Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 20, 2017

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

RE: Senate Bill 248 – testimony in opposition

Dear Chair Prozanski and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to Senate Bill 248.

As originally proposed, SB 248 is very broad: In its original form, SB 248 constitutes a very broad paradigm shift in Oregon law away from adherence to open courts and open justice to a system in which participants in the criminal justice process (both alleged victims and grand jury witnesses) could be shielded from public identity for all crimes, for any reason irrespective of need, without judicial oversight.[1]

It is our understanding that proponents now intend to narrow the focus of SB 248 in the Dash 7 Amendment to indictments which allege at least one sex crime. OCDLA opposes the Dash 7 Amendment for the following reasons.

Dash 7 Amendment: victims

Minor vs. adults: It is the practice in Oregon now to identify a *minor* victim of a sex crime by use of abbreviation, typically initials. The Dash 7 Amendment would expand this allowance to identify any victim of a sex crime, including adults.

No judicial supervision or oversight: The Dash 7 Amendment would allow this to be done at the first instance by the prosecutor with no articulated basis of particularized need, without judicial supervision or oversight. The Dash 7 Amendment gives no authority to courts to open the indictment at a later date upon resolution of the case, upon motion from media, historians, or others after showing that the need for continued secrecy has expired, was not present in the first instance, or that public interest compels disclosure.

Defense investigation will be impacted: The defense is often able to obtain critical information about a person by and through information contained in publically filed indictments.

[1] The founders of Oregon's Constitution very much embraced the notion that justice should be administered openly. See Or Const, Art I, § 10 "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay . . ."

People in the community who personally know a victim or state witness often contact defense investigators and defense counsel with critical information that can assist in the preparation of the defense. Sometimes this information is germane to the allegation itself; sometimes this information leads to critical testimony to the truth and veracity (or lack thereof) of state witnesses. Shielding all sex crime indictments from any specificity as to the identity of the victim (or the grand jury witnesses, discussed further below) would impede this stream of critical information to the defense.

Moreover, the defense often initiates its own investigative leads by searching information contained on publically filed indictments in cases other than the one at issue. Cases have been won by learning that a victim (or witness before the grand jury) have been involved in other cases similar in nature, and/or connected with certain individuals.

Given the secrecy that currently cloaks Oregon's grand jury practices in secrecy,[2] and given the disparity that exists in Oregon in allowing the state to have possession of critical facts while withholding those facts from the defense, every instance of further enshrining pre-trial proceedings in greater secrecy impedes the defense function from operating at a capacity in which justice can be assured.

Dash 7 Amendment: grand jury witnesses

Novel: In searching other state laws, OCDLA can find no other state that allows an indictment to employ use of a pseudonym in listing the witnesses before the grand jury.

Long-standing obligation since statehood to list witnesses: Since statehood, Oregon law has required that witnesses before the grand jury be identified on a publically filed indictment. Oregon's first codification of criminal laws in 1863 contained the following provision:

> **Chapter VII: Of the finding and presentation of the indictment.** Section 61. When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court, . . . [3]

The Dash 7 Amendment dispenses with this obligation without an articulated showing of particularized need, and without judicial supervision and oversight. As with Section 1 which applies to alleged victims, this provision in Section 2 would not give courts authority to open the identity of witnesses upon resolution of the case (even after a publically held trial), nor upon motion from media, historians, or others that the need for continued secrecy has expired, was not present in the first instance, or that public interest compels disclosure.

Further enshrouds Oregon grand jury procedures in greater secrecy: Given that Oregon's grand jury proceedings already enjoy unparalleled obscurity from oversight or outside scrutiny,[4] it is significant that SB 248 seeks to enhance this obscurity even further. Whatever basis may be present to relieve a youthful victim of a sex crime from public scrutiny certainly doesn't apply with

[2] Oregon remains the only state to initiate all felony prosecutions by way of the grand jury and yet does not record grand jury proceedings. See Senate Bill 496 for further details.
[3] General Laws of Oregon, Crim Code, ch VII, § 61 (Deady & Lane 1843-1872).

[4] Again, see Senate Bill 496 for further discussion.

equal measure to the identity of state witnesses before the grand jury, some of whom are seasoned law enforcement officers who are neither embarrassed nor at risk for offering their testimony.

Impediment to the defense function: Further, as stated above, the defense is at an acute disadvantage by not being apprised of critical facts behind an allegation beyond what is contained in police reports. Who are the witnesses at the grand jury is often a critical key for the defense in learning who the state considers to have important information. Much can be gleaned by comparing how wide (or narrow) in scope was the grand jury inquiry when compared to the scope of conduct ultimately alleged in the indictment. The defense is often reduced to capturing meaning from discrete bits of information that slowly begins to give form and meaning to the state's case. Further enshrining the grand jury process in more and more secrecy only compounds the information-disparity that exists between the parties.

Dash 7 Amendment: notice to defense counsel

The Dash 7 Amendment deletes the reference in the original bill that defense counsel may be denied access to the supplemental pleading "within 10 days of filing," but leaves in the bill an allowance that access might be denied at the time of arraignment "if good cause is shown," placing no limits on the amount of time notice may be denied. OCDLA is as concerned with this provision in the Dash 7 Amendment as it is with the original bill.

Defense is entitled to notice at arraignment: The arraignment is a critical stage of proceedings at which the accused is brought before the court (in the event of a sex crime, almost always by way of arrest) and informed of the charges that are being lodged against the accused. This right attaches to the specifics of the criminal charge, not its generics. A person does not commit a sex crime *generally.* A person commits a sex crime *against a particular individual.* Withholding this information from the accused at the time of arraignment is never justified, for any cause.

Any concern that an indictment might need to be corrected for technical or scrivener's error (i.e., date of birth, middle initials, etc.) is unavailing. The Oregon Court of Appeals just decided in *State v Garcia,* 284 Or App 357 (2017) that an indictment might be amended by interlineation on the day of trial to correctly allege the proper intent of the accused. Given the allowance granted in *Garcia,* it is difficult to believe that the state could not correct any technical or scrivener's error at a later date such that notice of the indictment should not be given at arraignment.

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

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