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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

March 7, 1972

Minutes

Members Present: Judge James M. Burns, Chairman
Mr. Donald R. Blensly
Representative Norma Paulus

Excused: Mr. Donald E. Clark

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel

Others Present: Hon. Robert L. Gilliland, President, Oregon District Judges' Association
Hon. Thomas W. Hansen, Marion County District Court Judge
Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Marvin Weiser, ODAA Liaison Committee
Mr. William Snouffer, Chairman, American Civil Liberties Union
Mr. Greg Lowe, Deputy District Attorney, Multnomah County

Agenda: GENERAL DISCUSSION ON GRAND JURY

Judge James M. Burns, Chairman, called the meeting to order at 7:15 p.m. in Room 315 State Capitol.

Chairman Burns moved that the minutes of the subcommittee meeting of February 21, 1972 be approved as submitted. The motion carried.

Grand Jury in Oregon - Some Future Alternatives; February 1972

Mr. Paillette explained to the subcommittee that the grand jury involves an area that has not been encountered by the Commission in either the substantive or procedural revision in that it will concern itself with an Oregon constitutional provision and therefore, for the purpose of discussing policy questions and the issues and alternatives involved, the staff felt the research paper giving the background and alternatives of the grand jury would be more appropriate at this time than preparing a preliminary draft for consideration. Mr. Paillette said he was hopeful the subcommittee could form some guidelines or recommendations to submit to the full Commission at its March 9 meeting. Once the policy decision is made by the Commission, the staff will

proceed with preparation of the necessary Resolution if it wishes to recommend a constitutional amendment, as well as a possible rewrite of the procedural statutes on the grand jury.

Mr. Paillette introduced Mr. Marvin Weiser who was Chairman of the Bar Committee at the time it proposed HJR 12 and Mr. Chapin Milbank who is now Chairman of the Bar Committee on Criminal Law and Procedure and suggested they present to the subcommittee the Bar Committee's views on HJR 12 or some other proposals.

Mr. Weiser stated that at the time of the drafting of HJR 12, the Bar Committee was in favor of the limited, or optional grand jury whereby the grand jury would have been available either to the prosecutor or called on its own motion, and gave the prosecutor authority to file an information at his election. The Bar Committee felt this had the advantage of expediting criminal procedure and still retain the benefits of the grand jury. There are advantages to retaining the grand jury, he said, such as the independence of the grand jury. Many prosecutors would wish the grand jury to be available when they needed it, he said.

Mr. Paillette asked if the "independence of the grand jury" is mostly a myth. Mr. Weiser replied that it is unfortunate if it is but if this is true, it is through mishandling.

Chairman Burns asked Messrs. Lowe and Snouffer to express their views as to the independence of the grand jury.

Mr. Snouffer did not believe that it, as an institution, has very much independent function in Oregon or elsewhere. He referred to a 1931 study by Wayne Morse on grand juries and to his recollection the study showed a very small percentage of indictments originated because of the grand jury's initiative. It was Mr. Snouffer's belief that the grand jury is basically set up to operate for the court; it is run by the district attorneys and rarely do its members bring to the operation any independent knowledge.

Chairman Burns referred to the Morse study and suggested it be reviewed by Mr. Gustafson and his findings summarized and presented to the Commission at its meeting on Friday.

Mr. Lowe told the subcommittee that the statement has been made in the past that the grand jury is a rubber stamp for the district attorney's office which, if this meant indictments in every case, he would be in disagreement. In 90% of the cases, he said, the facts are such that there would be an indictment, and the remaining 10% will contain the disputes. Mr. Lowe continued to say that the type of personnel on the grand jury plays a major part, for example, quiet ones will indict as the cases are presented to them. The last grand jury, he said, was an independent group who not-trued indictments, two of which were over the district attorney's objections. In Multnomah County, he said, there is

some fair degree of screening which takes place before the district attorney ever gets the case. The case originally is presented to a district court deputy who decides whether or not to issue an information at the district court level or to send the case directly to the grand jury. This can be reviewed by the district attorney, however. If the district court deputy thinks it is strong enough and the district attorney disagrees, the case does not get presented. If it is presented, the grand jury deputy then reviews it and makes the decision as to whether or not it goes to the grand jury. This should be qualified, he said, as there are times the grand jury is used as a sounding board. The screening process of the grand jury is one of the great benefits.

Mr. Snouffer remarked that there are two features of the independence of the grand jury: (1) the rubber stamp aspect of it and the degree to which the grand jury does not follow the recommendations of the district attorney, and (2) the investigative aspect of the grand jury. Mr. Snouffer could recall only two investigative grand juries in recent history, one concerning the vice squad and the other with gambling, both of which investigations were at the direction of the district attorney's office.

Mr. Lowe observed that a provision is contained in the statutes that if the juror has knowledge of a crime, he is required to present it to the grand jury, and in his experience this has never happened. Other investigative aspects, he said, are extremely important to the prosecutor. He must have the subpena power available to him. Referring to Mr. Snouffer's comments regarding the two major investigations, Mr. Lowe said that there are many relatively minor investigations where the subpena is an extremely valuable tool for the prosecutor.

Mr. Blensly remarked that he did not know of any district attorney who would completely want to do away with the grand jury, as they all recognize the importance of the investigative aspects and the importance of using it as a sounding board in close cases, but expressed concern that one individual has the sole determination as to whether a person will or will not be charged with a crime, and this is why he somewhat favors the grand jury in that there will be seven persons who will be able to make a determination of the facts. Mr. Blensly called attention to the statement made by Mr. Lowe of the two not-true bills returned and that the recommendations of the district attorney were not followed. He said he is concerned that the district attorney makes these recommendations and objections. This is the duty and responsibility of the grand jury, Mr. Blensly reported, and that he does not make any recommendation and does all he can not to let the jurors know his thoughts in the case. If this happens, he said, there is no reason for having the grand jury.

Chairman Burns stated that by asking questions to a jury in a particular manner, they will be alerted as to the district attorney's feeling regarding the disposition of the case.

Representative Paulus was of the opinion that if certain facts come to the district attorney, his duty is to present them to the grand jury but this does not necessarily mean he accepts them.

As a practical matter, Mr. Paillette said, the district attorney can decide whether or not to take the case to the grand jury in the first instance. Chairman Burns responded that in a vast majority of the cases the grand jury does what the district attorney wishes, and basically, he did not see anything wrong with this.

Chairman Burns asked what the time would be for the average presentation to the grand jury. Mr. Blensly replied it would be approximately one-half hour; Mr. Lowe said about 15 minutes or less, depending on the facts.

Mr. Lowe reported two areas where the grand jury was beneficial to the accused, one being a child molesting case where the case was dropped because the facts were not there. If there was an information system, this information would be filed, he said, and although it may be dismissed in a subsequent preliminary hearing, the damage would have been done to the individual because he would be labeled a sex offender. The second situation would be a fraud case - allegations are made but the man later is cleared but still, in the eyes of his fellow businessmen, he is labeled an embezzler. This is why there is a need for a procedure whereby a case can be decided in relative secrecy, he contended.

Mr. Paillette asked if the District Attorneys' Association had taken a position on HJR 12. Mr. Blensly said the executive committee did favor the option. He did not recall anyone opposed to it although some were in favor of retaining the grand jury as is, and it was his recollection the committee had decided not to take a position.

Chairman Burns asked Judges Hansen and Gilliland if they had any comments to make regarding the grand jury.

Judge Hansen replied that anything the Commission could do would be an improvement on the present system. The grand jury could be able to indict the same way but there could also be a preliminary hearing and information system, he said, and that more flexibility is needed within the system. In Marion County, Judge Hansen reported, the district attorney wants the psychological effect of a grand jury indictment rather than a waiver when he is trying a case and the circuit court will not allow waiver of the indictment without the approval of the district attorney. Judge Hansen had no doubt that if the defendant is to get any protection at all, there should be a preliminary hearing.

Representative Paulus spoke of instances where the grand jury investigates such institutions as Fairview and juvenile homes and was of the opinion that if the grand jury does not serve this function well, ~~the investigative aspect should be strengthened, but as far as the~~ indictment on individual offenses was concerned, she remarked that the grand jury is an ineffectual mill.

Judge Gilliland felt there was a need for a system with subpena powers which, if the grand jury is abolished, the system would be totally without, but the grand jury, after a bind-over at that level, is completely superfluous. If a preliminary hearing is held before a magistrate capable of determining factually if the person should be charged with a particular crime, the system and public would be better served if, at that level it went to trial, he said.

Chairman Burns remarked that the preliminary hearing has been misshapen and distorted. The defense tries to use it for discovery and the state puts on the skinniest case possible to limit discovery. He said that from the standpoint of protecting the person charged from a capricious prosecutor, there should be a probable cause showing before the magistrate and if the probable cause exists, he should go to trial. He pointed out that the probable cause and discovery should not be confused and wrapped into one - discovery should be dealt with separately.

Chairman Burns stated that the court is running on the average of 25 days from arrest to indictment. With the 25 days for this process and the 30 days from arraignment in circuit court to trial, the district attorney is right against the 60-day limit. As the volume grows, Salem, Eugene, etc., will be faced with this very same problem.

Mr. Blensly said the problem is even greater in the smaller counties where there is one judge and also, the inability to keep the grand jury in session. He expressed the view that the grand jury layman is perfectly qualified to hear facts and determine the truth of these facts and decide if indictments should be returned, but to take this layman through the county jails and get into the area of institutional inspections is totally beyond the capability of the seven persons who have had no training, experience or knowledge in this area. On the other hand, he said, the fact that there is a body who can make investigations acts as a great lever over those persons who run these institutions.

Mr. Snouffer asked if any states have actually abolished grand juries. Michigan abolished the grand jury constitutionally but continued it as a legislative matter, Mr. Gustafson replied.

Mr. Blensly asked if any determination had been made for the cost of a grand jury in Oregon. Mr. Gustafson replied that a 1967 survey of district attorneys showed costs from $1200 to $250,000 per year.

Mr. Blensly reported that this raises one of the reasons why he leans toward the present system as opposed to the optional system. As a practical matter, he said, the cost factor will come into play expecially when the criminal system is financed by the county governments, and that gradually one will find that, on an optional basis, the grand jury will be used infrequently and finances would be one of the reasons for it.

Mr. Snouffer was of the opinion that if the grand jury becomes optional it will only be used for approximately 10% of the cases. With the 90% of the cases being routine, why should there be the extra time and paperwork factor involved, he said.

Mr. Paillette asked Mr. Snouffer if the ACLU had taken any position on HJR 12 and Mr. Snouffer was unaware of any stand taken.

The subcommittee recessed at 8:30 p.m., reconvening at 8:40 p.m.

Mr. Gustafson presented three alternatives to the grand jury system: (1) that the grand jury be abolished within the Constitution, leaving it a legislative matter as is the case in Michigan. If this were abolished, the Constitution could provide for an information and preliminary hearing; (2) insert a proposal similar to the California proposal to prosecute by information or by indictment, as may be prescribed by law. This is similar to HJR 12, which requires either a preliminary hearing or an indictment or a waiver of either one; (3) the Washington proposal which leaves everything to the legislature. Washington, he said, has seen fit to limit the grand jury only to matters dealing with corruption, called by majority vote of the judges in the county.

With the optional system, Mr. Gustafson said, the question could be raised as to whose decision it would be, the judges or the district attorneys. The opinionative research of Mrs. Lucy Schaefer indicated that 42% of 92 respondents believed the district attorney should have the option; 26% of those responding wanted the grand jury retained as it is and 9.8% thought it should be abolished. As to the type of amendment that would be best, he said, out of 72 responses 38.9% thought the Constitution should contain a redefined procedure and 30% believed the Constitution should merely specify whether there should be a grand jury.

Chairman Burns asked if the members of the subcommittee and those others present would express their thoughts concerning the grand jury, so that it could report to the full Commission on Friday if alternatives were deemed advisable.

Mr. Milbank was in favor of the optional system and would leave the option with the district attorney since he is the elected officer.

Mr. Lowe favored the optional system and leaving the option with the district attorney. A second possibility, he said, would be to call a second grand jury during the term under the provisions of ORS 132.020 if it is found to be necessary in order to expedite the cases. His preference, however, would be the optional system.

Mr. Snouffer felt it should not be exclusively within the district attorney's judgment whether or not a case should go through the grand jury. There will be instances where the court ought to have some control over whether the grand jury should investigate circumstances that a

district attorney may not be willing to investigate for a variety of reasons. Mr. Snouffer suggested that the public opposition to abandoning the grand jury has been because of the weight it has as an institution and as a buffer between the citizen and the actions of government. There may be instances, he said, where a defendant who is accused by the district attorney of a crime should have some right or choice to try to make his case before the grand jury before having to stand trial and run the risk of conviction. If there are instances where a defendant wishes to have his case before the grand jury, he should have that option. This would obviate the political opposition to eliminating the grand jury. Whether this should be in the Constitution or provided by the legislature, he did not know.

Representative Paulus asked for an explanation of HJR 12. Mr. Paillette responded that HJR 12 requires an indictment in circuit court unless the defendant has been held to answer. The amended version would allow the district attorney to proceed upon an information if the defendant had been held to answer, after preliminary hearing or waiver of preliminary hearing.

Chairman Burns said that under HJR 12, if the district attorney puts on a preliminary hearing and the defendant is bound over, that is sufficient, or if the defendant waives his preliminary hearing and is bound over, in either of those events an indictment is not needed. Under HJR 12 if he waives his preliminary hearing, he is, in effect, waiving his right to indictment.

Mr. Blensly felt it was important to do what has been done in HJR 12. It still retains the grand jury and gives control to the district attorney; it has the advantage of making it optional as 90% of these cases should not be going to the grand jury. One of Mr. Blensly's main concerns in criminal cases is the additional burden placed on the victim by requiring his presence before the grand jury after having preliminary hearings, etc. It is essential, he said, to have the probable cause hearing, and he would be opposed to a limited grand jury and bitterly opposed to any abolishment of the grand jury.

Representative Paulus was of the opinion HJR 12 should be rewritten to contain the same intent but contended that there was a need for more clarity in the language regarding the necessity of a preliminary hearing and when the district attorney can proceed on information.

Chairman Burns suggested the subcommittee continue with the intent of HJR 12 but allow the legislature some flexibility, or as an alternative rewrite the entire section. Chairman Burns stated that the investigative functions of the grand jury visiting the jails, etc, is vastly overrated. His experience with Rocky Butte jail, he said, has been with the grand jury continuously investigating the premises and not one change ever being accomplished. Whether it may have a limited value in Salem so far as visiting the state institutions, he did not know.

Mr. Blensly said his county, however, has had changes made because of the grand jury recommendations. There has been a juvenile home formed, changes made in construction of jails, but he still did not believe the grand jury has the expertise to make any value judgments. The changes they had recommended were of the obvious type.

Representative Paulus asked how a corrupt county or district attorney system would be handled.

Mr. Paillette replied this would be investigated by the grand jury; if there was a corrupt district attorney, the Attorney General has statutory authority and can convene the local grand jury. The second phase which the Commission will have to concern itself with in the area of grand juries, he said, would deal with chapter 132, the statutory law, and what changes the Commission would wish to recommend in that area. Mr. Paillette spoke of receiving several letters from district attorneys with respect to some of the questions and problems they have operating under the statutory law, one of which asked if the district attorney had the right to proceed if he did not have seven grand jurors present. There are a few ambiguities in the statutes, he said.

Chairman Burns spoke of another area which should be given attention and that is the problem presented by secret not-true bills. When the matter has not been originated by the preliminary hearing or bind over and is not-trued and later gets prosecuted, then there is no record of the first not true bill, which is a bar to the second indictment. In Multnomah County, he said, the district attorney keeps a file of these cases and when the case comes through the second time, hopefully, the file is checked.

It was the decision of the subcommittee to recommend to the Commission that it propose a constitutional amendment along the lines of HJR 12 with the district attorney having the option of either proceeding by information or indictment after a preliminary hearing. The first phase would be a proposed constitutional amendment and the second phase would concern itself with ORS chapter 132, statutory laws, i.e., investigation matters, secret not-true bills and other procedural matters.

The subcommittee members agreed they would next meet on Thursday, May 16, 1972 at 1:30 p.m. in Room 315 to discuss Pre-Trial Discovery, Preliminary Draft No. 1.

The meeting adjourned at 9:30 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission