March 10, 1972

Members Present: Senator Anthony Yturri, Chairman
Senator John D. Burns, Vice Chairman
Mr. Donald R. Blensly
Judge James M. Burns
Senator Wallace P. Carson, Jr.
Mr. Robert W. Chandler
Representative George F. Cole
Representative Norma Paulus
Judge Herbert Schwab (Ex-Officio)
Mr. Bruce Spaulding

Excused: Mr. Donald E. Clark
Attorney General Lee Johnson
Representative Leigh T. Johnson
Representative Robert Stults

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel
Professor George M. Platt, Reporter

Also Present: Mr. Bernt A. Hansen, Office of Lane County District Attorney
Mr. David L. Hattrick, Deputy District Attorney Multnomah County
Mr. Gregg A. Lowe, Deputy District Attorney, Multnomah County
Mr. Larry Luta, Eugene
Mr. Douglas L. Melevin, Deputy District Attorney, Lane County
Mr. Mike Montgomery, Deputy District Attorney, Clackamas County
Mr. M. Chapin Milbank, Chairman, Oregon State Bar Committee on Criminal Law and Procedure
Mr. Scott Parker, Deputy District Attorney, Clackamas County
Mr. William N. Wallace, Curry County District Attorney

The meeting was called to order at 9:30 a.m. by Chairman Yturri.

Pleadings of Defendant; Plea Discussions and Agreements

Plea withdrawal. Mr. Paillette called attention to section 2.1 of the ABA standards set forth on page 39 of Preliminary Draft No. 1. Chairman Yturri indicated that this was discussed on the previous day and, as he had indicated at that time, it was his opinion that plea withdrawal standards should not be included as a part of the Commission's proposed draft. ORS 135.850, he said, should be retained and the commentary should state that the criteria for plea withdrawals would remain in the discretion of the court.

Judge Burns commented that the only sound reason for the court to refuse withdrawal would be in a situation where the state had brought witnesses from a great distance, they had been sent back home and the defendant then requested permission to withdraw his plea. It would be difficult and expensive to gather the witnesses again, and in that circumstance he thought there might be sufficient grounds to refuse his request. Normally, he said, it was simpler to allow the defendant to withdraw his plea and to do so avoided possible post-conviction problems.

Chairman Yturri asked if there were any post-conviction cases where the defendant had attempted to withdraw his plea and the court had denied his request. Judge Schwab said he believed there was one such case in which the higher court affirmed the trial judge's denial. Mr. Paillette indicated he had found two old cases, both of which held that denial was within the sound discretion of the court and the trial court's findings were not to be disturbed in the absence of the abuse of discretion. He added that it was not the intent of this draft to change the language of the present statute although it would be incorporated in the final draft along with ORS 135.830, 135.840 and 135.860.

Representative Cole recalled the discussion at yesterday's meeting wherein Judge Burns contended that plea agreements should not contain sentence concessions and that sentencing should be left to the discretion of the court. He said he tended to agree with that contention but was still concerned that a defendant might not be given an opportunity to withdraw his plea if the judge, instead of giving him two years probation, as an example, gave him ten years. Judge Burns said that so long as the defendant was told at the very outset that the sentence concessions were merely recommendations, that the judge was not bound by them, and so long as he was told the maximum sentence he could receive, his rights were protected.

Sections 10 and 12 of Preliminary Draft No. 2. Mr. Paillette recalled that sections 10 and 12 of Preliminary Draft No. 2 had been rereferred to Subcommittee No. 3. He asked whether it was the desire of the Commission that the staff proceed with the preparation of a Tentative Draft on plea bargaining or whether the Commission wished to withhold approval of the draft until the subcommittee had taken a position on those two sections. Chairman Yturri indicated that the subcommittee should consider the matter first and that the Commission would act on the entire draft after a reconsideration of those two sections.

With respect to section 10, Chairman Yturri recapitulated the discussion of the previous day and asked Judge Schwab if he thought statements made by the defendant during the course of plea bargaining or during the time he was before the court prior to trial should be admissible at trial. Judge Schwab said that if the defendant made a

statement before the court, it would be assumed that he had counsel with him, and at that juncture there would be no Miranda problem, so he believed the statements should be admissible. Mr. Spaulding agreed. Senator Burns, Mr. Chandler and Chairman Yturri expressed the opposing view.

Grand Jury

Mr. Paillette called attention to materials that had been furnished the Commission in connection with the subject of grand juries. One was a summary of the discussion of Subcommittee No. 3 [attached hereto as Appendix A] and the other was a paper prepared by Mr. Gustafson at the request of Judge Burns summarizing an Oregon Law Review article written by Wayne Morse that appeared in 1931 containing a summary of data and conclusions regarding the grand jury system. A copy of that summary is attached hereto as Appendix B. Mr. Gustafson had also prepared a reference paper dealing with some of the issues involved and some of the possible alternatives to the existing grand jury system.

Mr. Gustafson summarized the history of the grand jury system in Oregon including constitutional amendments which had been voted upon by the people. It seemed apparent, he said, judging from the proposals that had been rejected and adopted by the voters, that the people do not want a broad declaration of power in the Constitution allowing the legislature complete authority to prescribe whatever system it sees fit to adopt so far as grand juries are concerned. Subcommittee No. 3 had adopted this approach in its recommendations to the Commission.

Mr. Gustafson pointed out that there were four alternative proposals in the criminal procedure reference paper he had prepared. The first was complete elimination of the grand jury. If this approach were adopted, the second question would be whether to provide for an information and preliminary hearing in the Constitution. The third proposal was for a limited grand jury such as that in the State of Washington. The fourth option would be initiation of prosecution either by indictment or by information and preliminary hearing. The problem in this area was making the determination as to whether the district attorney, the court or the accused should have the option of commencing a prosecution.

Judge Burns indicated that a number of persons were present at the subcommittee meeting when grand juries were discussed and two of them, Mr. Milbank and Mr. Lowe, were also present at today's meeting. He asked that they be given an opportunity to present their views to the Commission. He first introduced Mr. Lowe, Deputy District Attorney for Multnomah County, who had recently been working with the grand jury where he had received a tremendous amount of experience because of the high caseload in that county. Last month, Judge Burns advised, Multnomah County had 261 indictments and they had been averaging between 180 and 200 per month for the past six months.

Mr. Lowe said he would first address himself to the oft-stated criticism that grand juries are a rubber stamp for the district attorney and a means by which he can control the strings of a puppet organization. In a properly administered grand jury, he said, that should not be the case. There were in his opinion very strong values to a grand jury system. One example concerned the case of a business fraud where it is a close question as to whether the state has enough evidence to prosecute. If operating strictly on an information basis, the state would probably go to a preliminary hearing in that situation. If the court determines there is not sufficient evidence and the case is dismissed, that individual -- a businessman -- is labeled a potential embezzler in the eyes of the public. The grand jury secret indictment can eliminate that possibility.

Another area where the grand jury is desirable, Mr. Lowe continued, involves accusations of sexual molestation of a child. There is no way to remove the taint on an individual accused of that kind of crime. If a preliminary hearing is held and the case is dismissed either because the child is fantasizing or because he or she is not a competent witness, the accused is still labeled a sex offender in the eyes of the public.

Another advantage of the grand jury is that it offers protection to witnesses. For example, disclosure of the identity of undercover police officers can be protected up until the time of trial by the use of the grand jury system.

Mr. Lowe said one of the most important values is the investigative and subpena powers of the grand jury covering not only organized crime and corruption factors but also the power to require the production of records in cases where administrators refuse to deliver them to the district attorney. In many instances it is impossible to proceed with a case without, for instance, bank records, hospital records or school attendance records.

Mr. Lowe stated that in his opinion there is no major reason why the average case -- the "caught inside" burglary, the fingerprint burglary, the majority of narcotics cases -- should have to go through the grand jury, particularly when a preliminary hearing has been held. If an optional system were in operation in Multnomah County, he estimated that 80 to 90% of the 200 cases they process per month would go by information, and only 20% would go to the grand jury because it is repetitive to have first a preliminary hearing and then send them to the grand jury. He said he would strongly favor an optional system.

Chairman Yturri asked Mr. Lowe if an amended version of HJR 12 would accommodate his views and was told that he believed it would. What he was proposing, Mr. Lowe said, would not require a major change

in the present procedure. He would like to retain the ability to indict after a preliminary hearing where the hearing results in a non-bind over, but in those cases where the defendant has been arrested and goes to a preliminary hearing, he believed the case should proceed directly to trial. In reply to a question by Chairman Yturri, Mr. Lowe said that if the optional system were available to the district attorney, the procedure would be speeded up tremendously.

Judge Burns commented that because of the new 60-day law, they had been watching the time factor in criminal cases very closely in Multnomah County. Presently it is running between 22 to 26 days from arrest to indictment in those cases in which there is an arrest, preliminary hearing, bind over and indictment, and much of that time is consumed by the various mechanical steps that must take place. Further time is consumed by the volume plus the necessity to obtain witnesses twice -- once for the preliminary hearing and once for the grand jury. The procedure makes it very difficult to comply with the 60-day rule, he said. His guess was that the period could be reduced to 15 days or less from the time the defendant is arrested to the time the case is ready to be assigned for trial in circuit court if the optional system were available. Mr. Lowe believed that the time could be reduced to less than 15 days and probably the defendant could appear in circuit court for arraignment on approximately the eighth day following arrest.

Chairman Yturri asked Mr. Lowe how he reacted to the argument that the defendant should have a right to have his case presented to a grand jury and was told that he favored that argument.

Chairman Yturri then commented that in certain areas in the state the practice is to submit the matter immediately to the grand jury to prevent a preliminary hearing and asked if that was the case in Multnomah County. Mr. Lowe said that it sometimes occurs, particularly in murder cases, the majority of which are indicted directly. The Chairman asked if that would still obtain if the optional system were adopted and received an affirmative reply from Mr. Lowe.

Senator Burns inquired if the subcommittee had considered discovery in connection with grand juries. Judge Burns replied they had not. Discovery, he said, was to be considered as a subject in and of itself and suggested that the Commission should bear in mind that basically the preliminary hearing was a poor discovery device. He advised that the proposal under discussion was not to eliminate preliminary hearings but to provide for a probable cause preliminary hearing in those cases where the district attorney chooses not to take the case to the grand jury but instead files in circuit court by way of information. That, he said, was the thrust of HJR 12. The probable cause hearing in that kind of a system serves the function of making sure that a person is not held to answer a charge without a magistrate scrutinizing the existence of probable cause and should not be confused with whether the preliminary hearing is or is not a good discovery device.

Chairman Yturri remarked that in attempting to reach a conclusion as to what disposition should be made of the grand jury system, it was important to know what was contemplated in the discovery area because the Commission might react one way if there was to be no discovery and another way if there was to be an adequate discovery procedure to supplant and improve upon the preliminary hearing. Judge Burns indicated complete agreement with the Chairman's statement. He was of the opinion that there should be a decent discovery procedure and added that the preliminary hearing had not proven to be a good discovery device. Mr. Spaulding said it was not intended to be one and Judge Burns agreed. He said the ultimate objective of the Commission should be to permit prosecution by way of information provided there was a true probable cause hearing and provided further that an adequate discovery procedure would be adopted.

Chairman Yturri expressed the view that it would be easier for the Commission to make a decision with respect to grand juries if a conclusion were first reached on discovery procedures.

Mr. Blensly said he would prefer to believe that discovery was a subject in and of itself and that the grand jury was a procedure whereby a person was charged with a crime. He believed the preliminary hearing was as good a discovery system for the prosecution as for the defendant but that the purpose of the grand jury or the purpose of the preliminary hearing was not discovery and it was wrong to think of either in that context. He indicated that the present system was a good system but he was not opposed to HJR 12.

Senator Carson suggested that if the Commission could tacitly agree that there should be some discovery technique in Oregon, then they could move on and treat the preliminary hearing as part of the indictment. He said he would be reluctant to leave the present system until he was assured there would be an adequate substitute.

After further discussion, the Commission was generally agreed that adequate discovery procedures should be enacted.

In response to the Chairman's request, Judge Burns outlined the provisions of HJR 12: instead of the Constitution saying that no person can be charged in circuit court except by indictment or by waiver thereof by the defendant, HJR 12 would provide that any charge may be filed in circuit court if the defendant waives indictment or if he has had a preliminary hearing, or waived a preliminary hearing, and in either event has been bound over by a magistrate. In other words, at the present time there is a preliminary hearing or a waiver and he is bound over to the grand jury. Under HJR 12 if there is a preliminary hearing, or if it is waived, and the defendant is bound over,the grand jury procedure could be by-passed, at the option of the district attorney, and the information could then be filed in circuit court. In that event the information would be the charging document.

Mr. Chandler asked how that system would take care of the secrecy need discussed by Mr. Lowe and was told by Judge Burns that HJR 12 would not remove from the district attorney the power to submit cases initially to the grand jury as in the case of a secret indictment. Mr. Chandler asked if the purpose of the grand jury was to protect the accused or to serve as another arm for the prosecution. Chairman Yturri said he believed at the present time it was a combination of the two. One purpose was to enable the prosecution to call certain witnesses that it couldn't hear without the grand jury and another was that it was a forum where the prosecution could wash out some of its cases. Mr. Spaulding added that in the latter situation the prosecution did not have to take the responsibility for "kicking out" those cases and that it also provided a means of trying out cases that the district attorney could not quite decide on. Chairman Yturri said in addition it protected an individual from having public knowledge disseminated with respect to a charge made against him.

Judge Schwab commented that it was important to make sure there was some sort of a judicial body to decide whether there was probable cause to put the defendant through the criminal process. The grand jury may or may not serve that function depending upon its sophistication, its awareness and depending upon the integrity of the prosecutor. A magistrate can perform the same function and probably perform it better. Certainly, he said, it seemed a waste of time to put through the grand jury the burglar caught in the act, the man found in possession, etc. He saw nothing wrong with using the grand jury as a legitimate investigative device from the standpoint of the district attorney bringing in a witness to establish probable cause because it was his duty to protect the public. If he did not produce sufficient evidence, the proceedings were secret and the man was not labeled, as he would be in a preliminary hearing. However, when probable cause was established and the district attorney had chosen to go the preliminary hearing route, he did not see why thereafter the district attorney should be able, at his option, to put the man through the grand jury. That was where he disagreed with HJR 12; at that point probable cause had been established and that was the end of that function. From there on if there were to be discovery, either for the state or for the defendant, it should be by a separate proceeding established by statute. Judge Schwab said he approved of HJR 12 in that it allowed the district attorney to go either the grand jury or preliminary hearing route at his option but after a preliminary hearing, he should not be able to go back and get an indictment.

Tape 6 - Side 2

Mr. Milbank said that as a defense attorney, he would support the optional grand jury system. He stated that in Marion County usually there were only one or two witnesses appearing before the grand jury and generally they were police officers who testified about their reports, ownership of the property, crime laboratory reports, etc.

To that extent the grand jury did not really get a complete picture. In Marion County, he said, there were virtually no preliminary hearings and, as a defense attorney, his practice was to waive preliminary hearings because he knew he would never get one anyway. He would prefer to get his cases into circuit court immediately on a set of facts but the grand jury process delayed that procedure. He agreed with Judge Schwab that at the outset of a criminal case there should be some independent judicial body to protect the accused.

Judge Schwab recapitulated Mr. Milbank's contention that in the majority of his cases there was probable cause as distinguished from proof beyond a reasonable doubt and that the best interests of his clients were protected by getting them before the court as soon as possible. What he would like to have was some kind of a reasonable discovery procedure at that stage and then go to trial. Mr. Milbank concurred that this was his contention and it was particularly true in court appointed counsel cases. He observed that his firm had neither the time nor the funds to conduct a full scale pre-trial investigation and they would like to have a discovery system so they could advise their client, for example, to plead guilty so they wouldn't be called back for post-conviction proceedings or habeas corpus proceedings and charged with incompetency because they didn't investigate exhaustively and in their best judgment recommend a plea of guilty.

Mr. Melevin advised that he had been deputy district attorney in Lane County for six years and their grand jury caseload in 1971 was approximately 100 cases per month. He said he generally agreed with the comments of Mr. Lowe concerning the function and operation of the grand jury. One problem that might be created by adoption of HJR 12 was that there would be a decided increase in the number of preliminary hearings in district court. Chairman Yturri commented that with adequate discovery procedures, there would be a number of cases where preliminary hearings would be waived. Mr. Melevin agreed but pointed out that it was a decided burden on the defendant to make him wait in jail while all the necessary mechanics were taking place, and this was particularly true in instances where he was eventually given probation.

Chairman Yturri asked Judge Burns if it was the subcommittee's view that the matter of grand juries should go back to subcommittee or that the full Commission should make a decision as to the course to be followed. Judge Burns replied that after a discussion similar to the one taking place in the Commission today, the members had expressed their notions concerning either the text or the spirit of HJR 12. They agreed that until the full Commission did likewise, both with respect to HJR 12 or possibly a complete rewrite of section 5, Article VII, of the Constitution and a rewrite of ORS chapter 132 dealing with indictments, they would not go further because it made more sense to get a broad policy statement before the staff did any drafting. He indicated that the subcommittee was told that for strategy purposes and to avoid unnecessary difficulty in getting the bill through the

legislature, the language of the Constitution in HJR 12 was left as nearly intact as possible. He was of the opinion that it was a mistake to take an already clumsy constitutional provision and add clumsy language to it. If it would not kill the chances of the bill's passage, he said he would prefer to rewrite section 5 of Article VII of the Constitution. Chairman Yturri expressed agreement.

Chairman Yturri next asked Mr. Lowe if he believed it was necessary to permit the district attorney to submit a matter to a grand jury once there had been a preliminary hearing resulting in a bind over. Mr. Lowe said he was not so sure that was a great necessity. Mr. Blensly remarked that if there was not a bind over, there would be a problem if a judge refused to hold the defendant to answer. Chairman Yturri asked why that would create a problem and was told by Mr. Blensly that it was because the judge was treated as having the final say in one circumstance where there was not a bind over but not in the other circumstance where there was a bind over.

Senator Burns said that earlier Mr. Blensly had argued in favor of grand jury subpena powers to subpena hospital records, bank records, etc. He outlined the procedure in civil cases where a person's deposition could be taken before filing a complaint and asked why a procedure such as that would not serve the same purpose so far as obtaining records was concerned without the necessity of the grand jury machinery. Mr. Blensly concurred that such a procedure would fulfill the same function. Judge Schwab commented that the deposition would of necessity be filed as a public record which would create the problem in certain types of cases of labeling the defendant. Senator Burns replied that the statute could provide that it not be a public proceeding. Judge Schwab said he did not like the idea of establishing secret judicial proceedings; secrecy should stop with the grand jury.

Senator Burns stated that an attempt was being made to expedite and speed up the system and, despite what had been said at today's meeting, he was of the opinion that in the large majority of cases the district attorney controlled the grand jury. Speaking to the optional system, Senator Burns said he was a strong supporter of the function the grand jury served in two particular types of cases. One was the situation involving a weak case where the defendant could go in and "wash the case out." The other was when a policeman killed someone in the line of duty. There, the grand jury system avoided many otherwise volatile problems. No one, he said, had spoken to the question of why the option should not be limited to the defendant. He asked why the proposal would not be improved if, rather than giving the option to the district attorney, the statute were to provide for indictment by information except in those cases where the defendant himself wanted to go to the grand jury.

Mr. William Wallace, Curry County District Attorney, said he would have no objection to Senator Burns' proposal provided the defendant waived the 60-day period. In a small county such as his,

he said, the judge was only in the county once a month and if the defendant were permitted to go to the grand jury at his option, the time schedules were such that the 60 day period would have expired before he could be brought to trial.

Mr. Wallace was of the opinion that a change in the present system probably would not be of as much assistance to the small counties as to the large ones. The grand jury in Curry County, he said, met once a month, two days before the judge was scheduled to arrive. He said he liked the grand jury system and liked to get the feelings of the people. He had been district attorney for five years and had never submitted a matter to the grand jury on which he did not expect to get a true bill. His only suggestion for improvement was that grand juries be empaneled for six months to give them an opportunity to gain more expertise.

Judge Schwab commented that discovery was still getting involved in the consideration of the grand jury problem and Senator Burns had raised that consideration when he spoke about the rights of the defendant. Because of the consequences of the criminal prosecution and the power of government, the law provided that a criminal case could not be filed against a man without first establishing probable cause to the satisfaction of an impartial, objective body -- either a magistrate or a grand jury. He said he did not see why this system should be made more cumbersome, at the option of the defendant, just so he could use the grand jury as a discovery proceeding. The question at issue, he said, was whether there should be a right of appeal on the part of the district attorney when the grand jury returned a not true bill or the magistrate found there was no probable cause.

Judge Burns said that as a practical matter in a volume operation, it frequently happened that the magistrate was extremely busy and if for some reason one particular witness failed to appear and the docket was such that the case could not be continued, the court would dismiss that case. That result was not really the fault of the district attorney and in such instances it would not be fair to say that at that point the prosecutor could not take the case before the grand jury.

Senator Burns asked Judge Schwab if he believed that the district attorney should be barred from filing another information against the defendant in a situation such as Judge Burns had just described. Judge Schwab replied that the point he had attempted to make earlier was that when the district attorney went to the grand jury after the court had dismissed the case or had not bound the defendant over, he was in effect appealing the magistrate's ruling. It was a strange aberration of the system, he said, to have an appeal from a judge to a grand jury and it created a possible tool for harassment.

Mr. Mike Montgomery, Clackamas County Deputy District Attorney, said it would be a disaster in his county if they were bound by the

ruling of the magistrate on serious felony cases. Sometimes they were given 24 hours notice to have all of their witnesses before the magistrate and this was not always possible. The magistrate might be having seven preliminary hearings that day and therefore didn't have time to consider the matter fully. He urged that the state not be precluded from seeking an indictment in cases where the magistrate did not bind over.

Mr. Chandler asked where the options should rest -- with the prosecutor, with the court or with the defendant -- assuming that an optional system was adopted. Judge Schwab answered that the options for establishing probable cause should rest with the prosecutor.

Chairman Yturri commented that the Commission was seeking an improvement in the system and if they did nothing other than to go along with a procedure similar to that contained in HJR 12, it would in effect eliminate approximately 80% of the cases from the grand jury proceeding. It would save time, money and would expedite trials. On the other hand, he said he could see Mr. Montgomery's point of view where a magistrate failed to see something in a serious case and held there was not probable cause. In that situation it seemed wrong that the state would then be foreclosed from further proceedings against that defendant.

Mr. Montgomery remarked that if the state were precluded from proceeding after the magistrate's ruling, they would probably indict 100% of the defendants rather than risk going through a preliminary hearing.

Mr. Melevin said that in a preliminary hearing where the defendant was not bound over, there were certain instances where a person arrested by a police officer on probable cause was brought in and the witness for some reason failed to appear or where there was insufficient evidence at that time. That did not necessarily mean, however, that at a later time more evidence might not come forward or be discovered. Chairman Yturri commented that he was convinced that Mr. Melevin's point of view was correct.

Following a recess, Judge Burns moved that the Commission direct that Subcommittee No. 3 be instructed to proceed to a consideration of a system along the following lines including the necessary redrafting of HJR 12, or its equivalent, and ORS chapter 132 to accomplish the following results:

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

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

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

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

The above recommendations would be adopted with the understanding that Subcommittee No. 3 will proceed to consideration and submission of a decent two-way discovery proceeding in criminal cases, Judge Burns said.

Mr. Blensly moved to amend recommendation (2) to read " . . . the district attorney may not, without the consent of the defendant, take the case before the grand jury. Judge Burns accepted the amendment.

Senator Burns questioned Mr. Blensly as to the effect of his amendment and asked if he meant that where there had been a waiver or a bind over and the district attorney wanted to go to the grand jury, he would have to get the consent of the defendant to do so. He further asked if he also meant that if the defendant wanted to go before the grand jury, he had the right to do so without the consent of the district attorney. Mr. Blensly answered affirmatively to the first question and negatively to the second. Senator Burns said he could not support the motion because he believed the defendant should be able to go before the grand jury if he wanted to do so.

Mr. Wallace said that under the present law the magistrate was not obliged to bind over on the charges filed by the district attorney. He can bind over on another charge, either a lesser or a greater one. He asked if under the proposal the district attorney would have to go to trial if there was a bind over on any charge. Mr. Blensly admitted that the district attorney would be bound by the magistrate's determination, whatever it might be.

Judge Schwab remarked that after listening to this discussion, it was obvious that the status of the magistrates was such that the members did not want district attorneys finally bound by their decisions, either by dismissing the charge or by binding over on a lesser or a greater charge. Therefore, if the Commission wanted to give the option to the district attorney to go either the grand jury or the preliminary hearing route in about 20% of the cases, he believed that HJR 12 was acceptable.

Mr. Blensly withdrew his motion to amend recommendation (2).

Mr. Chandler asked if the defendant anywhere in the recommendations proposed by Judge Burns had a right to insist upon going before the grand jury and received a negative reply from Judge Burns who added

that the proposal would not detract from any rights a defendant presently has inasmuch as he does not have a right to go to the grand jury at the present time. Mr. Chandler said he was not asking whether the defendant had a right to appear but whether he had a right to have a grand jury consider his case after he was bound over by the magistrate. Judge Burns indicated that he would not propose that that be the case.

Mr. Blensly pointed out that the defendant had a right to a jury trial but he did not have a right to say whether he was going to be charged with a crime.

Judge Schwab agreed that the defendant should have the right to have his case heard by the grand jury.

After further discussion, Senator Burns moved adoption of recommendation (1). Motion carried unanimously.

Representative Paulus moved adoption of recommendation (2). Motion carried.

With respect to recommendation (3), Senator Burns commented that the district attorney was being given two shots at the defendant. This was a manifestation of a lack of confidence in magistrates, he said, and asked why it would not save time and expense to allow the district attorney to file over again rather than requiring him to go to the grand jury. Judge Burns replied that in any busy court there would be numerous cases where the witnesses failed to show up and the cases would be dismissed for that reason alone. Therefore, as a reasonable device to take care of that slippage problem, he thought the provision was necessary.

Mr. Spaulding said it was a necessity also for the district attorney to be permitted to present to the grand jury more serious charges in those cases where the magistrate bound the defendant over for a lesser charge.

Judge Burns moved adoption of recommendation (3). Motion carried unanimously.

Judge Burns next moved adoption of recommendation (4). Motion carried. Mr. Chandler voted no.

Judge Burns moved that the staff be directed to proceed with the drafting of HJR 12, or its equivalent, and ORS chapter 132 in accordance with the guidelines just adopted by the Commission as set forth on pages 43 and 44 of these minutes.

Chairman Yturri asked if the Commission wanted to empower the legislature to modify grand jury powers by a constitutional amendment. The concensus was that no such amendment should be included in the revision.

With respect to recommendation (2), Mr. Spaulding indicated he had not voted on that portion because he was concerned that the magistrate might be able to sabotage the prosecution. Judge Burns said that the point raised by Mr. Spaulding and by Mr. Wallace was one that was worthy of consideration and when the matter came before the subcommittee, that particular area would be reexamined.

Chairman Yturri directed Subcommittee No. 3 to return to the Commission an alternate to recommendation (2) so that the members would have two alternatives to consider.

Mr. Chandler suggested that the subcommittee also reexamine recommendation (4). He was concerned that district attorneys in some counties would take everything to the grand jury just as they do at the present time which was not the intent of the Commission. Mr. Spaulding disagreed that this would be the case if the district attorney were permitted to file an information. Chairman Yturri added that in the run-of-the-mill cases there would be no occasion to submit them to a grand jury. Mr. Blensly commented also that if discovery were taken out of the grand jury as opposed to the preliminary hearing, that problem was eliminated.

Next Meeting

The Commission agreed to meet again on Saturday, April 22, 1972.

The meeting was adjourned at 12:00 noon.

Respectfully submitted,

Mildred E. Carpenter, Clerk
Criminal Law Revision Commission

Appendix A
March 10, 1972

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 3

March 7, 1972

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

Excused: Mr. Donald E. Clark

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

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

Agenda: GENERAL DISCUSSION ON GRAND JURY

SUMMARY OF DISCUSSION

Mr. Blensly in favor of HJR 12 which would still retain the grand jury, although he does not believe they have the expertise required to discharge some of the investigative functions, such as inspecting jails and other institutions. HJR 12 has the advantage of making it optional as 90% of these cases should not be going to the grand jury. Essential to provide the probable cause hearing.

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

Chairman Burns favors keeping HJR 12 and inserting language giving the legislature flexibility, or as an alternative, rewrite the entire section. Believes that investigative function of visiting jails, etc., overrated.

Mr. Milbank favors the optional system, leaving the district attorney the option to decide how to proceed in a given case, since he is the elected officer.

Mr. Lowe favors the optional system as set out in HJR 12.

Mr. Snouffer not in favor of it being exclusively within the judgment of the district attorney. Defendant accused should be given right to make his case before the grand jury before having to stand trial. Whether this should be in the Constitution or provided by the legislature, he did not know.

Mr. Weiser in favor of HJR 12 and safeguards for the defendant. Must have a probable cause hearing.

Judge Hansen thought anything the Commission could do would be an improvement on the present system. The grand jury could be able to indict the same way but also have a preliminary hearing and information system. More flexibility is needed.

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

Recommendations:

The subcommittee recommends to the Commission that it propose a Constitutional amendment along the lines of HJR 12 with the district attorney having the option of either proceeding by information or indictment after a preliminary hearing.

First phase to be a proposed Constitutional amendment.

Second phase would deal with ORS chapter 132, statutory laws, i.e., investigation matters, secret not-true bills and other procedural matters.

Appendix B
March 10, 1972

OREGON CRIMINAL LAW REVISION COMMISSION
311 State Capitol
Salem, Oregon

Subject: Morse, "A Survey of the Grand Jury System," 10 Or L Rev 295 (1931)

This survey analyzes 7,414 cases considered by grand juries in 21 states during the fall and winter terms of 1929-30 and reviewed questionnaire responses from 545 judges. Data on the cases was obtained from public prosecutors including 14 Oregon district attorneys, four Oregon Supreme Court Justices, and ten Oregon trial judges.

Summary of Data and Conclusions

Cases surveyed:

Total	7,414	
Liquor cases	1,633	22.0%
Non-liquor cases	5,781	77.9%

Crimes against property	57.1%
Crimes against persons	24.8%
Crimes against public morals and safety	18.11%

4.76% of 7,414 cases were initiated by grand juries;

16.57% of 7,061 cases initiated by prosecutor were "not true billed";

20. 4% of 353 cases initiated by the grand juries were "not true billed";

348 cases out of 6,453 cases (5.4%) the prosecutors disagreed as to the disposition;

206 charges out of 7,061 cases (2.9%) were changed on indictment;

The average cost per year per county in 1928 for the grand jury was $1,466;

237 judges expressed the view that grand juries spend enough time;

163 judges were of the opinion that grand juries do not spend enough time;

30 minutes per case was the average time the grand jury spent deliberating (estimated by the judges);

A majority of the 545 judges surveyed favored the exercise of some discretion in the selection of grand juries so as to secure a more competent personnel;

Many judges urged that the personnel of committing magistrates should be improved. Inexperience of the prosecutor and lack of legal training of the magistrate are the main problems;

There appears to be no difference between investigations conducted pursuant to an indictment or an information;

The indictment method causes considerable delay in the prosecution of criminal cases with resultant weakening of the state's position;

The information system is decidedly superior to the indictment method from the standpoint of speed;

In most jurisdictions, prosecutors can amend indictments as to form but not as to substance;

Grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval the wishes of the prosecutor;

A majority of the judges concurred with the recommendation of the American Law Institute that a transcript of the testimony given at the grand jury hearing should be prepared to help reduce the amount of perjury;

The grand jury can be an effective instrument for the investigation of political fraud and corruption and does serve as a constant warning to public officials that they cannot escape public scrutiny;

The information system centers upon the prosecutor the responsibility for initiating criminal prosecutions. The indictment method provides the prosecutor with a scapegoat.

The cumulative effect of the evidence and data presented in this survey supports the conclusion that from the standpoints of efficiency, speed, economy and the fixing of responsibility, the dual method of initiating criminal prosecutions is much to be preferred to the indictment method used alone. Under the dual method the grand jury always exists in the background as a possible check on any officer, or group of officers, who fail to keep faith with the public. It is recommended that a grand jury should be convened whenever the judge believes that it can be of value in the investigation of criminal cases, or whenever the prosecutor asks the judge for the assistance of a grand jury.