OCDLA
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

Legislative Testimony

Oregon Criminal Defense Lawyers Association

June 29 2017

Senator Jackie Winters, Co-Chair
Representative Duane Stark, Co-Chair
Ways & Means Subcommittee on Public Safety, Members

RE: SB 505 (grand jury recording)

Dear Co-Chair Winters, Stark and Members,

This letter addresses the fiscal impact of SB 505 by highlighting the inefficiencies imbedded in current procedures, and the corresponding efficiencies that will be realized through the transparency and disclosure provided by recorded grand jury testimony.

The Oregon Criminal Defense Lawyers Association has long supported recordation of grand jury testimony and has previously submitted materials in support of this policy under Senate Bill 496. Please refer to our previously submitted testimony under SB 496 in support of the policy reasons behind recording grand juries in Oregon.

We similarly support SB 505, which assigns responsibility to record grand jury testimony upon district attorneys. The amended bill clarifies that the recording equipment and maintenance will be selected and financed through the Oregon Judicial Department, relieving counties of the fiscal burden. There are several states that operate under this model of recordation and to their report, it works well. Oregon currently manages intoxilyzer machines in this way - they are purchased and maintained by the Oregon State Police for use by local law enforcement officers.

In time, we anticipate that the fiscal impact upon the state and criminal justice system by converting to a recorded grand jury will result in notable efficiencies. Among them:

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OCDLA written testimony
SB 505
June 29 2017

1) SB 505 relieves courts from burdensome motions for production of grand juror handwritten notes

Currently, courts are burdened with motions from defense counsel requesting access to handwritten grand juror notes. Case law places a high burden on the defense to establish that it knows there is evidence within the notes that is material to the defense. On occasions, the court might examine the notes in chambers to determine their contents. On other occasions courts refuse this step, which leads to endless appellate litigation thereafter.

Among the longest running appellate effort to secure access to grand juror notes is the case of Frank Gable, now in federal appellate litigation. This murder trial occurred in 1991. Gable's defense counsel sought access to grand jury notes at the trial level, before the Oregon Court of Appeals, the Oregon Supreme Court, on state post-conviction relief, and now in federal court under federal habeas review. The state of Oregon has literally expended hundreds of thousands of dollars on this singular effort alone.

In sum, Oregon trial and appellate courts are currently burdened with a hefty motion practice in an effort by defense counsel to secure access to grand juror notes. Recording grand jury proceedings and discovering the record to defense counsel will result in an efficiency that will off-set motion practice that might arise under SB 505 by way of district attorneys seeking protective orders in sensitive cases.

2) SB 505 relieves district attorneys from managing a paper-dependent record

Currently, district attorneys are tasked with the responsibility of preserving grand juror notes which are still in paper format in most counties. These handwritten notes need to be catalogued, boxed and stored, often in locations outside the courthouse. It will be much easier and expeditious for district attorneys to preserve recorded testimony on a server (purchased and maintained by the state) and distribute the testimony to defense counsel. District attorneys are already tasked with distributing electronically formatted evidence to defense counsel such as surveillance videos, police dash-cam videos and custodial interrogation videos. SB 505 allows district attorneys to similarly forward grand jury testimony to defense counsel. They will be entitled to charge a fee, thereby off-setting costs in doing so.

3) SB 505 avoids delays during trial

Currently, trials are delayed whenever the district attorney contends that a witness at trial has given testimony inconsistent with their testimony before the grand jury. (Please be mindful that only the district attorney has this ability; the defense attorney has no means of knowing what a trial witness has said in the grand jury.) In those instances, the following delays occur:

Delay while the district attorney secures copies of the notes. There have been instances where the notes have been in storage outside the courthouse, thereby necessitating delay of several hours before the notes can be secured.

Delay while the notes are produced and/or reviewed by the courts. Defense counsel contends during this phase that they should have access to the notes as well. Sometimes the court review the notes first in chambers before deciding whether to give access to defense counsel.

Delay while securing attendance of the grand jurors to read their notes to the jury. Should the trial witness maintain that their trial testimony is consistent with their grand jury testimony, it then becomes necessary to secure the attendance of the grand jurors to read their notes from the witness stand. Defense counsel often contends that all seven grand jurors need to testify because it is inappropriate for the state to hand-select which grand juror should testify.

There was recently a trial in Marion County where six grand jurors read their notes at trial as to a critical issue of a complainant's testimony. The six grand jurors could not clear-up the point in contention as several grand jurors could not remember the case (even with access to their notes), their notes were incomplete on the issue in question and between two grand jurors, inconsistent with one another. The case resulted in a not guilty verdict.

SB 505 will relieve courts, jurors, witnesses and participants of all these delays. The district attorney or defense counsel will have immediate access to the recorded testimony and can impeach or rehabilitate the witness right there in court, necessitating no delay whatsoever.

4) SB 505 promotes expeditious negotiations

There are two fundamentals for expeditious resolution of a dispute through negotiation: trust and information. If a party does not trust its opponent *and* knows that it lacks critical information held by its opponent, that party will not be quick to resolve the dispute. Such is the case with the criminally-accused and non-recorded grand juries. The defendant does not trust the government, often does not trust their court-appointed lawyer, and knows that the defense lawyer does not know as much as the district attorney. This is not a formula for quick resolution.

SB 505 does away with this dynamic. Giving defense counsel access to the sworn testimony of state witnesses will promote clear, concise and relevant discussions with clients at an early stage of proceedings. The "Come to Jesus" discussion will occur much sooner. Former district attorneys in Idaho and Alaska report that in most instances, a strong case before the grand jury promotes prompt plea negotiations and when the government's case is weak, it is appropriate that the defense should be informed of that weakness during its negotiations.

5) The possibility of preliminary hearings

OCDLA is aware that 35 of the 36 district attorneys contend they will convert to preliminary hearings in the event SB 505 becomes law. OCDLA would like to make the following comments:

Available now. Current law affords district attorneys a preliminary hearing on any case they so choose. [ORS 135.070, et seq] It is not necessary for SB 505 to pass in order for DA's to realize the benefits of a preliminary hearing.

Inconsistent data. The survey data of the conversion rate among the 35 county DA's is logically inconsistent between like-sized counties such that it is apparent no one attempted to synthesize the data for consistency and congruency. In short, the survey ought not drive any determination of statewide fiscal impact.

Unlikely. Some county data doesn't account for current procedures whereby preliminary hearings are already waived, or continued in the normal course of plea negotiations as part of current operations. Marion County is such an example.

Efficiencies from preliminary hearings. Preliminary hearings are very effective for expeditious resolution of cases. Multnomah County data from the 1970's and early 1980's shows that 40% of cases that went through a preliminary hearing were resolved within 10 days. *That is very efficient!* Current time-to-resolution of Multnomah County cases is much longer.

6) With cooperation, recorded grand juries can be done quite cheaply

SB 496 and SB 505 were modeled after procedures in place in Idaho since 1981 and Alaska since statehood. District attorneys in both states have reported they do not seek protective orders out of recognition that a witness's statement is already contained in the police reports and in any event, the accused is entitled to know what the accuser is saying.

In sum, neighboring states have shown that recorded grand juries can be expeditious and beneficial to the government and accomplished without much expense. It is anticipated that in time, the Oregon experience will be the same.

We are happy to answer any questions you might have. We encourage your "aye" vote.

Best,

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