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OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

April 8, 1972

Members Present: Mr. Bruce Spaulding, Acting Chairman
Mr. Donald R. Blensly
Mr. Donald E. Clark

Excused: Judge James M. Burns, Chairman
Representative Norma Paulus

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

Also Present: Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Larry Derr, Secretary, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Willard Fox, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Dave Hattrick, Deputy District Attorney, Multnomah County
Mr. Ray Robinette, Washington County District Attorney
Mr. John Hawkins, Capital Journal

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The meeting was called to order at 10:00 a.m. in Room 315 State Capitol by Mr. Bruce Spaulding serving as Acting Chairman in the absence of Judge Burns who was out of the state.

Approval of Minutes of Meeting of March 16, 1972

Mr. Clark moved that the minutes of the meeting of Subcommittee No. 3 of March 16, 1972, be approved as submitted. Motion carried unanimously.

Pleadings of Defendant; Plea Discussions and Agreements; Preliminary Draft No. 2; February 1972

Mr. Paillette recalled that the Commission at its meeting on March 9 had rereferred sections 10 and 12 of the draft on plea discussions to Subcommittee No. 3 for further study and for the purpose of making recommendations concerning the questions raised at that meeting.

Section 10. Discussion and agreement not admissible. The Commission voted to redraft section 10 in the following form:

> "(1) The fact that the defendant or his counsel and the district attorney engaged in plea discussions or made a plea agreement shall not be received in evidence for or against the defendant in any criminal or civil action or administrative proceeding.
>
> "(2) The provisions of subsection (1) will not apply if the defendant enters a plea of guilty or no contest which is not withdrawn."

Judge Burns had then suggested that the aspect of admissibility of statements was not completely covered by the draft and the Commission voted to rerefer section 10 to Subcommittee No. 3 for a recommendation as to whether the section should be broadened to exclude the disability of statements made during the course of plea negotiations. Mr. Paillette explained that the question, discussed at some length by the Commission, was whether it would really discourage plea negotiations if section 10 were adopted as set forth above. [Note: See Commission minutes, 3/9/72, pp. 26-29.]

Mr. Paillette advised that the Oregon State Bar Committee on Criminal Law and Procedure at its meeting on April 1 had thoroughly discussed section 10.

Mr. Milbank, Chairman of that committee, read from a rough draft of the minutes of the Bar committee meeting:

> "The members agreed that the content of the plea bargaining process including statements made by the defendant should not be admissible in later proceedings. However, the prohibition should be qualified to the extent

that if the defendant later testifies, he should not be allowed to make inconsistent statements unchecked by impeachment. The committee felt that the general rules for suppression and voluntariness of confession-type hearings should apply.

"The following motion was made and unanimously adopted:

"Section 10 should be amended to broaden its prohibition to include statements and admissions made by the defendant and his attorney during plea discussions and as a part of the plea agreement except to the extent that such statements and admissions become relevant for impeachment purposes at a subsequent trial."

Mr. Derr commented that section 10, as presently drafted, was concerned only with the fact that plea bargaining took place and did not go into the content of the bargaining process.

Chairman Spaulding expressed approval of the Bar committee's recommendation to include admissions made by the defendant or his attorney.

In view of the Fifth Amendment and the reasons for excluding statements made by the defendant, Mr. Blensly asked what basic rationale existed for excluding admissions by the defendant made during plea discussions. Chairman Spaulding replied that the procedure would discourage plea discussions. Mr. Paillette pointed out that at the Commission meeting both Judge Burns and Senator Yturri were of the opinion that if negotiations broke down and the trial followed, the district attorney should not be permitted to use the defendant's statements made during the course of those negotiations against him at trial.

Mr. Blensly opposed the Bar committee's recommendation to use the defendant's statements during the course of plea negotiations only for impeachment purposes. He asked why the Bar committee did not go one step further and permit those statements to be used at a perjury trial. Mr. Milbank replied that that aspect was not discussed. Mr. Blensly next asked if, under the Bar proposal, admissions made during plea negotiations could be used as substantive evidence at trial and received a negative reply from Chairman Spaulding and Mr. Paillette.

Mr. Clark was of the opinion that the negotiation process should be carefully protected to insure that it was a secret process where the discussions could be totally candid. He expressed approval of the section as proposed by the Commission.

Mr. Blensly said that the purpose of the criminal justice system was to present evidence to determine whether a person was guilty or innocent. He objected to throwing a cloak over plea negotiations by saying that anything that took place during that process was secret. If facts indicating guilt were found during negotiations and those facts could not be used, it was not accomplishing the ultimate goal of the criminal justice system. If the fact that the defendant's statements were to be admissible had some effect on plea negotiations, perhaps this was as it should be, he said.

Mr. Derr stated that from the defense attorney's standpoint, he would find no problem with a limited use of those statements. It would not be detrimental, he said, for the client to know that if he was not completely honest, his statements could come back to haunt him. Chairman Spaulding commented that a reputable defense counsel would not permit his client to testify differently than that counsel knew the facts to be and expressed the view that the Bar proposal was a good compromise.

Chairman Spaulding then asked if the reasons for keeping statements out of a civil action were the same as those applicable to a criminal action inasmuch as section 10 referred to both. Mr. Paillette replied that the section as originally drafted was limited to the fact that a discussion had taken place. Mr. Blensly said he believed the same reasoning would apply to civil and administrative proceedings as to a criminal action.

After further discussion, Mr. Clark moved that the staff be directed to draft language to accomplish the recommendation of the Bar committee with respect to section 10 as set forth on page 3 of these minutes. Motion carried. Voting for the motion: Clark, Chairman Spaulding. Voting no: Blensly.

Section 11. Withdrawn plea not admissible. Mr. Paillette pointed out that the Bar committee had proposed to break section 11 into two subsections. The first would retain the language of the original section 11 and subsection (2) would incorporate the amendment just adopted in section 10. Under section 11, he said, there could be a guilty plea where no negotiations had taken place and the section would also be applicable to an Alford type hearing.

Mr. Milbank explained that the Bar committee believed that the provisions of section 10 should also be applicable in cases where there had been no plea negotiation prior to the time the defendant entered a plea of guilty; in other words, the provisions of section 10 should extend to and be treated in the same manner as the situations covered by section 11.

Mr. Clark moved that section 11 be amended in accordance with the Bar committee's recommendations, i.e., that it should contain two

subsections: subsection (1) to retain the language of the original section 11; subsection (2) to incorporate the amendment to section 10 adopted by the subcommittee with regard to the inadmissibility of statements and admissions made by the defendant or his attorney during any proceedings relating to the entry of a plea of guilty, including the impeachment exception. Motion carried unanimously.

Section 12. Pleading to other offenses. Mr. Paillette explained that the purpose of section 12 was to allow the defendant to plead to several offenses committed or alleged to have been committed outside the county in which he was pleading. The Commission had raised a number of questions with respect to this procedure and had ultimately rereferred it to subcommittee. One question was concerned with waiver of venue, but the Commission members apparently did not feel that venue created a problem. It was also pointed out at that meeting that unless formal charges had been made against the defendant, a number of problems would be created when the provisions of the section were invoked. The Bar committee had discussed this point and agreed with the Commission. He read from the minutes of the Bar committee:

> "There was a strong unanimous feeling among the committee members that the section 12 procedure would be a very valuable one to have in the Criminal Procedure Code, but the committee felt that the procedure should be spelled out more carefully . . . . It was decided that a formal charge should exist in every case under this section. The following motion was unanimously adopted after discussion.
>
> "Section 12 should be amended as follows:
>
> "(1) Upon entry of a plea of guilty or no contest, or after conviction on a plea of not guilty, the defendant's counsel may request permission for the defendant to enter a plea of guilty or no contest as to any other crime [~~he has committed~~] with which he has been charged which is within the jurisdiction of coordinate courts of this state.
>
> "(2) With consent of the district attorney of the county in which the plea is to be entered, and upon written approval of the district attorney of the county in which the crime is charged [~~or could be charged~~], the court may allow the defendant to enter the plea.
>
> "(3) Entry of a plea as provided in this section constitutes a waiver of [~~:--(1)~~] venue, as to crimes committed in other counties of the state[~~;--and~~].
>
> "[~~(2) Formal charge as to offenses not yet charged.~~]"

Mr. Clark said he was in favor of keeping the procedure as simple as possible and a requirement that the defendant be formally charged only complicated the matter. Mr. Blensly explained that a formal charge was a necessity for several reasons, one being to protect the defendant's right of double jeopardy. Furthermore, almost any offense could be charged in several different forms, and a formal charge was needed so the person would know precisely what he was pleading to.

Mr. Blensly called attention to the phrase in subsection (1), "within the jurisdiction of coordinate courts." He asked if "jurisdiction" referred to an indictment placing the crime within the jurisdiction of the circuit court or to an information in district court. Unless there was a constitutional amendment, he said, this could create a problem on the constitutional indictment requirement. Mr. Paillette replied that if jurisdiction could be waived in County A, it could also be waived in County B. It was venue, not jurisdiction, that created the problem, he said, and clearly venue could be waived.

Mr. Derr explained that the Bar committee had discussed two entirely different approaches to the procedure under section 12. One was to change the venue requirement under existing law and transfer the entire case to the court where the plea was going to be entered. The other was to leave the case in each of the originating counties for record purposes and when the judge in the county in which the defendant was being held acted on each of the individual charges, he would be acting as a judge of the court where that charge originated. The Bar committee believed this latter proposal was the most reasonable way to handle the matter, and, if adopted, there would be no problem when the defendant waived indictment in the county in which he was found before a judge who was in effect acting as a judge of the other court.

Mr. Clark commented that the proposed procedure was less complex and less expensive than the present system. Mr. Paillette agreed and pointed out also that section 12 was permissive. Probably the most widespread use of the section would be in connection with check cases where a defendant had written a number of bad checks throughout the state. Mr. Clark remarked that it would probably be useful also where an individual had committed a number of house burglaries.

Mr. Paillette then read from the minutes further recommendations of the Bar committee:

> "Section 12 should be amended to include additional subsections describing procedure conforming to the following principles. Every criminal case will continue to originate in the county with the proper venue by formal charging document. At the request of the defendant and with the

approval of the various district attorneys as provided in the existing section 12, the entry of a guilty plea or plea of no contest and sentencing upon those pleas for several crimes committed in different counties may be consolidated in one county. Each participating originating county would forward a certified copy of the charging document together with the written consent of the local district attorney to the county in which the defendant is found. The case would retain the heading and all records would indicate that the case remained in the court of the originating county. If the judge in the county in which the defendant is found accepts the plea and imposes sentence, his original judgment order will be forwarded to the originating county for filing.

"The attorneys noted that under the present law a defendant cannot plead to an information without formally waiving indictment by the grand jury. This restriction could create practical difficulties in the operation of section 12. The committee felt that it would be consistent with the theory of procedure which it proposes for section 12 that the defendant should be allowed to appear in the county in which he is found to formally waive indictment by the grand jury in the county in which the crime is committed. In view of the fact that the court in the county in which the defendant is found is actually operating as an extension of the originating court this should not create a problem.

"The following motion was unanimously adopted:

"Section 12 should be amended to add a subsection providing that a defendant may appear in the county in which he is found to waive indictment by the grand jury of any county in which formal charges are filed or are to be filed.

"The committee discussed various ramifications of charges pending but not formally filed in connection with section 12. It was the consensus of opinion that such matters are not conducive to legislation."

Chairman Spaulding stated that apparently their conclusion was that there was no practical way to clean up charges on a wholesale basis unless the district attorney in the originating county filed a charge.

Mr. Blensly asked if there was a difference between "formal charge" and "charge" and questioned the necessity of including "formal" in the statute. Mr. Paillette replied that the term would probably ultimately be defined as a written accusatory instrument filed against

the defendant and whatever term was decided upon would then be made uniform throughout the code.

Mr. Blensly said the proposed section 12 directed that the judgment order be forwarded to the county where the crime occurred. He believed that all orders entered in that particular case -- arraignment, pleading order, etc. -- should be forwarded to the originating county. Mr. Derr indicated that this was the intent of the Bar committee.

Mr. Clark then moved that the recommendations of the Bar committee be adopted with respect to section 12, i.e., the amendments to subsections (1), (2) and (3) of section 12 set forth on page 5 of these minutes; the addition of a subsection describing a procedure whereby every criminal case will continue to originate in the county where the crime was committed as described in the first paragraph of the Bar minutes set forth on pages 6 and 7 of these minutes; and the addition of a subsection providing that a defendant may appear in the county in which he is found, to waive indictment by the grand jury of any county in which formal charges are filed or are to be filed. Motion carried unanimously.

Section 5. Determining accuracy of plea. Mr. Paillette indicated that the Commission had adopted section 5 and rejected alternate section 5 as set forth on page 7 of Preliminary Draft No. 2 because the majority felt that the alternate proposal gave too much latitude and that the defendant could enter a guilty plea to a crime that bore little, if any, relationship to the crime committed. The Bar committee discussed the Commission's decision and voted to continue to express support for the alternate section 5.

Mr. Blensly asked if the subcommittee had authority to reconsider section 5 in view of the Commission's decision to approve it and was told by Mr. Paillette that the authority existed and there was precedent for doing so, but the decision was up to the subcommittee as to whether they wished to reconsider the section.

Following an explanation by members of the Bar committee as to their reasons for supporting the broader latitude allowed by the alternate section 5, Mr. Clark moved that it be called to the attention of the Commission that the Bar committee had again raised the issue. Motion carried. Mr. Blensly abstained from voting.

Grand Jury and Indictments; Preliminary Draft No. 1; April 1972

Mr. Paillette explained that Preliminary Draft No. 1 contained amendments to ORS chapter 132. In addition, two proposed constitutional amendments had been prepared for the subcommittee's consideration, copies of which are attached hereto as Appendix A and Appendix B. He recapitulated the Commission's directive to the subcommittee

with respect to grand juries as set forth on pages 43 and 44 of the Commission minutes of March 10, 1972, and on page 12 of Preliminary Draft No. 1.

Mr. Paillette advised that if the Commission's recommendations were ultimately adopted, there would be some changes necessary in ORS chapter 132 in addition to those contained in the draft.

Section 1. ORS 132.030. Qualification; acceptance; excuse from service. ORS 132.040. Challenge to panel or individual juror. Mr. Gustafson advised that the amendments in ORS 132.030 modified the provisions of that section and incorporated ORS 132.040 because the two sections related to the same subject matter. The section was intended to make clear that it was the court that made the decision as to whether a grand juror was qualified to serve.

Chairman Spaulding inquired if this provision would eliminate the court's ability to challenge a grand juror after he had been sworn. Mr. Gustafson replied affirmatively and added that the provision made no change in existing law.

Section 2. ORS 132.050. Foreman. Mr. Gustafson explained that section 2 added provision for appointment of an alternate foreman inasmuch as the draft later provided that under certain circumstances a grand jury may be composed of five or six members. If the foreman were absent, this proposal would provide for appointment of an alternate foreman to act in his stead.

The subcommittee decided to study the entire draft before voting on approval or disapproval of individual sections.

Section 3. ORS 132.060. Oath or affirmation of jurors. Mr. Gustafson advised that the amendment to section 3 made clear that it was the court who administered the oath to the grand jurors.

Mr. Clark was of the opinion that the oath administered to grand jurors as set forth in the statute failed to recognize reality. Grand juries, he said, operated with a great deal of discretion and many times, although there was ample evidence to indicate that a crime had been committed, they made the judgment that it was not socially desirable to indict. The clause in the oath, "that you will indict upon the evidence before you according to the truth and the laws of this state, so help you God," made it mandatory that the grand jury return a true bill in such cases, he said.

Chairman Spaulding pointed out that section 10 on page 17 of the draft stated when a grand jury was required to indict.

Section 10. ORS 132.390. When the grand jury should indict. ORS 132.380. Whom the grand jury may indict or present. Mr. Gustafson explained that the draft contemplated repeal of ORS 132.380 because it contained essentially the same test as ORS 132.390. In ORS 132.390 "ought to" was changed to "shall" to indicate that the grand jury had no alternative to indictment once the evidence test had been fulfilled.

Mr. Gustafson disagreed with Mr. Clark's contention that the grand jury should not be forced to indict if for some reason they believed they should not. That purpose, he said, was served by the trial jury and they were the ones who should serve as the conscience of society. Mr. Clark replied that he was not necessarily advocating that the grand jury not be required to indict if the facts supported indictment but was saying that the oath did not recognize the realities of the system because the grand jury did exercise discretion. Chairman Spaulding agreed and added that most district attorneys so instructed the grand jury.

Mr. Fox asked if it was Mr. Gustafson's position that section 10 established a probable cause test and was told that ORS 132.380 appeared to be a probable cause test while ORS 132.390 set an evidence type test which made 132.380 unnecessary. Mr. Paillette commented that ORS 132.380 and 132.390 contained inconsistent tests, although 132.380 apparently was placed in the statutes for another purpose, namely, to indicate that whether or not there was a bind over, the grand jury could indict the individual.

Mr. Robinette remarked that it would make no difference in the grand jury room whether the verb was "ought to" or "shall" so long as the words "would warrant a conviction by the trial jury" were retained in the statute. That phrase, he said, left the grand jury discretion to bend with the social trend.

Mr. Clark said the oath seemed pretty clear to him when it said, "you will indict upon the evidence before you according to the truth and the laws of this state." Mr. Paillette explained that the oath was modified by the other provisions of ORS chapter 132. The jurors were sworn to follow the law, including the provisions of that chapter.

There followed a lengthy discussion of the policies followed by various district attorneys in presenting cases to the grand jury.

Mr. Paillette indicated that section 10 embodied a policy matter as to the kind of test the subcommittee wanted to place in the statute and the members might want to suggest an amendment later. Additional discussion on section 10 begins on page 25 of these minutes.

Section 4. ORS 132.090. Presence of persons at sittings or deliberations of jury. Mr. Gustafson explained that the first

amendment in section 4 changed "interrogation" to "examination" and the second deleted "a woman" and inserted "or other special attendant" which would include a woman. The amendment in subsection (2) would avoid the absurd result of barring women during deliberations or voting of the grand jury.

Mr. Gustafson said section 4 involved a basic policy decision as to the right of the accused and/or his counsel to appear at grand juries. He and Mr. Paillette had discussed that question and decided against including such a provision in this draft but agreed it should be discussed as a policy matter. If that course were adopted, section 4 would have to be amended to allow the presence of the accused and/or his counsel, and ORS 132.320 regarding consideration of evidence would also need to be amended.

Chairman Spaulding asked that the subcommittee bear that suggestion in mind and discuss it later.

Section 5. ORS 132.100. Oath to witness before grand jury. Mr. Gustafson noted that section 5 allowed the foreman or the clerk to administer an oath to the witness. If both the foreman and the clerk were absent, the revision to the section would permit any other grand juror to administer the oath.

Mr. Blensly commented that the phrase "may administer an oath" implied that the grand jury could hear unsworn testimony and asked if the subcommittee felt this should be permitted. Chairman Spaulding said he read the section to mean that someone was going to administer the oath and it may be someone other than the foreman.

Mr. Blensly maintained that the section, as drafted, left enough leeway that the grand jury would not be required to swear every witness. He questioned the necessity of administering an oath to every witness, particularly when they were conducting, for example, an investigation of prisons. Mr. Clark stated he had appeared before grand juries conducting that type of investigation and had not been sworn.

After further discussion, all three members of the subcommittee agreed that witnesses before the grand jury should be sworn in all cases.

Mr. Blensly moved to amend section 5 to read:

> "The foreman of the grand jury or, in his absence, any other grand juror shall administer an oath to any witness appearing before the grand jury."

The motion carried unanimously.

Section 6. ORS 132.110. Absence, disqualification or inability of juror. Mr. Gustafson explained that the amendment to section 6

would permit a grand jury to operate with less than seven members under "exigent circumstances" and eliminated an ambiguity between this section and ORS 132.100 where it was implied that less than seven jurors could hear testimony and indict.

Mr. Blensly asked if section 6 would require the absent juror to be discharged. Mr. Paillette replied that it did not change the original language "to take the place of a discharged juror" and was not meant to take care of the situation where a grand juror failed to show up for one day only. It was intended to apply to discharged jurors, he said.

Mr. Blensly next noted the amendment said that "the court may allow them to hear testimony" but it did not say they could act. He suggested it would eliminate an ambiguity to state that "the court may allow them to proceed."

Mr. Robinette commented that section 6 limited exigent circumstances only to those instances that prevented the drawing of a substitute grand juror. There might well be other exigent circumstances that would not necessarily prevent the drawing of a substitute grand juror. Mr. Blensly said that under this section a grand juror who was ill would have to be discharged before the grand jury could proceed with less than seven members. If a trial jury were sitting in the courthouse at the time, he observed that there was no reason why another grand juror should not be drawn to bring the grand jury back to seven members.

Mr. Robinette said he would rather work with an experienced grand juror than discharge one and bring in a new member. He wanted to change the statute to permit a temporary substitution when, for example, one juror became ill. It would be helpful, he said, to allow the experienced juror to return as soon as he was able to do so rather than to discharge him permanently. He would prefer, he said, to work with a six man grand jury for a short time and revert back to the original juror rather than to discharge him and appoint a substitute juror. In a long investigation, he said, it had sometimes been necessary to begin a case over again because the substitute juror was not present to hear all the testimony. Mr. Blensly stated that under section 6, in that situation it might be preferable to continue the investigation with a six member jury rather than to start again.

Mr. Paillette indicated that the purpose of the amendment in section 6 was to clear up the question raised by Mr. Wallace at the Commission meeting on March 10 concerning the course that should be taken when one or two members were absent and a replacement was not available. The section was intended to indicate that, if possible, there should be seven members, but five or six members could indict under exigent circumstances. It was not intended to go as far as Mr. Robinette suggested.

Mr. Blensly was of the opinion that if a substitute juror were readily available, the seventh member should be drawn. Mr. Clark said one reason for not drawing the seventh member would be to avoid the situation posed by Mr. Robinette where the case would have to be started over again. Mr. Blensly replied that he believed the court would construe that situation to be an "exigent circumstance" that would permit the case to be continued with less than seven members.

Mr. Paillette pointed out that the amendment was intended to say that the grand jury could indict with five members as long as the five who were voting had heard all the evidence. Whether or not a substitute juror was brought in, the case could be continued, but only the five who had heard all the evidence could vote.

Mr. Blensly suggested that the amended portion of section 6 be revised to read, " . . . prevent the drawing and attendance of a substitute grand juror . . . . " In his county, he said, the juror could be drawn but it might not be possible to have him in attendance on that day.

Mr. Derr commented that as section 6 was originally worded, the qualifications on the power of the judge to discharge a grand juror and draw a substitute were listed in subsections (1), (2) and (3). As presently worded, the section said that the judge may discharge the grand juror and draw another one provided those five continued under the exigent circumstances and provided the subsections (1), (2) and (3) situations existed. In other words, the three subsections modified the "provided, however," clause instead of the first clause.

At this point the subcommittee recessed for lunch and reconvened at 1:15 p.m. with the same members present. Also present for the afternoon session were Mr. Milbank, Mr. Derr, Mr. Robinette and Mr. Hattrick.

Mr. Blensly restated his previous motion and moved to revise the amended portion of section 6 to read:

> " . . . the court may allow them to proceed if exigent circumstances exist that prevent the drawing and attendance of a substitute grand juror . . . . "

Motion carried.

Chairman Spaulding asked if "discharge" should be deleted in the third line of the section. Mr. Blensly said he disagreed with Mr. Robinette that the juror should not be discharged and would oppose that amendment.

Mr. Blensly next commented that Mr. Derr's objection merited consideration. It was, he said, difficult to relate the wording on

the discharge of the grand juror to the requirements in the three subsections. Those requirements appeared to modify the proceeding with less than seven members. Mr. Paillette indicated that if that ambiguity existed, the section should be redrafted because subsections (1), (2) and (3) were intended to relate back to the power of the court to discharge a juror. It was not meant to say that the judge would have the power to discharge under any circumstances but only under the limitations of subsections (1), (2) and (3).

Mr. Blensly moved that the staff be directed to redraft section 6 to clarify the ambiguity discussed by Mr. Derr. Motion carried.

Mr. Clark was critical of the language in subsection (2), "Is related, by affinity or consanguinity within the third degree." Those words, he said, were not commonly used and were not likely to be readily understood by laymen reading the statute.

Following a discussion, Mr. Clark moved to amend subsection (2) to strike "affinity or consanguinity" and insert "marriage or blood". Motion failed. Voting for the motion: Clark. Voting no: Blensly and Chairman Spaulding.

ORS 132.120. Duration of session. Mr. Blensly disapproved of the opening sentence of ORS 132.120, "When the business of the grand jury is completed it must be discharged by the court." That could be construed, he said, to mean that when their business was completed at the end of the day, they were to be discharged. He indicated that some counties follow the practice of picking the grand jury on the last day of a jury session from the trial jurors in attendance and hold them over for the next session so that experienced jurors were acting as grand jurors. Question had been raised as to whether this was a proper procedure under the wording of ORS 132.120 which could be read to mean that grand jurors had to be picked from the jury then sitting and they could not be continued unless some particular piece of business was being held over; as soon as they had completed what they were working on, they must be discharged. That language should be clarified, he said, and probably should be tied to the term of the court.

Mr. Derr commented that to tie the jurors' term to the term of court would eliminate the practice Mr. Blensly had just described. Mr. Blensly answered that the court had the option to continue the jury for any reason it deemed desirable under the last portion of the section. If the judge deemed it desirable to have experienced grand jurors, he could draw the jurors from the previous term.

Various methods of wording the section were discussed to make it clear that the business of the grand jury was to run concurrently with the term of the court. Mr. Clark moved to amend ORS 132.120 to read:

"When the term of the [~~grand-jury~~] court is completed, [~~it~~] the grand jury must be discharged by the court; . . . . "

The motion carried unanimously.

ORS 132.130. Commission of crime after discharge of jury. Mr. Clark inquired if ORS 132.130 referred to small counties without a continuing grand jury. Mr. Blensly responded that he knew of no county that did not have a grand jury and observed that he could see no purpose in retaining the section.

Mr. Clark moved to delete ORS 132.130. Motion carried unanimously.

ORS 132.210. Immunity of jurors as to official conduct. Mr. Blensly asked whether ORS 132.210 would make a grand juror liable for a charge of contempt of court if he discussed something that happened in the grand jury room. The section said "while acting as such," and his question applied to the time that he was a member of the grand jury but was away from the jury room at the time he was discussing a matter that took place inside. Chairman Spaulding commented that the section didn't say he could not talk about the proceedings; it said he could not be questioned about them. Mr. Blensly replied that the oath he took as a grand juror said he shall not disclose that information. That situation could be handled as a contempt and he would be required to show cause. The show cause proceeding would necessitate making inquiry into something the juror said while acting as a grand juror. Perhaps, he said, he was not acting as a grand juror when he was outside the jury room.

Mr. Paillette stated he believed the intent of the section was to give the grand juror immunity so that he would not need to be concerned about having to answer later for something he did as a grand juror unless he lied while appearing as a witness before the grand jury.

Mr. Paillette then commented that the rationale would apply equally to both perjury and false swearing and suggested that the section be amended to include false swearing.

Mr. Clark suggested that the section be amended to read " . . . for perjury, false swearing or violation of oath . . . . " Mr. Blensly objected to including "violation of oath."

Mr. Blensly, after further discussion, said that the section could be interpreted to mean that the person was not acting as a grand juror when he made statements outside the jury room because that was not part of his official function as a grand juror. Mr. Milbank concurred that as soon as the indictment was out, there was no longer a need for secrecy.

Mr. Blensly then moved to amend ORS 132.210 to read:

" . . . except for [a] perjury or false swearing of which he may have been guilty . . . . "

Motion carried unanimously.

ORS 132.220. Disclosure by juror of testimony of witness examined by jury. Mr. Derr commented that subsection (1) of ORS 132.220 allowed a grand juror to testify for impeachment purposes at a trial but as a practical matter the only person who could make use of that provision was the district attorney because the defense had no way of knowing what was said at the grand jury session.

Mr. Milbank stated that, as a defense attorney, he had been tempted to subpena the foreman of the grand jury to sit in on the trial to determine if the testimony was the same as that heard by the grand jury, but he had never actually done so.

Mr. Derr commented that if that information were going to be made available either to the public generally or only when requested under certain circumstances, question then arose as to whether there should be a transcript made of the proceedings.

Mr. Paillette indicated that he and Mr. Gustafson had discussed this matter and Mr. Gustafson felt the court should be required to appoint a reporter. Mr. Paillette said he disagreed with that position because it flew in the face of the secrecy concept of the grand jury and the protection of the identity of innocent people. In the reporter system, he said, there was no half-way mark; either everything would have to be in the record or nothing. One possible alternative might be to give discretionary authority to someone to pick and choose what was going to be included.

Mr. Milbank asked Mr. Blensly under what circumstances he asked the circuit court for permission to make a record of grand jury proceedings and was told that in the usual case it was when the defendant appeared before the grand jury or occasionally when making a broad inquiry into a complicated case involving a large number of witnesses. Mr. Milbank asked if the grand jury then received a copy of the transcript and was told by Mr. Blensly that they did in some instances.

Mr. Paillette suggested that subsection (2) of ORS 132.220 be amended to add "or false swearing" after "perjury" to coincide with the amendment made to the previous section. Mr. Clark so moved and the motion carried unanimously.

ORS 132.310. Inquiry into crimes; presentation to court. Mr. Clark noted that ORS 132.310 failed to follow reality when it said,

"shall inquire into all crimes committed or triable in the county" inasmuch as grand juries certainly did not inquire into every crime. Mr. Blensly suggested this objection could be cured by changing "shall" to "may."

Mr. Milbank proposed that ORS 132.310 be deleted because the function of the grand jury was contained in ORS 132.010 which said it was "sworn to inquire of crimes committed or triable within the county from which they are selected." Mr. Blensly remarked that if ORS 132.310 were deleted, it might remove the only reference in the statute to the right of the grand jury to make a presentment rather than an indictment. Mr. Milbank noted that ORS 132.370 provided for presentment.

Mr. Robinette indicated that in some counties the district attorneys followed the practice of conducting a grand jury investigation and then presenting the report of that investigation to the court. In his county, he said, the court refused to act on such reports even though they related to public issues. Mr. Milbank advised that there was no statutory authority for the grand jury to make a report. Mr. Robinette agreed but said it was nonetheless being done in some counties at the present time.

Mr. Clark was of the opinion that the reporting function was a valuable one. Mr. Milbank concurred and suggested that provision be made for it in the statute. Mr. Robinette stated it could also be a dangerous procedure because someone could be accused of a wrongdoing and no forum was provided for clearing him of that accusation. Mr. Blensly said that in most cases a report clarified some area of concern rather than indicting a particular individual. The principle danger in such a procedure, he said, was that the grand jury might investigate something that was more properly a police function. It could create a situation where seven lay persons, who would receive a great deal of credence from the public, would make determinations that might better be made by professional law enforcement personnel. Chairman Spaulding said that to adopt such a provision would permit the grand jury to editorialize and he did not believe it was a proper function of the grand jury to issue editorials about suspicions of wrongdoing.

Mr. Gustafson noted that ORS 142.430 said that if a true bill was not found against a person, "the same, together with the minutes of the evidence in relation thereto, must be destroyed by the grand jury." Although the question being discussed did not concern an indictment, he said, this provision might be applicable insofar as a report of the grand jury was concerned by requiring that any minutes or other written memoranda be destroyed.

Mr. Blensly recalled that Judge Burns at the last meeting of the subcommittee had discussed the fact that the documents pertaining to a not true bill were destroyed and therefore there was no record of that transaction that would prevent that same charge from being brought against the individual at another term of the grand jury. One possible alternative, he said, would be for the court to keep a secret record as is presently done with adoption records.

Mr. Paillette commented that the principal reason for destroying such records was to protect the individual's reputation and that appeared to him to be a sound policy. He said he and Mr. Gustafson had discussed an approach whereby the minutes of the proceedings would be retained but kept secret, but the matter involved a difficult policy decision.

Mr. Blensly moved to amend ORS 132.310 to read:

> "The grand jury shall retire into a private room [~~,~~] and may inquire into [~~all~~] crimes committed or triable in the county . . . . "

Motion carried unanimously.

Section 7. ORS 132.320. Consideration of evidence. Mr. Gustafson explained that section 7 amended ORS 132.320 to allow a report or a copy of a report made by certain individuals or agencies to go into the grand jury without requiring the expert witnesses to appear in person. This procedure, he said, would save time and expense. Mr. Blensly agreed that there was no reason to question the trustworthiness of that type of evidence.

Mr. Clark inquired if the term "public servant or agency" would preclude the use of reports prepared by an independent laboratory since they were not public agencies. The subcommittee agreed that the term needed clarification and, upon motion by Mr. Clark, unanimously voted to delete "a public servant or agency, who is" from subsection (2).

Mr. Milbank advised that the amendment was based on the New York law, and the reason it was in the New York statute was because that state did not permit hearsay testimony before the grand jury. If Oregon adopted the New York law, this might then be the only hearsay testimony permitted. State v. McDonald, 231 Or 24, 361 P2d 1001 (1961), and several other cases on the same subject held that hearsay evidence before the grand jury was permissible in Oregon and if this New York statute were to be adopted, the Oregon court might be persuaded to say that there was only one area where hearsay evidence would be permitted before the grand jury and that was the copy of the report of an expert witness.

Mr. Milbank's next question concerned how the copy of the report would be appended to the indictment in lieu of indorsing the witness's name at the foot of the indictment. Mr. Robinette suggested that the name of the person preparing the report could be indorsed thereon with an identifying reference to the report, and the members agreed that procedure would be satisfactory.

In reply to a question by Mr. Paillette, Mr. Milbank explained that in the line of decisions he spoke of earlier with respect to hearsay evidence, the Supreme Court said they did not want to go behind the face of the indictment and that was why they would not permit inquiry as to the relevancy or the nature of the evidence before the grand jury.

Mr. Paillette read from State v. McDonald which held that ORS 132.320 was admonitory only but not mandatory. It further held that the fact that the grand jury may have been prejudiced by hearsay evidence or prejudicial publicity which it ought not to consider was not grounds for dismissing or quashing an indictment.

Mr. Milbank commented that one solution to the problem might be contained in section 17. Some district attorneys, he said, brought one witness to the grand jury and that was a policeman who had talked to a number of witnesses and who proceeded to repeat what each of them had said to him. If the statute required the names of the witnesses to be indorsed on the indictment and one witness came in with hearsay testimony, it defeated the whole purpose of the statute. McDonald held that the purpose of indorsing the names of the witnesses on the indictment was to enable the defendant to know the names of witnesses who would testify against him at trial. If hearsay was to be permitted, he suggested that the names of all persons who testified or whose testimony was given should be placed on the indictment.

Mr. Clark suggested that the discovery draft would answer a great many of the questions being discussed. Mr. Paillette replied that this might well be true, depending on the procedures finally adopted.

With respect to subsection (1), Mr. Clark asked if it meant that the grand jurors were not to be influenced by what they read in the newspapers or what they heard discussed about the case. Chairman Spaulding explained that it meant that they should not hear any incompetent evidence such as forced confessions or illegal search and seizure. His interpretation was that it did not necessarily exclude hearsay evidence because hearsay was competent evidence unless objected to.

Mr. Paillette explained that the amendment in subsection (1), "Except as provided in subsection (2) of this section," was intended to indicate that as a rule of evidence, there would ordinarily be someone there to lay the foundation for this kind of report; otherwise it would be hearsay. He was assuming, he said, that it was desirable

not to provide for hearsay as a statutory rule but at the same time the section was not meant to overrule McDonald.

Chairman Spaulding noted that subsection (3) involved the question of whether the defendant should have a right to appear before the grand jury. The matter was discussed briefly and the subcommittee agreed that subsection (3) should be approved as drafted.

ORS 132.330. Submission of indictment by district attorney. Mr. Gustafson called attention to the commentary to ORS 132.330 on page 12 of the draft stating that the section would need to be amended if Commission recommendations (1) and (2) were adopted.

Mr. Blensly remarked that he violated this statute several times a month because he took the defendant in and waived indictment by grand jury after he had been held to answer. Mr. Robinette said he followed the same practice and generally it was at the instigation of the defendant.

Mr. Blensly asked if there was any reason for retaining the section and Mr. Paillette replied that while subsection (1) was contrary to the recommendation approved by the Commission, subsection (2) should be retained in some form because it was consistent with the other directives of the Commission as to the optional system. Mr. Gustafson suggested that it might be possible to combine subsection (2) with ORS 132.340.

Mr. Clark moved to delete subsection (1) of ORS 132.330 and the motion carried unanimously.

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Mr. Clark then moved that subsection (2) of ORS 132.330 be combined with ORS 132.340. Mr. Blensly could see no advantage in combining the two statutes. Mr. Paillette said that subsection (2) might require an amendment later because it could be somewhat ambiguous in view of the statute yet to be written, should recommendations (1) and (2) of the Commission be adopted, to provide that the district attorney could not go to the grand jury after a preliminary hearing.

Mr. Robinette asked how, under recommendations (1) and (2), a case would be terminated that had been bound over following a preliminary hearing when later evidence appeared showing the defendant to be innocent. Mr. Paillette replied that the Commission did not intend to say that it was mandatory that the case be taken to the circuit court; it was meant to provide that the district attorney could not take it to the grand jury. In reply to Mr. Robinette, Chairman Spaulding advised that when the defendant was bound over, the prosecutor would file an information in the circuit court. If evidence then turned up to show that he was innocent, the district attorney could file a motion to dismiss.

Mr. Paillette commented that despite subsection (1) of ORS 132.330, some district attorneys at the present time just let the case lapse into limbo and did nothing further about it. There would be nothing to prevent that from happening under the Commission's proposal.

Mr. Blensly moved that subsection (2) of ORS 132.330 be retained subject to the understanding that if the Commission's proposal is adopted, it will have to be reworded. Motion carried unanimously.

Mr. Paillette noted that ORS 132.430, set out on page 19 of the draft, concerned the same area and embodied the same question concerning true bills because under the Commission's proposal there would not be a true bill following a bind over under the mandatory requirement to file an information after a bind over. Subsection (1) of that section would therefore have to be amended in the same manner as ORS 132.330.

ORS 132.340. Duties of district attorney to jury. No change was made in this section. For discussion on addition to commentary, see ORS 132.370 on page 25 of these minutes.

Section 8. ORS 132.350. Juror's knowledge of an offense; action thereon. Mr. Gustafson explained that the addition of subsection (3) to ORS 132.350 would prevent a grand juror who testified on a particular case from either voting on that case or being present when the vote was taken.

Mr. Blensly construed section 8 to say that when a grand juror testified before the grand jury, he could not then continue on as a grand juror and would have to be discharged. He based his contention on the fact that section 8 by implication said that the jury could proceed, deliberate and vote with less than seven, and the only provision for proceeding under those circumstances was contained in section 6 which required the juror to be discharged.

Mr. Paillette indicated that section 8 was not limited to testimony with a five man grand jury and that it was intended to apply only to the case on which the juror was testifying; it was not meant to imply that he had to be discharged in order to testify.

Mr. Blensly suggested that another subsection be added to section 8 to provide that the grand jury in this instance may proceed on that matter in the absence of the juror who was testifying. The provision would permit him to sit out on that one case but continue as a grand juror on other matters.

Mr. Paillette said that was precisely what section 8 was intended to do but if it was ambiguous, he proposed to follow Mr. Blensly's suggestion by adding a separate subsection to provide that notwithstanding the provisions of section 6, section 8 would not require the discharge of a grand juror who testified before the grand jury and to allow the grand jury to proceed in his absence on that case.

Mr. Blensly moved that the staff be directed to prepare wording to that effect and the motion carried unanimously.

Mr. Clark moved to amend subsection (1) of ORS 132.350 by changing "shall" to "may" in the last line of the subsection: " . . . who may thereupon investigate the same." Motion carried unanimously.

Section 9. ORS 132.360. Number of jurors required to concur. Mr. Blensly noted section 9 provided that the five jurors voting for an indictment must be the same jurors who heard all the testimony. The section, he said, made no provision for jurors voting for a not true bill. Mr. Gustafson said that if there were five jurors and only four voted for indictment, the result would be a not true bill. Mr. Blensly disagreed. That situation, he said, constituted a hung jury; in his opinion there had to be five to vote either way. Chairman Spaulding said he had always interpreted the statute that it was not a true bill unless there were five voting for indictment and Mr. Robinette concurred.

Mr. Milbank pointed out that the Constitution said, " . . . five of whom must concur to find an indictment." Therefore, Mr. Paillette said, if there were not five votes for an indictment, there was no indictment returned.

Mr. Blensly said he interpreted ORS 132.360 to mean that if five voted for a not true bill, it was presented as a not true bill whereas if less than five voted for a not true bill, the district attorney was not precluded from presenting the matter to the next grand jury for their consideration.

Mr. Derr suggested that the amended portion of section 9 be revised to read: " . . . provided that [~~the~~] five concurring jurors voting for indictment . . . . "

Mr. Hattrick called attention to ORS 132.370 which provided that the judge may be asked for advice and this was not a presentment in the common law sense of the word. In his opinion this was one of the district attorney's duties. Mr. Robinette said he had tried in the past to have a grand jury make a presentment because they sometimes asked him a point of law that would be decisive of the result of the grand jury action, but he had never been able to convince the grand jurors that they should make a presentment. Chairman Spaulding said the purpose of ORS 132.370 was probably to take care of instances where the grand jury would not take the district attorney's opinion as to the law and the judge could then be asked for instructions.

Mr. Gustafson suggested that the subcommittee might want to substitute the following section of the New York Criminal Procedure Law for ORS 132.370:

> "Legal advisers of the grand jury are the court and the district attorney. The grand jury may not seek or receive legal advice from any other source. Where necessary or appropriate, the court or the district attorney, or both, must instruct the grand jury concerning the law with respect to its duty or any matter before it."

Mr. Blensly agreed that the New York language was considerably shorter, but it did not provide a concrete step-by-step procedure for going to the court for advice as did the Oregon law. Mr. Clark expressed the view that the New York law was easier to understand than ORS 132.370. Chairman Spaulding concurred with Mr. Blensly that the Oregon statute was superior to New York's and that it was a useful procedure that should be retained.

With respect to ORS 132.360, Chairman Spaulding said there was a quesion in his mind as to the difference between "present a person" and "present facts to the court for information." The subcommittee discussed the utility of retaining the requirement to "present a person" and decided that the phrase was meaningless.

Mr. Blensly moved to delete "or present a person," from ORS 132.360. Motion carried unanimously.

Mr. Blensly next moved to revise the amended portion of ORS 132.360 to read: ", provided that five jurors voting for indictment or presentment are the same jurors . . . . "

Mr. Paillette suggested that the clause should read "voting on an indictment or presentment" rather than "voting for indictment or presentment." Chairman Spaulding commented that there was nothing in the Constitution or the statute requiring five to vote for a presentment. Mr. Paillette explained that the amendment was inserted in ORS 132.360 for the purpose of protecting the defendant. The restriction requiring five jurors to hear all the testimony was a good one and crucial to protecting a defendant when there were fewer than seven grand jurors, but the same argument did not apply to a presentment of facts.

Mr. Blensly said he would oppose Mr. Paillette's proposal to substitute "on" in place of "for" because the five voting for an indictment should have heard all the evidence. Mr. Paillette agreed and said that was the original purpose of the amendment, but he did not believe it applied to a presentment. Mr. Blensly contended that if five were required to return a presentment, those five should have heard all the testimony.

Mr. Derr explained that by changing "for" to "on," the section would require not only the five concurring jurors to have heard everything but all those entitled to vote to have heard all the testimony also. Mr. Blensly said he could see no reason why the jury should not be allowed to proceed with a six week investigation if one juror died on the last day; in that situation they should be permitted to complete the case and allow five to vote on all the evidence they had heard.

The language of the proposed amendment was discussed at considerable length after which Mr. Blensly moved to revise the amended portion of ORS 132.360 to read:

> ", provided that [~~the~~] five jurors voting for indictment or presentment are the same jurors who heard all the testimony relating to the person indicted or case presented."

The motion carried unanimously.

Mr. Paillette said he was not certain that the amendment just adopted solved the problem when there were more than five grand jurors voting. Chairman Spaulding thought striking the word "the" made it clear that there must be at least five.

Mr. Blensly said that instead of saying "or case presented" at the end of the amendment just adopted, it should read "or facts presented" to coincide with the language of ORS 132.370. Mr. Robinette said he would prefer to use the word "presentment" in the amendment because that word had a precise meaning and was used in the defining statute. He suggested that "or presentment" be substituted for "or case presented."

After further discussion, Chairman Spaulding directed the staff to prepare language to carry out the wishes of the subcommittee in accordance with the above discussion.

Mr. Hattrick commented that the term "presentment" as it was to be used in section 9 was not being applied in its common law sense and questioned whether it would cause confusion to use the term at all. Mr. Blensly pointed out that "presentment" was defined in the next statute. Chairman Spaulding expressed agreement that ORS 132.370 took the place of the common law presentment.

ORS 132.370. Presentment of facts to court for instruction as to law. Mr. Derr pointed out that ORS 132.340 contained a reference to a presentment that referred to the common law presentment inasmuch as the statutory presentment was not prepared by the district attorney. Mr. Blensly was of the opinion that it was a statutory presentment if ORS 132.340 gave the district attorney authority to prepare it. Mr. Spaulding commented that although the foreman was directed to make the presentment by ORS 132.370, under 132.340 it was presented by the foreman but the district attorney actually prepared it.

Mr. Paillette suggested that the problem could be resolved by placing commentary under ORS 132.340 to relate it to ORS 132.370 and the subcommittee agreed. Mr. Derr said that commentary could also be added to ORS 132.370 to make it clear that wherever the term "presentment" appeared in this chapter, it was intended to mean the procedure under this statute. The Chairman concurred with this suggestion. [Note: For previous discussion of ORS 132.370, see pages 22 and 23 of these minutes.]

Section 10. ORS 132.390. When the grand jury should indict. ORS 132.380. Whom the grand jury may indict or present. [Note: See page 10 of these minutes for earlier discussion of section 10.]

Mr. Clark pointed out that grand juries did not in fact always find an indictment even when a great preponderance of the evidence indicated the defendant was guilty. They exercised a great deal of discretion, he said, and the statute should make provision for that discretion. He suggested that either "ought to" be retained or that "shall" be changed to "may."

Mr. Paillette called attention to the phrase "in its judgment" which accomplished the goal proposed by Mr. Clark, and Mr. Blensly noted that the section said "warrant a conviction" rather than "sustain a conviction" which made a further distinction and gave the grand jury more leeway. He expressed the view that the statute as amended stated exactly the practice followed by grand juries and "shall" made it even more clear that they should not be exercising so much power to pardon guilty individuals. Chairman Spaulding agreed that grand juries exercised a great deal of discretion and properly so.

After further discussion, Mr. Clark moved to strike "shall" and insert "may" in ORS 132.390. Motion carried. Voting for the motion: Clark and Chairman Spaulding. Voting no: Blensly.

Mr. Gustafson commented that ORS 132.380 was essentially the same as 132.390 and this draft contemplated its repeal. Mr. Paillette noted that the commentary on page 18 of the draft said that if the Commission's policy is changed to allow the district attorney to go to the grand jury after a bind over, the phrase, "whether such person has been held to answer for such crime or not," should be restated in ORS 132.390.

Mr. Blensly opposed the repeal of ORS 132.380. The section, he said, answered the question of whether the grand jury had the power to indict after a person had been held to answer and related to the right of a person to have a preliminary hearing. He believed that, regardless of the approach finally adopted with respect to grand juries, the section should be retained and reworded along whatever lines were necessary to conform it to the balance of the draft. It was unanimously agreed, however, that "or present" should be deleted from the section in any case.

ORS 132.400. Indorsement of indictment as "a true bill." Mr. Clark asked if it would be appropriate to question the use of the terms "true bill" and "not true bill." Chairman Spaulding said it would be appropriate but he could think of no good reason why they should be changed. Those terms had been used for hundereds of years, he said. Mr. Clark observed it was language that was not commonly understood, and Chairman Spaulding thought the terms were not at all difficult to understand. After a brief discussion, the subcommittee agreed to introduce the subject to the Commission to determine if there was any support for Mr. Clark's proposal.

ORS 132.410. Presentation of indictment to court; filing; inspection. Mr. Robinette said he could see no practical necessity for having the foreman and the grand jury make a formal presentation of indictments to the court. Many times, he said, it was necessary for the grand jury to sit around and wait until the district attorney could get a judge to come to the courthouse so the foreman could personally hand the indictments to the judge. On some occasions when the grand jury had worked late, it was necessary to call them back the following day just for that purpose.

Mr. Blensly said he had encountered the same problem. The purpose of the statute, however, was to assure the grand jury that the indictments the judge received were those actually voted on.

Mr. Clark commented that everything that involved extra expense and that slowed down the wheels of government should be carefully scrutinized. Chairman Spaulding remarked that if something was wrong with the indictments, it would be discovered later in any event and the grand jury could be called back.

Mr. Clark moved to delete from ORS 132.410 "presented to the court by the foreman in the presence of the grand jury and". Motion carried unanimously.

Foreman of the grand jury. Mr. Paillette pointed out that inasmuch as this Article provided for an alternate foreman, it should contain a general statute providing that any duties of the foreman of a grand jury may be discharged by the alternate foreman. That section would be placed toward the front of the draft, he said. The subcommittee unanimously agreed, and the staff was instructed to draft such a section.

ORS 132.420. Disclosure by juror, reporter or officer relative to indictment not subject to inspection. Mr. Blensly commented that an officer of the court -- for example, the district attorney -- has a right to disclose information regarding indictments in order to effect the arrest of the person indicted or to tell the general public

to be wary of that particular individual. Mr. Robinette agreed that this statute had probably been violated by every district attorney. On the other hand, he said, the provision in this statute kept a lever on everyone concerned. He asked what could happen to a district attorney who violated the statute and was told by Mr. Paillette that violation was punishable as contempt.

Mr. Paillette inquired if the statute created a practical problem. Mr. Blensly said it was a problem to him to leave a law on the books that was constantly being violated.

Mr. Milbank was of the opinion that the facts disclosed should be at the district attorney's discretion. Mr. Blensly said the sheriff should also have that discretion.

A number of methods were suggested for amending the section to accomplish the purpose discussed by the subcommittee. Ultimately, Mr. Clark, at the Chairman's suggestion, moved that the staff be directed to prepare an amendment to ORS 132.420 along the following lines:

> "No grand juror, reporter or other person except the district attorney or a peace officer in the exercise of his duties in effecting an arrest shall disclose any fact concerning any indictment while it is not subject to public inspection."

Motion carried unanimously.

ORS 132.430. Finding against indictment; indorsement "not a true bill." Mr. Robinette said that in view of the amendment to ORS 132.410, subsection (1) of ORS 132.430 should be amended to read:

> " . . . which indorsement must be signed by the foreman [~~and presented to the court~~] and filed with the clerk . . . . "

The same type of amendment should be made in subsection (2) to make it consistent, he said.

Mr. Clark so moved and the motion carried without opposition.

Grand Jury; Proposed Constitutional Amendment; Rough Drafts Nos. 1 and 2

Mr. Paillette noted that it was now past 4:00 p.m. and since it was obvious that it was going to be impossible to complete this draft today, he suggested that the subcommittee consider the proposed constitutional amendments to give him an idea as to the approach they wished to adopt. As outlined earlier, the Commission had directed

that the subcommittee proceed with a consideration of the grand jury system along the lines of HJR 12, and the feeling appeared to be that the language of the Constitution should be somewhat modernized. With that directive in mind, Mr. Paillette indicated he had prepared two rough drafts. Rough Draft No. 1 [see Appendix A] was drafted in the form of an amendment to the existing language of the Constitution and retained as much of the original language as possible. Rough Draft No. 2 [see Appendix B] proposed to repeal section 5, Article VII, of the Constitution and adopt a new section in lieu thereof. The effect of either approach, however, would be to amend the Oregon Constitution.

Beginning with Rough Draft No. 1, Mr. Paillette explained the amendments contained in the first three subsections. Subsection (4), he noted, deleted misdemeanors and inserted felonies because the provision was applicable to circuit courts and therefore there was no need to retain the reference to misdemeanors in the Constitution.

Paragraph (a) of subsection (5) dealt with the waiver of an indictment while paragraph (b) dealt with the optional system. Mr. Paillette noted that paragraph (b) required a showing of probable cause. He recalled that Mr. Spaulding and Judge Burns had stressed the importance of the probable cause nature of the hearing at the Commission meeting on March 10. He was of the opinion that "probable cause" should be included in the Constitution. In this paragraph also he inserted the restriction, which may or may not be approved, that "if the person knowingly waives preliminary hearing, the district attorney shall not submit the case to the grand jury but may charge the person on information filed in circuit court." Under that provision the district attorney after a bind over at the preliminary hearing would be prevented from going to the grand jury, but he would not be required to file an information in circuit court; he would still have discretion as to whether he continued with the case.

Mr. Clark asked if there was a Commission directive to include all of the proposed language in the Constitution rather than leaving the amendments to the legislature. Mr. Paillette answered affirmatively. He added, however, that it was not the Commission's directive to include the restriction against the district attorney taking the case to the grand jury after the preliminary hearing. If that provision were adopted, however, it was his opinion that it would make the proposed constitutional amendment more understandable.

Mr. Blensly said he was totally opposed to that precept, as were a number of other district attorneys, and he believed that if it were to be approved, it should be placed in the statute where it could be changed by a means other than by vote of the people. He suggested that the last portion of paragraph (b) be amended to read, " . . . if the person knowingly waives preliminary hearing, the district attorney

may charge the person on information filed in circuit court." The requirement that "the district attorney shall not submit the case to the grand jury" could then be placed in the statute, he said. Mr. Paillette commented that the latter phrase was not included in Rough Draft No. 2; this was merely one possible approach.

Mr. Robinette observed that many of the district attorneys would object strenuously to the dilution of subpena powers. Once the subpena power had been used in the preliminary hearing, the only way a district attorney, upon discovering additional evidence, could properly prepare and assemble evidence was by grand jury subpena. Mr. Blensly also expressed disapproval of having the district judge set the exact charge on which the defendant would have to be tried. He said he would hate to see a provision such as that included in the Constitution.

Mr. Clark advocated that as much be omitted from the Constitution as was possible and still be consistent with the mandate of the full Commission. Mr. Paillette agreed and said his personal opinion was that the only thing that should be in the Constitution was a statement that the legislature shall provide by law for grand juries, but that probably would not be acceptable to the people in view of the past history of Oregon voters regarding similar constitutional amendments. Mr. Clark said there had been a decided change in attitude toward a number of matters involving the criminal law so far as the average citizen was concerned and the fact that the voters had turned down changes in the grand jury in the past did not necessarily mean that they would do so today. He added that the fact that the optional system would be less expensive would be another selling point to the public.

Mr. Blensly said he believed the general public had considerable respect for the grand jury system, perhaps even more than for the general court system. When a revision to that system was proposed, their first reaction was to vote against it, and before it could be passed, the voters would have to be convinced that change was needed.

Mr. Paillette then explained that Rough Draft No. 2 attempted to place the material in a logical sequence and retained all of the existing provisions but in a different format. Chairman Spaulding expressed approval of the format of Rough Draft No. 2.

The Chairman recalled that the Commission had directed the subcommittee to discuss the question of giving the magistrate the final word on the grade of the crime. Mr. Blensly agreed that was the directive of the Commission and reiterated his opinion that the provision, if adopted, should be statutory. Mr. Paillette read from page 46 of the minutes of the March 10 Commission meeting wherein Subcommittee No. 3 was directed to return to the Commission an alternate to recommendation (2) so the members would have two alternatives to consider.

Mr. Blensly moved that the staff prepare a statutory provision for implementing Commission recommendation (2) with an explanation of those changes that would have to be made throughout ORS chapter 132 and further moved that the subcommittee recommend that that proposal be rejected. No vote was taken on this motion.

In support of his motion, Mr. Blensly said that the Commission proposal without recommendation (2) was adequate. The district attorney could proceed by information if there were one of two probable cause hearings -- either the preliminary hearing or the grand jury hearing. If there were a preliminary hearing, the district attorney at his option could still go to the grand jury but he would not be required to do so.

Mr. Paillette asked for the subcommittee's opinion of the language contained in subsection (5) of Rough Draft No. 2 concerning the probable cause type of hearing.

Mr. Blensly asked what was wrong with saying, "In any case in which a person has a preliminary hearing before a magistrate and is held to answer on the charge," and deleting the probable cause language. Mr. Paillette replied that he felt it was stronger protection for the individual defendant to have the probable cause type of language in the Constitution.

Mr. Blensly said he was even more concerned with the phrase, "if the person knowingly waives preliminary hearing," which raised a question as to whether the waiver was knowing, intelligent, voluntary, etc. Mr. Paillette responded that even if "knowingly" were deleted, any time the Constitution or the statute spoke in terms of a waiver, the courts had consistently held that the provision required a knowing waiver.

With respect to the question of whether to provide by some means that the magistrate's decision after a preliminary hearing was binding on the district attorney as to what charge he must file against the defendant, Chairman Spaulding said he would oppose such a provision. The purpose of the preliminary hearing, he said, was not to make an ultimate decision of guilt or innocence, and the district attorney was not in many cases in a position to properly represent and present to the court society's side of the issue at that early time. The proposed course would require the magistrate to make a final decision that was binding on the state at a time when the state had not had a chance to put on its case reasonably and thus make a final determination of facts. Both Mr. Clark and Mr. Blensly expressed agreement with the Chairman's position.

Chairman Spaulding said he had given quite a lot of thought to the matter since the meeting of the Commission, and he was convinced that it did not make sense to bind the state at a preliminary hearing. The

purpose of the preliminary hearing, he said, was to determine if there was probable cause for holding the defendant for the grand jury, and the state should not be bound by something the district attorney may or may not be able to produce at that time.

The subcommittee unanimously agreed that the staff should draft an alternate proposal providing that the state would not be bound by the magistrate's decision at a preliminary hearing. After a preliminary hearing, the district attorney at his option would be permitted to go to the grand jury but he would not be required to do so.

Next Meeting

Mr. Paillette indicated that the members would be contacted by telephone to set a date for the next meeting which he was hopeful could be held within the next week or at least prior to the Commission meeting scheduled for April 22.

The meeting was adjourned at 4:45 p.m.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

CRIMINAL LAW REVISION COMMISSION

Grand Jury; Proposed Constitutional Amendment

(Rough Draft No. 1)

Be It Resolved by the Legislative Assembly of the State of Oregon:

Paragraph 1. Section 5, Article VII (Amended), Oregon Constitution, is amended to read:

Section 5. (1) In civil cases three-fourths of the jury may render a verdict. The Legislative Assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors [; and] .

(2) Out of the whole number of jurors in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment.

(3) [But] Provision may be made by law for drawing and summoning the grand jurors from the regular jury list at any time, separate from the panel of petit jurors, for empanelling more than one grand jury in a county and for the sitting of a grand jury during vacation as well as session of the court.

(4) No person shall be charged in any circuit court with the commission of any crime [or misdemeanor] defined or made punishable as a felony by any of the laws of this state, except upon indictment found by a grand jury or on information

filed by the district attorney as provided in subsection (5) of this section; provided, however, that any district attorney may file an amended indictment whenever an indictment has, by a ruling of the court, been held to be defective in form.

(5) [Provided further, however, that] (a) If any person appear before any judge of the circuit court and knowingly waive indictment, such person may be charged in such court with any [such] crime punishable as a felony [or misdemeanor] on information filed by the district attorney.

(b) In any case in which a person has a preliminary hearing before a magistrate and is held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person charged has committed it, or if the person knowingly waives preliminary hearing, the district attorney shall not submit the case to the grand jury, but may charge the person on information filed in circuit court.

(6) Such information shall be substantially in the form provided by law for indictments, and the procedure after the filing of such information shall be as provided by law upon indictment.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout the state.

CRIMINAL LAW REVISION COMMISSION

Grand Jury; Proposed Constitutional Amendment

(Rough Draft No. 2)

Be It Resolved by the Legislative Assembly of the State of Oregon:

Paragraph 1. Section 5, Article VII (Amended), Oregon Constitution, is repealed, and the following section is adopted in lieu thereof:

Section 5. (1) The Legislative Assembly shall provide by law for:

(a) Selecting juries and the qualifications of jurors;

(b) Drawing and summoning grand jurors from the regular jury list at any time, separate from the panel of petit jurors;

(c) Empaneling more than one grand jury in a county; and

(d) The sitting of a grand jury during vacation as well as session of the court.

(2) A grand jury shall consist of seven jurors chosen by lot from the whole number of jurors in attendance at the court, five of whom must concur to find an indictment.

(3) Except as provided in subsections (4) and (5) of this section, a person shall be charged in a circuit court with the commission of any crime punishable as a felony only on indictment by a grand jury.

(4) The district attorney may charge a person on information filed in circuit court of a crime punishable as a felony if the person appears before the judge of the circuit court and knowingly waives indictment.

(5) The district attorney may charge a person on an information filed in circuit court if, after a preliminary hearing before a magistrate, the person has been held to answer upon a showing of probable cause that a crime punishable as a felony has been committed and that the person has committed it, or if the person knowingly waives preliminary hearing.

(6) An information shall be substantially in the form provided by law for an indictment. The district attorney may file an amended indictment or information whenever, by a ruling of the court, it is held to be defective in form.

(7) In civil cases three-fourths of the jury may render a verdict.

Paragraph 2. The amendment proposed by this resolution shall be submitted to the people for their approval or rejection at the next regular general election held throughout the state.