Tapes #46, 47 and 48

#46 - 325 to end of Side 2
#47 - Both sides
#48 - 1 to 712 of Side 1

OREGON CRIMINAL LAW REVISION COMMISSION
Room 309 Capitol Building
Salem, Oregon

February 20, 1970

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OREGON CRIMINAL LAW REVISION COMMISSION
Eighteenth Meeting, February 20, 1970

Minutes

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Mr. Donald E. Clark
Representative David G. Frost
Representative Harl H. Haas
Mr. Frank D. Knight
Mr. Thomas D. O'Dell representing Attorney General Lee Johnson
Representative Thomas F. Young

Excused: Mr. Robert Chandler
Senator Kenneth A. Jernstedt
Mr. Bruce Spaulding

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

Also Present: Dr. James Sullivan, Political Science Professor, Lewis & Clark College, Portland; Kennedy Action Corps
Mrs. Margot Perry, Portland; Kennedy Action Corps
Mr. Terry Finn, Portland; Kennedy Action Corps
Miss Dolores Sathre, Portland; Kennedy Action Corps
Mr. Lee Crawford, attorney, Salem; Oregon State Rifle and Pistol Association
Mr. Donald R. Blensly, Yamhill County District Attorney; District Attorney's Association Criminal Law Revision Committee

Agenda: OFFENSES INVOLVING FIREARMS AND WEAPONS
Preliminary Draft No. 1; January 1970
(Gun Control Proposal by Oregon Kennedy Action Corps)

Amendments to
OFFENSES AGAINST PRIVACY OF COMMUNICATIONS
Preliminary Draft No. 2; December 1969

The meeting was called to order by the Chairman, Senator Anthony Yturri, at 9:30 a.m. in Room 315, Capitol Building, Salem.

Approval of Minutes of Commission Meeting of January 23, 1970

Judge Burns moved that the minutes of the Commission meeting of January 23, 1970, be approved as submitted. The motion carried unanimously.

Gun Control Proposal Submitted by the Oregon Kennedy Action Corps to be Considered in Conjunction with Article on Offenses Involving Firearms and Weapons; Preliminary Draft No. 1; January 1970

Chairman Yturri related that representatives of the Kennedy Action Corps had earlier appeared before Subcommittee No. 3 to explain their position in support of firearms control legislation. Today twenty minutes was being allotted for a verbal presentation to supplement their printed report which had previously been distributed to Commission members.

Dr. James Sullivan stated that firearms control legislation was considered by the Kennedy Action Corps to be a method of saving lives and preventing crime. Since 1900, he said, more people had been killed by guns than by all of the wars. Deaths in the Vietnam war amounted to approximately 9,000 per year and at the same time 20,000 persons per year were being killed in America with guns. As noted in the report, the use of guns in violent crime was going up. Since 1964 the use of firearms in murder had increased 71%; in armed robberies 113%; and in aggravated assaults 117%. The condition, he said, was growing worse and it was time steps were taken to help the situation.

Concerning the constitutionality of gun control legislation, Dr. Sullivan said there was nothing in the Second Amendment to prevent passage of such legislation by a state legislative body so long as the provisions were not arbitrary or capricious.

The Kennedy Action Corps recommended total registration coverage which would apply to persons who newly acquired firearms as well as to those who currently owned them. They urged that the provisions apply not only to those who acquired firearms from responsible dealers but also to private exchanges so as to cover all transfers of ownership. They recommended a licensing provision which would give some sort of criterion for the state to decide the suitability of persons desiring to own firearms. There were, he said, persons who had a legitimate need and a suitable temperament to own guns and to use them with wisdom and they should be permitted to do so. The Corps further recommended provisions to revoke the license to own a gun and favored a waiting period between the sale and delivery of guns with provisions for at least a preliminary basic education in the proper use of firearms by persons who were to receive a license.

Dr. Sullivan said he was not suggesting that these recommendations would make it impossible for criminals to obtain guns but it would at least make it more difficult. Secondly, it would be possible to convict lawless persons of being illegally in possession of a firearm before they had a chance to commit a crime with the weapon.

Dr. Sullivan called attention to the statistics presented on page 33 of their report to the Commission. The United States with a population of roughly 200 million had a homicide rate approximately twice the amount in all other countries where strict firearms controls were in effect despite the fact that the combined population of those countries was nearly double that of the United States.

In conclusion, Dr. Sullivan said that firearms control legislation as advocated by the Oregon Kennedy Action Corps was a valid first step toward solution of a problem which was steadily growing more serious and urged the Commission to take immediate action in line with their recommendations.

Mr. Paillette asked whether the Kennedy Action Corps had prepared specific legislation to implement their recommendations and was told by Mrs. Perry that they had not but there were a number of excellent sample bills available, one of which was House Bill 1546 introduced at the 1969 session of the Oregon legislature.

Mr. Lee Crawford stated he had been asked to appear before the Commission by the Oregon State Rifle and Pistol Association. The first approach to gun registration, he said, was to determine the magnitude of the undertaking and to weigh the cost of such a program against the possible gain. Since 1968, he said, 359,111 hunting licenses had been issued in Oregon. He estimated that there were probably one and a half million guns in Oregon. It cost, he said, about $3 out of each $10 license fee to register a boat in Oregon and, based on this figure, it would cost approximately three or four million dollars to register the guns in Oregon plus a continuing expense to keep them registered. Registration would not keep the guns out of the hands of the criminal element, he contended, so that the cost of registration would far exceed the benefit.

Under current law Mr. Crawford said there was no central filing system for permits issued to carry a concealed weapon. Those issued by the county sheriff were filed with the county clerk and those issued by the chiefs of police were filed in their respective offices. Under this system it became a virtual impossibility for the state police to determine who had a permit to carry a concealed weapon. Central filing would solve that problem, he said. Present law carried no method for revoking these permits and he suggested that such a provision would be beneficial. He further urged the Commission to consider a special law with an enhanced penalty covering theft of a firearm or knowingly receiving or concealing a stolen firearm.

Existing law, Mr. Crawford said, contained a provision for confiscation of a firearm used in violation of game laws but there was no provision for confiscation of a gun used in threatening to commit a felony or in an attempted suicide. He said it would not be unreasonable to enact legislation whereby an individual who was found to be emotionally unstable would be prohibited from using any firearm.

Judge Burns asked Mr. Crawford if the group he represented would favor lodging the power of issuance of permits to carry a concealed firearm in, for example, the state police or some one agency so there would be a central filing point. Mr. Crawford said his association had not discussed the problem but he personally felt the local sheriff or the local chief of police was in a better position to pass judgment on those to whom the permits were issued. Judge Burns pointed out that the subcommittee had discussed the fact that the policies regarding issuance of permits differed widely between sheriffs and chiefs of police and there was often a disparity in policy in the same community between the two officers. Mr. Crawford said he was aware that some sheriffs had taken the position that they would not issue such a permit and he said their refusal to do so should perhaps be reviewed by the circuit judge.

Chairman Yturri noted that Mr. Crawford had suggested special legislation for stealing firearms and advised that one of the Commission's goals was to eliminate the passage of special statutes for special areas. If this suggestion were adopted, he said, it would open up the code to requests by cattlemen for a special statute on stealing cattle, requests by railroads for a special statute for breaking into a boxcar, requests by the telephone companies for a special statute for tampering with a telephone coinbox, etc. Mr. Crawford agreed this might cause a problem for the Commission but his intent was to get guns out of the hands of the wrong people and guns in that classification were quite often stolen guns.

Senator Burns said some experts maintained that a system of firearms registration with ballistical information as part of the registration system, while it might not reduce the incidence of firearms deaths, would immeasurably aid the police in apprehending those who perpetrated crimes. He asked Mr. Crawford if his association had taken a position on this aspect. Mr. Crawford said there was no merit in a ballistics file because he knew of no way to classify a bullet other than by caliber and it would be an impossible task to compare a murder bullet with all the other ballistics samples of guns of that same caliber. Furthermore, he said, it was a simple matter to change the ballistic sample of a gun by filing the barrel with emery paper.

With respect to license and registration costs, Mrs. Perry stated that the facts her organization had assembled indicated that it cost about 25 cents to register a gun and license fees were ordinarily between $5 and $7. Gun licenses should be reviewed periodically, she said, and the Kennedy Action Corps recommended every five years. Ballistics checks, she said, had proven to be very expensive and the Corps recommended that registration consist only of name, address, gun serial number, etc.

Mr. O'Dell noted that the witnesses had mentioned that the primary purpose of gun control was to keep guns out of the hands of "improper persons" and asked if there were any firm standards which could be imposed to determine who were "improper persons." Mr. Crawford replied that everyone was entitled to the presumption that he was a proper person to own a firearm unless he fell into certain prohibited categories. Mrs. Perry indicated that the categories recommended by the Kennedy Action Corps would be objective categories to establish some means to judge whether a person was mentally stable. For example, if he had spent time in a mental institution, his eligibility to own a firearm would be based on whether he had been adjudged cured of his disability. The ACLU, she said, had made some very good suggestions on the specific categories which could be set up to establish specific guidelines.

Chairman Yturri thanked the witnesses and indicated the Commission's decision would be made at a future meeting.

Proposed Amendments to Offenses Against Privacy of Communications; Preliminary Draft No. 2; December 1969

Mr. Paillette explained that pages 1 through 3 of the proposed amendments set forth revisions approved by the Commission in January while the remaining pages conformed this Article to the provisions of the federal Omnibus Crime Control Act. He explained that this area of the law was unsettled and would probably remain so until the United States Supreme Court made some determination as to the constitutionality of Title III of the Omnibus Crime Control Act (18 U.S.C. Ch. 119).

Section 2. Eavesdropping. Mr. Wallingford explained that section 2 provided an exception for police officers, or those acting under their direction, to overhear or record conversations in certain circumstances. This provision, he said, was consistent with the federal law.

Judge Burns asked if the draft contained provision for similar permission to permit a police officer to record a telephone conversation. Mr. Paillette replied that if the police wanted to place a bugging device on a telephone when neither party had consented, they would have to have a warrant to do so and that was provided for in a later portion of the draft.

Section 2 was subsequently amended. See page 7 of these minutes.

Tape 2 begins here:

Mr. Wallingford read and explained the revisions in sections 4 and 7 as approved by the Commission in January.

Section 8. Tampering with private communications. Mr. Wallingford advised that subsection (2) of section 8 had been added to permit disclosure by an employe of a telephone company and provided an exception to subsection (1) (c).

Mr. Clark questioned the advisability of the phrase "or to cooperate fully" in subsection (2) and said it might be interpreted to permit the police to require the telephone company employe to do the eavesdropping for them. Mr. Wallingford said that the phrase was not to be interpreted to mean that the police were going to be allowed on the premises of the telephone company to monitor telephone conversations in the absence of a warrant. Representative Carson said that it might be used by the police to say to the employe, "You listen to the conversations and report them to me." Senator Burns was of the opinion that it would be difficult to enforce the clause requiring the employe "to cooperate fully."

Mr. Clark moved to delete the language in subsection (2) following "relating to such matter." Mr. Wallingford expressed approval of the motion and explained that once the employe had furnished all the information he had available, any action taken thereafter by the police would have to conform to the further requirements of the Article. The motion carried unanimously.

Section 9. Eavesdropping warrants; definitions. Mr. Wallingford explained that section 9 and the subsequent sections in the proposed amendments set forth the procedure which would have to be followed in obtaining an eavesdropping warrant based on the requirements of the federal law. The sections were based on the New York eavesdropping procedure which was signed into law in June of 1969.

With respect to subsection (6) Mr. Clark asked why district court judges were included rather than just circuit court judges. Mr. Wallingford advised that a "judge of competent jurisdiction" under the federal law was defined as "a judge of any court of general criminal jurisdiction of the state." Mr. Paillette commented that the definition would thereby exclude district judges.

Mr. Clark suggested that the definition should say a "circuit judge of the district" rather than "of the county." Representative Carson contended that the judge should not be limited either to a district or to a county because some judges moved from one district to another.

After further discussion, Judge Burns moved to amend subsection (6) of section 9 to read: "'Judge' means a circuit court judge." The motion carried.

Representative Frost noted that both subsection (4) (b) and subsection (1) of section 2 contained no qualifying statement that the police officer should be acting in his official capacity. He said it was quite common to hire an officer to do investigative work on a civil case in his off-duty hours but during this time he would not be working in his official capacity. A peace officer was a peace officer 24 hours a day, he said, and these two subsections should require that he be acting in his official capacity while recording or overhearing by means of an eavesdropping device.

Judge Burns moved that subsection (1) of section 2 and subsection (4) (b) of section 9 be amended by inserting "acting in his official capacity" following "peace officer." The motion carried unanimously.

Senator Burns asked why subsection (1) of section 2 said " . . . or a person acting under his direction . . . " while subsection (4) (b) of section 9 said " . . . or a person acting under his direct supervision or command . . . " Mr. Wallingford explained that beginning with section 9 a different model was used for drafting the sections. He agreed, however, that the language of the two sections should conform.

Senator Burns moved that the language of subsection (1) of section 2 referred to above be amended to conform to that used in subsection (4) (b) of section 9 and the motion carried unanimously.

Mr. Wallingford explained that subsection (8) of section 9 was incomplete because it was virtually impossible to designate all of the offenses that would be covered by the subsection until the substantive code was completed. Mr. Paillette called attention to section 2516, subsection (2), of the Omnibus Crime Control Act where the kinds of offenses were listed that would qualify under subsection (8) of the draft. When this subject was first discussed in subcommittee, he said, the members were under the impression that the draft would be limited to felonies. However, a closer reading of the federal law indicated that certain specific offenses would qualify for wiretap even though they were not felonies:

> " . . . when such interception may provide or has provided evidence of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb, or property, and punishable by imprisonment for more than one year . . . "

Mr. Wallingford added that New York had also included some misdemeanors, particularly in the area of gambling.

The Commission agreed that it would be necessary to delay the decision as to the specific crimes to be included until completion of the substantive code.

Section 10. Eavesdropping warrants; in general. Mr. Wallingford explained that section 10 limited the person who could apply for an eavesdropping warrant to the district attorney and limited the period of the warrant's authority to 30 days.

Professor Platt objected to the provisions of section 10 which would permit the police to eavesdrop on conversations for a 30 day period. These conversations, he said,would involve many innocent people as well as the people who might be under suspicion and he was of the opinion that the provision was of questionable constitutionality. He urged that in this area the state adopt requirements more strict than those found in the federal statute by restricting the length of time an eavesdropping warrant could be used to something less than 30 days. He was strongly opposed to unsupervised listening by the police for an extensive time which could be further renewed ad infinitum each 30 days.

Mr. Wallingford explained that subsequent sections would meet some of the criticism Professor Platt had expressed by requiring particularity not only as to what the police were seeking in listening to the wiretap but also as to the specific person whose conversation was to be overheard, the facilities to be used and the precise period of time. If the officers wanted to extend their eavesdropping after they had obtained the information authorized by the warrant, they would have to get further authorization from the court.

Mr. Knight read subsection (2) of section 10 and called attention to the phrase "for any period longer than is necessary." Mr. Paillette explained that the 30 day requirement was to cut off the eavesdropping period and to make sure that it would not go beyond that. Section 12, he said, was very specific as to the kind of information which had to be alleged in the application form and he called particular attention to subsection (2) (e) of that section requiring a statement of the period of time for which the eavesdropping was to be maintained. The intent of the provision to which Professor Platt was objecting, he said, was to place a limitation on the warrant rather than to give the police carte blanche authority. Mr. O'Dell expressed the view that the form and content of the warrant requirements were specific enough to avoid constitutional problems.

Mr. Clark pointed out that the eavesdropping warrant procedure was so involved that it would be a rarity when the police would go to

the trouble of obtaining one and it would probably be used only in severe instances when they were, for example, dealing with some type of organized crime.

Section 11. Eavesdropping warrants; when issuable. Chairman Yturri asked if "particular communications" in subsection (3) of section 11 referred to the subject matter or the time of the communications. He was told by Mr. Wallingford that the phrase had reference to the subject matter.

Senator Burns asked if subsection (1) was surplusage and was told by Judge Burns that it was not because sections 12 and 14 were being incorporated by that language. He suggested, however, that "appropriate" be deleted. The Commission unanimously agreed to strike "appropriate" from subsection (1) of section 11.

Subsection (5) of section 11 was subsequently amended. See pages 18 and 19 of these minutes.

Section 12. Eavesdropping warrants; application. Senator Burns noted that subsection (3) of section 12 said that "the sources of the facts must be either disclosed or described." Under existing law, he said, the identity of a confidential informant did not have to be disclosed under certain circumstances but since the clause he referred to above was stated in the disjunctive, it appeared that the source would not have to be disclosed in any instance so long as it was described. This would be looser than the existing law, he said, and he would not subscribe to it.

Judge Burns called attention to the further requirement of the sentence referred to by Senator Burns which stated that the "application must contain facts establishing the existence and reliability of the informants . . . " He suggested that a statement be placed in the commentary to show that the Commission did not intend to depart from present case law that under carefully prescribed circumstances the identity of confidential informants could be protected. The cases were quite clear, he said, that where the anonymity of the informant was preserved, an affidavit was required to establish facts from which the magistrate could determine the reliability of the information.

Senator Burns said his point was that if the source was not a confidential informant, he wanted the source to be disclosed in the affidavit. Judge Burns agreed that in some instances there would be no need to protect the informant's identity.

Chairman Yturri expressed the view that the language "either disclosed or described" was needed because in some cases the affidavit would disclose and in others it would describe the source of the facts.

The Commission was agreed that there was no intent to change present case law relating to preservation of the identity of the confidential informant by the language of subsection (3) of section 12.

Judge Burns pointed out that one of the purposes for the specificity required by section 12 was that the district attorney himself was required to make application for the warrant and frequently he would not have had any personal part in the case up to that point. Mr. O'Dell observed that the district attorney was not always personally available 24 hours a day and he was of the opinion that deputy district attorneys should be authorized to act for the district attorney in these instances. Professor Platt was of the opinion that this area was so sensitive that it was desirable to permit only the district attorney to request this type of affidavit.

Mr. Paillette stated that when section 12 was being drafted, the staff did not have in mind that the section would be limited to the district attorney personally inasmuch as ORS contained a specific statute to the effect that deputy district attorneys were authorized to act for the district attorney (ORS 8.780).

Judge Burns said he believed that such applications, because of the sensitive area involved, should be made by the district attorney himself or at least by a deputy district attorney specifically designated by him.

Senator Burns moved that subsection (1) of section 12 be amended to read: " . . . subscribed and sworn to by a district attorney or a deputy district attorney specifically authorized by him."

Mr. Wallingford expressed doubt that this amendment would meet the federal requirements inasmuch as section 2516 of the federal Act said, "The principal prosecuting attorney of any State, or the principal prosecuting attorney of any political subdivision . . . "

The New York law, he said, used the term "applicant" rather than "district attorney" and defined an applicant as "a district attorney or the Attorney General." It further stated: "If a district attorney or the Attorney General is actually absent or disabled, the term 'applicant' shall mean that person designated to act for him and perform his official function in and during his actual absence or disability."

Senator Burns withdrew his motion and Mr. Clark moved to amend subsection (1) of section 12 by adding thereto:

> "If a district attorney is actually absent or disabled, then 'district attorney' shall mean that person designated to act for him and perform his official function in and during his actual absence or disability."

The motion carried without opposition.

Judge Burns noted that subsection (2) (b) of section 12 was not grammatically correct in that it said a "designated offense has been, is being or is about to be committed . . . " and then referred to the identity of the person committing the designated offense. Mr. Knight pointed out that section 2518 (1) (b) of the federal law used the same language, i.e., "the identity of the person, if known, committing the offense and whose communications are to be intercepted;".

Chairman Yturri suggested that the commentary state that no difference in meaning was intended in the draft section from that set forth in the federal Act.

Section 12 was further discussed and amended. See pages 14 to 16 of these minutes.

Section 13. Eavesdropping warrants; determination of application. Judge Burns inquired as to the meaning of the term "documentary evidence" as used in subsection (1) of section 13. He said the judge could be on dangerous ground if he based his decision on material which had not been sworn to. Mr. Paillette pointed out that this language was derived from section 2518 (2) of the federal Act which said, "The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application." He explained that section 13 also followed the New York law and the purpose was to set out with more clarity what the judge could do and what the application was required to contain.

Chairman Yturri pointed out that section 12 set forth the specific information which had to be provided by the district attorney in order to obtain an eavesdropping warrant. Section 13 then went on to say that even though the provisions of section 12 were fully complied with, the judge could still require more information in support of the application. Judge Burns believed that section 13 meant that even though the application complied with section 12 as to form, the judge was entitled to ask for more information to determine whether sufficient grounds existed to issue the warrant.

Mr. Paillette explained that section 13 was just another way of saying what section 2518 (c) of the federal law said; namely, what the judge had to determine before he issued a warrant. Mr. Wallingford further explained that section 13 was intended to say that the judge would first examine the application to make certain that it conformed to section 12 and that all the necessary allegations were contained therein. If he were not then convinced that those allegations amounted to probable cause, he could call for additional testimony or documentary evidence.

Chairman Yturri was of the opinion that the confusion arose because section 13 referred back to section 12. Mr. Knight concurred

and moved to strike the following clause from subsection (1) of section 13: ", if he finds that the application conforms to section 12 of this Article,". The motion carried unanimously.

Senator Burns moved that the reference to section 12 also be deleted from subsection (3) of section 13. Representative Haas said that if that phrase were deleted, the judge would not be forced to deny the application even though it failed to conform to section 12. After further discussion, Senator Burns withdrew his motion.

Mr. Knight pointed out that subsection (3) said that if the grounds do not exist, the judge shall deny the application whereas the federal statute was stated in a positive fashion and said that if the judge finds that grounds do exist, he may issue the warrant. Mr. Paillette noted that subsection (2) said the judge "may grant" whereas subsection (3) said he "shall deny." The federal statute said "may" in each instance which he interpreted to mean that if the grounds for issuance existed, the court would not have the discretion to deny the application. The Commission, therefore, might want to say under subsection (2) that the judge "shall" grant the application.

Judge Burns said he was not convinced that it was necessary to include subsection (3) because if the judge determined that adequate grounds did not exist for the issuance, he would refuse to grant the application and that would be the end of the matter.

If the application were in proper form and the grounds were present to grant the warrant, Mr. Paillette asked what other grounds the judge would have to deny its issuance. Mr. Knight said he could deny it on the basis that he disapproved of wiretapping. Mr. Wallingford stated that the judge would probably say that probable cause was not shown.

After further discussion, Judge Burns moved that subsection (3) of section 13 be deleted and that subsection (2) be amended by inserting after "section 11 of this Article" the following phrase: "and that the application conforms to section 12 of this Article". The motion carried.

Section 14. Eavesdropping warrants; form and content. Judge Burns cited a hypothetical situation where police, working on a kidnapping case, obtained an authorization for wiretapping. He asked what period of time the warrant would cover under subsection (6) of section 14 and under subsection (2) (e) of section 12; whether the authorization would end with the recording of the first ransom call or whether the police would be permitted to maintain the wiretap in order to record further calls in the event the kidnapper called again.

Mr. Wallingford replied that it would be necessary first to show the identity of the suspected kidnapper and the location of the phone to be tapped. The period of time during which the interception would be authorized would relate also to section 14 (4) particularly with respect to the type of communication sought to be intercepted. The communications might involve a series of negotiations and the application might result in authorization for a 72 hour wiretap, for example, if the district attorney could convince the judge that these negotiations would continue over that period of time. He said the "described communication" referred to in section 14 (6) might be a series of communications and not just a single call.

Judge Burns asked if "communication" should therefore be made plural in subsection (6) and was told by Mr. Paillette that the singular included the plural so far as statutory construction was concerned.

Mr. Wallingford commented that some of the procedural questions which would arise under this draft were unanswerable at the present time because the federal statute had not been tested and there was no case law construing the Act.

Mr. Knight noted that subsections (7) and (8) of section 14 were not included in the federal statute and asked what their derivation was. Mr. Wallingford replied that they were based upon the New York law and were included in an attempt to minimize the danger that the Article would be declared unconstitutional when wiretap laws were reviewed by the United States Supreme Court.

Professor Platt pointed out that subsection (8) of section 14 authorized the court to permit a criminal trespass, presumably into a private home. Senator Burns commented that under the federal Act this would be permitted without an express authorization by the judge. Professor Platt contended that the judge would be guilty of aiding and abetting a criminal trespass if he authorized this type of entry.

Judge Burns said that when a person's privacy was to be violated by an authorized wiretap, he could not see where it made much difference that entry was permitted on his premises. If physical access were unnecessary, the police would not be permitted to make entry; they could only make a physical trespass when it was specifically authorized as provided by subsection (8) and was necessary in order to execute the warrant.

Approval of sections 2 through 14. Mr. Clark moved that sections 2 through 14 be approved as amended. The motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Clark, Frost, Haas, Jernstedt, Knight, O'Dell, Young and Mr. Chairman.

The Commission recessed for lunch and reconvened at 1:30 p.m.

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Judge James M. Burns
Representative Wallace P. Carson, Jr.
Representative David G. Frost
Representative Harl H. Haas
Attorney General Lee Johnson
Mr. Frank D. Knight
Representative Thomas F. Young

Excused: Mr. Robert Chandler
Mr. Donald E. Clark
Senator Kenneth A. Jernstedt
Mr. Bruce Spaulding

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

Also Present: Mr. Donald R. Blensly

Section 14. Eavesdropping warrants; form and content (Cont'd). Representative Frost asked if sections 8 and 14 authorized a criminal trespass in an area other than that in which the subject of the wiretap was located. If, for example, the subject lived in a duplex, he asked if the police would be permitted to enter the residence of the subject's neighbor for the purpose of placing a bug. He expressed the view that the language of section 14, subsection (8), conferred a very broad authorization and did not limit the entry to the person's home, office or any other specific place.

Judge Burns said the intent was that the authorization for entry would be limited to the premises or place described in the application in conformance with section 12.

Senator Burns was of the opinion that the police should not be permitted to enter another person's home to place a bug on a suspect without specific permission from the owner of those premises.

Mr. Wallingford noted that section 11 stated when warrants were issuable and subsection (5) of that section said that one of those times was upon probable cause to believe that the place where the communications were to be intercepted was commonly used by the described person. This, he said, was based upon the New York approach and he was of the opinion that in New York they intended to grant authority to trespass in any place, public or private, in order to install eavesdropping devices without the knowledge of the owner of the premises.

Senator Burns remarked that the police should be required to obtain separate authorization to go into the premises of some person other than the suspect in order to place a bug. Chairman Yturri expressed agreement and suggested that consent of the owner be required to enter premises other than those of the suspect.

Professor Platt was of the opinion that subsection (8) placed the courts in a morally indefensible position by telling them to say that it was all right to break the law and commit criminal trespass. He urged that subsection (8) be deleted from section 14 and noted that if the police wanted to plant a bug, there was nothing in this Article which said they could not use the evidence they obtained in that manner. Mr. Paillette commented that the courts authorized trespass in an analagous manner when they issued search warrants.

Chairman Yturri suggested that subsection (8) be amended to read: "An express authorization to make secret entry upon the private place or premises of the person being investigated or under suspicion."

Mr. Johnson proposed that subsection (8) state specifically that the judge, in issuing a warrant, was to make a separate provision as to the premises which could be entered and if it were necessary to enter premises other than those of the suspect, the permission of the owner of those premises would have to be obtained.

Mr. Paillette proposed that the problem might be solved by deleting express authorization to make entry to install or remove an eavesdropping device. In lieu thereof a provision could be added to section 12 requiring the application to contain a description of the type of eavesdropping device to be used and a particular description of the nature and location of the place where it was to be installed. If this were done, the court would be informed not only of the location of the interception device but would also be apprised of the kind of device to be used. If the device were then placed on premises belonging to someone other than the suspect, the court would be aware that the police were, for example, going to go into Apartment A to bug Apartment B. Judge Burns suggested that either permission should be obtained from the occupant of the premises in which the device would be installed or reasons given why securing of that permission would jeopardize the validity of the investigation.

Representative Haas moved that subsection (8) of section 14 be deleted. He explained that if this motion passed, it was his understanding that a law enforcement official would then have to obtain consent of the owner of the premises before he could install a bugging device. Senator Burns pointed out that Mr. Paillette had suggested that the criteria to accomplish this would have to be set out in section 12. Mr. Paillette said his suggestion would assure that the court knew what would have to take place in order to install the bugging device. If the court felt the installation would involve a trespass or invade some innocent person's privacy, the court could take this into consideration in ruling on the application.

Representative Haas asked if law enforcement officials were permitted under existing law to enter upon private premises for the purposes of installing a bugging device and was told by Mr. Paillette he knew of nothing expressly authorizing this type of act but neither was there a statute prohibiting it.

Judge Burns moved to amend Representative Haas' motion to delete subsection (8) of section 14 by adding thereto the directive that section 12, subsection (2) (b), would be amended to embrace his earlier suggestion plus the suggestion of Mr. Paillette.

Mr. Paillette stated that adoption of Judge Burns' amended motion would result in language similar to the following being added to section 12 (2) (b): "A description of the type of eavesdropping device to be used and a particular description of the nature and location of the place where the eavesdropping device is to be installed, whether permission to enter the premises had been obtained, and, if not, reasons why permission could not be obtained."

Representative Haas asked if under the proposed amendment, the court could then judicially authorize the secret invasion of the premises of private citizens not involved in the investigation. Senator Burns replied that if probable cause existed, the court could make such authorization without the private citizen's permission provided the invasion was in the public interest.

A division of the vote was requested between Representative Haas' motion and Judge Burns' amended motion. Vote was taken first on Representative Haas' motion to delete subsection (8) of section 14 and the motion carried unanimously.

Mr. Paillette noted that the last sentence of subsection (2) of section 15 should also be removed in view of the motion just passed inasmuch as that sentence conferred authority to enter the premises for the purpose of removing the device.

Representative Carson so moved and the motion carried unanimously.

Vote was next taken on Judge Burns' motion to amend section 12 as set forth above. Motion failed. Voting for the motion: Judge Burns, Senator Burns, Johnson, Knight. Voting no: Carson, Frost, Haas, Young.

Mr. Knight moved to restore the two sentences deleted from sections 14 and 15. He said he had voted for the motions to delete in the belief that Judge Burns' motion would be adopted. Since that motion had failed, the deleted language should be restored for without it, the police were left without authority to enter even the suspect's home for the purpose of installing an eavesdropping device.

Representative Frost commented that some of the Commission members were acting on the erroneous assumption that in order to place a bug, the police would have to commit a trespass. He was of the opinion that if they had to make a trespass to place a bug, they should not be given authority to eavesdrop.

Senator Burns remarked that if subsection (8) were deleted and the police bugged the suspect's premises without any of the standards which would have been set up by the motion which was just defeated, presumably the information so obtained would be admissible in evidence. He stated that if this position were adopted, the police would eavesdrop secretly. This paralleled Professor Platt's position, he said, that the courts should not be placed in the position of being asked to approve a criminal trespass. Mr. Knight remarked that under the circumstances described by Senator Burns the information obtained would be illegal evidence which could not be used in court.

Mr. Johnson suggested that Mr. Knight's motion to reinstate the deleted material in sections 14 and 15 be adopted with the understanding that a further motion would be made to make the statute clear that the only place which could be bugged was the place under suspicion.

Representative Frost summarized the three questions before the Commission at this time:

(1) Whether to permit a bug without violating the physical enclosure of the person involved which, in effect, would mean that only telephone conversations could be tapped.

(2) Whether to restore the deleted language in sections 14 and 15 and provide that only the privacy of the person directly involved could be violated by invading, without his consent, his physical enclosure in order to place a bug.

(3) Whether the privacy of some third person not involved in the suspected crime could be violated in order to eavesdrop on the suspect.

Representative Frost observed that together with the right to invade one's private communication, the draft was adding the right to invade his private enclosure. He said he would go along with necessarily invading his communications but if the burden of invading his home was added, he could not approve of that philosophy.

Senator Burns commented that there was a philosophic difference of opinion which should be resolved before proceeding further. Some of the members were of the opinion that it was all right to bug a telephone so long as it could be done from a point outside the suspect's physical premises but they objected to placing a spike mike on the outside of that same person's wall to overhear a conversation inside his home.

Senator Burns asked for a show of hands of those who would favor the philosophy of permitting invasion of privacy of communications but not permitting the means to that invasion to include entry into the person's home or enclosure. There were four persons in favor of that concept and four opposed. It was generally agreed that further consideration of this Article was useless until this point was resolved. Inasmuch as Chairman Yturri was not present and the vote was tied, a recess was taken at this point pending his return to the meeting.

When the meeting was resumed, Mr. Knight withdrew his motion to reinstate the language deleted from sections 14 and 15.

Mr. Johnson suggested that the Commission adopt a policy position that eavesdropping devices would be permitted on the premises of the person under suspicion but the warrant would not extend to permission to install a bugging device on the premises of a person not under suspicion without his explicit authority. Mr. Wallingford pointed out that reference to the premises of the person under suspicion would be somewhat misleading because the premises being used by the suspect might not be his own premises.

Judge Burns suggested that this problem could be solved by wording Mr. Johnson's proposal in the language of subsection (5) of section 11.

Mr. Johnson then moved that the Commission adopt the following policy position, framed in the terms of section 11 (5):

> "Express authorization to make a secret entry upon a private place or premises to install an eavesdropping device will be allowed upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by the described person."

Mr. Wallingford expressed the view that Mr. Johnson's motion would not solve the problem under discussion because it would still permit secret entry upon the premises of another to eavesdrop on a designated person, which was exactly what the draft allowed.

Representative Frost said he was offended by a provision permitting criminal trespass of the premises of the person who was being bugged. He said he would approve of intercepting his communications under a warrant but only if this could be done without invading his physical enclosure. Mr. Paillette said that this position seemed

to be drawing an artificial distinction between a physical trespass and a nonphysical trespass. To him, he said, it was more offensive to listen to what a man said than it was to go onto his property to place a listening device.

Senator Burns suggested that the Commission vote on the policy question embodied in Mr. Johnson's motion and leave the specific language to the staff. Mr. Paillette asked if the policy question could be framed in terms of whether or not subsection (8) of section 14 would be deleted. Mr. Johnson said he preferred to leave that decision to the staff. His motion, he said, was to adopt a policy to frame the Article in terms which would allow a warrant to eavesdrop; however, the warrant would be limited to permission to bug only the premises of the person who was under suspicion or being investigated by using the language of section 11, subsection (5). Mr. Paillette added that in section 11 (5) the staff could also insert the place where the eavesdropping device would be permitted. In reply to a question by Representative Haas, Senator Burns explained that the motion would limit the eavesdropping warrant to the premises being used by the person under suspicion, whether they were freehold premises or a hotel room.

Vote was then taken on the motion and it carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Haas, Johnson, Knight, Mr. Chairman. Voting no: Frost, Young.

Section 15. Eavesdropping warrants; manner and time of execution. Judge Burns noted that the last sentence of subsection (2) of section 15 had been previously deleted and suggested that it be restored. When the device was placed on premises authorized by the warrant, the police should have the authority to go in to remove that device, he said.

Mr. Paillette expressed the view that the sentence should be deleted. If the Commission was concerned about a physical trespass, there was as much trespass involved in removing the device as in placing it there in the first instance and if the draft did not expressly authorize entry in the first instance, it should not be authorized in the second instance.

Senator Burns moved to approve the earlier decision of the Commission to delete the last sentence of subsection (2) of section 15 and the motion carried.

Section 16. Eavesdropping warrants; order of extension. Judge Burns said he had serious doubts about the advisability of permitting perpetual extension of a wiretap. Mr. Wallingford explained that section 16 was directed at long term investigations which might continue over a period of two or three years.

Senator Burns moved that section 16 be deleted. Mr. Paillette commented that law enforcement officers would be in no worse position without section 16 because in effect each application for extension would require them to start the warrant procedure from the beginning.

Mr. Blensly commented that without section 16 the police would have to remove the bug and put it back in again each time the 30 day period expired. Mr. Paillette pointed out that under section 15 they were only required to remove the device "as soon as practicable." If they were going to request an extension, it would not be practical to remove the device.

Mr. Knight opposed removal of section 16 and was of the opinion that the court should have statutory authority to extend the time period of the warrant.

Vote was taken on the motion to delete section 16 and the motion carried. Voting for the motion: Judge Burns, Senator Burns, Carson, Frost, Haas, Johnson, Young. Voting no: Knight, Mr. Chairman.

Section 17. Eavesdropping warrants; progress reports and notice. Mr. Knight commented that section 17, subsection (6), set forth one of the reasons for needing an extension for the time period of the warrant. Mr. Paillette commented that if a new warrant were issued, a new 90 day period would begin as stated in subsection (3). The court could then postpone the giving of notice for another 90 days.

Representative Frost moved that, in line with the decision to delete section 16, the following language be deleted from section 17, subsection (3): "or expiration of an extension order". The motion carried unanimously.

Senator Burns asked if subsection (5) of section 17 should state the judge shall rather than the judge may. Judge Burns advised that this problem was solved by the provisions of section 23. Section 17 included persons other than defendants and the purpose of section 17 (5) was to allow additional authority for nondefendants where the judge believed they should also be made aware of the contents of the intercepted communications. Mr. Johnson advised that it could jeopardize investigations to force the judge to divulge this information.

Section 18. Eavesdropping warrants; emergency authority. Mr. Wallingford explained that if a law enforcement officer had reason to believe that grounds existed for an eavesdropping warrant, he was authorized by section 18 to immediately begin an eavesdropping operation so long as within 48 hours he applied to the judge for a warrant. Mr. Johnson commented that the activities described in section 18 were not a problem in Oregon at the present time.

Senator Burns commented that if the Commission went on record as adopting a policy of emergency authority for eavesdropping warrants, it would be inconsistent if they did not also adopt a policy for emergency search warrants. He believed that approval of section 18 could open the door to a great many problems.

Representative Frost moved that section 18 be deleted and the motion carried unanimously. Voting: Judge Burns, Senator Burns, Carson, Frost, Haas, Johnson, Knight, Young, Mr. Chairman.

Section 19. Eavesdropping warrants; custody of warrants, applications and recordings. Judge Burns asked why the material described in section 19 had to be kept for 10 years and was told by Mr. Paillette that this was a requirement of the federal Act.

Chairman Yturri noted that the section stated the material could not be destroyed except upon an order of the issuing judge and asked what would happen if the judge died in the interim.

To take care of this contingency, Representative Haas moved that "or his successor" be added after "judge" on the last line of subsection (1) and after "warrant" on the third line of subsection (2). The motion carried unanimously.

Section 20. Eavesdropping warrants; reports to the administrative office of the United States courts and the judicial conference. Mr. Johnson asked if "judicial conference" as used in section 20 was defined in the code and was told by Mr. Wallingford that section 2519 of the federal Act went into considerable detail concerning the type of reports to be made and to whom the reports were to be sent. Mr. Johnson said that "judicial conference" was not a very descriptive term.

Judge Burns advised that these reports were required by federal law and he saw no advantage or necessity for including section 20 in the state statutes. He moved that section 20 be deleted and the motion carried unanimously. Voting for the motion: Judge Burns, Senator Burns, Frost, Haas, Johnson, Knight, Young, Mr. Chairman.

Section 21. Eavesdropping warrants; disclosure and use of information; order of amendment. Representative Haas asked if the intent of section 21 was to prevent testimony as to the contents of the tape while it was under a seal and received a negative reply from Mr. Paillette.

Mr. Knight explained that the purpose of the section was to prevent tampering with the recording between the time it was recorded and the time it was used in court. It was to be sealed under the

direction of the judge and would still be sealed when brought into court which would negate the necessity of the officer having to testify that it was the same tape he had recorded and that no changes had been made in its contents.

Tape 3 begins here:

Judge Burns said that the contents of the tape might be needed by the police while the preparation of the case was under way and if they were permitted to make a copy of the tape before it was taken to the judge to be sealed, the privacy of the communication would be violated. Mr. Knight noted that the section said the tape could be used in the investigation and the provisions for making a copy were included for that purpose.

Mr. Paillette advised that this was a federal provision. He said probably when this section was being discussed in Congress, they decided to seal the tape to protect it. Someone then may have asked what would happen when the police needed to use the information and it was decided to permit a copy to be made for that purpose.

Senator Burns asked if there was a penalty section applicable to section 21 which could be used in the event the communication was used in a manner inappropriate to proper performance of the officer's official duties. Mr. Paillette replied that Preliminary Draft No. 2 provided that any eavesdropping done outside the provisions of this Article was a crime. If that provision did not cover the activity described by Senator Burns, he said, the federal laws would. Senator Burns contended that if it were going to be unlawful for police to misuse or disclose the contents of a wiretap, the penalty sanction should be included in this section.

Representative Frost asked why the Commission could not use Oregon's present wiretap statute and was told by Mr. Paillette that it did not conform to federal requirements.

Senator Burns asked if it was necessary to include in this draft a provision that it was a crime for a law enforcement officer to go beyond the provisions of section 21 with respect to use or disclosure of an intercepted communication.

Mr. Wallingford called attention to section 6 of Preliminary Draft No. 2 on divulging illegally obtained information. Mr. Paillette said the state was not required, in order to conform with Chapter 119 of the federal Act, to make it a separate crime not to comply with the provisions of section 21. The state, however, did have to conform to the procedural provisions regarding the basis for getting and using an eavesdropping warrant. Beyond that it was unnecessary to make it a separate state crime because it would be a federal crime to fail to comply.

In view of section 6 of the draft, Senator Burns asked why section 21 could not be eliminated. Mr. Paillette replied that it was helpful to give the law enforcement agencies guidelines so they could go to the statute and read in one place what they could or could not do.

With respect to subsection (4) of section 21 Mr. Wallingford explained that this provision came into play when, during a period of authorized eavesdropping, a communication was intercepted which was not otherwise sought but which constituted evidence of a designated crime not authorized by the warrant. In that event the contents of the communication were permitted to be disclosed or used as provided in subsections (1) and (2) of section 21.

Representative Frost expressed opposition to subsection (4) and was of the opinion that it went beyond present law. Judge Burns disagreed. He pointed out that if the police were operating under a search warrant looking for guns, for example, and came across heroin, they were empowered to confiscate the heroin and the defendants could be convicted on the basis of that evidence. He said he could see nothing wrong with that procedure, and subsection (4) was analagous.

Representative Frost said subsection (4) amounted to authorization for a "fishing expedition" and moved to delete subsection (4) in its entirety. The motion failed on a 4 - 4 vote. Voting for the motion: Carson, Frost, Haas and Young. Voting no: Judge Burns, Senator Burns, Johnson and Knight.

Section 22. Eavesdropping evidence; definitions. Mr. Wallingford explained that sections 22 through 25 described the provisions for giving notice.

Judge Burns noted that subsection (2) (b) described the aggrieved person as the one against whom the overhearing was directed. He asked if this meant that the aggrieved person was the one described in the application for the warrant. Mr. Paillette replied that a situation might arise where a person would object to the use of a recording even though he may not have participated in any of the conversations which were recorded as a result of the eavesdropping warrant. For example, an eavesdropping warrant might be granted to record the conversations of A, B and C, but only A and B subsequently participated in the conversations. Although C did not actively participate, he would still be given standing to object to the use of the recording by the language of subsection (2) (c) because of his possible implication in the proceedings as a result of the conversations of A and B.

Section 23. Eavesdropping evidence; notice before use. Senator Burns asked if it was necessary for the defendant to serve a demand upon the state to obtain the information described in section 23 and

and was told by Mr. Paillette that the burden was upon the state to furnish the defendant with a copy of the warrant and application.

Representative Haas asked if there would be any objection to serving the defendant with a copy of the communication that was intercepted prior to the time of the trial in addition to the other materials required by section 23. He was of the opinion that the defendant should have access to the same evidence that the prosecutor would use. Judge Burns noted that section 24 (2) said that the judge may disclose the contents of the intercepted communication if he determined such action to be in the interest of justice.

Judge Burns expressed the view that 10 days notice was inadequate particularly where derivative evidence was involved. It would be difficult in that period of time for the defendant to evaluate the intercepted communication so as to determine whether there was derivative evidence other than that evidence which the state was willing to admit was derivative. This, he said, was a time consuming task. Representative Carson agreed that it would be of little help to the defendant to be told that in 10 days he was going to have a recording used against him without knowing its contents.

Mr. Knight commented that one of the purposes of giving the defendant 10 days notice was that this would be his only opportunity to test the legality of the probable cause used as the basis for the issuance of the eavesdropping warrant.

Representative Haas concurred that section 23 gave the defendant extremely short notice to prepare his defense. Mr. Wallingford pointed out that section 17 (3) provided that written notice was to be served upon the person named in the warrant not later than 90 days after the eavesdropping was terminated. Mr. Carson noted that the draft was assuming that it was impossible to go to court within 90 days after the eavesdropping was terminated and this was not necessarily true.

Judge Burns moved to amend section 23 by substituting "30 days" wherever "10 days" appeared in the section.

Senator Burns suggested it might be better to say "not less than 10 days after the date of the indictment." Mr. Johnson's suggestion was to state "a reasonable time but not less than 20 days." If his proposal were adopted, he said, the judge could set the trial over if it appeared necessary in the interest of justice.

Mr. Paillette commented that the defendant would not be testing the quality or quantity of the evidence obtained but whether or not there was a basis for the warrant. Judge Burns noted that section 24

said, "An aggrieved defendant may move to suppress the contents of any intercepted communication, or evidence derived therefrom . . . " The latter phrase concerning derivative evidence, he contended, was where the defendant was going to be pressed for time.

Mr. Knight expressed the view that in most counties 10 days would not be sufficient to prepare for trial and as a practical matter, the cases would have to be continued in virtually every instance.

Judge Burns commented that the problem with Mr. Johnson's suggested amendment -- "a reasonable time but not less than 20 days" -- was that it furnished another point of decision for the court and opened up another area for contention.

Vote was then taken on Judge Burns' motion to insert "30 days" in place of "10 days" in section 23. The motion carried.

Representative Haas moved that the Commission adopt a policy whereby the state would supply copies of the intercepted communication along with advice as to the derivative evidence and the evidence that the state intended to use.

Mr. Blensly commented that this could pose a problem if the tape were sealed and no copy had been made.

Mr. Knight noted that section 24 (2) extended the right to the defendant to obtain this information at the judge's discretion. Representative Haas advised that this provision did not entirely satisfy his objection because the Article gave the state the right to invade, intercept and utilize an intercepted communication while the subject of this invasion was only given the right to request information on the results of the violation of his privacy. He contended that the defendant should have the right to receive this knowledge prior to trial.

Judge Burns said that the problem with granting full disclosure was that there could be cases, in a conspiracy, for instance, where the tape might contain information that would not be used in the case which was coming to trial but which would be of value and use in another case at a later time. Representative Haas said he would have no objection to limiting the disclosure to the evidence to be used in the case in question. The defendant, he said, was placed in a very poor position when he was sitting in court and heard an alleged intercepted communication being played at the end of the state's case and had to come up with a defense on such short notice. Mr. Paillette asserted that the defendant had the opportunity to apply for that information before trial.

Representative Young maintained that it would be necessary for the defendant to have the contents of the communication, not just a copy of the warrant and application, before he could prepare an effective defense.

Chairman Yturri advised that the issue before the Commission was whether intercepted communications were to be made available to the defendant at the judge's discretion as outlined in section 24 (2) or whether it would be mandatory to disclose evidence which was going to be used in the state's case in chief. Vote was then taken on Representative Haas' motion that the Commission adopt a policy that the state would be required to furnish the defendant information or copies of the evidence it intended to use in the case. The motion carried.

In reply to a question by Mr. Knight, Chairman Yturri advised that this policy decision would be incorporated into section 23.

Mr. Knight said there was no problem in giving the defendant a transcript of the portions of the communication to be used in the case but there would be situations where some of the evidence might or might not be derived from the intercepted communication and the state might not be willing to concede, at that point at least, that it was actually derived from the tape until the motion to suppress had been decided by the court. Chairman Yturri said that giving the defendant a portion of the transcript would at least place him in a better position than did the Article as originally drafted.

Mr. Paillette asked in what form the Commission wanted the district attorney to furnish this information to the defendant -- whether by a copy of the transcript of the recording or merely by a resume or recapitulation of the transcript. Chairman Yturri replied that he thought a statement or resume would suffice. Senator Burns maintained that the defendant should have a verbatim transcript because the district attorney's resume might omit something which could be very relevant to the trial. Chairman Yturri commented that if this happened, he would not then be permitted to introduce the omitted portion in evidence.

The Chairman directed the staff to draft language to be included in section 23 for the Commission's consideration at its next meeting.

Section 24. Eavesdropping evidence; suppression motion; in general. In reply to a question concerning the last sentence of subsection (2) of section 24, Mr. Wallingford stated that if the defendant was going to be given a transcript by the requirements of section 23, this provision would be unnecessary in section 24. Mr. Blensly pointed out that if the defendant were given a limited transcript, there might be some portion of the communication that the

state would not introduce in evidence but which the judge would feel the defendant should know about in order to have a basis for filing his motion to suppress on the ground, for example, that the eavesdropping was not conducted in conformity with the warrant. Chairman Yturri expressed agreement that the last sentence in subsection (2) should be retained for that reason.

Mr. Knight suggested that subsection (1) (b) of section 24 should include the application as well as the warrant. Judge Burns asked Mr. Wallingford if there was any reason why the application had not been included and was told that the language followed 18 U. S. Code section 2518 which made no reference to the application.

Judge Burns moved to amend section 24 (1) (b) to read: "The eavesdropping application or warrant under which it was intercepted . . . " He explained that the amendment was to make it perfectly clear that the subsection covered both documents. The motion carried.

Section 25. Eavesdropping evidence; suppression motion; time of making and determination. Mr. Knight remarked that subsection (1) of section 25 was contrary to subsection (3) of section 24. Judge Burns explained that section 21 (3) said that the motion was to be made in accordance with the provisions of this Article which included section 25 (1). The motion to suppress would be made unless there was adequate grounds not to make it.

Judge Burns then called attention to subsection (3) of section 25 which said that if the motion to suppress was granted, the contents of the intercepted communication or the derivative evidence was not to be received in evidence in any trial. He was of the opinion that this provision should be applicable only to the moving party and not to some by-stander or someone who had no standing to make an objection. The provision, he said, was for the benefit of the individual who filed the motion to suppress. For example, in a search situation where one person consented to the search and the other did not, if the one who did not consent prevailed in his motion to suppress, the motion should not necessarily be good as to the other person who consented to the search.

Mr. Wallingford advised that if the motion to suppress was granted, it would be granted on one of the three grounds listed in section 24. The federal law stated that if the motion to suppress was granted, "the communication or any evidence derived therefrom shall be treated as having been obtained in violation of this chapter." From that standpoint, therefore, it appeared that the information could not be used against anyone in any trial.

Judge Burns said he disagreed with that statement. If the motion was granted, it would be treated as having been in violation of this chapter as regards that defendant. He maintained that the provisions of subsection (3) were incorrect and questioned whether the state law was bound by the federal statutes on the rules of evidence.

Mr. Blensly suggested that subsection (3) of section 25 be deleted because the court's ruling on the particular case would take care of the problem for that defendant. Mr. Wallingford remarked that a subsequent defendant could make his motion to suppress on the same grounds as the first case which would result in conflicting determinations.

Judge Burns then moved to amend subsection (3) of section 25 to read: " . . . shall not be received in evidence in any trial, hearing or proceeding involving the movant." The motion carried.

Approval of sections 14 through 25. Chairman Yturri noted that section 14 had been amended following its approval by the Commission during the morning session and should therefore be approved as amended. Vote was taken on a motion to adopt sections 14 through 25 as amended subject to approval of additional language to be drafted by the staff. The motion failed. Voting for the motion: Judge Burns, Senator Burns, Knight, Mr. Chairman. Voting no: Carson, Frost, Haas, Young.

Approval of the sections were then voted on individually:

Section 14 as amended -- approved.

Section 15 as amended -- approved.

Section 17 as amended -- approved.

Section 19 as amended -- approved.

Section 21. Roll call vote was taken on approval of section 21. Members disagreed on inclusion of subsection (4) and the motion failed on a tie vote. Voting for approval: Judge Burns, Senator Burns, Knight, Mr. Chairman. Voting no: Carson, Frost, Haas, Young. Chairman Yturri stated that section 21 would be reconsidered at the next meeting of the Commission.

Section 22 -- approved.

Section 23 as amended. Approved subject to language to be added by the staff. Voting for approval: Judge Burns, Senator Burns, Carson, Frost Haas, Young, Mr. Chairman. Voting no: Knight.

Section 24 as amended -- approved.

Section 25 as amended -- approved.

Next Meeting of the Commission

Chairman Yturri suggested that the Commission meet next on March 18 and 19 and there was no objection.

The meeting was adjourned at 5:00 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission