

See: Minutes of Subcommittee No. 1
1/8/70, p. 1, Vol. X, Tape #88

Minutes of Commission
1/10/70, p. 39, Vol. IX, Tapes # 44 & 45

For PD #2 as amended, see:
Minutes of Subcommittee on
Grading & Sentencing
4/5/70, p. 60, Vol. X, Tape #57

CRIMINAL LAW REVISION COMMISSION
311 Capitol Building
Salem, Oregon

For Minutes of Tentative Draft No. 1, see:
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5/14/70, p. 6, Vol, IX, Tape #57
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ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Preliminary Draft No. 2; December 1969

Reporter: Roger D. Wallingford

Subcommittee No. 1

ARTICLE 27 . OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

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ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Preliminary Draft No. 2; December 1969

Section 1. Offenses against privacy of communications; definitions. As used in this Article, unless the context requires otherwise:

Existing Law
ORS
165.535

(1) "Conversation" means the transmission between two or more persons of a private oral communication which is not a telephonic, telegraphic, radio or television communication.

(2) "Eavesdropping device" means any instrument, device or equipment designed for, adapted to or used in wiretapping or mechanical overhearing or recording of a conversation.

COMMENTARY - OFFENSES AGAINST PRIVACY OF COMMUNICATIONS;
DEFINITIONS

A. Summary

Subsection (1) defines "conversation" in terms of a private oral communication transmitted without the aid of mechanical or electronic equipment.

Subsection (2) defines "eavesdropping device" to include any type of equipment which may be used in wiretapping or "bugging."

B. Derivation

Subsection (1) is taken from ORS 165.535 (1).

Subsection (2) is derived from New York Revised Penal Law section 250.10.

C. Relationship to Existing Law

Oregon is one of seven states that imposes criminal liability for the unauthorized interception of private communications. Only Illinois allows no wiretapping or "bugging" under any circumstances.

ORS 141.720 provides a statutory procedure for obtaining an ex parte order to legally intercept communications. Sections 9 through 18 of this Article propose a revision of that statute.

ORS 165.535 defines four terms used in ORS 165.540 to state the crime of interception of communications. Only "conversation" has been retained as essential to the revised sections.

TEXT OF REVISIONS OF OTHER STATES
TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 14-1. Definition

(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

(c) Principal.

A principal is any person who:

- (1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or
- (2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or
- (3) Directs another to use an eavesdropping device illegally on his behalf. 1961, July 28, Laws 1961, p. 1983, § 14-1.

#

TEXT OF NEW YORK REVISED PENAL LAW

§ 250.00 Eavesdropping; definitions of terms

The following definitions are applicable to this article:

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. The normal operation of a telephone or telegraph corporation and the normal use of the services and facilities furnished by such corporation pursuant to its tariffs shall not be deemed "wiretapping."

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.

3. "Unlawfully" means not specifically authorized pursuant to section eight hundred thirteen-a or section eight hundred thirteen-b of the code of criminal procedure. L.1965, c. 1030, eff. Sept. 1, 1967.

#

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Definitions]

Sec. 5601. The following definitions apply to this chapter:

(a) "Eavesdrop" means to overhear, record, amplify or transmit any part of the private discourse of others without the consent of at least one of the persons engaged in the discourse, except as otherwise provided by law.

(b) "Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group of the public has access.

(c) "Surveillance" means secret observation of the activities of another person for the purpose of spying upon and invading the privacy of the person observed.

#

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 197. Eavesdropping; definition of terms

The following definitions are applicable to this article:

1. "Wiretapping" means the intentional overhearing or recording of a telephonic or telegraphic communication by a person other than a sender or receiver thereof, without the consent of either the sender or receiver, by means of any instrument, device or equipment. The normal operation of a telephone or telegraph corporation and the normal use of the services and facilities furnished by such corporation pursuant to its tariffs shall not be deemed "wiretapping."

2. "Mechanical overhearing of a conversation" means the intentional overhearing or recording of a conversation or discussion, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device or equipment.

3. "Unlawfully" means not specifically authorized by law.

This article does not apply to wiretapping by criminal law enforcement officials in the lawful performance of their duties and does not affect the admissibility of evidence in any proceedings other than a prosecution for eavesdropping or tampering with private communications.

#

Section 2. Eavesdropping. A person commits the crime of eavesdropping if, without legal authority granted under sections 9 through 18 of this Article, he intentionally:

(1) Overhears or records a conversation by means of an eavesdropping device, without the consent of all the persons engaged in the conversation; or

(2) Intercepts or records a telephonic or telegraphic communication by means of an eavesdropping device, without the consent of at least one of the persons engaged in the communication; or

(3) Installs an eavesdropping device in a place or premises knowing, or having good reason to know, that it is to be used for criminal eavesdropping.

Existing Law
ORS
141.720
141.730
141.990
165.540
165.545
41.910

COMMENTARY - EAVESDROPPING

A. Summary

Criminal liability for eavesdropping is predicated upon three forms of activity directed towards the interception of private communications:

(1) "Bugging" conversations by means of a mechanical device, without the consent of all the parties to the conversation.

(2) "Wiretapping" telephonic and telegraphic communications by means of a mechanical device, without the consent of at least one of the parties to the communication.

(3) Installing a wiretapping or "bugging" device with actual or implied knowledge that it is to be used for illegal eavesdropping.

The reference to "legal authority" incorporates the requirements of sections 9 through 18, which are intended to replace present ORS 141.720. Persons acting in conformity to those sections are immune from criminal liability for conduct pursuant to a court ordered ex parte eavesdropping warrant. A discussion justifying the need for revision of ORS 141.720 is found on pages 35-38.

B. Derivation

Subsection (1) is taken from New York Revised Penal Law section 250.00 (2).

Subsection (2) is taken from New York Revised Penal Law section 250.00 (1).

Subsection (3) is based generally on Michigan Revised Criminal Code section 5615.

C. Relationship to Existing Law

The problem of protecting the privacy of communications has been complicated by modern advances in electronic technology. The privacy of the business office, the automobile and the bedroom have all become vulnerable to the professional telephone line splicer and cleverly concealed "bug". The demand for information is insistent and insatiable; recourse to surreptitious electronic surveillance becomes irresistible. Competing and conflicting interests are involved in this moral and legal tug-of-war. Law enforcement agencies insist on access to private communications to combat organized crime, while private citizens demand recognition of and adherence to a constitutional right to "be left alone".

This summary will attempt to explore some of the historical antecedents of the problem and to justify proposed legislation devised to balance the conflicting equities.

67 U. of Mich L Rev 455 (1967), "The Legitimation of Electronic Eavesdropping - The Politics of Law and Order":

"The chief argument against the constitutionality of most kinds of eavesdropping is that the resulting search and seizure is unavoidably too sweeping to comply with the particularity requirements of the fourth amendment. When a continuous tap is placed on a telephone, the eavesdropper almost inevitably hears all the conversations of everyone who talks on that line whether the subject calls out from the tapped number, calls in to that number, or is called by someone using that phone, and no matter how irrelevant or privileged the communication. A bug can be even more intrusive, for it can catch every intimate, irrelevant, or privileged utterance of each person in the room or area bugged. Because these devices intrude so deeply and grossly, they discourage people from speaking freely; as Justice Brennan has warned, if these devices proliferate widely, we may find ourselves in a society where the only sure way to guard one's privacy 'is to keep one's mouth shut on all occasions'." (Lopez v. U.S., 373 US 427,450 (1963)).

Is eavesdropping a problem new to the law? The United States Supreme Court, in Berger v. State of New York, 388 US 41, 87 S Ct 1873 (1967), discusses its historical background:

"Eavesdropping is an ancient practice which at common law was condemned as a nuisance. 4 Blackstone Comm. 168. At one time the eavesdropper listened by naked ear under the eaves of houses or their windows, or beyond their walls seeking out private discourse. The awkwardness and undignified manner of this method as well as its susceptibility to abuse was immediately recognized. Electricity, however, provided a better vehicle and with the advent of the telegraph surreptitious interception of messages began. As early as 1862 California found it necessary to prohibit the practice by statute....

"The telephone brought on a new and more modern eavesdropper known as the 'wiretapper'. Interception was made by a connection with a telephone line. This activity has been with us for three quarters of a century.... In 1934 the Congress outlawed the interception without authorization and the divulging or publishing of the contents of wiretaps by passing Section 605 of the Communications Act of 1934....

"Sophisticated electronic devices have now been developed (commonly known as 'bugs') which are capable of eavesdropping on anyone in most any given situation. They are to be distinguished from 'wiretaps' which are confined to the interception of telegraphic and telephonic communications.... Since 1940 eavesdropping has become a big business. (See, Westin, Science, Privacy, and Freedom; Issues and Proposals for the 1970's, 66 Columbia L Rev 1003, 1005-1010).

"As science developed these detection techniques, law-makers, sensing the resulting invasions of individual privacy, have provided some statutory protection for the public. Seven states--California, Illinois, Maryland, Massachusetts, Nevada, New York, and Oregon--prohibit surreptitious eavesdropping by mechanical or electronic devices. However, all save Illinois permit official court-ordered eavesdropping. Some 36 states prohibit wiretapping. But of these, 27 permit 'authorized' interception of some type. Federal law prohibits interception and divulging or publishing of the contents of wiretaps without exception.

"In sum, it is fair to say that wiretapping on the whole is outlawed, except for permissive use by law enforcement officials in some states; while electronic eavesdropping is--save for seven states--permitted both officially and privately. And, in six of the seven states, electronic eavesdropping ('bugging') is permissible on court order." (Berger v. New York, supra, pp 1877-1888).

Constitutional issues involving privacy of communications have been framed in terms of the 4th and 9th amendments to the U. S. Constitution.

Constitution of the United States:

Amendment IV: "Security from unreasonable searches and seizures. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment IX: "Rights retained by the people. The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

A long line of U. S. Supreme Court cases, extending from 1914 to 1967, have dealt with interception of private communications as it relates to "unreasonable searches and seizures":

Weeks v. U. S., 232 US 383, 34 S Ct 341, 58 L Ed 652 (1914), Supreme Court formulated and pronounced the federal exclusionary rule prohibiting the use in federal courts any evidence seized in violation of the Fourth Amendment.

Olmstead v. U. S., 277 US 438, 48 S Ct 564, 72 L Ed 944 (1928), First wiretap case considered by the Court. Olmstead's telephone line was tapped without entry upon his premises and was, therefore, found not to be proscribed by the Fourth Amendment. Established "physical trespass" rule.

Nardone v. U. S., 302 US 379, 58 S Ct 275, 82 L Ed 314 (1937), and 308 US 338, 60 S Ct 266, 84 L Ed 307 (1939), extended the exclusionary rule to wiretap evidence offered in federal prosecutions.

Goldman v. U. S., 316 US 129, 62 S Ct 993, 86 L Ed 1322 (1942), First "bugging" case considered by the Court. Court found that the use of a detectaphone placed against an office wall in order to hear private conversations in the office next door did not violate the Fourth Amendment because there was no physical trespass in connection with the relevant interception.

Wolf v. Colorado, 338 US 25, 69 S Ct 1359, 93 L Ed 1782 (1948), recognized the constitutional right of individual privacy, stating, "The security of one's privacy against arbitrary intrusion by the police...is...implicit in the 'concept of ordered liberty' and as such enforceable against the State through the Due Process Clause".

On Lee v. U. S., 343 US 747, 72 S Ct 967, 96 L Ed 1270 (1952), held that since "no trespass was committed" a conversation between Lee and a federal agent, occurring in the former's laundry and electronically recorded, was not condemned by the Fourth Amendment.

Mapp v. Ohio, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081 (1961), held that "the Fourth Amendment's right of privacy is enforceable against the States through the Due Process Clause of the 14th Amendment".

Silverman v. U. S., 365 US 505, 81 S Ct 679, 5 L Ed 2d 734 (1961), involved a spike with a microphone attached that was inserted under a baseboard into a party wall until it made contact with a heating duct that ran through the entire house. The Court found "that eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners." Holding such intrusion to be in violation of the Fourth Amendment, the Court stated, "our decision does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area". (At 5212, 81 S Ct at 683).

Wong Sun v. U. S., 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963), held for the first time that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of "papers and effects". (At 485, 83 S Ct at 416).

Lopez v. U. S., 373 US 427, 83 S Ct 1381, 10 L Ed 462 (1963), confirmed that the Court had "in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear....It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area". (At 438-439, 83 S Ct at 1387).

Dissenting to the majority opinion, Justice Brennan articulated what was later to become the central philosophy of a majority of the Court:

"Electronic surveillance strikes deeper than at the ancient feeling that a man's home is his castle; it strikes at freedom of communication, a postulate of our kind of society....Freedom of speech is undermined where people fear to speak unconstrainedly in what they suppose to be the privacy of home and office."

Berger v. State of New York, 388 U S 41, 87 S Ct 1873 (1967), held that conversation is within the Fourth Amendment's

protections and use of electronic devices to capture it is a "search" within meaning of the Amendment. "Basic purpose of Fourth Amendment is to safeguard privacy and security of individuals against arbitrary invasions by government officials".

Katz v. U. S., 389 US 347, 88 S Ct 507 (1967), held that the "trespass" doctrine enunciated by Olmstead and Goldman can no longer be regarded as controlling:

"What a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected under the Fourth Amendment. The Fourth Amendment protects people, not simply areas, against unreasonable searches and seizures, and its reach cannot depend upon presence or absence of a physical intrusion into any given enclosure. Search and seizure, without prior judicial sanction and attendant safeguards, conducted by electronic surveillance by way of an electronic listening and recording device attached to outside of public telephone booth from which defendant had placed calls did not comply with constitutional standards."

The Omnibus Crime Control and Safe Streets Act of 1968, Public Law No. 90-351, Title III, Ch 119, Section 2518 (3), authorizes electronic surveillance for 30 days, with the possibility of an unlimited number of 30 day extensions, if a judge makes an ex parte determination that:

"(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

"(b) that there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

"(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

"(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person."

This legislation was based upon the following Congressional findings, published as a preamble to the Act:

"Title III--Wiretapping and Electronic Surveillance:

"Findings

"Sec. 801. On the basis of its own investigations and of published studies, the Congress makes the following findings:

"(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. There has been extensive wiretapping carried on without legal sanctions, and without the consent of any of the parties to the conversation. Electronic, mechanical, and other intercepting devices are being used to overhear oral conversations made in private, without the consent of any of the parties to such communications. The contents of these communications and evidence derived therefrom are being used by public and private parties as evidence in court and administrative proceedings, and by persons whose activities affect interstate commerce. The possession, manufacture, distribution, advertising, and use of these devices are facilitated by interstate commerce.

"(b) In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce, it is necessary for Congress to define on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized, to prohibit any unauthorized interception of such communications, and the use of the contents thereof in evidence in courts and administrative proceedings.

"(c) Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

"(d) To safeguard the privacy of innocent persons, the interception of wire or oral communications where none of the parties to the communication has consented to the interception should be allowed only when authorized by a court of competent jurisdiction and should remain under the control and supervision of the authorizing court.

Interception of wire and oral communications should further be limited to certain major types of offenses and specific categories of crime with assurances that the interception is justified and that the information obtained thereby will not be misused."

9 Arizona L Rev 439 (1968) comments on the state of the law following the Katz decision:

"The result in Katz could have been foreseen as the climax of the recent trend to abolish the traditional notion that a physical intrusion into a constitutionally protected area is necessary to constitute a Fourth Amendment violation. Katz defines the scope of constitutional protections against eavesdropping in terms of an individual's right to privacy, as measured by the reasonableness of his reliance on the fact that his conversation will remain confidential. The rationale adopted by the Court is sound, for regardless of the means employed to obtain evidence, the evil against which the individual should be protected is the invasion of his privacy, and with the sophisticated nature of modern electronic devices, his right to privacy will be in extreme danger if law enforcement agencies are not reasonably restricted in the employment of such devices."

ORS 141.720: Order for interception of telecommunications, radio communications or conversations.

ORS 141.730: Proceedings under expired order prohibited.

ORS 141.990 (2): Violation of ORS 141.730 punishable by \$3,000 fine and 3 years.

ORS 41.910: Evidence of communications obtained in violation of ORS 165.540 and without a court order under ORS 141.720 shall not be admissible in any state court.

ORS 165.540: Interception of communications.

ORS 165.545: Prohibitions not applicable to fire or police activities; inadmissibility of recordings.

Wiretapping, or "cutting in" without use of a mechanical device, was first raised as an issue in Oregon in DeLore v. Smith, 67 Or 304, 132 P 521 (1913):

"Since a time practically concurrent with the use of the telephone as a medium of communication, the courts have held that a conversation had over the telephone was admissible when the witness could testify he recognized

the voice of the party speaking. While the practice of eavesdropping or 'cutting in' on a telephone is most despicable, yet we cannot say as a rule of evidentiary law that the practice of this impropriety disqualifies a person who has qualified himself by testifying he recognized the voice of the speaker...."

In Elkins v. U. S., 364 US 206, 80A S Ct 1437 (1960), defendant was indicted for intercepting and divulging telecommunications in violation of 47 USC 501, 605 and 18 USC 371. He was convicted in the U. S. District Court in Oregon. In two earlier decisions the Oregon state courts had held that the evidence used in the federal prosecution had been illegally obtained and was therefore inadmissible in state court.

The United States Supreme Court held that evidence obtained by state officers during search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.

In Re Langley, 230 Or 319, 370 P2d 228 (1962), involved a State Bar disciplinary proceedings wherein evidence of wrongdoing was based upon illegally obtained voice recordings. Dismissing the proceedings, the Court stated:

"We hold that it would not be desirable for the Bar to employ in its disciplinary operations illegal tape recordings, evidence secured unlawfully by wire-tapping, or other fruits of criminal eavesdropping.... To permit the Bar to use illegal tape recordings would be inconsistent with the public policy expressed by ORS 165.540...."

State v. Cartwright, 246 Or 120, 131-132, 418 P2d 822 (1967), involved securing evidence for a search warrant by prolonged auditory surveillance of the defendant through a thin partition separating his bedroom from the adjacent apartment. No mechanical device was employed. In affirming defendant's conviction the Court commented:

"Electronic eavesdropping is a phenomenon concerning which there is widespread and justifiable public concern.... In Oregon, as in some other states, statutes have been enacted to control electronic eavesdropping...."

"Conventional eavesdropping...is not, apparently, much indulged in by the police, and it is not to be compared as a menace to the privacy, whether of law-abiding persons or of criminals, with the use of modern electronic devices.... No Oregon statute prohibits conventional eavesdropping."

"Professor Beany, op. cit. 233-234, in his discussion of the Silverman case, asks: 'But is it not the intention of all electronic eavesdropping to make an 'auditory trespass'?' There is a similar suggestion in United States v. Stone, 232 F Supp 396, 399 (ND Tex 1964):

"'Privacy of a protected area [in earlier times] was invaded only by an actual physical intrusion. But today electronic devices without physical presence enable an intrusion upon the air, light and sound waves of a person's property as real as any physical trespass.'

"We have no occasion to inquire whether in these observations may be found a sound basis for drawing a distinction between conventional eavesdropping and electronic eavesdropping in their relationship to the application of the Fourth Amendment. It must be enough for us that on the question of Federal constitutional law before us the Supreme Court has spoken and this court is bound by its decisions. They committed no trespass, technical or otherwise, and the information they gained by listening at the wall could properly be made the basis for the issuance of a search warrant."

The Cartwright decision is reviewed in 46 OLR 353 (1967) in an article entitled "Unreasonable Search & Seizure--Admissibility of Evidence Obtained by Eavesdropping":

"Eavesdropping as a generic term has been applied in the law to three distinct types of activity...wire-tapping of a suspect's telephone line, electronic eavesdropping or 'bugging', and conventional eavesdropping.... The fact that nontrespassory electronic eavesdropping may soon be brought within the Fourth Amendment requires attention to be focused upon an issue discussed, but not decided, in the Cartwright opinion, viz., whether there is any constitutional difference between conventional and electronic eavesdropping....Although the distinction between electronic and conventional eavesdropping is arguably too fine for constitutional differentiation it should be noted that the Oregon legislature has drawn such a distinction. OR. Rev. Stat. Secs. 165.535-165.545 (1965) prohibit electronic eavesdropping, with certain exceptions, but as noted in the Cartwright case, there is no Oregon statute prohibiting conventional eavesdropping....Unless the [U.S. Supreme Court] justices advocating prohibition of eavesdropping under the Fourth Amendment rationale abandon the distinction they seem to have drawn between electronic and conventional eavesdropping...the Cartwright decision may well outlive the electronic eavesdropping precedents upon which it is based...."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 250.12. Violation of Privacy.

(1) Unlawful Eavesdropping or Surveillance. A person commits a misdemeanor if, except as authorized by law, he:

(a) trespasses on property with purpose to subject anyone to eavesdropping or other surveillance in a private place; or

(b) installs in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying or broadcasting sounds or events in such place, or uses any such unauthorized installation; or

(c) installs or uses outside a private place any device for hearing, recording, amplifying or broadcasting sounds originating in such place which would not ordinarily be audible or comprehensible outside, without the consent of the person or persons entitled to privacy there.

"Private place" means a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance, but does not include a place to which the public or a substantial group thereof has access.

(2) Other Breach of Privacy of Messages. A person commits a misdemeanor if, except as authorized by law, he:

(a) intercepts without the consent of the sender or receiver a message by telephone, telegraph, letter or other means of communicating privately; but this paragraph does not extend to (i) overhearing of messages through a regularly installed instrument on a telephone party line or on an extension, or (ii) interception by the telephone company or subscriber incident to enforcement of regulations limiting use of the facilities or to other normal operation and use; or

incident

(b) divulges without the consent of the sender or receiver the existence or contents of any such message if the actor knows that the message was illegally intercepted, or if he learned of the message in the course of employment with an agency engaged in transmitting it.

#

TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 14-2. Elements of the Offense

A person commits eavesdropping when he:

(a) Uses an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or

(b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device. 1961, July 28, Laws 1961, p. 1983, § 14-2.

§ 14-4. Penalty

Any person convicted of eavesdropping shall be fined not to exceed \$1,000 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. 1961, July 28, Laws 1961, p. 1983, § 14-4.

§ 14-5. Evidence Inadmissible

Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings. 1961, July 28, Laws 1961, p. 1983, § 14-5.

#

TEXT OF NEW YORK REVISED PENAL LAW

§ 250.05 Eavesdropping

A person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation.

Eavesdropping is a class E felony. L.1965, c. 1030, eff. Sept. 1, 1967.

#

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Eavesdropping]

Sec. 5605. (1) A person commits the crime of eavesdropping if he intentionally uses any device to eavesdrop, whether or not he is present at the time.

(2) Eavesdropping is a Class C felony.

#

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 199. Eavesdropping

A person is guilty of eavesdropping when he unlawfully engages in wiretapping or mechanical overhearing of a conversation.

Eavesdropping is a class D felony.

#

Section 3. Possession of an eavesdropping device. A person commits the crime of possession of an eavesdropping device if he possesses an eavesdropping device with the intent that it be unlawfully used by himself or another for eavesdropping.

COMMENTARY - POSSESSION OF AN EAVESDROPPING DEVICE

Section 3 is analogous to "possession of burglar's tools," made a criminal offense in the Theft Article in the section on burglary and criminal trespass.

The offense covered by this section includes two elements: (1) Possession of an eavesdropping device with (2) intent that it be used for unlawful eavesdropping. The term "unlawful" means a use not in accordance with the eavesdropping warrant requirements of sections 9 through 18 of this Article.

There is no comparable provision in Oregon law. The concept of imposing criminal liability for possession of certain instruments used in the commission of other crimes is represented in Oregon law by the following statutes:

ORS 166.220 - Carrying dangerous weapon with intent to use it.

ORS 166.240 - Carrying a concealed weapon.

ORS 166.250 - Unlawful possession of weapons.

ORS 166.510 - Possession of slugging or stabbing weapons.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK REVISED PENAL LAW

§ 250.10 Possession of eavesdropping devices

A person is guilty of possession of eavesdropping devices when, under circumstances evincing an intent to use or to permit the same to be used in violation of section 250.05, he possesses any instrument, device or equipment designed for, adapted to or commonly used in wiretapping or mechanical overhearing of a conversation.

Possession of eavesdropping devices is a class A misdemeanor, L.1965, c. 1030, eff. Sept. 1, 1967.

#

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Criminal Possession of Eavesdropping Device]

Sec. 5620. (1) A person commits the crime of criminal possession of an eavesdropping device if he possesses, manufactures, sends or transports any device designed or commonly used for eavesdropping; and:

- (a) Intends to use that device to eavesdrop; or
- (b) Knows that another intends to use that device to eavesdrop.

(2) Criminal possession of an eavesdropping device is a Class C felony.

#

Section 4. Forfeiture of eavesdropping devices. An eavesdropping device installed or used in violation of this Article shall be forfeited to the state.

COMMENTARY - FORFEITURE OF EAVESDROPPING DEVICES

This section is designed to increase the deterrent effect of the penal provisions of this Article. The court would enter an order of forfeiture upon conviction, and disposition of the device would be made by the appropriate state agency.

There is ample authority in existing Oregon law for this type of forfeiture legislation:

ORS 167.540: Seizure and destruction of slot machines.

ORS 142.080: Forfeiture of conveyances used unlawfully to conceal or transport stolen property.

ORS 453.990 (9): Forfeiture and destruction of adulterated drugs.

ORS 471.660: Seizure of conveyances transporting liquor.

ORS 471.610: Confiscation of liquor and property by Oregon Liquor Control Commission.

ORS 474.140: Forfeiture and destruction of unlawfully possessed drugs.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Forfeiture of Eavesdropping Device]

Sec. 5635. Any eavesdropping or surveillance 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 5. Divulging an eavesdropping warrant.

A person commits the crime of divulging an eavesdropping warrant if, having information concerning the existence or content of an eavesdropping warrant issued pursuant to sections 9 through 18 of this Article, or concerning any facts or circumstances attending an application for such a warrant, he discloses that information to another person without specific legal authority.

Existing Law
ORS
141.740
141.990 (2)

COMMENTARY - DIVULGING AN EAVESDROPPING WARRANT

Section 5 is a restatement of ORS 141.740, which by virtue of ORS 141.990 (2) is punishable as a felony. Sections 9 through 18 of this Article provide a means of obtaining court approved eavesdropping warrants.

The section is derived from New York Revised Penal Law section 250.20.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK REVISED PENAL LAW

§ 250.20 Divulging an eavesdropping order

A person is guilty of divulging an eavesdropping order when, possessing information concerning the existence or content of a court order issued pursuant to section eight hundred thirteen-a of the code of criminal procedure, or concerning any circumstance attending an application for such an order, he discloses such information to another person; except that such disclosure is not criminal or unlawful when made in a legal proceeding, or to a law enforcement officer or agency connected with the application for such order, or to a legislative committee or temporary state commission, or to the telephone or telegraph corporation whose facilities are involved.

Divulging an eavesdropping order is a class A misdemeanor.
L.1965, c. 1030, eff. Sept. 1, 1967.

#

Section 6. Divulging illegally obtained information. A person commits the crime of divulging illegally obtained information if he intentionally uses or divulges information he knows to have been initially obtained through a violation of section 2 of this Article.

Existing Law ORS 165.540 (1) (e)

COMMENTARY - DIVULGING ILLEGALLY OBTAINED INFORMATION

Section 6 penalizes using or divulging information known to have been initially obtained by means of an illegal eavesdrop.

A person who hires an eavesdropper or assists in the unlawful act would be a party to the substantive offense. All that is within the reach of this section is the taking advantage of eavesdropping information already obtained by another. Its primary utility will be to encourage the person obtaining the information "second-hand" to cooperate with the police by testifying against the eavesdropper himself.

The section, as it relates to eavesdropping, is a restatement of ORS 165.540 (1) (e) which prohibits the use or divulgence to others of any conversation, telecommunication or radio communication obtained by means prohibited by law.

Offenses Against Privacy of Communications

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Divulging Illegally-Obtained Information]

Sec. 5625. (1) A person commits the crime of divulging illegally-obtained information if he knowingly or recklessly uses or divulges information obtained through eavesdropping or surveillance.

(2) Divulging illegally-obtained information is a Class B misdemeanor.

#

Section 7. Defenses. It is a defense to a prosecution under this Article that:

(1) The person charged was a public servant performing official duties in compliance with sections 9 through 18 of this Article; or

(2) The person charged was an employe of a communication common carrier who, while acting in the ordinary course of his employment, overheard the communication when transmitted through the facilities of his employer. This defense shall not apply to a prosecution under subsection (3) of section 8 of this Article; or

(3) The communication intercepted or recorded consisted of a radio or television broadcast transmitted for the use of the general public, or was an emergency communication made in the normal course of operations by, or to, a federal, state or local public agency dealing in emergency services.

Existing
Law
See section 2
&
ORS
165.540 (2) (a)
& (4)

COMMENTARY - DEFENSES

Section 7 provides certain criminal liability exemptions, framed in terms of a defense.

Subsection (1) exempts a public servant acting in the lawful performance of his duties. The lawful performance of his duties in the area of eavesdropping means that the officer is acting under a judicially approved eavesdropping warrant issued in accordance with the terms of sections 9 through 18 of this Article.

Subsection (2) exempts the monitoring activities of telephone, telegraph and radio company employes. It is not a defense when the employe is charged under section 8 with divulging such information without the consent of the sender or receiver.

Subsection (3) exempts from coverage communications transmitted for consumption by the general public and those made in connection with emergency radio calls. The nature of these communications prevent them from being "private."

These exemptions are essentially a restatement of existing law embodied in ORS 165.540, subsections (2) and (4). Subsection (3) of that statute exempts subscribers and members of their family who perform the acts prohibited in their homes. This exemption has not been retained. Subsection (5) of ORS 165.540 exempts law enforcement officers engaged in the investigation of crimes involving drugs and narcotics. Insofar as the constitutional issue of unreasonable search and seizure affects the validity of evidence obtained by eavesdropping without court approval, there would appear to be no rational basis for distinguishing this type of police activity from other criminal investigations. Subsection (5) applies only to "bugging" by a police officer or someone under his direct supervision, as applied to conversations in which the officer is himself involved.

These defenses are not categorized as affirmative defenses. The defendant would have the burden of coming forward with the evidence negating criminal liability if he wished to avail himself of the defense, but the burden of proof would remain upon the state.

TEXT OF REVISIONS OF OTHER STATES
TEXT OF ILLINOIS CRIMINAL CODE OF 1961

§ 14-3. Exemptions

The following activities shall be exempt from the provisions of this Article:

(a) Listening to radio, wireless and television communications of any sort where the same are publicly made;

(b) Hearing conversation when heard by employees of any common carrier by wire incidental to the normal course of their employment in the operation, maintenance or repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer;

(c) Any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;

(d) Recording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services, including, but not limited to, hospitals, clinics, ambulance services, fire fighting agencies, any public utility emergency repair facility, civilian defense establishment or military installation. 1961, July 28, Laws 1961, p. 1983, § 14-3.

#

TEXT OF MICHIGAN REVISED CRIMINAL CODE

[Defenses]

Sec. 5630. (1) A person does not commit a crime under this chapter if:

(a) He is, or acts at the request of or in cooperation with a peace officer engaged in the lawful performance of his duties; or

(b) He is an employee of a communications common carrier who while acting in the course of his employment hears a communication transmitted through the facilities of his employer.

(2) The burden of injecting the issue under subsection (1) is on the defendant, but this does not shift the burden of proof.

#

Section 8. Tampering with private communications. A person commits the crime of tampering with private communications if, knowing that he does not have the consent of the sender or receiver, he:

(
(Existing
(<u>Law</u>
(
(ORS
(165.505
(165.510
(165.515
(165.520
(758.060
(758.990 (2)
(

(1) Intentionally opens or reads a sealed private communication; or

(2) Obtains in any manner from an employe or officer of a telephone or telegraph company information regarding the contents or nature of a telephonic or telegraphic communication; or

(3) While an employe or officer of a telephone or telegraph company, knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication.

COMMENTARY - TAMPERING WITH PRIVATE COMMUNICATIONS

A. Summary

Section 9 substantially restates Oregon law evidenced by a number of related provisions.

Subsection (1) prohibits the unauthorized opening or reading of a sealed private letter or other communication. Interference with mail moving in federal commerce is controlled by federal law.

Subsections (2) and (3) prohibit the obtaining or divulging of telephonic or telegraphic communications.

B. Derivation

The section is taken from New York Revised Penal Law section 250.25.

C. Relationship to Existing Law

ORS:

165.505: Opening or procuring telegraphic message addressed to another

165.510: Learning contents of telegraphic message sent to another

165.515: Bribery of telegraph company agents to disclose contents of message

165.520: Opening, reading or publishing letter; federal jurisdiction

758.060: Wrongful disclosure or alteration of telegraphic message

758.990 (2): Violation of ORS 758.060 punishable by \$1,000 fine and 1 year imprisonment

There is no relevant Oregon case law involving these statutes.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK REVISED PENAL LAW

§ 250.25 Tampering with private communications

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he opens or reads a sealed letter or other sealed private communication; or

2. Knowing that a sealed letter or other sealed private communication has been opened or read in violation of subdivision one of this section, he divulges without the consent of the sender or receiver, the contents of such letter or communication, in whole or in part, or a resume of any portion of the contents thereof; or

3. Knowing that he does not have the consent of the sender or receiver, he obtains or attempts to obtain from an employee, officer or representative of a telephone or telegraph corporation, by connivance, deception, intimidation or in any other manner, information with respect to the contents or nature thereof of a telephonic or telegraphic communication; except that the provisions of this subdivision do not apply to a law enforcement officer who obtains information from a telephone or telegraph corporation pursuant to section 250.35; or

4. Knowing that he does not have the consent of the sender or receiver, and being an employee, officer or representative of a telephone or telegraph corporation, he knowingly divulges to another person the contents or nature thereof of a telephonic or telegraphic communication; except that the provisions of this subdivision do not apply to such person when he acts pursuant to section 250.35.

Tampering with private communications is a class B misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

#

TEXT OF PROPOSED CONNECTICUT PENAL CODE

§ 198. Tampering with private communications

A person is guilty of tampering with private communications when:

1. Knowing that he does not have the consent of the sender or receiver, he obtains from an employee, officer or representative of a telephone or telegraph corporation, by connivance, deception, intimidation or in any other manner, information with respect to the contents or nature of a telephonic or telegraphic communication; or

2. Knowing that he does not have the consent of the sender or receiver, and being an employee, officer or representative of a telephone or telegraph corporation, he knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication.

Tampering with private communications is a class A misdemeanor.

#

SUPPLEMENTAL COMMENTARY

CIVIL DAMAGES:

Section 10 of Preliminary Draft No. 1 authorized civil damages for offenses against privacy of communications, providing for treble damages to any party injured by such conduct and punitive damages in the discretion of the court or jury.

There are presently three civil liability statutes directed at the illegal interception of communications:

ORS 30.780 establishes civil liability for damages caused by illegal interception of communications.

ORS 165.505 authorizes treble damages for opening or procuring telegraphic messages addressed to another.

ORS 165.510 establishes civil liability for learning contents of telegraphic message sent to another.

Subcommittee No. 1 deleted section 10 on the grounds that there exists no compelling need for codification of a civil remedy in the penal code. The subcommittee was particularly concerned with the imposition of a second penalty in the form of treble damages. Of course, ORS 30.780 would not be affected by the revision of the substantive criminal code.

By deleting section 10 the subcommittee did not intend that a party injured through a violation of this Article should be deprived of civil redress. Traditional tort remedies will still be available, including the imposition of punitive damages in appropriate cases. The treble damage provision found in ORS 165.505 would be repealed.

EX PARTE EAVESDROPPING WARRANTS:

Subcommittee No. 1 directed that the commentary examine ORS 141.720 in light of the United States Supreme Court decision of Berger v. State of New York, 388 US 41, 87 S Ct 1873 (1967). The Berger case involved a Fourth Amendment constitutional challenge to New York Code of Criminal Procedure section 813-a, which authorized court approved ex parte eavesdropping orders. ORS 141.720 is similar to New York Code of Criminal Procedure section 813-a, which was held to be unconstitutional in the Berger case.

The indictment charging Berger with conspiracy to bribe a New York Liquor Authority official was based upon information obtained through the installation of a court approved eavesdropping device. The original ex parte order authorized electronic surveillance for a 60 day period. At the expiration of the 60 day period an additional 60 day extension was authorized by the court.

The court held that New York Penal Law section 813-a, authorizing any justice of the Supreme Court or judge of county court or of court of general sessions of New York county to issue ex parte orders for eavesdropping upon oath or affirmation of a district attorney or of attorney general or officer above rank of sergeant of any police department or political subdivision thereof that there is reasonable ground to believe that evidence of crime may be thus obtained, containing no requirement for particularity as to what specific crime has been or is being committed or place to be searched or conversations sought as required by the Fourth Amendment, and requiring no showing of exigent circumstances, is too broad in its sweep, resulting in trespassory intrusion into a constitutionally protected area and is violative of Fourth and Fourteenth Amendments.

In discussing the lack of constitutional safeguards found in New York Penal Law section 813-a, the Court stated:

"The Fourth Amendment commands that a warrant issue not only upon probable cause supported by oath or affirmation, but also 'particularly describing the place to be searched, and the persons or things to be seized.' New York's statute lacks this particularization....Indeed, it authorizes indiscriminate use of electronic devices....

"As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided....Moreover, the statute permits... extensions of the original two month period--presumably two months each--on a mere showing that such extension is 'in the public interest'.

"This we believe insufficient without a showing of present probable cause for the continuance of the eavesdrop. Third, the statute places no termination date on the eavesdrop once the con-

versation is seized....Finally, the statute's procedure...has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts....Nor does the statute provide for a return on the warrant....In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures...."

Applying these constitutional standards to ORS 141.720, constitutional infirmity is found in the following respects:

(1) In regard to "bugging," as distinguished from "wiretapping," the statute fails to require that "the place to be searched, or persons or things to be seized" be specified with particularity.

(2) The 60 day effective period, with a 60 day extension authorized and further renewals of 30 days, is "equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause."

(3) No prompt execution of the order is required.

(4) No termination date of the order is specified.

(5) The statute has no provision for a return on the warrant (order).

Sections 9 through 18 are therefore intended to replace and repeal ORS 141.720. While the provisions for obtaining an ex parte eavesdropping warrant may appear to be essentially procedural, there is persuasive argument for including them in this Article.

Until and unless ORS 141.720 is revised to conform to the constitutional demands enunciated by Berger, law enforcement agencies will be denied the assistance of this valuable investigative technique. The 1971 Legislative Assembly should therefore have an opportunity to consider this important aspect of eavesdropping. A similar combination of the substantive and procedural law is found in the proposed Article on Responsibility.

The sections that follow attempt to establish with precision and clarity the forms and procedures to be followed in obtaining judicially approved ex parte warrants for interception of private communications. The constitutional guidelines dictated by the Berger case have been observed. Substantial refer-

ence was made to New York Code of Criminal Procedure sections 814 through 824, and their revisors' staff commentary to Proposed Article 370, Proposed New York Criminal Procedure Law of 1968, which formed the basis of that legislation. Sections 814-824 were adopted by the New York Assembly in 1968 to replace section 813-a, and became law in June 1968.

Sections 9 through 18 of this Article apply to electronic eavesdropping conducted by means of wiretapping and mechanical overhearing or recording of conversations. Inasmuch as the interception or recording of telephonic or telegraphic communications with the consent of one of the parties thereto is not deemed criminal under section 2 of this Article, it is not covered by sections 9 through 18.

The proposed procedure for obtaining ex parte eavesdropping warrants to intercept or record otherwise private communications provides a comprehensive scheme for the restricted issuance of such warrants. Strict standards of probable cause and necessity are imposed, and scrupulous particularity in the description both of the person and place upon which the eavesdropping is to be conducted and the nature of the evidence sought thereby is demanded.

ORS 141.030 states:

"A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and place to be searched."

"Probable cause" has been judicially defined to mean:

"The existence of circumstances which would lead a reasonably prudent man to believe in the guilt of the arrested party. Mere suspicion or belief, unsupported by facts or circumstances, is insufficient." (See State v. Jones, 248 Or 428, 432, 435 P2d 317 (1967).)

The term "probable cause" has been used throughout sections 9 through 18 as the measure of facts and circumstances necessary to support the issuance of an ex parte eavesdropping warrant.

Section 9. Eavesdropping warrants;
definitions. As used in sections 9 through 18
of this Article, unless the context requires
otherwise:

Existing Law
ORS
141.720

(1) "Eavesdropping warrant" or "warrant" means a court order authorizing wiretapping or mechanical overhearing of a conversation by means of an eavesdropping device as defined in section 1 of this Article.

(2) "Exigent circumstances" means conditions requiring the preservation of secrecy, whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

(3) "Judge" means circuit or district court judge of the county in which the eavesdropping warrant is to be executed.

COMMENTARY - EAVESDROPPING WARRANTS; DEFINITIONS

A. Summary

Subsection (1) establishes the scope of activity permissible under an eavesdropping warrant.

In defining "exigent circumstances," subsection (2) provides a standard for determining whether the notice required by section 17 may be postponed for a reasonable period of time.

Subsection (3) constitutes a circuit or district court judge as the authority competent to issue an eavesdropping warrant, and provides further that the judge must have jurisdiction in the county in which the warrant is to be executed.

B. Derivation

The definitions in section 9 are derived from New York Code of Criminal Procedure section 814.

C. Relationship to Existing Law

ORS 141.720 (1) provides:

"An ex parte order for the interception of telecommunications, radio communications or conversations, as defined in ORS 165.535, may be issued by any judge of a circuit or district court upon verified application of a district attorney setting forth fully the facts and circumstances upon which the application is based."

The definition of "judge" continues to vest authority to issue eavesdropping warrants in circuit and district court judges. The requirement that the warrant be issued by a judge of the county in which the warrant is to be executed is new to Oregon law.

TEXT OF REVISIONS OF OTHER STATES
TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 814. Eavesdropping warrants; definitions of terms

As used in this title the following terms have the following meanings:

1. "Eavesdropping warrant" means an order of a justice authorizing wiretapping or mechanical overhearing of conversation, as those terms are defined in section 250.00 of the penal law.

2. "Justice" means any justice of the supreme court who has been designated by the governor as a justice of an appellate division, or any justice of the supreme court of the judicial district in which the eavesdropping warrant is to be executed, or any county court judge of the county in which the eavesdropping warrant is to be executed.

3. "Applicant" means a district attorney, the attorney general, the police commissioner of the police department of the city of New York, or the superintendent of the state police. If a district attorney, the attorney general, the police commissioner of the police department of the city of New York or the superintendent of the state police is actually absent or disabled the term "applicant" shall mean that person designated to act for him and perform his official function in and during his actual absence or disability.

4. "Exigent circumstances" means conditions requiring the preservation of secrecy, and whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

#

Section 10. Eavesdropping warrants; when issuable. Under conditions prescribed in this Article, a judge may, upon ex parte application of the district attorney, issue an eavesdropping warrant where:

Existing Law
ORS
141.720

(1) An appropriate application made in conformity with this Article is presented to the court; and

(2) The application discloses probable cause to believe that a particular crime punishable as a felony has been or is about to be committed, or that information aiding in the apprehension of the perpetrator of a particular crime punishable as a felony may be obtained; and

(3) The application discloses that normal investigative procedures to obtain the evidence or information sought:

- (a) Have been tried and have failed; or
- (b) Reasonably appear unlikely to succeed if tried; or
- (c) Are too dangerous to employ under existing circumstances.

COMMENTARY - EAVESDROPPING WARRANTS; WHEN ISSUABLE

A. Summary

Section 10 specifies the conditions under which an eavesdropping warrant may be issued. The three requirements are in the conjunctive.

First, the application must conform to the specific demands of section 11.

Second, there must be probable cause to believe that eavesdropping will either produce evidence of the commission of a particular crime or information essential to the apprehension of the perpetrator of a crime.

Third, there must be no reasonable alternative means for the acquisition of such evidence or information.

The third requirement goes beyond the restrictions explicitly demanded by the majority opinion in Berger. It recognizes that eavesdropping is an extraordinary investigative technique whose justification arises from a lack of any other reasonable recourse, and is intended to encourage the exhaustion of conventional investigative techniques before resort to eavesdropping.

B. Derivation

Section 10 is taken from New York Code of Criminal Procedure sections 815 and 816.

C. Relationship to Existing Law

ORS 141.720 (1) requires that:

"(a) There are reasonable grounds to believe that a crime directly and immediately affecting the safety of human life or the national security has been committed or is about to be committed; and

"(b) There are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime; and

"(c) There are no other means readily available for obtaining such information."

Section 10 extends the scope of existing law by not requiring a showing that the crime committed or about to be committed "directly and immediately affects the safety of human life or the national security." It does require that the crime under investigation be punishable as a felony. Section 10 would also allow eavesdropping where the purpose of the investigation is the apprehension of a known felon. Crimes carrying misdemeanor penalties only would not be subject to investigation by eavesdropping.

Subsection (3) is a restatement of ORS 141.720 (1) (c), imposing certain additional requirements, particularly in respect to the exhaustion of conventional investigative procedures.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 815. Eavesdropping warrants; in general

Under circumstances prescribed in this title, a justice may, upon ex parte application of an applicant, issue an eavesdropping warrant.

§ 816. Eavesdropping warrants; when issuable

An eavesdropping warrant may issue only upon an appropriate application made in conformity with this title, and upon reasonable cause to believe that evidence of the commission of a particular crime, or information aiding in the apprehension of the perpetrator of a particular crime, may be obtained (and upon a showing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought.

#

Section 11. Eavesdropping warrants;
application. (1) An ex parte application for
an eavesdropping warrant or order of amendment
shall be in writing, subscribed and sworn to by
the district attorney.

Existing Law
ORS
141.720

(2) The application shall contain:

(a) A statement of facts showing probable cause to believe that a particularly described crime punishable as a felony has been, is being or is about to be committed; and

(b) A statement of facts showing probable cause to believe that the conversation of a particularly described person will constitute evidence of the particularly described crime that has been, is being or is about to be committed, or that the conversation will aid in the apprehension of the perpetrator of such crime which has been, is being or is about to be committed. The statement shall include a particular description of the place or premises where the conversation will occur or a particular description of the telephone or telegraph lines over which the conversation will occur; and

(c) A particular description of the type of the conversation sought to be overheard; and

(d) A statement of facts establishing that normal investigative procedures have been tried and have failed, or reasonably appear to be unlikely to succeed if tried, or are too dangerous to employ under existing circumstances, and that the conversation is not otherwise legally privileged; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If the character of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described conversation has been first obtained, the application shall specifically state facts establishing probable cause to believe that additional conversations of the same type will occur subsequently; and

(f) If the applicant knows that a prior application has been submitted or a warrant previously obtained for eavesdropping on the person whose conversation is sought to be overheard, a statement fully disclosing the date, court, applicant, execution, results and present status of the prior application or warrant.

(3) Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, the application shall so state. If the facts stated in the application are derived in whole or in part from the statements of persons other than the applicant, the sources of the facts shall be either disclosed or described, and the application shall contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application shall also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Accompanying

affidavits may be based either on personal knowledge of the applicant, or information and belief with the source thereof and the reason therefor specified.

COMMENTARY - EAVESDROPPING WARRANTS; APPLICATION

A. Summary

Section 11 itemizes the statements and allegations required to be included in every eavesdropping warrant application. Stressed throughout is particularity of description consistent with Fourth Amendment demands.

Subsection (3) provides that the applicant may rely upon information supplied by others. In the event information is supplied by others the application must conform to established search and seizure law governing specification of grounds for belief in the reliability of the information supplied, and, so far as possible, disclosure of the basis of the informant's knowledge or belief.

The emphasis of section 11 is upon full disclosure to the court of all relevant facts upon which the court may pass to determine whether reasonable grounds exist for the issuance of an eavesdropping warrant.

B. Derivation

Section 11 is derived from New York Code of Criminal Procedure section 817.

C. Relationship to Existing Law

Existing Oregon law fails to detail with particularity the information and allegations required to support issuance of an eavesdropping order.

ORS 141.720 requires that the verified application of the district attorney state:

(1) That there are reasonable grounds to believe that a crime...has been committed or is about to be committed.

(2) That there are reasonable grounds to believe that evidence will be obtained essential to the solution of such crime, or which may enable the prevention of such crime.

(3) That there are no other means readily available for obtaining such information.

(4) Where statements are solely upon the information and belief of the applicant, the precise source of the information and the grounds for the belief.

(5) Whether any prior application has been made to obtain...conversations on the same instrument or from the person and, if such prior application exists, the applicant shall disclose the current status thereof.

(6) The identity of the particular telephone or telegraph line...from which the information is to be obtained and the purpose thereof.

(7) The court is given authority to examine under oath the applicant and any witness the applicant produces or the court requires to be produced.

Section 11 requires that the following additional elements be included in an application for an eavesdropping warrant:

(1) The crime under investigation must be described as one punishable as a felony.

(2) A particular description of the place or premises where the conversation will occur.

(3) The type of conversation sought to be intercepted or overheard.

(4) A statement that such conversation is not legally privileged.

(5) A stated period of time for which the eavesdropping is required to be maintained.

(6) If based upon the knowledge or belief of a person other than the applicant, the source of such facts must be disclosed, and the reliability of the informant's information supported.

TEXT OF REVISIONS OF OTHER STATES
TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 817. Eavesdropping warrants; application

1. An ex parte application for an eavesdropping warrant or order of amendment must be in writing, subscribed and sworn to by an applicant.

2. The application must contain:

(a) A statement of facts establishing reasonable cause to believe that a particularly described crime has been, is being, or is about to be committed; and

(b) A statement of facts establishing reasonable cause to believe that the conversation of a particularly described person will constitute evidence of the particularly described crime that has been, is being or is about to be committed or that the conversation will aid in the apprehension of the perpetrator of such crime which has been, is being, or is about to be committed. The statement shall include a particular description of the place or premises where the conversation will occur or a particular description of the telephone or telegraph lines over which the conversation will occur; and

(c) A particular description of the type of the conversation sought to be overheard; and

(d) A statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence or information sought, and that such conversation is not otherwise legally privileged; and

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If practicable, the application should designate hours of the day or night during which the conversation may be reasonably expected to occur. If the character of the investigation is such that the authorization for eavesdropping should not automatically terminate when the described conversation has been first obtained, the application must specifically state facts establishing reasonable cause to believe that additional conversations of the same type will occur subsequently; and

(f) If the applicant knows that a prior application has been submitted or a warrant previously obtained for eavesdropping on the person whose conversation is sought to be overheard, a statement fully disclosing the date, court, applicant, execution, results, and present status of the application or warrant.

3. Allegations of fact in the application may be based either upon the personal knowledge of the applicant or upon information and belief. If the applicant personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the applicant, the sources of such facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the applicant may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Such accompanying affidavits may be based either on personal knowledge of the applicant, or information and belief with the source thereof and the reason therefor specified.

Section 12. Eavesdropping warrants;
application; how determined. (1) If the appli-
cation conforms to section 11 of this Article,
the judge may examine under oath any person for
the purpose of determining whether grounds exist for the issuance
of the warrant pursuant to section 10. The judge shall take the
deposition of any person so examined and cause it to be subscribed
by him.

Existing Law
ORS
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(2) If satisfied that grounds exist for the issuance of
an eavesdropping warrant pursuant to section 10, the judge shall
grant the application and, in accordance with section 13, issue
an eavesdropping warrant.

(3) If the application does not conform to section 11, or
if the judge is not satisfied that grounds exist for the issuance
of an eavesdropping warrant, the application shall be denied.

COMMENTARY - EAVESDROPPING WARRANTS;
APPLICATION; HOW DETERMINED

A. Summary

Subsection (1) allows the judge to supplement the in-
formation contained in the application by oral interrogation
of any person who may have relevant knowledge. The oral
examination, however, may not be used as a substitute for
compliance with the form and content of the application as
required by section 11. [The court is required to record
the substance of any such examination or interrogation in
writing, so that it may be preserved for possible use in a
subsequent challenge to the warrant.]

B. Derivation

The section is derived from New York Code of Criminal Procedure section 818.

C. Relationship to Existing Law

ORS 141.720 (5) provides:

"The court shall examine upon oath or affirmation the applicant and any witness the applicant desires to produce or the court requires to be produced."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 818. Eavesdropping warrants; application; how determined

1. If the application conforms to section eight hundred seventeen, the justice may examine under oath any person for the purpose of determining whether grounds exist for the issuance of the warrant pursuant to section eight hundred sixteen. Any such examination must be either recorded or summarized in writing.

2. If satisfied that grounds exist for the issuance of an eavesdropping warrant pursuant to section eight hundred sixteen, the justice may grant the application and issue an eavesdropping warrant, in accordance with section eight hundred nineteen.

3. If the application does not conform to section eight hundred seventeen, or if the justice is not satisfied that grounds exist for the issuance, the application must be denied.

Section 13. Eavesdropping warrants; form and content. An eavesdropping warrant shall contain:

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(1) The subscription and title of the issuing judge; and

(2) The date of issuance, date of effect, if known, and termination date. The effective period of the warrant must not exceed 15 days. If the effective period of the warrant is to terminate upon the acquisition of a particular conversation, the warrant may so provide. If the effective period of the warrant is not to terminate upon the acquisition of a particular conversation, the warrant shall so provide; and

(3) A particular description of the person upon whom eavesdropping has been approved, or a particular description of the place, premises or telephone or telegraph line upon which eavesdropping is to be conducted; and

(4) A particular description of the type of the conversation to be obtained by eavesdropping, including a statement of the crime to which it relates; and

(5) An express authorization to make secret entry upon a private place or premises to install the eavesdropping device, if entry is necessary to execute the warrant.

COMMENTARY - EAVESDROPPING WARRANTS; FORM AND CONTENT

A. Summary

The required contents of the warrant itself are itemized in these five subsections. Subsection (2) requires inclusion of both the date of issuance and date of effect. Inasmuch as the effective period of the warrant is limited to 15 days and several days may be necessary to install the eavesdropping device, the warrant may be issued in advance of its effective date.

Pursuant to this Article, authorized eavesdropping automatically terminates once the conversations described in the application and warrant have been acquired. Thus, the termination date contained in the warrant is automatically advanced if the conversation is immediately overheard. This feature may be specified in the warrant in order to alert the executing officer to its limitation, but the absence of such a specification in the warrant does not affect the automatic termination. In some cases, however, there may be reasonable grounds to believe that additional conversations of the same nature will occur subsequent to the conversations described in the application. Subsection (2) (e) of section 11 provides that in those cases the application may so state, and that the court may specifically suspend the automatic termination and allow the warrant to remain in effect until its specified termination date. This provision is found in subsection (2) of section 13 and subsection (3) of section 15.

Subsection (3) requires a description in the warrant of the person whose conversation is sought as well as the place or premises in which it is to occur, or telephone or telegraph lines over which it may be transmitted. This same concept is reflected in subsection (2) (b) of section 11 wherein it is required that the warrant application describe the person whose conversation is sought as well as the place or facility in or over which it will be heard. It is not required, however, that the person must be named or described with absolute certainty. In many instances this would be an impossible requirement, and the impossible is not requisite. Nonetheless, the description of the person must be sufficiently narrow to allow the executing authority to determine the object of surveillance with a high degree of probability. Persons, of course, may be described by their relationship to premises or other persons. Thus, this provision would be satisfied by designating the proprietor of a particular store or the occupant of a particular apartment, or by the designation of a person in the company of a named individual. It would not allow such vague and general descriptions as, for example, "the suspect in a robbery."

Subsection (4) resolves a similar problem involving particularity of description. A lawful eavesdropping application and warrant must both particularly describe the conversations sought as evidence. It is obviously impossible to describe a future conversation in haec verba, and, again, this Article does not require the impossible. It is, however, reasonable to exact a description of the conversation sought in terms of its nature. Thus, it is quite possible to specify in advance a conversation relating to the payment of a sum of money to a named state agency or public servant in order to obtain a designated type of license.

Subsection (5) is intended to clarify the legality of a physical trespass necessary to execute an eavesdropping warrant. Such express authorization, of course, removes the entry from the category of trespass.

B. Derivation

Section 13 is derived from New York Code of Criminal Procedure section 819.

C. Relationship to Existing Law

ORS 141.720 (4) provides:

"The application and any order issued under this section shall identify fully the particular telephone or telegraph line, or other telecommunication or radio communication carrier or channel from which the information is to be obtained and the purpose thereof."

ORS 141.720 (6) provides:

"Orders issued under this section shall not be effective for a period longer than 60 days."

Section 13 imposes a number of new requirements in this area:

(1) The effective period of the warrant is reduced from 60 days to 15 days.

(2) If the warrant is not to terminate upon acquisition of the particular conversation sought, the warrant must so provide.

(3) The person under surveillance must be particularly described.

(4) The type of conversation sought must be described, as well as the crime to which it relates.

(5) If a physical trespass is necessary to execute the warrant, the warrant must authorize such secret entry.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 819. Eavesdropping warrants; form and content

An eavesdropping warrant must contain:

1. The subscription and title of the issuing justice; and
2. The date of issuance, date of effect, if known, and termination date. The effective period of the warrant must not exceed twenty days. If the effective period of the warrant is to terminate upon the acquisition of a particular conversation, the warrant may so provide. If the effective period of the warrant is not to terminate upon the acquisition of a particular conversation, the warrant must so provide; and
3. A particular description of the person and the place, premises or telephone or telegraph line upon which eavesdropping may be conducted or has been approved; and
4. A particular description of the type of the conversation to be obtained by eavesdropping or which has been approved including a statement of the crime to which it relates; and
5. An express authorization to make secret entry upon a private place or premises to install the eavesdropping device, if such entry is necessary to execute the warrant.

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Section 14. Eavesdropping warrants; renewals. (1) At any time prior to the expiration of an eavesdropping warrant or any renewal thereof, the district attorney may apply for a renewal with respect to the same person, place, premises, or telephone or telegraph line. An application for renewal shall incorporate the warrant sought to be renewed together with the application and any accompanying papers upon which it was issued.

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(2) The application for renewal shall set forth the results of the eavesdropping already conducted, together with present grounds for extension in conformity with section 10.

(3) The judge may issue an order renewing the eavesdropping warrant and extending the authorization for a period not exceeding 15 days. The order shall specify the basis for the finding of present reasonable grounds for the issuance of the renewal.

COMMENTARY - EAVESDROPPING WARRANTS: RENEWALS

A. Summary

Section 14 provides for a renewal of an eavesdropping order upon a showing of present grounds for extension. This change in the present law was dictated by Berger to prevent the pro forma continuation of eavesdropping merely on the basis of facts and circumstances justifying the original warrant. The application for renewal need not be submitted to the judge who originally granted the warrant, since he may be unavailable. It is required that the judge have jurisdiction in the county where the warrant is to be executed.

B. Derivation

The section is derived from New York Code of Criminal Procedure section 820.

C. Relationship to Existing Law

ORS 141.720 (6) provides:

"Orders issued under this section shall not be effective for a period longer than 60 days, after which period the court which issued the warrant or order may, upon application of the officer who secured the original warrant by application, in its discretion, renew or continue the order for an additional period not to exceed 60 days. All further renewals thereafter shall be for a period not to exceed 30 days."

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 820. Eavesdropping warrants; renewals

1. At any time prior to the expiration of an eavesdropping warrant or any renewal thereof, the applicant may apply to a justice for a renewal with respect to the same person, place, premises, or telephone or telegraph line. An application for renewal must incorporate the warrant sought to be renewed together with the application and any accompanying papers upon which it was issued.

The application for renewal must set forth the results of the eavesdropping already conducted, and it must set forth present grounds for extension in conformity with section eight hundred sixteen. ^u

2. Upon such application, the justice may issue an order renewing the eavesdropping warrant and extending the authorization for a period not exceeding twenty days. Such an order shall specify the basis for the finding of present reasonable cause for the issuance of the renewal.

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Section 15. Eavesdropping warrants;
manner and time of execution. (1) An eaves-
dropping warrant shall be executed by the
applicant personally or by another person expressly designated
by him for that purpose.

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(2) The warrant shall be executed according to its terms during the authorized period or a part of the authorized period. Unless specifically ordered otherwise, the authorization shall terminate upon the acquisition of the conversation described in the warrant. Warrants shall be executed as soon as practicable.

(3) Upon termination of the authorization in the warrant or any renewal thereof, eavesdropping shall cease and the eavesdropping device installed shall be removed as soon as practicable. Entry upon a private place or premises for the removal of the device is authorized whether or not expressly provided by the warrant.

COMMENTARY - EAVESDROPPING WARRANTS;
MANNER AND TIME OF EXECUTION

A. Summary

Subsection (1) provides that a warrant may be executed by an applicant or another acting expressly on his behalf.

Subsection (3) contains the automatic termination provision and provides for the prompt removal of any eavesdropping device. Entry for the purpose of removal is authorized by the warrant even without a specific provision therein ordering such entry.

B. Derivation

Section 15 is taken from New York Code of Criminal Procedure section 821.

C. Relationship to Existing Law

The provisions contained in section 15 are new to Oregon law, inasmuch as ORS 141.720 fails to provide guidelines concerning execution of eavesdropping warrants.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 821. Eavesdropping warrants; manner and time of execution

1. An eavesdropping warrant may be executed by the applicant personally or by another person expressly and particularly designated by him for the purpose.

2. The warrant may be executed according to its terms during the hours specified, and for the authorized period or a part of the authorized period. Unless specifically otherwise ordered, the authorization must terminate upon the acquisition of the conversations described in the warrant. Warrants must be executed as soon as practicable. Upon termination of the authorization in the warrant or any renewals thereof, eavesdropping must cease and any device installed for the purpose of the eavesdropping must be removed or permanently inactivated as soon as practicable. Entry upon a private place or premise for the removal or permanent inactivation of such device is deemed to be authorized by the warrant.

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Section 16. Eavesdropping warrants; order of amendment.

(1) When an eavesdropping warrant has been issued and is being or has been executed pursuant to this Article and a conversation is overheard, the overhearing of which was not otherwise sought under the warrant, and the conversation constitutes evidence of a crime punishable as a felony that has been, is being or is about to be committed, or which will aid in the apprehension of the perpetrator of the crime, the district attorney shall, as soon as practicable, apply to a judge for an order amending the warrant to include the conversation.

(2) The application for an order amending an eavesdropping warrant shall contain:

(a) A statement of facts fully disclosing the circumstances of the overhearing of the conversation including the date of issuance and present status of the eavesdropping warrant and the substance of the conversation; and

(b) A statement of facts establishing probable cause to believe that the conversation constitutes evidence of a particularly described crime punishable as a felony that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of the crime.

(3) If the judge is satisfied that the conversation was overheard under the eavesdropping warrant and that the conversation does constitute evidence of a particularly described crime punishable as a felony that has been, is being or is about to be committed or

which will aid in the apprehension of the perpetrator of the crime, he may amend the warrant to include such conversation.

COMMENTARY - EAVESDROPPING WARRANTS;
ORDER OF AMENDMENT

A. Summary

An applicant is required by section 16 to apply to a judge for an amendment to an existing eavesdropping warrant when information concerning a crime not contemplated by the original warrant is disclosed by such surveillance. This amendment application is intended to ensure conformity to Fourth Amendment standards imposed throughout the Article. Since the conversations contemplated by this section relate to facts and circumstances not forming a basis for the original application and warrant, constitutional infirmity is avoided by amending the warrant to conform to the new line of inquiry.

B. Derivation

The section is taken from New York Code of Criminal Procedure section 822.

C. Relationship to Existing Law

ORS 141.720 does not contain a comparable provision.

State v. Cartwright, 246 Or 120, 418 P2d 822 (1966), involved the execution of a search warrant based upon information obtained by conventional eavesdropping. The search warrant stated that the applicant, a Multnomah County Deputy Sheriff, had personal knowledge of defendant's unlawful possession of narcotics. It appeared further that the officer had overheard conversations indicating that defendant was in possession of a firearm, although this information was not made a basis for the search warrant. The warrant was executed and the ex-convict defendant was found to be in possession of a firearm. He was subsequently convicted of possessing a pistol in violation of ORS 166.270.

The conviction was affirmed by a majority of the court on the grounds that information obtained by conventional eavesdropping did not constitute an illegal search and seizure. The court did not discuss the issue of the admissibility of evidence obtained under a search warrant describing contraband other than that which formed the basis of defendant's conviction.

TEXT OF REVISIONS OF OTHER STATES
TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 822. Eavesdropping warrants; order of amendment

1. When an eavesdropping warrant has been issued and is being or has been executed pursuant to this title and a conversation is overheard, the overhearing of which was not otherwise sought pursuant to such warrant, and such conversation constitutes evidence of a crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime, an applicant must, as promptly as practicable, apply to the justice who issued such warrant for an order amending such warrant to include such conversation.

2. The application for an order amending an eavesdropping warrant must contain: (a) a statement of facts fully disclosing the circumstances of the overhearing of such conversation including the date of issuance and present status of the eavesdropping warrant and the substance of such conversation; and (b) a statement of facts establishing reasonable cause to believe that such conversation does constitute evidence of a particularly described crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime.

3. If the justice is satisfied that such conversation was overheard pursuant to the eavesdropping warrant and that such conversation does constitute evidence of a particularly described crime that has been, is being or is about to be committed or which will aid in the apprehension of the perpetrator of such crime, he may amend such warrant to include such conversation.

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Section 17. Eavesdropping warrants; notice and return.

(1) Not later than 30 days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subsection (2) of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping shall be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

(2) On a showing of exigent circumstances the issuing judge may order the serving of the notice required by this section to be postponed for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

(3) Within 10 days after termination of the warrant or the last renewal thereof, a return shall be made by the applicant to the issuing judge who shall retain the return. The return shall consist of a report in writing subscribed and sworn by the applicant or the person expressly designated by him to conduct or supervise the execution of the warrant, summarizing the conversations over-

heard or recorded and the nature of the evidence obtained thereby. It shall also state whether the eavesdropping device has been removed or permanently inactivated.

COMMENTARY - EAVESDROPPING WARRANTS;
NOTICE AND RETURN

A. Summary

Section 17 provides for two distinct types of written reports.

Subsection (1) requires that notice of the eavesdropping is to be served upon either the person whose conversation is to be obtained or the owner, lessee or occupant of the premises, or the subscriber or owner of the telephone or telegraph line on which the eavesdropping device is installed, within 60 days of the termination date of the warrant. It is obvious that prior notice would effectively curtail the efficacy of the evidence-gathering technique. Carefully guarded secrecy is in many cases essential to effective eavesdropping, and this fact has been recognized by the United States Supreme Court.

In certain circumstances there may be a large scale and continuing investigation involving the installation of a succession of eavesdropping devices. Notice to any one of such persons within 60 days after termination of any of the installations could destroy the effectiveness of eavesdropping upon a coconspirator or associate. Consequently, subsection (2) provides for postponement of notice where such circumstances have been demonstrated.

Subsection (3) requires a return to the judge issuing the warrant, summarizing the evidence obtained thereby. The return must be made within 10 days after the termination of the warrant and any renewals thereof.

B. Derivation

Section 17 is derived from New York Code of Criminal Procedure section 823.

C. Relationship to Existing Law

Present Oregon law does not provide for notice and return of an eavesdropping order.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 823. Eavesdropping warrants; notice and return

1. Not later than sixty days after termination of the eavesdropping warrant or any renewals thereof, except as otherwise provided in subdivision two of this section, written notice of issuance of the eavesdropping warrant and of the period of authorized eavesdropping must be personally served upon the person named in the warrant whose conversations were sought to be overheard, or upon the owner, lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee, or occupant, if known, of the place or premises in which the eavesdropping device was installed, or upon the subscriber to the telephone or owner or lessee of the telegraph line described in the warrant.

2. On a showing of exigent circumstances to the issuing justice the serving of the notice required by this section may be postponed by order of the justice for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

3. Within fourteen days after termination of the warrant or the last renewal thereof, a return must be made by the applicant to the justice who issued the warrant, which return the justice shall retain. The return shall consist of a report in writing subscribed and sworn by the applicant or by the person expressly and particularly designated by him to conduct or supervise the execution of the warrant, summarizing the conversations overheard or recorded, which may be thereafter used in criminal prosecution, lead to other evidence, or information leading to the apprehension of the perpetrator of a crime. It must also state whether the eavesdropping device has been removed or permanently inactivated.

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Section 18. Eavesdropping warrants; safeguarding and custody of warrants and applications. The eavesdropping warrant, together with a copy of papers upon which the application is based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized by the warrant. A copy of the eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the judge issuing the warrant, and, in the event of the denial of an application for an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the judge denying the application.

COMMENTARY - EAVESDROPPING WARRANTS; SAFEGUARDING
AND CUSTODY OF WARRANTS AND APPLICATIONS

Section 18 sets forth the record keeping system to be followed in respect to eavesdropping applications and warrants. The proper care and custody of this material is essential in the event the validity of the warrant issued is later challenged.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF NEW YORK CODE OF CRIMINAL PROCEDURE

§ 824. Eavesdropping warrants; safeguarding and custody of warrants and applications

Any eavesdropping warrant together with a copy of papers upon which the application is based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A copy of such eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the justice issuing the same, and, in the event of the denial of an application for such an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the justice denying the same.

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See: Minutes of Commission
1/23/70, p. 27, Vol. IX, Tape #46
2/20/70, p. 5, Vol. IX, Tapes #46, 47, 48
3/18/70, p. 5, Vol. IX, Tapes #48, 49

AMENDMENTS

ARTICLE 27. OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Preliminary Draft No. 2; December 1969

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AMENDMENTS
OFFENSES AGAINST PRIVACY OF COMMUNICATION
Preliminary Draft No. 2

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OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

Preliminary Draft No. 2; December 1969

Amendments Approved at Commission Meeting
January 1970

On page 6, section 2 is amended to read:

Section 2. Eavesdropping. A person commits the crime of eavesdropping if, without legal authority granted under sections 9 through 25 of this Article, he intentionally:

(1) Overhears or records a conversation by means of an eavesdropping device, without the consent of all the persons engaged in the conversation, except that it shall not be unlawful for a peace officer, or a person acting under his direction, to overhear or record a conversation by means of an eavesdropping device, where such person is a party to the communication or one of the parties to the communication has given prior consent to such eavesdropping; or

(2) Intercepts or records a telephonic or telegraphic communication by means of an eavesdropping device, without the consent of at least one of the persons engaged in the communication; or

(3) Installs an eavesdropping device in a place or premises knowing, or having good reason to know, that it is to be used for criminal eavesdropping.

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Amendments to
OFFENSES AGAINST PRIVACY OF COMMUNICATIONS
Preliminary Draft No. 2

On page 22, section 4 is amended to read:

Section 4. Forfeiture of eavesdropping devices. An eavesdropping device installed or used in violation of this Article shall be forfeited to the state, and shall by court order be turned over to the Superintendent of State Police for whatever disposition he may order.

On page 28, section 7 is amended to read:

Section 7. Defenses. It is a defense to a prosecution under this Article that:

(1) The person charged was a public servant, or a person acting under his direction, performing official duties in compliance with sections _____ of this Article; or

(2) The person charged was an employe of a communications common carrier who, while acting in the ordinary course of his employment, overheard the communication when transmitted through the facilities of his employer. This defense shall not apply to a prosecution under paragraph (c) of subsection (1) of section 8 of this Article; or

(3) The communication intercepted or recorded consisted of a radio or television broadcast transmitted for the use of the general public, or was an emergency communication made in the normal course of operations by, or to, a federal, state or local public agency dealing in emergency services.

On page 31, section 8 is amended to read:

Section 8. Tampering with private communications. (1) A person commits the crime of tampering with private communications if, knowing that he does not have the consent of the sender or receiver, he:

(a) Intentionally opens or reads a sealed private communication;
or

(b) Obtains in any manner from an employe or officer of a telephone or telegraph company information regarding the contents or nature of a telephonic or telegraphic communication; or

(c) While an employe or officer of a telephone or telegraph company, knowingly divulges to another person the contents or nature of a telephonic or telegraphic communication.

(2) It shall not be unlawful under paragraph (c) of subsection (1) for an employe or officer of a telephone or telegraph company, having knowledge that the facilities of a telephone or telegraph corporation are being used to conduct any criminal business, traffic or transaction, to furnish to his immediate superior or to an appropriate law enforcement officer or agency all pertinent information within his possession relating to such matter, or to cooperate fully with any law enforcement officer or agency investigating such matter.

Amendments Not Considered by Commission

Pages 39 through 72 are amended to read:

Section 9. Eavesdropping warrants; definitions.

As used in sections 10 to 25 of this Article:

(1) "Eavesdropping" means wiretapping or mechanical overhearing or recording of a "conversation" by means of an "eavesdropping device", as those terms are defined in section 1 of this Article.

(2) "Eavesdropping warrant" means an order of a judge authorizing or approving eavesdropping.

(3) "Exigent circumstances" means conditions requiring the preservation of secrecy, whereby there is a reasonable likelihood that a continuing investigation would be thwarted by alerting any of the persons subject to surveillance to the fact that such surveillance had occurred.

(4) "Intercepted communication" means:

(a) A telephonic or telegraphic communication which was intentionally overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of an eavesdropping device; or

(b) A conversation which was intentionally overheard or recorded, without the consent of all the persons engaged in the conversation, by means of an eavesdropping device; except that a conversation overheard or recorded by a peace officer, or a person acting under his direct supervision or command, by means of an eavesdropping device, where such person is a party to the conversation, or one of the parties to the conversation has given prior consent, is not an "intercepted communication".

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Section 9 (Cont'd):

(5) "Contents", when used with respect to a communication, includes any information concerning the identity of the parties to the communication, and the existence, substance, purport or meaning of that communication.

(6) "Judge" means a circuit or district court judge of the county in which the eavesdropping warrant is to be executed.

(7) "Law enforcement officer" means a public servant empowered by law to conduct an investigation of or to make an arrest for a designated offense, or a lawyer authorized by law to prosecute or participate in the prosecution of a designated offense.

(8) "Designated offense" means any one or more of the following crimes:

(a) A conspiracy to commit any offense enumerated in this subsection or an attempt to commit any felony enumerated in this subsection which attempt would itself constitute a felony:

(b) Any of the following felonies: [].

(c) Any of the following crimes: [].

Section 10. Eavesdropping warrants; in general. (1) Under circumstances prescribed in this Article, a judge may issue an eavesdropping warrant upon ex parte application of a district attorney authorized by law to prosecute or participate in the prosecution of the particular designated offense which is the subject of the application.

(2) No eavesdropping warrant may authorize the interception of any communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than 30 days.

Section 11. Eavesdropping warrants; when
issuable. An eavesdropping warrant may issue only:

(1) Upon an appropriate application made in
conformity with this Article; and

(2) Upon probable cause to believe that a
particularly described person is committing, has committed or is about
to commit a particular designated offense; and

(3) Upon probable cause to believe that particular communications
concerning the offense will be obtained through eavesdropping; and

(4) Upon a showing that normal investigative procedures have
been tried and have failed, or reasonably appear to be unlikely to
succeed if tried, or to be too dangerous to employ; and

(5) Upon probable cause to believe that the facilities from
which, or the place where, the communications are to be intercepted,
are being used, or are about to be used, in connection with the
commission of the offense, or are leased to, listed in the name of,
or commonly used by the described person.

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Section 12. Eavesdropping warrants; application.

(1) An ex parte application for an eavesdropping warrant shall be made to a judge in writing and shall be subscribed and sworn to by a district attorney.

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(2) The application shall contain:

(a) The identity of the district attorney and a statement of his authority to make the application; and

(b) A full and complete statement of the facts and circumstances relied upon by the district attorney to justify his belief that an eavesdropping warrant should be issued, including a statement of facts establishing probable cause to believe that a particular designated offense has been, is being or is about to be committed, a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, a particular description of the type of the communication sought to be intercepted, and the identity of the person, if known, committing the designated offense and whose communications are to be intercepted; and

(c) A statement that the communications are not otherwise legally privileged; and

(d) A full and complete statement of facts establishing that normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ, to obtain the evidence sought; and

Section 12 (Cont'd):

(e) A statement of the period of time for which the eavesdropping is required to be maintained. If the nature of the investigation is such that the authorization for eavesdropping should not automatically end when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter; and

(f) A full and complete statement of the facts concerning all previous applications, known to the district attorney, for an eavesdropping warrant involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each application.

(3) Allegations of fact in the application may be based either upon the personal knowledge of the district attorney or upon information and belief. If the district attorney personally knows the facts alleged, it must be so stated. If the facts stated in the application are derived in whole or part from the statements of persons other than the district attorney, the sources of the facts must be either disclosed or described, and the application must contain facts establishing the existence and reliability of the informants or the reliability of the information supplied by them. The application must also state, so far as possible, the basis of the informant's knowledge or belief. Affidavits of persons other than the district attorney may be submitted in conjunction with the application if they tend to support any fact or conclusion alleged therein. Accompanying affidavits may be based on either personal knowledge of the affiant, or information and belief with the source thereof and the reason therefor specified.

Section 13. Eavesdropping warrants; determination of application.

(1) For the purpose of determining whether grounds exist for the issuance of the warrant, the judge, if he finds that the application conforms to section 12 of this Article, may require the district attorney to furnish additional testimony or documentary evidence in support of the application.

(2) If the judge determines on the basis of the facts submitted by the district attorney that grounds exist under section 11 of this Article, he may grant the application and issue an eavesdropping warrant in accordance with section 14.

(3) If the judge finds that grounds do not exist for the issuance of an eavesdropping warrant, or if the application fails to conform to section 12 of this Article, he shall deny the application.

Section 14. Eavesdropping warrants; form and content. An eavesdropping warrant shall contain:

(1) The name of the applicant, date of issuance, and the subscription and title of the issuing judge; and

(2) The identity of the person, if known, whose communications are to be intercepted; and

(3) The nature and location of the communications facilities as to which, or the place where, authority to intercept is granted; and

(4) A particular description of the type of communications sought to be intercepted, and a statement of the particular designated offense to which it relates; and

(5) The identity of the law enforcement agency authorized to intercept the communications; and

(6) The period of time during which the interception is authorized, including a statement as to whether the interception shall automatically end when the described communication has been first obtained; and

(7) A provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in a way that will minimize the interception of communications not otherwise subject to eavesdropping under this Article, and shall terminate upon attainment of the authorized objective, or in any event in 30 days; and

(8) An express authorization to make secret entry upon a private place or premises to install an eavesdropping device, if entry is necessary to execute the warrant.

Section 15. Eavesdropping warrants; manner and time of execution.

(1) A law enforcement officer who is a member of the law enforcement agency authorized in the warrant to intercept the communications shall execute an eavesdropping warrant according to its terms.

(2) The law enforcement agency intercepting the communications shall cease eavesdropping immediately upon termination of the authorization in the warrant. The agency shall remove or permanently inactivate any installed eavesdropping device as soon as practicable. Entry by the law enforcement agency upon a private place or premises for the removal or permanent inactivation of the eavesdropping device is considered to be authorized by the warrant.

(3) The law enforcement agency shall, if possible, record on tape, wire or other comparable device the contents of a communication intercepted by any means authorized by this Article. The recording of the contents of the communication shall be done in a way that will protect the recording from editing or other alteration.

Section 16. Eavesdropping warrants; order of extension. (1)

Any time before the expiration of an eavesdropping warrant, the district attorney may apply to the issuing judge, or, if he is unavailable, to another judge, for an order of extension.

(2) The application for an order of extension shall conform in all respects to the provisions of section 12 of this Article and, in addition, shall contain a statement setting forth the results of the eavesdropping already conducted, or a reasonable explanation of the failure to obtain any results. The provisions of sections 11 and 13 of this Article are applicable in the determination of the application for an order of extension.

(3) The period of extension shall be no longer than the judge considers necessary to achieve the purposes for which it is granted and in no event for longer than 30 days.

(4) The order of extension shall conform in all respects to the provisions of section 14 of this Article.

(5) The order of extension shall be executed in the same manner as an eavesdropping warrant.

Section 17. Eavesdropping warrants; progress reports and notice. (1) An eavesdropping warrant may require that intermittent reports be made to the issuing judge, at such intervals as he may order, showing what progress has been made toward achievement of the authorized objective and the need for continued eavesdropping.

(2) Immediately upon the expiration of the period of an eavesdropping warrant, the recordings made under subsection (3) of section 15 shall be made available to the issuing judge and sealed under his directions.

(3) Except as otherwise provided in subsection (6) of this section, within a reasonable time, but no later than 90 days after termination of an eavesdropping warrant or expiration of an extension order, written notice shall be personally served upon the person named in the warrant and upon any other party to the intercepted communication that the judge determines should be notified in the interest of justice.

(4) The written notice specified in subsection (3) of this section shall include:

(a) Notice of the fact and date of the issuance of the eavesdropping warrant;

(b) The period of time covered by the authorized eavesdropping; and

(c) Notice of whether communications were or were not intercepted during the authorized period.

Section 17 (Cont'd):

(5) The judge, upon the filing of a motion by a person served with notice of authorized eavesdropping, may in his discretion make available to that person or his counsel for inspection portions of the intercepted communications, applications and warrants as the judge determines to be in the interest of justice.

(6) On a showing of exigent circumstances to the issuing judge, the service of notice required by subsection (3) may be postponed by order of the judge for a reasonable period of time. Renewals of an order of postponement may be obtained on a new showing of exigent circumstances.

Section 18. Eavesdropping warrants; emergency authority. (1)

Notwithstanding the provisions of this Article, a law enforcement officer who reasonably believes that an emergency situation exists with respect to conspiratorial activities threatening national security or characteristic of organized crime that requires the interception of communications before a warrant authorizing such interception can with due diligence be obtained, and there exists grounds upon which a warrant could be obtained under this Article to authorize such interception, he may intercept the communications, provided that he makes an application for a warrant approving the interception in accordance with this Article within 48 hours after the interception has occurred, or begins to occur.

(2) In the absence of a warrant, emergency interception shall immediately end when the communication sought is obtained or when the application for the warrant is denied, whichever is earlier.

(3) In the event the application for approval is denied, or in any other case where the interception ends without a warrant having been issued, the contents of any communication intercepted shall be treated as having been obtained in violation of this Article, and notice shall be served as provided for in section 17 of this Article on the person named in the application.

Section 19. Eavesdropping warrants; custody of warrants, applications and recordings. (1) Applications made and warrants issued under this Article shall be sealed by the judge. An eavesdropping warrant, together with a copy of papers upon which the application is based, shall be delivered to and retained by the district attorney as authority for the eavesdropping authorized by the warrant. A copy of the eavesdropping warrant, together with all the original papers upon which the application was based, shall be retained by the issuing judge, and, in the event of a denial of an application for an eavesdropping warrant, a copy of the papers upon which the application was based shall be retained by the judge denying the application. Eavesdropping applications and warrants shall be disclosed only upon a showing of good cause before a judge and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for 10 years.

(2) Custody of recordings made under subsection (3) of section 15 shall be wherever the judge orders. They shall not be destroyed except upon an order of the judge who issued the warrant and in any event shall be kept for 10 years. Duplicate recordings may be made for use or disclosure under the provisions of subsections (1) and (2) of section 21 for investigations.

Section 20. Eavesdropping warrants; reports to the administrative office of the United States courts and the judicial conference. (1)

Within 30 days after the termination of an eavesdropping warrant, or expiration of an extension order, or the denial of a warrant approving an emergency interception, the issuing or denying judge shall submit to the administrative office of the United States courts a report as is required by federal law. A duplicate copy of the report shall be forwarded to the judicial conference.

(2) In January of each year, each district attorney shall submit to the administrative office of the United States courts a report as is required by federal law. A duplicate of such report shall be forwarded to the judicial conference.

Section 21. Eavesdropping warrants; disclosure and use of information; order of amendment. (1) A law enforcement officer who has by any means authorized by this Article obtained knowledge of the contents of an intercepted communication, or evidence derived therefrom, may disclose such contents to another law enforcement officer to the extent that the disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

(2) A law enforcement officer who has by any means authorized by this Article obtained knowledge of the contents of an intercepted communication, or evidence derived therefrom, may use such information to the extent that its use is appropriate to the proper performance of his official duties.

(3) Any person who has by any means authorized by this Article received information concerning a communication, or evidence derived therefrom, intercepted in accordance with the provisions of this Article may disclose the contents of that communication or such derivative evidence while giving testimony under oath in any criminal proceeding in any court or in any grand jury proceeding; provided, however, that the presence of the seal provided for by subsection (2) of section 17, or a satisfactory explanation of its absence, shall be a prerequisite for the use or disclosure of the contents of any communication or derivative evidence.

Section 21 (Cont'd):

(4) When a law enforcement officer, while engaged in intercepting communications in a manner authorized by this Article, intercepts a communication which was not otherwise sought and which constitutes evidence of a designated crime that has been, is being or is about to be committed, the contents of the communication, and evidence derived therefrom, may be disclosed or used as provided in subsections (1) and (2) of this section. Contents of an intercepted communication and any evidence derived therefrom may be used under subsection (3) of this section when a judge amends the eavesdropping warrant to include such contents. The application for an amendment shall be made by the district attorney as soon as practicable. If the judge finds that the contents were otherwise intercepted in accordance with the provisions of this Article, he may grant the application.

Section 22. Eavesdropping evidence; definitions. As used in sections 23 through 25 of this Article:

(1) "Aggrieved defendant" means an aggrieved person who has been named as a defendant in an indictment or information filed in a court having trial jurisdiction of such indictment or information.

(2) "Aggrieved person" means:

(a) A person who was the sender or receiver of a communication described in paragraph (a) of subsection (4) of section 9 of this Article; or

(b) A party to a conversation or discussion described in paragraph (b) of subsection (4) of section 9 of this Article; or

(c) A person against whom the overhearing or recording described in subsection (4) of section 9 of this Article was directed.

Section 23. Eavesdropping evidence; notice before use. (1) The contents of an intercepted communication, or evidence derived therefrom, shall not be received in evidence or otherwise disclosed upon trial of a defendant unless the state, not less than ³⁰~~10~~ days before the commencement of the trial, has furnished the defendant with a copy of the eavesdropping warrant, and accompanying application, under which the interception was authorized or approved, and a written transcript of the contents of the intercepted communication intended to be used by the state at the trial or from which evidence was derived that is intended to be used at the trial.

days before the trial and that the defendant will not be prejudiced by the delay in receiving the papers.

Section 24. Eavesdropping evidence; suppression motion; in general.

(1) An aggrieved defendant may move to suppress the contents of any intercepted communication, or evidence derived therefrom, which the state intends to offer in evidence upon such defendant's trial, on the ground that:

(a) The intercepted communication was unlawfully overheard or recorded; or

(b) The eavesdropping warrant under which it was intercepted is insufficient on its face; or

(c) The eavesdropping was not conducted in conformity with the eavesdropping warrant.

(2) The motion to suppress prescribed in subsection (1) of this section shall be made in a court having trial jurisdiction of the indictment or information pending against the aggrieved defendant. The court shall hear evidence upon any issue of fact necessary to a determination of the motion. The court may, in its discretion, make available to the aggrieved defendant or his counsel for inspection portions of the intercepted communication, or evidence derived therefrom, as the court determines to be in the interest of justice.

(3) If no motion is made in accordance with the provisions of this Article, the defendant shall be considered to have waived any objection during trial to the admission of evidence, based upon the ground that the evidence is subject to suppression as prescribed in subsection (1) of this section.

Section 25. Eavesdropping evidence; suppression motion; time of making and determination. (1) The suppression motion prescribed in subsection (1) of section 24 of this Article shall be made before commencement of the trial, except that the court may entertain a motion made for the first time during trial upon a showing that the aggrieved defendant did not have an opportunity to make the motion before trial, or that he was not aware of the grounds of the motion.

(2) When the motion is made before trial, the trial shall not be commenced until the motion has been determined. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made before trial, and shall decide all issues of fact and law.

(3) If the motion to suppress is granted, the contents of the intercepted communication, or evidence derived therefrom, shall not be received in evidence in any trial, hearing or proceeding.

Section _____. Unlawful dealing in eavesdropping devices. (1) A person commits the crime of unlawful dealing in eavesdropping devices if he knowingly:

(a) [Sends through the mail,] Transports in intrastate commerce, manufactures, assembles, possesses or sells an eavesdropping device knowing that the device is designed primarily for use in wiretapping or mechanical overhearing or recording of a conversation; or

(b) Places in a newspaper, magazine, trade circular, catalogue or other publication an advertisement of an eavesdropping device knowing that the device is designed primarily for use in wiretapping or mechanical overhearing or recording of a conversation.

(2) It shall not be unlawful under this section to [send through the mail,] transport in intrastate commerce, manufacture, assemble, possess, advertise or sell devices that may be used for eavesdropping if:

(a) Done by a communications common carrier, or its agents, in the normal course of the communication common carrier's business; or

(b) Done by a public servant, or a person acting under his direction, in the normal course of law enforcement or investigative activities authorized by this Article; or

(c) Done by a person under contract with a public servant or governmental agency incident to an authorized business transaction; or

(d) The device is not designed primarily for surreptitious electronic eavesdropping and is [mailed,] transported, manufactured, assembled, advertised, possessed or sold with the intent that it be lawfully used as designed:

TO: Criminal Law Revision Commission

RE: Recommended Designated Offenses Subject to Electronic Surveillance

<u>Article</u>	<u>Section</u>	<u>Title of Offense</u>
_____ . Homicide	_____ .	Murder
_____ . Sexual Offenses	_____ .	Rape, First Degree
	_____ .	Sodomy, First Degree
_____ . Kidnapping	_____ .	Kidnapping, First Degree
	_____ .	Coercion
_____ . Arson	_____ .	Arson, First Degree
_____ . Robbery	_____ .	Robbery, First Degree
	_____ .	Robbery, Second Degree
_____ . Escape	_____ .	Escape, First Degree
	_____ .	Escape, Second Degree
_____ . Narcotics & Dangerous Drugs	_____ .	Criminal Dealing in Drugs
_____ . Gambling	_____ .	Promoting Gambling, First Degree
	_____ .	Promoting Gambling, Second Degree
	_____ .	Possession of Gambling Records
	_____ .	Possession of Gambling Devices
_____ . Bribery	_____ .	Bribe Giving
	_____ .	Bribe Receiving
_____ . Riot & Disorderly Conduct	_____ .	Treason
_____ . Business & Commercial Frauds	_____ .	Commercial Bribe Receiving
	_____ .	Commercial Bribe Giving
	_____ .	Sports Bribe Giving
	_____ .	Sports Bribe Receiving
	_____ .	Tampering With Sports Contest
_____ . Obstructing Governmental Administration	_____ .	Witness Bribe Giving
	_____ .	Witness Bribe Receiving
_____ . Theft	_____ .	Theft by Extortion