OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

April 18, 1972

Minutes

Members Present: Representative Norma Paulus
Mr. Donald R. Blensly

Staff Present: Mr. Donald L. Paillette, Project Director

Others Present:
Mr. John Osburn, Solicitor General, Department of Justice
Mr. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Gregg Lowe, Multnomah County District Attorney's Office
Mr. Jack Dolan, Sheriff, Benton County
Mr. James W. Dolan, Chief Deputy, Benton County Sheriff's Office
Mr. J. Pat Horton, Board on Police Standards and Training
Mr. Ray Robinette, Washington County District Attorney
Mr. Mike Montgomery, Clackamas County Deputy District Attorney
Mr. John Hawkins, Capital Journal

The meeting was called to order at 3:15 p.m. by Representative Norma Paulus, Acting Chairman of Subcommittee No. 3, in Room 315 State Capitol. Mr. John Osburn, Solicitor General of the Department of Justice, represented Attorney General Lee Johnson at the meeting.

GRAND JURY: PROPOSED CONSTITUTIONAL AMENDMENT
Rough Drafts 1 and 2

Mr. Paillette explained to the subcommittee that at its meeting of April 8, 1972 it had discussed approximately three-fourths of the draft relating to Grand Jury, Chapter 132, and that today's meeting was only to discuss the constitutional amendment that would be required, or deemed desirable by the Commission to implement the optional grand jury - district attorney's information system.

Mr. Paillette referred to the proposal before the last legislature, HJR 12, and stated that one of the Commission's four directives was that the subcommittee proceed with a constitutional amendment along the lines of HJR 12, and to restructure the section, although he said the Bar Committee's position on HJR 12 was that they were attempting to displace as little of the sacred language as possible.

Each of the proposals to be presented today change the amended version of section 5, Article VII considerably more than did HJR 12, Mr. Paillette continued. Rough Draft No. 1 is a restructuring in style and is broken down in subsections dealing with it by subject matter in an attempt to make it more clear whereas it now runs together with respect to civil cases, criminal cases and grand juries. The language is essentially the same in subsections (1), (2) and (3). A change begins in subsection (4) where the language relating to misdemeanors is deleted and language inserted referring to felony and with respect to the district attorney's information.

Subsection (5) (a) is essentially the same as it now is in providing for a waiver of indictment but again restricts the reference to crime as crimes punishable as a felony. All language in paragraph (b) is new in the proposed subsection. This proposal incorporates the view of the Commission in that the district attorney, after a bind over, should not go to the grand jury. The draft places this restriction in the Constitution, whereas Rough Draft No. 2 does not, and if it were retained it would be dealt with as a statutory matter.

Mr. Paillette next referred to Rough Draft No. 2, which he reported to be completely different in form and would actually repeal the existing section 5, Article VII and enact a new one in lieu thereof. From the standpoint of drafting, it again breaks the section down into more understandable language and the subject matter would be easier to find.

Mr. Milbank commented that the Bar Committee had testified regarding HJR 12 and the concepts involved but it had not yet considered this language or approach. He believed it best to stay with an HJR 12 format as far as the structure was concerned. Rough Draft No. 2 would create controversy and that although he would be in favor of deleting the civil verdict, etc., it was his experience with a constitutional amendment that the least the language is touched and the purpose accomplished, the better off it is.

Mr. Paillette reported that under either of the versions before the subcommittee, the only place the actual substance of the Constitution is changed is with respect to the optional information system. If this were to be explained in a ballot title or explanation it would be essentially the same except for the restriction on the district attorney written into Draft No. 1. Although it may be easier to read and understand, the voters may be more suspicious because it looks different, he observed.

Chairman Paulus remarked that a selling job must be done on any constitutional revision and as long as this is necessary she felt it advisable to clarify it and make it as readable and workable as possible.

Mr. Paillette explained that "probable cause" language was placed in both versions and which he felt was desirable from the standpoint of quieting the fears of persons who would think their protections were being taken away or lessened by a constitutional amendment.

Mr. Milbank was of the opinion this would make it a great deal more difficult than the way the district court judges now view it. He spoke of a recent case of failure to show any sufficient evidence and still the defendant was bound over. The probable cause test would be a tougher test than is now employed, he believed. Mr. Blensly reported that in his county it had to be proven a crime was committed and probable cause to believe the defendant guilty.

Mr. Robinette asked if the two versions were related to HJR 12 and Mr. Paillette answered affirmatively. Mr. Robinette then asked which of the proposals was similar to HJR 12. Mr. Paillette explained that the similarity is that all three of the proposals would provide the district attorney with the option to file an information in circuit court after a preliminary hearing. The difference is that both draft versions use probable cause language whereas HJR 12 did not. The language proposed by the Bar Committee to the original version of HJR 12 reads:

> " . . . or if he has been held to answer upon the charge before a magistrate, such person may be charged in such court."

When the Resolution reached the floor of the Senate, where it failed, the language was amended to read:

> " . . . or if he has had or waived a preliminary hearing and has been held to answer . . . ."

Mr. Robinette said he could not see the importance of the language "had a preliminary hearing and bound over" or "held to answer." Where, if one of these is adopted and passed, is the remedy or is there any remedy to the problem in the preliminary hearing system, he asked. Mr. Robinette was uncertain there was any, and that language such as "probable cause" and the others will not make any difference from a practicing standpoint. It will not influence any committing magistrate in making any decision on a preliminary hearing.

Mr. Robinette next expressed concern over Draft No. 1 in that subsection (5) (b) contains the mandatory requirement that the district attorney shall not submit the case to the grand jury. Mr. Robinette

felt quite strongly about this language and believed the majority of the district attorneys would oppose this requirement. Mr. Paillette responded that at the March 10th Commission meeting this was one of the tentative decisions made and that the subcommittee was directed to proceed along this line, either through an amendment or statutory language. This is just a suggestion, he said. The problem, he said, is that whether it is in the constitution or not, there still must be an HJR 12 type of proposal.

Mr. Blensly observed that the only question is the restriction of whether or not the district attorney can go to the grand jury after a magistrate holds someone to answer. Even though the subcommittee had directions to prepare some form of this, he thought the subcommittee had decided not to place it in the Constitution and to prepare it as a separate draft. Mr. Paillette agreed to this statement, but said there still must be a constitutional proposal which the subcommittee can settle on.

Mr. Robinette again referred to Draft No. 1 and the words "punishable as a felony" in subsection (4). From a practical standpoint, he said, there have been certain misdemeanors which he desired to be handled by the circuit court because of what he felt was public importance and also because that is where it would go had the state prevailed in the district court. He asked the reason for this language in the draft and if it would restrict it to felony matters only in circuit court.

Mr. Paillette replied that it would not restrict it to felony matters only - it removes the requirement of charging by indictment or a waiver system a misdemeanor in circuit court. Under the existing section 5, Article 7, if one wants to go to circuit court on a misdemeanor there must be either a waiver of indictment or a grand jury indictment and Mr. Paillette said he did not see any reason for having the language with respect to misdemeanors in the proposed draft.

Mr. Robinette inquired as to how the state would initiate the matter in circuit court rather than district court if the word "misdemeanor" were deleted. He stated he did not wish to eliminate his right to take a misdemeanor into circuit court. He did not know if the draft will do this, but needed some assurance it did not.

Mr. Paillette replied the draft was not meant to allow this but if the interpretation is such, there should perhaps be other language added to both drafts to clarify it. His interpretation of the original language is that the restriction is directed at what type of crime can be charged in circuit court and how it can be charged and that he was attempting, through the draft, to remove any restriction with respect to misdemeanors. What is meant to be said is that the defendant could be charged in circuit court by an information without the preliminary hearing or without a waiver of indictment.

Mr. Blensly asked if the draft should go that far insofar as there may be problems selling the constitutional amendment. Mr. Paillette responded that he could not see what advantage there is to requiring an indictment in order to charge a misdemeanor in circuit court, to which Mr. Blensly inquired why there should be a distinction in circuit court as to the manner in which a misdemeanor can be charged as opposed to a felony. Because of the penalty that attaches, Mr. Paillette replied. Mr. Blensly then remarked that the basic reasons for the safeguards are the same whether the defendant goes to the county jail for one year or the penitentiary for two years.

Mr. Paillette contended that this would be saying that if the circuit court sends the defendant to the county jail for one year, the defendant would have to be indicted. If the district judge sentences the defendant to one year, it is just charged on a complaint. To require a grand jury indictment on a misdemeanor charge just because it is going to circuit court seems to him to be senseless.

Mr. Osburn stated that neither draft refers to what the grand jury may do. It simply provides those instances in which an indictment by a grand jury may be required to a felony. He did not know if it was in the Constitution that the grand jury can return an indictment in circuit court but felt this has always been assumed.

Mr. Milbank was of the opinion it was a waste of time and taxpayers' money to try misdemeanors in circuit court, to which Mr. Osburn responded that trying the defendant twice was just as bad.

Mr. Robinette remarked that Mr. Osburn's statement would be a factor in some cases which would be worthy of having the misdemeanor tried in circuit court. Mr. Paillette reported that if HJR 17 is approved then Senate Bill 450 will go into effect which will make the district court a court of record. Even then, Mr. Robinette said, in a certain class of misdemeanors he would wish to utilize the grand jury for its investigatory powers. It may be a misdemeanor but there may be records that the state could not get prior to subpoenaing the witness for trial. For these reasons he felt that, with discretion, misdemeanors are properly filed in circuit court.

Chairman Paulus asked the subcommittee for other examples where the misdemeanors would be filed in circuit court. All Marion County narcotics cases are brought to circuit court, Mr. Milbank said. There are cases such as a Curry County case where an assault and battery charged involved some of the County Commissioners and which would be an ideal case for the district attorney to present to the grand jury, Mr. Osburn related. He referred to an earlier case in Lane County where the Department of Agriculture wanted to charge a local bakery with violation of the balloon bread ordinance and said this is the type of thing where the misdemeanor charge would be brought to circuit court. Petty embezzlement on the part of a city councilman, assault and battery cases involving teachers versus pupils, election violation

cases, minor sex abuse cases would be other instances, Mr. Montgomery said, and besides avoiding a second trial, the protection is greater for both sides when going to the grand jury.

Chairman Paulus referred to Mr. Robinette's earlier statement regarding "probable cause." She asked if he was objecting because he did not feel this would do any good. Mr. Robinette replied that he was not objecting, but merely pointing out that he did not feel the effect will be noticeable to any degree.

Mr. Milbank referred to ORS 133.810:

> " . . . if it appears either that the crime has not been committed or that there is no sufficient cause to believe the defendant guilty thereof, the magistrate shall order the defendant to be discharged. . . ."

This is the negative statement, he said, and the positive is that if the crime is committed then there is "sufficient cause to believe the defendant guilty thereof." The tests that apply are varying, as there is the preponderance of the evidence test, probable cause, beyond a reasonable doubt, etc.

Mr. Paillette remarked that the Commission members at the March meeting were in general agreement that this should be a probable cause type of hearing and Mr. Robinette observed that in the majority of jurisdictions this is the test today.

Mr. Blensly referred to probable cause relating to the crime being committed, not that the defendant had committed it and Mr. Paillette advised the proposal responds to probable cause on both the defendant and the crime.

Mr. Robinette remarked that he had never engaged in a preliminary hearing where the fact of a crime had not first been established before deciding whether there was probable cause that the defendant committed it.

Where there is probable cause or something a little less than that, Mr. Paillette asked if the test was not the same with respect to the crime as well as the defendant as far as the state's burden at the preliminary hearing. Mr. Blensly responded that there is a greater burden for the crime.

Mr. Robinette stated that he had never heard mentioned in any preliminary hearing the terms "probable cause" or "reasonable doubt." His interpretation of the statute was that this is not a trial of the guilt or innocence of a person but solely a question for the judge to determine the answer to the grand jury. His court presently does not sign a bind over based on the fact of the existence of probable cause or reasonable doubt and he did not believe there was any requirement to do so. In his county the judge finds (1) a crime has been

committed and (2) there is probable cause to hold the defendant to answer. If this is being done, it is not according to the statute, Mr. Milbank pointed out.

Mr. Paillette commented that if so much confusion exists, there should be spelled out in the statute or constitutional amendment just what the burden of proof is.

Mr. Robinette disagreed with this suggestion as he said this is a court of inferior jurisdiction and not the trier of the fact. The court has to listen to certain facts but it is like a prima facie case and he knew the judges don't listen to defense evidence.

This does not answer Mr. Paillette's point, Mr. Blensly said, in that even though they are a court of lesser jurisdiction, why not put the standard to which they are to adhere before a defendant is held to answer. Mr. Robinette then asked what standard would be stated in the constitutional amendment and Mr. Osburn suggested "after he is held to answer." Mr. Blensly referred to "probable cause" and said the only thing he was afraid of in using this term was that the amendment may not be approved by using this term and stating "upon a showing of probable cause that a crime punishable as a felony has been committed...."

Mr. Robinette remarked that he did not have any objection to the term and felt it was a lessening of the present requirement.

Mr. Blensly referred to Draft No. 2, subsection (5) where it states: " . . . probable cause that a crime punishable as a felony has been committed and that the person has committed it, ..." His interpretation would be that it meant only probable cause that a crime has been committed, but it would have to be proven the person committed it without probable cause.

Chairman Paulus disagreed with this statement and said that the words "upon a showing of probable cause" would mean that the person would have to have committed it, but for further clarity, she was of the opinion the phrase should be repeated. Mr. Paillette remarked that it was clearly intended to apply to both.

Mr. Blensly referred to the last phrase of subsection (5) "or if the person knowingly waives preliminary hearing.", and in order to make the subsection more understandable he suggested the waiver clause be moved to the beginning of the paragraph.

Mr. Blensly expressed approval of Rough Draft No. 2 and favored the probable cause concept with the clarification in subsection (5). Chairman Paulus also favored the Draft No. 2 and by making the language more understandable, she felt the selling job to the legislature and the public would be a much easier task.

Mr. Osburn asked what benefit the constitutional amendment would be from the defense standpoint. Mr. Milbank said that hopefully, the district attorneys would stop using the grand jury so broadly and just go by straight information and get the case to trial quicker. Mr. Osburn then asked why the defense does not waive grand jury in every case in which it has had a preliminary hearing. The district attorney is unwilling to do this in Marion County unless there will be a guilty plea, Mr. Milbank responded.

Some district attorneys feel there is a tactful advantage also, Mr. Paillette pointed out. If the defendant is going to trial, they want the indictment.

Mr. Robinette observed that a preliminary hearing on a major case develops quite rapidly under the present system. There are many times that the state desires again to utilize the grand jury for further investigation before it gets to circuit court and without this opportunity he felt the district attorneys were losing a very valid and effective tool to further explore the case. It is not always a one-sided case, he said, as on occasions defense attorneys have requested the right to produce their client to testify, which has always been honored, and because of the disclosure of further evidence the grand jury has, at times, failed to indict. He again asserted he was not in favor of being shut off from the power of the subpena for investigative powers.

Mr. Osburn asked how many district attorneys decline to permit a defendant to waive grand jury if the case is going to be tried. The response from those attending the meeting was that this was the case in Marion, Yamhill and Polk Counties. Mr. Horton said that in Lane County generally the waiver is only used in plea negotiation situations.

Mr. James Dolan remarked that Benton County has never had problems getting directly to circuit court if the defendant wishes to waive either or both preliminary hearing or grand jury. One of the objections the police have in preliminary hearings now, he said, is that it is a miniature trial and takes far too long and the police feel it should only be required to show that a crime has been committed and that the person charged is a reasonable one to be charged in that particular crime. They do not feel that going beyond that should be required in this preliminary hearing. On some occasions, he related, it takes up to three hours on a very simple possession of drug case and they desire to see this shortened.

Mr. Paillette asked if this problem was because of the law or if Mr. Dolan felt it was because of the way it was being handled handled either by the court or the district attorney's office. Mr. Dolan replied that it was probably because of the judge's understanding

of the law and allowing defense attorneys to drag things out too much at that time. If it were spelled out more clearly in the law, perhaps this could be avoided.

Mr. Blensly asked if Mr. Dolan had any objections as to what was being attempted by the amendment which would be to do away with either the preliminary hearing or the grand jury and just have one step rather than both. Mr. Dolan said they had no objections but that they would still like to see the grand jury kept, if needed. In certain investigations where the state knows some person has evidence but is unwilling to furnish it, they would still wish to see the grand jury called to produce this evidence before trial time.

Mr. Osburn asked why a district attorney who opposes waiver of grand jury now would be in favor of either of these proposals. Mr. Blensly responded that the reason he is opposed to a waiver is because of a case in Polk County in which there was a question as to whether or not a waiver of grand jury involved the same original case, or whether or not the statute of limitations had run on it. If the indictment by grand jury is obtained there would be no question of that and it is just as easy when the facts are at hand to go to the grand jury. Mr. Blensly commented that he had no feeling on an ordinary case on a waiver as opposed to an indictment but felt this was a safeguard to prevent this situation from happening.

Mr. Horton referred to the standard employed by the district court on a bind over. He remarked that the notes of decisions in the annotations on ORS 133.810 (Discharge) reports:

> "The discharge of an accused on preliminary examination by a magistrate is prima facie evidence of want of probable cause for the arrest." Stamper v. Raymond, 38 Or 16, 35, 62 P 20 (1900).

On the other hand, he said, interpreting ORS 133.820 (Holding defendant to answer) it is reported:

> "If the magistrate is satisfied that the crime was committed, it is his duty to commit the accused notwithstanding irregularity in the proceedings before him." Merriman v. Morgan, 7 Or 68 (1879).

and further:

> "Under this section, the state must prove to the magistrate that the crime has been committed and make a prima facie showing that the accused is apparently guilty." State v. Belding, 43 Or 95, 71 P 330 (1903).

Apparently, Mr. Horton said, there is more than a probable cause standard, at least to the commission of a crime. In his experience, the district courts have not required this. It has been a probable cause showing of crime and a probable cause showing of guilt.

This gives evidence of the need for the insertion of probable cause, Chairman Paulus stated.

Mr. Montgomery asked what the subcommittee had done with the option of allowing the district attorney to go to the grand jury after a bind over, if he wishes. Mr. Paillette replied that the subcommittee will recommend to the Commission that it reverse the position it took in March.

Mr. Robinette said he would rather see the matter allowed to be presented directly to the grand jury. In presenting a homicide case, he said, the state knows there are certain types of physical evidence which are available but the witnesses are uncooperative. What justification, he asked would he have to call the grand jury just to subpena the records, if he is not presenting it for grand jury consideration after the defendant is held to answer to a crime. He believed this would be aborting all the reasons for having the grand jury.

Mr. Osburn expressed concern over Draft No. 1, subsection (5) (b), in that it is taking the problems of Ashe v. Swensen which has put a fear into all district attorneys that they must charge every crime by a multiple count indictment, because of the fear of former jeopardy questions, plus the State v. Willard question about merger of crimes. Mr. Osburn was uneasy about stirring those problems into the draft where it states the defendant has been held to answer for the crime and the grand jury cannot inquire into the case. The subcommittee already agreed to exclude this, Mr. Blensly said. Mr. Paillette remarked that after the Commission had given the subcommittee the four directives, it recognized these problems existed and that he expected it would agree with the subcommittee's recommendation that the restriction not be retained.

With regard to Draft No. 2, Mr. Osburn asked if it represents the maximum improvement which the subcommittee feels can be made in grand jury proceedings. Chairman Paulus replied that the draft is responsive to the directive the full Commission made, with the exception of the inclusion in Draft No. 1. The Commission did not feel it advisable to make grand juries completely statutory; it wanted to speed up the process, keep the investigative portion of it and encourage the use of informations as frequently as possible.

Mr. Osburn then asked if the draft accomplishes enough to make it worthwhile to go to the people and ask for a change which was primarily necessitated by the fact that the district attorneys have been traditionally reluctant to permit the defendant to waive grand jury. Mr. Blensly said he did not feel this is the point.

Mr. Lowe spoke of a policy started in Multnomah County on waiver of grand jury. In the last two months, he said he had only seen three cases which have come by way of grand jury. The defense Bar seems to want to go through the grand jury, he said. Mr. Montgomery was of the opinion some of the attorneys are afraid to waive it, especially those court-appointed attorneys not familiar with criminal cases.

Mr. Milbank reiterated his statement that he did not view the grand jury as adding anything to the defense case and if anything, it is probably a detriment. There is no way to challenge anything which goes on in the grand jury room.

Mr. Paillette pointed out that HJR 12 was not only supported by the Bar Association but also the ACLU. He did not believe Mr. Milbank was the exception as far as defense attorneys are concerned in his view toward the grand jury. Most feel that, from the standpoint of protection of the defendant, the grand jury offers very little.

Mr. Milbank referred to the side problems created by the grand jury - the double bond, constant return to court, and the delay. This is what should be eliminated, he said. Chairman Paulus remarked that this was the position taken by the ACLU. It is based solely on the speedy trial which they state is beneficial to both the accused and the public.

Mr. Robinette disagreed with this statement and said that he did not think 95% of the defendants want that speedy trial.

Mr. Blensly moved Draft No. 2 be approved as amended in subsection (5), with the probable cause language extending to the person and the waiver clause inserted at the beginning of the subsection.

Because of the problem raised earlier by Mr. Robinette, the subcommittee turned its attention to the deletion of "misdemeanor" in the drafts. This seems to be a two-part question, Mr. Paillette said, in that (1) is it necessary to require an indictment or a waiver in order to charge a misdemeanor in circuit court and (2) if this is decided to be unnecessary, is the language of the proposed constitutional amendment ambiguous and implies that a misdemeanor cannot be charged in circuit court.

Mr. Blensly then moved that the staff be directed to prepare a proposed statute to cover handling misdemeanors in circuit court.

Mr. Paillette asked if this would satisfy Mr. Robinette's objections to the questions he had raised earlier. Mr. Robinette did not know. He said that presently this is in the Constitution and he would have some hesitation in supporting the wording in the draft, not knowing at this point what the legislature may or may not do regarding

the proposed statutory law. It could, he said, decide that misdemeanors should not be in circuit court and he would be opposed to this concept. Mr. Blensly's motion would leave that concept up in the air, he said.

Mr. Paillette said that at this stage, all that can be done is to attempt to formulate a point of view for the Commission and hope that whatever procedure or revision submitted will hang together in the legislature. Any statutory language that would be proposed, he explained, would be dependent upon the passage of a constitutional amendment and would have to be written as a contingent type of statute in that it would not become effective unless the constitutional amendment passes. He again reported that his intention in drafting the proposal was to remove any requirement of indictment or waiver of indictment in order to charge a misdemeanor in circuit court. It was Mr. Paillette's belief that the statutory law should contain as much as possible, rather than the constitutional amendment. His reasoning for inserting the probable cause language, he said, was that he felt it would be a positive thing with respect to showing protection for a defendant.

A vote was then taken on Mr. Blensly's earlier motions to approve Draft No. 2, as amended, and that the staff be directed to draft a statute on charging of misdemeanors in circuit court. The motion carried.

The meeting adjourned at 4:45 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission