

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CRIMINAL LAW

April 8, 1997 Hearing Room 357

1:00 pm Tapes 80 - 82

MEMBERS PRESENT:

Rep. John Minnis, Chair

Rep. Jo Ann Bowman, Vice-Chair

Rep. Peter Courtney

Rep. Floyd Prozanski

Rep. Lane Shetterly

Rep. Ron Sunseri

Rep. Larry Wells

MEMBER EXCUSED:

STAFF PRESENT:

Nikola Jones, Counsel

Brian Higgins, Administrative Support

MEASURE/ISSUES HEARD:

Public Hearing - SB 936A

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 80, A		
004	Chair Minnis	Calls subcommittee to order at 1: 13 pm
<u>SB 936A - PUBLIC</u>		

HEARING		
005	Chair Minnis	Opens public hearing on SB 936A >I would like to go through the bill section by section.
019	Mark Gardner	Special Counsel to the Attorney General >submits and reads written testimony, (EXHIBIT A)
058	Norm Frink	Chief Deputy District Attorney, Multnomah County >We will proceed on the A-Engrossed bill section by section.
070	Tim Sylvester	Assistant Attorney General, Department of Justice, Appellate Division >Section 1 of the bill is intended to implement subsection 1F of Ballot Measure 40. >It is not our opinion that this section would repeal the "Rape Shield" statute.
084	Rep. Shetterly	What remains of any sanction for the violation of the statute? I understand that to be the whole point of the exclusionary rule.
087	Frink	This does not eliminate the exclusionary rule. What this bill would do is limit certain statutes.
104	Sylvester	Suppose a defendant who is intoxicated runs into a tree and is taken to a hospital and tests show he was over the limit, if the state obtains this evidence, it is not admissible unless it was obtained in accordance with Chapter 813 >This provision would say that this type of evidence is admissible. >Measure 40 does not create any new civil liabilities.
124	Frink	There are preexisting cases where police officers were sued for statutory violations which would not be affected by this.
127	Gardner	There are some circumstances in the criminal code where there is a prohibition on the conduct of the person who obtains the evidence.
136	Rep. Shetterly	That's fine. I just wanted to get that on the record.
139	Chair Minnis	There are three things then that answer your question: civil actions against the officer, a possible criminal violation and complaints to the agency with respect to their conduct.
144	Rep. Shetterly	That's what I wanted on the record.
145	Rep. Prozanski	Asks for comments on the rape shield law >submits a memo from Judge Michael Marcus for the record, (EXHIBIT

		B)
165	Chair Minnis	Under section 1, unless the exclusion of the evidence is required by the rights of the press, this would pertain to the press itself?
167	Frink	There is a provision in the statute, the Press Shield Law, which creates rights for the press to withhold information from a criminal prosecution if it is obtained during the course of their employment.
176	Chair Minnis	Let's go into Section 2 briefly.
178	Sylvester	Section 2 is meant to codify what is required by subsection 1i of Measure 40 which gives a victim the right to a copy of any court proceeding.
184	Rep. Prozanski	Can we talk about actual costs and how they are going to be defined?
188	Frink	Responds that the intent is to encompass all of the costs, including employee copying
200	Rep. Bowman	Measure 40 states that a victim has a right to a copy of any court proceedings and this has now been expanded to include audio and video, why?
205	Frink	I think the intent was to cover any recordings of the proceedings.
212	Rep. Bowman	I'm just going by what Measure 40 says.
215	Rep. Prozanski	This memo from Judge Marcus appears to contradict your position on the "rape shield" law.
221	Frink	Responds that Judge Marcus has had interpretations of previous victims' rights provisions which have not been sustained >His concerns flow from the actual language of Measure 40.
234	Sylvester	Section 1, by its terms, does not affect the application of the rape shield statute. Although the due process clause of the federal constitution may require a mutuality as far as the admission of evidence, the rape shield statute will not upset the general balance.
252	Rep. Prozanski	I just want to make sure we have the intent on the record.
255	Frink	I want to be definitive on that. There was no intent in Measure 40 to affect the rape shield law, nor is there any intent in SB 936A to do this.
262	Sylvester	Section 3 is intended to implement subsection 1m of Measure 40 which gives the victim the right to be consulted upon request regarding plea negotiations involving any violent felony. >Section 4 of the bill also addresses this.
270	Chair Minnis	How would a victim request this information? What are the timelines?
273	Frink	In section 5 of the Act which is on page 2, lines 29-45 and page 3, line 1, it sets out a period for notification as "reasonably practical."

288	Sylvester	Section 4 of the bill puts a duty on the court at the time the plea is accepted to make an inquiry of the district attorney to make sure they have complied with the consultation requirement. The purpose of this section is to enforce that right.
296	Chair Minnis	So, there are no particular timelines?
298	Frink	Other than the phrase of "reasonably practical," no.
299	Chair Minnis	Who ultimately determines what is "reasonably practical?"
301	Frink	Responds that the ultimate determination lies with the courts >We chose not to create a rule that may not work in every jurisdiction.
308	Rep. Bowman	I'm trying to think from a victim's viewpoint. >Are we delaying trials so that we can comply with this measure?
318	Frink	Responds that it is not the effect
334	Chair Minnis	I need to have a clearer picture. >I'm trying to get this in the context it would actually occur. >You don't actually go out and seek the victim, you wait for their request?
360	Frink	Actually, in most cases, we do go out and seek their input. The only issue is: How would their actual right, as opposed to their practice, be carried out?
369	Chair Minnis	What does Section 4 do?
371	Sylvester	Section 4 puts a duty on the court at the time a change in plea is accepted, to ask the DA on the record to ensure that he or she has consulted with the victim as required by Measure 40.
382	Rep. Prozanski	What is the cross-reference in the measure?
384	Sylvester	It is section 1M, but there is no specific provision in Measure 40.
394	Rep. Prozanski	What about judges participation in the plea negotiations?
401	Frink	That's current law. The only portion of section 4 which changes the law is subsection C.
407	Rep. Prozanski	I've been in these negotiations where the judges have, in fact, participated. Are we saying that unless the parties agree to allow that to go forward, we're not supposed to be doing that?
414	Frink	This sets up a scheme under current law for the judge to participate formally in plea negotiation and sets up a consequence if the court does not ultimately impose the agreed-upon sentence.

431	Chair Minnis	What part is section 5 related to?
433	Frink	It's related to 1M and 1N.
438	Chair Minnis	And this just talks in general about the law enforcement agencies' duties and responsibilities.
TAPE 81, A		
007	Sylvester	Section 6 is intended to implement subsection 1c of Measure 40 which gives the victim the right, upon request, to information about the conviction, sentence, imprisonment, criminal history and future release of physical custody of the criminal defendant or convicted criminal.
019	Rep. Prozanski	It is important to note, for the record, we will not be required to give copies of the NCIC reports and those things already prohibited by federal law.
022	Frink	That's correct.
023	Rep. Prozanski	So, to meet the goals of this section, some typewritten or handwritten history with the dates of conviction [will suffice].
025	Frink	We have a person who compiles that data in our office.
031	Rep. Shetterly	I just picked up on the actual cost thing that Rep. Prozanski was talking about. It doesn't appear to cross-reference the public records law, was that intentional?
041	Gardner	Section 2 deals with just the transcript; Section 6 deals with other information of a broader nature.
044	Frink	The transcript issue is not covered by those sections of the public records law.
052	Sylvester	Section 7 of the bill is intended to implement subsection 1d of Measure 40 which gives the victim the right to refuse an interview, deposition or other discovery request by the defendant or their attorney.
064	Rep. Prozanski	On line 30 of the bill, what is the latitude as to what is going to be defined as allowable for discovery? It seems pretty cloudy.
070	Sylvester	The intent here is if the victim is on the stand in a pre-trial hearing, the defendant may ask the victim to provide evidence that relates to the issue before the court, but it does not allow the attorney to ask questions unrelated to the issue before the court.
079	Frink	At the request of some of the defense attorneys who participated in the work group, you should note that on line 34 the subpoenaing of records was included without the discovery limitation.
		Oregon District Attorneys Association >in support of the bill >It is a good effort at trying to constrain the statute to the measure.

088	Dale Penn	<p>>Most plea bargains begin at the Grand Jury stage.</p> <p>>District attorneys understand we have a role to play in enforcing these rights and willingly accept those.</p>
116	Sylvester	<p>Sections 8-10 are all based on subsection 1G of measure 40 which gives the victim a right to have a jury selected from registered voters and composed of persons who have not been convicted of a felony within the last 15 years.</p> <p>>Under the current measure, these people would have been allowed to serve on criminal juries and so these amendments are intended to implement that these people are not allowed to serve on juries.</p>
127	Rep. Bowman	How would someone who is not a registered voter be notified about the potential to be served on a jury?
129	Frink	That would be up to the individual court and the elections division.
132	Gardner	You'll note that people who are not registered to vote are still part of the jury pool because they are eligible to sit on civil trials. It should become clear to them early on that they are not eligible to sit on criminal trials because they are not registered to vote.
144	Rep. Bowman	<p>Statistically, there is 1.2 percent of African-American people in this state and 1.4 percent of Hispanics who are registered to vote.</p> <p>>The Judge said the lack of diversity in the jury pool is due to the randomness of the process.</p> <p>>Based on these statistics, it appears there will never be people of color serving on any criminal juries in Oregon under this provision.</p>
156	Frink	<p>This has been one of the most demagogued issues in this bill. The law in Oregon, until 8 years ago, was that it was a requirement to be a registered voter in order to serve on a jury. This remains to be the requirement in federal courts. There is no statistical evidence that minorities are under-represented in the jury pool.</p> <p>>Two studies address this: One by the Multnomah County Elections Division, and the second used was done by the US Census Bureau.</p>
206		<p>>The Census Bureau survey is fundamentally flawed because the numbers don't match up. It also doesn't take into account other factors like citizenship.</p> <p>>This has been the law since 1986 and we have simply carried it out in statute.</p> <p>>Because of the concern of this being unfair or unconstitutional, we attached a sunset clause to the bill of 1999.</p>
240	Chair	Asks for source of Rep. Bowman's statistics

	Minnis	
243	Rep. Bowman	They are from the Criminal Justice Commission Report dated 1994.
247	Frink	My sources are: the US Census Bureau and the Multnomah County Elections Division study, which is in the record on the Senate side, done by Philip Clifford.
261	Chair Minnis	Even if the statistics Rep. Bowman is using are correct, there is nothing that bars anyone called for jury duty from registering to vote.
269	Rep. Bowman	I think if the criteria to call someone is their voter registration then you have eliminated a major portion of the population.
273	Chair Minnis	I'm not so sure that is true, because I assume these juries are pooled at the same time.
276	Gardner	It is important to note that they call civil and criminal juries at the same time. At this time, those that are not registered to vote, would not be eligible to sit on a criminal jury, but they would for a civil one. >Maybe the under-representation of minorities should be something the Legislature should think about. >Ultimately, this bill could help to assist in increasing minority voter registration.
311	Rep. Bowman	For the record, the US Census Bureau consistently undercounts minority populations.
316	Chair Minnis	My thought is that the best place to go would be the Center for Population Research at Portland State University to ask them to do a study on the topic.
321	Rep. Bowman	A report on discrimination and the judicial system has already been done and on file in this building.
325	Chair Minnis	I believe that had more to do with sentencing practices. It may be that we need additional research. >When the pools are called, no one is precluded based on their voter registration.
338	Frink	The jury pools come from voter registration lists and Department of Motor Vehicle lists. >I want to point out that Chief Moose, at Sen. Gordly's request, reviewed this bill and has endorsed this provision.
354	Rep. Wells	Why was that provision in there?
358	Frink	The thought was that perhaps those who do not care enough to vote are also not appropriate decision-makers to serve on a criminal trial.
376	Rep. Wells	Have there been any court cases as far as discrimination in the jury selection process is concerned?
		The provision requiring registered voters was law in the state of Oregon

378	Frink	until 8 years ago, is the law in federal court, and has had no successful court challenges.
387	Sylvester	Measure 40 expressly ensures that a criminal defendant's rights under the federal constitution are not affected. Even if it is a bad idea to exclude non-registered voters, we need to remember that this was overwhelmingly approved by the voters. We are simply attempting to conform the statutes to the constitutional requirements.
433		>If, one year from now, the Supreme Court strikes down Measure 40 as unconstitutional, then all of the juries selected in the previous year would have been selected in violation of state statute and all of those cases could potentially be reversed on that basis.
TAPE 80, B		
017	Rep. Bowman	We're putting this into the statute in case Measure 40 is found to be unconstitutional so that we don't have to worry about the cases tried before this unconstitutionality is affirmed, is that correct?
021	Sylvester	What I am saying is, that if it is judged to be unconstitutional, it is important to have the statute conform to the constitution. >Regardless of whether the statute is changed, trial courts will be selecting juries in accordance with the measure because it currently is the law.
032	Chair Minnis	Even if they did find it unconstitutional and this provision wasn't in the law, it doesn't bar future prosecution. It only means we have to go back and start over again.
035	Frink	I am only aware of one court that has struck down the measure as a whole. I think it would be irresponsible to not include this.
045	Rep. Bowman	Section 9c, says, "a District Attorney may elect to allow to serve on a jury persons who would otherwise be disqualified." Can I get an example of why a DA would want someone to serve who has been listed as being unqualified?
049	Frink	I am going to propose that this section was put in this bill as a concession to those who were concerned about that element. I am prepared today to submit an amendment to delete that provision.
056	Gardner	This is a victims' right and any right can be waived.
070	Frink	At any right, we will be offering an amendment to remove the waiver provision.
073	Rep. Prozanski	How are the juries being selected now for criminal cases?
076	Gardner	I was a judge in Washington County and there they are selecting juries pursuant to Measure 40.
083	Rep. Prozanski	Do you know what the reports are from around the state?

084	Gardner	I can only speak to Washington County.
086	Frink	I think the same would be true, but some courts have found that this provision is not retroactive to crimes that occurred before December 5.
092	Gardner	Only Jefferson and Crook Counties have struck down Measure 40 <i>en todo</i> , and all others are enforcing all of the measure.
097	Rep. Prozanski	I had heard that some District Attorneys had requested that provision in section 9c so that they could have an out.
102	Gardner	Ms. Sullivan, a district attorney from eastern Oregon, was interested in a mechanism to allow non-registered voters to sit on juries in her criminal cases which led to its inclusion in the bill.
110	Rep. Shetterly	Section 8 includes the criteria for a criminal jury as set out under subsection 1g of Measure 40 except that it does not include the voter's registration requirement, correct?
115	Frink	That's correct.
116	Rep. Shetterly	Section 9b restates the entire statute including the criteria for qualification to serve on a criminal jury and does include the voter's requirement.
119	Frink	That's correct.
120	Rep. Shetterly	The intent of section 9a is to say that, until January 1, 1999, section 9b will be the law?
122	Frink	That's correct.
123	Rep. Shetterly	Is that an error on line 34 where it says section 9 of this Act shall not be operative? Shouldn't it be section 8?
125	Frink	That is not an error.
127	Rep. Shetterly	Where does it say that section 8 does not operate at the same time?
128	Frink	You may be right and I would need to check with Legislative Counsel.
133	Rep. Shetterly	I thought I understood it, but when I started reading it in detail, it didn't make sense.
135	Chair Minnis	Can you explain to me what you are discussing?
136	Gardner	I went through the same analysis before the Senate hearing on this measure and it took me about 30 minutes of reading this, but I ultimately concluded that it was correctly drafted. It might not be a bad idea to recheck it.
142	Chair Minnis	You're a sitting judge and it took you 30 minutes to decide whether it was structurally sound or not?
144	Gardner	I am a formerly sitting judge.
146	Rep. Shetterly	Section 8 revises ORS 10.030 in terms of jury selection criteria and it doesn't include the reference to the voter registration requirement. Section 9b amends the same statute and does included the voter registration requirement. The intent is that section 9b would be operative until the sunset on January 31, 1999. I believe that is what section 9a sets out to do,

		but on line 34, it says, "until January 31, 1999, ORS 10.030 and section 9 of this Act shall not be operative." Shouldn't that be section 8?
169	Frink	Section 9a says, "notwithstanding ORS 10.030." Section 8 is an amendment of ORS 10.030, so in passing this act that statute has been amended. I understand the language is quite confusing, but we have been told by Legislative Counsel that this is the correct form.
189	Rep. Shetterly	I see that, but on line 33, it might be clearer, if it says "notwithstanding ORS 10.030 as amended by Section 8 of this Act."
197	Frink	I have no objection to that, except there might have been some sort of unintended consequence that Legislative Counsel saw.
203	Rep. Shetterly	Something about it just doesn't feel right. I would want to have Legislative Counsel look at it before we amend it.
211	Sylvester	Section 10 is a codification of the Measure 40 provision which takes away certain rights of a person convicted of a felony and the new language would make it clear that the person could not serve on a jury.
		>Sections 11-13 are all intended to implement subsection 1b of Measure 40 which gives the victim the right to be present at stages of the criminal proceedings in which the defendant is present.
		>Section 14 implements subsection 1j of Measure 40 which ensures the victim has the right that no law shall permit a sentence imposed by a judge in open court to be set aside or otherwise not carried out. <Sections 14, 15, 16, and 17 are all intended to codify this principle.
247	Frink	A strong presumption was created in favor providing that time.
252	Sylvester	Sections 18 - 20 of the bill intend to implement subsection 1a of Measure 40 which gives the victim the right to be reasonably protected from a criminal defendant through the criminal justice process.
279	Rep. Prozanski	Are we getting ready to get into section 20? In regards to section 19, can we put on the record how the minimum security amounts were obtained as well as any potential conflict with due process or equal protection for those who do not have the wealth of others?
288	Frink	The amounts were obtained because they were the bail amounts that the court chose. The \$50,000 amount was put in as a minimum standard.
306	Gardner	My experience in Washington County was that the bail was set on Measure 11 offenses at \$250,000.
316	Rep. Prozanski	Were these types of offenses restructuring what the test is for the release of an individual?
328	Gardner	I think if you read the provision of the ballot measure, it is pretty clear that one of the criteria is the protection of society and victims.
338	Frink	I would also point out that this statute implements important procedural safeguards for the defendant which do not currently exist.
351	Rep. Bowman	Is it your belief the victim will be safer with the \$250,00 bond?

357	Frink	I believe that provision is only if the court orders release.
363	Rep. Bowman	In your experience as a judge, did you ever say that you expected some one not to reoffend as a criminal? What would be the criteria you would use to determine whether someone would reoffend if released?
372	Gardner	The first thing I would look to is to see if there is a history of a criminal record. Absence of one is an indicator to me that this person is not likely to reoffend.
401	Sylvester	Section 20 is still part of the pre-trial release provisions and is intended to implement subsection 1a of Measure 40 which requires pre-trial release decisions be based on the principle of protection of the victim and the public.
		>Section 21 of the bill implements subsection 1g of the Measure giving the victim a right in a criminal prosecution to a public trial.
		Section 22, albeit complex, implements subsection 2 of Measure 40 which provides that Section 9 of Article 1 and Section 12 of Article 1 of the Oregon Constitution should not be construed more broadly than the federal constitution.
437	Rep. Bowman	Did I understand, in Section 21, that the defendant and the State could request a jury trial? Can the state do it if the defendant doesn't want a jury trial?
444	Frink	That's correct. Explains.
TAPE 81, B		
016	Rep. Bowman	So the state can request a jury trial and a defendant can say I just want a judge? And that's the law right now?
019	Frink	Measure 40 went into effect on December 5, so it is the law.
022	Rep. Bowman	We are working on implementing it.
023	Sylvester	<p>Section 22 implements subsection 2 of Measure 40 which provides that the Oregon constitution should not be construed more broadly than the federal constitution. It's a bit unclear as to what section 2 may require.</p> <p>>There is a discrepancy between the state and federal constitutions as to what extent of immunity is required to give a victim in order to compel their testimony. In the federal constitution, the standard is use and derivative use immunity. The Oregon constitution has transactional immunity.</p> <p>>It's not exactly clear how it is going to be construed, so we've drafted it only to grant immunity that will be required by Article 1, Section 12 whether it be transactional or use and derivative use immunity.</p> <p>>The language is intended to be neutral.</p>

057	Chair Minnis	I think it is clear.
075	Cathleen Dunwoody	Submits and reads written testimony, (EXHIBIT C)
119	Shayla Herzog	Submits and reads written testimony, (EXHIBIT D)
167	Lynnae C. Berg	Assistant Chief, Investigative Branch, Portland Police Bureau >testifies in support of measure >refers to testimony of Chief Charles Moose, Portland Police Bureau, (EXHIBIT E)
215	Barbara Simon	Multnomah County Sheriff's Office >testifies in support of measure
267	Dee Dee Kouns	Chief Petitioner, Ballot Measure 40 >Member, Crime Victims United >testifies in support of measure
317		Continues testimony
367		Continues testimony
417		Continues testimony
TAPE 82, A		
019	Chair Minnis	Declares subcommittee adjourned >Announces there will be a continuation of testimony at a later date

Submitted by, Reviewed by,

Brian Higgins, Nikola Jones,

Administrative Support Counsel

EXHIBIT SUMMARY

A - SB 936A, Written testimony, Mark Gardner, Department of Justice, 3 pp.

B - SB 936A, Memorandum from Judge Michael Marcus to David Nebel, submitted by Rep. Prozanski, 1 p.

C - SB 936A, Written testimony, Cathleen Dunwoody, 2 pp.

D - SB 936A, Written testimony, Shayla Herzog, 1 p.

E - SB 936A, "Testimony of Chief Charles Moose in support of SB 936 before the Senate Crime and Corrections Committee, April 12, 1997," submitted by Lynnae Berg, 4 pp.