

HOUSE COMMITTEE ON JUDICIARY - CRIMINAL LAW

February 15, 1999 Hearing Room 357

9:00 a.m. Tapes 42 - 44

MEMBERS PRESENT: Rep. Mannix, Chair

Rep. Prozanski, Vice-Chair

Rep. Bowman

Rep. Gianella

Rep. Hansen

Rep. Simmons

Rep. Sunseri

STAFF PRESENT: John Horton, Counsel

Patsy Wood, Administrative Support

MEASURE/ISSUES HEARD:

Discussion of DUII Related Topics

HB 2365 Public Hearing and Work Session

HB 2392 Public Hearing

HB 2398 Public Hearing

HB 2534 Public Hearing

HB 2515 Public Hearing

HJR 9 Public Hearing

HB 2168 Public Hearing

TAPE/#	Speaker	Comments
TAPE 42, SIDE A		
007	Chair Mannix	Calls meeting to order at 9:15 a.m.
<u>HB 2365 PUBLIC HEARING</u>		
015	Counsel Horton	HB 2365 allows copies of administrative rules regarding methods of conducting breathalyzer tests to be admitted into evidence even if the copy is not a certified copy.
027	Jean Kunkel	Marion County District Attorney's Office Testifies in support of HB 2365. States that the Oregon District Attorney's Association is in favor of this bill because the administrative rules are public record. They are likened to a statute and just a copy of the record without the certified seal from the Secretary of State's office is just an added labor and we don't see that it changes any of the value of the document.
050	Venita Howard	Governor's Advisory Committee on DUII Testifies and submits written testimony in support of HB 2365 (EXHIBIT A).
070	Counsel Horton	Asks about line 8 of HB 2365. Wants to make sure that the courts can easily interpret it.
078	Kunkel	Discusses the normal procedure in most DUII cases. Discusses problems that often arise within the Administrative rules.
100	Counsel Horton	Are you suggesting that, after the comma in line 8 that the language be taken out?
102	Kunkel	It would solve problems down the road. In line 6, I like "shall" better than "may".
115	Kunkel	I don't know what happens with complied consent hearings at the DMV.
116	Rep. Prozanski	Explains how the DMV gets to the point where they would submit a breathalyzer test.
121	Kunkel	The point of a DMV hearing is probable cause.
124	Rep. Prozanski	Discusses how the suspension period is determined. Explains that the waiting

		time is shorter if someone fails the breathalyzer test rather than refuses to take the test.
143	Chair Mannix	Discusses probable cause in refusing to take the breath test.
136	Rep. Prozanski	Discusses the consequences if a breath test is failed.
139	Chair Mannix	Discusses the necessity in having probable cause when submitting a breath test.
<u>HB 2365 WORK SESSION</u>		
151	Chair Mannix	Asks if there is unanimous consent to amend these bills without waiting for the LC draft.
157	Rep. Prozanski	MOTION: Moves to AMEND on page 1, in line 8, delete "if the validity of such test is an issue in a proceeding arising from the arrest of a person for driving while under the influence of intoxicants".
		VOTE: 6-0 EXCUSED: 1 - Simmons
	Chair Mannix	Hearing no objection, declares the motion CARRIED.
162	Counsel Horton	Expresses concern over whether line 10 of Section 2 would continue to limit the statute and define it as when this could be admitted into evidence. Suggests omitting the phrase "if the validity of such test is an issue" (line 8, Sec. 2).
172	Kunkel	How does the bill apply to a case where someone refuses the breath test?
178	Chair Mannix	It is about time that we start bringing in copies of the rules without certification. Discusses the past procedures of producing copies with certification.
195	Ingrid Swenson	Criminal Defense Lawyerís Association Deleting the final portion on lines 8 and 9 would require the court to admit those rules whether or not they were relevant to any issue in the proceeding. I donit think that is what the committee intends to do.
204	Chair Mannix	Suggests different language for line 6, Sec. 2 by adding "if requested by a party

		to the case".
211	Swenson	Discusses that whenever the rules are at issue, a certified copy is not necessary to be admitted into evidence.
218	Rep. Prozanski	Withdraws motion.
219	Chair Mannix	Explains that he plans to ask for a LC draft of these amendments and set a further work session on HB 2365.
<u>HB 2392,2398,2534,2515,2168,HJR 9 CONSOLIDATED PUBLIC HEARING</u>		
286	Counsel Horton	Summarizes HB 2534, which adds specified crimes that constitute murder if death occurs during commission of those crimes.
323	Liz Cruthers	President, Oregon Council of Police Associations Testifies in support of HB 2534. Discusses who is responsible for deaths when someone is alluding the police. Discusses HB 2394 and speaks in support of that bill. I would like the language from HB 2394 be included in HB 2534. HB 2534 adds language to the murder statute that would address repeat offenders and hold them accountable for deaths only that they caused. Hopes that the committee will amend assault 1 and assault 2 statutes to include injuries that are less severe than death.
419	Bob Miller	Operations Manager, Office of Alcohol and Drug Abuse Programs Testifies and submits written testimony in support of HB 2168 (EXHIBIT B). Explains the current law for what takes place for those convicted of DUII. Feels that the initial screening interview would be more valuable if it was focused on determining what program to refer the person to. Discusses what may cause a repeat offender.
TAPE 43, SIDE A		
046	Rep. Sunseri	What percentage of people who go through the diversion program reoffend?
048	Miller	I don't have the exact figures, but I do know that about 40% of clients processed through the system every year are convicted clients rather than diversion.
055	Rep. Prozanski	Discusses the screening fee. They are already required to pay this fee unless the court finds that they are unable to do so. I'm not sure what we are trying to address in the original bill if they are already required to pay these assessment fees for the screening.
061	Miller	There is no change in requirement for the payment of the \$90 fee. What changes is what the evaluator does for that fee. The evaluator would still conduct the

		initial screening interview with the client, but the focus of the interview would not be in determining the diagnosis, but to determine which program would serve the client best, not just the outcome of the test.
072	Rep. Prozanski	The first sentence of the original bill seems to be unnecessary.
078	Miller	We intended to maintain the \$90 fee and did not have any intention in eliminating that.
079	Chair Mannix	We are simply maintaining the imposition of the requirement.
081	Miller	That's correct.
082	Chair Mannix	Discusses the possibility of misinterpretation of the summary.
089	Rep. Bowman	If the \$90 fee isn't changing, but the job of the evaluators has changed, will they perform the same job for the same fee?
097	Miller	Evaluators are already providing both services for the diversion clients for the same \$90 fee. We are increasing the responsibilities of the evaluator since they have to conduct the monitoring and tracking of the offenders, but we are also reducing what they have to do in the initial interview.
108	Rep. Prozanski	Are we putting a non-funded mandate on counties? Discusses concerns that counties might be assigned duties that they may not be reimbursed for.
121	Miller	In Lane County the evaluators already conduct monitoring of offenders. That is also the case in almost all of the other counties in Oregon.
125	Chair Mannix	Does this bill just clear up the law as it stands right now?
131	Miller	Yes.
132	Sunseri	Is the cost of taking away the screening test the same as the cost of adding the monitoring, or is there a substantial difference?
133	Miller	I don't have an answer to that question.
136	Chair Mannix	Is the monitoring going on in most counties?
138	Miller	Yes.

138	Rep. Prozanski	Maybe counties that don't do this will now be required to comply with the counties that are voluntarily doing it. People who go through the diversion are being screened once. It's not necessary to put them through an additional screening when they are convicted if they reoffend.
144	Rep. Bowman	Are we talking about people with at least a second convictions or is this the initial conviction?
149	Miller	This is for the first conviction and any subsequent convictions.
150	Rep. Bowman	Could the person found guilty on a first conviction be eligible for drug court?
152	Miller	The drug courts don't include DUI offenses as part of the offenses that they deal with.
176	Counsel Horton	HJR 9 amends the Constitution declaring that sobriety checkpoints are not prohibited by unreasonable search and seizure provision of Constitution.
192	Lyle Lee	Citizen, Dallas, Oregon Testifies against HJR 9. Feels that responsible citizens should not be stopped for sobriety purposes. Gives examples of people being intoxicated while driving and not being issued tickets for DUI. Discusses the importance of enforcing the laws on all people despite their status in the town.
245	Chair Mannix	You would rather not see roadblocks because it affects all citizens and you want to make sure there is not selective enforcement, is that right?
249	Lee	Yes.
255	Counsel Horton	HB 2392 prohibits driving while under the influence of intoxicants diversion if defendant caused damage to property of another person. HB 2515 makes driving while under the influence of intoxicants a Class C felony if person has at least two prior convictions. HB 2398 establishes that implied consent law does not prohibit introduction of evidence of blood alcohol content in prosecution for DUI if blood is drawn in hospital or test results are obtained pursuant to search warrant.
336	Jean Kunkel	Oregon District Attorney's Association Testifies in support of HB 2392. Discusses different situations where accidents could have been avoided had the person involved had a lower blood alcohol level. Feels that people whom cannot maneuver a vehicle because of their blood alcohol level should not be eligible for diversion.
369	Chair Mannix	Shouldn't there be some limitation as to who can apply for diversion?

378	Kunkel	We do have a significant number of accidents involving tire tracks through a park or through someone's lawn. I suppose technically, under the language of this statute, those specific accidents would prohibit someone of being in diversion and maybe you don't want to do that. Maybe you should put a monetary damage on that penalty.
388	Chair Mannix	We need to define "significant damage". Discusses the idea of having a \$500 or more fine.
390	Kunkel	Discusses the definition of "significant damage".
397	Chair Mannix	Technically, this language could eliminate all diversions.
402	Rep. Prozanski	Discusses what kind of crimes would qualify to be able to go through diversion.
Tape 42, Side B		
005	Kunkel	States that the ODAA's main concern is traffic accidents.
008	Rep. Sunseri	We could maybe strike a balance with that.
011	Kunkel	Testifies in support of HB 2398. We have a lot of DUI accidents where the driver of the car is unknown when the victims have been taken to the hospital. Blood taken by hospital staff is not taken by complied consent rule so it cannot be used as evidence in trial.
053	Rep. Sunseri	Are you convinced that we have no constitutional problems with this?
056	Kunkel	Yes.
057	Chair Mannix	There might be a constitutional problem if the police ask the hospital personnel to draw the blood because that person then might be construed to be the agent of the state. On the other hand, if they were doing the blood draw for medical reasons any civilian can always turn over evidence to the state. Discusses warrant requirements for admission of the evidence.
068	Rep. Prozanski	Isn't this standard operating procedure? If a blood test is ordered by a doctor for medical purposes, that is one less step we have to worry about. We should focus on the administrative rules for the procedures of taking the test.
079	Kunkel	I can't speak to specific examples, but if administrative rules were changed, maybe that would accomplish the same thing.
088	Chair Mannix	Discusses alcohol swabs used in blood draw affecting the alcohol content.

101	Chair Mannix	Reminds the committee that they are not working the bill right now but rather coming up with policy issues and themes.
107	Rep. Sunseri	It would seem prudent to me that a defender would have to establish that it was medically necessary to draw the blood if there is a question that would affect the 4 th amendment. If we do this, a defense lawyer will need us to establish that it was a necessary procedure. I support this concept , but I need to make sure that we do it right.
118	Kunkel	I don't see language in the bill that would cause that to occur. If you added the language that said the blood was taken for medical purposes
122	Rep. Sunseri	I think that is implied.
123	Chair Mannix	We are not putting any such requirement like that in the bill right now.
124	Kunkel	It has been my experience that blood is always taken when one is taken to the emergency room.
127	Chair Mannix	The main point is whether we will be implicitly dragging doctors and medical staff into the procedure.
130	Rep. Prozanski	Cites statute about blood level alcohol and blood test. We do have statutes that state that blood sampling has to be in the course of that treatment.
150	Chair Mannix	Discusses problems that health care providers have had with confidentiality when it comes to protecting the law.
154	Rep. Prozanski	Discusses situations where people show up at the hospital after having been involved in an accident and the police having a difficult time discovering who caused the accident.
163	Kunkel	The only loophole that provision would leave is the situation of multiple car accidents where you don't know who the driver is. Testifies in support of HJR 9. This bill has a tremendous preventative influence and encourages designated drivers. Testifies as being neutral on HB 2515. Discusses what is currently happening with sentencing now. Our suggestion would be to elevate the number of convictions to 4 or 5 to place it higher on the grid for a felony conviction.
220	Chair Mannix	Would you prefer the specification of a new sentence rather than relate to the grid?
232	Kunkel	I would prefer a new sentence over how it is written now. I think if a third time conviction for a DUII is going to be a penitentiary sentence, it's going to have a major fiscal impact.

239	Chair Mannix	Maybe you can give us a suggestion on what the drop-off point should be. I know of one judge that would rather handle this as a misdemeanor.
247	Kunkel	A year sentence in the county jail is probably appropriate for a third conviction.
259	Chair Mannix	Shouldn't there be a time-frame tie-in?
260	Kunkel	Yes. The last 10 years might be a good time frame.
269	Rep. Hansen	What is the current threshold before driving infractions get to the felony level?
274	Kunkel	Driving under the influence is never a felony unless the person causes a death.
283	Rep. Hansen	What about a suspended license?
284	Kunkel	There are certain things that cause a felony to be suspended. Gives examples.
296	Rep. Hansen	So a repeat drunk driver would have a felony suspension hanging over him?
297	Kunkel	Yes.
298	Counsel Horton	For people in Marion County that are sentenced for felony driving while suspended, what is the typical sentence they receive?
301	Kunkel	Suspended drivers in Marion County are almost always suspended as misdemeanors, explains.
318	Chair Mannix	Do we have any statutes for the chronic predatory driver?
320	Kunkel	I don't know.
325	Counsel Horton	There was, up until the eighties, a more severe habitual traffic offender statute. Right now that classification has to do with suspension and revocation of drivers license, not a conviction and sentence by being a habitual offender.
331	Chair Mannix	Discusses different types of offenders. Defines "predatory" in regards to driving.
344	Kunkel	I think the Department of Motor Vehicles (DMV) can suspend someone's license because of a bad driving record. That can result in a suspension that is a felony suspension.

358	Rep. Bowman	How many people are habitual DUII offenders. Asks for "habitual" to be explained.
367	Kunkel	Those figures would have to come from DMV. From what I can see in my reports, at least half of the people are not eligible for diversion. Discusses that one person had 11 or 12 convictions and were sent to prison. Explains why.
388	Rep. Prozanski	There is an article, which I will try to find, where they listed how many people had gone through the diversion system.
425	Kevin Campbell	Oregon Association Chiefs of Police Testifies in a neutral position to HJR 9 and submits testimony (EXHIBIT C) from Rep. Ben Westlund. Anything to prevent a deterrent from drunk driving we would be in favor of, but the bill needs to be more specific.
TAPE 43, SIDE B		
038	Campbell	Testifies on HB 2392 and HB 2515.
062	Lt. Ethan Wilson	Oregon State Police Testifies on HJR 9 saying it falls short. Testifies and submits written testimony in support of HB 2515 (EXHIBIT D). Provides the committee with drunk driving statistics.
093	Rep. Prozanski	Asks Lt. Wilson if he has comments on HB 2392 which looks at limiting some of the drivers who would qualify for diversion.
101	Lt. Wilson	I do not have comments at this time.
106	Chair Mannix	There is an obvious pressure point of state resources v. local resources. We seem to be focusing too much on the local community in terms of forcing them to use their resources under the misdemeanor conviction and the county jail use.
117	Rep. Bowman	The Senate is looking at a bill that would lower the alcohol count. We would need to create more jail space if this passes.
129	Chair Mannix	Discusses the Senate bill that would lower the blood alcohol level and states concerns with bill.
144	Rep. Hansen	It seems to me that we put people through diversion to see if they can become safer drivers and better citizens. I'd like to see a rationalization as to why people who have committed property damage are going to be less successful in diversion.

160	Chair Mannix	It may be more of a sensitivity to the reaction of the victim.
171	Lt. Wilson	With regard to HB 2392, there is a statute in place for property damage of \$1000 or more. With regard to being denied diversion, it is important that the message be as good as the punishment itself.
183	Chair Mannix	What about other driving offenses this person may have had that perhaps weren't DUI related? That person shouldn't get diversion.
194	Campbell	There should be some connection between the property damage and diversion.
203	Rep. Gianella	Do we monitor drunken drivers in Oregon? Isn't there a program in Washington?
209	Lt. Wilson	I'm not aware of a program in Washington.
212	Rep. Prozanski	States electronic monitoring is used in many cases, but not for drunk driving.
237	Rep. Bowman	It would be helpful to have statistics on repeat drunk drivers. It seems to be a very small amount of people that are repeat offenders.
243	Chair Mannix	That will be requested from DMV.
245	Lt. Wilson	The DMV will run lists for those that have three or more convictions in the last 10 years.
260	Vinita Howard	Governor's Advisory Committee on DUII Testifies and submits written testimony on HB 2365 (EXHIBIT E). Discusses repeat offenders of driving under the influence. Discusses specific statistics that deal with the first, second and third time convictions. DMV keeps all of these records.
284	Chair Mannix	Asks Ms. Howard to provide the committee with a copy of these records.
288	Howard	Testifies in support of HB 2392. Discusses index figure for damage.
298	Chair Mannix	Is this because we don't like diversion or because diversion isn't working?
305	Howard	People whose property has been damaged by a drunken driver get very upset if the driver goes to a diversion program. There is also the question of the effectiveness of some diversion programs.
312	Chair Mannix	Discusses double indemnity. If there is an accident that requires the filing of an

		accident report and someone wants to get diversion, they must be willing to pay that person two times the physical property damage. There is an economic problem with those that can't afford that penalty.
322	Howard	Explains that diversion was created to reduce the caseload when DUII stopped being a driver's issue and came back into the criminal statutes.
332	Chair Mannix	It seems that diversion was more of a resources issue for the government.
334	Howard	Diversion was definitely a resources issue, but as time has gone on we've hoped that it has also had some positive effects on that driver's future behavior.
339	Chair Mannix	Should we challenge those that say that diversion is a good thing to provide us some statistical information that makes it really worthwhile?
342	Howard	On my behalf, I've written several articles dealing with the need to research the affect of diversion and actually preventing the future behavior. Discusses specific laws in various counties that deal with habitual DUII offenders.
367	Chair Mannix	When we look at exclusions from diversion, we have to ask why do we have diversions in the first place. Gives examples of why diversion was established.
389	Howard	Discusses research that has been done on first-time offenders. There were instances in which some offenders had violated the law 200 times before they got caught. Testifies in support of HB 2398. Testifies to HB 2515 and that the language in 4(b) should be amended. Testifies in support of HJR 9 and would entertain an amendment.
TAPE 44, Side A		
006	Chair Mannix	Asks about a sobriety checkpoint law that was passed last session.
008	Howard	I think Ballot Measure 40 might have reestablished the opportunity to have sobriety checkpoints, but that did not pass. I have prepared separate testimony on sobriety checkpoints and will submit written testimony on the research done about how we can more effectively use our police resources by using sobriety checkpoints.
016	Rep. Prozanski	Could you give us a list of those who were on the Governor's Council?
018	Howard	Yes.

036	James Rice	<p>Oregon Criminal Defense Lawyers Association</p> <p>Testifies against HJR 9. Discusses balancing power between the government, the police and the citizen. Discusses the limited power of government and the rights that citizens have against the authority of a police officer. Discusses a specific case where a roadblock was set up to scope out a specific person. To deny people diversion based solely on property damage or a limit is not good. Testifies against HB 2398 and discusses some of his concerns with the bill.</p>
154	Chair Mannix	<p>Closes public hearing on HB 2365, 2392, 2398, 2534, 2515, 2168 and HJR 9. Adjourns meeting at 11:05 a.m.</p>

Submitted By, Reviewed By,

Patsy Wood, Sarah Watson

Administrative Support Administrator

EXHIBIT SUMMARY

A ñ Statement: Governorís Advisory Committee on Driving Under the Influence of Intoxicants, Vinita Howard, 2 pgs.

B ñ Memo from Barbara Cimaglio on HB 2168, Bob Miller, 3 pgs.

C ñ Memo from Rep. Ben Westlund on HJR 9, Kevin Campbell, 1 pg.

D ñ Letter from Lieutenant Ethan Wilson on HB 2515, Lieutenant Ethan Wilson, 2 pgs.

E ñ Letter from Vinita Howard on HJR 9, 2 pgs.