

## HOUSE COMMITTEE ON JUDICIARY - CRIMINAL LAW

March 1, 1999 Hearing Room 357

8:30 a.m. Tapes 58 - 60

**MEMBERS PRESENT:** Rep. Mannix, Chair

Rep. Prozanski, Vice-Chair

Rep. Bowman

Rep. Gianella

Rep. Hansen

Rep. Simmons

**MEMBER EXCUSED:** Rep. Sunseri

**STAFF PRESENT:** John Horton, Counsel

Patsy Wood, Administrative Support

**MEASURE/ISSUES HEARD:**

**HB 2083 Public Hearing and Possible 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 58, A		
003	Chair Mannix	Calls meeting to order at 8:35 a.m.

**HB 2083 PUBLIC HEARING**

004	Counsel Horton	HB 2083 requires imposition of maximum term of imprisonment and fixing of maximum presumptive length of imprisonment on person convicted of certain felonies.
038	<b>Diane Rea</b>	<b>Oregon Board of Parole</b>  Testifies and submits written testimony in support of HB 2083 ( <b>EXHIBIT A</b> ). Discusses HB 2083 and the reasons that would prevent the automatic release of inmates into the community at the end of their determinate sentence. HB 2083 was proposed during the 1997 Session as SB 155. It passed the House and the Senate, but died in Ways & Means because the wording insinuated a large fiscal impact. Discusses the history of the parole system in Oregon, and the change in 1977 to the Matrix system. Gives examples of the type of inmate who needs to be held beyond their sentence. Discusses that HB 2083 would apply only to future offenders. Discusses the "Length of Prison Release Deferrals" on page 2, Exhibit A. Discusses the fiscal impact of HB 2083.
353	Chair Mannix	Could you put a numerical cap of 50 beds for the first biennium and no cap thereafter to alleviate the fiscal impact issue?
362	Rea	My goal is to get to a fiscal impact that this legislative session can tolerate.
367	Chair Mannix	The purpose of the cap is to have some figure to accommodate for budget purposes.
382	Rea	The Department of Corrections has worked in partnership with the Parole Board to come up with a workable plan. As time passes, we see this population continuing to grow.
386	Chair Mannix	I do not like imposing a cap on the number of beds for the future. Every time I see a cap, it means we have a resource-driven system rather than a justice-driven system. The Board of Parole needs to work jointly with the Department of Corrections on developing Administrative Rules concerning prison population.
415	Rea	The fiscal impact is to the Department of Corrections (DOC), not to the Board of Parole.
418	Chair Mannix	You would rather have no cap at all, but you want the bill?
419	Rea	Discusses the Parole Board's partnership with DOC in drafting administrative rules to control prison population.
428	Chair Mannix	Did the group think about converting sentencing guidelines to true guidelines? You would have a mandatory minimum that must be imposed and, at the same time, the judge would have full discretion to impose a determinate sentence which could not be reduced by more than 15% for good time, and would not be

		subject to the narrower standards of sentencing guidelines. Within the indeterminate maximum sentence, the DOC is given some authority to impose sanctions for specific misconduct.
<b>TAPE 59, A</b>		
019	Rea	There is a problem with "one size fits all" sentencing, and this is just an incremental fix to the current system. One problem the parole system ran into before was unfettered discretion to override judicial minimums.
030	Chair Mannix	Discusses how the parole system got a bad name because it was turned into a release system that was resource driven. It was looked upon as forcing prisoners out because there was not enough space.
040	Rep. Bowman	How will you make the determination to hold people for 24 months past their sentences?
051	Rea	The Board only has authority to defer sentences if an inmate's crime was committed before November 1, 1989. For the offenders sentenced under pre-guidelines, the Board must order a psychological evaluation and all information available to determine if the offender is still dangerous. A sophisticated analysis is used for each individual case.
083	Rep. Bowman	Have you heard that there is a bias in the psychological exams?
087	Rea	A cultural bias?
087	Rep. Bowman	Yes.
088	Rea	I have heard that concern. I have spoken with our psychologists and they have assured me that they are trained to take those types of considerations into account in their analysis.
093	Rep. Bowman	When would it be appropriate for the Board of Parole or DOC to ask for the 60-day extension to stabilize an inmate's medication prior to release?
102	Rea	We are not trying to manipulate the sentence just to keep people incarcerated. Discusses the criteria used in asking for the 60-day deferral to stabilize medication.
114	Rep. Bowman	Doesn't DOC do an evaluation upon entry into the prison system so it shouldn't take 6 years to find an appropriate medication for an inmate?
122	Rea	I would have to ask DOC when they perform mental health evaluations.

126	Rep. Bowman	If an inmate is on the 60-day deferral for medication stabilization and they re-offend, wouldn't they be sentenced for that new crime committed in prison?
131	Rea	That occurs in some circumstances, but not every assault in prison is prosecuted by the District Attorney's office.
148	Rep. Bowman	How would you prevent the 6-month interval from being misused by DOC?
151	Rea	We would look at each case individually and the Board of Parole would have to decide which recommendations from DOC to follow. We are not trying to waste beds by trying to keep people longer than their sentence.
167	Rep. Gianella	What is the cost of holding 50 prisoners and who pays that expense?
170	Rea	For 46 beds at \$63/day/inmate it would be over \$2 million for the next biennium which would be allocated to DOC.
188	Rep. Prozanski	It seems like we're getting into "blended sentences". When we went to the Matrix system in 1977, was it a mix of determinate and indeterminate sentences?
196	Rea	I believe all those offenders had been sentenced to indeterminate sentences.
198	Rep. Prozanski	That's what I was thinking because anyone sentenced prior to 1989 is still on the old system.
200	Rea	It was determinate in the sense that they had a prison term hearing, but it wasn't officially or legally a determinate sentence.
202	Rep. Prozanski	If HB 2083 were passed as written, would the Parole Board be able to prolong a prisoner's stay indefinitely, up until the point their indeterminate sentence had been reached?
212	Rea	Yes.
213	Rep. Prozanski	Are there safeguards or checks and balances that after a certain number of deferrals an inmate would go back in front of a judge for determination to be kept in the facility?
219	Rea	I had not considered checks and balances for HB 2083. The Board of Parole could be subject to forms of judicial review that would provide another safeguard.
233	Rep. Prozanski	There have been concerns that the Board of Parole's panel of three is not within a check and balance system. Do you know the reasons that we have moved from

		indeterminate sentences into the Matrix system and then into sentencing guidelines? Was this decision resource-driven or was too much discretion being given to the Board?
252	Rea	I would have to defer to people who were involved in developing the sentencing guidelines to answer those questions. I'm sure prison overcrowding was one concern, and I have heard concerns about the way the Board was handling inmates by releasing too many or not releasing enough.
260	Rep. Prozanski	I know that one other reason for the change was to get uniform sentencing throughout the state based upon the crime.
265	Chair Mannix	Discusses the reasons why the Matrix system was replaced by sentencing guidelines.
286	Rep. Bowman	How long have you been with the Board of Parole?
287	Rea	One year.
288	Rep. Bowman	In that time, approximately how many inmates have come up for parole in front of the Board?
289	Rea	I have reviewed about 60 hearings a month, for the last 12 months. Of those, 45 are parole release and the others are date cuts or parole violations.
299	Rep. Bowman	So approximately 500 inmates have come up for parole before the Board since you've been there?
301	Rea	Yes.
302	Rep. Bowman	Out of those 500 inmates, how many have had psychological exams that were favorable for their release?
307	Rea	I don't know, but I keep a log of all the hearings I participate in, and I can get you that information. I can remember hearings where there was no diagnosis, and under the law, if there is no diagnosis that person has to be released.
319	Rep. Bowman	I am more interested in the exact number of how many inmates had psychological exams that were favorable for their release, how many had psychological exams that were not favorable for their release, and of those, how many were released?
334	Rea	When you say, "favorable" to the inmate, this is a difficult term to quantify. Discusses that good things could be said about the inmate, but often the doctor's conclusions are very ambiguous.

341	Rep. Bowman	Specifically, it is when the report says the inmate "does not present a danger to themselves or the community", but something in your file tells you to keep that person longer than their release date.
346	Rea	Discusses two Court of Appeals cases, Weidner and Merrill, that restate Oregon law on this issue. For a 24-month deferral, the Board must have a diagnosis constituting the presence of severe emotional disturbance. Discusses all the information the Board analyzes to determine an inmate's danger to society. The doctor makes the diagnosis, but the Board makes the final decision for "dangerousness".
391	Rep. Bowman	Because you have no medical background, is your determination based solely upon what is in the inmate's file?
395	Rea	I do not have a medical degree, but I do have a lot of experience in evaluating defenders and risk. The Board takes all the information available to us to make this determination.
401	Rep. Bowman	I would like to have the numbers on how many inmates were released and how many inmates had psychological exams that said they were not a danger but were kept beyond their release date.
407	Rea	I have the information on who received a psychological exam, who was released and not released. However, it would be extremely difficult to review 500 psychological exams to pick out the ones that might be viewed as favorable or unfavorable and correlate the Board's decision.
416	Rep. Bowman	Are you assuming that all 500 of those inmates that came before the Board last year had psychological exams?
419	Rea	I know how many of those 500 inmates had psychological exams and how many were released or deferred. But I don't know how many of those were considered "favorable" or "unfavorable".
425	Chair Mannix	The psychological report is subjective depending upon how it is interpreted. Isn't it correct that the trigger mechanism for deferral is the requirement that there be a diagnosis showing severe emotional disturbance?
<b>TAPE 58, B</b>		
001	Rea	Yes.
002	Chair Mannix	If you did not have a report of at least a severe emotional disturbance, then you would not have authority to defer release?
003	Rea	Yes, and those people have been released on parole.

005	Rep. Bowman	How many different types of sentenced inmates are coming before the Board of Parole?
011	Rea	The only people coming before the Board of Parole are those inmates who committed their crimes before the sentencing guidelines were enacted.
012	Rep. Bowman	So these are people convicted prior to 1989?
013	Rea	The Board of Parole considers for release people who committed their crime before November 1989, people sentenced as dangerous offenders regardless of when they committed their crime, or people convicted and sentenced for aggravated murder.
019	Counsel Horton	On page 2, line 43, the inmate sentenced under ORS 137.120 (3)(b) would make HB 2083 applicable only to crimes committed on or before June 14, 1939. Is there a technical change you can suggest for this?
026	Rea	I will look at that statute to determine if it is in error.
029	Counsel Horton	Based on the language in HB 2083, would a person who is an 8 G, H, or I on the grid block be eligible for a probationary sentence?
039	Rea	Yes. Discusses the type of sentencing that could occur at the time of a conviction.
047	<b>Dave Cook</b>	<b>Director, Department of Corrections (DOC)</b>  Testifies in support of HB 2083. Discusses inmates in the correctional facilities who do not manage their behavior through medication. I view HB 2083 as a management tool for DOC against those inmates who plan on a "payback" or assault on the people who have controlled them the last few years. Discusses the possible need for a "cap" to determine the fiscal impact. Discusses page 3, line 35, regarding "a substantial risk of commission of a crime", not as the crime they were convicted for, but the potential of criminal activity if released into the community.
124	Rep. Bowman	I don't see anything in HB 2083 that identifies the inmates having their sentences deferred.
142	Cook	I share your concern whether this legislation should be placed in statute or if administrative rule is more appropriate. There are no specific people we are trying to "snare", but there are a number of people who have assaulted employees who were not prosecuted.
155	Rep. Bowman	The district attorney decided not to prosecute those cases?
157	Cook	Yes, or the facts did not allow a prosecution. Discusses three different groups of

		inmates defined in HB 2083.
195	Chair Mannix	Would a fiscal impact cap of ‡ of 1% of the available beds in DOC be acceptable?
203	Cook	It would be more acceptable than trying to forecast the types of crimes committed in the community or the types of crimes of conviction that could have sanctions applied.
210	Chair Mannix	If this cap is in place it means the DOC will have to determine which inmates are the most dangerous and only ‡ of 1% will be able to be deferred for release.
231	Cook	A management cap is the way I have approached this problem. The DOC would have to forward to the Parole Board those inmates who should be sanctioned, and then the Board would make the final determination.
247	Chair Mannix	Discusses an inmate not being eligible for deferral simply because they were sentenced to prison for a level 7 crime.
267	Cook	My experience in this system tells me that it is very difficult to determine the potential risk to the community simply by looking at the crime of conviction. I would rather watch these inmates over a prolonged period of time to determine by their actions, their writings or their threats that they are a potential danger to the community.
280	Rep. Bowman	Does the DOC make recommendations to the Parole Board whether an inmate should or should not be released?
284	Cook	They do for those three specific categories mentioned: people who committed their crime before November 1989, people sentenced as dangerous offenders regardless of when they committed their crime, or people convicted and sentenced for aggravated murder.
289	Rep. Bowman	That is the current law?
291	Cook	Yes. Explains that all relevant information on a parole-ready inmate is presented to the Board.
301	Rep. Prozanski	Do you think it is time to look at sentencing with more discretion at the court level? That is, no specific sentence under the guidelines or under Measure 11, but leave it to the court to make a determination? Then under HB 2083, DOC through the Parole Board would have the latitude to contain someone who needs further sanctions.
319	Cook	I am in favor of discretion on the part of judges, but I also favor proportionality and uniformity. I would want the available sanctions, if applicable, to apply for all inmates.



344	Rep. Gianella	I thought I heard that if someone committed a crime while incarcerated, and the district attorney did not have enough charges to prosecute, would this offense be listed in this proposal?
355	Rep. Bowman	When I was asking Mr. Cook how an assault in prison would be handled, he said sometimes the district attorney did not have enough information or they chose not to prosecute. In that case, if the district attorney chose not to prosecute, and HB 2083 was in place, the DOC could use this provision and prosecute the inmate internally and not as a new criminal activity.
367	Cook	The DOC has no ability to prosecute an inmate absent the prosecution of the District Attorney. We can use administrative sanctions for retaining custody of these inmates. Page 3, subsection (7) specifies how sanctions would work if an inmate demonstrated serious misconduct while incarcerated.
381	Rep. Bowman	If an inmate attacked a guard, and the district attorney did not prosecute the inmate, could you use this six-month interval as a punishment for that inmate?
387	Cook	We could use up to a six-month deferral of time as a sanction. I see much shorter periods of time as sanctions in most cases.
394	Rep. Bowman	That would be developed in the Administrative Rules?
396	Chair Mannix	We wouldn't have any control over the Administrative Rules as long as they were within the statute. Only the district attorney can determine what cases to prosecute, and a criminal case has to be proven beyond a reasonable doubt. There is a lower standard of proof if it can be determined administratively that certain acts occurred.
<b>TAPE 59, B</b>		
001	<b>James Rice</b>	<p><b>Oregon Criminal Defense Lawyer's Association (OCDLA)</b></p> <p>Testifies in opposition to HB 2083. Government lawyers like to create law, but how about enforcing the laws that we have on the books? Discusses cases of inmates committing crimes in prison and how these cases are handled at the present time. Discusses the presumptive sentences already in place. HB 2083 doesn't adequately protect people who are accused of something because there is no judge involved looking at the case. Discusses and gives an example of the bias supposedly built into psychological exams. When administrators in the corrections system have a lot of leeway to do what they want, it doesn't always comport with the law and that can lead to civil litigation with money being paid out. I would recommend the involvement of an unbiased, judicial review to make sure the sanctions are appropriate.</p>
118	<b>Dale Penn</b>	<p><b>District Attorney's Association</b></p> <p>Testifies in support of HB 2083. Discusses and gives examples of three specific places where HB 2083 will bring flexibility into the sentencing system. The Appellate Courts can review actions by the Board of Post Prison Supervision and</p>

		prison discipline cases, and this review is sufficient without additional trial court review. Before an inmate can commit a new crime in the community, it is important to let them know that if they are going to re-offend, there is some response in place (sanctions).
156	Rep. Hansen	Would you support telling an inmate that a year or two would come off of their sentence if they take their medication, go to counseling and work on getting their GED?
161	Penn	You are talking about a total restructuring of the sentencing system. Discusses sentencing guidelines and the flexibility available for "good time" release.
183	Rep. Prozanski	Is early release for "good time" 20% or 15% of the sentence?
185	Penn	The statute still authorizes up to 20%, but the average is closer to 15%. Discusses misconduct within a prison system and district attorney decision-making regarding that misconduct. The district attorney's office does not prosecute misdemeanor crimes within the institutions, but we do prosecute all felonies that occur within the institutions that we can prove. Discusses resource limitations and what cases the district attorney's office has not been prosecuting for the last 7 years. Rather than use the costly resources of the county, we have requested that the DOC use the administrative remedies that they have for sanctioning misconduct such as withdrawing good time or putting someone in isolation.
261	Rep. Hansen	Have you ever asked for legislation or introduced legislation requiring the state to pay for prosecution costs in Marion County?
264	Penn	Yes. In 1981, Representative Courtney introduced legislation for the state to fund prosecutions within the prison system. That legislation did not get passed. There have been a couple of attempts since then, but none of them have ever been funded.
274	Chair Mannix	Amendments to HB 2083 are necessary. Discusses SB 155 from the 1997 Session asking if it passed both the Senate and House Judiciary Committees?
290	Rea	Yes.
291	Chair Mannix	It then ended up in Ways & Means and never got out of committee?
291	Rea	Yes. In respect to Counsel Horton's question if page 2, line 43 is a technical error, the reference to ORS 137.120 pertains to everyone sentenced under HB 2083, not the old statute.
308	Chair Mannix	What is your reaction to the cap of no more than $\frac{1}{4}$ of 1% of the DOC beds can be used for deferred sentences?

315	Rea	That is an excellent suggestion that would help judges in determining whether to use an indeterminate sentence or not.
324	Chair Mannix	Would you work with Counsel Horton on developing language for this amendment?
334	Rea	Yes.
342	Chair Mannix	Discusses the different amendment options that could be adopted for HB 2083.
360	Rep. Prozanski	Discusses additional amendments to HB 2083 regarding medication and the 60-day deferral for release.
373	Chair Mannix	Should the DOC require that medication should have been offered at least 60 days prior to release?
374	Rep. Prozanski	Yes. Something on the record that shows medication was offered at least 60 days prior to release. The other amendment involves a review by an independent body like a judge or magistrate.
391	Chair Mannix	What do you think about the idea that the Parole Board would have to refer the deferral to the sentencing court for its determination?
398	Rep. Prozanski	That is what I had in mind: a subsequent review by the court.
406	Chair Mannix	What if we said any extension beyond the determinate sentence of 30 or 36 months cumulative time would be subject to review by the court?
414	Rep. Prozanski	Discusses the proposed deferrals for the three different types of offenses.
418	Chair Mannix	At what point would you like to see this judicial review?
<b>TAPE 60, A</b>		
002	Rep. Prozanski	If someone's sentence is going to be altered after an additional 24-month sentence has been imposed, they should go before a judge.
006	Chair Mannix	What if any extension of sentence beyond 24 months would require an opportunity for review by the court having jurisdiction while the inmate was incarcerated?

014	Rep. Bowman	If the Board of Parole has determined that an inmate would be a danger to society and would need a 24-month deferral to their release, then a judge should have some authority to review that sentence.
027	Chair Mannix	Discusses the idea of a judge determining the maximum and minimum sentence.
029	Rep. Bowman	We have the guidelines for determining the maximum and minimum sentences. My concern is giving someone the authority to extend that sentence when the sentence can already be significant.
030	Chair Mannix	I'll ask Rep. Prozanski to work up his judicial review proposal and Rep. Bowman would like judicial review for any deferral decision made by the Board of Parole. Mentions a "global" review of the sentencing system might be in order.
044	Rep. Prozanski	I think a work group should look at the sentencing system right away. If we are going to look at a traditional system of having an indeterminate sentence apply, then we should reinstate the checks and balances by the court.
066	Rep. Hansen	Gives examples of the problems encountered when trying to figure out the sentencing guideline grid.
085	Rep. Prozanski	HB 2083 has a good relating clause related to sentencing.
092	Chair Mannix	We could do a revolutionary change with a delayed impact date.
099	Rep. Bowman	I am still trying to figure out the Matrix system as compared to the guidelines, as compared to the Measure 11 sentences, to determine what a person's sentence will be.
119	Cook	Are you speaking only of those people who have committed a felony and are sentenced to the custody of DOC for incarceration into our institutions and not SB 1145 from the 1995 Session?
123	Chair Mannix	Yes. If we engage in any revolutionary thinking, the Governor would have to be part of any discussion because SB 1145 might be affected. I would certainly work with a group that wanted to explore the sentencing issue. Adjourns the meeting at 10:37 a.m.

Submitted By, Reviewed By,

Patsy Wood, Sarah Watson,  
Administrative Support Administrator

**EXHIBIT SUMMARY**

**A ñ HB 2083, written testimony submitted by Diane Rea, Oregon Board of Parole, 3 pgs.**

**B ñ HB 2083, written testimony submitted by Kent Zwicker, Oregon State Police, dated 3/1/99, 2 pgs.**