

HOUSE COMMITTEE ON JUDICIARY - CRIMINAL LAW

January 26, 1999 Hearing Room 357

8:30 a.m. Tapes 10, 11 & 12

MEMBERS PRESENT: Rep. Mannix, Chair

Rep. Bowman

Rep. Gianella

Rep. Hansen

Rep. Simmons

Rep. Sunseri

MEMBER EXCUSED: Rep. Prozanski, Vice-Chair

STAFF PRESENT: John Horton, Counsel

Patsy Wood, Administrative Support

MEASURE/ISSUES HEARD:

HB 2304 Public Hearing and Possible Work Session

HB 2305 Public Hearing and Possible Work Session

HB 2307 Public Hearing and Possible Work Session

HB 2293 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 10, A		

006	Chair Mannix	Calls meeting to order at 8:30 a.m.
<u>HB 2304 PUBLIC HEARING</u>		
022	Stephanie Tuttle	Oregon District Attorney's Association Gives testimony in support of HB 2304 citing a current case with a victim who is not able to testify at this time. This bill would allow the court to consider if there is sufficient cause to keep someone in custody longer than 60 days, but not to exceed 180 days. Cites several more reasons why the extension to keep a defendant in custody would be beneficial.
076	Chair Mannix	Clarifies that the current statute is rigid at 60 days unless the defendant consents.
078	Tuttle	Yes. Gives instances when the 60 days could be extended.
084	Chair Mannix	States the second barrier is 180 days.
086	Rep. Sunseri	Asks if this has anything to do with a person who has not been charged?
088	Tuttle	No.
090	Rep. Sunseri	Asks what the terms of release are.
093	Tuttle	States you couldn't require a defendant to pay the bail because after the 60 days they have to be released.
098	Chair Mannix	Clarifies that in Oregon making \$100,000 bail means posting 10% of the amount, or \$10,000.
100	Tuttle	Yes.
105	Rep. Bowman	Asks for clarification of page 2, line 3, concerning notifying a victim of the trial.
113	Tuttle	Clarifies that the statute requires the victim to be notified by the court, not the District Attorney's office.
122	Chair Mannix	Clarifies that it wasn't a failure on the part of the District Attorney, but a failure on the part of the court.
123	Tuttle	Yes. Discusses ORS 136.145 Setting of court dates when presence of victim required.

134	Rep. Bowman	Asks for clarification on page 2, line B, talking about the victim or an essential witness -- can you give an example of an essential witness that wouldn't be able to attend?
138	Tuttle	Gives example of a rape victim currently in an institution (due to attempted suicide) who can't testify within 60 days because of her mental condition.
152	Rep. Bowman	Asks what happens if victim is still not able to testify after 180 days?
154	Tuttle	States the defendant would be released.
156	Rep. Hansen	Asks why the circumstance previously mentioned wouldn't be covered under section (4)(a) line 26 of page 1.
158	Tuttle	Clarifies the victim's injury was not related to the crime itself.
165	Chair Mannix	Asks if this is true because the subsequent suicide attempt is not an injury received at the time the rape occurred.
168	Tuttle	Yes.
171	Counsel Horton	Asks a question about page 2, line 15 (G) and ORS 161.309 relating to the defense of insanity. Is it the intent of the bill's language to include partial responsibility as well as guilty but insane?
180	Tuttle	HB 2304 includes both definitions.
186	Counsel Horton	Further asks for clarification of (C), (D) and (E) under good cause. Could a defense attorney waive the 60 days without the defendant asking for that waiver?
193	Tuttle	Yes. Discusses instances with regard to the 60-day time period and what this bill is meant to address.
211	Chair Mannix	Asks if a defendant could be released after the 60 days if his defense is not ready to go to trial.
219	Tuttle	Explains it can happen.
228	Chair Mannix	Asks if pre-trial detention is allowed in only a limited number of cases?
231	Tuttle	States you have to post bail if you're charged with a Measure 11 crime so those people are generally held.

235	Chair Mannix	Asks what percentage of defendants charged with a crime in Marion County are released on their own recognizance?
240	Tuttle	I would guess 75%.
244	Chair Mannix	Asks, of remaining 25%, how many are able to post bail?
250	Tuttle	States it is not a very large number.
257	Rep. Bowman	Asks for further clarification on page 2, line 3, concerning ORS 136.145. States it is the duty of the district attorney to inform the victim of a trial, and if that hasn't been done, why should the defendant remain in jail for a longer period of time?
282	Tuttle	The court has the responsibility to hear from the district attorney when the victim is available; but the witness believes this section of the statute addresses when the court doesn't take that into consideration, and gives examples.
300	Chair Mannix	Asks if example given in this bill has to do with the part of ORS 136.145 where the court has the obligation and sometimes resets the trial date without notifying the District Attorney.
305	Tuttle	Yes.
306	Chair Mannix	Further asks if the example here will not involve situations where the District Attorney failed to do his/her job, but the court failed to send out a notice?
310	Tuttle	Yes.
316	James Rice	Oregon Criminal Defense Lawyers Association Testifies that the present bill works now and works well. Gives some instances of the 60 days being extended and when a defendant might be kept longer than the 60 days unfairly.
377	Rice	Gives further examples of when
TAPE 11, A		
007	Rice	Urges committee to leave the 60 days intact.
011	Rep. Bowman	Asks how long it normally takes to determine get scientific evidence for a trial.

014	Rice	Explains why it is difficult to determine an average time to get evidence prepared. States he doesn't know of a case where the 60-day rule has been a problem with respect to scientific evidence.
034	Rep. Sunseri	States that there needs to be some flexibility to the 60-day rule. Do you have any suggestions for allowing this flexibility?
046	Rice	There has to be some flexibility for protecting the public as well as protecting the accused. The previously cited incident of rape should already be covered by statute.
065	Rep. Sunseri	Asks counsel if an existing law has the ability to get a continuance and keep the defendant in custody beyond the 60 days.
069	Counsel Horton	There is not law except for certain crimes and gives examples.
080	Rep. Bowman	Asks for clarification on page 2, line 13, scientific evidence ñ are we talking DNA, blood tests or urine samples?
088	Tuttle	States it would cover any type of scientific evidence. Gives turnaround times for certain evidence. States this bill would not mandate the court to extend the 60 days.
104	Rep. Sunseri	Could the 60 days be extended for specific things like scientific evidence?
114	Chair Mannix	States the court "may", not shall, order an extension. This bill simply permits the judge to consider an extension.
126	Dale Penn	Marion County District Attorney Yes. That is exactly what we've tried to do with this bill. Clarifies subsection (B). States there must be a problem that has caused us to ask for the additional 60 days.
162	Rep. Bowman	What happens if you cannot locate the witness? Should the defendant have to stay in jail longer because the district attorney has been unable to locate the witness?
167	Penn	States it would be unlikely in that situation that an extension of the 60 days would be granted.
175	Chair Mannix	Asks if there would be a distinction if the witness were kidnapped?
176	Penn	Yes. If evidence was shown to that effect, then we could ask for a continuance.

180	Rep. Bowman	Asks if a friendly amendment to the bill would be acceptable: on pg 2, line 1, have "not" removed.
185	Penn	Discusses why he would prefer to have the bill remain as it is.
199	Chair Mannix	Wouldn't it be fair to say in most of the statutes, when good cause is mentioned, limiting examples are not included in the statute, but in this bill you've given limiting examples?
202	Penn	Yes.
202	Rep. Bowman	States this bill is not limiting the examples.
204	Chair Mannix	States all of page 2 could have been taken out, and the bill could just ask for "good cause" which would be left to the discretion of the judge.
215	Rep. Bowman	Asks if the District Attorney's Association wanted the bill bad enough to accept it if "not" was removed.
218	Penn	Yes.
220	Rep. Hansen	Asks what the conditions are that could be put upon a defendant for limits on their release?
231	Penn	States the limitations of the 60-day rule.
242	Rep. Hansen	Asks if a better approach would be to be able to put a range of conditions on the release?
246	Penn	States each county is unique on elements of release.
259	Rep. Hansen	States his concerns about holding people for longer than 60 days.
282	Chair Mannix	Asks on page 2 what "good cause" means, and if it would be better to list examples.
292	Rep. Hansen	Yes. Further states concerns with the amount of time extended.
311	Chair Mannix	Explains judges need to keep their dockets moving. Asks counsel to draft amendments for Friday: one draft limiting a scientific evidence extension for an additional 30 days; another amendment which would convert the list of examples to a list of specifics where the extension will be allowed.

330	Rep. Sunseri	States the committee should also consider the bill as it is. Getting more specific often ties the hands of judges (citing Measure 11 as an example).
356	Chair Mannix	Requesting Legislative Counsel to draft amendments doesn't necessarily mean support for the amendments.
380	Rep. Bowman	Asks for a definition of "extraordinary circumstances" on page 1.
386	Chair Mannix	Explains because it is extraordinary means it is hard to define, but that would be left to the discretion of a judge.
399	Chair Mannix	Closes public hearing of HB 2304.
<u>HB 2305 PUBLIC HEARING</u>		
404	Counsel Horton	Summarizes HB 2305 which expands the bases upon which the state may appeal criminal actions.
TAPE 10, B		
018	John Hoover	Multnomah County Deputy District Attorney Testifies in support of HB 2305. Gives examples of cases where the judge has overturned jury verdicts and the state has no recourse. States he isn't sure of the fiscal impact, but says this power would be used in very limited circumstances.
093	Chair Mannix	Asks for clarification of ORS 136.130.
109	Dale Penn	Marion County District Attorney States the district attorney's concern is when the judge does not have a legal basis to overturn. This bill would provide the ability to appeal in those cases. Further clarifies ORS 136.130 and gives examples. It would only be about 10 cases a year with negligible budget impact.
152	Rep. Bowman	States the narrow focus the witness spoke to is not evident in the bill.
162	Penn	Explains this would allow the capability to review the judgement in the court of appeals for a legal basis.
178	Chair Mannix	States this doesn't happen very often.
191	James Rice	Oregon Criminal Defense Lawyer's Association

		States this is correct in most cases ñ if a judge has made a error, the Court of Appeals should be able to review it. Gives examples of the accusatory instrument being dismissed.
244	Rep. Hansen	Asks why a particular ruling would want to be appealed by the District Attorney.
249	Rice	States this is applicable to a very small number of cases. The Appellate Courts should be able to review trial judges.
261	Chair Mannix	Closes public hearing on HB 2305.
<u>HB 2305 WORK SESSION</u>		
264	Rep. Sunseri	MOTION: Moves HB 2305 to the floor with a DO PASS recommendation.
		VOTE: 6-0 EXCUSED: 1 - Rep. Prozanski
		Chair Mannix Hearing no objection declares the motion CARRIED. REP. MANNIX will lead discussion on the floor.
<u>HB 2307 PUBLIC HEARING</u>		
300	Counsel Horton	Summarizes HB 2307 that increases the penalty for assault when the victim is less than two years of age. States assault 1 & 2 are Ballot Measure 11 crimes: assault in the first degree has a mandatory minimum of 90 months in prison; assault in the second degree has a mandatory minimum of 70 months in prison.
340	Stephanie Tuttle	Marion County Deputy District Attorney representing the Oregon District Attorney's Association Testifies in support of HB 2307. Explains differences in sentencing for different crimes. The focus here is to increase the penalty when the victim is less than 2 years of age.

393	Tuttle	Discusses shaken baby syndrome, cites an incident, and explains what happens to a baby when shaken. Explains it is difficult in court to prove a person intentionally caused serious injuries by shaking a child or baby which is why the reckless standard is applied in this bill.
TAPE 11, B		
008	Darin Tweedt	Marion County Deputy District Attorney representing the Oregon District Attorney's Association Tells the committee what is happening in courts with current law in child abuse cases. Section 1 of the bill would increase the penalty for recklessly caused injuries to children less than 2 years old.
033	Tuttle	Indicates that the number of shaken baby cases in Lane, Marion and Multnomah counties accounted for approximately 60% (25 cases) out of the 40 cases a year that Section 2 would affect.
049	Rep. Bowman	Asks why cases couldn't be prosecuted under criminal mistreatment in the first degree?
052	Tuttle	Explains that the mental element requirement for criminal mistreatment is "intentionally" or "knowingly" which is extremely difficult to prove. This bill would allow us to lower that mental state and make it easier to hold these people responsible for their conduct.
061	Rep. Bowman	States the current law doesn't say anything about the mental state of the person committing the crime.
064	Tuttle	Both sections of ORS 163.205 that apply say "intentionally" or "knowingly".
069	Rep. Bowman	Asks why wasn't this covered in the bills we passed last session.
079	Tuttle	States as far as crimes are concerned, this bill is specifically for children under the age of 2.
095	Rep. Gianella	Asks if line 11 would include a young father recklessly driving a car?
099	Tuttle	Yes.
104	Tweedt	States those cases are currently being prosecuted under assault 2.
118	Rep. Gianella	What if someone was not under the influence of alcohol, but driving recklessly?

120	Tweedt	If a person is aware that they're creating a risk of injury to another person, they could be prosecuted.
124	Rep. Bowman	Asks what about a child under 2 years of age who runs out in front of a car? Would you be able to prosecute that under this law?
130	Tuttle	States those facts would not rise to a criminal charge.
139	Rep. Hansen	Asks for clarification between physical injury and serious physical injury.
143	Tuttle	Clarifies the difference between permanent or long-term impairment with a serious physical injury.
152	Rep. Hansen	Asks if serious physical abuse could cause developmental damages that could be considered serious and a lifetime impairment?
165	Tweedt	Gives instances where newborn infants have suffered skull fractures, but because the child would not have long-term impairment, the injury could not be considered serious. Also, because of the young age, psychological damages could not be assessed.
192	Tuttle	States the law focuses on physical injury, not psychological problems.
205	James Rice	<p>Oregon Criminal Defense Lawyer's Association</p> <p>Discusses shaken baby cases in Lane County. Feels the bill has added some very loose language by adding "reckless". Looks at differences between negligence and reckless conduct. Discusses Measure 11 and Oregon Sentencing Guidelines. Discusses sentences that could be given under Measure 11. This bill would take people and place them in prison for a very long time. Feels present law is adequate and opposes this bill.</p>
304	Chair Mannix	States Rep. Prozanski, who is ill, would like the work session postponed until he is able to attend.
310	Chair Mannix	Asks about creating a separate crime rather than amending assault in the 1 st and 2 nd degree statute? By using the language proposed in this bill you could: 1) add a requirement that the recklessness be in circumstances demonstrating indifference to the effect of the recklessness; and 2) a Measure 11-type sentence is not a mandatory minimum, but is a presumed sentence under sentencing guidelines.
333	Dale Penn	<p>Marion County District Attorney</p> <p>States there would be no problem with changing the sentence and making it a guideline sentence. States it is possible to get departure in the 18-month range. We wouldn't have a difficulty with saying the presumptive sentence should be 70</p>

		months and that would be a departure sentence.
355	Chair Mannix	No, no. The presumed sentence would be the Measure 11 sentence instead of being a mandatory minimum sentence.
358	Penn	States we want to send a clear message that shaking an infant has tremendous implications both for that child and for society who has to deal with the impact of the injury to the child.
364	Chair Mannix	Clarifies that the number of months you would find in Measure 11 would be the presumed sentence, but it would not be a mandatory minimum which means good time could apply 15% or a judge may depart up or down.
371	Penn	States that would be a good alternative. Talks about negligence and clarifies reckless conduct.
403	Chair Mannix	Asks if it is not a gross deviation from the standard of care that a reasonable person would expect to put a child in the back seat of a car without a baby seat?
407	Penn	Yes. Gives example of negligence by having a pan fall off the stove. Those are not ever going to fit these criteria. Explains the type of injury caused by shaking. We want to be able to protect infants with a more substantial prison sentence.
TAPE 12, A		
001	Chair Mannix	Asks for an amendment to keep assault 1 and assault 2 as they are, but have an assault on someone under the age of 2 years statute have as a presumed sentence the 90 months and 70 months rather than a mandatory minimum Measure 11 sentence.
015	Rep. Hansen	Asks about redefining serious injury to be broader to cover a 3-year-old.
026	Chair Mannix	What if we had gradation of child under 1; child under 2; child under 3?
034	Tuttle	Explains why shaken baby syndrome is mainly found with 2 year olds and younger. Discusses the problem with having graduated sentences for children under 1, under 2 and under 3. Another idea might be to allow the court to deviate from the mandatory minimums in certain specific situations rather than create a whole new assault 2 and assault 1.
055	Rep. Bowman	States the problem with that is SB 1049 requires the district attorney to concur, and in most cases statewide that hasn't been happening.
058	Penn	States concurrence only applies to cases that had been litigated and people were sentenced. States what is presently happening under SB 1049.

066	Rep. Gianella	If it's basically a shaken baby bill, couldn't this be called a shaken baby bill?
077	Tweedt	States that these situations don't occur because of immaturity or lack of common sense.
085	Chair Mannix	Asks if the standard for reckless driving is the same standard of recklessness that we're talking about here?
087	Tweedt	Yes, the definition does apply in both instances.
087	Chair Mannix	What if the bill said "recklessly directly causes serious physical injury" and "recklessly directly causes physical injury" meaning there has to be a nexus between the recklessness and the impact?
095	Penn	Clarifies why he gave the previous explanation of negligence. States legal standard for reckless driving is very high and tells why.
123	Rep. Gianella	Asks if Mr. Rice could give his opinion on how this wording can be misused or misinterpreted?
129	Rice	States the bill should be drafted to focus on what the problem is ñ if we're worried about a shaken baby that's what it should be called.
151	Chair Mannix	Asks for 1 LC amendment that creates a separate crime and look at it on Friday. Also look at recklessly through physical contact and use Measure 11 times as a presumed sentence or current sentencing guidelines.
<u>HB 2293 WORK SESSION</u>		
178	Counsel Horton	Summarizes HB 2293, which allows a defendant in a criminal trial to enter a conditional plea of guilty, or no contest. Discusses concerns on page 1, lines 15 and 16. Present ñ1 amendment dated 1/25/99 (EXHIBIT A), and ñ2 amendment dated 1/25/99. (EXHIBIT B)
201	Chair Mannix	States using the ñ2 amendments is most preferred.
212	Rep. Bowman	MOTION: Moves to ADOPT -2 amendments dated 1/25/99.
		VOTE: 6-0 EXCUSED: 1 - Rep. Prozanski

	Chair	Hearing no objection declares the motion CARRIED .
217	Rep. Bowman	MOTION: Moves HB 2293-2 to the floor with a DO PASS AS AMENDED recommendation.
		VOTE: 6-0 EXCUSED: 1 - Rep. Prozanski
	Chair	Hearing no objection, declares the motion CARRIED . REP. PROZANSKI will lead discussion on the floor.
229	Chair Mannix	Meeting adjourned at 10:36 a.m.

Submitted By, Reviewed By,

Patsy Wood, Sarah Watson,

Administrative Support Office Manager

EXHIBIT SUMMARY

A ñ HB 2293, -1 amendment s (LC 1185), dated 1/25/99, Staff, 1 pg

B -- HB 2293, -2 amendments (LC 1185), dated 1/25/99, Staff, 1 pg

C ñ HB 2307, written testimony, Stephanie Tuttle, 1 pg