

HOUSE COMMITTEE ON JUDICIARY SUBCOMMITTEE ON CRIME AND CORRECTIONS

April 7, 1993 Hearing Room 357 3:00 p.m. Tapes 70 - 71

MEMBERS PRESENT: Rep. Bob Tiernan, Chair Rep. Kate Brown Rep. Peter Courtney Rep. Veral Tarno

VISITING MEMBER: Rep. Kevin Mannix

STAFF PRESENT: Julie Nolta, Committee Clerk Holly Robinson, Committee Counsel

MEASURES CONSIDERED: HB 2352 - Relating to post-conviction relief HB 3321 - Relating to motor vehicles HB 3424 - Relating to driving while suspended or revoked HB 3432 - Relating to forfeiture of vehicles

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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. [--- Unable To Translate Graphic ---]

TAPE 70, SIDE A

CHAIR TIERNAN: Calls meeting to order at 3:08 p.m.

HB 2352 - WORK SESSION

Witnesses: Ross Shepard, Oregon Criminal Defense Lawyers Assoc. Brenda Peterson, Oregon Department of Justice Rep. Kevin Mannix, District 32 Bill Linden, State Court Administrator

007 HOLLY ROBINSON, COMMITTEE COUNSEL: HB 2352 allows post-conviction relief petitions to be filed within two years. Has been referred to this committee from the Civil Law Subcommittee. (EXHIBIT A)

021 ROSS SHEPARD, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION: Discussed

with Chairman Del Parks of the Full Judiciary Committee about ways to amend the post-conviction relief statute to save money. The majority of relief petitions are without merit. If a judge can determine that the petition is meritless, why don't we give the judge the authority to dismiss the petition? Post-conviction relief costs the government \$500,000 per biennium. Suspects that more than half of the petitions will be summarily dismissed.

The 120 day statute of limitation was enacted in the 1989 session and we suggest that it be changed to two years. We have taken language from the habeas corpus statute and allow for a dismissal at any time during

the proceedings of a meritless petition. Is our intent to say that if a court summarily dismisses a petition before there is appointment of counsel, that it should be without prejudice. (EXHIBIT B)

066 CHAIR TIERNAN: Confirms future 2 year statute of limitations.

SHEPARD: Some may get caught in these amendments and lose the civil right of post-conviction relief. But to arrive at this compromise, I am willing to do that.

CHAIR TIERNAN: Does the Oregon District Attorneys Association agree to this compromise?

SHEPARD: This is an attorney general's issue. They represent the government in these proceedings.

078 CHAIR TIERNAN: Aren't the District Attorneys part of this as well?

SHEPARD: Not directly. Asks how many cases per year are remanded for new trial in post-conviction relief? Less than one?

088 BRENDA PETERSON, ASSISTANT ATTORNEY GENERAL, OREGON DEPARTMENT OF JUSTICE: Doesn't know. Not very many. Refers to proposed amendments

(EXHIBIT B) Amendments regarding meritless petitions would provide that any time during the proceeding the judge declared or dismissed a petition on the ground that it was meritless, that would not be appealable. Would also amend ORS 138.580 to provide that a petitioner needs to attach evidence supporting the allegations of the petitions.

Section 3 of HB 2352 deals with retroactivity. If the statute of limitations is changed to two years, we would have three categories of

people: 1) those whose convictions are decided under the "without limit in time" language; 2) those under the 120 days statute of limitations

who filed petitions after Aug. 5, 1989; 3) those who fall under the two year limitation amendment. Amendments say that everyone must file a post-conviction petition within two years of the effective date of this act. For those inmates under the 120 days who have already had their case dismissed, they cannot have another post-conviction action on the same case.

141 CHAIR TIERNAN: Why can't you give two years to anyone convicted before 1989 and keep the 120 days for new convictions?

PETERSON: Could do that.

CHAIR TIERNAN: What is the rationale for going out two years?

SHEPARD: Statute of limitations for legal malpractice is two years from

the discovery of the error or omission. Fits the appeals process.

169 CHAIR TIERNAN: Did you make the same argument in 1989 when this was originally passed?

SHEPARD: We supported the bill in the end.

187 REP. KEVIN MANNIX, DISTRICT 32: The 1989 Legislature intended to make the 120 days retroactive. The court decided the 120 days was not retroactive. Introduced HB 2352 which can determine retroactivity. Would not apply to cases entertained in the meantime, but has no problem with allowing a 120 day window of opportunity for all old cases effective from date of passage. Doesn't agree with two year time period. Doesn't have a problem with judge's opportunity to dismiss petitions. Language should be changed from "liberally construed" to "reasonably construed."

249 REP. BROWN: Isn't imposing either the 120 day or 2 year period on defendants convicted prior to 1989 an ex-post facto issue?

REP. MANNIX: No, because we are allowed to make reasonable limitations on procedural statute and access to the courts. It is not a substantive change.

REP. BROWN: Would you agree that many of these people are incarcerated and wouldn't have notice of the 120 day limitation?

REP. MANNIX: The criminal defense attorneys will get the word out aggressively. Can be posted on bulletin boards. Some won't get the word but that could be said about any law.

277 SHEPARD: Refers to twenty people incarcerated in the Oregon State Penitentiary under an unconstitutional statute. They were convicted of engaging in a drug scheme or network. They pled guilty, did not appeal, were serving their time and 120 days went by. The court of appeals case was rendered which said the law was unconstitutional and those people were out of luck. Tried to craft a period of time to fit the appellate process which is two years.

295 CHAIR TIERNAN: But if the law wasn't challenged until several years after on another case and was held unconstitutional, you have the same

effect.

SHEPARD: Under the proposed amendment some are left out.

311 HOLLY ROBINSON, COMMITTEE COUNSEL: What are the other ramifications of the extensions of the time?

SHEPARD: The fiscal impact is minimal according to the State Court Administrator's office. Prior to 1989 there was no statute of limitations and post-conviction costs have not gone down.

329 CHAIR TIERNAN: Since the law was passed at 120 days, how many people have claimed that their rights were denied? SHEPARD: Doesn't know.

333 HOLLY ROBINSON, COMMITTEE COUNSEL: The comparison has to be between a period of time when there was no statute of limitations and

the 120 days. If the numbers have stayed the same, then there is a policy question without our fiscal impact.

352 SHEPARD: There are a lot of non-indigent defendants who have been affected by this.

363 REP. MANNIX: We draw lines about how many times a case can be revisited. One of the reasons the law was passed in 1989 was the astronomical rising fiscal impact of post-conviction relief proceedings. We were concerned about old cases being brought up which are the most expensive to litigate. Keep fiscal impact in mind and don't give up 120 day cap in exchange for this bill. The section 2 and 3 amendments of dismissal of meritless petitions are a good idea.

412 PETERSON: Refers to the savings clause in current law ORS 138.510 which is an escape valve for petitioners who don't file in 120 days.

454 REP. TARNO: Likes 120 day language and the additional language in section 2 and 3.

463 REP. BROWN: Feels the two year statute of limitation is reasonable in light of the fact that in civil statutes the statute of limitation is two years.

483 REP. BROWN: Concerned about the education level of the inmates. Feels two years is a reasonable statute of limitations given the people we are working with.

TAPE 71, SIDE A

027 REP. COURTNEY: Doesn't want to take out the 120 days. Are the proposed amendments agreed upon by both the Attorney General and the defense bar?

045 SHEPARD: They agreed on all.

REP. MANNIX: The district attorney's and judges that I've dealt with don't like the two years. It is the committee's call on what is the best public policy.

056 REP. COURTNEY: Asks how "meritless" is used in section 3, subsection 2.

SHEPARD: It is drawn verbatim from ORS Chapter 30 which deals with habeas corpus litigation.

063 CHAIR TIERNAN: Asks Mr. Shepard if he would agree to add sections 2 and 3 if the committee decides to go with less than two years.

SHEPARD: Thinks that is a responsible thing to do.

073 BILL LINDEN, STATE COURT ADMINISTRATOR: Thinks a middle ground would be to extend the time period to one year instead of two years.
REP. MANNIX: Agrees.

SHEPARD: Agrees to a year.

092 CHAIR TIERNAN: Asks Rep. Mannix if one year bothers him.

REP. MANNIX: Feels one year is a good compromise.

100 REP. BROWN: Liked the two year period because the appeal process would be completed within that time frame. What happens within the one year

period?

REP. MANNIX: The post-conviction relief period starts after the appeal case is final. Agrees to the one year period because it is a lesser window of opportunity. The trade off is the "meritless petition" language.

118 MOTION: REP. COURTNEY: Moves to AMEND THE OREGON CRIMINAL DEFENSE LAWYERS ASSOC. PROPOSED AMENDMENTS TO HB 2352 dated April 7, 1993, by deleting "two" on lines 3, 4 and 6 and inserting "one."

VOTE: 4-0 MOTION PASSES AYE: Brown, Courtney, Tarno, Tiernan
NO: None

146 MOTION: REP. COURTNEY: Moves to ADOPT O.C.D.L.A. AMENDMENTS AS AMENDED TO HB 2352.

VOTE: 4-0 MOTION PASSES AYE: Brown, Courtney, Tarno, Tiernan
NO: None

152 SHEPARD: Asks that the bill go to Legislative Counsel before going to full committee in order to draft language that would reflect that the dismissal of a meritless petition is without prejudice if counsel was not appointed.

REP. MANNIX: Is agreeable to that so long as we're not tolling the time.

159 HOLLY ROBINSON, COMMITTEE COUNSEL: Asks about adding "without prejudice" to the last line of the amendments.

SHEPARD: We don't want it to be without prejudice if an attorney has been appointed.

REP. MANNIX: Is without prejudice where the petitioner was involuntarily not represented by counsel.

PETERSON: Trying to get at cases where the trial judge dismisses the petition without an attorney being appointed and dismisses before there is any evidence or hearing. Trying to get at the narrow group of cases at the front end.

189 REP. MANNIX: Suggests an additional sentence to read "A dismissal is

without prejudice where the meritless petition was dismissed without a hearing and the petitioner was not represented by counsel."

203 MOTION: REP. COURTNEY: Moves to AMEND O.C.D.L.A. PROPOSED AMENDMENTS TO HB 2352 dated April 7, 1993 by adding "A dismissal is

without prejudice where the meritless petition was dismissed without a hearing and the petitioner was not represented by counsel." to subsection 4.

VOTE: Hearing no objections the amendments are ADOPTED. All members are present.

214 MOTION: REP. COURTNEY: Moves to ADOPT O.C.D.L.A. AMENDMENTS AS AMENDED TO HB 2352.

VOTE: Hearing no objections the amendments are ADOPTED. All members are present.

217 MOTION: REP. COURTNEY: Moves HB 2352 AS AMENDED TO FULL COMMITTEE with a DO PASS recommendation.

222 HOLLY ROBINSON, COMMITTEE COUNSEL: Summarizes changes to the bill after the amendments.

234 REP. BROWN: Assumes that this does not extend the 120 day limitation to the people convicted between 1989 and 1993.

HOLLY ROBINSON, COMMITTEE COUNSEL: Thinks the answer is yes unless the committee adds a retroactivity clause.

253 PETERSON: If the inmates convicted between 1989 and 1993 filed post conviction petitions and were dismissed, they would be barred from bringing another petition. If they didn't file a post-conviction petition and were within the one year window, they could still file. Some will definitely be cut off.

271 CHAIR TIERNAN: If this takes effect Jan. 1, 1994 will it cover the convicted person after Jan. 1, 1993.

HOLLY ROBINSON, COMMITTEE COUNSEL: No. Explains that it triggers on the appeal date.

302 HOLLY ROBINSON, COMMITTEE COUNSEL: Would need to add language that says "this applies to those appeals become final."

312 HOLLY ROBINSON, COMMITTEE COUNSEL: Could do 120 days retroactive and

state that everyone will have a year from the effective date. Could revert language in HB 2352 back to the 120 days retroactive for that group. Then make the one year provision good for all of those people whose appeals become final after the effective date of the act.

337 PETERSON: That was our intent. For those who have the 120 days statute of limitations, if their time has run out, it has run out. There may be a few whose 120 days have not run out.

REP. BROWN: Wants to make sure that we are not terminating the rights for the pre-1989 people.

348 HOLLY ROBINSON, COMMITTEE COUNSEL: Will suggest separate sections for the statute of limitations and meritless petitions.

361 REP. COURTNEY: Withdraws the motion to move the bill to the full committee.

MOTION: REP. BROWN: Moves TO ADOPT THE CONCEPTUAL AMENDMENT TO HB 235 2 as stated by Committee Counsel to include a class of potential claimants.

VOTE: Hearing no objections the amendments are ADOPTED. All members are present.

384 MOTION: REP. COURTNEY: Moves HB 2352 AS AMENDED TO FULL COMMITTEE with a DO PASS recommendation.

VOTE: 4-0 MOTION PASSES AYE: Brown, Courtney, Tarno, Tiernan NO: None

402 CHAIR TIERNAN: Calls recess at 4:00 p.m. Reopens the meeting at 4:10 p.m.

HB 3321 and HB 3432 - WORK SESSION

409 HOLLY ROBINSON, COMMITTEE COUNSEL: HB 3321 defines criminal driving while suspended as prohibited conduct for purposes of the state civil forfeiture statute if the suspension was for conviction of driving while under the influence of intoxicants. It is a subset of HB 3432 which authorizes seizure and forfeiture of vehicles for all driving while suspended (DWS) offenses. HB 3321 looks at part of the DWS universe which is based on a DUUI conviction. Summarizes the committee's options for amendments.

TAPE 70, SIDE B

001 HOLLY ROBINSON, COMMITTEE COUNSEL: Continues summary.

047 HOLLY ROBINSON, COMMITTEE COUNSEL: If the committee passed HB 3424, there would be indigent defense savings, but the Department of Corrections also anticipated 123 beds. The Department of Corrections will save \$5.5 million in the 1993-95 biennium and \$5.6 million in the 1995-97 biennium. This is for making misdemeanors of a majority of the felonies for DWS. The offenses that remain as felonies would be suspensions that result from any degree of murder, manslaughter, criminal negligent homicide or assault resulting from the operation of a motor vehicle.

071 REP. TARNO: HB 3424 should be dealt with as a separate issue. When felonies are lowered to misdemeanors and jail populations are impacted

instead of prison populations there will be a conflict.

079 CHAIR TIERNAN: Understands HB 3424 to be a new penalty of losing a car for the habitual offender.

084 HOLLY ROBINSON, COMMITTEE COUNSEL: Not automatically. If the

legislature enacts one of the bills, it is discretionary for the law enforcement officer.

094 CHAIR TIERNAN: HB 3321 deals only with an underlying DUII. It does not deal with negligent or reckless driving.

114 BILL LINDEN, STATE COURT ADMINISTRATOR: HB 3321 is the right way to go because of the way it uses forfeiture. It will build in a new sanction that doesn't exist for DWS offenders.

CHAIR TIERNAN: Isn't HB 3321 very narrow?

LINDEN: It is narrow but given the past problems of including forfeiture in relation to DWS it is best to start narrow. We are getting at the most dangerous offenders by having the DUII connection.

The forfeiture sanction will be more effective than the felony status.

Not sure what the impact would be on county jails if the felony status was reduced to misdemeanor.

154 REP. TARNO: Concerned about impacting overcrowded jails.

159 CHAIR TIERNAN: What is the most common DWS offense?

LINDEN: Failure to prove insurance might be the most common grounds.

There are no effective sanctions for DWS. Multiple offenders keep offending.

178 CHAIR TIERNAN: If HB 3432 passes, would that include administrative suspension such as expired drivers licenses?

HOLLY ROBINSON, COMMITTEE COUNSEL: The bill refers to criminal DWS and there are different levels. LINDEN: HB 3432 would bring into the forfeiture process all DWS regardless of the reason for the suspension. It is considerably broader than HB 3321.

198 CHAIR TIERNAN: Does that include the administrative suspensions?

LINDEN: It would.

205 HOLLY ROBINSON, COMMITTEE COUNSEL: According to 1991 information from the Department of Motor Vehicles, 54% of felony DWS arrests involve DUII convictions.

212 CHAIR TIERNAN: Concerned about giving offenders extra chances which have no deterrent value. Should send a message that they shouldn't be

driving if suspended.

237 RUSS SPENCER, OREGON STATE SHERIFFS ASSOCIATION: HB 3321 Section 2, subsection 2 says the officer shall seize the vehicle. Leaves no discretion. HB 3432 says that the vehicle is subject to seizure but is not required. Law enforcement prefers that latitude. Urges caution in requiring a seizure.

258 CHAIR TIERNAN: What happens after the cars are seized?

SPENCER: They hold the cars pending an appeal on the forfeiture. They are put up for auction after about 60 days.

HOLLY ROBINSON, COMMITTEE COUNSEL: Depends upon the jurisdiction and how often it holds auctions.

271 CHAIR TIERNAN: Where does that money go?

SPENCER: Into the asset forfeiture fund.

277 REP. TARNO: Under existing state forfeiture law, is there a mandate that requires law enforcement agencies to maintain the condition of a seized vehicle?

SPENCER: Believes that is accurate. The seizing agency is responsible for the vehicle, which means you may have to garage and cover it but you do not have to perform routine maintenance.

298 HOLLY ROBINSON, COMMITTEE COUNSEL: Valuable vehicles are seized constantly.

304 SPENCER: Depends upon what you are seizing for.

314 HOLLY ROBINSON, COMMITTEE COUNSEL: Discusses the difficulty of an officer to determine at the scene the basis of the suspension. Discusses the state preemption issue and the determination of prohibitive conduct. If the state legislature determines, does that limit what the city or county can do or is already doing?

368 REP. TARNO: Would it give local government agencies the flexibility to make decisions?

HOLLY ROBINSON, COMMITTEE COUNSEL: Yes. It becomes a policy statement. The state would encourage state police officers to seize but cities and counties can already do it. And we don't want to adversely affect what they are already doing.

387 REP. TARNO: Wouldn't that accomplish what we are trying to accomplish?

HOLLY ROBINSON, COMMITTEE COUNSEL: There is no requirement to bring criminal charges in a civil forfeiture case. If a law enforcement agency chooses not to prosecute, then you would potentially see a savings. Can't project a savings. Can just make a policy statement in creating a civil tool.

414 CHAIR TIERNAN: It allows an effective sanction on the civil side that we don't have on the criminal side.

REP. TARNO: As long as it is optional.

424 FRANK BRAWNER, OREGON BANKERS ASSOCIATION: When we included the forfeiture option for prohibitive conduct we discussed gambling and prostitution. The process would have to comply with the state law. The problem is there could be 36 different county approaches and more than

300 city approaches. The uniform rules are working and that the process ought to comply with what exists in statute. Believes HB 3321 with -1

amendments is a good next step. Allows cities to add additional prohibitive conduct.

472 CHAIR TIERNAN: Agrees that uniformity is needed if not a necessity.

Concerned that we don't have enough sanctions and if we have an opportunity to create a deterrent, we should do it.

TAPE 71, SIDE B

030 BRAUNER: Once an act becomes prohibitive conduct in any jurisdiction, the process of notification should be set by state statute.

039 LINDEN: If you want to expand coverage under HB 3321, you could bring in HB 3432 language that covers all the underlying reasons for suspensions. Do you want to make it discretionary as to whether or not a vehicle is going to be seized without providing guidance under which

that decision will be made in the field? The safer course is to use the mandatory language in HB 3321. Recommends that it be an automatic seizure if that suspension is there.

056 REP. TARNO: What would you do in a one officer town in regards to storage problems and fees?

LINDEN: Is looking at it from a perspective of a more effective sanction. Is worried about judgement calls in regards to seizures.

068 HOLLY ROBINSON, COMMITTEE COUNSEL: It isn't in the state asset forfeiture statute.

072 CHAIR TIERNAN: Discusses discretion of seizing a \$300 car. Flexibility may provide unequal treatment but also some greater equity. LINDEN: If you put in place a forfeiture process, you are providing a

good sanction that doesn't exist today. Should be accompanied by a step in saving money which HB 3424 represents.

089 SPENCER: May be placing an unfunded mandate on a small jurisdiction. Asks for discretion on imposing sanctions on needed offenders.

099 BRAUNER: Concerned about the effects on law enforcement in small towns. We need to make this work without placing undue hardships. Once the decision to seize is made, the process should move forward in an orderly fashion with the proper people notified and their rights spelled out in statute.

119 SPENCER: Agrees that uniformity is important.

125 CHAIR TIERNAN: Adjourns meeting at 4:50 p.m.

Submitted by:

Reviewed by:

Julie Nolta
Committee Coordinator

Anne May Committee Clerk

EXHIBIT LOG:

A - Proposed amendments to HB 2352 - 1 page B - Proposed amendments to
HB 2352 - Oregon Criminal Defense Lawyers Assoc. - 2 pages C -
Testimony on HB 3321 - City of Portland Citizens Committee on Forfeiture
Nuisance Ordinance - 1 page