person will be arrested on a charge which has resulted in a search warrant being issued and a return made.

Professor Platt was of the opinion that keeping the two files was an unnecessary step. The original was all that was needed.

After further discussion, the subcommittee agreed to continue subsection (4) to read ", when ordered by such court."

Section 8 was adopted subject to the following amendments:

Subsection (1): Delete ", together with a written report of the reasons why it was not executed." (lines 4 and 5);

Subsection (3): Delete ", pursuant to subsections (1) and (2) of this section," (lines 3 and 4);

Subsection (4): Insert ", when ordered by such court" at the end of the subsection.

The commentary to the section to state that the judge may make inquiries and such inquiries and responses to be made part of the record.

Mr. Frost referred to subsection (2) of the section. He asked what was anticipated with the "verified report of the facts and circumstances of execution" and how extensive this report would have to be. Mr. Paillette was of the opinion there was not much difference in this than what the return now states. Mr. Frost said the only thing now reported is the inventory, as well as the time and day. This would be the "facts and circumstances" Mr. Paillette said.

Mr. Frost contended the subsection should be more specific as to what was required. Professor Platt remarked there was no way to try to specify what should be reported on as there is no way to determine what the circumstances of a particular service would be, and he recommended the draft be general now. If it is found there is an abuse, then the provision could be amended to make it more specific as to the contents of the report.

Mr. Frost inquired if the exclusionary rule would be invoked if the report was not satisfactory. Professor Platt replied it would not, although it could be applied in an appropriate circumstance where the report was needed on a motion to suppress and was not being properly furnished to the court.

Mr. Snouffer remarked that the report the officer dictates for his own inter-department file will come out on cross-examination on the motion to suppress and he could not see any objection to having this provision in the draft. He agreed that the general provision would be better than trying to isolate all the possible circumstances which might occur.

Section 9. Execution and return of warrants for documents. Professor Platt explained that this section contains the procedure for handling intermingled documents which are seized under the search warrant, and applied also to seizure incidental to an arrest where there is not a warrant. In cases where the officer would not be able to determine which documents or part of a single document he is entitled to seize under the warrant, he will seal and bring them into the court, which will establish the ground rules for the reading of these documents. There would be an adversary hearing, he said, with the defendant being entitled to counsel and this now makes a judicial procedure in this area.

Because of the lengthiness of the second sentence in subsection (3), the committee directed the staff to re-write the sentence.

Mr. Milbank asked if the district court holds the hearing and orders certain documents returned, would this order be binding on the circuit court if it commences to be a felony prosecution. Professor Platt replied it would and that if the returned documents are needed, another search warrant would have to be executed.

Mr. Osburn remarked that when it involves a motion to suppress filed in the district court, and not a motion to controvert, the court is not entitled to return the property.

Professor Platt reported that sections 21 through 23 contain specific provisions with respect to disposition of things seized. Chairman Carson recommended that the subcommittee discuss the matter of whether the order would be binding when it discussed these later sections of the draft.

Mr. Milbank suggested that the second sentence in subsection (3) contain a time limit on the hearing.

Mr. Snouffer remarked that subsection (3) states the executing officer must report "as promptly as possible" the facts and circumstances of the impounding or removal of documents and was of the opinion this should be within the same time limit as the return on the warrant.

Mr. Paillette was concerned that the subsection seemingly states that there will be a hearing before anyone has even requested one. Professor Platt replied that there may not actually be an adversary hearing - if the defendant does not want to appear he would just give notice. It would be the police, however, who would want the hearing in order to determine which documents they will be allowed to keep, he said.

Chairman Carson suggested the problem be resolved by stating in the draft that the officer must request a hearing; that the fact and circumstances of the impounding be reported within three days and that the hearing be held within 10 days thereafter.

Subsection (4) relates to the handling and disposition of the documents and states the defendant does not waive his privilege against self-incrimination.

Mr. Snouffer referred to the last sentence in the subsection and indicated it would be more appropriate to place it in a separate subsection.

Mr. Frost asked if this sentence precludes the prosecution from any evidence that might develop as a result of what the defendant might have said. Professor Platt replied that the fruit of the poisonous tree doctrine would apply, other than in a prosecution for perjury or contempt as stated in the draft.

Mr. Osburn was of the opinion that investigative leads based upon testimony at such a hearing could be followed up. This involves different principles than the fruit of the poisonous tree, which concerns those things taken unlawfully by the police, he said, and that the draft simply involves the principle that a man may not be convicted by his testimony.

Representative Stults moved the adoption of section 9, subject to the following amendments:

Subsection (3): Redraft to state that within three days a report shall be made of the facts and circumstances of the impounding or removal of documents;

Require that the hearing shall be requested by the officer;

Delete: "As soon thereafter as the interest of justice permits" and insert "Within 10 days";

Rephrasing of second sentence into two sentences.

Subsection (4): Last sentence to become subsection (5).

The motion carried.

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

Section 10. Definitions. Sections 10 through 14, Professor Platt explained, deal with inspectorial searches and searches pursuant to licensed activities. Sections 10 through 13 are covered by these definitions and section 14 is not affected. Typical of the one kind

of search would be zoning inspections and fire inspections which are not accomplished pursuant to a license. The second type would concern itself with all those having licensed activity, such as restaurants, fishing, hunting and the like.

There is some case law, he said, where the inspections are authorized but there is no licensing authority and which approved inspectorial searches but required search warrants. The draft, in sections 10 through 13, takes note of the Camara and See cases but section 14 is the section specifically set aside to deal with the inspections pursuant to a licensed activity. Section 14 authorizes more intrusion in a search of premises than do sections 10 through 13 and it may be necessary to obtain an inspectorial order in those sections, he explained.

Representative Stults posed a hypothetical situation where a game warden had set up a roadblock during hunting season, making an inspection of all automobiles and in the course of his inspection, he finds evidence of another crime. Representative Stults wondered if this evidence could be kept.

Professor Platt replied that he did not feel there was a clear answer with respect to game wardens intruding into private automobiles and trailers and was of the opinion that not too much be authorized in the section 14 searches. The approach taken in subsection (2) of section 14 is that a search is allowed. The language in the subsection does not specifically respond to Representative Stults' hypothetical but it does set up the scheme whereby administrative standards are to be imposed on the officers by the agency which is authorized by statute to conduct the search. This is a good place to allow administrative standards for searches, he said, and is especially desirable in this type of situation where the officer would have a detailed list of guidelines to follow. Another good reason for this administrative rule would be that the statutes would not have to contain all the details and that it would be easier to amend the rules rather than the statutes, he contended.

Professor Platt spoke of his conversation with Captain Hershey concerning the problems along the coast where the game warden searches the fishing boats. Does this give him the right to also examine private cabins, he asked. This situation would certainly be appropriate for publication as an administrative standard for search and would have the advantage of informing the officer where he can and can't look and would also advise the public what to expect.

Chairman Carson remarked that if the standards were set up and the public was aware the police only checked certain areas of the fishing boat, they may put their illegal supply of fish elsewhere. This would be a challenge to the drafter of the administrative rules, Professor Platt replied, as he would have to insert an escape hatch which must be based on the observations of the officer himself and the

search of the private quarters would only be authorized under certain circumstances. He reported it was Captain Hershey's belief that the officers desire some type of limitations set up for them.

Chairman Carson inquired as to the term "inspectorial search." Professor Platt said this word has common usage and is the one used most often.

Chairman Carson suggested the word "into" on line 1 of subsection (1) be deleted, which was agreeable to the subcommittee.

Mr. Milbank asked the meaning of the phrase in subsection (1) "and other laws or ordinances duly enacted for the promotion of public well-being." Professor Platt replied that the third paragraph of the summary responds to this.

Representative Stults moved the adoption of section 10, subject to the deletion of "into" on line 1 of subsection (1). The motion carried.

Section 11. Inspectorial search by consent. The section, Professor Platt explained, states that the inspector first seeks voluntary consent and if he is refused this consent he would then obtain an inspection order, which is detailed in section 12. It is anticipated, he said, the consent will be voluntary in most cases.

Subsection (2) directs the officer to inform the person of his authority and reason for the inspection and no further Miranda type warnings are required because this is a typically non-criminal procedure. If the inspector sees evidence of another crime, he is entitled to inform the police and an arrest may follow, but there would be no warning to the resident that he can be subjected to criminal penalties above and beyond the purpose of the search, Professor Platt explained.

Mr. Milbank reported that the defense argument in this case would be that if an inspector finds something illegal while inspecting a fire hazard, the defense would argue they consented to the fire hazard inspection only and not to the evidence found and that if this were not built into the draft he felt this argument would stand. Professor Platt agreed this could happen and that under the general consent provisions it is provided that the consent is limited by what is sought in the way of consent. By operation of the other consent provisions, there could be a limit, he said. This section, however, lessens the warning which is given to the person, but may open the floodgate as the consent may seem too broad.

Subsection (4) states that, unless there is a good reason for inspecting without prior notice, the notice must be given.

Chairman Carson asked the meaning of "adequate notice." This could be by telephone, mail or newspapers, Professor Platt explained.

Mr. Osburn asked if this notice would be necessary if the consent was already obtained. Sanitarians may have a report of salmonella in a slough, and as a result of this people are advised they wish to examine the sewage facilities. Would there be any reason to have a requirement of advance notice in this type of situation, he asked.

Subsection (5) would come into play in this type situation, Professor Platt replied.

Chairman Carson presented a situation where a builder would wish to close in a drainfield but it must be inspected by the Board of Health or such other agency. The builder asks them to inspect, but it would be his interpretation of the draft that the agency would still have to send him adequate notice of the time and purpose of the inspection. Professor Platt said that if everyone was willing for the inspection to take place, it should not be necessary for any prior notice.

Chairman Carson asked if a highway stop for brakes, lights, etc. would be considered under subsection (5). Professor Platt replied it would and the Chairman contended that the idea to stop the cars would not be to apprehend anyone.

Chairman Carson was of the opinion that the purpose of prior notice was good, but could create problems inasmuch as some cities may not abide by it. He suggested deleting the prior notice on consent and strengthen the fact, in subsection (2), that consent does not have to be given.

Mr. Paillette commented that at times, cities put out a general notice, such as for a fire inspection, thus alerting the residents. This is what he had in mind, Professor Platt stated. Rather than the individual notices mailed, he suggested the publication in the newspapers of these inspections.

Mr. Snouffer asked if the problem in subsection (4) could be resolved by stating that "Except in accordance with the provisions of subsections (1) and (5) of this section...." This would make it clear that if there was a voluntary consent situation, the prior notice would not be triggered.

Chairman Carson asked the subcommittee's position as to whether there should be any statutory requirement for prior notice in any sense on a voluntary search. Mr. Osburn said the subcommittee may want to make prior notice a requirement for obtaining an inspection order, when consent is refused.

Professor Platt reported that where consent is refused, there is a detailed provision in section 12 which does require an adversary hearing, so there will be notice given in this case.

Chairman Carson observed that if the prior notice requirement is deleted, perhaps a further step should be taken requiring the inspector to advise the person that he may withhold his consent.

Mr. Snouffer said the purpose of the prior notice would be relevant to the degree of voluntariness of the consent. If the person has one weeks' notice, this would give him time to call his attorney and inquire as to whether he must give the consent.

Mr. Milbank, referring to subsection (3), said the subsection authorized the inspection during the daytime unless there is a reasonable basis for carrying out the inspection at night. He said other statutes preserve the sanctity of the Sabbath for a summons and asked if this should be contained in the subsection. It was the decision of the subcommittee not to insert such language in the draft.

Section 11 was approved subject to the following amendments:

Delete subsection (4);

Delete subsection (5);

Add requirement in subsection (1) or (2) that individual be advised that an affirmative statement of consent need not be granted.

Section 12. Inspection orders. This section provides that if the inspector is denied consent he then makes application for the inspection order which is made to any magistrate authorized to issue search warrants. He must show he has been refused consent before being entitled to receive the order, Professor Platt explained. There must be a notice and hearing provided for the issuance of the order and the person to be inspected is entitled to notice and appearance at an adversary hearing which would not be secret.

Representative Stults commented that a homeowner may be away from his home and the fire marshall has reason to believe a wiring difficulty may burn down the neighborhood. There would be no way to serve the notice and no way to obtain consent, he said. Professor Platt replied that section 13 contains a provision that a consent is not required if an emergency exists.

Chairman Carson referred to the phrase in subsection (4) "reasonable legislative or administrative standards." He asked if this would require the magistrate to declare that a legislative statute is unreasonable and therefore unconstitutional. Professor Platt said there may be legislative standards involved, set up by city councils in their ordinances.

Mr. Paillette inquired if the purpose of the hearing is to determine if the underlying regulation is reasonable or whether the particular request for a search is reasonable.

Chairman Carson asked what the administrative standards would be. Professor Platt replied that this would relate to section 14. The housing or building inspector can adopt his own administrative rules and state what may or may not be done with respect to inspections. Chairman Carson replied that "standards" to him would be getting into administrative law on how the inspection would be conducted. He agreed that the inspector, when seeking the order, should have to prove that he is within the law to have the right to inspect, but did not feel it necessary to include the standards prior to the inspection and suggested the draft state "in accordance with law."

Mr. Milbank was of the opinion section 14 would not be needed if there were another statute which authorizes a special type of search. He asked if the right of privacy is being protected or eroded by this section. There is a great invasion of privacy, Professor Platt replied. What the draft tries to do is build in some minimal right to privacy. Chairman Carson said that the place to do that is within the statute which grants the right to search under the different codes and not in the section dealing with obtaining the order to inspect.

Professor Platt said that his intention was to put in the draft an inspection order system which will cover those situations where there is no provision at all for an inspection order or a search warrant, and to cover the situation where there is one, but where there may be great diversity in how the warrant is obtained.

Mr. Snouffer referred to paragraph (a) of subsection (5): "Upon final approval...." He asked if the word "final" is needed and this was subsequently deleted by the subcommittee.

Mr. Snouffer called attention to the fact that a time limit should be included in the paragraph. Mr. Milbank agreed with this and asked if it should be a continuing inspection order. Professor Platt remarked that if a violation is found, a charge may be brought for violation of a criminal ordinance or the person may be sent notice requesting him to comply within 30 days, and would not be in favor of the continuing order.

The subcommittee agreed to insert a time limit of 14 days from the issuance of the order in which to conduct the search.

Mr. Snouffer asked if a time limit would be desirable in paragraph (e) and it was the subcommittee's decision to continue the paragraph to state that the order must be returned within 10 days after the date of the inspection.

Representative Stults referred to the sworn report required in the paragraph and as this was not the intention of the subcommittee, the word "verified" was inserted, thereby eliminating the notary public necessity.

Representative Stults moved the adoption of section 12, subject to the following amendments:

Subsection (4): Delete "reasonable legislative or administrative standards" and insert "law".

Subsection (5), Paragraph (a): Delete "final" in line 1, page 37; Delete "search" in line 3, page 38, and insert "inspection"; Continuation of paragraph to state the inspection is to be conducted within 14 days of the date of the issuance of the order.

Paragraph (b): Delete "search" and insert "inspection" in line 1; Continuation of paragraph to state that deadly force may be used under circumstances specified in section 13 (2).

Paragraph (e): Delete "sworn" and insert "verified" in line 3; Continuation of paragraph to state that the order must be returned within 10 days after the date of the inspection.

The motion carried.

The subcommittee agreed it would next meet on Tuesday, February 22, 1972 at 10 a.m. in Room 315 State Capitol.

The meeting adjourned at 4:30 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission