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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

Thirteenth Meeting, December 11, 1969

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: Mr. Jacob B. Tanzer, Solicitor General, Justice Department
Capt. Raymond G. Howard, Criminal Division, Dept. of State Police

Agenda: Offenses Involving Narcotics & Dangerous Drugs; P.D. No. 1; October 1969. (Article 31)

The meeting was called to order by the chairman, Judge Burns, at 1:50 p.m., Room 315, Capitol Building, Salem, Oregon.

OFFENSES INVOLVING NARCOTICS & DANGEROUS DRUGS; P.D. NO. 1; OCT. 1969.

At the request of Subcommittee No. 3, at its meeting of November 7, 1969, the Commission directed "Subcommittee No. 3 to incorporate ORS chapters 474 and 475 into the proposed criminal code without doing substantial violence to the provisions of House Bill 1838." (See Commission Minutes, November 7, 1969, pp. 2-4.)

Mr. Wallingford explained that the proposed draft is based on ORS chapters 474 and 475. The criminal provisions were taken out of these chapters and combined into one Article on the sale and possession of narcotic and dangerous drugs. The regulatory provisions will remain in ORS chapters 474 and 475.

Chairman Burns asked what effect, if any, the proposed draft would have on the Josephine County problem, sometimes called the "Bowe Amendment."

Mr. Wallingford replied that the proposed draft would have no effect on the problem. The definitions in ORS 474.010 and 475.010 are incorporated into the draft and "dangerous drug" is defined in ORS 475.010 (1) as meaning "a drug designated by the Drug

Advisory Council as a dangerous drug and included in published regulations of the State Board of Pharmacy under ORS 689.620." The draft would in no way affect the procedure followed by the Board of Pharmacy in designating a dangerous drug.

Chairman Burns wondered, as long as the subcommittee has been charged by the Commission to consider the area dealing with narcotic and dangerous drugs, why the "Josephine County problem" could not be solved, assuming the problem still remains by the time the code is presented to the 1971 legislature.

Mr. Knight remarked that the quickest way to remedy such a situation as this would be to give the state the right to appeal. He understood that the State Board of Pharmacy plans to have another set of hearings in order to bring Josephine County within the law again.

Mr. Tanzer thought the simplest way to handle the problem would be for the statute defining "dangerous drugs" to define them as:

> "(a) A list of drugs presently designated as dangerous drugs; and
>
> "(b) Such other drugs as the Drug Advisory Council may designate pursuant to chapter ___."

In this way there would be no administrative law challenges.

Mr. Knight agreed that this could be a problem, particularly now that dangerous drug cases are felony cases. Adoption of the "Tanzer approach" would mean that each time a new drug was added to the list, it would have to be acted upon by the legislature. The discretionary power during the interim would have to be left with the Board of Pharmacy so that they could handle anything new that came up between legislative sessions.

Representative Frost thought the suggestion made by Mr. Tanzer was a logical approach. It would reduce the possibility of a decision coming up as it did in Judge Bowe's decision. While he did not like the fluidity in the criminal law which would result by having the legislature making changes every two years, as a practical matter he could see no other way of approaching the problem. Mr. Clark agreed that this seemed the reasonable approach.

Mr. Wallingford thought there would be no problem in drafting along this line. On page 48 of the draft are listed 29 dangerous drugs--this is the current list designated by the Drug Advisory Council as "dangerous drugs." "Dangerous drugs" could be defined as these 29 articles plus other drugs designated in the manner suggested by Mr. Tanzer.

Representative Frost asked Mr. Tanzer if there was a better method than the rather cumbersome method presently used for having a drug designated as a "dangerous drug."

Mr. Tanzer recalled that the Board of Pharmacy used to designate the "dangerous drugs" and this was changed to allow for a Drug Advisory Council because it was felt that the designations, particularly for criminal purposes, should be made by a more broadly based organization. The Drug Advisory Council by statute (ORS 689.650) consists of:

> "...an instructor in pharmacology and an instructor in medicine employed by the State Board of Higher Education, a licensed physician specializing in the practice of psychiatry, a licensed physician specializing in the practice of internal medicine, a member of the State Board of Pharmacy, a pharmacist, and a member of the Oregon State Bar."

Chairman Burns asked if the proposed draft makes it clear as to what constitutes a "dangerous drug."

Mr. Paillette advised that section 1 (1) of the draft states that "the definitions in ORS 474.010 and 475.010...apply to this Article." This would incorporate the definition of "dangerous drug" set out in ORS 475.010.

Representative Frost asked about the exact decision made by the Commission in regard to the Offenses Involving Narcotics and Dangerous Drugs.

Copies of the minutes of the Commission meeting of November 7, 1969, were distributed to the subcommittee members. Chairman Burns thought it was the attitude of the Commission that, at least in regard to the general penalty structure, there not be much change made from present law.

Mr. Paillette thought this was implicit in the Commission decision inasmuch as the explanation given the Commission about the first draft indicated no big changes were being contemplated.

Chairman Burns referred to page four of the Commission minutes and read the motion adopted by the Commission. (Set out on page one of these minutes.)

Representative Frost moved the "Tanzer approach" to the definition of "dangerous drugs" be adopted. The motion carried unanimously.

Mr. Paillette understood that the same changes contemplated in the draft would be desired in ORS chapters 474 and 475. There was agreement on this point.

Chairman Burns stated that as long as the code was being revised, he would propose the subcommittee present to the Commission a revision removing marihuana from the area of narcotics and placing it in the dangerous drugs category. He was convinced that an attempt ought to be made to be as non-hypocritical and as realistic as possible and as near as he had been able to determine from reading and studying, marihuana is not a narcotic within the definition of a narcotic drug unless it is so designated by the legislature.

Mr. Clark agreed with the statement made by Chairman Burns and moved this be the approach taken by the subcommittee.

Representative Frost thought the objections to this approach were twofold. First, while he agreed that, medically, marihuana is not necessarily a narcotic drug, there would be a problem if medical definitions were to be adopted for everything. For instance, he thought the Responsibility Draft would be a "hash" if an attempt were made to be strictly non-legal and to incorporate only medical definitions. Secondly, and strictly politically, he continued, if the revision gets "ditched" it will be in the area of "sex and drugs." The proposed code will be jeopardized if the revision even looks like it is a step toward legalization or a down-grading of the present criminal basis of marihuana. If it is felt desirable to do this, Representative Frost suggested it be done in a separate bill.

Mr. Knight noted that with the penalty provisions presently in the statutes and with those proposed in the draft, no distinction is drawn between narcotic and dangerous drugs except where the draft proposes some measurements. The penalty for marihuana would be the same whether it is classed a narcotic or a dangerous drug.

Chairman Burns thought this was one of the benefits resulting from the passage of HB 1838 last session. This provision, he thought, made it possible to call marihuana what it is, a dangerous drug, without down-grading the penalty imposed for its use.

Mr. Knight noted that such an approach would necessitate the amendment of ORS chapters 474 and 475 which define "dangerous drugs" and "narcotics." Chairman Burns agreed.

Mr. Clark added that if it were not for the political considerations affecting the entire revision, as were outlined by Representative Frost, he would favor going much farther in revising the statutes in this area--particularly in the area of users, who should be treated non-criminally. Since this action would probably result in the death of the revision, he would not propose taking this approach. He thought, however, that the Commission ought to at least have the option of making the decision of whether or not to pull marihuana out of the "narcotic" classification and putting it into the "dangerous drug" category.

Mr. Tanzer expressed the view that marihuana is no more a "dangerous drug" than it is a "narcotic"--it is simply "marihuana." Thethird alternative, then, would be to have three statutes, one prohibiting the selling or possession of"narcotics", one prohibiting the selling or possession of "dangerous drugs" and one prohibiting the selling or possession of "marihuana." The appropriate penalties could be provided for each offense.

Mr. Wallingford thought that if political implications were of concern, the suggestion made by Mr. Tanzer would be less desirable than that made by Chairman Burns because the public might feel that marihuana was being categorized in a different way in order to allow different treatment. It would be very easy to reduce the penalty for sale or possession of marihuana because there would be a separate statute on it.

Chairman Burns asked if it were felt that the presentment of his suggestion to the Commission would jeopardize the revision work.

Representative Frost thought this possible--it is where such things are picked up and talked about publicly. If it were the desire of the members to take the approach suggested by Chairman Burns, he favored doing it via a separate bill entirely. He did not disagree with the theory proposed; but the practice concerned him.

Mr. Knight questioned that it made much sense to propose a new code and right along with it present a bill to change it.

Representative Frost commented that the practice has precedent whether or not it seems logical. The insurance code in 1967 contained five or six extraneous matters the Law Improvement Committee felt were too touchy to put into the insurance code. This procedure was also employed in regard to the education bill in 1965. The rationale behind this procedure was that the areas considered separately were highly controversial and might have imperiled all of the work done in the area.

Chairman Burns still felt the Commission should have the opportunity to make a decision on the matter. He was not certain that a decision in this regard had to be made by the subcommittee.

Mr. Paillette pointed out, however, that if it were desired to have the next draft reflect the views of the subcommittee, a vote should be taken so that the draft could be amended before it is sent to the Commission for consideration.

Mr. Knight tended to agree with the viewpoint expressed by Representative Frost. He thought there had been a real argument

on the matter of marihuana being classed as a narcotic, when medically it is not, when there was an entirely different penalty structure between offenses involving narcotic drugs and offenses involving dangerous drugs. Now that the penalty is the same and will be the same under the new code, it really does not make much difference as to the classification. A judge will pass sentence based simply on the acts of the defendant. As far as the Commission is concerned, he favored leaving the classification of marihuana as it is.

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

Mr. Wallingford explained that subsection (1) incorporates the definitions contained in ORS 474.010. There are 22 definitions set out in this statute but not all of them are used in the draft because it does not have applicable sections. Those used are ORS 474.010 (2), "physician," and (18), "narcotic drugs." The reference to ORS 475.010 (1) is to the definition of a "dangerous drug." As a result of the amendment proposed by Mr. Tanzer and adopted by the subcommittee, this reference will not be used. Mr. Wallingford assumed ORS 475.010 would be amended to conform with the amended draft. The third reference in subsection (1), to ORS 475.615, can be deleted since it creates a conflict. ORS 475.615 (2) defines "physician" as does ORS 474.010 (2) and the definitions are different. The preferable definition is ORS 474.010 (2).

Chairman Burns noted that ORS 474.010 (10) defines "sale" and section 1 (3) of the draft defines "sells." He asked if ORS 474.010 (10) should be specifically excluded when the definitions are incorporated in order to avoid problems.

Mr. Wallingford did not anticipate any problems in this regard because the terms are, in fact, two different words.

Chairman Burns wondered if incorporating the language of subsection (10) of ORS 474.010 would ever enable someone to prosecute an employer for a sale of narcotics made by an employe. This subsection reads:

> "'Sale' includes barter, exchange or offer therefor, and each such transaction made by any person, whether as principal, proprietor, agent, servant or employe."

As the definition appears in ORS 474.010 it is a part of an appropriate regulatory scheme but he was not so sure it would be an appropriate part of a criminal law scheme.

Mr. Paillette thought the objection raised by Chairman Burns was valid and one that could be cured by specifically mentioning which definitions out of ORS 474.010 are being incorporated into the Article on Narcotics and Dangerous Drugs.

Mr. Knight thought another possible problem might arise when definitions in other statutes are incorporated by reference: If the definitions in the statutes referred to are amended and the other statutes using the definitions by reference are not also amended, a definite conflict could arise. He wondered if it would not be better to restate in the criminal code those definitions brought over from another statute.

Chairman Burns had no objection to bringing sections referred to over in their entirety rather than by reference, although he thought perhaps this was a problem to be dealt with by Legislative Counsel.

Mr. Paillette agreed that the definitions could be restated in their entirety although he noted that if a definition adopted is later changed in its original place in the statutes, a risk of inconsistency arises if it is not also changed wherever the same term is defined in the law.

It was agreed that the specific subsections used out of ORS 474.010 and 475.010 will be brought over either in their entirety or by reference, whichever course is recommended by Legislative Counsel.

Mr. Wallingford stated that the definition of "ounce" used in subsection (2) of section 1 is dependent upon the retention of the degree system set out in the proposed draft.

Representative Frost referred to the language "or federal law" contained in the definition of "unlawfully" in subsection (4) and asked if this reference was new.

Chairman Burns also wondered why "'unlawfully' means in violation of...federal law." He was concerned that this language "might sweep into the kitchen" all of the federal violations. If, for example, it is a violation of federal law to bring something into San Diego without a stamp on it, why should Oregon be prosecuting this violation as a matter of state law.

Mr. Wallingford explained that this language is used in subsection (4) because some of the regulatory language in chapters 474 and 475 incorporate reference to federal law, ORS 474.050 and 474.060, for example. He noted, however, that all federal law is applicable in the regulatory provisions and there is no direct

reference made in the criminal sections to federal law. Mr. Wallingford drew attention to ORS 474.010 (18), the definition of "narcotic drugs," and pointed out this definition contains the words "...or other drugs to which the federal narcotic laws may now or hereafter apply." This definition, he continued, is incorporated into the proposed draft.

Chairman Burns had no objection to leaving the present language as it is in ORS 474.010 (18), but he could see no reason why the words "or federal law" could not be deleted in section 1 (4) of the draft.

Mr. Knight observed that the term "possess" is not defined anywhere. The present statutes read "...possess, have under his control..." which makes it somewhat broader than just to "possess." When the Gordineer case is cited in marihuana cases in regard to matters of custody and control, it is possible to get around the argument because of the present statute language. In that the proposed draft simply uses the word "possess" without defining it, it could create a different situation. "Possess" under Gordineer, he continued, means to "possess for your own use to the exclusion of all others."

Mr. Paillette advised that the word "possess" is defined in the General Definitions Draft (P.D. No. 2) as meaning "to have physical possession or otherwise to exercise dominion or control over property."

Representative Frost moved to delete the words "or federal law" contained in subsection (4) of section 1. The motion carried unanimously.

Chairman Burns asked if anyone was concerned about the use of the words "dispose of" in the definition of "sells" set out in sub (3).

Mr. Knight pointed out that this language comes within the present definition of "dispense" in ORS 474.010 (21) which reads:

> "'Dispense' includes distribute, leave with, give away, dispose of or deliver."

Chairman Burns announced that since there were no further objections to section 1, that, subject to Representative Frost's reservations regarding the definition of "ounce" in sub (2), section 1 will be treated as having been approved. There were no objections raised to this.

Section 2. Criminal sale of drugs in the second degree.

Section 3. Criminal sale of drugs in the first degree.

Mr. Wallingford explained that section 2 states the basic offense of criminal sale of drugs. The terms "unlawfully", "narcotic" and "dangerous drug" are defined terms provided for in section 1 of the draft.

Section 3 sets out circumstances raising the offense of criminal sale to a first degree level. These are: (1) Selling a narcotic or dangerous drug to a person less than 21 years of age; or (2) selling in one transaction a narcotic or dangerous drug in certain, specified amounts. This is the approach used by Michigan and New York.

Representative Frost observed that while the directive received from the Commission regarding subcommittee work in the area of narcotics and dangerous drugs was broad, it did provide that it be carried out "without doing substantial violence to the provisions of HB 1838." He felt that when the draft gets into degrees, into differentiating sale and possession in separate sections, into amounts, weights, etc., substantial violence is being done to HB 1838. He did agree that if the criminal provisions of ORS chapters 474 and 475 were engrafted into the criminal code, the regulatory parts should be left where they are.

Mr. Wallingford advised that an alternative he had drawn up would leave section 2 as it is drafted but amend section 3 to read:

> "A person commits the crime of criminal sale of drugs in the first degree if he knowingly and unlawfully sells a narcotic or dangerous drug to a person less than 18 years old."

The distinction would not be based on amounts; the aggravated offense would be made of a sale to a minor.

Mr. Tanzer stated that, personally, he was opposed to the whole draft for a number of reasons:

There is no reason, he said, to revise simply to revise. While criminal law may not be a very successful approach to the handling of drug matters, we do deal with it in the criminal law and he is not satisfied that there is anything unsatisfactory in the present statutes. They seem to be as workable as anything else.

He opposed the division of sale and possession into separate offenses primarily because the bigger a person is in drug trafficking,

the more likely he is to be charged with possession rather than sale. Because of this, it is better to treat the offenses the same and provide for flexible penalties within the statute. This is what is now in the law as amended in 1969.

The job of revision is to simplify whereas he thought the proposed draft would complicate the law.

The distinctions made in the draft are extremely difficult to apply in the real world. A person who is picked up for sale of drugs will usually not be charged with selling to a minor because the sale he is charged with will usually be made to a vice squad officer. Few, if any, of these people are under 21. The quantative measures set out would be extremely difficult to work with; in fact, he was not sure the laboratory could determine the amount of heroin in a "cap" sent to it. Heroin is "cut" by the time it gets down to the street and the lab testing is for the presence of heroin. The present statutes cover a huge range of individual situations and yet are flexible enough to deal with, particularly now that the sentencing allows the judge to apply the statutes in a manner appropriate to the individual case. Mr. Tanzer did not believe arbitrary distinctions within the statute really would make it more suitable for application.

Chairman Burns referred to section 3(2)(d)noting that "fifty or more cigarettes containing marihuana" is not a realistic distinction to draw on. He could recall but one case where, purely by coincidence, the defendant had just finished rolling a number of cigarettes on a cigarette machine and was caught with 10-20 cirgarettes in his possession.

Mr. Knight added the fact that the size of the cigarettes made vary a good deal, also, depending upon whether they are machine rolled or hand rolled. Five cigarettes, he said, would be a much more realistic number than the "fifty or more cigarettes" standard set out in section 3 (2) (d).

Chairman Burns commented that frequently sales made are for a single dosage. It is likely that a purchase made by the vice officer, even from an active, heavy seller, will be for a small amount--one or two fixes. Mr. Tanzer related that a dealer will generally keep his stuff cached away, carrying only a little bit for his market.

Mr. Clark thought the only thing standards such as those set out in section 3 would accomplish would be to make the organized seller conform to what is set out in the law. Mr. Knight agreed that it probably would catch the more inexperienced individual; the "pro" would be aware of the statutory limitations.

Mr. Wallingford stated that the draft approach is based upon that of Michigan and New York and they, of course, face the problem of much heavier traffic in narcotics than is faced in Oregon.

Mr. Knight supported the approach favored by Mr. Tanzer in dealing with narcotic and drug offenses but he was concerned about classifying the offenses when the penalty provisions are attached to the proposed code. He thought the present penalty provisons proper to have, but he did not know if the new penalty structure would have a felony class with a maximum of 10 years which could also be treated as a misdemeanor. He anticipated that a felony which could also be treated as a misdemeanor would be down in the category of a five year maximum.

Mr. Tanzer suggested the best approach would be to abandon the proposed draft entirely and simply move the present statutes over along with the necessary definitions or cross references.

Representative Frost moved that the staff be directed to include in the criminal sections on narcotics and dangerous drugs only those present criminal sections contained in ORS chapters 474 and 475 without doing substantial violence to HB 1838. He admitted that as a result of doing this, there would be inconsistencies as to style in the criminal code but he did not see where this would be any great problem.

Chairman Burns understood the adoption of the approach suggested by Mr. Tanzer would apply, essentially, to sections 2, 3, 4 and 5 of the draft. It would still leave room for sections 6 through 12 of the draft.

Mr. Paillette added that the provisions in the latter sections are existing law; they have been restated to conform to the style of the revised code.

Mr. Knight questioned the use of the term "drug addict" used in section 8 of the draft.

Mr. Wallingford informed the members that he had restructured section 8 and substituted the term "drug users" for the words "drug addict."

Representative Frost asked if there would be any harm done to the revised code if an "odd ball" penalty were used in the sections on Narcotics and Dangerous Drugs as opposed to classifying the offenses.

Mr. Tanzer wondered why it could not be provided so that an offense could be a certain class felony (say a Class C felony) or a misdemeanor, in the judge's discretion.

Mr. Paillette observed that it might well be that the Commission would want to provide within the definition of a Class B or Class C felony that it could be treated as an indictable misdemeanor. The narcotics and dangerous drug offenses could then be put into whatever class is desired. He did not think the penalty problem in this area would create much difficulty.

The subcommittee recessed at 3:05 p.m., reconvening again at 3:25 p.m.

Mr. Knight moved that a section be drafted which, in effect, would combine sections 2 and 4 of the draft. This would combine both the sale and possession of dangerous drugs and narcotics into one section in the new code.

Representative Frost asked if it would not be easier to just direct the staff to pick out the criminal sections of ORS chapters 474 and 475 and draft them.

Mr. Knight agreed that this might be so. He intended that possession and sale of narcotic and dangerous drugs be combined into one section and the distinction between first and second degree offenses be done away with. Sections 3 and 5 would be deleted.

Representative Frost thought this would accomplish the same result as the motion he proposed earlier (see p. 11 of these minutes) and therefore seconded the motion.

Mr. Knight thought his motion differed from that made by Representative Frost in that it combined sale and possession of both narcotic and dangerous drugs into one section rather than having a separate section for each, which would be the result if the criminal sections of ORS chapters 474 and 475 were carried over into the criminal code. It would not matter, then, whether marihuana were classed as a "narcotic" or a "dangerous drug" since both would be treated the same within the same statute.

Mr. Knight's motion carried unanimously, resulting in one section taking the place of sections 2, 3, 4 and 5 of the draft.

Section 6. Causing drug addiction in another.

Mr. Wallingford explained that this section restates present Oregon law, ORS 475.070.

Mr. Clark asked if the section's provisions really do anything and if there had ever been any cases prosecuted under the provisions in present law.

Mr. Knight replied that he did not think there had ever been a prosecution under the statute but he thought it was a part of the Uniform Narcotic Drug Act. It is difficult, he continued, to see how anyone could "cause or aid in causing another person to become addicted" without having sold or dispensed a narcotic drug. Mr. Knight moved to delete section 6 and the motion carried unanimously.

Mr. Paillette understood that this motion carried with it a recommendation that ORS 475.070 be repealed. Chairman Burns affirmed this statement.

Section 7. Criminal use of drugs.

Mr. Wallingford stated this section restates ORS 475.625.

Representative Frost recalled that ORS 475.625 was amended by HB 1838 so that the statute covers use of both narcotic and dangerous drugs.

Chairman Burns asked what made the use of a dangerous drug "unlawful". Mr. Paillette replied that it was use without a prescription. Chairman Burns wondered if use of the term "unlawful" made this clear.

Mr. Knight noted the definition of the term "unlawfully" was contained in section 1 of the draft and means "in violation of any provision of ORS chapter 474 or 475, or any other Oregon statute."

Representative Frost wondered what would be wrong with using the wording contained in ORS 475.625 (2).

Chairman Burns understood the adoption of section 7 of the draft would mean repealing ORS 475.625. Upon the repeal of ORS 475.625, he wondered what in chapters 474 or 475 would make it unlawful to smoke marihuana. What in these chapters states that it is necessary to have a prescription to use a narcotic or a dangerous drug.

Mr. Wallingford replied that these provisions are set out in sections beginning with ORS 474.030. These sections prescribe the conditions under which a license may be obtained in order to manufacture drugs, the procedure for obtaining narcotics and under what conditions they may be dispensed, under what conditions a druggist can sell drugs, under what conditions a physician or

dentist may administer drugs, etc. Even with these provisions, however, he saw nothing wrong with following Representative Frost's suggestion re subsection (2) of ORS 475.625.

Mr. Tanzer left the meeting.

Representative Frost moved to amend section 7 of the draft by inserting the language contained in subsection (2) of ORS 475.625. Subsection (1) of section 7 would then read:

> "(1) A person commits the crime of criminal use of drugs if while in this state he knowingly uses or is under the influence of a narcotic or dangerous drug, except when administered or dispensed by or under the direction of a person authorized by law to prescribe and administer dangerous drugs or narcotic drugs to human beings."

There were no objections raised to this approach and Chairman Burns announced the adoption of the motion.

Mr. Knight and Chairman Burns drew attention to the phrase "while in this state" used in subsection (1) and questioned the meaning of and the need for the language.

Chairman Burns asked if it was clear where the burden of proof lies under subsection (2) of section 7.

Representative Frost stated that subsection (2) is the same as subsection (3) of ORS 475.625.

Chairman Burns understood that the defendant would have to inject the matter into the case but once injected, the burden is on the state. Mr. Paillette agreed--the draft provision does not shift the burden.

Representative Frost moved to delete the phrase "while in this state" contained in section 7 (1). The subsection would read:

> "A person commits the crime of criminal use of drugs if he knowingly uses or is under the influence...."

Chairman Burns announced that since there was no objection, the motion would be considered adopted.

Mr. Knight wondered if there was some way in which to repeal the "second Bowe Amendment." Judge Bowe has ruled that a person

smoking a marihuana cigarette is not in "possession," he is "using" it. He threw the state out on a case of possession of marihuana on the basis that the offense was covered under ORS 475.625, use of narcotic drugs, and therefore the possession statute did not apply. In other words, the defendant must be charged with "use."

Chairman Burns asked when a person would be charged with "use" as opposed to "possession."

Mr. Knight replied that "use" could be a "cop-out" for "possession." A defendant is charged with "use" when he is apt to be under the influence of a narcotic or dangerous drug. There are separate acts involved--the holding or carrying of a cigarette is "possession;" the smoking of a cigarette or the popping of a pill is the "use" of it.

Chairman Burns asked when a "use" would not include a "possession."

Mr. Knight replied that there would be a "possession" prior to the "use."

Chairman Burns asked if a Pirkey problem is created if there is a different penalty for "use" than there is for "possession."

Mr. Paillette did not think this would be a problem in that there are reasonable standards in the statutes to distinguish one offense from another. There is no unbridled discretion without guidelines.

Representative Frost moved the adoption of section 7 as amended and subject to the amendments directed to the staff. The motion carried unanimously.

Section 8. Criminal drug promotion.

Mr. Wallingford advised that the present "frequenting" statute is ORS 474.130. The bulk of this present statute is a nuisance statute; subsection (3) is the part that is really in point and it is penalized as a misdemeanor.

Mr. Wallingford explained that he had made some structural changes in the section and in the third line of the section changed the word "addicts" to "users." The amended section reads:

> "A person commits the crime of criminal drug promotion if he knowingly maintains or frequents a place:
>
> "(1) Resorted to by drug users for the purpose of unlawfully using narcotics or dangerous drugs; or

"(2) Which is used for the unlawful keeping or sale of such drugs."

Mr. Clark cited a situation where an individual attends a party in someone's home and, while he does not participate in the conduct, he remains in the home when he knows that upstairs part of those at the party are "blowing pot." He asked if this person could be prosecuted under the provisions of section 8.

Mr. Knight replied that the term "frequents" used in the section would provide such an individual with a defense--if he were in the home just the one time. The statute is designed to get at the "hippy flophouse"--the situation where one individual has an apartment and people come there and congregate and sleep on mattresses placed all over the floor. ORS 474.130 provides a way in which to close this type of place. Although no prosecution has been brought under the nuisance provisions of the statute, he said, it is always a nice statute to have to get a landlord to abate the nuisance and clean the place up.

Mr. Clark remarked that he had some concern about statutes such as this and Mr. Wallingford advised that the "frequenting type statute" is fairly common in the areas of drugs, gambling and prostitution.

Mr. Knight acknowledged that at times where it is known that drugs are being used at a certain place, the police obtain a search warrant to search the premises and arrest everyone at the party for "frequenting." The police can then search each individual and thus get at those who are in "possession."

Chairman Burns thought it would be rather interesting if someone challenged the validity of the arrest under the "dragnet theory" of a recent Mississippi case.

Mr. Clark thought that, given the facts set out by Mr. Knight, almost any tavern around Portland State would fit the description cited. He thought it could also apply to some situations in college dormitories.

Mr. Wallingford pointed out that in the Prostitution Article there is an offense for being found in or about a house of prostitution but the subcommittee added, in addition to the individual's presence, the mens rea requirement of an intent to engage in prostitution.

Mr. Paillette noted section 8 contains a culpability requirement because it uses the term "knowingly." This term has been defined in the Culpability Draft, P.D. No. 4, as:

"When used with respect to conduct or to a circumstance described by a statute defining a crime, means that a person acts with an awareness that his conduct is of a nature so described or that a circumstance so described exists."

He thought this culpability requirement would protect the innocent person who just happened to be caught in a place where drugs were found or being used.

Chairman Burns remarked that the statute (ORS 474.130) has been on the books and, by and large, the law enforcement people have exercised good judgment in using it. On occasion it can be very useful as a prosecution device. He admitted, however, to being concerned about the entire area.

Mr. Clark thought the one saving grace is that the police are using increasing discretion in enforcing this type of statute.

Representative Frost moved the adoption of section 8 as revised by Mr. Wallingford. The motion carried with Mr. Clark abstaining.

Section 9. Obtaining a drug unlawfully.

Section 10. Criminal possession of drugs; prima facie evidence.

Mr. Wallingford explained that section 9 is a restatement of ORS 474.170. Section 9, he said, creates the biggest problem in carrying over definitions and restating them. All of the terms used in paragraph (e) are defined in ORS 474.010.

Chairman Burns referred to the word "subterfuge" used in subsection (1) (a) and asked what it added to the section. He was aware that the term is presently used in the statute.

Mr. Wallingford did not think it meant anything other than fraud or deceit, terms also used in paragraph (a). It seemed to him that there is quite a bit of overlap in ORS 474.170 (1), the derivation of section 9.

Chairman Burns noted paragraph (b) of subsection (1) reads: "By the forgery or alteration of a prescription or any written order." Since ORS 474.010 (20) defines an "official written order" he suggested the adjective "official" be inserted after the word "any" and before the word "written" in section 9 (1) (b) so that it will read: "...of a prescription or any official written order...."

Chairman Burns then referred to paragraph (d) of subsection (1), noting it reads: "By the use of a false name or the giving of a false address." He asked what the distinction is between "use" and "giving." This language, too, is brought over from ORS 474.170 (1) (d).

Mr. Knight moved to amend section 9 (1) (d) so that it will read: "By the use or giving of a false name or address; or". Since there was no objection to this approach, Chairman Burns announded it adopted.

Chairman Burns directed attention to the language "falsely assuming" contained in paragraph (e) and asked if "assuming" meant the same as "pretend."

Mr. Paillette said this was the meaning intended in the statute.

Chairman Burns noted the language in paragraph (e) is carried over from ORS 474.170 (4) but wondered if it would not be better to have the paragraph read: "By falsely representing himself to be a manufacturer...." He thought this terminology would cover all of the range of conduct desired. There being no objection, the suggestion was adopted.

Mr. Knight understood subsection (2) of section 9 was presently contained in ORS 474.170 and Mr. Wallingford confirmed this. In that there is no patient-physician privilege in criminal law, Mr. Knight questioned the need to include this statement in the section. He admitted it might be of benefit in the administrative law.

Chairman Burns asked if the non-applicability of physician-patient privilege extended to the whole range of criminal law.

Mr. Knight replied that this was his understanding of State v. Betts, 235 Or 127, 384 P2d 198 (1963).

Chairman Burns referred to ORS 44.040 (1) (d) and read:

> "A regular physician or surgeon shall not, without the consent of his patient, be examined in a civil action, suit or proceeding, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient."

Chairman Burns suggested deleting subsection (2) of section 9 and noting in the commentary that it is intended that existing law be preserved. There being no objection, this approach will be followed.

Mr. Clark moved to accept section 9 as amended.

Representative Frost noted that the provisions in subsections (5) and (6) of ORS 474.170 are not covered in the draft. These read:

"(5) No person shall make or utter any false or forged prescription or false or forged written order.

"(6) No person shall affix any false or forged label to a package or receptacle containing narcotic drugs."

If these subsections are repealed, Representative Frost was concerned about a possible problem in the event an individual manufactured and sold false prescriptions. He asked if this conduct is covered elsewhere.

Mr. Paillette recalled that this subject had been discussed by the Commission in connection with the Forgery Article. He stated he had sent an inquiry, along with the Forgery Draft, to the Oregon Medical Association and the Pharmaceutical Association asking whether or not they felt there was a need in the Forgery Draft for specific coverage of prescriptions not related to dangerous drugs or narcotics. No reply has been received from either organization so their views are not known. The letters were written because uttering a forged prescription would be covered under forgery but it would not be first degree forgery as New York and Michigan provide.

Representative Frost wondered, then, about coverage for affixing a false or forged label to a package. This might come up where someone is trying to get around the exempt narcotics statutes or, perhaps, would be done by a pharmacist.

Mr. Wallingford thought the provision also was directed at persons who might have in their possession an illegal drug in a container labeled "aspirin" or something else not a narcotic drug.

Chairman Burns asked the rationale behind not carrying subsections (5) and (6) of ORS 474.170 over into the proposed draft.

Mr. Wallingford said it was thought that subsection (5) of ORS 474.170 was covered by the Forgery Article.

Chairman Burns was still concerned about subsection (6) and suggested writing the subsection's provisions into the draft and, in the interval before the draft is considered by the Commission, making a check to see if it is needed. It was his impression that the provisions of ORS 474.170 (6) have been very infrequently used.

Representative Frost commented that if the approach of taking the law as it presently exists and carrying it over into the criminal code is followed, it would hurt nothing to put the provisions of the subsection into the draft.

Mr. Paillette agreed that a section entitled "Falsely labeling a narcotic drug" could be drafted.

Chairman Burns expressed the opinion that paragraphs (a) through (d) could also be tightened up by some redrafting.

Mr. Wallingford agreed, noting that there is quite a bit of overlap. Paragraph (a) is a rather generalized prohibition; paragraph (b) is a rather specialized situation but is covered by paragraph (a), also.

Mr. Knight could not see where ORS 475.100 (4), possessing a drug not in the container in which it was dispensed, was carried over into the proposed draft.

Mr. Wallingford acknowledged that there were three different areas not covered by the draft. He distributed a sheet of amendments to the members. These set out three additional sections: (1) Criminal possession of drugs in the second degree; (2) Forfeiture of conveyances; and (3) Immunity.

Mr. Knight did not feel it necessary to go as far as the amendment proposed but thought it should be provided that where an individual has a drug not in the container in which it was dispensed to him or does not have the prescription, it is prima facie evidence that it is possessed unlawfully.

Mr. Wallingford stated that the proposed section is a restatement of present law; in fact, the proposal is a little more liberal because presently there are two different provisions--ORS 474.110, possession of drug lawful only in container, applying to a narcotic drug, and ORS 475.100 (4), which applies only to dangerous drugs. Under present law, a narcotic drug must be carried in its original container but a dangerous drug may be carried either in its original container or in a different container as long as the individual has in his possession a label prepared by the pharmacist for the drug dispensed. The proposed section for the draft reads:

> "A person to whom or for whose use any narcotic or dangerous drug has been prescribed commits the crime of criminal possession of drugs in the second degree if he knowingly possesses such narcotic or dangerous drug not in the container in which it was originally delivered, sold or dispensed."

Mr. Knight acknowledged that a certain amount of discretion is now exercised in prosecuting under the present statutes and he felt this discretion should be left with the prosecutors.

Representative Frost asked if under the present draft there is a prima facie case made for the state if an individual carries a narcotic or dangerous drug in a mismarked or unmarked container.

Mr. Knight replied that it is not presently in the draft. Mr. Wallingford added that it is not presently in the statutes in regard to a narcotic drug. It is there only on a dangerous drug when it is not in its original container or when the individual does not have a proper label in his possession.

Representative Frost posed a situation where an individual puts a pill, properly prescribed, in a purse or pocket but leaves the label and prescription at home. He asked if this person would have a defense.

Mr. Paillette noted that the statute now reads: "...does not have a proper label in his possession." He did not think this would necessarily mean the individual must have the label with him. If it were in the person's home, he would still "possess" it.

Mr. Knight interpreted the language to mean "in his immediate possession."

Representative Frost stated that this is what concerned him. If the statute language means the individual has a defense if he has the label or prescription at home, he could see no problem.

Mr. Knight noted that under present law, possessing a dangerous drug not in its container or without a label "is prima facie unlawful." The defendant can produce a doctor to testify he prescribed such a prescription for the individual if the case goes this far.

Representative Frost agreed, then, that in regard to carrying a dangerous drug, an individual would have a defense. There would be no defense, however, for the person carrying a prescribed, narcotic drug in her jeweled pill case.

Mr. Knight agreed this would be so but pointed out it is not because the individual is carrying a narcotic drug but because she is violating ORS 474.110, possession of drug lawful only in container.

Mr. Wallingford reported penalty for violation of ORS 474.110 is provided in ORS 474.990: "...upon conviction, shall be punished by a fine not exceeding $5,000, or by imprisonment in the state penitentiary for not exceeding 10 years, or both."

Representative Frost thought this a rather "stupid crime" and Mr. Clark agreed, adding that many women just do not carry pills "in the container in which it was dispensed."

Representative Frost understood it was Mr. Knight's point that the prima facie case when the drug is out of its container should be provided for in section 9.

Mr. Wallingford was of the opinion that a separate section would have to be made on this because section 9 deals with "obtaining" a drug unlawfully.

Representative Frost suggested the prima facie evidence provision supported by Mr. Knight be inserted into section 10 of the draft. He acknowledged the necessity for this for the valid arrest and for some prosecutions, as long as there is a defense for the defendant who lawfully obtains the drug. Representative Frost suggested adding to section 10: "or possession of a narcotic or dangerous drug in a container other than the container in which it was originally issued from a lawful source."

Mr. Paillette was concerned about the fact that the proposed draft lacked some of the provisions now contained in ORS 475.100. The present statute, he said, contains some exceptions which would fall by the wayside if ORS 475.100 were repealed. The definition of the term "unlawfully" in the draft incorporates some of the exceptions set out in ORS 475.100. He pointed out that presently the prima facie provisions are limited to ORS 475.100 and if these provisions are inserted into the draft sections on possession, they might really be too harsh on someone when the exceptions now provided in the law are not carried over to the new code.

Mr. Wallingford stated that some of ORS 475.100 will have to remain in the regulatory code because it, in effect, lays out how a person can legally possess, thus keeping him from coming under the definition of "unlawfully."

It was the decision of the subcommittee that the draft be sent back for additional staff work with instructions to check, particularly, the provisions regarding prima facie evidence and ORS 475.100.

Section 11. Burden of proof on exemption from drug law.

Chairman Burns understood this section to be the same as present law. It provides that if there is a proviso or exemption, it is up to the defendant to show it.

Mr. Wallingford agreed; advising the present law is contained in ORS 474.180.

There being no objection, Chairman Burns announced section 11 approved.

Section 12. Acquittal or conviction under federal law as precluding state prosecution.

Mr. Wallingford explained this section is a restatement of ORS 474.210.

There were no objections to the section's provisions and Chairman Burns announced it will be considered as approved.

New, Unnumbered Sections Considered:

Section . Criminal possession of drugs in the second degree.

This section was considered along with sections 9 and 10 of the draft. This discussion is set out on pp. 20-22 of these minutes.

Section . Forfeiture of conveyances.

Mr. Wallingford reported the section contained no substantive changes from present law.

Mr. Knight referred to the language "any conveyance used with the knowledge of its owner for unlawful transportation..." and observed that most cars are owned by banks and finance companies and very few of them would actually have any knowledge of how the vehicle is being used. The present statute (ORS 475.120 (2)) reads: "Any such conveyance used by or with the knowledge of the owner or the person operating or in charge thereof in the unlawful transportation...." This gives the owner the right to come in and defend himself against the charge if he did not have knowledge of the conduct.

Mr. Wallingford questioned that it would be possible to "forfeit" an automobile showing only knowledge by the driver and no knowledge on the part of the owner as to how the vehicle had been used.

Chairman Burns informed the subcommittee that this same procedure applies in liquor law violations. He read from ORS 471.665, Disposal of conveyance transporting liquor:

"(1)....No claim of ownership or of any right, title or interest in or to such vehicle shall be held valid unless the claimant shows to the satisfaction of the court that he is in good faith the owner of the claim and had no knowledge that the vehicle was used or to be used in violation of law."

He then asked Mr. Wallingford if there was any reason for taking out the language relating to the "person operating or in charge" of the vehicle now in ORS 475.120 (2).

Captain Howard mentioned the fact that the proposed draft does not contain the provisions relating to the search of motor vehicles presently found in ORS 475.120 (1).

Mr. Knight remarked that the constitutionality of this procedure could possibly be decided on cases now pending before the Supreme Court although the cases really do not go after the constitutionality of the provisions directly. He believed the statute to be a very valuable one.

Mr. Wallingford admitted that the provisions set out in ORS 475.120 (1) have not been carried over into the proposed draft but stated that these would remain in the regulatory code. This subsection would not be repealed; subsection (2) of ORS 475.120 is the only part to be repealed.

Chairman Burns questioned that the provisions relating to the search of motor vehicles were properly a part of the regulatory statutes; they probably should be brought over into the criminal sections.

Captain Howard commented that these provisions are very valuable tools and are frequently used very effectively. The decision in State v. Raymond, he advised, held the procedure constitutional.

Chairman Burns believed both subsections (1) and (2) of ORS 475.120 should be carried over into the criminal code and the present wording relating to the "owner or the person operating or in charge" should be brought over as well. There is still a saving clause for the innocent owner of the vehicle involved; he would be able to get out under ORS 471.665.

Mr. Knight moved the adoption of the approach outlined by Chairman Burns.

Chairman Burns asked about the disposition of vehicles received through forfeiture.

Mr. Clark said the vehicles are sold by the sheriff's office and the money received is shared by the county and the state.

Mr. Knight recalled that at one time his county had obtained an old Volkswagen through a forfeiture and had thought they might have a use for it in undercover work. Under the statute, however, it appears that the county must sell the vehicles obtained so this was done. He did not know whether or not there would be an advantage in allowing a sheriff to either sell or keep a vehicle for county use.

Mr. Knight's motion to approve the unnumbered section relating to forfeiture of conveyances with the provision that it be amended to read substantially like subsections (1) and (2) of ORS 475.120 passed unanimously.

Section . Immunity.

Mr. Wallingford reported this section a restatement of ORS 475.150 (3).

There were no objections to the section and Chairman Burns stated it will be considered as approved.

Mr. Paillette stated that the draft on Offenses Involving Narcotics and Dangerous Drugs will be revised and resubmitted to the subcommittee.

Captain Howard asked if the provisions now in ORS 475.150 (1) and (2) were to be transferred to the criminal code or left in the regulatory chapter. These subsections provide:

> "(1) All special funds provided by law for enforcement of the liquor laws of this state are available, under the direction of the Governor, for the enforcement of the laws of this state regulating or prohibiting the sale and use of narcotic drugs.
>
> "(2) All officers, agents and inspectors authorized by law to enforce the liquor laws of this state, shall likewise enforce the laws of this state regulating or prohibiting the sale or use of narcotic drugs."

Captain Howard wondered why it would not be better to charge all of the police officers of the state with the enforcement of the statute rather than to refer to those authorized by law to enforce the liquor laws.

Mr. Knight thought this procedure had come about because ORS chapters 474 and 475 are not in the criminal code. Now that they are being brought within the criminal code, he thought it would be obvious that the police would enforce the narcotic and dangerous drug statutes. He did not think it necessary to spell this out in the criminal code.

Chairman Burns asked if subsections (1) and (2) of ORS 475.150 have any practical effect now; does the Governor now allot liquor money for narcotic enforcement.

Mr. Knight replied that District Court funds and Circuit Court funds have to go into the General Fund. The counties having Justice Courts still get the money from fines imposed for such offenses as a minor in possession, furnishing intoxicating liquor, etc. This money goes into a Liquor Enforcement Fund and the district attorneys in these counties simply get a letter from the Governor authorizing them to use this Liquor Enforcement Fund in the enforcement of the narcotic laws. The counties not having Justice Courts budget for the enforcement of the narcotic laws.

Judge Burns felt this was a matter to be called to the attention of the Legislative Counsel. He did not believe it was something which should be brought into the criminal code because it concerns the administrative, financial affairs of a narcotic squad and he doubted very much that the county treasurers would be looking to the criminal code for their directions.

Mr. Paillette thought it would be best to leave the provisions where they are--in the regulatory chapter--but if the subcomittee wished to recommend that some attention be given the matter, this could be done either formally or informally.

Chairman Burns suggested a sentence be inserted in the commentary stating the subcommittee recommends the provisions remain where they are in ORS chapter 475 and if the Commission wants to do something different, it can do so.

The meeting adjourned at 5 p.m.

Respectfully submitted,

Maxine Bartruff, Clerk
Criminal Law Revision Commission