

See: Minutes of Subcommittee No. 3
1/22/70, p. 14, Vol. XI, Tapes #90 & 91

Minutes of Commission
4/3/70, p. 34, Vol. IX, Tape #52

Criminal Law Revision Commission
311 Capitol Building
Salem, Oregon

ARTICLE ____ . OFFENSES INVOLVING FIREARMS AND DEADLY WEAPONS

Preliminary Draft No. 1; January 1970

Reporter: Roger D. Wallingford

Subcommittee No. 3

ARTICLE ____ . OFFENSES INVOLVING FIREARMS AND DEADLY WEAPONS

Preliminary Draft No. 1; January 1970

Section 1. Firearms and deadly weapons;
definitions. As used in this Article, unless the
context requires otherwise:

Existing Law ORS 166.210

(1) The definition of "narcotic drug" in
ORS chapter 474 and "dangerous drug" in ORS chapter 475 apply to
this Article.

(2) "Blackjack" means a blackjack, slung shot, billy, sand-
club, sandbag or bludgeon.

(3) "Deface" means to remove, cover, alter or destroy the
manufacturer's serial number or any other distinguishing number
or identification mark.

(4) "Detention facility" means any place used for the confine-
ment of persons charged with or convicted of a crime or otherwise
confined pursuant to a court order.

(5) "Firearm" means any pistol, revolver or other handgun
which may be concealed upon the person.

(6) "Gravity knife" means any knife with a blade which is
released from the handle by the force of gravity or the application
of centrifugal force which, when released, is locked in place by
means of a button, spring, lever or other device.

(7) "Knife" means any dagger, dirk, knife or stiletto with
a blade over three and one-half inches in length, or any other
dangerous instrument over three and one-half inches in length
capable of inflicting cutting, stabbing or tearing wounds.

(8) "Machine gun" means a weapon of any size or designation, loaded or unloaded, from which two or more shots may be fired by a single pressure on the trigger device.

(9) "Peace officer" means a sheriff, constable, marshal, municipal policeman or a member of the Oregon State Police.

(10) "Public servant" means a public officer or employe of the state or of any political subdivision thereof or of any governmental instrumentality within the state.

(11) "Sawed-off shotgun" means a shotgun with its barrel reduced to less than 18 inches in length.

(12) "Shotgun" means a weapon designed or redesigned to be fired from the shoulder and to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger.

(13) "Switchblade knife" means a knife the blade of which opens automatically by hand pressure applied to a button, spring or other device in its handle.

(14) "Unlawfully" means in violation of the provisions of sections 2 to 4 of this Article, or except as authorized by any other Oregon statute.

COMMENTARY - FIREARMS AND DEADLY WEAPONS;
DEFINITIONS

A. Summary

These 14 terms are used to define the 12 substantive firearm and deadly weapon offenses proposed in this Article. The definitions are largely self-explanatory. Additional commentary is directed to the following terms:

Subsection (5) defines "firearm" as any type of handgun capable of being concealed upon the person. This would presumably include "zip-guns" and other forms of homemade handguns that fire a projectile by use of an explosive energy.

Subsection (7), in defining "knife", sets the prohibited blade length at in excess of three and one-half inches. This applies to carrying a concealed weapon in the second degree, with the prohibited length conforming to existing law.

The definition of "machine gun" in subsection (8) is a restatement of the existing definition in ORS 166.210 (2).

A "sawed-off shotgun" is defined in subsection (11) to mean a shotgun with a barrel less than 18 inches in length. This conforms to federal law.

The terms "unlawfully" defined in subsection (14) refers to existing and future regulatory statutes applicable to firearms and any other relevant state statute.

B. Derivation

Subsection (2) "Blackjack", Michigan Revised Criminal Code section 5701 (a).

Subsection (3) "Deface", New York Revised Penal Law section 265.00 (7).

Subsection (5) "Firearm", New York Revised Penal Law section 265.00 (3).

Subsection (6) "Gravity knife", New York Revised Penal Law section 265.00 (5).

Subsection (7) "Knife", Michigan Revised Criminal Code section 5715 (3).

Subsection (8) "Machine gun", ORS 166.210 (2).

Subsection (11) "Sawed-off shotgun", drafted by reporter.

Subsection (12) "Shotgun", New York Revised Penal Law section 265.00 (12).

Subsection (13) "Switchblade knife", Michigan Revised Criminal Code section 5701 (j).

Subsection (14) "Unlawfully", Michigan Revised Criminal Code section 5701 (k).

C. Relationship to Existing Law

POSSESSING OR USING FIREARMS

166.210 Definitions for ORS 166.230, 166.250 to 166.270, 166.280, 166.290 and 166.410 to 166.470. As used in ORS 166.230, 166.250 to 166.270, 166.280, 166.290 and 166.410 to 166.470:

(1) "Pistol," "revolver" and "firearms capable of being concealed upon the person,"

apply to and include all firearms having a barrel less than 12 inches in length.

(2) "Machine gun" means a weapon of any description by whatever name known, loaded or unloaded, from which two or more shots may be fired by a single pressure on the trigger device.

The only change in existing definitions is in "firearms" as it applies to a weapon "capable of being concealed upon the person." ORS 166.210 (1) restricts such weapons to those having a barrel less than 12 inches in length. The proposed definition of firearm does not include the length requirement. Hence, a weapon capable of being concealed upon the person would violate the carrying a concealed weapon statute regardless of its size or length.

OREGON REVISED STATUTES

POSSESSING OR USING FIREARMS

166.210 Definitions for ORS 166.230, 166.250 to 166.270, 166.280, 166.290 and 166.410 to 166.470. As used in ORS 166.230, 166.250 to 166.270, 166.280, 166.290 and 166.410 to 166.470:

(1) "Pistol," "revolver" and "firearms capable of being concealed upon the person," apply to and include all firearms having a barrel less than 12 inches in length.

(2) "Machine gun" means a weapon of any description by whatever name known, loaded or unloaded, from which two or more shots may be fired by a single pressure on the trigger device.

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TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK REVISED PENAL LAW

§ 265.00 Definitions

As used in this article and in article four hundred, the following terms shall mean and include:

1. "Machine-gun" means a weapon of any description, irrespective of size, by whatever name known, loaded or unloaded, from which a number of shots or bullets may be rapidly or automatically discharged from a magazine with one continuous pull of the trigger and includes a sub-machine gun.

2. "Firearm silencer" means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearms to be silent, or intended to lessen or muffle the noise of the firing of any gun, revolver, pistol or other firearms.

3. "Firearm" means any pistol, revolver, sawed-off shotgun or other firearm of a size which may be concealed upon the person.

4. "Switchblade knife" means any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in the handle of the knife.

5. "Gravity knife" means any knife which has a blade which is released from the handle or sheath thereof by the force of

TEXT OF NEW YORK REVISED PENAL LAW (CONT'D.)

gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.

6. "Dispose of" means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer and otherwise dispose of.

7. "Deface" means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

8. "Gunsmith" means any person, firm, partnership, corporation or company who engages in the business of repairing, altering¹ assembling, cleaning, polishing, engraving or trueing, or who performs any mechanical operation on, any pistol or revolver. Gunsmith shall not include a wholesale dealer.

9. "Dealer in firearms" means any person, firm, partnership, corporation or company who engages in the business of purchasing, selling, keeping for sale, loaning, leasing, or in any manner disposing of, any pistol or revolver. Dealer in firearms shall not include a wholesale dealer.

10. "Licensing officer" means in the city of New York the police commissioner of that city; in the county of Nassau the commissioner of police of that county; in the county of Suffolk a county judge of that county; and elsewhere in the state a judge or justice of a court of record having his office in the county of issuance.

11. "Rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

12. "Shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger. L.1965, c. 1030; amended L.1967, c. 791, § 46, eff. Sept. 1, 1967.

¹ So in original. A comma probably should follow "altering".

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definitions]

Sec. 5701. The following definitions apply in this chapter:

(a) "Blackjack" includes any blackjack, slung shot, billy, sand club, sand bag or bludgeon.

(b) "Deface" means to remove, deface, cover, alter or destroy the manufacturer's serial number or any other distinguishing number or identification mark.

(c) "Dispose of" means to dispose of, give, give away, lease, loan, keep for sale, offer, offer for sale, sell, transfer or otherwise dispose of.

(d) "Firearm silencer" means any instrument, attachment, weapon or appliance for causing the firing of any gun, revolver, pistol or other firearm to be silent, or intended to lessen or muffle the noise of the firing of any such weapon.

(e) "Gas gun" means any gas ejecting device, weapon, cartridge, container or contrivance designed or equipped for ejecting any gas that will cause death, serious physical injury or physical injury, or will temporarily incapacitate.

(f) "Gravity knife" means any knife that has a blade released from the handle or sheath thereof by the force of gravity or the application of centrifugal force, that when released is locked in place by means of a button, spring, lever or other device.

(g) "Machine gun" means any firearm, whatever its size and usual designation, that shoots automatically more than 1 shot, without manual reloading, by a single function of the trigger.

(h) "Pistol" is defined as in section 1 of Act No. 372 of the Public Acts of 1927, as amended, being section 28.421 of the Compiled Laws of 1948.

(i) "Seller" is defined as in section 1 of Act No. 372 of the Public Acts of 1927, as amended, being section 28.421 of the Compiled Laws of 1948.

(j) "Switchblade knife" means any knife the blade of which opens automatically by hand pressure applied to a button, spring or other device in its handle.

(k) "Unlawfully" means in violation of Act No. 372 of the Public Acts of 1927, as amended, being sections 28.421 and following of the Compiled Laws of 1948, or except as authorized by any other Michigan regulatory statute or federal law. The burden of injecting the issue that he has acted in compliance with law is on the defendant, but this does not shift the burden of proof.

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Section 2. Issuance of license to carry a concealed firearm. (1) Upon satisfactory proof that the applicant is of good moral character and that good cause exists for its issuance, the Department of State Police has authority to issue a license to carry a concealed firearm for a period not to exceed one year from date of issue. Payment of a \$3 fee must accompany the application and any subsequent renewal, to be turned over to the State Treasurer to be credited to the General Fund.

Existing Law
ORS
166.290

(2) All applications for licenses shall be filed in writing, signed by the applicant, and shall include the name, occupation, residence and business address of the applicant; his fingerprints, age, height, weight, color of eyes and hair, and reason for desiring the license.

(3) Any license issued shall include all the information required by subsection (2) of this section, and a description of the weapon authorized to be carried, giving name of manufacturer, serial number and caliber.

(4) When a license is issued a record of the application and a duplicate of the license shall be maintained by the Department of State Police. The applications and licenses shall be uniform throughout the state, upon forms to be prescribed by the Attorney General.

COMMENTARY - ISSUANCE OF LICENSE TO CARRY
A CONCEALED FIREARM

A. Summary

It is necessary to include in this Article certain regulatory provisions affecting the licensing and sale of firearms. Similar statutes are presently found in the Oregon criminal code. To exclude them in revising the substantive firearms offenses would leave essential aspects of firearms control in limbo.

Section 2 sets out the procedure for the application for, and issuance of, licenses to carry a concealed firearm. In brief outline, those requirements may be summarized as follows:

(1) An application filed with the Department of State Police.

(2) Such application containing specific background information, and accompanied by a \$3 fee.

(3) A finding by the State Police that the applicant is of good moral character and that good cause exists for issuance of the license.

(4) The term of any license issued may not exceed one year, after which it may be renewed upon application.

(5) The Department of State Police shall maintain records of all applications filed and licenses issued on forms to be prescribed by the Attorney General.

B. Derivation

The form of the section is taken from ORS 166.290.

C. Relationship to Existing Law

The proposed section is patterned after ORS 166.290, with one substantial revision. The present statute vests authority in issue such licenses to the county sheriff, board of police commissioners, chief of police, city marshal, town marshal or other head of the police department of any city, county, town or other municipal corporation of this state. The proposed section would limit the authority to issue licenses to carry concealed weapons to the Department of State Police.

The issuance of a permit to carry a concealed weapon confers upon the licensee the right to carry the weapon in any county of the state. 25 Op Atty Gen 172 (1950-52) states:

"There is nothing in the foregoing statute which purports to limit the license to carry concealed weapons to the area of the granting authority. On the contrary, the fact that the license may be issued to any 'person' who possesses the required qualifications and that 'such applications and licenses shall be uniform throughout the state,' seems to indicate that a license issued by the sheriff of one county is effective in any place in the state until it has expired."

The provisions of ORS 166.290 were enacted in 1925. During that period some legitimacy could be advanced for the argument that local authorities were best qualified to judge a person's fitness to carry a concealed weapon. Increased social mobility since that time has cast serious doubt on that assumption. The demands of effective law enforcement require that two criteria be consistently applied in the issuance of licenses to carry a concealed firearm: (1) a close screening of the applicant's qualifications to carry a concealed weapon, and (2) issuance of a license only where an urgent need is clearly shown.

Since a license authorizes the licensee to carry a concealed weapon anywhere in the state, the issuing authority should have statewide jurisdiction. It is submitted that only the Department of State Police has the investigative, administrative and enforcement resources necessary to effectively implement this licensing program.

OREGON REVISED STATUTES

166.290 Issuance of license to carry concealed weapons. (1) The sheriff of a county, and the board of police commissioners, chief of police, city marshal, town marshal or other head of the police department of any city, county, town, or other municipal corporation of this state, upon proof before said person or board, that the person applying therefor is of good moral character, and that good cause exists for the issuance thereof, have authority to issue to such person a license to carry concealed a pistol, revolver or other firearm for a period of one year from the date of the license, upon payment of a fee of 50 cents, and a like fee upon any renewal thereof. The fees shall be turned over to the treasurer of such city, county, town or other municipal corporation and credited to the general fund thereof.

(2) All applications for licenses shall be filed in writing, signed by the applicant, and shall state the name, occupation, residence and business address of the applicant; his age, height, weight, color of eyes and hair, and reason for desiring a license to carry the weapon. Any license issued upon the application shall set forth the foregoing data and shall, in addition, contain a description of the weapon authorized to be carried, giving the name of the manufacturer, the serial number and the caliber thereof. When such licenses are issued by a sheriff a record thereof shall be kept in the office of the county clerk; when issued by police authority such record shall be maintained in the office of the authority by whom issued. The applications and licenses shall be uniform throughout the state, upon forms to be prescribed by the Attorney General.

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Section 3. Licensing provisions to sell
firearms at retail; limitation and conditions.

Existing
Law

ORS

166.430

(1) Licensing authorities of any municipality within this state may grant licenses in form prescribed by the Attorney General, effective for not more than one year from date of issue, permitting the licensee to sell firearms at retail within the municipality, subject to the following conditions:

(a) The business shall be carried on only in the building designated in the license.

(b) The license or a certified copy of the original shall be prominently displayed on the premises.

(c) No firearm shall be delivered on the day of the purchase application, unless the purchaser either is personally known to the seller or presents clear evidence of his identity.

(d) No firearm or imitation thereof, or placard advertising the sale or transfer of a firearm, shall be prominently displayed on the premises.

(e) When delivered to a buyer, a firearm shall be unloaded and securely wrapped.

(f) A register of sales and transfers shall be maintained in compliance with the provisions of section 4 of this Article.

(2) Breach of any of the conditions enumerated in subsection (1) shall subject the license to forfeiture.

COMMENTARY - LICENSING PROVISIONS TO SELL
FIREARMS AT RETAIL; LIMITATION AND CONDITIONS

Section 3 represents a restatement of ORS 166.430 and certain provisions found in ORS 166.470. The penalty provided for violation of any of the requirements is forfeiture of the retail seller's license. Section 10 provides a criminal penalty for the illegal sale of firearms, or the use of a fictitious name or address by a purchaser of a firearm.

The only departure from existing law is the addition of paragraph (f) to subsection (1), which in effect makes an improperly maintained firearms transfer register ground for forfeiture of the dealer's retail sales license.

OREGON REVISED STATUTES

166.430 Licenses to sell at retail. Licensing authorities of any city, county, town or other municipality within this state may grant licenses in form prescribed by the Attorney General, effective for not more than one year from date of issue, permitting the licensee to sell at retail within the municipality, pistols, revolvers and other firearms capable of being concealed upon the person, subject to the following conditions, for breach of any of which the license is subject to forfeiture:

(1) The business shall be carried on only in the building designated in the license.

(2) The license or a copy thereof, certified by the issuing authority, shall be displayed on the premises where it can easily be read.

(3) No pistol or revolver shall be delivered on the day of the application for the purchase, or unless the purchaser either is personally known to the seller or presents clear evidence of his identity.

(4) No pistol or revolver, or imitation thereof, or placard advertising the sale or other transfer thereof, shall be displayed in any part of the premises where it can readily be seen.

(5) When a pistol or revolver is delivered it shall be unloaded and securely wrapped.

166.470 Limitations and conditions for sales of concealable firearms. No person shall sell, deliver or otherwise transfer any pistol, revolver or other firearm capable of being concealed upon the person to any person whom he has cause to believe to be within any of the classes prohibited by ORS 166.270 from owning or possessing such firearms, nor to any minor under the age of 18 years. Such firearm shall not be delivered to the purchaser on the day of the application for its purchase, and when delivered it shall be securely wrapped and unloaded. When neither party to the transaction holds a dealers' license, the vendor shall not sell or otherwise transfer any such firearm to any other person within this state who is not personally known to the vendor. Violation of this section is a misdemeanor.

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Section 4. Firearms transfer register;
form and content of register and by whom main-
tained. (1) Except as provided in subsection
(4) of this section, every person in the business

Existing Law
ORS
166.420

of selling, leasing or otherwise transferring firearms, whether he is a retail dealer, pawnbroker or otherwise, shall maintain a register in which shall be entered the time, date and place of sale, the make, model, manufacturer's number and caliber or other marks of identification on the firearm. The register shall be prepared by and obtained from the State Printer in the form provided in subsection (5) of this section, and shall be furnished by the State Printer to the dealer on application at a cost of \$5 per 100 leaves, in duplicate.

(2) The purchaser of any firearm shall be required by the dealer to sign his name and affix his address to the register in duplicate. The salesman shall affix his signature in duplicate as a witness to the signature of the purchaser.

(3) The duplicate sheet of the register shall, on the evening of the day of sale, be placed in the mail, postage prepaid, and properly addressed to the Department of State Police, Salem, Oregon.

(4) This section does not apply to wholesale dealers in their business transactions with retail dealers, nor to the regular or ordinary transportation by wholesale or retail dealers of unloaded firearms as merchandise.

(5) The register provided for in this section shall be in the following form:

Series No.....
 Sheet No.....

ORIGINAL
(DEALERS' RECORD OF SALE OF FIREARM

State of Oregon

Notice to Dealers: This original is for your files. If spoiled in making out, do not destroy. Keep in books. Fill out in duplicate.

Carbon duplicate must be mailed on the evening of the day of sale, to the Oregon Department of State Police. Failure to comply is punishable as a misdemeanor or by forfeiture of seller's retail firearms license, or both. Use carbon paper for duplicate. Use indelible pencil.

Sold by..... Salesman.....
 City, town or township.....
 Description of arm (state whether revolver or pistol).....
 Maker..... Number..... Caliber.....
 Name of purchaser..... Age..... years
 Permanent address (state name of city, town or township, street and number of dwelling).....
 Height..... feet..... inches. Occupation.....
 Eyes..... Hair.....
 If traveling, or in locality temporarily, give local address.....
 Signature of purchaser.....
 (Signing a fictitious name or address is a misdemeanor. To be signed in duplicate.)
 Witness..... Salesman.
 (To be signed in duplicate.)

Series No.....
 Sheet No.....

DUPLICATE
(DEALERS' RECORD OF SALE OF FIREARM

State of Oregon

Notice to Dealers: This carbon duplicate must be mailed on the evening of the day of sale as set forth in the original of this register page. Violation of this law is a misdemeanor.

Sold by..... Salesman.....
 City, town or township.....
 Description of arm (state whether revolver or pistol).....
 Maker..... Number..... Caliber.....
 Name of purchaser..... Age..... years
 Permanent address (state name of city, town or township, street and number of dwelling).....
 Height..... feet..... inches. Occupation.....
 Eyes..... Hair.....
 If traveling, or in locality temporarily, give local address.....
 Signature of purchaser.....
 (Signing a fictitious name or address is a misdemeanor. To be signed in duplicate.)
 Witness..... Salesman.
 (To be signed in duplicate.)

COMMENTARY - FIREARMS TRANSFER REGISTER;
FORM AND CONTENT OF REGISTER AND BY WHOM MAINTAINED

A. Summary

Section 4 restates in substance the provisions of ORS 166.420. Certain minor changes have been made to conform to the other firearms provisions; the Department of State Police has been designated as the records depository for copies of registers, the cost of the register forms to be supplied by the State Printer has been raised from \$3 per hundred to \$5, and the penalty provisions have been incorporated into the sections defining the substantive offenses. Slight alteration in the register form has been proposed, including reference to the Department of State Police and removal of the question relating to race of the applicant.

The issue of firearms registration has been the most controversial aspect of the continuing debate on gun control. House Bill 1546 was introduced during the 1969 Legislative Assembly. It would have required all owners of firearms, including rifles, to obtain a permit from the State Police to own, possess, sell or transfer a firearm. The bill was tabled in the House Fish and Game Committee.

Firearms registration legislation proposed by the present draft is limited to handguns, and is applicable only when the firearm is transferred by a licensed dealer or when an applicant desires to carry a concealed firearm.

OREGON REVISED STATUTES

166.420 Register of transfers of concealed weapons; form and content of register and by whom to be maintained. (1) Except as provided in subsection (5) of this section every person in the business of selling, leasing or otherwise transferring a pistol, revolver or other firearm, of a size capable of being concealed upon the person, whether he is a retail dealer, pawnbroker or otherwise, shall keep a register in which shall be entered the time, date and place of sale, the name of the salesman making the sale, the make, model, manufacturer's number, caliber or other marks of identification on the pistol, revolver or other firearm. The register shall be prepared by and obtained from the State Printer in the form provided in subsection (6) of this section, and shall be furnished by the State Printer to the dealer on application at a cost of \$3 per 100 leaves, in duplicate.

(2) The purchaser of any firearm capable of being concealed upon the person shall sign, and the dealer shall require him to sign, his name and affix his address to the register in duplicate and the salesman shall affix his signature in duplicate as a witness to the signature of the purchaser. Any person signing a fictitious name or address is guilty of a misdemeanor.

(3) The duplicate sheet of the register shall, on the evening of the day of sale, be placed in the mail, postage prepaid, and properly addressed to the board of police commissioners, chief of police, city marshal, town marshal or other head of the police department of the city, county, town or other municipal corporation wherein the sale was made. If the sale is made in a district where there is no municipal police department, the duplicate sheet shall be mailed to the county clerk of the county wherein the sale is made.

(4) Violation of this section by any person engaged in the business of selling, leasing or otherwise transferring such firearm is a misdemeanor.

(5) This section does not apply to wholesale dealers in their business intercourse with retail dealers, nor to wholesale or retail dealers in the regular or ordinary transportation of unloaded firearms as merchandise by mail, express or other mode of shipment, to points outside of the city, county, town

or municipal corporation wherein they are situated.

(6) The register provided for in this section shall be substantially in the following form:

Series No.....
Sheet No.....

ORIGINAL
(DEALERS' RECORD OF SALE OF REVOLVER OR PISTOL)
State of Oregon

Notice to Dealers: This original is for your files. If spoiled in making out, do not destroy. Keep in books. Fill out in duplicate.

Carbon duplicate must be mailed on the evening of the day of sale, to head of police commissioners, chief of police, city marshal, town marshal or other head of the police department of the municipal corporations wherein the sale is made, or to the county clerk of your county if the sale is made in a district where there is no municipal police department. Violation of this law is a misdemeanor. Use carbon paper for duplicate. Use indelible pencil.

Sold by..... Salesman.....
City, town or township,
Description of arm (state whether revolver or pistol),
Maker..... Number..... Caliber.....
Name of purchaser..... Age..... years
Permanent address (state name of city, town or township, street and number of dwelling).....
Height..... feet..... inches. Occupation.....
Color..... Skin..... Eyes..... Hair.....
If traveling, or in locality temporarily, give local address,
Signature of purchaser.....
(Signing a fictitious name or address is a misdemeanor. To be signed in duplicate.)
Witness..... Salesman.....

(To be signed in duplicate.)

Series No.....
Sheet No.....

DUPLICATE
(DEALERS' RECORD OF SALE OF REVOLVER OR PISTOL)
State of Oregon

Notice to Dealers: This carbon duplicate must be mailed on the evening of the day of sale as set forth in the original of this register page. Violation of this law is a misdemeanor.

Sold by..... Salesman.....
City, town or township,
Description of arm (state whether revolver or pistol),
Maker..... Number..... Caliber.....
Name of purchaser..... Age..... years
Permanent address (state name of city, town or township, street and number of dwelling).....

Height..... feet..... inches. Occupation.....
Color..... Skin..... Eyes..... Hair.....
If traveling, or in locality temporarily, give local address,
Signature of purchaser.....
(Signing a fictitious name or address is a misdemeanor. To be signed in duplicate.)
Witness..... Salesman.....

(To be signed in duplicate.)

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Section 5. Possession of a deadly weapon in the second degree. (1) A person commits the crime of possession of a deadly weapon in the second degree if:

(a) He knowingly possesses a blackjack, switchblade knife, gravity knife or metallic knuckles; or

(b) Having recklessly or negligently killed or injured another with a rifle, shotgun or firearm, he at any time thereafter owns or has in his possession a rifle, shotgun or firearm of any kind or description.

(2) Paragraph (b) of subsection (1) does not deprive the people of this state of the right to bear arms in defense of themselves or the state.

Section 6. Possession of a deadly weapon in the first degree. A person commits the crime of possession of a deadly weapon in the first degree if:

(1) He knowingly possesses a machine gun or sawed-off shotgun; or

(2) Having been convicted of a felony under a state or federal law he owns or has in his possession any firearm.

Existing
Law

ORS

166.220

166.240

166.250

166.270

166.275

166.300

166.310

166.410

Section 7. Carrying a concealed weapon in the second degree.

A person commits the crime of carrying a concealed weapon in the second degree if he knowingly carries a knife concealed on or about his person.

Section 8. Carrying a concealed weapon in the first degree.

A person commits the crime of carrying a concealed weapon in the first degree if he knowingly and unlawfully carries a firearm concealed on or about his person or concealed in a vehicle that he is driving or occupying.

COMMENTARY

POSSESSION OF A DEADLY WEAPON IN THE SECOND DEGREE

POSSESSION OF A DEADLY WEAPON IN THE FIRST DEGREE

CARRYING A CONCEALED WEAPON IN THE SECOND DEGREE

CARRYING A CONCEALED WEAPON IN THE FIRST DEGREE

A. Summary

To achieve a clear perspective of the extent to which the states may exercise their police power in firearms legislation, it is necessary to examine the constitutionally grounded federal power in the same area.

The tenth amendment to the United States Constitution states:

Powers reserved to states or people. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U. S. v. Butler, 297 US 1, 63 (1936), holds:

"All powers not expressly granted to the federal government by the Constitution or reasonably to be implied from those expressly conferred, are reserved to the states."

Northwestern Fertilizer Co. v. Hyde Park, 97 US 659, 667 (1878):

"The police power is generally acknowledged to have been reserved to the states."

Hannibal and St. Joseph R. R. v. Husen, 95 US 465, 471 (1878), and Munn v. Illinois, 94 US 113, 125 (1877), held:

"Police power includes making regulations to promote domestic order, morals, health, and safety and this same power justifies the exclusion of property dangerous to the property of citizens of the state, and extends to the manner in which each citizen shall use his own property."

Firearms control clearly falls under the exercise of police power and unless its regulation may be achieved in areas over which the federal government exercises control by virtue of express or implied authority of the Constitution, it cannot maintain control of the subject matter.

The second amendment to the United States Constitution states:

Right to bear arms. A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The second amendment has been widely discussed and the doctrine is now fairly settled. Although it provides a basis for the slogan "constitutional right to bear arms" and some minor court decisions appear to grant an individual right to so bear arms (See U.S. v. Miller, 26 F Supp 1002 (WD Ark 1939)), the overwhelming weight of authority is contrary:

"The Second Amendment in the Federal Constitution does not apply to state governments but is only controlling upon the federal government." Miller v. Texas, 153 US 535, 538 (1894).

"It is further held that the second amendment restriction applies only to the right of the state to maintain a militia and not to the individual's right to bear arms." U.S. v. Miller, 307 US 174, 178 (1939).

The commerce clause of the United States Constitution, **art. I, §8, states:**

The Congress shall have the Power to regulate Commerce with foreign Nations and among the several states,.....

U.S. v. Darby, 312 US 100, 114 (1941), construed this granted power:

"Congress may exclude from interstate commerce articles whose use in the states for which they are destined, may be injurious to the public health, morals or welfare even though the state does not regulate their use, and such regulation is not a forbidden invasion of state power because its motive or consequence restricts the article's use within the states of distribution."

By recourse to the full federal **power granted** under the commerce clause, as construed by the U.S. Supreme Court, the federal government could effectively preempt the entire field of firearm legislation. They have not seen fit to do so. Section 233 of the Civil Obedience Act, 18 USCA (Supp 1968), expressly provides that the Act is not intended to preempt the field. This provision is in accord with similar provisions in other 1968 federal legislation. (See Omnibus Crime Control and Safe Street Act, 1 US Code Cong and Ad News 283, 927 (1968), and Gun Control Act, 927 (1968)). These provisions are in furtherance of the purpose of federal gun control laws, i.e., to aid local and state law enforcement agencies.

Federal restrictions on persons who may receive firearms or ammunition interstate or by foreign commerce are found in the Gun Control Act and the Omnibus Crime Control and Safe Streets Act, which, in effect, provide overlapping coverage in some areas:

Gun Control Act, 922 (d), (g), (h) (1968), prohibits receipt of any firearm by:

- (1) Persons under indictment or convicted of a felony.
- (2) Fugitives from justice.
- (3) Drug addicts.
- (4) Mental defectives.

Title VII of the Omnibus Crime Control Act (Unlawful Possession or Receipt of Firearms), 1 US Code Cong & Ad News 283 (1968), declares:

"Felons, veterans discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship...are declared unfit to receive, transport or possess any firearm."

There are a number of other federal statutes directed at firearm control:

Gangster-type weapons: Int Rev Code of 1954, sec 5801 et seq, 68 A Stat 722.

Handguns sent through the mails: 18 USC 1715 (1964).

Use and possession of firearms on commercial aircraft: 49 USC 1472 (1) (1964).

Confiscation of firearms from convicted felons: 18 USC 3611 (1964).

Possession and discharge of firearms on Capitol Grounds: 40 USCA 193 (f) (Supp 1968).

Deportation of aliens: 8 USC 1251 (a) (14) (1964).

Sale and distribution of firearms and destructive devices: 18 USCA 231, 232, 233; 921 et seq (Supp 1968).

Pertinent sections in the Oregon Constitution are:

Oregon Constitution, article I, section 27:

Right to bear arms; military subordinate to civil power. The people shall have the right to bear arms for the defence (sic) of themselves, and the State, but the Military shall be kept in strict subordination to the civil power [.]

Oregon Constitution, article I, section 31:

Rights of aliens; immigration to state.

White foreigners who are, or may hereafter become residents of this State shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native born citizens. And the Legislative Assembly shall have power to restrain, and regulate the immigration to this State of persons not qualified to become Citizens of the United States.

Section 31, above, was held violative of due process in Namba v. McCourt and Neuner, 185 Or 579, 204 P2d 569 (1949), wherein the court stated at p. 612:

"A class of persons may be singled out and special burdens may be placed upon it, provided the class manifests characteristics which to a real and substantial extent distinguish it from all other persons and justify the imposition of the burden. But color, as well as race and creed, is an unacceptable distinguishing characteristic. Likewise, if the purpose of this law is to render Oregon inhospitable to ineligible aliens, and thereby induce them to avoid us, Truax v. Raich, [239 US 33, 60 L Ed 131, 36 S Ct 7], demands that we reject that as a legitimate purpose for state legislation."

80 Harv L Rev 1328 (1967) discusses this issue in an article titled "Firearms: Problems of Control," at p. 1338:

"....Other states, in provisions even more difficult to justify, prohibit aliens from owning handguns. **Hawaii; Mass.; Mich.** These provisions may stem from a desire to restrict transients; this, though, could be better accomplished through residence requirements. Or, they may result from a residue of war-time fear of saboteurs, cf 1940 Handbook of the National Conference of Commissioners on Uniform State Law 334, or from an attempt to regulate alien gangster elements." (Footnotes omitted.)

In 12 Marq L Rev 138, 142 (1928), an article titled "The Right to Keep and Bear Arms" discusses state constitutional limitations on an alien's right to own and possess firearms:

"Although it is commonly said that the right to keep and bear arms is not created by constitutions but

that only its infringement is forbidden, eighteen constitutions appear to be broad enough to create such a right, even if it were heretofore non-existent." (Citing Oregon and Michigan as two of the 18 states).

Michigan Constitution, article II, §5, reads:

"Every person has a right to bear arms for the defense of himself and the state."

In People v. Zenillo, 219 Mich 635, 189 NW 927 (1922), the court held that aliens as well as citizens had a right, under the Michigan Constitution, to possess firearms, whether a revolver, rifle or shotgun, for the defense of themselves and their property.

In view of these authorities, the present statute prohibiting aliens from owning or possessing a firearm has not been continued. There would appear to be no distinguishing characteristics of this class affording a rational basis for making such a distinction.

Despite an abundance of statutory provisions in the firearms area, judicial scrutiny has been centered on ORS 166.230 through 166.270. These statutes relate to the possession and concealment of certain weapons. Sections 5 through 8 attempt to restate that coverage with increased clarity and conciseness. A degree structure has been proposed consistent with the inherent dangerousness of the particular type of weapon proscribed.

Section 5 encompasses a class of strictly prohibited weapons, as well as a class of persons whose prior conduct with weapons justifies limiting their future ownership or possession.

Subsection (1) (a) makes it a crime to knowingly possess certain types of deadly weapons, including those defined under "blackjack" in section 1. These are primarily aggressive, harm-producing articles. The section does not prohibit their ownership, but denies a person the right to possess or "carry" such a weapon.

Subsection (1) (b) of section 5 makes it a crime for a person who has killed or injured another through the reckless or negligent use of a rifle, shotgun or firearm to own or possess such a weapon. Society is entitled to protection from persons whose past conduct with firearms has evidenced a wanton disregard for the safety of others.

Section 6 makes criminal the knowing possession of a machine gun or sawed-off shotgun, and prohibits persons convicted of a felony from owning or possessing a firearm.

Section 7 penalizes carrying a concealed knife. "Knife" is defined in section 1 to mean any instrument with a blade over three and one-half inches in length capable of inflicting cutting, stabbing or tearing wounds.

Section 8 prohibits carrying a concealed firearm. "Firearm" is defined in section 1 to include any pistol, revolver or other handgun capable of being concealed upon the person. Coverage extends to a vehicle which the actor is driving or occupying.

See section 12 of this Article, which enumerates certain classes of persons exempted from coverage of sections 5 through 8.

B. Derivation

Section 5 (a) - Michigan Revised Criminal Code section 5705.

(b) - CRS 166.300.

Section 6 (a) - Michigan Revised Criminal Code section 5705.

(b) - ORS 166.270.

Section 7 - Michigan Revised Criminal Code sections 5715 and 5716.

Section 8 - Michigan Revised Criminal Code section 5715.

C. Relationship to Existing Law

ORS 166.240 and 166.250 proscribe the carrying of concealed weapons. The pertinent provisions of the statutes read:

ORS 166.240. Carrying of concealed weapons.

"(1) Any person who carries concealed about his person in any manner, any revolver,

pistol, or other firearm, any knife...or any dirk, dagger, slung shot, metal knuckles, or any instrument by the use of which injury could be inflicted upon the person or property of any other person, shall be punished...by a fine of not less than \$10 nor more than \$200, or by imprisonment...not less than five days nor more than 100 days, or both."

ORS 166.250. Unlawful possession of weapons.

"(1)...any person who possesses or has in his possession any machine gun, or carries concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person, without having a license to carry such firearm...is guilty of a misdemeanor, unless he has been convicted previously of any felony or of any crime made punishable by this section...in which case he is guilty of a felony."

The Oregon Supreme Court has never discussed ORS 166.240 but has referred to ORS 166.250 when treating criminal possession of concealed weapons.

Although the courts have formulated many statements regarding legislative objectives sought in enacting concealed weapon statutes, a common thread runs throughout many of them: The legislative intent to protect the public by preventing an individual from having available a weapon of which the public was unaware, and which might be used by that individual in a fit of passion; and the legislative intent to protect the individual by withholding the means whereby he might commit an act of violence in a situation where his emotions were suddenly aroused.

At common law the offense of carrying concealed weapons involved riding or going about, and not merely holding or possessing a weapon. This is no longer true under the statutes, for it is almost universally agreed that locomotion is not needed in order for the weapon to be "carried" within the meaning of the statute. For the purposes of the statute, the word "carrying" is equivalent to the word "bears." 43 ALR2d 492, 499.

"Concealment upon or about" the person is an essential element of the offense under either ORS 166.240 or 166.250. The question "whether or not it is unlawful for a person who has not secured a permit to carry a concealed weapon, as

provided by law, to carry a pistol or revolver capable of being concealed upon the person in a vehicle when the weapon is not concealed therein, but is placed on the seat or is carried on the steering wheel in plain sight, and in view of anyone who may look into the vehicle" was considered in 19 Op Atty Gen 742 (1938-40). The Attorney General relied upon People v. Frost, 125 Cal App 794, 12 P2d 1096, wherein the California court passed upon the same question raised under a statute similar to Oregon's. The California court held:

"....On view of the whole act we find the conclusion clear and inescapable that it does not prohibit the carrying of a firearm in a vehicle unless it be concealed...."

Assuming the same construction would be applied to our statute by the Oregon court it can be said that it is not unlawful to carry, without a permit, a pistol or revolver in a vehicle when such weapon is not concealed therein.

Whether or not a weapon is "concealed" depends largely upon the facts and circumstances surrounding the possession. The annotation at 43 ALR2d 492 states several generalizations derived from relevant fact patterns:

First, "A defendant who wears a deadly weapon underneath his coat is generally held to have violated the concealed weapons statute." Id. at 529.

Second, "If the weapon is covered by the shirt, overalls, blouse, or other similar article of clothing worn by the defendant, he is usually held to have contravened the statute." Ibid.

Third, "Unless the statute requires that the weapon be carried fully exposed to view, the cases generally hold that a pistol stuck inside the waist band of the defendant, or worn in a holster attached to his belt, is not carried concealed within the meaning of the statute, although the result may differ if the weapon is also covered by the coat or shirt of the defendant." Id. at 530.

Fourth, "It is almost universally agreed that holding a weapon in the hand does not constitute an offense under the concealment statute." Id. at 532.

Fifth, "The majority of cases support the statement that the defendant's carrying of a weapon hidden in a

bag, bundle, lunch basket, traveling bag, or other similar article which is held in the hand or placed under the arm, is generally sufficient to constitute a transgression of the statute." Id. at 534.

Finally, "The cases generally hold an infringement of the statute where the weapon, having been hidden by some portion of the defendant's anatomy, is later revealed after the defendant has changed his position." Id. at 536.

Firearms carried openly in belt holsters are not concealed within the meaning of ORS 166.250. See ORS 166.250 (3).

The courts are split on whether or not the offense of carrying a concealed weapon requires a criminal intent. Three positions have been taken:

(1) State v. Holbert, 416 SW2d 129 (1967), held that evidence of intent to conceal the gun or to carry it concealed is required.

(2) People v. Weisman, 34 Misc2d 670, 229 NYS2d 171 (1962), held that guilty knowledge or intent is not an element of the crime of unlawful possession of firearms.

(3) People v. Foster, 178 NE2d 402 (Ill 1961), requires a showing that the defendant intended to place the weapon where it was placed; but it is not necessary to show that the defendant placed the weapon in a place specifically intending to conceal it.

Subsection (2) of ORS 166.250 provides an exception to the operation of the unlawful possession of weapons statute. A citizen of the United States over 18, who is a resident of Oregon or sojourning in this state may own, possess or keep within his residence or place of business a firearm without complying with the requirements of permits or licenses for such weapons. (See 31 ALR 1128, "Scope and effect of exception in statute forbidding carrying of weapons, as to person on his own premises.")

Of the statutes dealing with the possession of firearms, ORS 166.270 has received the most frequent judicial scrutiny. The statute reads:

ORS 166.270 Aliens and convicts forbidden to possess arms. "Any unnaturalized foreignborn person or any person who has been convicted of a felony against the person or property of another or against the Government of the United States or of this state,

or of any political subdivision of this state, who owns, or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person, or machine gun, shall be punished...."

So far as ex-convicts are concerned, the statute has been held not to violate the equal protection clause of the Fourteenth Amendment. State v. Robinson, 217 Or 612, 343 P2d 386 (1959). However, as applied to "unnaturalized foreign-born persons," the validity of the statute in the face of an equal protection challenge has not been determined. The defendant in State v. Robinson, supra at 615, argued that "if ORS 166.270 is recognized as valid, it is possible to adjudge guilty an alien who possesses in his homeland a firearm but who is completely unarmed during his visit in Oregon." Since the defendant lacked standing to raise the argument, the court found it unnecessary to decide the issue.

The constitutionality of statutes denying aliens the right to possess firearms has received mixed judicial reaction. In People v. Zerillo, 219 Mich 635, 189 NW 927 (1922), a resident alien was convicted of possessing a revolver without a permit. The defendant contended that his conviction violated **article II, section 5**, of the state constitution which provided:

"Every person has a right to bear arms for the defense of himself and the state." (Emphasis added).

Relying on this constitutional provision, the court, in reversing his conviction, said:

"...while the legislature has power, in the most comprehensive manner, to regulate the carrying and use of firearms, that body has no power to constitute it a crime for a person, alien or citizen, to possess a revolver for the legitimate defense of himself and his property." (Emphasis added).

A contrary result was reached in Ex parte Rameriz, 193 Cal 633, 226 P 914 (1924). The statute in question was similar to Oregon's:

"...no unnaturalized foreign born person...shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person...."

Holding the statute valid, the court said:

"In our opinion the legislation constitutes a proper exercise of the police power, and is not invalid under the 14th Amendment. The purpose of the act is to conserve the public welfare, to prevent any interference with the means of common defense in times of peace or war, to insure the public safety by preventing the unlawful use of firearms."

More recently, People v. Hendozo, 60 Cal Rptr 5 (1967), held that neither intent nor knowledge that the possession was illegal were necessary elements of the offense of ownership or possession by an alien of a concealed weapon.

Since it is generally agreed that "the Second Amendment is a limitation only upon the power of the Congress and the national government and not that of the state," State v. Cartwright, 246 Or 120, 418 P2d 822 (1966), the ultimate question of the constitutionality of a statute denying aliens the right to possess arms in Oregon must be based on an interpretation of the Oregon Constitution. **Article I, section 27,** states:

The people have the right to bear arms for the defense of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.

There are three elements comprising the offense defined by ORS 166.270: (1) An unnaturalized foreignborn person or a person who has been convicted of a felony (2) who owns, possesses or has under his custody or control (3) a firearm capable of being concealed upon the person or a machine gun.

Failure to set forth the previous conviction in the indictment is a fatal bar to a lawful conviction under ORS 166.270, since prior conviction is a material element of the crime. State v. Hoover, 219 Or 238, 312, 347 P2d 69 (1959). However, the law does not require that the facts constituting the commission of the prior crime be established to the satisfaction of the jury. The sole question before the jury is whether or not the defendant was previously convicted of a felony. It is a matter of law for the court to determine whether the crime committed constituted a felony against the property of another. State v. Anderson, 241 Or 18, 419 P2d 778 (1965).

The gravamen of the crime is the possession of a weapon. It is of no consequence whether the weapon was loaded or unloaded. State v. Cartwright, *supra* at 318. The central purpose of the possession and control requirement of the statute was discussed in State v. Hoover, *supra* at 311, where in rejecting the argument that the language was unconstitutionally vague the court said:

"....For the purposes of disposing of this assignment of error we need not probe the outer limits of 'possession', 'custody', or 'control'. It is enough to say that in possessing and controlling the weapon long enough to threaten others with it and thereafter in keeping it about him until overtaken by police the defendant violated the statute at its most central point."

In State v. Miller, 238 Or 411, 414, 395 P2d 159 (1964), the court was faced with the issue of whether the defendant had such weapons "in his possession or under his custody or control." Examining the evidence, the court held that it was sufficient to establish possession. The court's discussion follows:

"Knowledge by the driver of a car that there are concealable weapons in the car, available for the driver's use, is evidence of possession, custody or control of such weapon. In Commonwealth v. Whitman, 199 Pa Super 631, 186 A2d 632 (1963), it was held that a defendant passenger's knowledge of the presence of the weapons in the car was sufficient to convict such passenger of possession of concealed weapons.

"We hold that there is adequate circumstantial evidence from which the court could find that Miller had knowledge of the weapons, and thus was in 'possession...custody or control' of such weapons.

"The long time during which the defendant had been present in and operating the car, the obviousness of the revolver which was sticking out from under the front seat, and the presence of the weapon in the glove compartment, are particularly strong circumstantial evidence supporting the inference of knowledge."

However, there may be innocent possession of a concealable firearm by an ex-convict. State v. Cartwright, *supra* at 136, hypothesized such a possible instance where an ex-convict faced with a sudden onslaught and immediate threat

of great bodily harm or possible death seized a pistol within his reach for the purpose of defending himself. In People v. Furey, 217 NYS2d 189, 13 A2d 412 (1965), it was held that an ex-convict who had found a weapon and was carrying it for the purpose of delivering it to the police was not guilty of a crime.

Finally, the statute does not prohibit the possession by an ex-convict of any and all firearms, but only a pistol, revolver, or other firearm capable of being concealed upon the person, or a machine gun. Thus it is legal for such a person to possess a rifle or shotgun. State v. Cartwright, supra at 136.

If the weapon is in such defective condition that it could not be fired it is not a "firearm" within the meaning of the statute. However, a pistol in apparently good condition is presumptively operable for the purposes of prosecuting an ex-convict for illegal possession of a concealable firearm and the state need not prove that it was capable of being fired. State v. Thomas, 244 Or 377, 419 P2d 837 (1966). If the weapon was in fact incapable of being fired it is a matter of affirmative defense. State v. Cartwright, supra at 138, quoting with approval from Couch v. Commonwealth, 255 SW2d 478, 479.

Although the Oregon court has never defined the "requisite intent" of the offense, State v. Johnson, 244 Or 60, 415 P2d 519 (1966), it seems clear that knowledge of the possession is a prerequisite. State v. Miller, supra. However, no specific criminal intent is required. People v. Nieto, 55 Cal Rptr 546 (1966); People v. Vanderburg, 29 Cal Rptr 421 (1963); State v. Wheeler, 403 P2d 1015 (Kan 1965). In fact, it is not necessary to prove a general intent in the prosecution's case in chief, but evidence of a legal excuse for such possession should be submitted to the jury. People v. Harmon, 180 NYS2d 939 (1959). Thus it would appear that a general intent to do the proscribed act plus knowledge of the possession form the requisite intent with any matter tending to establish a legal justification for the possession to be raised as an affirmative defense.

ORS 166.230 provides an enhanced penalty for "Any person who commits or attempts to commit any felony...while armed with any pistol, revolver, machine gun or other firearm capable of being concealed upon the person, without having a licence or permit to carry such firearm...." Two recent cases discuss the manner in which the state must proceed under this statute. State v. Blacker, 234 Or 131, 136, 380 P2d 789 (1963), held that "the facts constituting the

aggravation of an alleged offense must be set forth in the indictment." Therefore, in order to take advantage of the enhanced penalties provided for by ORS 166.230, it is necessary to allege in the indictment or information that the defendant was carrying a weapon capable of concealment without having a license or permit to do so. State v. Engeman, 245 Or 209, 420 P2d 389 (1966), held that the failure of the state to introduce evidence showing the defendant did not have a permit or license to carry the firearm "merely went to the jurisdiction of the trial court to fix the penalty." The subject of enhanced penalty provisions is not treated in this Article, but will be covered in the proposed Sentencing Article.

The only other statute relating to firearms which has received legal interpretation is ORS 166.300. Concerning this statute 22 Op Atty Gen 134, 135 (1944-46) states:

"...the legislature said, in effect, if any person kill or injure another with firearms in any manner described in this act, as an additional penalty therefore he shall be prohibited from again bearing or carrying firearms within the state of Oregon for an unlimited period subsequent to the commission of 'said crime', if proven guilty thereof in the manner provided by law.

"...the only lawful authority by which he can be relieved of this restraint is vested in the governor of the state."

As a result of this statute "it is unlawful for any person who is guilty of carelessly or recklessly killing or injuring another, to carry or bear firearms of any kind or description within the state of Oregon." 12 Op Atty Gen 117 (1924-25). This result is mitigated only to the **extent** that subsection (2) provides that the operation of the statute cannot "deprive the people of this state of the right to bear arms for the defense of themselves and the state."

The remainder of the Oregon statutes dealing with the possession, manufacture or sale of firearms or other dangerous weapons have received little or no attention in the reported cases. The following is a summary of these provisions accompanied by a brief commentary where appropriate.

ORS 166.210: Defines "pistol", "revolver", "firearm" and "machine gun". Concealable weapons are limited to firearms having a barrel less than 12 inches in length.

ORS 166.220: Subsection (1) provides that a person carrying or possessing a firearm and other designated weapons, with the intent to use the weapon unlawfully against another is guilty of a felony. The penalties indicate the statute is to be treated as an indictable misdemeanor.

Subsection (2) provides that carrying or possessing such a weapon while committing or attempting to commit a felony is presumptive evidence of intent to use the weapon in violation of subsection (1).

Comment: The breadth of the statute could subject it to attack as violative of equal protection. For example, ORS 163.280, armed robbery, could also be prosecuted under this section.

ORS 166.260: Enumerates the persons or circumstances under which possession of a firearm without a license is not criminal.

ORS 166.275: Possession of designated weapons by inmates of a penal institution is declared to be a felony punishable by 20 years imprisonment.

Comment: The proposed Article on Escape covers this prescription.

ORS 166.280: Declares that unlawfully carrying concealed weapons is a nuisance and provides for their destruction "to such extent that they are wholly and entirely ineffective and useless for the purpose for which they were manufactured."

ORS 166.310: Imposes a duty on an arresting officer who finds on the person arrested any weapon enumerated in ORS 166.220 in violation of that statute or ORS 166.510 and 166.520 to lay an information charging a violation of the appropriate statute.

ORS 166.320: Provides misdemeanor penalties for the setting of spring-guns.

Comment: Such conduct would be covered under the proposed section defining recklessly endangering.

ORS 166.330: Prohibits the discharge of firearms with other than incombustible gun wadding on lands not the actor's own. The penalty is \$5-\$100 fine or 2-60 days.

ORS 166.340: Prohibits the use of firearms within the Devil's Lake area except in defense or protection of person or property or by a peace officer acting in the course of his duty. The penalty for violation of the statute is \$25-\$300 fine.

Offenses Involving Firearms and Deadly Weapons
Preliminary Draft No. 1

ORS 166.410: Prohibits the manufacture, importation, sale, gift, loan or possession of firearms otherwise than in accordance with the provisions of this chapter. Penalty for violation of the statute is five years imprisonment.

ORS 166.420: Requires retail sellers of concealable firearms to keep a register of designated information relating to their sales of such firearms. Violation of the registration requirements by such a seller is a misdemeanor. The form and content of the registration information is laid out in subsection (6).

ORS 166.430: Authorizes municipalities of the state to issue licenses permitting the licensee to sell at retail concealable firearms within the municipality under specified conditions.

ORS 166.440: Provides that the sale or advertising for sale of concealable firearms by persons not licensed to sell same is a misdemeanor.

ORS 166.450: Provides "Any person who changes, alters, removes or obliterates the name of the maker, model, manufacturer's number, or other mark of identification on any pistol or revolver, shall be punished upon conviction by imprisonment in the penitentiary for not more than five years. Possession of any such firearm upon which the same has been changed, altered, removed or obliterated, is presumptive evidence that the possessor has changed, altered, removed or obliterated the same."

ORS 166.460: Provides that antique pistols incapable of use are outside the provisions of the chapter.

ORS 166.470: Provides that no person shall transfer any concealable weapon "to any person whom he has cause to believe to be" either an unnaturalized foreignborn person or a person previously convicted of a felony or to any minor under the age of 18. Also "When neither party to the transaction holds a dealer's license, the vendor shall not sell or otherwise transfer any such firearm to any other person within this state who is not personally known to the vendor." Violation of the section is a misdemeanor.

ORS 166.480: Prohibits the sale or gift of explosives or firearms to children under 14. Violation of the statute is a misdemeanor.

Offenses Involving Firearms and Deadly Weapons
Preliminary Draft No. 1

ORS 166.510: Prohibits the manufacture, sale or possession of designated slugging or stabbing weapons.

First conviction is \$100, 30 days, or both.

Second conviction is \$200, three months, or both.

Third conviction is \$500 or six months to two years.

ORS 166.520: Designates persons who are authorized to possess a blackjack.

ORS 166.630: The portion of the statute applicable to firearms prohibits the discharge of any bow and arrow or firearm upon or across any highway or railroad right of way which has not been abandoned.

ORS 163.310: Penalty for negligently wounding another.

ORS 163.320: Pointing firearm at another.

OREGON REVISED STATUTES

166.220 Attempting to use dangerous weapon; carrying dangerous weapon with intent to use it. (1) Any person who attempts to use, or who with intent to use the same unlawfully against another, carries or possesses a dagger, dirk, dangerous knife, razor, stiletto, or any loaded pistol, revolver or other firearm, or any instrument or weapon of the kind commonly known as a blackjack, slung shot, billy, sandclub, sandbag, metal knuckles, bomb or bombshell, or any other dangerous or deadly weapon or instrument, is guilty of a felony, and upon conviction shall be punished by a fine of not less than \$50 nor more than \$500, or by imprisonment in the county jail for not less than one month nor more than six months, or by imprisonment in the penitentiary for not exceeding five years.

(2) The carrying or possession of any of the weapons specified in subsection (1) of this section by any person while committing, or attempting or threatening to commit a felony or a breach of the peace or any act of violence against the person or property of another is presumptive evidence of carrying such weapon with intent to use the same in violation of subsection (1) of this section.

(3) A justice court has concurrent jurisdiction with the circuit court of any offense defined in subsection (1) of this section where the penalty does not exceed a fine of \$500 or imprisonment in the county jail for not more than six months, or both.

(4) For the purpose of subsection (1) of this section, any knife with a blade longer than three and one-half inches when carried concealed upon the person, is a dangerous weapon.

166.240 Carrying of concealed weapons.

(1) Any person who carries concealed about his person in any manner, any revolver, pistol, or other firearm, any knife, other than an ordinary pocketknife, or any dirk, dagger, slung shot, metal knuckles, or any instrument by the use of which injury could be inflicted upon the person or property of any other person, shall be punished upon conviction by a fine of not less than \$10 nor more than \$200, or by imprisonment in the county jail not less than five days nor more than 100 days, or both.

(2) Nothing in subsection (1) of this section applies to any sheriff, constable, police or other peace officer, whose duty it is to serve process or make arrests. Justices of the peace have concurrent jurisdiction to try any person charged with violating any of the provisions of subsection (1) of this section.

166.250 Unlawful possession of weapons. (1) Except as otherwise provided in this section, ORS 166.230, 166.260, 166.270, 166.280, 166.290, or 166.410 to 166.470, any person who possesses or has in his possession any machine gun, or carries concealed upon his person or within any vehicle which is under his control or direction any pistol, revolver or other firearm capable of being concealed upon the person, without having a license to carry such firearm as provided in ORS 166.290, is guilty of a misdemeanor, unless he has been convicted previously of any felony or of any crime made punishable by this section, ORS 166.230, 166.260, 166.270, 166.280, 166.290 or 166.410 to 166.470, in which case he is guilty of a felony.

(2) This section does not prohibit any citizen of the United States over the age of 18 years who resides in or is temporarily sojourning within this state, and who is not within the excepted classes prescribed by ORS 166.270, from owning, possessing or keeping within his place of residence or place of business any pistol, revolver or other firearm capable of being concealed upon the person, and no permit or license to purchase, own, possess or keep any such firearm at his place of residence or place of business is required of any such citizen.

(3) Firearms carried openly in belt holsters are not concealed within the meaning of this section.

OREGON REVISED STATUTES (CONT'D.)

166.270 Aliens and convicts forbidden to possess arms. Any unnaturalized foreign-born person or any person who has been convicted of a felony against the person or property of another or against the Government of the United States or of this state, or of any political subdivision of this state, who owns, or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person, or machine gun, shall be punished upon conviction by imprisonment in the penitentiary for not more than five years.

166.275 Possession of weapons by inmates of penal institutions. Any person committed to any penal institution who, while under the jurisdiction of any penal institution or while being conveyed to or from any penal institution, possesses or carries upon his person, or has under his custody or control any dangerous instrument, or any weapon including but not limited to any blackjack, sling-shot, billy, sand club, metal knuckles, explosive substance, dirk, dagger, sharp instrument, pistol, revolver or other firearm without lawful authority, is guilty of a felony and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term not more than 20 years.

[1953 c.533 §1]

166.300 Killing another as cause for loss of right to bear arms. (1) Any person who has committed, with firearms of any kind or description, murder in any degree, or manslaughter, either voluntary or involuntary, or who in a careless or reckless manner, kills or injures another with firearms, and who, at any time after committing murder or manslaughter or after said careless or reckless killing or injury of another, carries or bears firearms of any kind or description within this state, shall be punished upon conviction by a fine of not more than \$500, or by imprisonment in the county jail not to exceed one year, or both.

(2) Subsection (1) of this section does not deprive the people of this state of the right to bear arms for the defense of themselves and the state, and does not apply to any peace officer in the discharge of his official duties or to a member of any regularly constituted military organization while on duty with such military organization.

(3) Justices of the peace, district courts, county courts and all other courts having jurisdiction as justices of the peace, shall have concurrent jurisdiction with the circuit courts of all prosecutions under subsection (1) of this section.

166.510 Concealed weapon found on arrested person; information to be filed. Whenever any person is arrested and it is discovered that he possesses or carries or has possessed or carried upon his person any loaded pistol, revolver or other firearm, or any weapon named or enumerated in ORS 166.220, in violation of ORS 166.220, 166.510 or 166.520, the person making the arrest shall forthwith lay an information for a violation of the section against the person arrested, before the nearest or most accessible magistrate having jurisdiction of the offense, and the magistrate must entertain and examine the information and act thereon in the manner prescribed by law.

166.410 Manufacture, importation, sale, gift, loan or possession of firearms. Any person who manufactures or causes to be manufactured within this state, or who imports into this state, or keeps, offers, exposes for sale, gives, lends or possesses a pistol, revolver or machine gun, otherwise than in accordance with ORS 166.230, 166.250 to 166.270, 166.280, 166.290 and 166.420 to 166.470, shall be punished upon conviction by imprisonment in the penitentiary for not more than five years.

#

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Possession of Illegal Weapon]

Sec. 5705. (1) A person commits the crime of possession of an illegal weapon if he knowingly and unlawfully possesses a blackjack, bomb, firearm silencer, gas gun, gravity knife, machine gun, metallic knuckles or switchblade knife.

(2) Possession of an illegal weapon is a Class C felony.

[Unlawfully Carrying a Concealed Weapon in the First Degree]

Sec. 5715. (1) A person commits the crime of unlawfully carrying a concealed weapon in the first degree if he knowingly and unlawfully:

- (a) Carries a knife concealed on or about his person; or
- (b) Carries a pistol concealed on or about his person; or
- (c) Carries a knife or pistol, whether concealed or not, in a vehicle that he is operating or occupying.

(2) This section does not apply to:

(a) A person in his own dwelling or place of business or on property owned or under his control at the time of the act of carrying; or

(b) A person meeting the requirements of sections 12 and 12a of Act No. 372 of the Public Acts of 1927, as amended, being sections 28.432 and 28.432a of the Compiled Laws of 1948.

(3) "Knife" as used in this section includes any dagger, dirk, knife or stiletto with a blade over 3 inches in length, or any other dangerous instrument capable of inflicting cutting, stabbing or tearing wounds, carried with intent to use it unlawfully against the person of another, but does not include a hunting or fishing knife carried for sports use. The burden of injecting the issue that a knife is a hunting or fishing knife is on the defendant, but this does not shift the burden of proof.

(4) Unlawfully carrying a concealed weapon in the first degree is a Class C felony.

(5) The court in its discretion may after conviction reduce the crime to a Class A or B misdemeanor.

TEXT OF MICHIGAN REVISED CRIMINAL CODE (CONT'D.)

[Unlawfully Carrying a Concealed Weapon in the Second Degree]

Sec. 5716. (1) A person commits the crime of unlawfully carrying a concealed weapon in the second degree if he carries concealed on or about his person a knife as defined in section 5715(3) but without the intent to use it unlawfully against the person of another.

(2) Unlawfully carrying a concealed weapon in the second degree is a Class A misdemeanor.

[Possession of Unregistered Pistol]

Sec. 5720. (1) A person commits the crime of possession of an unregistered pistol if he possesses a pistol without complying with the provisions of sections 2 and 9 of Act No. 372 of the Public Acts of 1927, as amended, being sections 28.422 and 28.429 of the Compiled Laws of 1948.

(2) Possession of an unregistered pistol is a Class B misdemeanor.

Section 9. Illegal traffic in deadly weapons. A person commits the crime of illegal traffic in deadly weapons if he knowingly sells, offers, transfers, gives or lends a blackjack, switchblade knife, gravity knife, metallic knuckles, machine gun or sawed-off shotgun to a person who cannot lawfully own or possess the same.

Existing
Law

ORS

166.410

166.420

166.440

166.470

166.480

Section 10. Illegal traffic in firearms. A person commits the crime of illegal traffic in firearms if:

(1) He knowingly sells, offers, transfers, gives or lends any firearm:

(a) In violation of sections 2 to 4 of this Article; or

(b) To a person who cannot lawfully own or possess the same; or

(c) To a person under 17 years of age; or

(d) To a person who is addicted to a narcotic or dangerous drug; or

(e) To a person who has previously been convicted of a felony; or

(f) To a person who has been adjudicated a mental incompetent.

(2) In purchasing a firearm from a retail dealer he intentionally signs a fictitious name or address in the firearms transfer register required by section 4 of this Article.

COMMENTARY - ILLEGAL TRAFFIC IN DEADLY WEAPONS
ILLEGAL TRAFFIC IN FIREARMS

A. Summary

Section 9 is intended to complement sections 5 and 6 by imposing criminal liability on the person who transfers deadly weapons with knowledge that the transferee cannot lawfully possess the same.

Section 10 makes illegal the transfer of firearms under certain conditions and to certain specified persons. Subsection (1) (a) incorporates the licensing and registration requirements of sections 2 through 4, making it a crime to transfer a firearm in violation of those provisions.

Subsection (1) (b) prohibits the transfer of a firearm to a person the transferor knows is not legally qualified. The remaining subsections make it a crime to transfer firearms to specified classes of persons, e.g., minors, narcotic addicts, felons, mental incompetents. The mens rea requirement is a "knowing" transfer; that is, the actor is aware that the condition or circumstance applicable exists.

Subsection (2) imposes criminal liability for the use of a fictitious name or address in purchasing a firearm from a licensed dealer.

B. Derivation

Section 9 is new.

Section 10 is new, although similar coverage is found in ORS 166.410 and 166.480. The age limitation has been raised from 14 to 17. The provisions relating to narcotic addicts and mental incompetents **are new**. Subsection (2) is derived from ORS 166.420 (2).

C. Relationship to Existing Law

ORS 166.410 prohibits the unlawful manufacture, importation, sale, gift, loan or possession of firearms.

ORS 166.440 prohibits unlicensed persons from selling or advertising for sale concealable firearms.

ORS 166.480 prohibits the sale or gift of explosives and firearms to children under 14 years old.

ORS 166.420 (2) states that it is a misdemeanor to sign a fictitious name or address in the firearms transfer register.

ORS 166.470 sets out limitations and conditions for sales of concealable firearms.

Section 9 is new to Oregon law. The prohibition found in existing law relating to possession of certain deadly weapons does not extend to their sale or transfer.

Section 10 is a combination of existing law and new law. It restates existing law to the extent that it is now a crime to unlawfully transfer a firearm, i.e., in violation of registration and licensing requirements.

Section 10 lists four specific prohibitions. A person may not transfer a firearm to a minor under 17 years of age, to a narcotic addict, a convicted felon or to a person who has been adjudicated a mental incompetent. This restriction does not apply to rifles, shotguns or other hunting weapons. The restriction on sale or transfer of firearms to ex-convicts is a restatement of ORS 166.470. The restriction on transfer to a minor restates ORS 166.480, but raises the age by three years. The other provisions are new to Oregon law.

Subsection (2) restates subsection (2) of ORS 166.420, the present firearms transfer register statute.

OREGON REVISED STATUTES

166.410 Manufacture, importation, sale, gift, loan or possession of firearms. Any person who manufactures or causes to be manufactured within this state, or who imports into this state, or keeps, offers, exposes for sale, gives, lends or possesses a pistol, revolver or machine gun, otherwise than in accordance with ORS 166.230, 166.250 to 166.270, 166.280, 166.290 and 166.420 to 166.470, shall be punished upon conviction by imprisonment in the penitentiary for not more than five years.

166.420 Register of transfers of concealed weapons; form and content of register and by whom to be maintained.

(2) The purchaser of any firearm capable of being concealed upon the person shall sign, and the dealer shall require him to sign, his name and affix his address to the register in duplicate and the salesman shall affix his signature in duplicate as a witness to the signature of the purchaser. Any person signing a fictitious name or address is guilty of a misdemeanor.

166.480 Sale or gift of explosives and firearms to children. Any person who sells, exchanges, barter or gives to any child, under the age of 14 years, any explosive article or substance, other than an ordinary firecracker containing 10 grains of gunpowder; or who sells, exchanges, barter or gives to any such child any firearms, or other device of a like kind, ordinarily used or ordinarily capable of being used in discharging gunpowder in a greater quantity than 10 grains; or who sells, exchanges, barter or gives to any such child, any instrument or apparatus, the chief utility of which is the fact that it is used, or is ordinarily capable of being used, as an article or device to increase the force or intensity of any explosive, or to direct or control the discharge of any such explosive, is guilty of a misdemeanor.

#

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Traffic in Illegal Weapons]

Sec. 5725. (1) A person commits the crime of traffic in illegal weapons if he knowingly and unlawfully manufactures, transports or disposes of a blackjack, bomb, firearm silencer, gas gun, gravity knife, machine gun, metallic knuckles or switchblade knife.

(2) Traffic in illegal weapons is a Class C felony.

[Unlawful Traffic in Pistols]

Sec. 5730. (1) A person commits the crime of unlawful traffic in pistols if:

(a) As seller of a pistol he disposes of it without complying with the requirements of section 2 of Act No. 372 of the Public Acts of 1927, as amended, being section 28.422 of the Compiled Laws of 1948; or

(b) He transmits to or within this state any printed or oral offer to send into this state from any place outside Michigan an illegal weapon enumerated in section 5705 or a pistol that the offeree or recipient cannot lawfully receive or possess; or

(c) As a pawnbroker, or as a second-hand junk dealer as defined in Act No. 350 of the Public Acts of 1917, as amended, he knowingly accepts a pistol; or

(d) As a seller of firearms or weapons he fails to maintain and exhibit to proper authorities any records required by law to be kept.

(2) Unlawful traffic in pistols is a Class B misdemeanor.

#

Section 11. Defacing a firearm. (1) A person commits the crime of defacing a firearm if he intentionally defaces a firearm or machine gun.

Existing
Law

ORS

166.450

(2) Possession of a defaced firearm or machine gun is prima facie evidence that it was defaced by the possessor.

COMMENTARY - DEFACING A FIREARM

A. Summary

"Deface" is defined in section 1 (3) to mean tampering with the manufacturer's serial number or other identification mark on a firearm or machine gun.

Section 11 restates the existing provisions of ORS 166.450. What is now a presumptive evidence provision in that statute is restated in subsection (2) in terms of prima facie evidence.

B. Derivation

The section is taken from Michigan Revised Criminal Code sections 5710 and 5735.

C. Relationship to Existing Law

ORS 166.450 penalizes as a felony the obliteration or change of identification marks on firearms. The only change in the proposed section is to include under this coverage sawed-off shotguns and machine guns.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Possession of a Defaced Firearm]

Sec. 5710. (1) A person commits the crime of possession of a defaced firearm if he knowingly and unlawfully possesses a defaced pistol or other firearm.

(2) Possession of a defaced firearm is a Class B misdemeanor.

[Defacing a Firearm]

Sec. 5735. (1) A person commits the crime of defacing a firearm if he intentionally defaces a pistol or other firearm.

(2) Defacing a firearm is a Class A misdemeanor.

#

Offenses Involving Firearms and Deadly Weapons
Preliminary Draft No. 1

Section 12. Illegal use of firearms.

(1) A person commits the crime of illegal use of firearms if:

(a) He intentionally aims or points a loaded or unloaded rifle, shotgun or firearm at another person who is within the range of the weapon; or

Existing Law
ORS
163.310
163.320
166.630
166.320

(b) He recklessly or with criminal negligence discharges a rifle, shotgun, firearm or bow and arrow; or

(c) He knowingly possesses or intentionally discharges a rifle, shotgun or firearm while under the influence of intoxicating liquor or a narcotic or dangerous drug; or

(d) He knowingly sets a loaded spring-gun or other trap or device that sets off an explosion in a place where it may be discharged by contact with a person or animal, except that this ~~para-~~ **agraph** does not apply to spring-guns or other traps or devices placed to destroy burrowing rodents, or to predatory animal control work engaged in by employes of county, state or federal governments.

(2) In addition to imposing a criminal penalty, the court may suspend hunting privileges of any person convicted under this section for a period not to exceed five years from date of conviction.

COMMENTARY - ILLEGAL USE OF FIREARMS

A. Summary

Section 12 combines several provisions in the present law.

Paragraph (a) of subsection (1) prohibits aiming or pointing any type of gun at another person who is within the range of the weapon. It is immaterial whether the gun is loaded or unloaded.

Paragraph (b) of subsection (1) is directed at reckless or criminally negligent conduct with a gun or bow and arrow. This paragraph requires that the weapon be discharged, but not necessarily at or towards another person.

Paragraph (c) of subsection (1) is intended to discourage the possession or use of guns while a person is intoxicated by liquor or drugs.

Paragraph (d) of subsection (1) is a continuation of legislation aimed at the suppression of explosive spring-guns and similar traps.

Subsection (2) grants the court authority to suspend hunting privileges of a person convicted of a crime under section 12.

B. Summary

The section is structured after Michigan Revised Criminal Code section 5740.

C. Relationship to Existing Law

ORS 163.310: Penalty for negligently wounding another.

ORS 163.320: Pointing firearm at another.

ORS 166.630: Discharging firearms on highway or railroad right of way.

ORS 166.320: Setting spring-gun or set-gun.

The constitutionality of ORS 163.320 was affirmed in Rose v. Gladden, 241 Or 202, 405 P2d 543 (1965), wherein the court distinguished the statute from ORS 163.250, which penalizes assault with a dangerous weapon:

"....The Assembly intended by ORS 163.320 to close a statutory opening through which persons who pointed firearms at others could escape liability for any crime if they could show that the act was intended to be an act of horseplay or mischief not amounting to an actual assault...."

Present law has been broadened to include rifles and shotguns. The suspension of hunting privileges has been reduced from 10 to five years, but applies to all violations instead of only the negligent wounding of another.

OREGON REVISED STATUTES

166.320 Setting spring-gun or set-gun.

(1) Any person who places or sets any loaded spring-gun, set-gun, or any gun, firearm or other device of any kind designed for containing or firing explosives, in any place where it may be fired, exploded or discharged by the contact of any person or animal with any string, wire, rod, stick, spring or other contrivance affixed to or connected with it, or with its trigger, shall be punished upon conviction by a fine of not less than \$100 nor more than \$500, or by imprisonment in the county jail for not less than 30 days nor more than six months, or both.

(2) Subsection (1) of this section does not apply to any loaded spring-gun, set-gun, firearm or other device placed for the purpose of destroying gophers, moles or other burrowing rodents, and does not prevent the use of a coyote getter by employes of county, state or federal governments engaged in cooperative predatory animal control work.

#

TEXTS OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Prohibited Use of Weapons]

Sec. 5740. (1) A person commits the crime of prohibited use of a weapon if:

- (a) He intentionally aims a firearm at another person; or
- (b) He discharges a firearm while it is intentionally aimed at another person; or
- (c) Recklessly or with criminal negligence he discharges a firearm or shoots a bow and arrow; or
- (d) He sets a spring gun or any trap or device that sets off an explosion and leaves it unattended by a competent person immediately present; or
- (e) He possesses or discharges a firearm while under the influence of intoxicating liquor or of a narcotic drug, dangerous drug or LSD, as defined in section 6001; or
- (f) Being under 21 years of age, he possesses or uses a handgun that propels BB's not exceeding .177 calibre by spring action, gas or air while not on his own property and not accompanied by a person 21 years of age or older.

(2) In addition to imposing criminal penalties, the court may suspend hunting privileges of any person convicted under this section for a period not to exceed 3 years from the date of conviction.

(3) Prohibited use of a weapon is a Class B misdemeanor.

#

Section 13. Forfeiture of deadly weapons and firearms. (1) Except as provided in subsection (2) of this section, any firearm, deadly weapon, bow and arrow or other device or instrument used or possessed in violation of this Article shall be forfeited to the state.

Existing Law
ORS
166.280

(2) In the event the weapon has been stolen and is recovered from the thief or a subsequent transferee it shall not automatically be forfeited to the state, but shall, upon proper identification and proof of ownership, be restored to its lawful owner as soon as its use as evidence has been served.

COMMENTARY - FORFEITURE OF DEADLY WEAPONS AND FIREARMS

Section 13 restates, with substantial modification, the substance of ORS 166.280. That statute relates to the seizure and destruction of concealed weapons, characterizing such weapons as a nuisance.

There is no apparent necessity for requiring the destruction of such weapons. The state may be able to realize some revenue from their authorized disposition. Coverage has also been extended to include all firearms or deadly weapons involved in a violation of this Article.

Subsection (2) is necessary since title to the weapon remains in the lawful owner.

OREGON REVISED STATUTES

166.280 Seizure and destruction of concealed weapons. The unlawful concealed carrying upon the person or within the vehicle of the carrier of any machine gun, pistol, revolver or other firearm capable of being concealed upon the person, is a nuisance. Any such weapons taken from the person or vehicle of any person unlawfully carrying the same are nuisances, and shall be surrendered to the magistrate before whom the person is taken, except that in any city, county, town or other municipal corporation the weapons shall be surrendered to the head of the police force or police department. The officers to whom the weapons are surrendered, except upon the certificate of a judge of a court of record or of the district attorney of the county that their preservation is necessary or proper to the ends of justice, shall annually, between July 1 and 10, destroy the weapons to such extent that they are wholly and entirely ineffective and useless for the purpose for which they were manufactured. In the event any such weapon has been stolen and is thereafter recovered from the thief or his transferee, it shall not be destroyed but shall be restored to its lawful owner as soon as its use as evidence has been served, upon his identification of the weapon and proof of ownership. Upon the certificate of a judge or of the district attorney that the ends of justice will be subserved thereby, such weapon shall be preserved until the necessity for its use ceases.

#

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Forfeiture of Weapons]

Sec. 5750. Any firearm, weapon, bow and arrow or device possessed or used in violation of this chapter is forfeited to the state, and shall by court order be turned over to the department of state police for whatever disposition its director may order.

#

Section 14. Defenses. (1) In any prosecution under section 7 or 8 of this Article it is a defense that at the time of the alleged offense the actor was:

Existing
Law

ORS
166.260
166.460
166.240

(a) A peace officer, or a person actually engaged at the command of a peace officer in assisting him in making an arrest or preserving the peace.

(b) A member of the active or reserve armed forces or Oregon National Guard, while performing official military duties.

(c) A public servant entrusted with maintaining the order and security of detention facilities.

(d) A member of a duly authorized military or veterans' organization engaged in authorized functions.

(e) A member of a club or organization formed for the purpose of practicing shooting at targets upon a public or private target range, while the members thereof are using firearms upon target ranges.

(f) A licensed hunter or fisherman actually engaged in hunting or fishing.

(g) A person carrying or concealing a firearm or deadly weapon in his own home or place of business, or on property he owns or controls.

(h) Carrying an antique firearm incapable of use as a weapon.

(i) A licensed merchant lawfully possessing or transporting deadly weapons or unloaded firearms as merchandise.

(2) In any prosecution under section 5 or subsection (1) of section 6 of this Article it is a defense that at the time of the alleged offense the actor was a person defined by paragraph (a), (b), (c) or (i) of subsection (1) of this section.

(3) In any prosecution under paragraph (a) of subsection (1) of section 12 of this Article it is a defense that at the time of the alleged offense the actor was a person defined by paragraph (a), (b) or (c) of subsection (1) of this section.

COMMENTARY - DEFENSES

A. Summary

Firearms and deadly weapons are not contraband in the sense that their possession and use is uniformly prohibited to all persons under all circumstances. The legitimacy or illegality of their possession and use is determined by the nature of the activity, the status of the possessor and, in some cases, the type of weapon involved.

A dissimilar standard is applied to illegal possession of weapons as distinguished from illegal concealment of a weapon. Policemen, for example, may lawfully possess and conceal any type of firearm or deadly weapon, while an ex-convict is forbidden from owning or possessing any kind of concealable firearm. In view of these distinctions, it is necessary to create certain statutory defenses to criminal liability in the area of firearms and deadly weapons.

Section 14 establishes nine such defenses. Eight of the defenses are essentially a restatement of existing law. Only one defense is new.

Paragraph (a) exempts peace officers and those assisting them at their command.

Paragraph (b) exempts active and reserve military personnel while performing a job-related duty.

Paragraph (c) is new. It exempts prison personnel responsible for the order and security of penal institutions. (The definition of "detention facility" is found in section 1 of this Article.)

Paragraph (d) refers to groups like the VFW, American Legion and other similar organizations whose members often carry weapons in parades and public ceremonies.

Paragraph (e) exempts club members organized for the purpose of target shooting.

Paragraph (f) applies to licensed hunters and fishermen.

Paragraph (g) allows a person to carry a concealed weapon without a license in three areas:

- (1) His own home; or
- (2) His place of business; or
- (3) On property owned or controlled by the possessor.

Paragraph (h) exempts antique firearms not capable of being fired.

Paragraph (i) exempts weapons in the flow of commerce as merchandise. This applies only to licensed merchants.

All of these exemptions apply to the two sections (7 and 8) on carrying a concealed weapon. Subsection (2) of this section also exempts (a), (b), (c) and (i) from section 5 and subsection (1) of section 6, the illegal possession sections. Subsection (2) of section 6 is not exempted as it applies to an ex-convict in possession.

Subsection (3) of this section excludes peace officers, members of the armed forces performing military duties and prison personnel from the scope of section 12, illegal use of firearms.

B. Derivation

Paragraphs (a), (b), (d), (e), (f) and (i) of subsection (1) are taken from ORS 166.260. Paragraph (c) is new. Paragraph (g) is taken from Michigan Revised Criminal Code section 5715 (2) (a) and ORS 166.240 (2). Paragraph (h) is taken from ORS 166.460.

C. Relationship to Existing Law

ORS 166.260 lists eight classes of persons not affected by existing illegal possession and concealment of firearms statutes. All of these provisions have been incorporated into section 14.

ORS 166.460 excepts antique firearms from the firearms provisions.

OREGON REVISED STATUTES

166.240 Carrying of concealed weapons.

(2) Nothing in subsection (1) of this section applies to any sheriff, constable, police or other peace officer, whose duty it is to serve process or make arrests. Justices of the peace have concurrent jurisdiction to try any person charged with violating any of the provisions of subsection (1) of this section.

166.260 Persons not affected by ORS 166.250. ORS 166.250 does not apply to or affect:

(1) Sheriffs, constables, marshals, policemen, whether active or honorably retired, or other duly appointed peace officers.

(2) Any person summoned by any such officer to assist in making arrests or preserving the peace, while said person so summoned is actually engaged in assisting the officer.

(3) The possession or transportation by any merchant of unloaded firearms as merchandise.

(4) Members of the Army, Navy or Marine Corps of the United States, or of the National Guard, when on duty.

(5) Organizations which are by law authorized to purchase or receive weapons described in ORS 166.250 from the United States, or from this state.

(6) Duly authorized military or civil organizations while parading, or the members thereof when going to and from the places of meeting of their organizations.

(7) Members of any club or organization, for the purpose of practicing shooting at targets upon the established target ranges, whether public or private, while such members are using any of the firearms referred to in ORS 166.250 upon such target ranges, or while going to and from such ranges.

(8) Licensed hunters or fishermen while engaged in hunting or fishing, or while going to or returning from a hunting or fishing expedition.

166.460 Antique firearms excepted. ORS 166.230, 166.250 to 166.270, 166.280, 166.290, 166.410 to 166.450, and 166.470 do not apply to antique pistols or revolvers incapable of use as such.

166.520 Persons permitted to carry blackjacks. Sheriffs and their deputies, constables, marshals, police officers or any other duly appointed peace officers, or persons summoned by such officers to assist in making arrests or preserving the peace, while engaged in assisting such officers, are not prohibited from carrying or possessing an instrument or weapon commonly known as a blackjack or billy.

#

TEXTS OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Unlawfully Carrying a Concealed Weapon in the First Degree]

Sec. 5715.

(2) This section does not apply to:

(a) A person in his own dwelling or place of business or on property owned or under his control at the time of the act of carrying; or

#