

HOUSE JUDICIARY  
SUBCOMMITTEE ON CIVIL LAW AND JUDICIAL ADMINISTRATION

Hearing Room 357  
10:00 am Tapes - 12

MEMBERS PRESENT:

Rep. Del Parks, Chair  
Rep. Bryan Johnston, Vice-Chair  
Rep. Kate Brown  
Rep. Chuck Carpenter  
Rep. Lisa Naito  
Rep. Eileen Qutub

MEMBERS EXCUSED: Rep. Tiernan

STAFF PRESENT:

Milt Jones, Committee Counsel  
Sarah May, Committee Assistant

MEASURES HEARD:

HB 2351 - Relating to forfeiture

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE , SIDE A

004 CHAIR PARKS: Calls the meeting to order at 10:08 am

PUBLIC HEARING ON HB 2351

( HB 2351 - Prohibits prosecution of person and civil forfeiture of property for same conduct unless law specifically allows forfeiture as part of criminal prosecution action.)

Witnesses:

Pete Shepherd, Attorney General  
Rep. Kevin Mannix, District 32  
Jeff Ratliff, Multnomah County District Attorney  
Tom Sieg, Douglas County District Attorney's Office  
Paul Fraiser, Coos County Deputy District Attorney  
Shawn McCrae, Oregon Criminal Defense Lawyer's Association  
Jenny Cooke, Oregon Criminal Defense Lawyer's Association

George Stevenson, City of Salem Attorney's Office

010 PETE SHEPHERD, ATTORNEY GENERAL: Testifies and submits written testimony in support of HB 2351. (EXHIBIT A) Discusses visual aides brought in to show past cases.

164 CHAIR PARKS: What is the distinction between the '89 and '93 case?

165 SHEPHERD: The Halpner case was a 5th amendment case involving double jeopardy questions and Austin was an 8th amendment case involving excessive fines.

167 CHAIR PARKS: In the statute enacted in '93, is there a set of standards for the trier of fact to arrive at proportionality?

170 SHEPHERD: Yes, but the standards should be applied by the court and not by the jury.

172 CHAIR PARKS: Are the standards constitutionally valid?

173 SHEPHERD: Yes, we have not had any opinion that has said otherwise. Continues with explanation of case history from visual aid.

219 REP. KEVIN MANNIX, DISTRICT 32: Testifies and submits proposed amendments to HB 2351. (EXHIBIT B)

261 CHAIR PARKS: Do these amendments totally replace the bill?

263 REP. MANNIX: They pretty much gut the bill and change it so that we are back to what I described. The amendments also repeal the sunset provisions, explains.

271 CHAIR PARKS: Does this bill solve anymore than the double jeopardy issue?

272 REP. MANNIX: It also takes out the sunset provision.

274 CHAIR PARKS: Cites Portland forfeiture case dealing with solicitation to an officer. They took the car away, is that the essence of what happened?

281 SHEPHERD: The court entered an order that indicated that the car could not be forfeited based upon the courts conclusion that double jeopardy applied.

288 CHAIR PARKS: Because the person had already been prosecuted and convicted of the criminal charge?

289 SHEPHERD: Yes, the decision that was made is different than in any other case. Explains situation.

298 CHAIR PARKS: What is the difference at what stage it was entered?

300 SHEPHERD: Explains the two judgments of double jeopardy and concern with these decisions.

317 CHAIR PARKS: Is that decision a legal nicety, when you know that is

what they are going to rule anyway?

319 SHEPHERD: I suppose that it is. Although maybe there wouldn't have been a forfeiture entered and they would have lost.

324 CHAIR PARKS: I want you to explain mechanically how the procedures would work in a real case.

327 REP. MANNIX: The double jeopardy applies in the second ruling or when the jury has convened.

348 JEFF RATLIFF, MULTNOMAH COUNTY DISTRICT ATTORNEY: Testifies in support of HB 2351. We are trying to consolidate two actions into one action. Explains how double jeopardy procedure would work in a real life case.

370 CHAIR PARKS: Does the burden of proof change?

371 RATLIFF: No.

372 CHAIR PARKS: So the defendant in the second part of the proceeding still has the burden of proof?

373 RATLIFF: The claimant, at that point, would then have the burden of proving beyond a reasonable doubt that the property would not be subject to civil forfeiture.

376 CHAIR PARKS: With something specific like a car or house, where there is a secured party involved, can the forfeiture defeat the right to the secured party?

383 RATLIFF: No, the statute protects the rights of legitimate lienholders.

385 CHAIR PARKS: Asks about example of person borrowing car and committing crime where car could be forfeited. Can the action cause the car to be forfeited, if it is not the persons who committed the crime?

388 RATLIFF: As long as the person who owned the car was not aware of the fact that the borrower was going to use the vehicle solicit a person, the car owners interest is protected.

391 CHAIR PARKS: But it would be the car owners burden of proof to explain that they were unaware of what the person that borrowed the car was going to do?

393 RATLIFF: That is an affirmative defense.

395 REP. MANNIX: It is preponderance on the civil side, not beyond a reasonable doubt.

397 REP. CARPENTER: We were discussing in terms of DUIIs, about forfeiture of automobiles. Does this bill facilitate that forfeiture and make it easier to implement the other legislation?

402 CHAIR PARKS: It seems like it deals exactly with that.

403 SHEPHERD: If the committee chooses to link another forfeiture idea with

the procedure specified in Ch. 791, then it would deal with that.

414 CHAIR PARKS: In the second civil procedure, does it also deal with the proportionality issue? Is the jury instructed that there are standards that they are supposed to apply?

418 RATLIFF: Once a determination has been made by a jury that the item of property is subject to civil forfeiture, a claimant can petition the court for a mitigation hearing within the time frame set forth in the statute. A mitigation hearing can then be held and additional evidence can be presented for the judge to consider the factors set forth in the statute.

426 CHAIR PARKS: Then that is a third proceeding that follows the first two?

427 REP. MANNIX: Yes. The reason for that is that there can be facts which are extraneous to the actual forfeiture, that might be presented in mitigation that you wouldn't want mingled into the forfeiture. Those facts could possibly effect the view of the trier of fact as to the forfeiture.

433 REP. JOHNSTON: The jury's decision on the criminal matter is first?

437 RATLIFF: Yes.

438 REP. JOHNSTON: If the jury comes back with a not guilty, can they still proceed on the forfeiture?

440 RATLIFF: Yes, because of the different burdens of proof.

442 REP. JOHNSTON: These are sequential hearings? The jury has to answer one first before they are allowed to approach the second question?

445 RATLIFF: The proposed amendments provide for the civil forfeiture aspect of the proceeding to immediately follow the criminal aspect of the proceeding.

448 REP. JOHNSTON: Does the jury get reinstructed?

TAPE 12, SIDE A

010 SHEPHERD: They would have to be reinstructed to be told what the forfeiture standards are.

013 REP. MANNIX: The reason that there is a second proceeding is that there are things that may be inadmissible for the civil proceeding.

015 REP. JOHNSTON: So, there may be an intervening taking of evidence?

016 REP. MANNIX: Correct.

017 CHAIR PARKS: In the criminal context, the members of the jury would be there only to decide the criminal case. After they decide the criminal case they are then told that they have to decide about the civil case?

021 SHEPHERD: The text of the amendment doesn't tell exactly what the judge

is to tell the jury. Gives example of death sentence case trials, where the jury knows in advance that there will be a second trial.

030 CHAIR PARKS: Right now it is the judges call?

031 SHEPHERD: HB 2351 doesn't answer that.

031 CHAIR PARKS: The bill shouldn't provide discretion for the judge, as to how they are to handle the situation?

033 RATLIFF: It is my belief that the trial court should have discretion as to what to tell the jury.

034 REP. BROWN: In a prostitution case, in the criminal aspect, the defendant would be entitled to an attorney. What about in the civil forfeiture proceedings, what happens when these proceedings are consolidated?

037 RATLIFF: My understanding of the bill is that the person would only have a court appointed attorney in the criminal proceedings. They would not be entitled to an attorney for the relating civil forfeiture matter.

041 REP. MANNIX: Here is an example; an attorney defends on the criminal prosecution and in many cases, there will be no further evidence to be offered on the civil forfeiture. Therefore, in effect, the defendant will have received counsel for the civil forfeiture proceedings as well.

046 REP. NAITO: Even though it is supposed to be one proceeding, there are still two trials. How does this resolve the double jeopardy?

053 SHEPHERD: Discusses a case to explain how HB 2351 might resolve the double jeopardy issue.

070 REP. JOHNSTON: The questions are being answered from the same accumulated evidence, so it seems like it would be one proceeding. My concern is that if a person is sitting on a jury and knows that they could let the defendant go on criminal charges, but take his car away for civil charges, that they would do that.

079 REP. MANNIX: That is not addressed in the current law. We'd like to leave it up to the trial judges to take a look at the nature of the charges and the nature of the forfeiture, then make a determination as to what they tell the jury. We want to leave that up to the judge.

091 REP. JOHNSTON: Has your office done any studies to relate the severity of punishments with the price value of forfeiture?

095 RATLIFF: Since the Austin decision, I factor the Austin's rational into my forfeiture resolutions. Gives example of a case and how he would proceed using the Austin '93 trial on forfeiture issues.

114 REP. JOHNSTON: Our protection is high quality prosecutorial discretion?

115 REP. MANNIX: The further protection is the constitutional requirement

that there be proportionality. There is the opportunity for the defendant, even after a forfeiture, to then ask for a mitigation hearing before a judge to show that the forfeiture was not proportional to the conduct that was involved.

123 CHAIR PARKS: This has to do with reciprocal attorney fees. This is not Tort reform, but where is it going to leave you if we make these reciprocal attorney fees? Where does that leave the state in the localities?

135 SHEPHERD: Cites SB 385. There isn't anything in SB 385 that would directly effect civil forfeiture, with the exception of the attempt of the bill to cause pre-litigation settlements, explains.

146 CHAIR PARKS: Your cases would always be under the \$20,000 mark. What if we made the attorney fees and settlement provisions only apply to cases under \$20,000? Explains that SB 385 could be amended so that it would only effect those cases where the matter in issues was under \$20,000. Gives car example. What does that example do to the forfeiture statute?

166 REP. MANNIX: I share your concerns about SB 385. If we start doing "loser pay" attorney fees all over, how would that effect civil forfeiture?

176 CHAIR PARKS: Would SB 385, truly kill forfeitures?

177 REP. MANNIX: I think in some instances, it would weaken forfeiture.

178 RATLIFF: There is already a provision within the Oregon Forfeiture Statute that provides for the prevailing claimants attorney fees to be paid for by the seizing agency, when that claimant prevails in the underlying forfeiture.

181 CHAIR PARKS: How often does that happen?

182 RATLIFF: Since I have been running the forfeiture unit within the Multnomah county DA office, I know of two cases in which the prevailing attorney received fees.

185 CHAIR PARKS: Out of how many cases?

187 RATLIFF: About 250 judicial cases.

189 CHAIR PARKS: One percent of the time.

190 REP. JOHNSTON: Is the existence of the statute part of your equation? Your estimate of prevailing party is 55 percent. Do you factor into your decision whether or not to go ahead if there is a possibility that you will have to pay their attorney fees?

196 RATLIFF: Yes.

197 REP. JOHNSTON: So it has a chilling effect on your decision to go forward?

198 RATLIFF: To some degree, yes. There is not a corresponding attorney fee provision for the government if they prevail.

200 CHAIR PARKS: Does that have any constitutional significance?

202 SHEPHERD: It was proposed that it be a reciprocal fee. The rationale for not including it is that the government is entitled, under the statute, to recover from the forfeited property their costs.

214 REP. MANNIX: We are not asking for a loser pays provision, explains.

219 REP. BROWN: HB 2351 effected the racketeering statutes. Do the amendments address and fix the problem?

223 REP. MANNIX: We took RICO out of this bill because it is a different scheme, and we stick to the regular forfeiture in the amended version.

227 REP. BROWN: Does that pose a problem in terms of the RICO statutes and the Austin case?

228 SHEPHERD: The recent history cases I've cited do have some implications for RICO. Discusses their civil and criminal RICO cases, and that they are satisfied with the status quo on the RICO cases. But, in the forfeiture arena where there is a lot of activity in the courts, RICO is something that the legislature should address.

246 REP. QUTUB: We were told for the civil proceedings that they were based on preponderance and not beyond a shadow of a doubt. How is it done in the criminal proceedings?

252 REP. MANNIX: Beyond a reasonable doubt is the criminal standard for a conviction. The standard for civil cases normally is preponderance, or which side has more evidence.

257 REP. NAITO: Even if this didn't solve the double jeopardy issue, would this streamline the process for your office and the defendants involved?

263 REP. MANNIX: Even if there isn't a double jeopardy problem, it is a good idea to streamline the process and that is what this bill with the amendment would do.

278 TOM SIEG, DOUGLAS COUNTY DISTRICT ATTORNEY'S OFFICE: Testifies in support of HB 2351.

292 CHAIR PARKS: Can we constitutionally make this bill retroactive?

293 SIEG: The concept is to consolidate it, not create additional punishment. Continues with testimony, cites example of civil proceedings in '93 session. The 9th circuit is the only circuit that is ruled this way on the double jeopardy issue, explains.

322 CHAIR PARKS: How many of these proceedings do you have in one year, and

how much money is involved?

326 SIEG: About 150-250 a year. The money amounts average to about \$100,000 a year total.

332 CHAIR PARKS: In your case, it is almost all drugs?

333 SIEG: Yes, our cases are all drugs. We don't deal with the other issues. In our district, we haven't lost a trial, the jury has always found for the plaintiff. You have to inform the jury of the decisions that they are going to be making. Gives example of drug case.

354 CHAIR PARKS: What happens in huSB and and wife situation, where the forfeiture is just against one of them?

357 SIEG: Right now there are provisions in the forfeiture law for the innocent spouse. In settlement, we have to take into consideration that the spouse has tried to prevent or has not approved with the activity, explains.

377 REP. JOHNSTON: The burden is on the innocent spouse to establish innocence?

381 SIEG: The provisions set forth that they have to come forward as the innocent spouse, and have a burden of showing that they disagreed with the activity.

390 REP. JOHNSTON: Is this a good administrative change, beside the double jeopardy argument?

398 SIEG: If there is not the double jeopardy issue, I don't know that I would agree. Explains position. Discusses federal forfeiture laws and how that can effect a civil forfeiture proceeding.

427 REP. JOHNSTON: Aren't you afraid that if you instruct the jury of the upcoming civil forfeiture case, that you will be facing a compromise verdict?

433 SIEG: You face a compromise verdict anytime you go to trial, explains.

TAPE 11, SIDE B

013 REP. JOHNSTON: This is different, you are telling the jury that you can hurt the defendant three different ways; criminal charges, civil charges, or both.

020 PAUL FRAISER, COOS COUNTY DEPUTY DISTRICT ATTORNEY: Testifies in support of HB 2351.

052 CHAIR PARKS: How many cases and how much money in one year?

053 FRASIER: For our county, \$120,000-\$150,000 since the later part of 1993.

056 CHAIR PARKS: How is the money split up? What is the formula?



059 FRASIER: Our team operates on an intergovernmental agreement. Explains that it varies at to how money is split up between the agencies.

071 REP. JOHNSTON: Are most criminal defendants going to waive out of this?

077 FRASIER: It has been my experience that most of them have.

078 REP. JOHNSTON: If we put this bill together, then they still have the right to do that?

078 FRASIER: Yes.

079 REP. JOHNSTON: Would that stay all civil proceedings until after the resolution of the criminal proceedings?

080 FRASIER: It changes it a little bit, explains. They have argued that "until completion" means until completion of appeals, which might mean a delay of a civil case for two or three years. The bill as amended would say "until completion of a plea, trial, or dismissal".

089 REP. JOHNSTON: If they don't want to waive it and you go ahead with a consolidated process, if you ask for deposition, they refuse and go to trial. If they are acquitted on criminal case at their trial and then re-open for additional evidence on civil case, can they offer the 5th amendment refusal?

096 FRASIER: Under the Oregon Evidence Code, there is a specific provision that says you cannot comment about person being questioned exercising an amendment privilege. Discusses that if the 5th amendment was included in that, then they would not be able to do discuss it.

106 REP. JOHNSTON: I agree.

112 SHAWN MCCRAE, OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION (OCDLA): Testifies in opposition of HB 2351. Oregon does not need -1 amendments, we do not agree with them, explains. Discusses federal system on criminal and civil forfeitures.

181 JENNY COOKE, OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION: Testifies in opposition of HB 2351. Explains her position, and gives court room example of burden of proof.

209 REP. NAITO: If the jury is told of two proceedings, there could be a compromise verdict. Cites example of jury being convinced that the defendant has to be guilty of something, because they know another trial is coming up.

220 COOKE: Yes, that is what I was referring to.

221 REP. JOHNSTON: Cites that Ms. McCrae and Ms. Cooke disagreed with each other on their testimony.

224 MCCRAE: We disagree on this statute.

225 REP. JOHNSTON: Is that both of your positions?

228 COOKE: I think the system is broke. I was not aware that Ms. McCrae thought differently.

230 REP. JOHNSTON: Considering proof beyond reasonable doubt and criminal rights and burden on the state?

232 COOKE: That is correct. That is what is happening in the federal system, explains.

241 CHAIR PARKS: Has any court held that the rights that you cited apply to this proceeding?

243 COOKE: Cites case and how civil right amendments apply. Oregon supreme court has held that if there is a penal proceeding, then those rights apply.

259 REP. BROWN: How does this work in practical reality with the amendments? The criminal defense lawyer would end up handling the civil forfeiture proceeding if you have trials back to back.

265 COOKE: The alternative is that there would be no lawyer in the civil forfeiture proceeding which is how the state would like it to be.

268 REP. BROWN: That puts the lawyer in the position to handle the criminal proceeding and then walk away before the civil proceeding starts?

272 COOKE: Cites federal case system. If a consolidation of trials occurs, then they will have to appoint counsel on the civil forfeiture proceeding.

283 REP. BROWN: You like HB 2351, it is the amendments you don't like?

285 COOKE: Yes.

286 REP. JOHNSTON: You settle most of your cases?

287 MCCRAE: Yes.

288 REP. JOHNSTON: Ms. Cooke, you are the trial lawyer?

289 COOKE: Almost all civil forfeiture cases get settled. Cites Mr. Ratliff's testimony. The reason the attorney fees don't get awarded is because the case is settled and everyone pays their own attorney fees.

296 REP. JOHNSTON: Is it difficult for you to see that if in the criminal defense case, they give one defense theory and prevail, but then in order to prevail on the civil case they have to give a different defense theory?

Gives example. The attorney could have to say something directly opposite in the civil proceeding, then they said in the criminal proceeding?

312 COOKE: That is a very logical occurrence. That points out that these are successive prosecutions.

319 GEORGE STEVENSON, CITY OF SALEM ATTORNEYS OFFICE: Testifies in support of HB 2351. Gives background on Salem forfeiture laws. How can we do a forfeiture without communication with the DA? Cites prisoner motions to get out of jail because of forfeiture proceedings. If the DA does the forfeiture proceedings, then it will be like the federal system.

403 SHEPHERD: They are accurate in their descriptions of the legal issues they presented (Cooke and McCrae).

408 REP. JOHNSTON: What is the net effect in leaving the law alone?

410 SHEPHERD: We would have inconsistent results from the trial judges. We would have a potential for unnecessary effects like the city of Salem. Discusses post conviction relief. Cites uncertainties of doing nothing with this bill.

437 REP. JOHNSTON: Is there a working group that meets on this subject?

443 SHEPHERD: There isn't a working group. Discusses Mr. Fidanque's thoughts. We would like to participate in discussion of these issues with the defense bar.

TAPE 12, SIDE B

014 CHAIR PARKS: Asks committee about moving the bill. Discusses four options they have concerning HB 2351.

029 REP. BROWN: Has anyone talked to the ACLU and Mr. Fidanque?

030 SHEPHERD: I don't know.

034 COOKE: Mr. Fidanque was of the opinion that the OCDLA should get behind a criminal forfeiture bill.

048 REP. JOHNSTON: I could vote on this, but I'd feel better not.

050 CHAIR PARKS: We will consider HB 2351 next week. Discusses changing times and dates of meetings, and that members need to try to decide their opinions so that they can get bills out of committee.

077 CHAIR PARKS: Adjourns the hearing at 11:40 am.

Submitted by, Reviewed by,

Sarah May                      Debra Johnson  
Committee Assistant              Committee Coordinator

EXHIBIT SUMMARY:

- A Testimony on HB 2351 - Assistant Attorney General Pete Shepherd - 22 pages
- B. Proposed Amendments to HB 2351- Rep. Kevin Mannix - 11 pages

C. Court Case relating to HB 2351 - Staff - 28 pages