CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

CRIMINAL PROCEDURE

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 3. COMMENCEMENT OF ACTIONS

Grand Jury and Indictments

Preliminary Draft No. 1; April 1972

Reporter: Staff

Subcommittee No. 3

INTRODUCTORY NOTE:

The Commission has tentatively decided to propose an amendment to Section 5, Article VII (Amended), of the Oregon Constitution that would require the district attorney to prosecute on an information filed in circuit court a person who has been held to answer after a preliminary hearing or waiver of hearing. (See Subcommittee No. 3 minutes, March 8, 1972; Commission minutes, March 10, 1972; Commentary this draft, p. 12.)

An "optional" indictment/information system is not without precedent or support in Oregon. House Joint Resolution 12, sponsored by the Committee on Judiciary at the request of the Oregon State Bar Committee on Criminal Law and Procedure, would have amended the Oregon Constitution, upon voter approval, to permit a criminal charge in circuit court upon a district attorney's information if the person charged had had or waived a preliminary hearing and had been held to answer before a magistrate. The measure passed in the House of Representatives, 45 to 11, but failed in the Senate by a vote of 14 to 16 during the Regular Session of the 1971 Legislative Assembly.

The following draft does not include a draft resolution to amend the Constitution; this will be dealt with separately and, if finally approved by the Commission, will be submitted to the Legislature as a separate measure. This draft deals solely with ORS chapter 132, "Grand Jury and Indictments," and sets forth certain proposed amendments to the statutes contained therein.

PART II. PRE-ARRAIGNMENT PROVISIONS

ARTICLE 3. COMMENCEMENT OF ACTIONS

Grand Jury and Indictments

Preliminary Draft No. 1; April 1972

(ORS 132.010 and 132.020 are not affected by this draft.)

132.010 Composition. A grand jury is a body of seven persons drawn by lot from the jurors in attendance upon the court at the particular term, having the qualifications prescribed by ORS 10.030 and sworn to inquire of crimes committed or triable within the county from which they are selected.

132.020 Selection of one or more juries; law applicable to additional jury; when inquiry void. (1) Under the direction of the court, the clerk shall write upon a separate ballot the name of each juror in attendance upon the court, place the ballots in the trial jury box and draw ballots therefrom one by one until the names of seven of such jurors are drawn and accepted by the court. The seven persons thus chosen shall constitute the grand jury.

(2) When the court, in its discretion, considers that one or more additional grand juries is needed for the administration of justice, one or more additional grand juries shall be selected in the manner provided in subsection (1) of this section.

(3) Any law applicable to the grand jury is equally applicable to any additional grand jury selected under subsection (2) of this section, except that whenever any duties or functions are imposed upon the grand jury, it shall be sufficient if such duties or functions are performed by one of the grand juries selected under this section.

(4) Any inquiry or investigation required by law to be made by a grand jury shall be void, unless such inquiry or investigation was made entirely by the same grand jury.

[Amended by 1959 c.59 §1]

Section 1. ORS 132.030 is amended to read:

132.030. (Qualification; acceptance; excuse from service.) [Before accepting a person drawn as a grand juror, the court must be satisfied that such person is qualified to act as a juror; but when drawn and found qualified, the person shall be accepted, unless the court, on the application of the juror and before he is sworn, excuses him] Neither the grand jury panel nor any individual juror may be challenged, but the court may at any time after a juror is drawn refuse to swear him upon a finding that the juror is disqualified from service for any of the reasons prescribed in ORS 10.040 and 10.050.

COMMENTARY

A. Summary

Section 1 simplifies the language of ORS 132.030 and incorporates the provisions of ORS 132.040.

B. Derivation

The amendment is derived from New York Criminal Procedure Law s. 190.20.

C. Relationship to Existing Law

The section does not change existing law. The court must examine the prospective jurors when they are chosen to be grand jurors to determine qualification or disqualification. During the court's examination of the panel any disqualifying factors will be brought to light in the colloquy enabling the court to excuse the juror from service before the oath is given.

ORS 132.040 would be repealed and made a part of ORS 132.030. ORS 132.040 merely modifies ORS 132.030 and therefore can easily be included therein without the necessity of a separate statute.

132.040 Challenge to panel or individual juror. No challenge shall be made or allowed to the panel from which the grand jury is drawn, nor to an individual grand juror, other than by the court for want of qualification, as prescribed in ORS 132.030.

Cases:

State v. Carlson, 39 Or 19, 62 P 1016 (1900), held that the legislature may prescribe who are eligible as grand jurors and the method of determining their qualifications. See also: State v. Brown, 28 Or 147, 41 P 1042 (1895).

Section 2. ORS 132.050 is amended to read:

132.050. (Foreman.) The court shall appoint a foreman and an alternate foreman of the grand jury from the persons chosen to constitute that body.

COMMENTARY

The appointment of the alternate foreman will avoid the problem of the absent foreman when an indictment is returned or when the grand jury makes its report to the court.

Section 3. ORS 132.060 is amended to read:

132.060. (Oath or affirmation of jurors.) (1) Before the members of the grand jury enter upon the discharge of their duties, the following oath must be administered to them by the court:

"You, as grand jurors for the County of ——, do solemnly swear that you will diligently inquire into, and true presentment or indictment make of, all crimes against this state committed or triable within this county that shall come to your knowledge; that you will keep secret the proceedings before you, the counsel of the state, your own counsel and that of your fellows; that you will indict no person through envy, hatred or malice nor leave any person not indicted through fear, favor, affection or hope of reward; but that you will indict upon the evidence before you according to the truth and the laws of this state, so help you God."

---

(2) In administering this oath, the blank therein must be filled with the name of the county in which the court is sitting; and if any juror prefers, he must be allowed to affirm thereto, in which case, instead of the final phrase thereof there must be added, "and this you promise under the pains and penalties of perjury."

COMMENTARY

Section 3 makes clear the requirement that the court swear in the grand jury. This amendment is consistent with the amendment in section 1 which allows the court to dismiss a prospective grand juror when he is not qualified.

(ORS 132.070 and 132.080 are not affected by this draft.)

132.070 Charge of court. When the grand jury is formed, the court shall charge it and give it such information as the court deems proper concerning the nature of its powers and duties, or charges for crime returned to the court or likely to come before the grand jury.

132.080 Clerk. 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.

Section 4. ORS 132.090 is amended to read:

132.090. (Presence of persons at sittings or deliberations of jury.) (1) No person other than the district attorney or a witness actually under examination shall be present during the sittings of the grand jury; provided, however, that upon a motion filed by the district attorney in the circuit court, the circuit judge may appoint a reporter who shall attend the sittings of such grand jury and take and report the testimony in any matters pending before the grand jury; and provided further, that the circuit judge, upon the district attorney's showing to the court that it is necessary for the proper [interrogation] examination of a witness appearing before the grand jury, may appoint an interpreter, [a woman,] a medical or other special attendant or a nurse, who shall be present in the grand jury room and attend such sittings.

(2) No [district attorney, witness, reporter, interpreter, woman, medical attendant or nurse] person other than members of the grand jury shall be present when the grand jury is deliberating or voting upon a matter before it.

COMMENTARY

The proposed amendment to ORS 132.090 would delete obsolete and repetitious language. Apparently, the original purpose in providing for the appointment of a "woman" to assist in the "interrogation of a witness" before the grand jury was to aid children of tender years or to help in similar circumstances. The new language, "or other special" attendant, will accomplish the same purpose without restricting it to women. A literal reading of the existing subsection (2) would have the absurd effect of barring women during deliberations or voting of the grand jury.

Section 5. ORS 132.100 is amended to read:

132.100. (Oath to witness before grand jury.) The foreman of the grand jury or, in his absence, [the clerk] any grand juror may administer an oath to any witness appearing before the grand jury.

COMMENTARY

This provision is similar to New York's Criminal Procedure Law s. 190.25 (2) which allows any juror in the absence of the foreman to administer the oath to witnesses.

State v. Carothers, 69 Or 382, 138 P 1077 (1914), stated that LOL s. 1409 (ORS 132.080) did not require the clerk of the grand jury to make a record of all the evidence produced, or of any of the evidence; and if such evidence is reduced to writing, such writing is only a memorandum from which the clerk may refresh his memory.

Section 6. ORS 132.110 is amended to read:

132.110. (Absence, disqualification or inability of juror.) After the formation of the grand jury and before it is discharged, the court may discharge a grand juror and order that another person be drawn and sworn from the jurors then in attendance upon the court, or if no other jurors are there in attendance, from the jury list of the county, provided, however, that if at least five grand jurors are present, the court may allow them to hear testimony if exigent circumstances exist that prevent the drawing of a substitute grand juror to take the place of [the] a discharged juror who [on the grand jury if the grand juror]:

(1) Becomes sick, is out of the county or fails to appear when the grand jury is summoned to reconvene;

(2) Is related, by affinity or consanguinity within the third degree, to the accused who is under investigation by the grand jury, or held for the commission of a crime; or

(3) Is unable to continue in the discharge of his duties.

COMMENTARY

A. Summary

ORS 132.110 is amended to allow either five, six or seven grand jurors to hear testimony. Any number fewer than seven can hear testimony only under exigent circumstances.

B. Derivation

The proposed amendment is an original draft.

C. Relationship to Existing Law

Currently, there is some ambiguity as to the number of jurors that constitute a quorum. ORS 132.100 provides for

the swearing of witnesses in the absence of the foreman. Therefore, by inference from this provision, a number of jurors less than seven, but made up of five or six, could hear testimony and indict.

However, the opposite inference occurs in ORS 132.110. This section provides various methods of obtaining additional jurors when a juror is sick, related to the accused or is otherwise unable to continue in the discharge of his duties. Here, there is apparently adequate provision for maintaining a grand jury at the full number of seven.

Another argument for a full jury with a quorum of seven is the small number of grand jurors. Many states require 23 members, and some states 16 members. Much discussion occurred at the Constitutional Convention in 1857 concerning the number of grand jurors with proposals varying from five to 12. Seven was a compromise that was finally agreed upon by the Convention and later approved by the people. Therefore, one can argue that Oregon opted for a small grand jury and therefore the necessity of a quorum of less than the full number was unnecessary. The states with larger grand juries needed a quorum figure because of the large size of the grand jury.

State v. Bock, 49 Or 25, 88 P 318 (1907), appears to be the only case dealing with this statute. However, Bock is not helpful because the grand juror who was excused was replaced by another person by direction of the court.

The proposed amendment recognizes that there are adequate provisions for calling another replacement juror. Therefore, these provisions can be circumvented only upon a showing of exigent circumstances lest the substituting provisions be rendered nugatory. The proposed amendment also recognizes that a quorum cannot be less than the number of persons necessary for indictment, five.

Exigent circumstances might occur in areas where the circuit judge is not reasonably available to call additional jurors and any delay will prejudice the accused's right to speedy trial.

A conforming amendment to ORS 132.360 (infra) states that the five jurors who heard the testimony must be the same five who indict the accused.

(ORS 132.120 to 132.310 are not affected by this draft.)

132.120 Duration of session. When the business of the grand jury is completed it must be discharged by the court; but the judge may, by an order made either in open court or at chambers anywhere in his district and entered in the journal, stating the reasons, continue the grand jury in session for such period of time as the judge deems advisable.
[Amended by 1959 c.638 §13]

132.130 Commission of crime after discharge of jury. If a crime is committed during the sitting of the court and after the discharge of the grand jury, the court may, in its discretion, order that the sheriff resummon the grand jury to inquire thereof or that another grand jury be drawn and formed for that purpose from the jurors then in attendance upon the court.

132.210 Immunity of jurors as to official conduct. A grand juror cannot be questioned for anything he says or any vote he gives, while acting as such, relative to any matter legally pending before the grand jury, except for a perjury of which he may have been guilty in giving testimony before such jury.

132.220 Disclosure by juror of testimony of witness examined by jury. A member of a grand jury may be required by any court to disclose:

(1) The testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court.

(2) The testimony given before such grand jury by any person, upon a charge against such person for perjury or upon his trial therefor.

132.310 Inquiry into crimes; presentation to court. The grand jury shall retire into a private room, inquire into all crimes committed or triable in the county and present them to the court, either by presentment or indictment, as provided in ORS 132.310 to 132.390.

Section 7. ORS 132.320 is amended to read:

132.320. (Consideration of evidence.) (1) Except as provided in subsection (2) of this section, in the investigation of a charge for the purpose of indictment, the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question.

(2) A report or a copy of a report made by a public servant or agency, who is a physicist, chemist, medical examiner, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison or test performed by him in connection with a case which is the subject of a grand jury proceeding, shall, when certified by such person as a report made by him or as a true copy thereof, be received in the grand jury proceeding as evidence of the facts stated therein.

[(2)] (3) The grand jury is not bound to hear evidence for the defendant, but it shall weigh all the evidence submitted to it; and when it believes that other evidence within its reach will explain away the charge, it should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses.

COMMENTARY

The amendment is based on New York Criminal Procedure Law s. 190.30 (sub 2) and would dispense with the necessity of summoning and obtaining actual grand jury testimony from chemists, ballistic experts and other technicians who have compiled complete reports of examinations, and who, when required to appear, can only repeat their findings as stated in the reports. This would save the time and expense incurred in calling such persons to testify in person before the grand jury.

(ORS 132.330 is not affected by this draft.)

132.330 Submission of indictment by district attorney. (1) The district attorney shall submit an indictment to the grand jury and cause the evidence in support thereof to be brought before it in the case of every person held to answer a criminal charge in the court wherein such jury is formed.

(2) The district attorney may submit an indictment to the grand jury in any case when he has good reason to believe that a crime has been committed which is triable within the county.

COMMENTARY

At its meeting of March 10, 1972, (See Minutes, pp. 43-46) the Commission instructed the subcommittee to proceed with a consideration of the grand jury system along the following lines, including the necessary redrafting of HJR 12, or its equivalent, and ORS chapter 132 to accomplish the following:

(1) If the defendant is arrested and has a preliminary hearing before the magistrate, or waives it, and is thereby bound over, the district attorney may thereafter proceed by way of information filed in the circuit court.

(2) In the cases set forth in (1) above, the district attorney may not take the case before the grand jury.

(3) If the case is not bound over by the magistrate, the district attorney at his option may take the case to the grand jury.

(4) The district attorney may take cases directly to the grand jury at his option without having initiated the process in the magistrate's court.

If recommendations (1) and (2) are adopted, then subsection (1) of ORS 132.330 would be in conflict and the section should be amended to delete it, or to insert new language which would prohibit submission of a case to the grand jury after a preliminary hearing or waiver and a bind over.

ORS 132.430 would also require amendment with respect to a "true bill" on a person who has been held to answer a criminal charge.

(ORS 132.340 is not affected by this draft.)

132.340 Duties of district attorney to jury. The district attorney, when required by the grand jury, must prepare indictments or presentments for it and attend its sittings to advise it in relation to its duties or to examine witnesses in its presence.

Section 8. ORS 132.350 is amended to read:

132.350. (Juror's knowledge of an offense; action thereon.) (1) If a grand juror knows or has reason to believe that a crime which is triable in the county has been committed, he shall disclose the same to his fellow jurors, who shall thereupon investigate the same.

(2) An indictment or presentment must not be found upon the statement of a grand juror unless he is sworn and examined as a witness.

(3) A grand juror testifying as provided in subsection (2) of this section shall not vote on the indictment nor be present when the vote is taken.

COMMENTARY

This statute is amended to prevent a conflict of interest of a "prosecuting" grand juror. A grand juror who testifies about the commission of a crime will, most likely, have an interest in voting for a true bill.

This protection is needed in light of the amendment to ORS 132.110 allowing five members of the grand jury to hear testimony and find a true bill under exigent circumstances. The fifth member could be the witness and therefore provide the "swing" vote.

Section 9. ORS 132.360 is amended to read:

132.360. (Number of jurors required to concur.) A grand jury may indict or present a person, or present facts to the court for instruction as provided in ORS 132.370, with the concurrence of five of its members, and not otherwise [.], provided that the five jurors voting for indictment are the same jurors who heard all the testimony relating to the person indicted.

COMMENTARY

The section is amended to conform to the amendment to ORS 132.110 which allows a grand jury of five jurors to hear testimony when two members are not present and exigent circumstances exist that prevent the call of substitute grand jurors. This section prevents a juror from voting for indictment when he has not heard the testimony relating to the person indicted.

(ORS 132.370 is not affected by this draft.)

132.370 Presentment of facts to court for instruction as to law. (1) When the grand jury is in doubt whether the facts, as shown by the evidence before it, constitute a crime in law or whether the same has ceased to be punishable by reason of lapse of time or a former acquittal or conviction, it may make a presentment of the facts to the court, without mentioning the names of individuals, and ask the court for instructions concerning the law arising thereon.

(2) A presentment cannot be found and made to the court except as provided in subsection (1) of this section, and, when so found and presented, the court shall give such instructions to the grand jury concerning the law of the case as it thinks proper and necessary.

(3) A presentment is made to the court by the foreman in the presence of the grand jury. But being a mere formal statement of facts for the purpose of obtaining the advice of the court as to the law arising thereon, it is not to be filed in court or preserved beyond the sitting of the grand jury.

Section 10. ORS 132.390 is amended to read:

132.390. (When the grand jury should indict.) The grand jury [ought to] shall find an indictment when all the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury.

COMMENTARY

A. Summary

ORS 132.390 is amended to make the indictment mandatory if and when the test is fulfilled.

B. Relationship to Existing Law

ORS 132.390 is amended to make clear the test that the grand jury shall use in determination of indictment. The original language states that the grand jury "ought to" find an indictment under certain conditions. The verb auxiliary "ought" means that this is the desired course but not necessarily the only course. In other words, the grand jury could dismiss the indictment even if the test was apparently fulfilled. This result is illogical because the purpose of the grand jury is to follow the law and to find an indictment if the prescribed test has been fulfilled and not to act as the conscience of the society. If the person is to be "freed," then the trial jury should do this, not the grand jury.

Therefore, the word "shall" is placed in the statute instead of "ought to" to indicate that the grand jury has no alternative to indictment once the test is fulfilled.

The provisions in ORS 132.380 set forth a test for determination of indictment. The test is essentially this: if the grand jury believes the defendant guilty of a crime, they should indict.

The provisions of ORS 132.390 set forth another test for determination of indictment which is based upon the amount of evidence. Essentially the tests in both sections state the same thing but use different words. Therefore, ORS 132.380 is redundant with ORS 132.390 and would be repealed.

132.390 Whom the grand jury may indict or present. The grand jury may indict or present a person for a crime when it believes him guilty thereof, whether such person has been held to answer for such crime or not.

The statute provides that the grand jury may indict "whether such person has been held to answer for such crime or not." The directive to the subcommittee which was adopted by the Commission at its March 10th meeting said, in part, that under an optional indictment/information system, if the defendant is bound over the district attorney may not take the case before the grand jury. If this procedure is followed, then the above-quoted phrase would be inconsistent. But if the Commission's policy is changed to allow the district attorney to go the grand jury after a bind over, then the phrase should be re-inserted into ORS 132.390.

(ORS 132.400 to 132.430 are not affected by this draft.)

132.400 Indorsement of indictment as "a true bill." An indictment, when found, shall be indorsed "a true bill," and such indorsement signed by the foreman of the jury.

132.410 Presentation of indictment to court; filing; inspection. An indictment, when found and indorsed, as provided in ORS 132.400 and 132.580, shall be presented to the court by the foreman in the presence of the grand jury and filed with the clerk, in whose office it shall remain as a public record. But if the defendant has not been held to answer the charge, neither the indictment nor any order or process in relation thereto shall be inspected by any person other than the judge of the court or an officer thereof in the discharge of a duty concerning the same until after the arrest of the defendant.

132.420 Disclosure by juror, reporter or officer relative to indictment not subject to inspection. No grand juror, reporter or officer of the court shall disclose any fact concerning any indictment while it is not subject to public inspection.

132.430 Finding against indictment; indorsement "not a true bill." (1) When a person has been held to answer a criminal charge and the indictment in relation thereto is not found "a true bill," it must be indorsed "not a true bill," which indorsement must be signed by the foreman and presented to the court and filed with the clerk, in whose office it shall remain a public record. In the case of an indictment not found "a true bill" against a person not so held, the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury.

(2) When an indictment indorsed "not a true bill" has been presented in court and filed, the effect thereof is to dismiss the charge; and the same cannot be again submitted to or inquired of by the grand jury unless the court so orders.

COMMENTARY

See Commentary following ORS 132.330. ORS 132.430 would need to be amended to avoid conflict with any provision that would preclude submission of a case to a grand jury after a bind over.

Section 11. ORS 132.440 is amended to read:

132.440. (Powers and duties other than inquiry into crime.) (1) [The] At least once yearly, a grand jury shall inquire into the condition and management of every public prison in the county and of the offices pertaining to the courts of justice therein.

(2) It is entitled to free access at all reasonable times to such prisons and offices and, without charge, to all public records in the county.

(3) The grand jury shall cause a report of inquiries made under this section to be made public.

COMMENTARY

A. Summary

ORS 132.440 is amended to provide for at least one grand jury a year and to further provide for a public disclosure of the report of the grand jury on public prisons.

B. Derivation

The amendments are an original draft.

C. Relationship to Existing Law

Subsection (1) is amended to require at least one grand jury per year whose function would be to investigate the public prisons. Under the optional indictment/information system, there will probably be some counties that do not have a grand jury convened within a year. Therefore, this statute is amended to provide for this eventuality. The grand jury, or some other public body, should inquire into the state of the prisons to determine whether adequate sanitation and living standards are maintained. This has traditionally been the responsibility of the grand jury, and it is continued in this draft, and strengthened by the publishing of its report in a newspaper. It seems desirable also to retain the authority of the grand jury to inquire into the operation of the "courts of justice" in the county because this improves citizen awareness of how the criminal justice system is functioning.

A new subsection (3) would specifically provide for public disclosure of the report on prison conditions.

Section 12. ORS 132.510 is amended to read:

132.510. (Forms and sufficiency of pleadings.) [All the forms of pleading in criminal actions heretofore existing are abolished; and hereafter] The forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are only those prescribed by the statutes relating to criminal procedure.

COMMENTARY

The amendment eliminates obsolete language relating to the ancient technical forms of pleading. There is no change in the thrust and the meaning of the law, and pleadings in criminal cases would continue to be entirely statutory.

Section 13. ORS 132.520 is amended to read:

132.520. (First pleading of state is indictment; contents.) The indictment [, which is the first pleading on the part of the state,] shall contain:

(1) The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties.

(2) A statement of the acts constituting the offense in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

COMMENTARY

The indictment would not be the first pleading of the state under the optional system of prosecution by either information or indictment. Should the optional system not be approved, the deleted language nevertheless would not be necessary.

(ORS 132.530 is not affected by this draft.)

132.530 Certainty required. The indictment must be direct and certain as to the party charged, the crime charged and the particular circumstances of the crime charged when such circumstances are necessary to constitute a complete crime.

Section 14. ORS 132.540 is amended to read:

132.540 Matters indictment must import; previous conviction not to be alleged; use of statutory language. (1) The indictment is sufficient if it can be understood therefrom that:

(a) It is entitled in a court having authority to receive it, though the name of the court is not accurately stated.

(b) It was found by a grand jury of the county in which the court was held.

(c) The defendant is named, or if his name cannot be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown.

(d) The crime was committed within the jurisdiction of the court, except where, as provided by law, the act, though done without the county in which the court is held, is triable therein.

(e) The crime was committed at some time prior to the finding of the indictment and within the time limited by law for the commencement of an action therefor.

(f) The act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, in such a manner as to enable a person of common understanding to know what is intended and with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case; provided, that the indictment shall not contain allegations that the defendant has previously been convicted of the violation of any statute which may subject him to enhanced penalties.

(g) The cause of a death or an injury is unknown to the grand jury, if such is the case.

(2) Words used in a statute to define a crime need not be strictly pursued in the indictment, but other words conveying the same meaning may be used.
[Amended by 1957 c.857 §1]

COMMENTARY

The amendment is for the purpose of making the statute consistent with pleading practice and Oregon case law. See State v. Schwensen, 237 Or 506, 392 P2d 328 (1964).

Section 15. ORS 132.550 is amended to read:

132.550. (Form.) The indictment [may be substantially in] shall contain the following [form]:

[The State of Oregon vs. A——— B———} Circuit Court for the County of ....., State of Oregon

A.B. is accused by the grand jury of the County of ———, by this indictment, of the crime of ——— (here insert the name of the crime, if it has one, such as treason, murder, arson, manslaughter, or the like; or if it is a crime having no general name, such as libel, assault, and battery, and the like, insert a brief description of it as given by law), committed as follows:]

[A.B., on the ——— day of ———, 19——, in the county aforesaid (here set forth the act charged as a crime).

Dated at ———, in the county aforesaid, the ——— day of ———, A.D. 19——.

(Signed): C.D., District Attorney.

(Indorsed): "A true bill."

(Signed) E.F., Foreman of the Grand Jury.]

(1) The name of the circuit court in which it is filed; and

(2) The title of the action; and

(3) A separate accusation or count addressed to each offense charged, if there be more than one; and

(4) A statement in each count that the grand jury accuses the defendant or defendants of a designated offense; and

(5) A statement in each count that the offense charged therein was committed in a designated county; and

(6) A statement in each count that the offense charged therein was committed on, or on or about, a designated date, or during a designated period of time; and

(7) A plain and concise factual statement in each count which, without allegations of an evidentiary nature, asserts facts supporting every element of the offense charged and the defendant's or defendants' commission thereof with sufficient precision to clearly apprise the defendant or defendants of the conduct which is the subject of the accusation; and

(8) The date and signature of the foreman or alternate foreman of the grand jury; and

(9) The date and signature of the district attorney.

COMMENTARY

ORS 132.550 is amended to modernize the language and allow the alternate foreman to sign the indictment. The amendment is derived from NYCPL s. 200.50. For further discussion regarding separate charges or counts (subsection (3)) see Commentary following ORS 132.560.

(ORS 132.560 is not affected by this draft.)

132.560 Joinder of counts and charges; consolidation of indictments. The indictment must charge but one crime, and in one form only, except that:

(1) Where the crime may be committed by the use of different means, the indictment may allege the means in the alternative.

(2) When there are several charges against any person or persons for the same act or transaction, instead of having several indictments, the whole may be joined in one indictment in several counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

COMMENTARY

ORS 132.560 (2) allows a "permissive" joinder of offenses that are part of the same act or transaction. The Supreme Court in State v. Huennekens, 245 Or 150, 420 P2d 384 (1966), stated that the same transaction would include crimes that are "concatenated in time, place and circumstances so that the evidence of one charge would be relevant and admissible with evidence of other charges."

Tentative Draft No. 1 on Former Jeopardy in section 1 (4) states the unit of required prosecution in terms of a "criminal episode." Criminal episode includes crimes that are connected in time, place and circumstance. However, for jeopardy purposes, it is narrower than the term, criminal "transaction" that is used in the above statute. The difference in definition is that a criminal episode is directed to a single criminal objective (compulsory joinder) while a criminal transaction would include crimes where evidence of one offense would be relevant to evidence of another crime (permissive joinder).

Section 16. ORS 132.570 is amended to read:

132.570. (Necessity of stating presumptions of law and matters judicially noticed.) Neither presumptions of law nor matters of which judicial notice is taken need be stated in an indictment or other accusatory instrument.

COMMENTARY

ORS 132.570 is amended to apply to an information or complaint as well as to indictments.

Section 17. ORS 132.580 is amended to read:

132.580. (Indorsement on indictment of name of witness before grand jury.) 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 indorsed thereon, before it is presented to the court. A witness examined before the grand jury whose name is not so indorsed shall not be permitted to testify at trial without the consent of the defendant.

COMMENTARY

This amendment codifies Oregon case law. If a witness testifies before the grand jury and he is to testify at the trial, the defendant should be aware of his existence. The statute does not now indicate the consequences of a failure to indorse a grand jury witness's name on the indictment.

The Oregon Supreme Court in State v. McDonald, 231 Or 24, 361 P2d 1001 (1961), stated that the purpose of indorsing the names of the witnesses upon the indictment is to advise the defendant of those persons who will give evidence at the trial. Therefore, the defendant could prepare an intelligent defense and avoid surprise. See also State v. Warren, 41 Or 348, 69 P 679 (1902).

The court in McDonald stated:

> "This is a substantial right that is inherent in the American judicial conception of fair play, but the enforcement for failure to comply with this mandatory requirement rests in the rule that a witness who has appeared before the grand jury may not, if his name is not endorsed on the indictment, testify at the trial over the objection of a defendant." 231 Or at 32.

(ORS 132.590 is not affected by this draft.)

132.590 Effect of nonprejudicial defects in form of indictment. No indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected, by reason of a defect or imperfection in a matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

Section 18. ORS 132.620 is amended to read:

132.620. (Place of crime in certain cases.) In an indictment for a crime committed as described in [ORS 131.320 to 131.380] (sections 2 and 3, Venue, Tentative Draft No. 1,) it is sufficient to allege that the crime was committed within the county where the indictment is found.

COMMENTARY

The amendment conforms existing law to the proposed changes in ORS chapter 131 relating to a crime commenced outside the state that is consummated within the state, where crime extends over more than one county, criminal nonsupport, crimes committed on water bordering on county, etc.

(ORS 132.610 and 132.630 to 132.990 are not affected by this draft.)

132.610 Time of crime. The precise time at which the crime was committed need not be stated in the indictment, but it may be alleged to have been committed at any time before the finding thereof and within the time in which an action may be commenced therefor, except where the time is a material ingredient in the crime.

132.630 Person injured or intended to be injured. When a crime involves the commission of or an attempt to commit a private injury and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured or intended to be injured is not material.

132.640 Description of animal. When a crime involves the taking of or injury to an animal, the indictment is sufficiently certain in that respect if it describes the animal by the common name of its class.

132.650 Private statute. In pleading a private statute or right derived therefrom in an indictment, it is sufficient to refer to the statute by its title and the day of its passage.

132.660 Judgments; facts conferring jurisdiction. In pleading in an indictment a judgment or other determination of or proceeding before a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment, determination or proceeding may be stated to have been duly given or made. The facts conferring jurisdiction, however, must be established on the trial.

132.670 Defamation. An indictment for criminal defamation need not set forth any extrinsic facts for the purpose of showing the application to the party defamed of the defamatory matter on which the indictment is founded; but it is sufficient to state generally that the same was published concerning him; and the fact that it was so published must be established on the trial.
[Amended by 1971 c.743 §319]

132.680 Forgery; misdescription of forged instrument. When an instrument which is the subject of an indictment for forgery has been destroyed or withheld by the act or procurement of the defendant and the fact of the destruction or withholding is alleged in the indictment and established on the trial, the misdescription of the instrument is immaterial.

132.690 Perjury. In an indictment for perjury, attempted perjury, solicitation of perjury or conspiracy to commit perjury it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, in what court or before whom the oath alleged to be false was taken and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment need set forth neither the pleadings, record or proceedings with which the oath is connected nor the commission or authority of the court or person before whom the perjury was committed.
[Amended by 1971 c.743 §320]

132.710 Construction of words and phrases used in indictment. The words used in an indictment must be construed in their usual acceptation in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

132.720 Fictitious or erroneous name; insertion of true name. When a defendant is indicted by a fictitious or erroneous name and in any stage of the proceedings his true name is discovered, it may be inserted in the subsequent proceedings, referring to the fact of his being indicted by the name mentioned in the indictment.

132.990 Premature inspection or disclosure of contents of indictment. Violation of ORS 132.420 or the prohibitions of ORS 132.410 is punishable as contempt.