

HOUSE COMMITTEE ON JUDICIARY - CRIMINAL LAW

May 3, 1999 Hearing Room 357

8:00 a.m. Tapes 174 - 177

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:

HJR 87 Public Hearing

HJR 88 Public Hearing

HJR 89 Public Hearing

HJR 90 Public Hearing

HJR 91 Public Hearing

HJR 92 Public Hearing

HJR 93 Public Hearing

HJR 94 Public Hearing

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 174, A		
005	Chair Mannix	Calls meeting to order at 8:09 a.m.
<u>HJR 87 & HJR 94 COMBINED PUBLIC HEARING</u>		
005	Chair Mannix	We will incorporate by reference the prior testimony on HJR 7 for the history of HJR 87 through HJR 94. Each of the following HJR is propose amendments to the Oregon Constitution. HJR 87 grants certain rights to victims of crimes and acts of juvenile delinquency. HJR 88 grants the victim of a crime the right to a jury trial. HJR 89 would disqualify a person from serving on a jury if the person is not registered to vote in Oregon or if the person has been convicted of a felony or served a felony sentence within 15 years preceding the trial. HJR 90 deals with bailable offenses. HJR 91 deals with the admissibility of evidence. HJR 92 provides that 11 members of a 12-person jury can render a verdict of guilty for murder. HJR 93 deals with self-incrimination. HJR 94 deals with the execution of sentences.
040	Counsel Horton	Discusses rough draft versions of proposed amendments to these bills and when the final Legislative Counsel amendments might be ready (EXHIBIT A).
064	James Rice	Oregon Criminal Defense Lawyers Association Testifies in opposition to HJR 87 through HJR 94.
079	James Arneson	Oregon Criminal Defense Lawyers Association Testifies in opposition to HJR 88. We are fundamentally opposed to the right to a jury trial. Some cases or issues are so prejudicial or the case is so technical that a judge should decide the facts rather than a jury. Subsection (4) on page 1 of HJR 88 gives the victim rights to the district attorney.
153	Chair Mannix	What about the concept of the "people" being the general victim of any crime?
157	Arneson	Do you mean in the name of the state?
158	Chair Mannix	What about the "people of the state" being the victim of any crime?
160	Arneson	That is not the definition in any of the bills nor is it currently in statute. If these are generalized crimes against the state as a victim, then say that, rather than saying these are rights given to those who are the actual victim of a particular crime and then give the prosecutor additional authority that they do not have now.
173	Rep. Prozanski	Have you done any research on what other states are doing regarding asserting

		the right for a jury trial?
178	Arneson	No.
186	Shaun McCrea	<p>Oregon Criminal Defense Lawyers Association</p> <p>Testifies in opposition to HJR 91 and HJR 93. Discusses how HJR 91 would change the Oregon Constitution so that the only restriction on admissibility of evidence would be under the 4th Amendment to the U. S. Constitution as opposed to the protection currently in place under Article 1, Section 9 of the Oregon Constitution.</p>
241	Rep. Prozanski	Asks for clarification on the need for a warrant if the police trespass on property that is posted "no trespassing".
244	McCrea	If there is a gate around the property, a fence, and "no trespassing" signs are posted, according to an appellate ruling, it would be trespass for police officers to go past that gate without a warrant.
250	Rep. Prozanski	Would an officer be able to approach the house if it was an open residence without signs being posted?
253	McCrea	Yes. We have the protection of the 4 th Amendment, but if we pass HJR 91 we are giving up our second layer of protection which is the appellate court and the judge's ability to interpret Article 1, Section 9 of the Oregon Constitution. The same analysis applies to HJR 93 regarding self-incrimination.
280	Anthony Bornstein	<p>State Public Defender</p> <p>Testifies in opposition to HJR 89 regarding restrictions for jury duty. A jury pool should be as representative of the community as possible. Discusses using not only registered voters for jury duty but individuals registered to drive with the Department of Motor Vehicles. Those on trial feel a greater respect for the law when those sitting in judgement are more representative of the community.</p>
328	Chair Mannix	Describes the history of a "jury of your peers", and states that a person who demonstrates their commitment to civic duty by registering to vote would be the best suited for a jury.
362	Bornstein	What you want in a juror is someone who is attentive, observant, conscientious, and fair. A person can maintain those qualities without being registered to vote. If a person serves on jury service, they should come away with hands-on, first-person experience which would encourage them to become an active voter.
372	Chair Mannix	Do you like hands-on, actively engaged juries?
373	Bornstein	Yes.

374	Chair Mannix	Why is it in many courts that we refuse jurors the opportunity to be instructed in the doctrine of nullification? Would instructing them empower them too much? Describes the doctrine of nullification which means a jury may decide that they are so offended by a charge against the defendant, that they are going to vote to acquit or return a "not guilty" verdict.
396	Bornstein	It is valuable to have juries instructed to follow the law, but they don't have to be instructed to go beyond the law. Juries will exercise rare instances of nullification when they feel that the government has engaged in significant overreaching which has resulted in an unfair prosecution.
TAPE 175, A		
013	Rep. Bowman	What percentage of Oregonians voted in the last election?
015	Bornstein	I don't know.
016	Rice	I think it was 40%.
018	Rep. Bowman	It was around 32%-34%. If we limit the jury pool to people who are registered to vote, how do we distinguish between those citizens who feel a civic commitment to vote and those citizens who may have been registered to vote for many years but do not exercise that right?
026	Rice	I'm not sure you could make that distinction. You can buy lists of people who have voted in the last four elections. Discusses reasons why people do not vote, but not voting shouldn't disqualify someone from jury duty. I believe the broadest base possible is best for a jury. Discusses the racial composition of juries.
058	Rep. Bowman	As a defense lawyer, if you are defending someone who is African American or Hispanic and your jury does not have one person of that origin, would you have your client plead to a lesser crime so the jury would not have to decide their guilt or innocence?
065	Rice	No. I try to sensitize the jury panel that my client is not equally represented on the jury and how that might feel.
078	Bornstein	A defense attorney could bring a challenge to the existing jury pool and demonstrate to the court how it does not represent the community and how that lack of representation is a constitutional violation.
090	McCrea	I might bring the issue to my client's attention, but it would be their decision in proceeding with the trial.
102	Rep. Hansen	Are you currently finding a disproportionate number of older people serving on juries?

105	Rice	No. Senior citizens often have more time to serve on juries than younger people with small children.
128	Arwen Bird	Resident of Portland Discusses that she and her sister were hit by a drunk driver and the life-changing injuries that resulted. Describes the valuable perspective she was able to contribute to the criminal proceedings against the drunk driver. I advocate for a system that maintains a strong level of accountability while also protecting the civil rights of an individual.
167	Rice	Testifies in opposition to HJR 90 regarding bail. Discusses the Federal Bail Reform Act that takes into account the threat to society if a person is released on bail. Discusses the unconstitutionality of HJR 90. There is a 60-day rule that people have to be tried within a certain period of time and that is not present in HJR 90. Discusses how HJR 92 lessens the burden of the state in convicting someone for murder. Having a unanimous verdict of all people on the jury convict someone of murder is imperative for a just society. Describes subsection (1) of Paragraph 1 of HJR 94 as binding the hands of future legislatures if they want to change the way execution of sentences are carried out.
361	Rep. Prozanski	Many of the people I talk to are concerned with all the referrals that they see coming out of the Legislature asking the people to make the decisions on these issues instead of the legislators they elected.
382	Chair Mannix	Wouldn't that continue to empower the common person?
383	Rice	Yes, but getting constitutional amendments on the ballot takes a considerable amount of money or considerable effort to get them through the legislature.
401	Karen Brazeau	Oregon Youth Authority (OYA) Testifies in opposition to HJR 94. Beginning on line 5 of page 1 this measure appears to be an attempt to impose determinate sentences for youth offenders who come to the OYA through the juvenile court system.
417	Chair Mannix	Whatever sentencing structure existed at the time of the case, would be the structure that would apply to that case. This is not intended to take away the potential for indeterminate sentences to youth correctional facilities.
TAPE 174, B		
016	Brazeau	Suggests requiring language in juvenile court that juveniles are under indeterminate sentences. The Director of the OYA should have the sole responsibility for determining when youth are moved out of a youth correctional facility. This procedure is how the OYA balances the beds that are authorized by the legislature. There are determinate sentences for juveniles who come to OYA through the adult courts, but not through the juvenile courts.

044	Chair Mannix	Is your main concern the reference to a youth's commitment to a youth correctional facility as opposed to imprisonment, which is an adult system term?
048	Brazeau	Yes.
054	Norm Frink	Multnomah County District Attorney's Office Testifies in support of HJR 87-HJR 94. Discusses the technical grounds that found Ballot Measure 40 unconstitutional, and consequently led to these joint resolutions being split up to be voted on separately. The concern that the technical wording of HJR 7 was not appropriate has been worked out in these separate resolutions. Discusses HJR 94 that states that a sentence has to be articulated in open court by the judge.
131	Chair Mannix	Are you suggesting that the language should read "no laws shall permit a criminal sentence or juvenile adjudication imposed by a judge in open court to be set aside, modified or not carried out except through further action by the judge in open court?"
138	Frink	Yes.
164	Rep. Bowman	You stated that prior to SB 936 sentencing was made behind closed doors. Isn't that exactly what district attorneys are doing now?
168	Frink	I stated that prior to Ballot Measure 40 and SB 936, there was ability within the bureaucracy to cut a sentence that the judge had set in open court without any authorization by the judge in open court and without any notice to the victim or other parties interested in the sentencing. HJR 94 would end that practice in the state constitution.
182	Rep. Bowman	Are district attorneys still making decisions about sentencing behind closed doors?
187	Chair Mannix	The proper answer is "no".
198	Rep. Prozanski	Why shouldn't the legislature reserve the right to be able to make modifications or changes within the sentencing structure?
205	Frink	The goal of HJR 94 is to make sure that when substantive sentencing decisions are made, that they are made in a public forum in open court with all interested parties present.
222	Rep. Prozanski	Would you oppose adding the language within HJR 94 that would allow or permit the legislature to pass legislation in the future that would have an effect on the term of incarcerations or the length of custody a youth would be in a correctional facility?

229	Frink	Did you state that the legislature rather than the sentencing judge could retroactively reduce a sentence that has been arrived at in open court?
233	Rep. Prozanski	No. I propose not taking anything away from the judge, but allowing the legislature to enact the equation for good time that may apply to someone already in custody.
242	Frink	I don't think this measure bars the legislature from delegating to the court the authority to make decisions in open court that have already been sentenced. Discusses SB 1049 from the 1997 session that allowed the court in open court to modify sentences that had already been imposed.
256	Chair Mannix	Are you saying that if the legislature wanted to see "softer" sentences imposed on people who are already sentenced, they could authorize the judge or the court to re-visit the sentence, but the legislature could not issue a reduction of sentences?
266	Frink	Yes, and the current language covers that situation.
268	Rep. Prozanski	Do you have a problem with the legislature being listed in HJR 94 to permit them to have additional flexibility that is not permitted as HJR 94 is written currently?
279	Frink	I do have a problem with changing the measure so that the legislature rather than the sentencing court can make a decision on a person's sentence.
286	Rep. Prozanski	Do you believe there should be a legislative debate as to what is good public policy before it is referred to the voters for their consideration?
295	Frink	In Oregon's system of government, the people are a second legislative assembly. On a number of subjects, there has been a desire expressed not to interfere with legislative mandates from the people except for technical changes and modifications.
323	Rep. Prozanski	Are you saying you do disapprove of the legislative process of looking at these eight referrals to determine if they are good public policy?
327	Frink	I don't think that is an either/or statement. These public policies were originally passed overwhelmingly by the people and they should be offered that opportunity to vote on them again.
342	Rep. Prozanski	Do you think we should allow the initiative process to bring these policies before the voters rather than use the legislative process?
349	Frink	In this case, when Ballot Measure 40 was found to be unconstitutional solely on technical ground, it is fully appropriate for the legislature to give them the opportunity to vote on these policies separately. Discusses HJR 88 and the

		history of jury trials in felony cases in the State of Oregon. Proponents of these resolutions were trying to bring some balance to the system by giving equal rights to the defendant and the victim to ask for a jury trial.
TAPE 175, B		
003	Chair Mannix	Now a defendant can waive a jury if he/she fears what the jury might say. Isn't that what this measure is all about?
016	Frink	Yes.
017	Rep. Prozanski	In your research of juries being required for capital offense cases, was it deemed appropriate to have a cross-section of the community making that decision?
024	Frink	Yes. It was deemed that the juries would make decisions in all criminal cases. For part of history juries could not be waived, but based upon the fact that the jury wasn't needed in some capital cases, and with the consent of the court and the acquiescence of the district attorney, juries were waived. Unfortunately, the language that went into the Oregon Constitution did not expressly say that it had to be done with the consent of the district attorney.
076	Rep. Prozanski	Discusses a Clackamas County case where a designated victim did not want a jury trial, but was forced to go to a jury trial. If this is a victim's right, shouldn't the victim have the right to say yes or no to a jury trial?
087	Frink	The case in Clackamas County had more than one victim.
095	Rep. Prozanski	Doesn't the definition of "victim" allow the parents or guardian of the actual victim to stand in his/her place if the actual victim is deceased?
097	Frink	Yes.
137	Paul Snider	Association of Oregon Counties Discusses that the concerns of the counties are resources and jails. Asks for clarification of the word "danger" in (1)(b) of Paragraph 1 of the proposed changes to HJR 90 (EXHIBIT A). There should be something to show what level of danger we are talking about.
158	Chair Mannix	Would saying "significant" danger help?
159	Snider	Yes. Subsection (3)(e) needs to define "threatened" physical injury. Is it the intent that "violent felony" is defined to be serious physical injury whereas "danger" in the pretrial release portion of HJR 90 does not include the word "serious"? Asks for clarification in the proposed amendments to HJR 94

		(EXHIBIT A) subsection (1) (a) relating to the term of imprisonment. Does this proposed new legislation affect or supercede SB 1145 that allows supervisory authority to move offenders around while they continue in custody?
189	Rep. Hansen	Could counsel draft amendments to deal with those issues?
191	Chair Mannix	Yes. If the sentence is imposed at a particular time under a particular statutory scheme, it is assumed that the sentence incorporates that statutory scheme.
207	Rep. Prozanski	Lane County has delegated certain duties to the supervisory authority. It sounds like the counties would like to make sure that that kind of authority is maintained.
222	Chair Mannix	The intent wasn't to bring the person back in front of the judge.
235	Frink	Discusses that the issue of the supervisory authority continuing to release people without the consent of the court was addressed last session in SB 936, and this proposed legislation wouldn't change that.
254	Rep. Prozanski	Is it your intent to diminish the right of a victim if they are a convicted felon?
264	Frink	Discusses the case of a 2-yr old child beaten to death by its mother.
268	Rep. Prozanski	Was it your intent to have felons who become victims held at a different standard than non-felon victims?
278	Frink	No one is demeaned because of their status of a felon or not.
294	Rep. Prozanski	Did you say that a victim who has a felony conviction should not be treated any differently from a victim without a felony conviction?
297	Frink	That is not what I said. Under this particular case, it was not the violation of the victim's right to a jury trial. Some situations are appropriate to have victim input, even if they have a felony conviction, and some may not.
311	Rep. Prozanski	Do you believe that the district attorney should have the superseding of power over a victim as designated in this legislation?
314	Frink	There will be times when a final call as to certain of the victim's rights has to be made by one of the parties in the two-party litigation system. The district attorney rather than the defendant often make that final call.
337	Rep. Bowman	How will the district attorney's job change if these resolutions pass?

340	Frink	I will be functioning within a system that is fairer and more directed to seeking the truth of what happened in a criminal case, and will be more considerate of the rights, feelings, responsibilities and past inequities of crime victims.
364	Rep. Bowman	I asked if sentencing decisions were being made behind closed doors. <u>The Oregonian</u> states that the decisions made in the Grant High School student's robbery case were made behind closed doors, not in open court. It is clear that sentencing decisions are being made in the district attorney's office before going to court. If these resolutions pass, how do we get truth in sentencing from district attorneys in open court like the decisions judges will be required to make in open court?
392	Frink	Your premise is false.
393	Rep. Bowman	Why is that?
394	Frink	Sentencing was done in open court. Discussions between the defense and the prosecution were carried on outside the open court long before the advent of Measure 11 and will continue to happen as long as the criminal justice system exists. The Measure 11 mandatory minimum sentences for those robberies was 90 months and more than one defendant pled to time in excess of 90 months because they thought that was the discretion the court would exercise if they went to trial and were convicted.
TAPE 176, A		
004	Rep. Bowman	Isn't it true that before going to court, each defendant knew how much time they were going to receive for their part in the robberies?
012	Frink	Prior to going to court there were discussions between the court, the defendants, the defense attorney, the prosecutor and the victims. Those discussions led to agreements that the judge chose to ratify in court as to specific sentences. That type of thing happened before Measure 11 and will always happen. The principal defendants agreed to sentences beyond the mandatory minimums because they concluded that the judge would use his discretion in mandating a longer sentence, not the district attorney. Discusses the relationship of the Oregon Constitution to the Federal Constitution and how specific articles of the constitution pertain to this proposed legislation. Addresses the restriction of jurors to registered voters and the efforts to expand the ability for citizens of Oregon to register to vote. There is no support for the notion that limiting juries to registered voters leads to less diversity in jury pools.
167	Rep. Prozanski	Discusses how the right to serve on a jury has changed in Oregon. Would you also agree that jury makeup has been changing?
176	Frink	Yes.
177	Rep. Prozanski	Do you believe it is inappropriate to have people who aren't registered to vote sit on a jury in a criminal case?

181	Frink	Yes.
181	Rep. Prozanski	Then why can they sit on a civil case?
182	Frink	In my personal opinion, they shouldn't be allowed to sit on a civil case. The language of these proposed new resolutions is confined to the content of Ballot Measure 40 that confined itself to criminal law.
190	Chair Mannix	What if we said registered voters applied to all juries?
192	Frink	As policy it is wise, but it shouldn't be contained within these resolutions. We are giving voters a chance to vote separately on what they passed overwhelmingly as Ballot Measure 40. The legislature could address the civil trial issue separately if they wish.
208	Steve Doell	President, Crime Victims United of Oregon Testifies in support of HJR 87-94. There are now 32 states that have constitutional provisions for victim's rights. Discusses the issue of having to have a jury trial in a federal case and that a person has to be a registered voter to serve on a federal jury.
313	Rep. Prozanski	Discusses states that have constitutional amendments regarding search and seizure or evidence coming into a trial. Arizona has the rules governing criminal procedure and admissibility of evidence in all criminal proceedings to protect victim's rights subject to amendment or repeal by the legislature to ensure the protection of these rights. Would you oppose our proposed resolutions including the legislature's right to amend or repeal these rules?
332	Doell	Yes.
362	Rep. Prozanski	You have listed the different states that have victim's rights. Could the amount of support vary from state to state based upon what rights were presented to the voters?
379	Doell	I don't know. Continues to discuss the Oregon Constitution and its close interpretation to the Federal Constitution.
TAPE 177, A		
002	Rep. Prozanski	Is it better to have the Oregon Constitution interpreted by the U. S. Supreme Court rather than Oregon's judges who are accountable to the citizens of this state?
008	Doell	I know that 87% of our judges were appointed, not elected by the people. I don't believe we should have expanded rights in Oregon for criminal defendants when it comes to the truth coming into the courtroom. Discusses the fact that more

		information concerning victims is presented in the courts in the State of Washington and the federal court than in the courts in Oregon.
024	Rep. Prozanski	Do you believe that it is appropriate for the Oregon Constitution to be interpreted under federal interpretation rather than the Oregon judges?
027	Doell	I think the Oregon Constitution should be interpreted as it was for 123 years prior to 1982 when the courts expanded the rights of the criminal defendant.
031	Rep. Prozanski	Would you have the same opinion if we had different individuals on the Supreme Court and they did expand the rights of the accused by placing in safeguards such as the Miranda rights?
037	Doell	We have to go with those decisions.
039	Chair Mannix	Any interpretation of the federal constitution that raises the bar is applicable to all the states. Oregonians cannot drive constitutional rights below the level established by the federal constitution, but we can raise constitutional rights.
058	Doell	In HJR 94 we are looking for truth in sentencing. The system of justice should not be revenue-driven, but based upon public safety and the safety of the victim.
077	Chair Mannix	Closes the combined public hearing on HJR 87 through HJR 94.
077	Chair Mannix	Adjourns the meeting at 10:33 a.m.

Submitted By, Reviewed By,

Patsy Wood, Sarah Watson,

Administrative Support Office Administrator

EXHIBIT SUMMARY

A ñ HJR 87 through HJR 94, proposed changes to the resolutions submitted by staff, 8 pgs.