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TO: Hon. Floyd Prozanski and Members of the Senate Committee on Judiciary

FROM: Erin K. Olson

RE: SB 496 Re: Recordation of Grand Jury Proceedings

I have been an attorney for 23 years. For the last 13 years, I have represented crime victims in civil and criminal cases. For ten years prior to that, I was a state and federal prosecutor. I am past president and a current board member of the National Crime Victim Bar Association, a member of the Amicus Committee of the National Center for Victims of Crime, and a co-founder and current board member of the Oregon Crime Victims Law Center.

As a prosecutor, I presented hundreds of cases to Multnomah County grand juries, dozens of cases to grand juries in numerous counties in Massachusetts, and several cases to federal grand juries in the District of Oregon. The significant differences between Oregon grand jury practice and that in Massachusetts and federal court are:

Oregon generally does not record grand juries, requires all evidence presented to be admissible at trial unless a special exception applies, and directs grand juries to return indictments only if the evidence presented to them is sufficient, if uncontradicted, to prove the defendant guilty beyond a reasonable doubt at trial.

Massachusetts and the federal government do record grand juries, and in both jurisdictions, the rules of evidence do not apply in grand jury proceedings. Therefore a police officer or other person can testify to the statements made by others, including the victim. Additionally, consistent with most other states, Massachusetts and federal grand juries may indict a person when there is probable cause to believe the person has committed a crime.

I support recording grand jury proceedings, but believe that there is still work to be done on Senate Bill 496. My foremost concerns involve the protection of victims and witnesses, and the fairness of the proposed law to them.

Ten years go the citizens of Oregon voted to amend the Constitution to recognize the need for balancing the rights of crime victims with the rights of the defendant in criminal cases. The two resulting amendments to the Constitution had several stated purposes, including to ensure crime victims a meaningful role in the criminal justice system, to accord crime victims due dignity and respect, to ensure that criminal proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and to ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants. SB 496 does not honor the constitutionally-mandated balance between the rights of the defendant and the rights of crime victims.

Under § 3(4)(a) of the bill, only the prosecuting attorney and a public servant who is the subject of a "not true bill" may seek a protective order. A victim or witness who testified before the grand jury, or whose records were subpoenaed to the grand jury, does not have legal standing to do so. Victims often have no idea their school or health or other confidential records have been subpoenaed to a grand jury until they arrive at the grand jury (and sometimes not even then). Much of the information in these records has nothing to do with the crime being investigated, but the records are turned over to the defense, and nothing in SB 496 gives the victim the ability to seek protection of the records herself. Nor can a victim seek redaction of her own testimony under SB 496 if she learns that she was asked questions that were improper or elicited privileged or legally confidential information. While a victim can ask the prosecutor to file a motion for a protective order on her behalf, there is no requirement that the prosecutor do so. The inability of victims and witnesses to seek protection of their own testimony and records is a troubling omission from this bill, is exactly opposite of what the Oregon Constitution requires in terms of a fair balance between the rights of crime victims and the rights of criminal defendants, and is a problem that is easily fixed.

Another apparent imbalance in this bill is the prohibition of the disclosure of portions of grand jury transcripts or recordings to even the witness whose testimony it is, unless the witness happens to be "an agent of the prosecuting attorney or defense attorney for the limited purpose of case preparation." § 3(2)(c).[1] While this prohibition applies to both parties, it will have a disproportionate effect on the

[1] While § 3(7)(a) allows a transcript or recording to be used as evidence "as permitted by ORS 40.375," that statute permits the introduction into evidence only of portions of a writing used by a witness to refresh her memory, and since grand jury transcripts cannot be shown to any witnesses who are not agents of the attorneys, ORS 40.375 will have very limited application.

prosecution since the prosecution has the burden of proof and is the only party required to call any witnesses. The parties can, however, use the transcript or recording of a witness's testimony to impeach that witness. *See* § 3(7)(a) (allowing use as evidence as permitted under ORS 40.380). The effect of the limitation on disclosure of the grand jury transcripts or recordings in § 3(2)(c) has a disparate effect on victims, and especially on victims of felony person crimes, because such cases often take many months, or even years, to get to trial. Amending this bill to expressly allow the parties to use grand jury recordings or transcripts to refresh a witness's recollection would be a simple fix to this problem.

Also, as described by Walt Beglau, Marion County District Attorney, in his testimony, a different imbalance exists in the bill due to the availability of grand jury recordings or transcripts for impeachment purposes, but not as substantive evidence due to confrontation clause issues. As a result, prosecutors may use preliminary hearings more frequently, which would be to the detriment of vulnerable victims and witnesses. Allowing hearsay evidence to be presented to the grand jury – as the vast majority of jurisdictions do - would eliminate this imbalance.

If this Committee is unwilling to allow hearsay evidence, then the categories of witnesses in § 5(13) of the bill whose statements may be presented through a police officer should be expanded to include all "vulnerable persons" within the meaning of ORS 136.427(5)(b).

One final point on the potential of the bill, as written, to harm victims and witnesses: there is no requirement that victims and witnesses be notified when a party seeks to publicly release their grand jury testimony. Notice and an opportunity to be heard is a fundamental procedural protection that should be afforded to persons who were, in many or most cases, required to appear and testify before the grand jury in a proceeding that was supposed to be secret, or at least confidential.

On the broader issues – the proponents of this bill have repeatedly argued that it serves the primary purposes of **accountability** and **transparency. Accountability** is a buzzword used to suggest that recording grand juries will prevent prosecutors from abusing or misusing the grand jury process, but it is not clear how this bill serves its **transparency** purpose. Does "transparency" mean the grand jury recording or transcript is released to the public? Only when a "not true bill" is returned in an investigation of a public servant may "any person" seek release of the grand jury recordings. § 3(3). In all other cases that voted on but are "not true billed," no one can

ask the court to release the grand jury recording.[2] § 3 (setting forth prohibition and listing exceptions). With one narrow exception,[3] no one can ask the court to release the grand jury recording in cases in which the prosecutor does not present an indictment for the grand jury's consideration. § 3(5)(a).

In cases that are "true billed," it appears that only the prosecutor and defense have standing to ask the court to release grand jury recordings or transcripts. § 3(2)(c). Not the victim, or the media, and not another government agency. *C.f.* Fed.R.Crim.P. 6(e)(3) (authorizing release of grand jury transcripts for various purposes including other government agencies' investigations); Cal. Penal Code § 938.1 (grand jury transcripts open to the public ten days after delivery to the defendant unless the court orders otherwise).

So there are two circumstances in which this bill might provide **transparency**: (1) when "a person" (any person) requests the release of grand jury recordings after a grand jury has "not true billed" criminal charges against a public servant and the court finds that the publish interest in disclosure outweighs the interest in maintaining grand jury secrecy; and (2) when the prosecutor or defense attorney files a motion for disclosure after a "true bill" is returned and the court allows the motion "for good cause shown." § 3 (2)(c). Certainly the legislature can decide when the public interest justifies release of grand jury transcripts or recordings, but it is a stretch to say that this bill creates transparency in the grand jury process when only a small handful of cases will actually result in the release of grand jury recordings.

There are a couple of practical issues that have not been discussed much. One is the motion practice that will result from this bill. Motions to dismiss or quash indictments are likely to become much more common once grand jury proceedings are recorded, notwithstanding § 3(7)(b) of the bill (grand jury transcripts "may not be used to challenge the indorsement of an indictment 'a true bill' or the proceedings that led to the indorsement'."). In Massachusetts, for example, there is a longstanding rule that courts will not inquire into the competency or sufficiency of the evidence before the grand jury. *E.g. Commonwealth v. Galvin*, 323 Mass. 205, 211 (1948) (so stating). Nonetheless, such motions are a regular part of criminal practice in Massachusetts, and are commonly known as *McCarthy* and *O'Dell* motions. *See Commonwealth v. McCarthy*, 385 Mass. 160 (1982) (indictment dismissed when grand jury minutes revealed that the grand jury had heard no evidence that defendant had committed the

[2] Unlike cases that are not voted on by the grand jury, there is no exception for the release of grand jury transcripts in cases that are "not true billed" but which are later reopened by order of the court pursuant to ORS 132.430(2).

[3] The exception is when an indictment is later returned for the same criminal episode. § 3(5)(b).

crime); *Commonwealth v. O'Dell*, 392 Mass. 445 (1984) (affirming dismissal of indictment because prosecutor withheld material, exculpatory evidence). These challenges will be based on constitutional, not statutory grounds. *C.f. State v. Stout*, 305 Or 34 (1988) (rejecting challenge to indictment based on admission of hearsay evidence and collecting cases).

Recording grand juries will also require transcripts to be prepared in in serious or complex cases, and this legislative body needs to anticipate that expense.

Finally, a minor point, but in Section 2, paragraph (2)(c) – the bill says the testimony of a grand juror who provides substantive testimony is not to be recorded or transcribed. I don't know the reason for this exclusion, but if the grand juror's testimony is considered by the grand jury in returning a true bill or not true bill, it should be recorded or transcribed.

Thank you.