

SENATE COMMITTEE ON RULES

July 18, 2005
1:00 P.M.

Hearing Room B
Tapes 165 - 168

Corrected 10/28/05

MEMBERS PRESENT: Sen. Kate Brown, Chair
Sen. Ted Ferrioli, Vice-Chair
Sen. Jason Atkinson
Sen. Charlie Ringo
Sen. Frank Shields

STAFF PRESENT: Tiffany Harris, Committee Administrator
Heidi Moawad, Counsel
Linda K. Gatto, Committee Assistant

MEASURE/ISSUES HEARD:
HB 3457A – Public Hearing
Approval of Drafting Requests – Work Session

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.

| TAPE/# | Speaker | Comments |
|---|--------------------|---|
| TAPE 165, A | | |
| 004 | Chair Brown | Calls the meeting to order at 1:07 p.m. and opens the public hearing on HB 3457A. |
| <u>HB 3457A – PUBLIC HEARING</u> | | |
| 050 | Heidi Moawad | Counsel. Explains that HB 3457A would amend existing civil and criminal forfeiture statutes and provides historical information. Notes the –A7 and –A10 (EXHIBIT A) amendments are very similar. States that the –A9 amendments (EXHIBIT B) extend the sunsets. |
| 104 | Rep. Andy Olson | House District 15. Explains that in December 2004, Ballot Measure 3 was unconstitutional. States that HB 3457A is in line with what the old law did with regard to the disbursement of asset proceeds. Details the percentages of the disbursements. Urges support of the bill with the –A10 amendments |
| 171 | Sen. Ginny Burdick | Chair, Senate Judiciary Committee and Member of the Methamphetamine Work Group. Discusses the effectiveness of drug courts and relief nurseries. Explains that civil forfeiture is a useful tool because of the standards; preponderance of the evidence and clear and convincing evidence. Notes this bill would only go into effect if the court declares Measure 3 unconstitutional. |
| 193 | Sen. Ferrioli | States there is concern from the medical profession regarding civil forfeiture and the standard of proof. Asks can the standard be brought outside the arena of drug or law enforcement issues. |
| 258 | Moawad | Clarifies that under civil forfeiture law you have to have engaged in prohibited conduct; that unless the medical professional engages in prohibited conduct in violation of the control substance chapters, the civil forfeiture could not be used. Defers |

| | | |
|--------------------|----------------------|---|
| | | to Ms. Vitolins from the Department of Justice. |
| 276 | Sen. Ferrioli | Explains the concern is whether ordinary conduct could trigger civil forfeiture. |
| 295 | Sen. Ringo | Wonders if there is room in this bill to allow for civil forfeitures for driving without insurance. |
| 316 | Sen. Floyd Prozanski | States that those who brought Measure 3 forward were not involved in the drafting of HB 3457A. States that public perception of asset forfeiture believes there is a conviction for the alleged crime before asset forfeiture could occur. Explains that pre Measure 3, the –A10 and the original HB 3457A do not require a conviction, charge or arrest, only the allegation. Discusses the shift in the burden of proof, notes that the lawsuit is against the property accused of wrong doing. |
| 378 | Sen. Prozanski | Recaps that Measure 3 is under legal challenge regarding the single subject rule. |
| 356 | Chair Brown | Asks which court and which judge. |
| 357 | Sen. Prozanski | Answers Marion county, he does not know who the judge was. |
| 372 | Chair Brown | Asks if he agrees or disagrees with the Court of Appeals ruling based on the Armatta decision (single subject rule). |
| 378 | Sen. Prozanski | Answers it is a close call. The question is whether the use of proceeds was sufficiently tied to the need for a conviction. The public believes there should be a conviction before private property can be seized. |
| 411 | Sen. Prozanski | Explains the –A9 amendments (EXHIBIT B) extend the sunset for two years and requires the Asset Forfeiture Oversight Advisory Committee to work during the interim to address these issues. |
| TAPE 166, A | | |
| 011 | Sen. Prozanski | Responds to Sen. Ferrioli’s question stating that he believes that the forfeiture language does not include every and any type of conduct but needs to be tied to a control substance. Notes the formula of distribution does not occur until after costs are paid. |
| 041 | Chair Brown | Asks, under Measure 3, is the limiting the funds that law enforcement can garner under the bill intended to guard against financial incentives. |
| 054 | Sen. Prozanski | Notes that after Measure 3 passed, a work group was put together to draft criminal forfeiture which is what the state has been operating under for some time. |
| 070 | Chair Brown | Asks who crafted Ballot Measure 3. |
| | Sen. Prozanski | Names the groups and individuals involved. |
| 080 | Chair Brown | Asks if voters would have a different response today considering the prominence of methamphetamine use today versus when the Measure was drafted |
| 093 | Sen. Prozanski | Answer no, not without a conviction. |
| 096 | Sen. Ringo | Asks if there is an issue with seizing a car for non insurance at an administrative proceeding. |
| 098 | Sen. Prozanski | Explains that vehicle impoundment is already permissible. |
| 114 | Sen. Shields | Inquires if in a rental property circumstance, could a property owner lose a house if they are unaware of what is going on. |
| 123 | Sen. Prozanski | Responds there is a claimant procedure and an innocent owner defense that says you had no knowledge or shouldn’t have knowledge. Provides an example of an in-state landlord versus an out-of-state landlord. |

| | | |
|-----|----------------|--|
| 140 | Daina Vitolins | Senior Assistant Attorney General, District Attorney Assistance Section. Submits prepared testimony in support of HB 3457A and the –A10 amendments (EXHIBIT C). Responds to previous questions of the committee members: clarifies to Sen. Ferrioli that there is no private right of action in a civil forfeiture case; clarifies for Sen. Prozanski that the –A10 amendments allow recovery of costs in a civil forfeiture for attorney fees, storage, towing and publication and must be approved by a judge; clarifies for Sen. Shields that the answer to his question is no, based on the information in his question. Adds that in the –A10 amendments, by the preponderance of the evidence, a real property case must be filed in court. |
| 164 | Vitolins | Notes that SB 243 was introduced without negotiation with law enforcement, introduced before HB 3457 and permanently enacted Ballot Measure 3. |
| 197 | Rob Bovett | Legal Counsel for the Oregon Narcotics Enforcement Association and the Lincoln Interagency Narcotic Team (LINT). Submits prepared testimony in support of HB 3457A (EXHIBIT D) and notes he is the one challenging Measure 3. Explains that civil forfeiture was not broken before Measure 3 and refers to page two of (EXHIBIT D). |
| 250 | Bovett | States he does not like HB 3457A but is willing to live with it because it makes effective compromises and reforms. Discusses the will of the voters and ask which of the eight pieces included in Measure 3 the voters supported. |
| 272 | Jason Carlile | District Attorney, Linn County. Representing himself only. Supports the –A10 amendments and explains he needs tools because those with a lot of money and a lot of drugs bail out every time. Supports the –A10 as a good compromise and a step in the right direction. |
| 301 | Sen. Ferrioli | Asks why is the standard being relaxed; that a criminal conviction is not required for a civil forfeiture. |
| 338 | Bovett | Refers to the historical origins of civil forfeiture. Discusses tracing drug proceeds. |
| 358 | Sen. Ferrioli | Asks if he is suggesting a privateering system for law enforcement. |
| 366 | Bovett | Answers no, clarifies he was suggesting that historically civil forfeiture dates back to the origins of this country when criminal organizations were interrupting governmental processes and public safety. |
| 344 | Sen. Ferrioli | Asks who makes the decision on what is clear and convincing evidence, what is the standard. |
| 380 | Chair Brown | Requests a further discussion on the –A10 and why that standard of evidence. |
| 391 | Sen. Ferrioli | Referring to (EXHIBIT D, Page 2) asks who are the “consortium of out-of-state billionaires” |
| 395 | Bovett | Answers George Soros and his organization. |
| 411 | Chair Brown | Asks why were these standard of evidence chosen. |
| 414 | Vitolins | Explains the two burdens of proof are clear and convincing evidence for real property and the preponderance of the evidence for personal property. Adds that the big change is that there is no shifting; the government has to prove the entire case. |
| 427 | Sen. Ferrioli | Explains there is concern that constituents believe the standard will affect their perception of fairness. |

TAPE 165, A

| | | |
|-----|---------------------|---|
| 028 | Sen. Shields | Asks why not wait on the – A9 amendments. |
| 033 | Bovett | Answers it perpetuates the harm for another two years. Reiterates that the system was not broke before and there is a need to restore the tools. |
| 047 | Vice-Chair Ferrioli | Asks if the court rules that Measure 3 is unconstitutional, is the previous civil forfeiture act resorted. |
| 053 | Bovett | Answers yes. Explains that civil forfeiture was designed to break down the large trafficking organizations. |
| 065 | Sen. Shields | States constituents believe that a conviction should proceed forfeiture. Asks when Measure 3 was argued in the public would it have made a difference if the voters understood how hard it can be to get a conviction. Asks how civil forfeiture itself had “misuse” of the costs, how do you get 85% cost. |
| 082 | Bovett | Responds that in response to the first question he is not sure if it would have made a difference. In response to the second question he does not know where the 85% cost came from. Explains why he does not take cost reimbursements. |
| 104 | Vitolins | Provides a personal perspective on Measure 3 as a civil forfeiture counsel. Believes that law enforcement dropped the ball on Measure 3. |
| 135 | Vice Chair Ferrioli | States that something resonated with the public in favor of Measure 30. |
| 144 | Bovett | Responds that Measure 40 is a good example of the separate vote requirement. Explains that today they are trying to further reform the tool and make it workable. |
| 198 | David Burright | Oregon State Sheriffs Association. Supports HB 3457A and the – A10 amendments to help combat the drug problem. Believes that this bill does raise the burden of proof requirement. |
| 252 | Sen. Shields | Asks how does pre Measure 3 and HB 3457A, in terms of evidence, feel on the streets and how will it affect things. |
| 281 | Burright | Answers that he does not believe it will have a drastic negative effect. |
| 275 | Sen. Ringo | Asks if it is the cash that they seek as the most important item. |
| 301 | Burright | Answers the cash is the easiest to talk about but the other proceeds are also important. |
| 311 | Chief Joe Simon | Chief, Albany Police Department. Representing Oregon Chiefs of Police. Supports the –A10 amendments and submits prepared testimony in support of HB 3457A (EXHIBIT E). States that in discussions with peers the educational piece was an issue. Explains the difficulties with convictions. |
| 382 | Dennis Dotson | Sheriff, Lincoln County. Provides his professional history and recalls decisions on seizing items/properties and the importance of getting it right. |
| 396 | Chair Brown | Expresses concern regarding the ability of law enforcement to meet costs under HB 3457A versus Measure 3. Asks what if the percentages were changed. |
| 444 | Dotson | Responds that Mr. Bovett testified that he has not billed for his costs and that to his knowledge most of his counterparts do not either. The attitude in Lincoln County was not to recoup costs but rather identify revenue as a tool to combat the problem because small agencies do not have that revenue. |

TAPE 166, B

| | | |
|-----|---------------|--|
| 014 | Sen. Ferrioli | Asks about connecting with the District Attorney’s using the |
|-----|---------------|--|

| | | |
|-----|----------------|--|
| | | Racketeering Influences and Corrupt Organization Act in prosecutions (RICO). |
| 020 | Burright | Answers the challenges to making it happen are considerable. Defers to the District Attorney. |
| 024 | Dotson | Concurs that it is difficult to proceed with. |
| 031 | Mark McDonnald | Senior Deputy District Attorney, Multnomah County. Responds that RICO is a very powerful tool and they are careful how it is applied. States that the proponents of Measure 3 were not able to pinpoint a single case of abuse. Discusses pre Measure 3 asset forfeiture versus what they have to work with today. |
| 072 | Chair Brown | Believes that citizens think they may be taken advantage of because it helps police recoup costs. |
| 079 | Sen. Ferrioli | Asks why not use the RICO statutes. |
| 100 | McDonnald | Explains that under criminal forfeiture they have to prove that the money did not come from an other source. |
| 111 | Sen. Ferrioli | Asks if the 50% plus 1 is adequate to meet the standard. |
| 125 | McDonald | Answers that in the preponderance of evidence, yes because the penalty of paying attorney's fee is high. The state has to prove probable cause, the state has to show the by preponderance of evidence and disprove other possibilities of where the money came from. |
| 140 | Chair Brown | Recalls tort reform discussions and the chilling effect of attorney fees if the case is lost. |
| 147 | McDonald | Adds that in talking with proponents regarding the –A10 amendments, there is an ambiguity between Section 1(a) and Section 8. |
| 179 | Chair Brown | Closes the public hearing on HB 3457A and opens a work session for the purpose of considering legislative counsel drafts for introduction as committee bills. |

APPROVAL OF DRAFTING REQUESTS – WORK SESSION

| | | |
|-----|-------------|--|
| 178 | Chair Brown | MOTION: Moves two drafting requests be approved for drafting by Legislative Counsel and BE INTRODUCED as committee bills (EXHIBIT F). |
| 179 | | VOTE: 3-0-2 |
| | Chair Brown | EXCUSED: 2 - Atkinson, Ringo |
| | | Hearing no objection, declares the motion CARRIED. |
| 188 | Chair Brown | Closes the work session and re-opens the public hearing on HB 3457A. |

HB 3457A – PUBLIC HEARING

| | | |
|-----|------------------|---|
| 154 | Erin Hildebrandt | Parents Ending Prohibition. Expresses concern about HB 5077 which takes away medical marijuana patients money; SB 1085 takes away rights; HB 2693 takes away jobs; and HB 3457A takes away property. States that rate of arrests for homicide, rape and robbery in 2001/2002 fell but arrests for cannabis rose 3%. |
| 277 | Hildebrandt | Continues testifying on the war on drugs and alcohol prohibition. |
| 311 | David Fidanque | Executive Director, ACLU of Oregon. Submits prepared testimony which includes the text of Measure 3 and vote results, a chart comparing pre Measure 3 to current law and HB 3457A, and a news article (EXHIBIT G). |
| 356 | Chair Brown | Asks why he believes he would win an Armatta challenge. |
| 384 | Fidanque | Clarifies that the ACLU is not involved in the current lawsuit; Mr. Bovett mentioned the Armatta case, which was an ACLU case. States that the proponents are not willing to give the voters |

| | | |
|--------------------|------------------|---|
| | | another chance and are not waiting for the Oregon Supreme Court's opinion. Explains the purpose of Measure 3 was to ensure due process and ensure no conflict of interest in pursuing forfeiture. |
| 439 | Chair Brown | Asks if the lack of due process and the inherent conflict of interest is the concern with HB 3457A. |
| 458 | Fidanque | Answers affirmatively and stresses that since 2001 the strategy has been to refuse using the current forfeiture statutes, counting on the Lincoln County lawsuit. Adds that HB 3457A amends the pre-Measure 3 statutes. |
| TAPE 167, A | | |
| 055 | Sen. Ringo | Asks if there a compromise for law enforcement to have a mechanism to tie the cash to the proceeds of the drug deal. |
| 062 | Fidanque | Answers affirmatively. |
| 063 | Sen. Ringo | Asks what would the standard of proof be. |
| 064 | Fidanque | Answers clear and convincing evidence, that the proceeds are connected with criminal activity, similar to the crime for which the person was convicted. States it is too late in session to carve out a compromise. |
| 087 | Sen. Ringo | Raises the issue of auto insurance. |
| 090 | Fidanque | Explains the difference between impoundment and forfeiture. |
| 114 | Moawad | Clarifies in reference to the Oregonian article (EXHIBIT G, Page 8) that the seizure of the property was done as evidence for trial, not a forfeiture action, and the scooter was returned pre-trial. |
| 127 | Fidanque | Responds that under HB 3457A with the –A10 amendments the government could seize a motorized scooter in those circumstances because they would not have to make an arrest or get a conviction. |
| 156 | Fidanque | Notes that pre-Measure 3, 85% of the civil forfeiture cases went by default judgment. Asks what is the harm in requiring a criminal conviction before finalizing a civil forfeiture. Discusses further. |
| 270 | Michelle Burrows | Attorney. Speaking on behalf of the Oregon Criminal Defense Lawyers Association. Provides professional background information. Opposes HB 3457A and explains there are facial deficiencies that are unconstitutional. |
| 292 | Burrows | Discusses the fugitive disentitlement doctrine, Section 2 (7) has been disallowed by the United States Supreme Court in civil forfeiture cases. Discusses the standards of proof. |
| 322 | Burrows | States that cash and bank accounts are what is most often seized by officers. Discusses the innocent owner defense. States that officers hold items as evidence to provide time to do the seizure planning. |
| 362 | Sen. Ringo | Asks if HB 3457A impacts holding evidence. |
| 365 | Burrows | Responds that in pre-Measure 3 there was no time line, under post Measure 3 it has be designated in a certain amount of time whether the seizure is for forfeiture. Discusses pre-Measure 3 excesses. |
| 434 | Burrows | Discusses the close proximity test and states that under decisional law it is legally problematic in HB 3457A. Agrees with Mr. Fidanque that more time is needed. |
| TAPE 168, A | | |
| 023 | Fidanque | Suggests increasing the allocation to the Drug Lab Cleanup Fund |

| | | |
|-----|------------------|---|
| 046 | Sen. Gary George | from 10% to 12.5%. Senate District 12. States that in response to why RICO is not being utilized, pursuit efforts are expended on the little guy. Emphasizes that Measure 3 is clear but the –A9 amendments allow more time to continue the dialogue and await the court decision. |
| 124 | Chair Brown | Closes the public hearing on HB 3457A and adjourns the meeting at 3:30 p.m. |

EXHIBIT SUMMARY

- A. HB 3457A, -A7 and –A10 amendments, Rep. Andy Olson, 9 pp**
- B. HB 3457A, -A9 amendments, Sen. Floyd Prozanski and Sen. Ben Westlund, 7 pp**
- C. HB 3457A, prepared testimony, Daina Vitolins, 3 pp**
- D. HB 3457A, prepared testimony, Rob Bovett, 2 pp**
- E. HB 3457A, prepared testimony, Joe Simon, 1 p**
- F. Drafting Requests, memorandums, Senator Kate Brown, 3 pp**
- G. HB 3457A, prepared testimony and attachments, 8 pp**