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Appendix A
Senate Judiciary Committee
March 24, 1971

EXPEDITING DISPOSITION OF CRIMINAL APPEALS IN OREGON

INTRODUCTION

Although some delays are inherent in the processing of a criminal case, the kinds of delay currently being experienced in the system threaten both fair treatment of the accused and effective law enforcement. Delay exaggerates the already severe dislocations in the economic and social life of the accused, and seriously dilutes the deterrent effect of criminal sanctions and postpones the removal of an offender from the society. The rehabilitative process is even misserved in the case of the guilty defendant since he is, through release processes, allowed to remain in the environment which originally contributed to the commission of the criminal act. Delay may also serve to undermine the public's confidence in the criminal justice system. One of the purposes of criminal law is to embody and express through its judgments community standards of proper social conduct and delay casts a shadow upon the strength of our commitment to these values.

Although delay between arrest and trial is most frequently discussed, the major delays in Oregon arise between sentencing and disposition upon appeal. Prior to 1969 a substantial portion of the delay in the Oregon system arose from the unusually heavy case load of the Supreme Court and the consequent delay in hearing and decision of appeals. That problem was substantially eliminated by the new Court of Appeals. When the Court of Appeals was created in 1969, approximately 150 days elapsed in the average case between reply brief and decision. In the intervening year that period has been reduced on the average to approximately 45 days. Delay, nevertheless, remains a significant problem in the Oregon appeals process. The focus however has now shifted to the steps leading up to hearing and decision. Oregon procedure allows a minimum of 190 days to place a case at issue upon appeal and an additional 30 to 45 days is contemplated for hearing and disposition. Reality, however, is far removed from the time tables contemplated under the statutes and the rules of the court. The average Oregon case consumes 361 days from notice of appeal to disposition by the Court of Appeals and delays of up to 2 years can be documented.

These delays are produced by statutes and rules which permit excessive periods of time for completion of each step in the process, and aggravated by the permissive attitude of certain courts in granting extensions of time.

This study focuses upon those rules and practices which have encouraged excessive delay in the disposition of Oregon criminal appeals. In the following sections we will consider each step of the Oregon appellate process to determine whether procedures may be simplified, time periods reduced and extension

practices tightened so that the average case can be processed within the 5-month period contemplated by the National Crime Commission.[1]

II

NOTICE OF APPEAL AND RELATED PROCEDURES

The notice of appeal is the first step in the appellate process. It sets forth the title of the cause, the names of the parties and their attorneys and notice that appeal is taken from the judgment or some part thereof. In general the entire text consumes less than one typewritten line. Current practice permits filing of the notice within 60 days after the judgment or order appealed from is given or made. ORS 138.070. The notice is filed with the clerk of the trial court who transmits a copy thereof within 10 days to the clerk of the court in which the appeal is to be heard. It seems quite clear that the 60 days now allowed for filing is excessive. Even existing practice contradicts the need for a full 60-day period. Notice was filed in less than 30 days in more than half of the cases reviewed in the docket study. Approximately 40 percent required 30 to 60 days to prepare and file notice.

Whether an appeal is to be filed as a matter of course or only where meritorious grounds exist therefor, it would seem that the decision to appeal can be made and the necessary notice filed within 14 days of sentencing. It is recommended that the statutory period of time be reduced therefore to a maximum of 14 days.[2] Since many cases will be appealed regardless of the sentence and since sentencing frequently consumes a substantial period of time, it is recommended the statute be changed to permit filing of the notice at any time after a verdict but not later than 14 days after sentencing. By permitting filing of the notice prior to sentencing it will be possible to expedite preparation of any necessary transcript.[3]

Under current practice post trial motions may not be disposed of prior to expiration of the 60-day period for filing an appeal. The proposed reduction in the notice of appeal period would sharply aggravate this problem. If post trial motions are to serve their corrective function there seems little justification for initiating the appeal process until they are decided. It is therefore recommended that the criminal practice be conformed to the civil practice whereunder post trial motions extend the time for filing notice of appeal. (see footnote 3). Present statutory time limits for filing post trial motions seem excessive however, and it is recommended that the statutory time period be reduced to 7 days for filing and 21 days for determination.[4]

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[1]Many of the rules and practices which contribute to unreasonable delay in the disposition of criminal cases also operated to create delay on the civil side.

[2]A period as short as 10 days has been recommended and can be justified where decision is to be made by trial counsel and the defendant. In most cases, however, the appeal will be handled by the Public Defender's office. Mr. Babcock feels that at least 14 days are required to allow for transfer of the defendant to the penitentiary or OCI and for necessary conferences which preceed the decision to appeal.

[3]Senate Bill 66 §§ 20 and 21.

[4]Senate Bill 66 §§ 17 and 18.

The notice of appeal procedure may be further simplified by eliminating the requirement that the clerk of the trial court transmit a copy of the notice to the appellate court. ORS 19.023 (2) should be amended to provide for service of a combined notice of appeal and designation of record on the trial court clerk, the other parties and the court reporter. The original should be filed by counsel directly with the court to which the appeal is made.[5]

III

DESIGNATION, PREPARATION AND SETTLEMENT OF RECORD

A. The existing system

Delay in the preparation of the trial transcript is one of the most frequently cited barriers to expeditious disposition of criminal appeals. Oregon, like most jurisdictions, depends upon a system of official court reports who attend and record court proceedings in shorthand or by stenotype, and transcribe such proceedings upon request and agreement to pay the prescribed fee. Electronic recording is authorized in Oregon only as a supplement to the reporter's shorthand or stenotype notes. ORS 8.340 (3)(b). Under the present system the record on appeal is designated at the same time as filing of the Notice of Appeal, but in a separate document. Counsel must then order necessary portions of the transcript from the reporter and file the transcript with the trial court. In general the entire trial proceedings are transcribed with the possible exception of voire dire and opening and closing argument.[6]

The nature of a court reporter's job and the increased demands upon individual reports inevitably produce a certain delay between order of transcript and delivery. Some of our reporters have been remarkably diligent and have never required an extension for completion of a transcript. Other consistently require 30 to 90 day extensions and more even in routine cases. The State Bar's committee on electronic reporting reported that extensions had been granted in 129 of the cases pending before the Supreme Court in 1965 for a total delay of 13,490 days. In 80 of those cases extensions totaled more than 60 days and in a substantial number extensions amounted to many months or even years. The average delay attributable to extensions for filing transcript was more than 100 days. In the intervening years the situation has not improved. During the first year of the Court of Appeal's existance an average of 92 days was required to secure transcript in a criminal case. Only 18 transcripts were filed within the 30-day period allowed by statute. In approximately 70 percent of the cases more than 60 days were required.

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[5]Senate Bill 66 §§ 22 and 23.

[6]Consideration has been given to requiring designation and transcription of only those portions of the proceedings directly relevant to the appeal. Counsel would give a sufficient summary of the remaining proceedings to place the transcribed portions in context. In Oregon, however, where different counsel handle trial and appeal this procedure seems impractical. It is necessary to transcribe the entire record so that appellate counsel can review the trial proceedings for error.

Although 30 days is generally acknowledged as a reasonable period for production of the average transcript reporter delays of the kind documented above are far from uncommon and are generated by a variety of factors. The manual techniques used by the reporter obviously limit the speed with which a transcript can be prepared. Once a trial is recorded it is extremely difficult if not impossible for another person to produce an accurate, usable transcript from the original notes or tapes. The reporter must either personally type the transcript or dictate the transcript from his notes for someone else to type. The recording reporter thus has a virtual monopoly upon transcription and the income that accrues therefrom.[7]

Although transcription of trial proceedings generates additional income for the reporter, economic pressures tend to work against a prompt preparation and delivery. Reporters are permitted to take outside work and the rate for such work is approximately 40 percent higher than that for transcripts. The economic advantage of outside work coupled with the threat of its loss if prompt service is not given tends to relegate trial transcription to a low priority.

A second factor contributing to delay is the absence of effective official sanction to compel prompt delivery of transcript. The trial court judges can bring pressure to bear and can dismiss a dilatory reporter. The shortage of qualified reporters however and the close personal friendship between a judge and his reporter frequently interferes with the exertion of substantial pressure. Counsel, while responsible for delivery of transcript, is without authority to compel such delivery. If the reporter fails to prepare a transcript within the 30-day time allowed by statute counsel's only recourse is to seek extensions of time for delivery.[8]

In this context it is not surprising the production has become a matter of the reporter's convenience and discretion rather than that of the court's and the litigants.

B. Recommended changes

As an initial matter, it seems desirable to eliminate some of the procedural red tape which surrounds designation and preparation of the record. Present practice provides for separate designation

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[7]Under ORS 21.470 the reporter is entitled to $0.75 for each original page of transcript; $0.25 per page for the first copy and $0.20 per page for each additional copy. The transcript on appeal thus costs $1.20 per page.

[8]ORS 19.078 (1) requires production of transcript within 30 days. Under ORS 19.094, however, the trial court may grant extensions up to 60 days for preparation of the transcript and further extensions may be granted by the court to which the appeal is made.

of record and notice of appeal. It is recommended that the designation of record be incorporated in the notice of appeal and that the combined notice and designation be served upon the reporter to constitute the appellant's order for transcript.[9] After counsel has filed his notice of appeal and designation of record he should have no further obligation for filing of the transcript other than payment of the reporter's charges.

Expediting actual preparation and delivery of the transcript may be accomplished in several ways. To some extent delay is simply a result of inattention by trial court judges to their reporter's work. Pending development of more effective sanctions, trial court judges should be encouraged to be much more diligent in the administration and policing of preparation of the appellate record.[10] Some limited success may be anticipated with this approach but it is only a marginal and short-term solution. As long as authority exists to grant extensions trial court judges will be tempted to do so, frequently because of their reliance upon the reporter involved. The reporter will be equally tempted to delay transcription and to request extensions so long as it is to his economic benefit and there are no real sanctions for unexcused delay.

In lieu of the informal techniques now available it is recommended that counsel's responsibility for delivery of transcript be eliminated upon service and filing of the combined notice of appeal and designation of record. The reporter should be responsible for delivery of the transcript within the allotted time to the court to which the appeal is pending.[11] The existing 30-day period for production of transcript may be retained but it is recommended that the power to grant extensions be transferred from the trial court to the Court of Appeals and to the Supreme Court.[12]

It is further recommended that the Court of Appeals and the Supreme Court publish rules provided for an initial 10 to 15 day extension upon affidavit of the reporter showing unanticipated circumstances precluding completion of the transcript within the 30-day statutory period. It should be clearly understood that the pressures of outside work accepted after the trial in question will not be a basis for extension. Extensions beyond that available upon affidavit should be allowed only upon personal appearance by the reporter and a showing that the trial in question was of such length and complexity that additional time is required when other trial court duties are considered.

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[9]Senate Bill 66 §§ 6, 22 and 23.

[10]A certain success with this technique was illustrated when Judge Langtry reported on substantial delays being experienced in the production of transcripts from certain courts. Judges then took it upon themselves to pressure their individual reporters to improve their work records.

[11]Senate Bill 66 §§ 11.

[12]Senate Bill 66 §§ 12 and 13.

Although transfer of authority to grant extensions and limitations upon the availability of extensions is desirable, such steps will be ineffective unless compliance can be enforced. Licensing reporters coupled with authority to suspend or revoke the privilege to record for the state's courts was discarded as an unduly cumbersome instrument of enforcement. Instead it is recommended that reporters be made officers of the appellate courts for purposes of any appeal in which the reporter's transcript is required.[13] As officers of the court hearing the appeal they will, of course, be subject to the full range of its disciplinary powers and such powers are regarded as sufficient to cope with any foreseeable compliance problem.

Substantial improvements in the existing system may be anticipated under the changes outlined above but such changes still do not represent a permanent solution to the reporting problem. The realities of supply and demand dictate adoption of some alternative to the present handcraft techniques. Demand for reporters' services in administrative proceedings and for depositions is rapidly outstripping the supply of competent reporters. An inadquate number of individuals join the occupation each year and substantially higher salaries offered in other jurisdictions, particularly California, tend to drain Oregon's already inadequate supply. Competent court reporters are particularly difficult to secure for the smaller more remote counties of the state.

Although several mechanical alternatives to manual reporting are available, only electronic recording offers immediate availability and practicality. There is a substantial body of literature available on the advantages and disadvantages of mechanical reporting of trial proceedings. It is sufficient to note here that controlled studies by disinterested parties consistently show that electronic reporting is at least as economical and as accurate as manual reporting. A 1966 Oregon State Bar committee report on electronic reporting remains the most definitive study of the system's feasibility in this state. The committee recorded all varieties of trial proceedings, comparing in each case the work product of the manual reporter with that of the electronic system. A careful comparison of the typed transcript prepared by each method disclosed no significant differences in accuracy of the record. While the report concludes that electronic reporting does not offer significant savings, the cost projections of the report indicate a 12-1/2 to 25% annual savings to Multnomah County with comparable savings projected for the other counties of the state. Other studies tend to confirm reductions in cost of approximately the same magnitude.

Even if cost advantge is ignored, however, electronic reporting still offers a significant opportunity to eliminate the inexcusable delays in transcription time suffered under the present system. The Bar committee did not find a significant difference in transcription speed between manual methods and electronic systems. That conclusion, however, misses the point. The delays we seek to avoid are not related to transcription speed but rather are caused by the reporter's failure to commence transcription. Electronic reporting, of course, makes it possible for any trained typist to directly transcribe required portions of the trial proceedings. Since the incourt reporter's expertise is not required

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[13]Senate Bill 66 § 2.

to transcribe the electronic record the pressures of court duties and outside work need not interfere with the job of preparing transcripts. It is simply necessary to hire and train a sufficient number of skilled typists to produce the required transcripts within the prescribed time period. In larger counties permanent transcription pools may be established with extra part-time typists on call for periods of heavy workload. In smaller counties the incourt reporter aided by other court personnel or part-time workers should be able to carry the transcription load.

In addition to eliminating the step which appears primarily responsible for delay in preparation of transcripts electronic recording offers a number of other advantages. These advantages have already been described in the Bar committee's report, and are only summarized here.

1) Availability of transcript for post conviction proceedings. It is anticipated that the need for transcripts of long dead legal proceedings will increase substantially in the future. Reporting techniques vary sufficiently from reporter to reporter that it is frequently impossible to secure a transcript if the reporter originally recording the proceedings is unavailable. Electronic recording, of course, assures the availability of accurate transcripts for as long as the tapes are preserved. In criminal proceedings the tapes should always be preserved for a period equal to the sentence imposed.

2) Immediate access to trial court proceedings by counsel and court. At the present time daily transcript is available only under special arangements, and is prohibitively expensive in all but the most important cases. Since electronic recording produces an immediate understandable record of the proceedings, counsel, with the aid of relatively inexpensive replay machines, can review proceedings on a day-to-day basis without the expense of transcription, and review selected portions of the record to determine whether or not an appeal should be prosecuted. Judges may also review all or portions of testimony before passing on motions for new trial or for judgment N.O.V. Electronic reporting thus has substantial usefulness quite apart from any transcript that might be prepared, and the availability of electronic tapes of proceedings may avoid the necessity for transcription altogether.

3) Transcription pools. The existence of a record that can be transcribed by third persons makes regional or state-wide transcription pools a possibility. Concentration of equipment and trained personnel in regional or state-wide transcription pools should offer substantial cost savings in preparation of transcripts, particularly in outlying counties.

4) Settlement of record. Errors of the manual reporter are hidden in his notes which are indecipherable to third persons, and therefore for all practical purposes there is no appeal from the manual reporter's decision. Assuming acceptable levels of audibility electronic tapes offer an objective record to which counsel and the court may refer in settling controversies regarding transcripts.

5) Hearings on appeal. The availability of an immediately understandable record of trial proceedings also offers the opportunity for de novo and appellate review on the basis of the electronic recording without transcription. Judge Schwab had suggested that in a number of cases this would be feasible and desirable. Where a case can be reviewed without transcription significant time savings are of course possible.[14]

Manual reporters have understandably raised a number of objections to electronic reporting, but these objections must always be evaluated in terms of the reporters' clear economic interest in the subject. Broad objections to the costs, accuracy and speed of electronic reporting are not well taken when considered in the light of independent studies which clearly establish the competitiveness of the mechanical systems. Manual reporters further argue, however, that their presence in the courtroom substantially improves the quality of the transcript produced. They claim, for instance, that by watching speakers they are able to pick up testimony which would be inaudible on tape because of background noise, low voices, unfamiliar language and the like. It must be remembered however that testimony inaudible to the tape machine will generally be inaudible or subject to misinterpretation by the judge and the jury. It is equally true that the manual reporter's perception of testimony and thus the accuracy of his record is affected by the same things that affect audibility on tape, and the reporter's best judgment of what is said may be no more accurate than that which is reproduced by electronic means. At least in the case of electronic tape such defects are clearly apparent. To a substantial degree the problems of inaudibility may be remedied in the same way the manual reporter handles testimony which he is unable to hear. Modern electronic recording equipment permits the electronic reporter to monitor all sound as it is recorded. If testimony is inaudible or not clearly understandable the testimony should be repeated just as it is for the manual reporter.

The manual reporters also feel that out-of-court transcribers cannot adequately perform the job of preparing an intelligible, clean transcript.

Reporters are both frank and proud to admit:

> ". . . that they regard it as part of their job to 'clean up' their notes and make the testimony and other parts of the record smooth and intelligible; they do not, as a matter of practice, hesitate to make such changes and insertions as in their judgment are advisable to clarify the reported proceedings. They appear[ed] to be excessively concerned over the physical appearance of their product and were reluctant, when the experiment was being planned to agree to the preparation of verbatim transcripts." 1966 Oregon State Bar Committee Report on Electronic Reporting, p. 5.

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[14] Senate Bill 66 §§ 9 and 10.

It is undoubtedly true that out of court typists would not be in a position to "clarify" and "smooth out" the transcript, but the question is whether this "clean up" job should be performed at all. A transcript should be as literally accurate a report of the proceeding as technology permits.

> "The appearance or intelligibility of such a transcript is not the proper concern of the reporter, and such considerations involve him in value judgments which are beyond his function. If an exception to an instruction was unitelligible to the circuit judge, it will probably be unitelligible to the Supreme Court, and this is itself a highly material fact on appeal. If an electronic tape shows its warts, they are at least honest ones; they show precisely because they cannot be concealed and they are there to be discovered by anyone who listens to the tape." 1966 Oregon State Bar Committee Report on Electronic Reporting, p. 6.

In summary, tape recording is a practical reporting alternative which is at least as accurate as manual reporting and which offers opportunities for cost savings, increased production speed and better accesibility. It is therefore recommended each circuit court judge be permitted in his discretion to authorize electronic recording in lieu of manual reporting.[15] The economic readiness of various counties to convert to electronic reporting plus sharp differences in need and appropriate facilities for electronic recording dictate that the statutory authority for electronic reporting be phrased in the broadest terms, allowing discretion with respect to the choice between available systems. Since specific applications of electronic recording will vary widely, no specific program is recommended here and none should be frozen in the statute. The technology of electronic recording and its application to court reporting and the preparation of transcripts is rapidly developing and changing and it is therefore important that flexibility be retained. The Supreme Court should be given power to establish by rule minimum standards governing the use of electronic reporting in the state, the transcription of tapes and their storage and preservation.

IV

SETTLEMENT OF RECORD

Although the record on appeal may be settled as early as 10 days after filing of the transcript, entry of the necessary order is frequently delayed either as a result of failure of the court to hold necessary hearings or through simple inattention

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[15] Senate Bill 66 § 4; see also Senate Bill 66 § 15 which provides for payment of reporter fees to the county where the county transcribes audio records of court proceedings.

of counsel. The record was settled in 15 days or less in only 27 of 167 cases. In 53 percent of the cases reviewed in the docket study more than 30 days was required for settlement and in 23 percent more than 60 days was required. The average case consumed 45 days for settlement of the record. Since the time for filing of briefs is tied to the date of settlement of transcript or filing of agreed narrative statement, this delay is crucial to the movement of appeals through the process. In most cases transcripts are settled on a pro forma basis without objection or hearing and the delay in settlement is therefore primarily created by counsel's neglect to enter the necessary settlement order. It is recommended that the trial court, absent written objections, be directed to automatically enter an order settling the record 10 days after filing of the transcript.[16] The right to object to material inaccuracies is thus preserved but simple neglect to enter the order of settlement will not extend the time for filing briefs.

V

BRIEFING SCHEDULES

The schedule for filing of briefs is fixed by court rule No. 12 (2) which provides as follows:

> "In criminal cases the appellant's brief shall be served and filed in the Supreme Court within 30 days after the order of the trial court settling the transcript or the filing of an agreed narrative statement with the clerk of the trial court, whichever shall last occur, or if neither is filed, then within 30 days after the filing of the notice of appeal. Within 30 days thereafter the respondent shall serve and file his brief. Within 30 days thereafter the appellant shall serve and file his reply brief or notify the Clerk of the Supreme Court that no reply brief will be filed."

The schedule established by the rule is seldom met. Extensions appear to be readily available and are granted on minimal showing in personal affidavits by counsel. Extensions are frequently granted on representation of difficulty in completing printing. That objection is, however, obviated by the court's willingness to accept Xerox briefs. The docket study discloses that an average of 73 days is consumed in filing the appellant's brief and an average of 68 days in filing of respondent's brief. In the cases studied only 26 percent of appellant's briefs and 24 percent of respondent's briefs were filed within the 30-day rule period. Sixty to 90 days was required by 21 percent of the appellants and 25 percent of the respondents. Seventeen percent of appellants and 10 percent of respondents required more than 120 days to complete their briefs. Counsel must again assume primary responsibility for these delays. Although statistical evidence is difficult to develop, it is generally agreed that counsels are accustomed to the availability of repeated extensions and take advantage

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[16] Senate Bill 66 § 11.

of that fact by giving other work priority over the duty to file briefs within the basic time limits fixed by the court. If criminal appeal work is given its proper priority in the practice there seems to be little reason for substantial extension of time for filing of briefs. In view of the court's willingness to accept Xerox briefs, it is appropriate to reduce the basic time limitations by the 2- to 5-day period ordinarily consumed in printing. Briefs would then be due at 25-day intervals.

It is recognized that special circumstances will arise where counsel for circumstances beyond his control will be unable to complete a brief within the time suggested above. A limited extension of 10 to 15 days should be available upon personal affidavit of counsel setting forth such circumstances. Further extensions for filing should be allowed only upon personal appearance of counsel before the court, and a showing of the circumstances precluding preparation and filing within the alloted time.

The value of reply briefs in criminal appeals has also been seriously questioned by the court. Frequently such reply briefs are waived and where filed they appear to add little to that already before the court. It will be noted that in the 167 cases where appellant's briefs were filed, reply briefs were filed in only 29 cases. It is recommmended that reply briefs be limited in size to not more than 10 pages and that the filing period for reply briefs be reduced to 15 days, unless special permission is secured from the court for a more extended brief or additional time.

VI

REHEARINGS IN THE COURT OF APPEALS

After an adverse decision is rendered in the Court of Appeals a substantial number of criminal defendants move for rehearing and finally for review by the Supreme Court. Although the docket study was not designed to evaluate delays at this level it appears that approximately 80 additional days are consumed in the rehearing and review process. This estimate would seem reasonably accurate since a total of 50 days is allowed for filing of the necessary petitions for rehearing and review. When time for decision at each step is allowed, the present 80-day average is not unreasonable if the present system is to be retained.

Provisions for rehearing at the Court of Appeals level may, however, be legitimately questioned. Rehearing permits the parties to direct the court's attention to alleged errors of fact or law in its decision and to matters which the court may have overlooked or failed to consider. Although the rationale for rehearing is plausible on its face, in practice it appears to provide only for further delay. Either the court does not err or it simply fails to recognize its errors.[17] In any event very few of the petitons filed result in rehearing and fewer still result in any change of decision. There is no evidence to indicate that the rehearing procedure reduces the number of litigants seeking review by the Supreme Court. It thus appears that rehearing by the Court of Appeals is only a procedural step intervening between that court's decision and the final petition for review by the Supreme Court.

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[17] If the Supreme Court is considered the final arbitor then it would appear, on the basis of its record, that the Court of Appeals simply does not err very frequently.

Since rehearing is not a meaningful tool for correction of error and since the opportunity for correction remains available in the Supreme Court it is suggested that rehearings by the Court of Appeals (other than on the court's own motion) be abolished. It is anticipated that an additional 20 to 30 days could thus be cut from the total time consumed in processing an appeal.

VII

BAIL ON APPEAL

Related, at least indirectly, to the problem of delay in the appeal process is Oregon's provision for mandatory bail pending appeal.

> "Admission to bail as matter of right. If the charge is for any other crime than those mentioned in ORS 140.020, the defendant, before conviction, or after judgment of conviction, if he has appealed, is entitled to be admitted to bail as a matter of right." ORS 140.030.[18]

The Oregon provision for bail as a matter of right pending appeal is an unusual one in the United States. Only 9 other states have similar statutes.

The presumption of innocence which provides the rationale for bail as a matter of right pending trial is absent at the appellate level. The availability of bail as a matter of right on appeal coupled with an absolute right to appeal can only encourage frivolous appeals and extended delays in their processing. The system as presently constituted permits the convicted criminal to remain free on the flimsiest of pretexts and jeopardizes the corrective process by delaying application of rehabilitative treatment and by permitting the convicted criminal to remain in an environment which may encourage further criminal acts. Although statistics are not available at this time the best opinion of the bench and the prosecution and defense bar is that substantial numbers of additional criminal acts are committed during release on bail, and the defendant knows that further prosecution for such acts is unlikely.

It is therefore recommended that ORS 140.030 be amended to permit bail upon appeal only in the discretion of the trial court. The trial court's discretion may be properly limited by the addition of standards similar to those used in the federal act and the model penal code.[19] Discretionary bail upon appeal will assure that those posing a threat to society will be retained in custody and still permit those who are not dangerous to secure release.

VIII

CONCLUSION

The existing timetable for appeal in Oregon contemplates

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[18]"Crimes not bailable. If the proof or presumption of the guilt of the defendant is evident or strong, he shall not be admitted to bail when he is charged with murder in any degree, with treason or with the infliction upon another of a personal injury likely to produce death under such circumstances that, if death should ensue, the offense would be murder in any degree." ORS 140.020.

[19]Senate Bill 66 § 27.

a minimum of 235 days from judgment to disposition in the Court of Appeals and in practice the average criminal case requires over one year to wend its way to decision.

	Existing Timetable	Existing Practices
Notice of Appeal	60	35
Transcript	30	92
Settlement of Record	10	45
Appellant's Brief	30	73
Respondent's Brief	30	68
Reply Brief	30	52
Hearing and Decision	45	45
	235 days	410 days[20]

The timetable outline in the preceeding sections would if strictly followed permit decision of the average case in approximately 5-1/2 months.

	Proposed Timetable
Notice of Appeal	14
Transcript	30
Settlement of Record	10
Appellant's Brief	25
Respondent's Brief	25
Reply Brief	15
Hearing and Decision	45
	164 days

Successful implementation of the schedule proposed will however depend upon cooperation of both the judiciary and the legislature. The new timetable will be meaningless if the courts do not strictly limit extensions for preparation of transcript and filing of briefs. It will be equally meaningless if the legislature fails to provide a sufficient staff in the Department of Justice to handle appeals within the time limits contemplated.

Respectfully submitted,

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Attorney General

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[20] A summary of the docket study of criminal cases decided by the Court of Appeals in its first year of operation is attached as Appendix A.

OREGON COURT OF APPEALS

DOCKET STUDY*

Cases in Sample		Average Days Elapsed	30 days or less	31 to 60 days	61 to 90 days	91 to 120 days	Over 120 days
90	Indictment to Verdict	119					
78	Verdict to Judgment	38					
117	Indictment to Judgment	148					
132	Judgment to Notice of Appeal	35	52%	39%	5%	2%	2%
162	Notice of Appeal to Transcript	92	11%	14%	36%	20%	19%
161	Transcript to Settlement of Record	45	45%	30%	10%	9%	4%
167	Settlement of Record to Appellant's Brief	73	26%	22%	21%	15%	17%
169	Appellant's Brief to Respondent's Brief	68	24%	25%	25%	16%	10%
29	Respondent's Brief to Reply Brief	52	34%	34%	14%	18%	
133	Judgment Until Case at Issue*	331					

* The docket study covers the court's criminal appeals decisions decided between July 1, 1969, and June 30, 1970. The number of cases in each category varies because pertinent data was not always available in the Court of Appeals' files.

* It is estimated that approximately 479 days elapse between indictment and the time a case is at issue upon appeal.