Tapes #90 and 91

#90 - Side 1 only
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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Fourteenth Meeting, January 22, 1970

Minutes

Members Present: Judge James M. Burns, Chairman
Mr. Donald E. Clark
Representative David G. Frost
Mr. Frank D. Knight

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Roger D. Wallingford, Research Counsel

Others Present: Mrs. Margot Perry, Chairman, Gun Control Committee, Kennedy Action Corps
Mr. Terry Finn, Member, Gun Control Committee, Kennedy Action Corps

The meeting was called to order by the chairman, Judge Burns, at 1:35 p.m., Room 315, Capitol Building, Salem, Oregon.

Representative Frost moved the approval of the minutes of the subcommittee meeting of December 11, 1969. There being no objection, the minutes were approved as submitted.

OFFENSES INVOLVING NARCOTICS & DANGEROUS DRUGS; P.D. #2; JAN. 1970.

Mr. Paillette explained that the second draft on Offenses Involving Narcotics and Dangerous Drugs contained the changes directed by the subcommittee at its meeting of December 11, 1969.

Section 1. Offenses involving narcotics and dangerous drugs; definitions.

Chairman Burns referred to subsection (2), the definition of "dangerous drugs", and asked if the list had been checked since the last meeting of the Drug Advisory Council.

Mr. Wallingford said the list had been checked after the Council meeting and that no changes were made.

Chairman Burns asked if the provisions in subsection (2) (c) would solve the "Josephine County problem."

Mr. Wallingford advised that it would not solve the problem with respect to drugs designated as "dangerous" in the future by the Drug Advisory Council. The draft provision in this regard is the same as that presently in the statutes. Since the Drug Advisory Council is the only group with the authority to designate a drug as "dangerous", he could see no way to avoid this potential problem. A problem might arise, also, in the event the Drug Advisory Council deleted one of the drugs now listed as "dangerous". In this case, Mr. Wallingford assumed the next legislative assembly would amend the statute to conform to the Council's decision. In the interim it would be necessary to rely upon the discretion of the prosecutors not to prosecute on charges relating to offenses involving the drug to be deleted. He suggested that perhaps some provision could be inserted in the draft to cover the situation where a drug is deleted from the list of "dangerous drugs" by action of the Drug Advisory Council.

Chairman Burns questioned the constitutionality of allowing the Drug Advisory Council to delete a drug from the list of "dangerous drugs" set out in the statute. Representative Frost agreed that it would probably be an "unlawful delegation of legislative powers." He observed that he had the same reservation with respect to the addition of drugs to the list, although he admitted this has been done in the past.

Chairman Burns pointed out that subsection (5) of section 1 defines "unlawfully" as "in violation of any provision of ORS chapter 474 or 475, or any other Oregon statute" while the section commentary on page 3 defines the term to mean "in violation of ORS chapter 474 or 475, or any other Oregon statute governing narcotic or dangerous drug transactions." He asked if one definition meant more or less than the other and if the language ",or any other Oregon statute" was needed in section 1 (5).

Mr. Wallingford stated that as far as he could determine, all of the statutes governing narcotic or dangerous drug violations or transactions are contained in ORS chapters 474 and 475 so that unless some future narcotic legislation were enacted and placed elsewhere in the code, this language could probably be omitted. ORS chapters 474 and 475 are the only two chapters in the Oregon code setting out the "lawful" means of possessing, manufacturing or selling narcotics and dangerous drugs.

Mr. Wallingford explained that in subsection (4) the language "and includes each such transaction made by any person, whether as principal, proprietor, agent, servant or employe" has been

added to the definition of the term "sells" appearing in the first draft of the Article. This amendment was necessary to make the definition conform to the definition of "sale" contained in ORS 474.010 (10).

Chairman Burns was of the opinion that if in the future a law governing narcotics or dangerous drugs were enacted and placed in the code in a chapter other than 474 or 475, it would be the responsibility of the Legislative Counsel to pick it up and see that all statutes affected were amended to conform. For this reason he favored deleting the language "or any other Oregon statute" contained in subsection (5).

Mr. Paillette agreed and, going a step further, wondered if it was necessary to define "unlawfully".

Representative Frost commented that the deletion of the definition might "crank in" some federal regulations the subcommittee is not aware of.

Chairman Burns noted there are lawful ways to prescribe narcotics. Section 2 of the draft covers "knowingly and unlawfully...sells...any narcotic or dangerous drug."

Representative Frost moved to delete the words ",or any other Oregon statute" contained in subsection (5) of section 1. The motion carried unanimously.

Chairman Burns asked for a vote on section 1 as amended. The vote was unanimously in favor of adoption.

Section 2. Criminal dealing in drugs.

Mr. Wallingford recalled that at the subcommittee meeting of December 11, 1969, a decision was made to draft a section which would combine the provisions of sections 2 through 5 of preliminary draft No. 1. The original sections 2 and 3 covered criminal sale of drugs in the second and first degrees. Sections 4 and 5 covered criminal possession of drugs in the second and first degrees. Section 2 of the second preliminary draft carries out this directive. The new section is pretty much a restatement of present law. The major change is the inclusion of both "narcotic" and "dangerous drug" within one section. Present statutes cover these in separate statutes although the penalties are the same.

Mr. Knight asked Chairman Burns if any of the Portland courts had had occasion to rule as to whether the buyer of a narcotic drug is an accomplice of the seller. Chairman Burns could recall no case on this. Mr. Knight related that he had heard a Lane

County case being argued before the Court of Appeals where the trial court had ruled that the buyer was an accomplice and the defendant was appealing on the basis that there was not sufficient corroboration. The state was endeavoring to get the Court of Appeals to reverse the trial court's ruling. The primary basis for the trial court's ruling was that "possession" is under the same statute as "buying". It held that even though the buyer might be charged under some other wording of the crime, the two offenses are charged under the same statute and the buyer is an accomplice as a matter of law. The Court of Appeals has not yet ruled on this case. Mr. Knight was satisfied with the draft provisions; however, if the court does rule that the buyer is an accomplice of the seller, it will create some problems.

Mr. Paillette knew of no Oregon cases involving narcotics but recalled some cases where it could be argued by analogy that the buyer should not be considered an accomplice, i.e., the Barnett case on abortion and State v. Coffey.

Chairman Burns recalled that State v. Stanley and State v. Nice, sodomy cases, hold that the victim can be an accomplice. It is a question of fact as to whether he is. He observed, however, that it could be possible to have a purchaser who is not in "possession" and it might be well to include the term "purchase" in section 2.

Representative Frost thought this situation would be covered by the provisions in the Inchoate Crimes Article.

Mr. Knight thought the addition of the word "purchase" to section 2 would make the problem of whether a buyer was an accomplice of a seller even more complicated.

Mr. Paillette advised that in the draft on Parties to Crime there is a section entitled "Exemptions to criminal liability for conduct of another" which reads:

> "Except as otherwise provided by the statute defining the crime, a person is not criminally liable for conduct of another constituting a crime if:
>
> "(1) He is a victim of that crime; or
>
> "(2) The crime is so defined that his conduct is necessarily incidental thereto."

Mr. Paillette was of the opinion that the buyer of a narcotic drug would fall within the provisions of subsection (2) of this section. The Model Penal Code commentary cited for this section of the Article on Parties to Crime reads:

"....No one can draft a prohibition of adultery without awareness that two parties to the conduct necessarily will be involved. It is proposed, therefore, that in such cases the general section on complicity be made inapplicable, leaving to the definition of the crime itself the selective judgment that must be made. If legislators know that buyers will not be viewed as accomplices in sales unless the statute indicates that this behavior is included in the prohibition, they will focus on the problem as they frame the definition of the crime."

Under the provisions of this section of the Parties to Crime Article, a buyer would not be an accomplice. Mr. Paillette suggested it might be helpful to allude to this section in the commentary on the Article on Narcotics and Dangerous Drugs. It was agreed by the subcommittee members that this would be advisable.

Since there were no more comments regarding section 2, Chairman Burns asked for a vote on its adoption. The section was adopted unanimously.

Section 3. Tampering with drug records.

Mr. Paillette recalled that there had been a good deal of discussion at the December 11th subcommittee meeting on the provisions of this section.

Mr. Wallingford informed the subcommittee of two additions to the section--subsections (2) and (3).

Chairman Burns understood that, basically, the provision puts together, in one place, the proscriptions regarding tampering with prescriptions and drug records.

Mr. Wallingford agreed, adding that the section restates a number of existing statutes; there is nothing really new in it.

Representative Frost asked if the problem arising when someone with a lawful prescription takes a pill out of the container in which it was dispensed and puts it in a "pill box" has been solved. Has this person removed a drug label or do the section's provisions apply only to the receptacle in which the drug was sold.

Mr. Wallingford replied that under the provisions set out in section 7 of the draft "proof of possession of a narcotic drug not in the container in which it was originally...sold...is prima facie evidence that such possession is unlawful" and such possession of a dangerous drug "is prima facie evidence that such possession is unlawful unless the possessor also has in his possession a label prepared by the pharmacist for the drug dispensed."

Mr. Wallingford advised that ORS 474.070 (3) provides that:

> "Any person who has obtained...any narcotic drug... shall return to such physician, dentist or veterinarian any unused portion of such drug when it is no longer required by the patient."

The penalty for violating this section is:

> "...upon conviction...a fine not exceeding $5,000, or by imprisonment in the state penitentiary for not exceeding 10 years, or both."

Mr. Knight thought that the only place where this statute could be realistically applied would be in a situation where a person obtains a narcotic from various sources and does carry with him a valid prescription although the drugs he has probably were not obtained under the prescription.

Chairman Burns noted the commentary on section 3, page 6, states that "in the most instances, the section applies both to narcotic and dangerous drugs" and on page 8 the commentary states that "the narcotic drug marihuana would not ordinarily be within the scope of section 3." He suggested that both of these sentences be removed from the commentary in that he believed the first statement to be inaccurate and the last one to be unnecessary. Conceivably marihuana could come to have a medical use, he said, in which event it would be desirable to cover forged prescriptions for it under subsection (3).

Representative Frost moved the adoption of section 3 as drafted and the motion carried unanimously.

Section 4. Criminal use of drugs.

Mr. Wallingford advised the subcommittee of two changes made in subsection (1). First, the language "except when administered or dispensed by or under the direction of a person authorized by law to prescribe and administer narcotic drugs and dangerous drugs to human beings" has been added. This was taken from the existing statute. Secondly, the first draft read: "A person commits the crime of criminal use of drugs if while in this state he...." The present draft omits the words "while in this state".

Chairman Burns asked if subsection (2) is a restatement of existing law and Mr. Knight observed that it is a restatement of the existing narcotic statute.

Mr. Wallingford agreed, adding that throughout the draft "narcotic" and "dangerous drug" provisions are combined in the sections.

Mr. Knight moved the adoption of section 4 as drafted and the motion carried unanimously.

Section 5. Criminal drug promotion.

Mr. Wallingford stated that the first draft of this section used the term "drug addicts" and this has been changed in the present draft to read "drug users".

Chairman Burns drew attention to the language "which is used for the unlawful keeping or sale of narcotic or dangerous drug" used in subsection (2) and asked the meaning of the term "keeping". He asked if there are any cases on this.

Mr. Wallingford said this language was taken from the present statute and the term "keeping" means "storing".

Mr. Knight added that there are no cases on this because it is a "cop-out". As a practical matter, it is almost impossible to prove because of the use of the word "frequents" in the existing statute. For this reason about all the statute is used for is for a reduced plea. Mr. Knight observed, too, that the present statute includes frequenting a "vehicle, boat, aircraft, or any place whatever." If it is desired to have a statute on which to prosecute, he was of the opinion that the term "frequent" should be changed to "being in", or something similar to this. After the Oare case, he continued, it becomes more important to have a statute like this. Under the Oare case, it comes almost to the point that unless a person has the drug in his hand, it is not possible to charge him with anything.

Mr. Wallingford advised that the provisions of section 5 do extend the scope of existing law (ORS 474.130) by including within its prohibition dangerous drug activity.

Mr. Knight moved to delete the word "frequents" used in section 5 and to substitute the language "is found in or about". The amended section would read:

> "A person commits the crime of criminal drug promotion if he knowingly maintains or is found in or about a place:".

The motion failed. Voting for the motion: Knight. Voting against the motion: Chairman Burns, Frost, Clark.

Representative Frost moved the adoption of section 5 as drafted. The motion carried. Voting for the motion: Chairman Burns, Frost, Clark. Voting against the motion: Knight.

Section 6. Obtaining a drug unlawfully.

Mr. Wallingford noted that preliminary draft No. 1 had used the language "by the use of a false name or the giving of a false address" and this has been changed in the present draft to read "the use or giving of a false name or a false address". The first draft had used the language "by falsely assuming to be a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian or other authorized person" and this has been changed in the present draft to read "falsely representing himself to be a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian or other authorized person".

Representative Frost referred to the language "or other authorized person" used in subsection (4) and asked what person, not listed in the subsection would be authorized to obtain a narcotic or dangerous drug. Since ORS chapters 474 and 475 specify those persons authorized to obtain a narcotic or dangerous drug, he thought it would be simpler to have subsection (4) read: "Falsely representing himself to be a person authorized by law to obtain narcotic or dangerous drugs."

Chairman Burns questioned the application of the verbs "obtains" and "procures" to each subsection of section 6. It seemed to him that only the verb "obtains" would apply to subsection (4). He suggested some redrafting be done so that the section would read to the effect that:

"A person commits the crime of obtaining a drug unlawfully if he:

"(1) Obtains a narcotic or dangerous drug by falsely representing himself to be a manufacturer, wholesaler...;or

"(2) Obtains or procures the administration of a narcotic or dangerous drug by:

"(a) The forgery or alteration...; or

"(b) The concealment of a material fact; or

"(c) The use or giving of a false name or a false address; or

"(d) Any other form of fraud, deceit, misrepresentation or subterfuge."

Representative Frost acknowledged the word "subterfuge" was presently used in the statutes but asked its meaning. He favored deletion of the term.

Mr. Paillette noted that the terms "fraud", "deceit" and "misrepresentation" have been used elsewhere in the proposed code but he could not recall use of the word "subterfuge".

Representative Frost asked if it was the desire of the subcommittee to amend subsection (4). Chairman Burns suggested the section be redrafted so as to show that subsection (4) is applicable to "obtains". He did not think this rewriting would necessitate running the draft through the subcommittee again.

Mr. Paillette favored the approach suggested by Representative Frost. He did not favor splitting the section into subsections by making part of it "obtaining" and part of it "procuring" as it would unduly complicate the structure.

Representative Frost moved to amend section 6 (4) so that it would read:

> "Falsely representing himself to be a person authorized by law to obtain narcotic or dangerous drugs."

The motion carried unanimously.

Representative Frost moved adoption of section 6 as amended and this motion also passed unanimously.

Section 7. Criminal possession of drug; prima facie evidence.

Chairman Burns asked if the provisions in subsection (1) had been checked against the Leary case. He noted, also, that another case had come down just this week which upheld the presumption in the case of heroin but did not uphold the presumption as to cocaine.

Mr. Wallingford said he had not checked the provisions against the Leary case and added that the case which came down this week turned on the presumption that cocaine and heroin were imported. Just having possession of heroin is prima facie evidence of knowledge that it is imported. These cases will be checked, however, before the draft is considered by the Commission.

Chairman Burns thought the Leary case went beyond this and Mr. Knight agreed, although the case dealt with marihuana rather than heroin. When the court dealt with heroin it held that there is not a growth of opium poppies available in the United States

sufficient to enable the manufacture of heroin so that with the possession of heroin there is still a prima facie evidence of importation. There is enough marihuana grown in the United States to make such a presumption incorrect.

Chairman Burns noted subsection (1) is limited to "proof of unlawful manufacture, cultivation, transportation or possession of a narcotic or dangerous drug is prima facie evidence of knowledge of its character" and wondered why "selling" was not included within the proscription.

Mr. Wallingford replied that it was not believed necessary to require this presumption on a sale.

Chairman Burns noted the subsection required "proof of unlawful...possession of a narcotic or dangerous drug" and asked how "unlawful possession" could be proved.

Mr. Knight said that if a person had a tablet in his pocket which, when tested, turned out to be LSD, the state would not have to prove the individual knew it was LSD; it would only be necessary to prove the individual knew the tablet was in his pocket.

Chairman Burns referred back to section 2 of the draft, Criminal dealing in drugs, and noted that it requires "knowingly and unlawfully manufactures, cultivates, transports...any narcotic or dangerous drug."

Mr. Wallingford said that the present possession statutes on narcotics do not use words of culpability.

Chairman Burns asked if under present law it is necessary for the state to prove the defendant knew the cigarette in his pocket was marihuana or the tablet LSD.

Mr. Paillette did not think such a showing is presently required and that is why the draft is written as it is. Chairman Burns understood, then, that proof of unlawful possession would be proof of possession. Mr. Paillette stated that proof of unlawful possession would be prima facie evidence of knowing possession.

Mr. Wallingford added that subsection (1) of section 7 satisfies the culpability element of "knowing" set out in section 2.

Mr. Paillette stated that under the provisions of section 2 the district attorney will have to allege and prove the defendant knowingly and unlawfully possessed a dangerous drug which he does not have to prove at the present time. At present it is just

necessary to prove knowing possession but not that the defendant had knowledge of the character of the item.

Representative Frost moved the adoption of section 7 and the motion carried unanimously.

Section 8. Burden of proof on exemption from drug laws.

Mr. Wallingford advised the members that this section is the same as it appeared in preliminary draft No. 1.

Mr. Knight noted the section began with the words "in any prosecution for violation..." and asked if the present law did not read "in any indictment for violation...."

Mr. Paillette replied that he was sure the draft language is different than existing law because it is standard language used throughout the proposed code for stating defenses or exceptions.

Representative Frost asked if the language "such exception, excuse, proviso or exemption" had previously been used and Mr. Paillette replied that this series of words has not been used--this language was lifted directly from the present statute. Representative Frost wondered why it would not be satisfactory to use the wording "exception, exemption or justification".

Chairman Burns referred to ORS 474.180 and read:

> "In any complaint, information or indictment, and in any action or proceeding brought for the enforcement of any provision of this chapter...."

Mr. Knight thought this language was more specific and that the draft ought to make it clear that by using the language "in any prosecution" it is not intended to change any of the present language of "complaint, information or indictment."

Chairman Burns did not see how the draft language would change this. He then asked if the section's provisions would apply to a forfeiture proceeding. He thought that if the defendant is made to "carry the ball" on a proviso or exception, it should also be necessary on a forfeiture as well. This is what the present law does. He asked if there was any objection to amending section 8 so as to make it applicable to prosecutions or forfeitures as well.

Representative Frost said the only objection he would have is that he does not like the forfeiture provision and therefore was reluctant to tie it to section 8.

Mr. Knight moved to apply the provisions of section 8 to section 9, Seizure and forfeiture of conveyances used in violation of this Article. The motion carried. Those voting for the motion: Chairman Burns, Clark, Knight. Voting against: Frost.

Chairman Burns asked for a vote on the adoption of section 8. The members voted uananimously to adopt the section.

Section 9. Seizure and forfeiture of conveyance used in violation of this Article.

Representative Frost asked if there was really any need to have a forfeiture of a vehicle. He did not feel that the forfeiture of firearms provided in the hunting statutes do any good.

Mr. Wallingford related that the federal law has a provision for forfeiture, also. He referred to an article entitled "The Federal Narcotic Laws" written by Henry L. Giordano, who was the Commissioner of the Bureau of Narcotics, wheren it states:

> "....An appreciable number of vehicles are seized under this act by the Bureau of Narcotics and forfeited to the United States. After forfeiture, some of these vehicles, as authorized by law, are used in enforcement work in the investigation, detection, and arrest of other violators. Thus, an important facility for narcotic peddling is taken from the violator and becomes a facility on the side of law enforcement."

Mr. Clark added that the federal Bureau of Narcotics buys no cars; all cars used are obtained by forfeiture.

Chairman Burns questioned the constitutionality of the warrantless search provided for in section 9. He noted that the commentary to the section states that reasonableness of a search does not depend on whether it was made by authority of a warrant and that an officer with a warrant may make an unreasonable search and that an officer without a warrant may make a reasonable search. It still offended him, however, to pass a statute that in terms, at least, is clearly unconstitutional.

Mr. Wallingford observed that William F. Frye in chapter 20, Oregon Criminal Law Handbook (1969), intimates that he feels the provision may be unconstitutional.

Mr. Knight recalled that the United States Supreme Court has considered a search under this type of statute in Cooper v. California. The search in this case took place about a week after the car had been seized and impounded because of the transportation of narcotics.

The court upheld the late search of the car and seizure of papers found therein on the basis of the California statute which is similar to that proposed in section 9.

Chairman Burns observed that in the Cooper case the state had a duty to hold the car for safekeeping and this was part of the rationale.

Mr. Knight added that it was held that the state does not have to wait until after the car has been forfeited before searching it. They can go ahead and search it any time they have it.

Chairman Burns stated that some cases since Cooper have cast doubt on just how strong Cooper is. He acknowledged that the draft language "...having personal knowledge or reasonable information that narcotic or dangerous drugs are being unlawfully transported or possessed..." might be considered the equivalent of "probable cause" under the fourth amendment and, therefore, there might not be a problem.

Mr. Knight thought the situation being dealt with involved a vehicle so mobile that there often is not time to obtain a search warrant. He did not see merit in sitting back and worrying as to how the courts will rule on the constitutionality of a statute. There is presently a statute on the books allowing a "search...without warrant and without any affidavit being filed...", (ORS 475.120), and if the courts are going to find it unconstitutional, he thought it their job and not one for the subcommittee to do for them.

Chairman Burns also objected to the last sentence contained in subsection (1), although he admitted it is found in the present statute. This sentence reads:

> "He shall also, without delay, make and file a complaint for any crime justified by the evidence obtained."

Chairman Burns asked for a vote on the adoption of section 9 as drafted. The section was adopted by the following vote: Voting for adoption: Chairman Burns, Knight. Voting against: Frost. Abstaining: Clark.

Section 10. Acquittal or conviction under federal law as precluding state prosecution.

Mr. Wallingford stated this section is the same as when it appeared in the first draft of this Article.

Mr. Knight moved the adoption of section 10 as drafted. The motion carried with Representative Frost voting against approval.

General Discussion on Article on Narcotics & Dangerous Drugs.

Mr. Knight stated he had a point he would like to bring out regarding the quantity of narcotics required before an individual would come within the prohibitions of the statute. He was of the opinion that this decision should be made by the legislature rather than by the courts. Various states have ruled on this question. Three or four states, primarily Texas, have ruled that there has to be a quantity of the drug sufficient to put it to its common use. Seven states have ruled this much is not required, that only a modicum is sufficient. Mr. Knight was hopeful that the Commission would make a decision on this issue so that it could be placed in the proposed Article and thus be in the revised code submitted to the legislature.

Chairman Burns asked if any of the states have reached a legislative solution; if the results haven't been reached by court construction. If the latter is true, he continued, why is it necessary for the Commission to write it into the code?

Mr. Knight agreed that the results have been reached by court construction but thought it necessary for the Commission to make a decision on the issue because the courts base their rulings on what they interpret as the intention of the legislature passing the statute.

Chairman Burns thought the decision to be made was a policy decision and suggested Mr. Knight prepare a statement regarding the issue and present it to the Commission for consideration when the Commission takes up the Article on Narcotics and Dangerous Drugs. This approach was agreeable to all.

Mr. Clark stated that while he had voted for a number of the sections in the draft on Narcotics and Dangerous Drugs, he still felt that offenses involving the use, or possession of these drugs for use, are inappropriately handled by criminal law sanctions and would be more appropriately handled in a medical-socio model. He recognized the reality that one state probably cannot adopt this by itself and that it will have to be done on a broader scale, probably at a national level. Applying criminal sanctions to this problem, he continued, is self-defeating and helps promote the use of and abuse of drugs.

GUN CONTROL

Witnesses - Oregon Kennedy Action Corps:

Mr. Paillette introduced Mrs. Margot Perry who is chairman of the Gun Control Committee of the Kennedy Action Corps and

Mr. Terry Finn, a member of that committee. He explained that he had been contacted by Mr. William Cormack who had requested that Mrs. Perry and Mr. Finn be allowed to appear before the Commission to present their views on gun control. Material submitted by the Oregon Kennedy Action Corps entitled "A proposal to the Oregon Criminal Law Revision Commission for Firearms Control Legislation" was distributed to each member of the subcommittee and copies will be made available for each member of the Commission.

Mrs. Margot Perry:

Mrs. Perry stated that the Oregon Legislature has passed a small amount of legislation regulating the sale and use of firearms but her organization feels it is absolutely inadequate. It is felt this is a negligent attitude because these are lethal weapons and the state has no comprehensive plan to prevent crimes done with guns. It is felt that the state condones misuse by having no restrictions on the potentially dangerous user of firearms. There is a law regarding the registration of handguns and a law which prohibits convicted felons and aliens from owning firearms. There is no way of enforcing this proscription.

Chairman Burns asked Mrs. Perry how she would change the present Oregon laws.

Mrs. Perry replied that first she would have a licensing law. She felt this to be the keystone of any preventive program. Each individual would apply for an identification card or permit to carry a gun. Some personal investigation would be done by the State Police and if the individual were approved, he would be issued a license. With this license the individual would be able to purchase or possess guns. The license should be renewed every five years and each time the individual should be reinvestigated. The decision by the State Police should be subject to judicial review to insure no arbitrary treatment of an applicant.

Mrs. Perry also advocated a system of registration of firearms, feeling that each person having a firearm should be legally responsible for it. These laws should apply to all firearms--transferred, newly purchased or already possessed and to ammunition.

Mrs. Perry felt there are no laws now to protect the public from gun misuse. That there is a great deal of gun misuse in the state and nation is well documented.

Mr. Terry Finn:

Mr. Finn stated that he did not think the subject of firearms control legislation had received serious consideration.

He observed that if he were a criminal or were mentally incompetent and obtained a gun from a friend, this friend would not be punished in any way under present Oregon laws for providing him with the gun. He thought the licensing provisions outlined by Mrs. Perry, and which have been enacted in some states, could prevent this type of transaction.

Mr. Finn did not think the proposal submitted to the Commission would in any way restrict anyone having a legitimate use for a gun yet it would be a big step toward preventing gun misuse.

Chairman Burns asked what other states have similar legislation or portions of the legislation proposed.

Mrs. Perry replied that Massachusettes, New Jersey, Illinois and New York have licensing regulations. She directed attention to page 34 of the material submitted where "Firearm Deaths in Strong and Weak Gun Law States Compared" are set out. She also recommended the book Firearms and Violence in American Life, a Staff Report to the National Commission on the Causes and Prevention of Violence. This establishes a relationship between firearms and violence.

Mr. Finn stated that one of the valuable things in the material submitted to the subcommittee is the bibliography found on pages 35-36 of the booklet. It is a tremendous collection of the latest, up-to-date statistics on firearms and what other states are doing.

Mrs. Perry said there was no reason why the state cannot regulate the use of guns. The Oregon Supreme Court in at least two cases has upheld the constitutionality of firearm laws. The court has declared that they do not infringe upon the second amendment to the United States Constitution nor do they infringe upon Article I, section 27, of the Oregon Constitution.

Mr. Paillette noted that on page 34 of the material submitted there is a list of states having weak gun control laws and states having strong gun laws. He asked where Oregon would fall in this rating.

Mrs. Perry characterized Oregon as a very weak gun control state. It in no way tries to deal with the sale and use of guns; handguns must be registered and selling guns to certain classes of people (aliens and convicted felons) is prohibited.

Mr. Wallingford asked if any of the strong gun law states provide for licensing and registration of long guns.

Mrs. Perry referred to a book entitled Firearms Facts, compiled by Criminal Division, United States Dept. of Justice,

right after the assassination of Robert Kennedy. At this time the Illinois law was not in effect and it requires a license and a permit to purchase long guns and handguns. New Jersey has different laws for long guns and handguns but both are covered. New York requires a permit for the purchase or possession of handguns and has just recently added provisions for registration of long guns. New York is a good example of the effects of gun laws, she continued. One would think New York would have a very high gun murder rate whereas, in fact, it has a very low over-all murder rate and a very low percentage of these are committed by a gun. It is something like 39% while nationally the percentage of murders committed by guns is 65% and increasing. New York has a restrictive licensing law, the Sullivan Law, requiring the purchaser to prove need before being allowed to purchase a gun. The Oregon Kennedy Action Corps is not advocating this approach in Oregon, however. The Sullivan Law has been in force in New York since around 1932 or 1938, she said.

Chairman Burns asked if the proposal submitted to the sub-committee is the same as that which had been contained in HB 1546.

Mrs. Perry said it was substantially the same; there are some changes but the proposal does contain licensing and registration provisions.

Chairman Burns asked when Illinois passed its statute on guns and Mrs. Perry advised that it was passed in 1967 and went into effect July of 1968. Not much has been reported as yet as to its effectiveness. Beginning on page 6 of the material submitted by the Kennedy Action Corps statistics are supplied as to the number of deaths due to firearms in this country and as to the crimes of violence committed with firearms.

Mr. Clark was of the opinion that there is sentiment on the Commission for a change in gun control in the state of Oregon. His own position is that the control of guns should go a great deal further than the proposal submitted by the Kennedy Action Corps. People who have observed the urban scene and observed the conflicts between different ethnic and cultural groups and between political extremists realize there will necessarily be gun confiscation in urban areas or there will be the bloodiest of civil wars. The Commission would be irresponsible to ignore at this time the facts of life in regard to what is happening in our urban centers, he said.

Mrs. Perry related that in Detroit, Michigan, the purchase of handguns jumped tremendously after the 1967 riots. Detroit has a handgun permit system so that they have records of gun purchases and they went from 6,000 new gun permits in 1966 to

17,000 in 1968. They compared the figures for gun deaths and gun accidents and suicides and found these jumped proportionately. The more guns, the more gun violence. Murders in those two years, with the purchase of new guns trebling, went up 400%.

There is also a "before and after" gun control study in Toledo, Ohio. They enacted a very strict gun control law covering both possession and purchase of guns. The gun deaths and all crimes of violence involving guns went way down; decreasing much more than crimes committed without guns.

Mr. Paillette asked if the Kennedy Action Corps is still trying to get some action on gun control at a national level.

Mrs. Perry did not think there is any longer an effort being made at the national level. One of the Kennedy Corps people had been advised by Senator Tydings over a year ago to forget trying to get legislation on a national level and advised to try to work within the states.

Chairman Burns asked if any of the cities in the northwest have followed the example of Toledo.

Mr. Clark advised that both the National Association of Counties and the National League of Cities are on record as favoring violence control at all levels but no city in the northwest has taken action.

Mr. Knight noted that the National Rifle Association is very strongly against such legislation. He noted, also, that even with a gun license required in order to purchase a gun, it will be necessary to catch the unlicensed individual with a gun before he can be charged with having a gun without a license.

Mr. Clark said he personally would go much further than what is being proposed by the Kennedy Action Corps--he favored outright confiscation, particularly in urban centers. He did not believe anyone except the police should be entitled to carry guns in urban centers.

Chairman Burns explained that the draft considered by the subcommittee will be presented to the Commission and that it would be well for the Kennedy Action people to make whatever appearance they felt necessary before the Commission when the draft is considered there. He felt the decision as to whether to stay within the scope of the present law or to go into a broader scope as outlined in the Kennedy Action Corps proposal is a basic policy decision to be made by the Commission.

Mr. Paillette related that he had advised Mr. Cormack that the initial draft on firearms to be considered by the subcommittee does not contain any gun control legislation, as was contemplated by HB 1546. The draft is a study draft for the purposes of the subcommittee and is pretty much along the lines of the traditional approach, although some changes have been proposed as far as the licensing of concealed weapons is concerned. It does not contain a proposal for gun registration, as such.

Mr. Clark questioned the value of studying in detail the proposed draft if there is a possibility that the Commission would be willing to adopt much more strict gun control regulations.

Chairman Burns assumed that some of the draft provisions would be applicable no matter what the Commission's policy decision turned out to be. Other provisions, however, would have to be changed radically if the Commission voted for the over-all gun licensing and registration approach.

Mr. Wallingford explained that the draft on Firearms and Deadly Weapons (P.D. No. 1) is essentially a restatement of the present gun control statutes, both as to the procedural aspects, licensing and registration, and the substantive crimes.

Mr. Paillette added that the draft proposes the license required to carry a concealed firearm be handled through the State Police rather than at a local level. He noted that he had been advised informally that the Sheriffs' Association would probably oppose this provision. He noted, also, there is a great variation in the counties as to the number of gun permits issued to carry a concealed weapon.

Mrs. Perry noted that in the research conducted by the Kennedy Action Corps it was found that Oregon is a bad record keeper. The State Police obtain their statistics from the Bureau of Health and they do not have records which categorize crime by the type of weapon used. The medical examiner will not have this information until the Bureau becomes computerized. Mrs. Perry asked why the licensing and gun registration provisions were not explored when the draft was drawn for consideration by the subcommittee.

Mr. Paillette advised that the provisions were explored and HB 1546 was studied and its legislative history traced. The work of other states engaged in code revision was also studied and as Commission Project Director he made the decision that the Commission should examine the area and discuss it. He noted that the Commission is a creature of the legislature created to propose recommendations to the legislature so that what is recommended may or may not become law. Mr. Paillette felt, personally, that incorporating an issue as volatile and explosive as gun control into the proposed code revision could be the death knell of the entire revision.

Chairman Burns added that the Commission has been charged with the job of rewriting all of the criminal law. It has now been working over two years and will continue working until the 1971 Legislature meets. The work covers rewriting the criminal statutes on burglary, arson, obtaining money by false pretenses, etc., and while these provisions may not be too exciting, they are very important. It would be a short-sighted and irresponsible move on the part of the membership to put an "albatross" around the neck of the revision, if, in fact, the Commission feels such a gun policy would be an "albatross," simply because that particular segment of the code appears to be a little more exciting than others. He thought it fair to say that the Commission has a broader objective than the objective of the Oregon Kennedy Actions Corps alone.

Mrs. Perry asked if there would be any way in which to submit a separate proposal, outside of the main body of the proposed revision, relating to gun control.

Mr. Paillette agreed that this approach would be possible although the Commission has not made such a decision. He asked Mrs. Perry how many different groups had appeared before the legislature on behalf of HB 1546.

Mrs. Perry advised that her organization had not contacted people or groups about appearing before the legislature since when the House Fish and Game Committee offered to hear people on HB 1546, it was stated that at the conclusion of the hearing the bill would be tabled.

Chairman Burns favored considering the draft on Firearms and Deadly Weapons before the subcommittee; then if the Commission decides to adopt the Kennedy Action Corps' policy, the subcommittee will put together a new draft carrying out the directive.

Mr. Paillette was of the opinion that the people supporting the proposal advocated by the Kennedy Action Corps should certainly have the opportunity to present the proposal, on its merits, to the Commission. He will keep the organization apprised of the dates and places of the meetings so they may have the opportunity to be heard.

The subcommittee recessed at 3:50 p.m., reconvening at 4:10 p.m.

OFFENSES INVOLVING FIREARMS & DEADLY WEAPONS; P.D. #1; JANUARY 1970.

Mr. Paillette recalled that at the subcommittee meeting of September 30, 1969, when discussing the Inchoate Crimes Article, Professor Platt brought up the fact that the Article did not con-

tain a section similar to MPC section 5.06, Possessing Instruments of Crime; Weapons. Copies of the MPC commentary on this section were distributed to the subcommittee members so they might have an opportunity to study the MPC background and policy favoring the MPC approach.

Mr. Paillette related that the problem was discussed in relation to other Articles--in regard to possession of counterfeiting or forgery devices and possession of burglar's tools. At the September 30th meeting the subcommittee's feeling was that a section should be drafted patterned after the MPC in order to supply the subcommittee with an option in dealing with this question. Mr. Paillette did not favor the MPC approach but reported it is favored by Professor Platt who feels that possessing instruments of crime is an inchoate crime. While it does not quite fall into the classification of an "attempt", it is still preparatory to the commission of a crime.

Mr. Paillette revealed that he had attempted to draft a section based on the MPC but advised that the MPC section contained so much that he felt it would be troublesome. One of the definitions of an instrument of crime contained in MPC section 5.06 (1) (b), reads:

> "anything commonly used for criminal purposes and possessed by the actor under circumstances which do not negative unlawful purpose."

The MPC commentary does not provide background material regarding this provision. Mr. Paillette's interpretation is that they were trying to get at two kinds of instruments--one that is obviously designed to be an instrument of crime and has no other use and one, such as a blowtorch, designed to be used for another purpose but which may be used as an instrument of crime.

The MPC section also contains subsections on presumptions ("Presumption of Criminal Purpose from Possession of Weapon" and "Presumptions as to Possession of Criminal Instruments in Automobiles") and it was Mr. Paillette's opinion that by the time all of these provisions were included, along with the provisions necessary to solve the problems dealing specifically with firearms, it would be necessary to draft a general section plus a number of satellite sections. If this were the case, he proposed forgetting a general section in favor of using sections dealing in specifics. In other words, if possession of burglar's tools is to be made a crime, it should be dealt with as possession of burglar's tools. If it is thought it should be a crime to possess a forgery device, what is meant by a "forgery device" should be defined and possession of it with the intent to commit forgery should be made a crime.

Chairman Burns favored jettisoning the MPC approach and working with the draft before the subcommittee.

Mr. Paillette advised that the draft on Offenses Involving Firearms and Deadly Weapons, without the provisions in MPC section 5.06, would take care of the possession of firearms and other dangerous weapons. There is already a section on burglar's tools but it will be necessary to go back to the Article on Forgery to put some sections back into that Article.

Mr. Knight observed that the Article on Narcotics and Dangerous Drugs does not contain anything regarding narcotic parphernalia--needles, etc.

Section 1. Firearms and deadly weapons; definitions.

Chairman Burns referred to subsection (1), the definition of "narcotic drug" and "dangerous drug", and assumed it was defined in the manner it is because the Article was drafted prior to Offenses Involving Narcotics and Dangerous Drugs, P.D. No. 2.

Mr. Paillette said this draft was written before the changes which were made in the narcotics draft and it will be necessary to make some changes in subsection (1) because of this. He thought all that would be necessary would be to have the subsection read:

> "The definition of 'narcotic drug' and 'dangerous drug' in the Article on Offenses Involving Narcotics and Dangerous Drugs apply to this Article."

This would incorporate the definitions in the Narcotics Article, and ORS chapters 474 and 475,by reference.

Chairman Burns referred to subsection (10), the definition of "public servant", noting that the definition is a restrictive one as opposed to the broader definition used in other Articles.

Mr. Wallingford noted that the only group not included in the draft definition of "public servant" are "jurors".

Mr. Paillette directed attention to subsection (9), the definition of "peace officer", which is the same as that presently in the Oregon statutes. He noted the use of the term "constable" and asked if there are still constables in Oregon.

Mr. Clark said that Clackamas County still has a constable; however, he only serves civil process. Mr. Knight recalled this point had been raised in a Commission meeting and it was brought

out that some cities in the eastern part of the state still call their city police officer a constable. Representative Frost pointed out that this officer would be covered by the term "municipal policeman" used in subsection (9).

Mr. Knight understood the term "peace officer" in this particular draft alluded to the right to carry a gun. The campus police officer is by statute a "peace officer" so he assumed he would be covered by the provision.

Mr. Wallingford reported that he had talked with the legal counsel for the Board of Education on this issue in regard to the Article on Escape and he felt the campus police officer should be included.

Mr. Paillette was of the opinion that the only thing it would be necessary to do would be to "flag" the section in the education code (ORS 352.360) so that the statute will be amended to refer to the definition of "peace officer" found in the revised criminal code.

Mr. Knight thought there might be a problem in this respect if "peace officer" is defined in various ways in the criminal code, depending upon the Article.

Mr. Clark noted that the proposed draft on firearms does not include anti-tank guns and guns of this type. He asked if it is not rather ridiculous to allow private individuals to possess anti-tank guns, artillery pieces, bazookas, mortars, hand grenades, bombs, etc. These must be covered in some way, he said.

Mr. Knight repeated his contention that the campus police should come within the provisions of the draft.

Chairman Burns had understood the problem would be taken care of by an appropriate amendment in the education code.

Mr. Wallingford referred to ORS 352.360 (3) and read:

> "The board, for the purpose of enforcing its rules and regulations governing traffic control, may appoint peace officers who shall have the same authority as other peace officers as defined in ORS 133.170."

Chairman Burns suggested that perhaps the language "or any other person designated by another statute as such" could be added to the definition of "peace officer" set out in subsection (9).

Mr. Wallingford observed that the term "peace officer" has been used so many times in various Articles that perhaps it should be put in the draft on General Definitions.

Mr. Paillette did not believe the term had been defined differently in the Articles where it has been used. He asked Mr. Knight if it was his feeling that wherever the term "peace officer" has been defined in an Article, the words "campus police" should be inserted.

Mr. Knight thought this might be required although if there was just one definition of "peace officer" for the whole criminal code, the statute in the education code could refer to this one section; otherwise, the statute in the education code must refer to each of the Articles in the criminal code if the campus police were to be peace officers for all purposes.

Mr. Paillette wondered if it were desirable to have the campus police be peace officers for all purposes, to have them able to do anything any other police officer is able to do.

Mr. Clark noted that in California persons such as prison guards and other penal officers are included within the definition of a "peace officer" only when dealing with persons confined by the California adult authority. He asked if these people would be covered by the draft.

Mr. Wallingford said they would not be covered. Where the term "detention facility" is defined it includes the personnel in charge of the facility.

Chairman Burns noted that in section 14 of the draft, defenses, "it is a defense that at the time of the alleged offense the actor was...a public servant entrusted with maintaining the order and security of detention facilities."

Mr. Clark asked if a correctionsofficer going around the state picking people up would be covered.

Mr. Paillette explained that the corrections code now has a section which states that persons such as the parole and probation people have the authority of peace officers. It is not the intention that this be changed.

Mr. Paillette understood that it was thought the draft should contain a section pertaining to tank guns and weapons of this sort. He noted that MPC section 5.07, Prohibited Offensive Weapons, reads:

"'Offensive weapon' means any bomb, machine gun, sawed-off shotgun...."

The term "tank gun" is not listed however.

Chairman Burns had no objection to prohibiting the owning or possession of these weapons by private individuals and Representative Frost agreed that it would seem somewhat of an oversight not to include these weapons within the draft provisions.

Mr. Clark moved the staff be directed to draft an appropriate subsection to cover this type of weapon.

Mr. Wallingford noted there is federal law regarding the owning and possessing of this type of weapon. Mr. Paillette thought this the reason the state codes have not dealt specifically with this kind of weapon.

Chairman Burns asked the staff to check out the federal regulations regarding this matter as it seemed the subcommittee generally favored a subsection covering this type of weapon if it is not already covered by federal law.

Chairman Burns referred to subsection (14) of section 1, noting it reads:

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

He asked if it should read:

"...or except as forbidden by any other Oregon statute."

Mr. Wallingford replied that "unlawfully" means "except as authorized by any other Oregon statute"--other than that which is authorized.

Section 2. Issuance of license to carry a concealed firearm.

Mr. Wallingford explained that sections 2, 3 and 4 are the licensing and registration sections.

Representative Frost understood the reasoning behind making the state the issuing authority for a license to carry a concealed firearm; however, he thought it might be well to have some local authority able to issue a license.

Mr. Clark observed that the draft procedure would insure a uniformity not available when local authorities are employed.

Mr. Paillette noted, also, that the draft procedure would place all records kept in one place. This would seem to be an improvement over the present procedure. Mr. Wallingford added that if it is desired to have any kind of a background investigation of the applicants, one that has any kind of validity, the State Police are best equipped to do this.

Mr. Paillette stated that the present statutes do not require fingerprints. The proposed draft provisions will require this.

Chairman Burns was of the opinion there would be a good deal of objection to the provisions removing the issuing of licenses from local authorities.

Mr. Wallingford stated that section 2 is a restatement of present law except in a couple of particulars. The license fee is raised from 50 cents to $3.

Representative Frost was concerned that this change would necessitate sending the code to the Ways and Means Committee since it would have financial implications. For this reason, he favored retaining the old fee rate and placing a fee increase in a companion bill.

Mr. Paillette related that he had talked with Mr. Holcomb, Superintendent of the Department of State Police, about licensing provisions in the draft and Mr. Holcomb thought the Department would want to do this but he felt an increase in the Department's budget would be necessary as more help would need to be hired.

Representative Frost suggested the staff check the matter out with Legislative Fiscal to determine the procedure required if fee changes are made. If the changes would require the code be sent to the Ways and Means Committee, the issue could be considered further. It might be possible for the increased costs to be taken care of through the budget of the State Police.

Chairman Burns suggested talking informally with Senator Yturri to determine his thoughts on the subject of over-all gun control rather than bringing the matter up at a Commission meeting as a policy question. Since there were no objections, this approach will be followed.

The meeting was adjourned at 4:55 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission