

## SENATE COMMITTEE ON JUDICIARY

June 06, 2005  
1:00 P.M.

Hearing Room 343  
Tapes 156 - 159

**MEMBERS PRESENT:**     **Sen. Ginny Burdick, Chair**  
                                  **Sen. Charles Starr, Vice-Chair**  
                                  **Sen. Roger Beyer**  
                                  **Sen. Floyd Prozanski**  
                                  **Sen. Charlie Ringo**  
                                  **Sen. Vicki Walker**  
                                  **Sen. Doug Whitsett**

**STAFF PRESENT:**       **William E. Taylor, Counsel**  
                                  **Joe O'Leary, Counsel**  
                                  **Heidi Moawad, Counsel**  
                                  **Sam Sears, Counsel**  
                                  **Dale Penn, Committee Assistant**

**MEASURES/ISSUES HEARD:**  
                                  **HB 2569A – Public Hearing and Work Session**  
                                  **SB 424 – Work Session**  
                                  **HB 2222A – Work Session**  
                                  **HB 2281 – Work Session**  
                                  **HB 2224A – Public Hearing**  
                                  **HB 2227 – Public Hearing**  
                                  **HB 2312A – Public Hearing**  
                                  **HB 2969 – Public Hearing and Work Session**  
                                  **HB 2322A – Public Hearing**

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These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.

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<b>TAPE/#</b>	<b>Speaker</b>	<b>Comments</b>
<b>TAPE 156, A</b> 003	Chair Burdick	Calls the meeting to order at 1:10 p.m. and opens a public hearing on HB 2569A.
<b><u>HB 2569A – PUBLIC HEARING</u></b> 005	Heidi Moawad	Counsel. Describes HB 2569A relating to exempting law enforcement officials acting in the course of official duty and performing lawful intervention techniques from motor vehicle accident reporting requirements. Introduces and describes the – A2 amendment ( <b>EXHIBIT A</b> ). Introduces written testimony from Steve Swenson, Captain of the Operations Support Division, City of Eugene Police Department in support of HB 2569A ( <b>EXHIBIT C</b> ).
028	Brian DeLashmutt	Oregon Council of Police Associations. Testifies in support of HB 2569A with the –A2 amendment.
040	Pete Shepherd	Deputy Attorney General, Oregon Department of Justice. Testifies in support of HB 2569A with the –A2 amendment.

046 Mardell Ployhar Oregon Department of Justice. Submits testimony and testifies in support of HB 2569A (**EXHIBIT B**).

068 Ployhar Declares the Department of Justice’s support for the –A2 amendment (**Exhibit A**).

084 Chair Burdick Inquires about the “lawful intervention techniques” listed in the bill on page 2.

103 Shepherd Describes the definition and intent of the term “lawful intervention technique.”

114 Chair Burdick Asks who would make the judgment call on which intervention technique is used and how it is interpreted.

119 DeLashmutt Explains that the employer would determine whether the act was an intervention technique as opposed to an accident.

128 Shepherd Talks about who would be responsible for such a decision.

141 DeLashmutt Stresses that there is usually discussion between the officers and the supervising commanders throughout the “chase.”

147 Chair Burdick Wonders about a change in the drafting language that would clarify the definition and protocol behind the term “lawful intervention techniques.”

145 Shepherd Declares their support for such an amendment.

161 DeLashmutt Talks about how that type of an amendment is not truly needed.

167 Moawad Comments on her own experience in this type of situation.

184 Sen. Starr States that he supports the bill.

193 Sen. Ringo Talks about the –A2 amendment and inquires where the differences exist between the two versions.

207 Moawad Answers with information on the changes made with the –A2 amendment.

228 Chair Burdick Declares her support for the bill with the –A2 amendment.

239 Sen. Ringo Inquires about the confusing drafting language of the –A2 amendment.

248 Ployhar Clarifies the confusion in the –A2 amendment.

270 DeLashmutt Talks about the policy of exemption from filing a report if the officer is using the right technique and method for the situation.

303 Shepherd Discusses the records established during crashes involved in civilian accidents and those involved in officer-related occurrences.

325 Chair Burdick Closes the public hearing on HB 2569A and opens a work session on HB 2569A.

**HB 2569A – WORK SESSION**

**334 Sen. Starr MOTION: Moves to ADOPT HB 2569A-A2 amendments dated 5/31/05.**

**Starr VOTE: 5-1-1**

**AYE: 5 - Beyer, Starr C., Walker, Whitsett, Burdick**

**NAY: 1 - Ringo**

**EXCUSED: 1 - Prozanski**

**339 Chair Burdick The motion CARRIES.**

**342 Sen. Starr MOTION: Moves HB 2569A to the floor with a DO PASS AS AMENDED recommendation.**

**VOTE: 6-0-1**

**EXCUSED: 1 - Prozanski**

**344 Chair Burdick Hearing no objection, declares the motion CARRIED. SEN. STARR will lead discussion on the floor.**

347 Chair Burdick Closes the work session on HB 2569A and recesses the meeting at 1:34 p.m. in order to attend the Governor’s signing of HCR 11.

353	Chair Burdick	Calls the meeting to order at 1:52 p.m. and opens a work session on SB 424.
<b><u>SB 424 – WORK SESSION</u></b>		
361	Joe O’Leary	Counsel. Describes SB 424 relating to giving the court discretion in awarding temporary custody of parties’ children when the court issues a restraining order under the Family Abuse Prevention Act. Introduces and describes the -3 amendment ( <b>EXHIBIT D</b> ).
400	Sen. Starr	<b>MOTION: Moves to ADOPT SB 424-3 amendments dated 6/6/05.</b> <b>VOTE: 4-0-3</b> <b>EXCUSED: 3 - Prozanski, Ringo, Walker</b> <b>Hearing no objection, declares the motion CARRIED.</b>
404	Chair Burdick	<b>MOTION: Moves SB 424 to the floor with a DO PASS AS AMENDED recommendation.</b> <b>VOTE: 6-0-1</b> <b>EXCUSED: 1 - Ringo</b> <b>Hearing no objection, declares the motion CARRIED.</b> <b>SEN. BURDICK will lead discussion on the floor.</b>
407	Sen. Starr	
411	Chair Burdick	Closes the work session on SB 424 and opens a work session on HB 2222A.
415	Chair Burdick	
<b><u>HB 2222A – WORK SESSION</u></b>		
418	Joe O’Leary	Counsel. Describes HB 2222A relating to providing that the Department of Justice has a lien upon certain judgments, settlements, and compromises obtained by a person who received an award of compensation from the department, or on whose behalf compensation was paid by the department, for compensable crime.
450	Sen. Starr	<b>MOTION: Moves HB 2222A to the floor with a DO PASS recommendation.</b>
451	Sen. Whitsett	Declares his support of the bill but expresses his doubts over the costs analysis. <b>VOTE: 6-0-1</b> <b>EXCUSED: 1 - Ringo</b> <b>Hearing no objection, declares the motion CARRIED.</b> <b>SEN. BEYER will lead discussion on the floor.</b>
479	Chair Burdick	
<b>TAPE 157, A</b>		
022	Chair Burdick	Closes the work session on HB 2222A and asks for unanimous consent to suspend the rules to allow Sen. Walker and Prozanski to vote on SB 424.
029	Sen. Burdick	<b>MOTION: Moves to SUSPEND the rules for the purpose of allowing Sen. Walker and Sen. Prozanski to vote on SB 424.</b> <b>VOTE: 6-0-1</b> <b>EXCUSED: 1 - Ringo</b> <b>Hearing no objection, declares the motion CARRIED.</b>
030	Chair Burdick	Votes Aye on SB 424.
031	Sen. Walker	Votes Aye on SB 424.
034	Sen. Prozanski	Opens a work session on HB 2281.
036	Chair Burdick	
<b><u>HB 2281 – WORK SESSION</u></b>		
040	William E. Taylor	Counsel. Describes HB 2281 relating to modifying the laws governing the circuit courts and appellate courts. Introduces and describes the -1 amendment ( <b>EXHIBIT E</b> ).
059	Chair Burdick	Asks about the costs per page in the bill.

064 Bradd Swank Oregon Judicial Department. Discusses the costs and fees that would be accrued if this bill passed.

075 Sen. Beyer Declares his support for the bill with the -1 amendment.

079 Sen. Starr **MOTION: Moves to ADOPT HB 2281-1 amendments dated 5/25/05.**  
**VOTE: 6-0-1**  
**EXCUSED: 1 - Ringo**

082 Chair Burdick **Hearing no objection, declares the motion CARRIED.**

083 Sen. Starr **MOTION: Moves HB 2281 to the floor with a DO PASS AS AMENDED recommendation.**  
**VOTE: 6-0-1**  
**EXCUSED: 1 - Ringo**

087 Chair Burdick **Hearing no objection, declares the motion CARRIED.**  
**SEN. WHITSETT will lead discussion on the floor.**

091 Chair Burdick Closes the work session on HB 2281 and opens a public hearing on HB 2224A.

**HB 2224A – PUBLIC HEARING**

093 Heidi Moawad Counsel. Describes HB 2224A relating to requiring the appellate court, after reversing any count but not all counts on appeal, to remand the case to the trial court for resentencing on the remaining count or counts.

111 Jonathan Fussner Oregon Department of Justice. Submits testimony and testifies in support of HB 2224A (**EXHIBIT F**).

160 Fussner Suggests that they need clarification of the current law. Talks about a possible amendment for the bill relating to cases with felony accounts as opposed to misdemeanor offenses.

191 Sen. Whitsett Asks about the re-sentencing and how it would not represent potential double jeopardy through enhanced sentencing.

197 Fussner Discusses the reasoning behind why this bill would not represent double jeopardy.

238 Sen. Whitsett Describes a hypothetical situation involving double jeopardy and this bill.

247 Fussner Agrees that there might be an argument, but he does not believe the courts would not attach a constitutional conflict with the bill.

255 Chair Burdick Brings up the *Blakely* decision's effects on this bill.

266 Fussner Discusses how *Blakely* might apply to current law and this bill.

284 Chair Burdick Talks about consecutive sentences possibly being interpreted as upward departures, and how that would affect the bill.

313 Peter Gartlan Chief Defender, Office of Public Defense Services. Submits testimony and testifies in opposition to HB2224A (**EXHIBIT G**).

358 Gartlan Addresses the double jeopardy and equal protection charges that may arise if this bill passes.

407 Chair Burdick Inquires about consecutive sentences.

412 Gartlan Replies that the judge would look at the situation and determine if consecutive sentences would be imposed.

430 Chair Burdick Asks if separate courts could make the sentence concurrent with each other's decisions.

445 Sen. Prozanski Offers information on this issue.

**TAPE 156, B**

010 Chair Burdick Inquires if *Blakely* would impact this bill as well.

012 Gartlan Replies that he does see issues with *Blakely* and this bill.

028 Chair Burdick Closes the public hearing on HB 2224A and opens a public hearing on HB 2227.

**HB 2227 – PUBLIC HEARING**

034	Heidi Moawad	Counsel. Describes HB 2227 relating to authorizing the introduction of victim impact evidence in non-death penalty aggravated murder sentencing proceedings.
052	Jonathan Fussner	Oregon Department of Justice. Submits testimony and testifies in support of HB 2227 ( <b>EXHIBIT H</b> ).
078	Richard Wolf	Oregon Criminal Defense Lawyers Association. Testifies in opposition to HB 2227.
124	Wolf	Describes the proceedings between the defendant and the state of Oregon in these cases.
141	Wolf	Gives a brief history of Oregon's death penalty statute.
188	Wolf	Describes a recent Supreme Court Case, <i>Kansas vs. Marsh</i> relating to the death penalty case.
231	Sen. Beyer	Wonders if the state chose not to retry the sentencing, would the presumptive sentence of life without parole become the sentence.
233	Wolf	States that he does not believe so and talks about the possibility of a parole sentence.
244	Sen. Whitsett	Inquires about character witnesses and mitigating circumstances in sentencing hearings for aggravated murder.
249	Wolf	Declares that they are permissible and permitted.
258	Sen. Whitsett	Wonders if the testimony is required to be proven (character references, mitigating circumstances, etc.).
265	Wolf	Replies that the jury will deem whether such evidence will be sufficient to be allowed the opportunity of parole.
335	Sen. Ringo	Asks about the defendant offering mitigating evidence why they deserve the possibility of parole.
349	Wolf	Stresses that he does not believe that a jury should be asked to decide whose evidence and testimony is more worthwhile in determining parole.
360	Sen. Ringo	Wonders if you can allow the weighing of evidence for death-penalty cases why not cases involving the possibility of parole.
364	Wolf	States that he does not believe such an option is an acceptable method.
385	Sen. Ringo	States that he is arguing that there is no place for aggravating evidence.
389	Wolf	Replies that the proper place for victim impact evidence is in wrongful death suits.
404	Sen. Prozanski	Addresses the rights of the victim at sentencing.
444	Wolf	Recites information on a recent case involving a victim's family not wanting to seek the death penalty sentence for the individual convicted of murder. This information was not presented to the jury: stresses that equality in information must be upheld in these circumstances then.
<b>TAPE 157, B</b>		
016	Wolf	Brings up the question of when this bill would apply if it passes: retroactivity, etc.
034	Fussner	Responds to the opposition to the bill; talks about the burden of proof facing the jury.
051	Sen. Prozanski	Inquires about the instructions for the jury involving mitigating circumstances.
056	Fussner	Responds that 10 or more jury members are needed, and talks about the roles of the defendant in this situation.
063	Sen. Ringo	Asks about the methods and protocols facing the jury in these situations.

065	Fussner	Talks about the instructions given to the jurors in these types of cases. Argues that the information given to the jurors is detailed enough to give them the knowledge of how to judge these cases.
090	Sen. Ringo	Asks if the bill passed right now, would the jury receive instructions on the different types of evidence relating to determining the possibility of parole.
097	Fussner	Replies that he is not sure on how instruction would change after the passage of the bill.
101	Sen. Prozanski	Stresses that increased instruction might be needed for jurors.
112	Moawad	Inquires about past court cases dealing with this issue.
121	Fussner	Discusses the court of appeals approving the admission of this evidence and how the Supreme Court declined to comment on the issue.
148	Steve Doell	President, Crime Victims United. Addresses the rights that crime victims have been fighting for in Oregon for many years. Declares that voters have agreed with these rights on three separate occasions.
191	Chair Burdick	Closes the public hearing on HB 2227 and opens a public hearing on HB 2312A.

**HB 2312A – PUBLIC HEARING**

192	Heidi Moawad	Counsel. Describes HB 2312A relating to extending the time that a motion requesting the performance of DNA testing must be filed. Introduces and describes the –A3 amendment ( <b>EXHIBIT I</b> ).
221	Andrea Meyer	American Civil Liberties Union. Submits testimony and testifies in support of HB 2312A with the –A3 amendment ( <b>EXHIBIT J</b> ).
270	Meyer	States that nobody in the last several years has used this statute.
300	Meyer	Talks about the arguments raised by the Oregon District Attorney’s Association four years ago against this bill.
340	Meyer	Continues reading testimony in support of HB 2312A ( <b>Exhibit J</b> ).
385	Kelly Skye	Oregon Criminal Defense Lawyers Association. Submits testimony and testifies in support of HB 2312A ( <b>EXHIBIT K</b> ).
436	Brad Berry	Yamhill County District Attorney. Oregon District Attorney Association. Testifies in opposition to HB 2312A.

**TAPE 158, A**

024	Chair Burdick	Inquires if it is more important for a victim to have closure than to have a person who is innocent remain in prison.
029	Berry	Asserts “absolutely not.” Talks about D.N.A evidence being used in existing cases.
043	Chair Burdick	Wonder what the harm would be in allowing this if the existing system isn’t being currently used.
046	Berry	Declares that this bill will open up retrying of many cases. Stresses that he cannot imagine any District Attorney who would not test new D.N.A. evidence that could exonerate an individual.
068	Chair Burdick	Asks if they have had many applications for this program.
071	Berry	States that there have been very few applications. Talks about somewhere between 5-7% of cases actually going to trial in the state.
080	Sen. Beyer	Inquires if the Governor could exonerate someone who brings new D.N.A. evidence to a case.
084	Berry	Replies yes, but stresses that any District Attorney would do what they could to take the person out of jail as soon as possible.

094	John Bradley	Multnomah County District Attorney's Office. Declares their opposition to HB 2312A.
120	Bradley	Stresses that most of these cases are going to apply to sex offense cases. Discusses the costs in maintaining the evidence for these cases.
152	Sen. Ringo	Inquires about the evidence that the state is keeping.
155	Bradley	Talks about the evidence protocol. Argues that this is not a problem facing the court system right now.
189	Berry	Comments on the need to retain much of the evidence.
202	Chair Burdick	Brings up the issue of the burden of proof being on the defendant in those cases to prove their innocence.
207	Berry	Details the problems with this bill.
224	Bradley	Stresses that there is no statute that dictates the state needs to retain evidence.
251	Sen. Ringo	Comments on the choice of the state to get rid of certain forms of evidence.
269	Bradley	Declares that they hold on to such evidence for awhile, but it's tough to tell how long in many cases.
282	Chair Burdick	Closes the public hearing on HB 2312A and opens a public hearing on HB 2969.

**HB 2969 – PUBLIC HEARING**

287	Heidi Moawad	Counsel. Describes HB 2969 relating to modifying the provisions relating to mandatory sentencing for crimes involving the use or threatened use of a firearm.
310	John Bradley	Multnomah County District Attorney's Office. Testifies in support of HB 2969.
345	Bradley	Discusses the ambiguity in the law dealing with this issue.
380	Chair Burdick	Closes the public hearing and opens a work session on HB 2969.

**HB 2969 – WORK SESSION**

**386 Sen. Starr MOTION: Moves HB 2969 to the floor with a DO PASS recommendation.**

**VOTE: 4-0-3**

**EXCUSED: 3 - Prozanski, Walker, Whitsett**

**Hearing no objection, declares the motion CARRIED.**

**SEN. RINGO will lead discussion on the floor.**

<b>390</b>	<b>Chair Burdick</b>	
393	Chair Burdick	Closes the work session on HB 2969 and opens a public hearing on HB 2322A.

**HB 2322A – PUBLIC HEARING**

397	Heidi Moawad	Counsel. Describes HB 2322A relating to expanding assault in the first degree to include intentionally or knowingly causing serious physical injury to a child under 13 years of age. Introduces the fiscal analysis of HB 2322A ( <b>EXHIBIT L</b> ).
430	John Bradley	Multnomah County District Attorney's Office. Submits testimony and testifies in support of HB 2322A ( <b>EXHIBIT M</b> ).

**TAPE 159, A**

024	Sen. Ringo	Asks about if this problem exists when dangerous weapons are used (including fists).
026	Bradley	Replies no (including fists). Continues his discussion in support of HB 2322A.
059	Moawad	Describes the reasoning behind the choice for the House Judiciary Committee to draw the line at 13 years of age.
075	Brad Berry	Yamhill County District Attorney. Oregon District Attorney's Association. Testifies in support of HB 2322A.
104	Kelly Skye	Oregon Criminal Defense Lawyers Association. Testifies in

140	Skye	opposition to HB 2322A because it increases a mandatory minimum sentence. Continues discussion in opposition to HB 2322A by discussing the age limitations for shaken baby syndrome.
180	Chair Burdick	Closes the public hearing on HB 2322A. Moves HB 2282A, HB 2297, and HB 2361A to Wednesday, June 7, 2005.
212	Chair Burdick	Adjourns the meeting at 4:03 p.m.

## **EXHIBIT SUMMARY**

- A. **HB 2569A, -A2 amendment, staff, 1 p**
- B. **HB 2569, written testimony, Mardell Ployhar, 2 pp**
- C. **HB 2569, written testimony, staff, 1 p**
- D. **SB 424, -3 amendment, staff, 41 pp**
- E. **HB 2281, -1 amendment, staff, 1 p**
- F. **HB 2224, written testimony, Jonathan Fussner, 1 p**
- G. **HB 2224, written testimony, Peter Gartlan, 2 pp**
- H. **HB 2227, written testimony, Jonathan Fussner, 1 p**
- I. **HB 2312A, -A3 amendment, staff, 4 pp**
- J. **HB 2312A, written testimony, Andrea Meyer, 4 pp**
- K. **HB 2312A, written testimony, Kelly Skye, 1 p**
- L. **HB 2322, Fiscal Analysis, staff, 1 p**
- M. **HB 2322, written testimony, John Bradley, 1 p**