Legislative Testimony

Oregon Criminal Defense Lawyers Association

March 19, 2019

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony in opposition to SB 597

Dear Chair Prozanski and Members of the Committee:

Thank you for the opportunity to submit the following comments in opposition to SB 597.

In its current form, SB 597 unwinds more than a century of Oregon law, constituting a very broad paradigm shift in Oregon law away from adherence to open courts and open justice to a system in which *any* alleged victims and grand jury witnesses could be shielded from public identity for *any* sex crime, for *any* reason irrespective of need, and without *any* judicial oversight.[1] OCDLA opposes SB 597 for the following reasons.

SB 597 Violates the Oregon Constitution

SB 597's use of a pseudonym, initials, or other identifier instead of the name of a victim of a sex crime or a witness before the grand jury violates the Oregon Constitution. Article 1, Section 10 of the Oregon Constitution states, "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay . . . ." SB 597 in removing the identities of alleged victims and witnesses before the grand jury is in direct opposition to the notion embraced by the founders of Oregon Constitution that justice should be administered openly. Further, Article 1, Section 11 of the Oregon Constitution states that the accused in all criminal prosecutions shall have the right "to demand the nature and cause of the accusation against him, and to have a copy thereof . . . [and] to meet the witnesses face to face." SB 597 in removing the identities of the alleged victims and witnesses before the grand jury directly violates the accused's constitutional right to demand "the nature and cause of the accusation against him" and denies him of his constitutional right "to meet the witnesses face to face." Thus, SB 597 violates the Oregon Constitution.

SB 597 Violates ORS 135.815(1)(a)

SB 597's use of a pseudonym, initials, or other identifier instead of the name of a witness before the grand jury violates ORS 135.815(1)(a). ORS 135.815(1)(a) states that "a district attorney shall disclose to a represented defendant . . . [t]he names and addresses of person whom the

[1] The founders of Oregon's Constitution embraced the notion that justice should be administered openly. *See* Or Const, Art I, § 10 ("No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay . . .").

district attorney intends to call as witnesses at any stage of the trial." SB 597's use of a pseudonym, initials, or other identifier instead of the name of a witness before the grand jury directly violates a district attorney's statutory obligation to disclose the names of persons whom the district attorney intends to call as witnesses. Thus, SB 597 violates ORS 135.81591)(a).

SB 597 Substantially Expands Current Oregon Law from Protection of *Minor* Victims of Sex Crimes to *Any* Victim of Sex Crimes as well as any Witnesses Before the Grand Jury

SB 597 seeks to replace an alleged victim's name with a pseudonym, initials, or other identifier for an indictment. It is currently the practice in Oregon to identify a *minor* victim of a sex crime by use of abbreviation, typically initials. SB 597 would expand this allowance to identify *any* victim of a sex crime, including *adults*. Furthermore, SB 597 would expand this allowance to witnesses before the grand jury; whatever basis may be present to relieve a *minor* victim of a sex crime from public scrutiny certainly doesn't apply with equal measure to the identity of state witnesses before the grand jury, some of whom are seasoned law enforcement officers who are neither embarrassed nor at risk for offering their testimony. Thus, SB 597 substantially expands Oregon law from protection of minor victims of sex crimes to any victim of sex crimes, as well as witnesses before the grand jury.

SB 597 Lacks Any Judicial Supervision or Oversight and Thus Can Permanently Seal Information That the Public Has a Constitutional Right to Know

SB 597 allows for prosecutors to use a pseudonym, initials, or other identifier with no articulated basis of particularized need, with a complete lack of judicial supervision or oversight. This means SB 597 gives no authority to courts to open the indictment (1) at a later date upon resolution of the case, or (2) upon motion from media, historians, or others after (a) showing that the need for continued secrecy has expired, (b) was not present in the first instance, or (c) that public interest compels disclosure. Thus, SB 597 would directly frustrate the public's constitutional right to open courts and open press. SB 597 lacks any judicial supervision or oversight, and thus can create a permanent seal on information that the public has a constitutional right to know.

SB 597 Does Not Achieve the Goals it Seeks to Accomplish

SB 597 seeks to reduce intimidation of alleged victims and witnesses before the grand jury by using a pseudonym, initials, or other identifier instead of the true name of a victim or witnesses for an indictment. SB 597 is misguided and ineffective in achieving its goals. While the address and contact information of victims and witnesses are removed from police reports, names of the victim and witnesses remain. Additionally, a victim's name, and sometimes witnesses' names, are included in a No Contact Order. Furthermore, a victim's name is usually included in Probable Cause Affidavits. Thus, the court file is riddled with the names of the victim and witnesses, making SB 597 misguided and ineffective in its attempt to obscure the identity of victims and witnesses. It is a legal fiction to argue that the use of pseudonyms, initials, or other identifiers for an indictment will somehow protect victims of a sex crime or witnesses before the grand jury from intimidation or harassment. The information SB 597 seeks to obscure, is ascertainable from other documents within the court file.

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SB 597 Will Substantially Frustrate Defense Investigation Efforts and Further Enshroud Oregon Grand Jury Procedures in Greater Secrecy

Often times, defense can obtain critical information about a person by and through information contained in publicly filed indictments. People in the community who personally know a victim or state witness often contact defense investigators and defense counsel with critical information that can assist in the preparation of the defense. Sometimes this information is germane to the allegation itself, other times it can lead to critical testimony to the truth and veracity of state witnesses.

Moreover, the defense often initiates its own investigative leads by searching information contained in publicly filed indictments in cases other than the one at issue. Cases have been won by learning that a victim or witness before the grand jury have been involved in other cases similar in nature, and/or connected with certain individuals. SB 597 would shield all sex crime indictments from any specificity as to the identity of the victim or the grand jury witnesses, and thus would impede the stream of critical information to the defense, substantially frustrating defense investigation efforts.

Further, the defense is at an acute disadvantage by not being apprised of critical facts behind an allegation beyond what is contained in police reports. Who are the witnesses at the grand jury is often a critical key for the defense in learning who the state considers to have important information. Much can be gleaned by comparing how wide or narrow in scope was the grand jury inquiry when compared to the scope of conduct ultimately alleged in the indictment. The defense is often reduced to capturing meaning from discrete bits of information that slowly begins to give form and meaning to the state's case.

Defense already struggles to obtain the information necessary from district attorneys to fulfil Sixth Amendment duties to adequately represent clients, investigate cases, and find exculpatory evidence. SB 597's removal of witness identities could result in exculpatory evidence disappearing before the defense has time to obtain it (*e.g.*, video evidence from a witness' store is deleted before the defense can obtain it). Further enshrining the grand jury process in more and more secrecy only compounds the information-disparity that exists between the parties.

Furthermore, if defense does not know who testified before the grand jury, it will be impossible to know whether the indictment rests on valid testimony. Without identifying the witnesses before the grand jury, defense would not know whether the district attorney relied on testimony from a police officer, and thus would qualify as hearsay. Given the secrecy that already cloaks grand jury practices and given the disparity that already exists in Oregon in allowing the state to have possession of critical facts while withholding those facts from the defense, it is significant that SB 597 seeks to enhance this obscurity even further. Every instance of further enshrining pre-trial proceedings in greater secrecy impedes the defense function from operating at a capacity in which justice can be assured.

It is also worth noting that in 2017 the Oregon Legislature passed SB 505, which requires grand jury to be recorded. This was a huge step forward in making the grand jury process more

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transparent. SB 597 would constitute a huge step backward, bringing us further away from the Oregon Legislature's intent to make the grand jury process more fair.

SB 597 Unwinds Longstanding Oregon Law That Requires Identification of Grand Jury Witnesses

Since statehood, Oregon law has required that witnesses before the grand jury be identified on a publicly filed indictment. Oregon's first codification of criminal laws in 1863 contained the following provision:

> **Chapter VII: Of the finding and presentation of the indictment.** Section 61. When an indictment is found, the names of the witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court, . . . [2]

SB 597 dispenses with this long-standing obligation, and does so, as mentioned above, without an articulated showing of particularized need, and without judicial supervision and oversight. Thus, SB 597 unwinds more than a century of Oregon law requiring identification of grand jury witnesses, and does so in such a way that identification of said witnesses would remain sealed.

SB 597 is Unlike Any Other Law

It is worth noting that in searching other state laws, OCDLA can find no other state that allows an indictment to employ use of a pseudonym, initials, or other identifier in listing the witnesses before the grand jury.

SB 597 Improperly Allows for Denial of Notice at Arraignment, to Which Defense is Entitled

SB 597 allows for a copy of a document "containing the name of the victim and the corresponding pseudonym, initials, or other signifier" to be provided to the defense attorney *after* arraignment "if good cause is shown." This places no limits on the amount of time notice may be denied. OCDLA is as concerned with this provision in SB 597.

The arraignment is a critical stage of proceedings at which the accused is brought before the court (in the event of a sex crime, almost always by way of arrest) and informed of the charges that are being lodged against the accused. This right attaches to the specifics of the criminal charge, not its generics. A person does not commit a sex crime *generally.* A person commits a sex crime *against a particular individual.* Withholding this information from the accused at the time of arraignment is never justified, for any cause.

Any concern that an indictment might need to be corrected for technical or scrivener's error (*i.e.*, date of birth, middle initials, etc.) is unavailing. The Oregon Court of Appeals decided in *State v Garcia,* 284 Or App 357 (2017) that an indictment might be amended by interlineation on the day of trial to correctly allege the proper intent of the accused. Given the allowance granted in

[2] General Laws of Oregon, Crim Code, ch VII, § 61 (Deady & Lane 1843-1872).

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Garcia, it is difficult to believe that the state could not correct any technical or scrivener's error at a later date such that notice of the indictment should not be given at arraignment.

For the reasons outlined above, OCDLA strongly urges a "no" to SB 597. Thank you for your consideration.

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About OCDLA

The Oregon Criminal Defense Lawyers Association (OCDLA) is a private, non-partisan, non-profit bar association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment, and post-conviction relief proceedings throughout the state of Oregon. The Oregon Criminal Defense Lawyers Association serves the defense and juvenile law communities through continuing legal education, public education, networking, and legislative action.

OCDLA promotes legislation beneficial to the criminal and juvenile justice systems that protects the constitutional and statutory rights of those accused of crime or otherwise involved in delinquency and dependency systems as well as to the lawyers and service providers who do this difficult work. We also advocate against issues that would harm our goals of reform within the criminal and juvenile justice systems.

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