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OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

# Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 5 2016

The Honorable Floyd Prozanski, Chair
The Honorable Jeff Kruse, Vice-Chair
Senate Judiciary Committee, Members

**RE: Senate Bill 1550**

Dear Chair Prozanski and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment and post-conviction relief proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in support of Senate Bill 1550.

**Oregon's current grand jury laws**

1. Testimony before the grand jury is given under oath, subject to penalty of perjury. Based on the testimony given before it, the grand jury will issue an indictment charging the commission of felony offenses which often carry mandatory minimum sentences. Notwithstanding the significance of the sworn testimony, Oregon continues to rely on handwritten notes taken by a grand juror to preserve the substance of what was said. ORS 132.080 provides:

> "The members of the grand jury shall appoint one of their number as clerk. The clerk shall keep minutes of their proceedings (except the votes of the individual jurors) and of the substance of the evidence given before them."

As might be imagined, these "minutes" are often abbreviated, illegible and inexact.

2. The "minutes" are retained in the district attorney's office. The defense attorney is not entitled to review them prior to trial. In a rare instance, the defense attorney is

allowed to review the minutes during trial if she can show a "particularized need" to determine whether a witness's testimony is inconsistent with testimony given under oath before the grand jury. *State v. Hartfield,* 290 Or 583 (1981).

3. When it is determined during trial that a government witness has given inconsistent testimony before the grand jury, it is necessary to delay the trial proceedings, contact the grand juror, ask them to suspend their activities and immediately come to the courthouse, review their handwritten notes, and testify before the grand jury on the basis of those notes. Often their notes, and the grand juror's testimony, do not clear up the dispute whether inconsistent testimony was given. This process can delay the trial for hours, if not a day or even longer.

4. Oregon law gives the district attorney sole discretion to decide whether to record the grand jury. ORS 132.090 (2). A trial court has no authority to require recordation on its own initiative. *State ex rel Johnson v. Roth,* 276 Or 883, 8883 n 6 (1977). This limitation on a court's authority is in contrast to other states' laws.

## Verbatim recording: the national norm

5. Thirty-six states have laws mandating a verbatim recording of grand jury proceedings. More states make a verbatim record by elective practice, rather than by legislative mandate. There are only three states that still have laws sanctioning the creation of handwritten notes by a grand juror: Oregon, Florida and Iowa. In contrast to Oregon, however, neither Florida or Iowa rely on the grand jury to initiate most felony prosecutions, but nonetheless each state in some manner affords the defense pretrial access to the witnesses' sworn testimony. Iowa law gives the defense counsel copies of the grand jury "minutes" as part of pretrial discovery [I.C.R. 2.4 (6)(b)] and Florida allows the defense to take pretrial depositions of witnesses. [F.R.Cr.P 3.220] Oregon is the *only* state in the nation that relies on the grand jury to initiate all felony prosecutions and yet relies upon handwritten notes taken by a grand juror.

6. The federal system engaged in a nationwide 30 year experiment with grand jury recordation before making it mandatory in 1979. [FRCrP 6(e)] The Advisory Committee on Rules of Criminal Procedure determined that the costs associated with recording were "justified by the contribution made to the improved administration of criminal justice." [FRCrP 6(e), Advisory Committee Notes 1979 Amendments] The Advisory Committee identified four key benefits:

- ✓ *Recording acts as a circumstantial guaranty of trustworthiness of testimony received by the grand jury*. The Advisory Committee observed that the restraint of being subject to prosecution for perjury is "wholly meaningless or nonexistent" if the testimony is unrecorded.

- ✓ *Recording restrains prosecutorial abuse and over-reaching.* Recording is the most effective restraint upon the potential abuses that set in when a

> grand jury develops a dependent relationship upon the prosecution, which can easily turn "into an instrument of influence on grand jury deliberations."

- ✓ *Recording insures that the accused learns whether a witness has given prior inconsistent testimony under oath.* The Advisory Committee endorsed the comment in *Dennis v. United States*, 384 US 855 (1966), "[I]n our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts."

- ✓ *Recording strengthens the government's case at trial*. The Advisory Committee noted that the benefits of recorded grand jury testimony do not all inure to the defense, but also allows the government the ability to correct or "rehabilitate" a witness who gives testimony at trial that varies from what they said under oath in the grand jury.

7. Following the lead of the federal system, the American Bar Association published its report in 1982, *Grand Jury Policy and Model Act (1977 – 1982)* with a recommendation that all proceedings before a grand jury, excepting its deliberation or vote, be recorded verbatim. Principle # 15 provides:

> All matters before the grand jury, including the charge by the impaneling judge, if any; any comments or charges by any jurist to the grand jury at any time; any and all comments to the grand jury by the prosecutor; and the questioning of and testimony by any witness, shall be recorded either stenographically or electronically. However, the deliberations of the grand jury shall not be recorded.

The commentary noted the following reasons and benefits:

- ✓ Recording "promotes the reliability of testimony given to the grand jury by making the threat of a perjury prosecution a realistic possibility."

- ✓ Recording "will prevent prosecutors from making "off-the-record" comments to influence the grand jury."

- ✓ "Availability of a complete record is necessary to insure effective judicial supervision of grand jury proceedings."

*ABA Report Accompanying Model Act, Section 103.*

8. SB 1550 is modeled after procedures employed in Alaska, Idaho, Nevada and Hawaii. Testimony will be received from Idaho and Alaska prosecutors as to the effectiveness of recorded grand jury testimony in solidifying state witnesses' testimony, preparing witnesses for trial, for supervisory oversight of subordinate deputy district

attorneys, for compliance with constitutional and ethical requirements to provide the defense with exculpatory or helpful information, and for achieving just and fair outcomes in criminal prosecutions.

**Oregon is not immune to grand jury abuse**

9. The lack of a record lends itself to the commission of abusive irregularities before the grand jury. Some examples:

- ✓ In 1993, then Clatsop County District Attorney Julie Leonhardt secured a grand jury indictment on two Astoria police officers for charges of tampering with physical evidence and criminal conspiracy after presenting no sworn witnesses to the grand jury, but merely by stating unsworn assertions before the grand jurors that the police officers had committed to crimes.

- ✓ In 2001, it was discovered that district attorneys in Josephine County had a systemic practice of presenting unsworn "expert witness" orientation testimony before grand juries on drug and sex crime prosecutions. Specifically with respect to child sex abuse allegations, the "orientation witness" told grand juries that children do not falsely report sexual abuse; that recantations are not to be believed; and encouraged the grand jury to be "part of the solution" by believing child witnesses. This practice continued unabated for several years before defense counsel learned of the practice, and it was stopped in a hearing before an out-of-county judge. See the accompanying documents in the matter of State v Tina Martin.

- ✓ Notwithstanding a prohibition against introducing inadmissible evidence before the grand jury [ORS 132.320], indictments are secured around the state based on inadmissible hearsay testimony. When discovered, there is no remedy for the defense to challenge the indictment or correct the abuse. *State v Stout,* 305 Or 34 (1988).

**Imbalance of power in plea negotiations**

10. The district attorney has full control of which charges to seek from the grand jury, which persons to allege as victims, how many different offenses to charge, what degree of crime, whether to seek sentencing enhancement factors, and whether crimes were part of the same or different criminal episodes. Each one of these charging decisions has tremendous consequences at sentencing either in terms of mandatory minimum sentences, consecutive sentences, or sentencing guideline calculations. These sentencing consequences drive the plea negotiations that occur in every case.

11. Often the defense attorney has no ability to independently assess the truthfulness of statements in the police reports. Victims are entitled to receive "no contact" orders prohibiting contact from the defense attorney or her investigator; other government witnesses are subtly persuaded to not accede to defense interviews; and it is standard practice for law enforcement officers to refuse a defense attorney's request for clarifying or additional information. In short, the defense attorney in Oregon has no ability to compel a witness or anyone else to give them information in the field or to agree to an interview prior to trial. The defense attorney is often left with no information except that which is contained in police reports.

12. This imbalance of power will be significantly impacted by recordation of grand jury proceedings. By learning what a government witness has said under oath, as opposed to merely reading the police reports, the defense attorney and her client will be able to more accurately assess the strength or weakness of the government's case and the value, or lack thereof, of the government's pretrial offer. This element of quality assurance will significantly aid the defense in driving a just outcome in cases where mandatory minimum sentences otherwise drive the plea bargain negotiations.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

*Respectfully submitted,*

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