

# Criminal Law



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A newsletter published by the Criminal Law Section of the Oregon State Bar

October 2001

## State PD's Office Abolished and Replaced by Commission

by Jesse Wm. Barton, Past Chair

During the final days of its 2001 session, the Legislature passed Senate Bill 145. On October 1, 2001, the bill abolished the State Public Defender's Office (which had been in continuous operation for 38 years). The bill also abolished the office's governing body, the Public Defender Committee.

Simultaneous with abolishing the committee and the Public Defender's Office, SB 145 created a new state agency called the Office of Public Defense Services (OPDS). This agency assumed the appellate-defense duties previously performed by the Public Defender's Office. The new office is making every effort to ensure that this transfer is seamless, so it does not interfere with the provision of indigent appellate-defense services.

Most significantly, SB 145 achieved a goal the Oregon Judicial Department has been pursuing since 1989. The bill created a new entity called the Public Defense Services Commission. The Commission is the governing body of the OPDS. Eventually it will be comprised of seven members serving staggered four-year terms, and appointed by the Chief Justice. The Chief Justice will serve on the Commission as a non-voting ex officio member.

As of October 1, the Chief Justice had made five appointments, including Portland attorney Barnes Ellis as Commission chair. Among the Commission's duties will be overseeing the appellate-defense services the OPDS began providing on October 1 (and that previously were provided by the Public Defender's Office). The Commission's larger duty will be overseeing the state's provision of trial-level indigent services, and non-criminal appellate indigent services. However, that latter oversight will not begin until October 1, 2003. On that date, the state Indigent Defense Program, see ORS 151.430 to 151.465, will be transferred from the State Court Administrator's Indigent Defense Services Division, to the Commission and the OPDS. Consequent to that transfer, the Indigent Defense Services Division will be abolished.

To assist with its oversight function, SB 145 authorizes the Commission to appoint an executive director. The Commission appointed former State Public Defender David E. Groom as its acting executive director. Mr. Groom will continue supervising administration of the appellate-defense services now provided by the OPDS. He also will work with Ann Christian, director of the Indigent Defense Services Division, to supervise planning of the October 1, 2003 transfer of services from the Division to the OPDS.

If you would like a copy of the Section-By-Section Summary of SB 145 in MS Word format, please contact: [jbarton@opd.state.or.us](mailto:jbarton@opd.state.or.us)

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### Oregon State Bar Criminal Law Section's Executive Committee

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## We're From the Federal Government and We're Only Here to Help

by Kenneth C. Bauman

*This article was prompted by my fellow members of the Executive Committee of the Criminal Law Section. We decided that we should have a section of our newsletter dealing with federal issues. In general conversations with them, I was surprised by how little is known about their counterparts in the federal system in Oregon. So for my first effort I decided to cover the general subject of federal litigation in Oregon. I will cover the United States Attorney's Office and our former Executive Committee member, Wendy Rae Willis, will cover the Federal Public Defender's Office.*

### United States Attorney's Office

The United States Attorney's Office for the District of Oregon is responsible for all of the criminal and civil litigation for the United States in the State of Oregon. The Office is currently headed by United States Attorney Michael W. Mosman. He has been a federal prosecutor since 1988. Prior to that, he worked at the Portland law firm of Miller Nash. The United States Attorney serves at the pleasure of the President. The person occupying the position of United States Attorney usually changes when the administration in Washington, D.C. changes. The position is generally considered a "senatorial prerogative," which means that the person whom the senator of the same party as the President recommends will be the appointed United States Attorney if the Senate agrees. The staff of the United States Attorney's Office is composed of Assistant United States Attorneys (AUSAs). The District of Oregon is allotted 47 full-time AUSA positions. Deputy District Attorneys from around the state and federal agency lawyers are often appointed to serve as Special Assistant United States Attorneys (SAUSAs). Such appointments last for the period of time that such status would be needed to litigate in federal court. As an example, Multnomah County Deputy District Attorney Norman Frink was appointed as an SAUSA when he and I worked on a long-term grand jury investigation of a major drug organization in the early 1980s. This resulted in Norm's and my conducting three trials together one of which lasted 4 weeks.

The main office for the United States Attorney for the District of Oregon is located in the Mark O. Hatfield United States Courthouse in downtown Portland. The telephone number is (503) 727-1000. There are branch offices in Eugene and Medford. The Eugene office is located at 701 High Street in Eugene. The Eugene telephone number is (541) 465-6771. The Eugene office is staffed by eight AUSAs. The Medford office is located at 310 West Sixth, Medford, Oregon. The Medford telephone number is (541) 776-3564. That office is staffed by two AUSAs. To put some of this in perspective, when I joined the United States Attorney's Office in August 1972, there were only nine AUSAs, and no branch offices.

Many AUSAs have areas of expertise which they are willing to share with their counterparts. Native Oregonian Barry Sheldahl currently serves as First Assistant United States Attorney. Barry is a good source for information about how the office runs and general questions about federal criminal matters. Other AUSAs have areas of expertise, for instance, the Violence Against Women Act (VAWA) - Sean Hoar, Eugene; Firearms - Fred Weinhouse, Portland; Appellate - Steve Peifer, Portland; Drug Cases - Leslie Baker, Portland; Post-Conviction & Bureau of Prisons (BOP) matters - Ken Bauman, Portland.

### Federal Public Defender's Office

The Federal Public Defender's Office is responsible for representing the indigent criminally accused in the District of Oregon. The Federal Defender's Office operates under the umbrella of the Federal Judicial Branch of government. Lawyers in the Federal Defender's Office represent indigent clients in federal criminal cases, criminal appeals, federal habeas corpus proceedings involving both state and federal inmates (28 U.S.C. §§ 2241 & 2254), and occasional other collateral matters for which the court sees fit to appoint counsel. The Federal Defender's Office also administers the conflicts panel for the District Court.

Steven T. Wax is the Federal Defender for the District of Oregon. The Federal Defender is appointed by the United States Court of Appeals for four-year terms. Mr. Wax is currently serving his fourth term as Federal Defender in this district. There are currently 18 Assistant Federal Defenders in this District. There are 15 Assistants in Portland, three in Eugene, and plans for two in Medford, to begin in early 2002. The Federal Defender's Office also employs a full staff of investigators, paralegals, and legal secretaries.

The lawyers of the Federal Defender's Office are always happy to share information and to consult with lawyers who have questions about federal law or federal practice. Each day, a duty lawyer is assigned to make appearances on new arrests and to speak to callers. In addition, each of the lawyers is willing to answer any questions that arise.

The telephone number for the Portland office is (503) 326-2123. The number for the Eugene Office is (541) 465-6937.

### Mark Your Calendar... for the 15th Annual Criminal Law CLE

Friday, April 5, 2002  
9:00 am - 4:00 pm  
Double Tree Hotel, Lloyd Center, Portland



A full day of CLE programming about the most timely issues in criminal law practice, combined with a rare opportunity for prosecutors and defenders to come together for dialogue and networking. Watch your mailbox for more information.

## Update on *Apprendi*-Based Challenges in Appellate Courts

by Timothy A. Sylwester

In *Apprendi v. New Jersey*, 530 US 466, 120 S Ct 2348, 147 L Ed 2d 435 (2000), the Court invalidated a sentence that was imposed pursuant to a state statute that authorized a sentencing court to impose an enhanced sentence (i.e., one that was longer than the maximum sentence otherwise authorized by law for the underlying conviction) based on the court's finding that the defendant's crime was racially motivated. The Court concluded that, under the Due Process Clause, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 147 L Ed2d at 455. Since *Apprendi* was announced, defendants and inmates around the state have been asserting a variety of *Apprendi*-based challenges to "enhanced" sentences. The appellate courts, however, have not yet issued any opinions that have addressed the merits of those challenges.

It is important to note the holding in *Apprendi* largely parallels the rule that the Oregon Supreme Court adopted 20 years ago under Article I, section 11, of the Oregon Constitution. In *State v. Quinn*, 290 Or 383, 623 P2d 630 (1981) (death penalty), and *State v. Wedge*, 293 Or 598, 652 P2d 773 (1982) (firearm-minimum), the court adopted the "simple principle that facts which constitute the crime are for the jury and those which characterize the defendant are for the sentencing judge." 293 Or at 607-09. See also *State v. Mitchell*, 84 Or App 452, 734 P2d 379, rev den 303 Or 590 (1987) (applying principle to require a jury finding on the dangerous-offender factor that the underlying crime "seriously endangered the life or safety of another," ORS 161.725(1)(b)). Moreover, the rule in Oregon by statute is that facts that serve to subcategorize an offense under the sentencing guidelines must be alleged in the indictment and proved to the jury beyond a reasonable doubt. ORS 132.557. Consequently, almost all of the "enhanced sentences" authorized by Oregon law are based on jury findings and hence are unaffected by *Apprendi*.

Most of the *Apprendi*-based challenges currently being litigated in the appellate courts are to dangerous-offender sentences imposed under ORS 161.725. That statute allows a sentencing court to impose up to a 30-year indeterminate sentence on a felony conviction if "the court finds that the defendant is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another." ORS 161.725(1)(a). The issue is whether that finding, which by statute and prevailing practice is made by the sentencing court, is one that must be made by a jury under *Apprendi*. Numerous inmates serving dangerous-offender sentences that were imposed many years ago have filed petitions either in state court for post-convic-

tion relief under ORS 138.510 et seq. or in federal district court for habeas corpus relief under 28 U.S.C. § 2254 contending that *Apprendi* invalidates their sentence. The state typically has opposed such petitions primarily on procedural grounds — i.e., that the claim is barred either by the statute of limitations, by the successive-petition bar, or by rules relating to exhaustion and procedural default. See ORS 138.510(3), (4); ORS 138.550(3); U.S.C. § 2244(b)(2)(A). The state also has contended, however, that the rule announced in *Apprendi* is no broader than the rule previously adopted in *Quinn* and that, consequently, the finding required by ORS 161.725(1)(a) is not a jury issue. The Marion County Circuit Court and the local federal district court uniformly have rejected *Apprendi*-based challenges to dangerous-offender sentences, both on procedural and substantive grounds. Those state-court rulings currently are before the Oregon Court of Appeals in several cases. See, e.g., *Wilbur Harth v. Palmateer*, A112579. The Ninth Circuit

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## Criminal Law Section Annual Meeting

Friday, Nov. 9, 2001

US Attorney's Office  
1000 SW 3rd Ave. Suite 600, Portland OR 97205  
(check in with photo I.D., at the 6th floor reception desk)

RSVP to Ken Bauman at (503) 727-1025

### EXECUTIVE COMMITTEE NOMINEES

Whitney Boise, Chair

Cynthia Easterday, Chair-elect

Lindsay Partridge, Secretary

Rebecca A. Duncan (Public Defender, Salem),  
member-at-large

Sarah Snyder Morris (Marion County DA),  
member-at-large

Janelle Factora-Wipper (Wash County DA),  
member-at-large

*For more information, contact:*  
Tim Sylwester (503) 378-4402

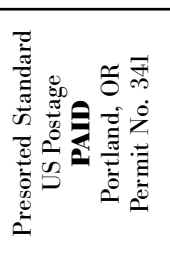
# Apprendi Update

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Court of Appeals currently has the issue before it in *Kenneth Barnett v. Johnson*, case no. 01-35005, among others.

In addition to the collateral challenges, a couple of direct-appeal challenges are pending before the Oregon Court of Appeals. In *State v. Calvin Dow*, A105922, and *State v. Crain*, A108785, the defendants are asserting an Apprendi-based challenges to their dangerous-offender sentences. In a slightly different twist, the defendant in *State v. Ice*, A111668, is asserting an Apprendi-based challenge to the findings made by the sentencing court under ORS 161.067(3) and ORS 137.123(5) to impose, respectively, separate convictions and consecutive sentences on the separate counts. There are, in addition, numerous appeals before the Court of Appeals in which defendants are contending that departure findings made by the sentencing court under the guidelines are subject to Apprendi and Quinn.

It may well be years and years before it finally is determined whether, and to what extent, the rule in Apprendi applies to dangerous-offender sentences and the various other decisions that a sentencing court is authorized to make under Oregon law. In the meantime, practitioners who are interested in the issue should check out the briefs filed in the cases listed above. Prosecutors may contact me for copies of briefs setting forth the state's position; members of the defense bar should contact either the state or federal public defender for briefs arguing the other side.



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## Legislative Report

by John Tynen

The 2001 Legislative Assembly became part of Oregon's colorful political history in mid-July. Senate Bill 70, one of the very last bills to receive favorable mention in the final committee, gives state judges a 6% pay raise in each of the next two-year cycles. It will ensure that qualified individuals will make less of a financial sacrifice to serve on the bench.

The legislature created six new judge positions, to be filled by election next year and begin serving in January 2003. The base budget for the courts was finally set at \$412 million, just \$3.5 million less than the Chief Justice requested. Indigent defense received \$163.7 million, \$4 million less than requested. The Public Defense Services Commission was created and it takes over the State Public Defender's Office this October, and the rest of indigent defense funding in October 2003.

Representatives of the Bar and judges' association worked with lawyer-legislators and budget committee leaders at the Capitol to maintain support for a strong

justice system, but volunteers are needed to testify on matters beyond the expertise of term-limited legislators.

Thanks to the leadership of the Oregon State Bar, the bar has moved up to the next level of political involvement this session. As a result, the legal profession has dramatically increased its role in shaping relevant parts of the public-policy agenda. It is important now to give some attention to the process and the roles of the participants. The skills possessed by experienced lawyers are critically important at the legislature during this era of term limits and increasingly powerful, but narrowly focused, corporate lobbyists.

Criminal lawyers should contact members of the Criminal Law Section executive board or call Bob Oleson at the Bar if they want to participate in the session. One way to give your voice more impact is to contribute to the process by supporting candidates financially. We need to help the people who will help us.