Appendix C

CIRCUIT COURT OF OREGON
FOR BENTON COUNTY

ROBERT S. GARDNER
CIRCUIT JUDGE

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BENTON COUNTY COURTHOUSE

May 30, 2001

RE: State v. Tina Martin, et al
Josephine County Case No. 00CR0682

Counsel:

On March 22, April 19, and May 24, 2001, the court heard evidence and arguments on the defense's Motions to Dismiss, Quash or Set Aside Indictment and on the defense's Motions for Discovery. All cases in which the motions were filed were consolidated in the *Tina Martin* case.

As usual, in cases where there are substantial legal issues, I wish that I had more time and resources. However, it is important that you promptly receive my decision. If I were to delay my decision, not only would a considerable number of criminal cases continue in limbo, but my own schedule would focus my attentions on other cases and other legal issues. I am confident that I am reaching the right decision under the existing law and facts; however, I would, of course, prefer to have more time to work on my decision letter so that I could perhaps better and more concisely articulate the reasons for my decisions.

I have written some additional comments, which include some findings of fact, and these additional comments are incorporated as Appendix A to this decision letter. Unfortunately, these additional comments are wordy and a bit repetitious.

I. What Did the District Attorney's Office Do That Was Wrong or Improper?

The defense raised three areas of alleged wrong or improper actions: The District Attorney's own orientation of the grand jury; the District Attorney's process for excusing certain jurors who told him they could not fairly hear sex abuse cases; and the District Attorney allowing narcotics enforcement officers and child sex abuse advocates to conduct their own orientations for the grand jury.

For the reasons stated in Appendix A, the court concludes that the District Attorney's own orientation was not wrong or improper and did not violate any statutory or constitutional provision. Also, the District Attorney's action in referring several grand jurors over a number of years to the

court to be excused because those grand jurors indicated to the District Attorney that they could not fairly hear sex abuse cases is not grounds for setting aside the indictments.

The special orientations raise more significant issues. The court concludes that they were improper and should not have been allowed to occur. The aspects of those orientations, particularly of the child sex abuse orientation, that are of most concern to the court are discussed at greater length in Appendix A. A summary here will suffice:

1. The District Attorney's office allowed persons who were not witnesses and not sworn as witnesses to give information to the grand jury that was material to the grand jury's decision to return an indictment. The grand jury did not request the information nor did they have a choice about hearing it.

2. The District Attorney's office allowed evidence that would not have been admissible before a trial jury to come before the grand jury. For example, that child victims' almost always testify truthfully about sex abuse.

3. The District Attorney's office allowed persons associated with drug enforcement and the investigation of child sex abuse to be alone with and talk to the grand jury.

4. The District Attorney's office did not list the names of these special "orienters" on the indictment nor did they tell the defendants, defense counsel, or the court that these persons were talking to the grand jury.

5. Particularly with regard to the child sex abuse orientations, the District Attorney's office was attempting via the special "orientation" to change the bias or viewpoints of individual grand jurors.

There are on the other hand, some other considerations:

1. The District Attorney's office did not act willfully. What they allowed and did was intentional in that they were conscious of what was going on. But the court finds that they did not fully realize that they were violating the rules. Mr. Johnson had concerns which he expressed to the then District Attorney about two years ago. But aside from those concerns, no one in the District Attorney's office seemed to be aware of the significance of the special "orientation." This is not an excuse, but it does show that the District Attorney's office was not acting in willful bad faith. Also, there is no evidence that anyone made any efforts to keep the special "orientations" secret from defense counsel or the court. In fact, the orientations came to light when mentioned in a child advocacy center's public newsletter.

2. The District Attorney's office could have called the persons doing the orientation as sworn witnesses in a case before the grand jury. Most of the information given in the orientations could have been given to the grand jury as expert testimony and then used by the grand jury to decide later cases they heard. We do not tell grand juries that they need to disregard what they heard in one case when they hear the next case.

The court discusses in Appendix A the ways that the above activities violated specific provisions of the Oregon statutes (ORS 132.010-132.440) which govern grand jury proceedings.

II. What Remedy Should the Court Impose?

The grand jury process is in many ways unique: It is designed to be a secret proceeding. The grand jury is an investigative and accusatory body and therefore different from a trial jury. The grand jury lacks many of the safeguards and procedures that we all feel are fundamental to our trial jury system. A few examples follow: There is no process for questioning the grand jurors in advance to see if they should, in fact, serve. None of the proceedings are recorded. There are no defense counsel or judges present to object to or to rule on objections to evidence or procedures.

In addition to the above, Oregon has a very "hands off" attitude toward the grand jury. In fact, in my limited research, it seems to me that Oregon has considerably less structure for its grand jury procedures than do most other states and the federal government. For example:

1. Oregon does not have any structure for the orientation of grand jurors. If grand jurors are to have such an important role in ensuring that proper procedures are followed, how can grand jurors be expected to perform this role without some form of a structured orientation?

2. Oregon does not, with some very limited exceptions, require grand jury proceedings to be recorded. My research discloses that the great majority of the states and the federal government require recording of grand jury sessions (except when the grand jurors vote).

3. Apparently, neither the courts, the legislature, nor the District Attorney's Association in Oregon have adopted any standards by which District Attorneys should conduct themselves before the grand jury. For example, the American Bar Association has adopted such standards. (One of the ABA standards is that the District Attorney must present known exculpatory evidence to the grand jury. Another is that grand jury proceedings be recorded.)

4. The Oregon appellate courts have pretty much taken a "hands off" approach to grand juries. We know that violations of the grand jury statutes in and of themselves are not grounds for setting aside an indictment. We know that if something is done that could result in an indictment being set aside, once the defendant is tried and convicted he or she loses the right to raise that issue.

The defense, therefore, needs to establish something more than a statutory violation to prevail on their motions.

1. I conclude, despite the forceful arguments on this point by Mr. McCrea and other defense counsel, that the orientations did not amount to an improper selection of the grand jury such as would entitle the defense to the benefit of the decision under the principles set forth in *State v Gortmaker*, 60 Or App 723 (1982)

2. I conclude that there is insufficient Oregon law on the subject for me, as a trial judge, to hold that there is a power of supervision of the grand jury vested in trial judges such as would allow a trial judge to set aside an indictment with prejudice. This court does, however, conclude that the grand jury is subject to the supervision of the courts and within such supervisory authority a trial judge in appropriate circumstances can set aside an indictment with leave to resubmit the case to the grand jury. For the reason's stated above and in Appendix A, this court concludes that the indictments charging crimes of child sexual abuse (and not the indictments charging illegal drugs and other crimes) must be resubmitted to a new grand jury. The state has agreed to resubmit all sex crime charges. There are three cases where the defendants were indicted on sex abuse charges which the state claims were not impacted by a child sex abuse orientation. That is an issue of fact. If defense counsel in any of these cases, disagrees with this fact they may request a hearing. At such a hearing, the state will have the burden of disproving that a child sex abuse orientation was given to the grand jury that returned the indictment.

3. I conclude that for the reasons noted above and in Appendix A that the defense has not established sufficient evidence to meet the standard set forth in the United States Supreme Court case of *Bank of Nova Scotia v United States* cited by counsel.

> "Constitutional error is found where the 'structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice' to the defendant. *Bank of Nova Scotia v. United States*, ____ U.S. at ____, 108 S. Ct. at 2374-76 [further citation omitted]. A constitutional violation may also be found if defendant can show a history of prosecutorial misconduct that is so systematic and pervasive that it affects the fundamental fairness of the proceeding or if the independence of the grand jury is substantially infringed."

4. In light of this court's ruling and the long established policy of grand jury secrecy and non-interference by the court, the court denies the defense motions for additional discovery of grand jury materials and information. (An exception would be if such discovery were necessary to prove that the grand jury that returned a sex crime indictment in a specific case heard a child sex abuse orientation before they returned the indictment.) The special "orientations" are of considerable

concern and do raise the possibility that other improper things may have occurred before the grand jury. But the court cannot act on possibilities; and as I have noted earlier, defense counsel and the trial courts have no effective way of knowing what happens during grand jury sessions. That is just a fact of life under the present legal rules.

The grand jury system in Oregon seems to me to be presently out of step with modern notions of how such a proceeding should be taking place. I assume this is because:

1. We are basically working under statutes that were initially adopted in the 1800s.

2. The grand jury workings are in secret. The grand jury does not get a lot of attention from the public.

3. Oregon appellate courts and the legislature have pretty much taken a "hands off" position toward grand jury procedures.

4. The District Attorney's offices, who are the most visible entities in the grand jury process, appear satisfied with the status quo.

I think there are some relatively minor changes that could be made to increase our confidence that the grand jury system is properly performing its very important function and, particularly, to increase the public perception of fairness. These charges would include the adoption of standards by the Oregon District Attorneys' Association; a more formalized and instructive orientation (and selection) process for grand jurors; and legislation requiring, at the very least, that orientations be recorded I do not think that any of these changes would bring about the often expressed concerns about creating more pretrial litigation and/or excessive court interference with the grand jury process.

The court's specific rulings are as follows:

1. The defense motions are denied with one exception: The state will be required to reindict all cases in which the grand jury returned a sex crime charge after hearing the special child sex abuse orientation.

2. The District Attorney of Josephine County will be enjoined from continuing the special orientations without specific further order of the court.

3. The persons who did the special drug and child sex abuse orientations are for the purposes of ORS 132 580 witnesses before the grand jury. Therefore, the District Attorney's office may not call them as witnesses in any specific case indicted by the grand jury unless either their names were listed on the indictment or the trial court otherwise allows them to testify under the special exception in ORS 132.580(2).

4. The District Attorney's office may continue to give their own orientation and if given as per the written outline which has been provided to the court, the orientation will not violate any provision of law.

5. The District Attorney's office may properly ask a grand juror if he or she knows of any reason why he or she could not fairly serve (for any reason, not just fairness to the prosecution) as a grand juror for the term or for a particular case. But if a grand juror says that he or she cannot fairly serve, that information should be referred to the court for the court's decision whether or not to excuse that grand juror. When the grand juror feels that he or she cannot serve in a particular case, I would assume that this fact can be conveyed to the court by the District Attorney's affidavit and motion requesting that the grand jury be allowed to hear a case with less than the required number of grand jurors. Of course, an individual grand juror can presumably on his or her own motion decide not to vote on a particular case and presumably the grand jury itself can decide whether an individual grand juror who has a bias or connection with a particular case should vote on that case.

6. Because this ruling will probably be appealed, the court will continue to order a stay of proceedings but only as follows: None of the defendants in the cases consolidated in State v Tina Martin will be required to either enter a plea of guilty or stand trial until after June 9, 2001 at 5:00 p.m.

Counsel for the State to prepare the Order.

Very truly yours,

Robert S. Gardner
Circuit Court Judge

Enclosure (Appendix A)

State v. Tina Martin, et al
Josephine County Case No. 00CR0682

Appendix A to May 30, 2001 Decision Letter

There are three major players in the Grand Jury process – the court, the district attorney's office, and the grand jurors. Unlike the pretrial and trial process, defense counsel has virtually no role in the grand jury process and the court only has a very limited statutorily defined role – to select and swear the grand jurors and give them some undefined form of orientation. I am sure that this judicial orientation varies considerably from judicial district to judicial district. Since grand jury sessions are not conducted in front of a judge, there is no impartial arbiter to rule on matters such admissibility of evidence. Certainly, we cannot expect seven lay persons to know the intricacies of the rules of evidence, including such difficult areas as the admissibility of hearsay evidence and "other bad act" evidence. On the other hand, prosecutors do not attempt to introduce as much evidence before the grand jury as they would at trial.

It seems to me that the courts must have the power of supervision of the grand jury process, even though Oregon trial courts' role in the grand jury process is really quite limited. I rather suspect that in most judicial districts the court does the following and no more:

1. Selects the names of the grand jurors from the list of jurors.

2. Gathers the prospective grand jurors together and gives them a short orientation based on their statutory duties. See ORS 132.070 (authorizing in general terms the court to charge the jury with such information as the court deems proper.)

3. Verifies that the grand jurors can be present during the times set for grand jury sessions.

4. Inquires whether any grand jury knows of any reason why he or she should not serve. The prosecutor cannot challenge a grand juror for cause but the judge can excuse a juror for the same reasons a court can excuse a trial juror in ORS 10.010. See ORS 132.030.

5. Swears the grand jury.

6. Designates the foreperson and assistant foreperson

7. Tells the grand jurors that if they have any concerns or questions that they cannot resolve with the prosecutor that they can call or write the court.

At that point the grand jurors are in effect turned over to the prosecutor who presumably gives them some sort of orientation (ORS 132.340 allows the District attorney to give advice to the grand jury), then the grand jury begins hearing cases.

The grand jury system in Oregon seems to rely almost entirely on the good faith and ethical obligations of the prosecutor. In my experience it is very rare for the court to hear from a grand juror with a concern or question (I think this has happened twice in my almost 20 years as a judge in a relatively small community.)

There are certain clear rules:

1. No person (with a very limited exception for having someone else present to record testimony), other than the District attorney or the witness actually under examination shall be present during the "sittings of the grand jury." ORS 132.090(1)

2. Only grand jurors may be present when the grand jury votes. ORS 132.090 (3)

3. With limited exceptions not applicable to our situation, ***the grand jury shall receive no other evidence than such as might be given on the trial of the person charged with the crime in question. ORS 132.320 (1)

4. The district attorney has a responsibility to advise the grand jury in relation to its duties ORS 132.340

5. The names of all witnesses (and an indication whether their testimony was given by affidavit or other means other than by direct testimony before the Grand Jury) whose testimony was received by the grand jury shall be placed on the indictment. Failure to do so means that the witness may not testify at the trial unless the defendant agrees or the name was omitted by inadvertence and the state furnished the name to the defense within ten days before the trial and the defendant would not be prejudiced. ORS 132.580

One obvious problem is how can it ever be possible to regulate the type of evidence that the grand jury hears. There are legitimate differences of opinion about whether certain evidence such as hearsay, "other bad acts," and so forth are admissible at trial. Lay person-grand jurors cannot be expected to know the evidence code and its nuances. So we must in our existing system rely on the good faith of the prosecutor. As a practical matter there is no real way to insure that the prosecutor does the right thing. There is no record of the grand jury proceedings. Obviously the prosecutor

has a powerful influence, including having the right to, in effect, make an unrebutted closing argument and give legal instructions and interpretations thereof to the grand jury.

In other areas, we recognize that a district attorney has certain important responsibilities that should be subject to standards. Among these areas are standards for negotiating pleas in good faith and standards for determining when to seek the death penalty. Motions are occasionally filed on the grounds of prosecutorial misconduct.

Although the court has not reviewed each of the Motions to Quash in every case in the Tina Martin file, the court assumes that they all raised similar issues. The written Motions raised issues concerning the drug and child sex abuse orientations. During the hearings it was learned that the district attorney gave a two-hour personal orientation to the grand jury. This issue was raised and addressed in the briefs and is before the court for decision.

Mr Johnson testified that he limited his remarks to the duties and functions of the grand jurors. His written outline confirms this. There is nothing in the record from which I can conclude that the district attorney 's personal orientation was improper. It would be the better practice for either the court to do the orientation on the record or for the district attorney to use an outline approved by the court or for the district attorney to record the orientation. The difficulty, of course, is that there are no real guidelines as to how the grand jury orientation should be done. As noted above, I rather suspect that different courts give different orientations and that some are very brief. I rather suspect that different District attorney s give different orientations and that in some cases the orientation may even be done by a non lawyer member of the office. The end result is that some grand juries may be receiving an objective orientation about their duties and the rules of grand jury procedure and some grand juries may be getting very little. The individual grand jurors are one of the entities (along with the district attorneys and courts) that is responsible for seeing that this rather unstructured and unsupervised grand jury process works the way we would all like to see it work. If the grand jurors are to be able to effectively carry out their responsibilities, they certainly have to know what those responsibilities are.

Another issue that was raised after the initial motions were filed was the impact of Mr Johnson questioning grand jurors before they heard sex abuse cases to see if they could be fair. If a grand juror said he or she could not be fair, then Mr. Johnson requested the court to replace that grand juror. This apparently was only done in child sex abuse cases and the question was only whether the grand jurors could fairly hear that type of case. A grand juror was only rarely excused. There is no evidence that Mr. Johnson did this just to excuse grand jurors who could not be fair to the state.

There does not appear to be any established procedure for determining if a grand juror has such a degree of bias, prejudice or connection to a particular case so that he or she should not serve on the grand jury panel or in a particular case. (The statutes do give the court the authority to excuse a grand juror for cause.) All of us who have participated in voir dire of a trial jury know that we are at times very surprised by the extent of a juror's bias or prejudice; so much so that we all agree that this juror could never fairly decide the case before the court. But there is no prescribed procedure for questioning grand jurors in Oregon. Do some judges ask grand jurors questions about their bias or prejudices? Are grand jurors told during the orientation the types of things that indicate whether they should or should not serve as a grand juror?

Moving to the drug and sex abuse orientations: What happened during these orientations is clearly set forth in the record. A few findings may be helpful:

1. The drug orientations seemed fairly straightforward. One officer, Officer Jenesta, went further than the other officers. Given the average citizen's attitude toward illegal drugs and the amount of publicity on the subject available in our society I conclude that it would be very unlikely that any grand juror would reach a different result on a drug indictment because of having such an orientation.

2. The child sex orientation is a different matter. Child sex abuse is a subject that the average citizen knows very little about. Expert opinion can be very sharply divided. Although the person doing the orientation was acting in good faith and relating what she believed to be established principles, she did mention certain things that would not have been admissible in a trial. She in effect told the grand jurors that children do not falsely report sex abuse. She cited statistics on what happens when children recant. She encouraged grand jurors to be "part of the solution" by not disbelieving children and by indicting offenders. On the other hand, many of the other things she told the grand jurors are the subject of differences of opinions among experts; but are the type of opinions that we allow experts to testify about before trial jurors. They are types of opinions we leave up to the other side to rebut and to the trial jury to sort out. Of course in the grand jury there is no opportunity for the other side to rebut. Also, the grand jury is presumably not instructed that they are free to disregard the testimony of an expert. The child sex abuse orientations were only about ½ hour long but the grand jury did receive a handout.

The court concludes that there is virtually no likelihood that the sex abuse and drug orientations would have had any impact whatsoever on the grand jury returning indictments on cases other than child sex cases.

The defense needs something other than a statutory violation in order to prevail.

The defense is requests that the indictments be dismissed with prejudice. This is a very drastic remedy and this court is virtually certain that under the facts of this case (the court does not see this as the type of intentional or deceitful action that would warrant dismissal with prejudice) this remedy is not appropriate and would not be approved by the appellate courts.

One reason to dismiss an indictment would be to make sure that improper procedures do not occur in the future. Another reason would be to correct a wrong done to an individual defendant. (For example, in a particular case to set aside an indictment that would not otherwise have been returned but for the improper action.)

There is an often stated concept of a presumption of regularity of grand jury proceedings which has been applied because the courts feel that they should only rarely intervene in the grand jury process. But we cannot forget that a fundamental purpose of the grand jury is to prevent injustice to a particular person – to prevent someone from our community being improperly indicted on felony charges. That purpose is as valid today as it was in times past. The personal, financial, and emotional costs to an individual who is indicted on felony charges are tremendous.

In our present, largely unregulated grand jury system, the district attorney has by far the greatest power and responsibility. As I mentioned during arguments, it is difficult for a prosecutor to leave the arena of adversarial justice (where at least in theory truth and justice are supposed to rise from the prosecutor and defense counsel acting as adversaries) and move into the grand jury proceedings where there is no defense counsel. But district attorneys have a special responsibility at both the grand jury and trial stage. They represent the state and have a responsibility to see that justice is done not just that someone is indicted and/or convicted. It seems to me the district attorneys need to adopt some written standards by which they agree to be bound in their dealings with the grand jury. If they do not do so, given current trends, I would expect that issues similar to those in the Tina Martin cases will reappear. Eventually those standards will be imposed by the courts or the legislature.

Robert S. Gardner, Circuit Court Judge