

SENATE COMMITTEE ON
JUDICIARY

March 3, 1993 Hearing Room C
1:00 p.m. Tapes 36-38

MEMBERS PRESENT: Sen. Dick Springer, Chair
 Sen. Neil Bryant
 Sen. Jeannette Hamby
 Sen. Bob Shoemaker
 Sen. Catherine Webber

MEMBERS EXCUSED: Sen. Grattan Kerans

STAFF PRESENT: Bill Taylor, Committee Counsel
 Kirk Bailey, Committee Assistant

ISSUES DISCUSSED: Public Hearing on SB 353, SB 393, SB 408.
 Public Hearing and Possible Work Session on SB
210 5.
 Work Session on SB 251, SB 112, SB 223.

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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.

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TAPE 36, SIDE A

003 CHAIR SPRINGER: Opens the hearing at 1:04 pm.

Public Hearing

SB 353: Expands criteria used to set earlier release date of prisoner by
by
 State Board of Parole and Post-Prison Supervision.

WITNESSES:
FRANK HALL, DEPARTMENT OF CORRECTIONS
VERN FAATZ, PAROLE BOARD

010 SEN. HAMBY Offers introductory comments on the bill.

019 FRANK HALL: Submits and reviews written testimony in support of
the
 bill (EXHIBIT A).

053 VERN FAATZ: Testifies in support of the bill. Concurs with Hall.

064 SEN. SHOEMAKER: Are sections, ORS 144.122 and 144.126, redundant?

HALL: One covers inmates under old parole matrix, the other under sentencing guidelines.

071 SEN. SHOEMAKER: Presently, subsection 126 does not require that prisoner be threat to public safety. Bill stiffens requirement that prisoner not be a threat to public safety?

HALL: Correct.

083 SEN. SHOEMAKER: Any count on prisoners effected?

HALL: Reviewed age of population. Has data on current age and age at release. No data at present.

097 SEN. HAMBY: Is there a need for the bill?

FAATZ: Yes, not great today but useful in the future.

113 HALL: Makes criteria for release clear.
>There are some cost issues that will be involved.

124 SEN. SHOEMAKER: Cost of medical care will be same either in or out system?

HALL: Federal government may help however.

126 SEN. SHOEMAKER: Apply to those sentenced without parole, is release date requirement a problem.

FAATZ: Under subsection 126, life without parole would not be eligible.
Don't see how it could apply.
>Under subsection 122, inmates had indeterminate sentences up to life, some without parole date set, so there is true life sentence and they would not be eligible.

148 SEN. SHOEMAKER: Needs some work then.

CHAIR SPRINGER: Clarifies intent of committee for counsel. Those with parole should be eligible?

159 SEN. HAMBY:: Yes, if person significantly debilitated.

162 CHAIR SPRINGER: Draft amendments. How would this apply to those diagnosed with HIV/AIDS?

HALL: Might apply where person is completely debilitated, with no reason to detain individual.
>Reviewed on case by case basis.

183 CHAIR SPRINGER: That population would be included?

FAATZ: They are already provided for in statute.

187 CHAIR SPRINGER: How many in system?

HALL: No numbers, perhaps 2 cases.

197 CHAIR SPRINGER: Requests specific data.

SB 393: Extends time for filing post-conviction relief petition from 120 days
to 10 years.

WITNESSES:

ROSS SHEPARD, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

DAVE GROOM, STATE PUBLIC DEFENDERS OFFICE

LYNN LARSEN, DEPARTMENT OF JUSTICE

FRED AVERA, OREGON DISTRICT ATTORNEY'S ASSOCIATION

211 ROSS SHEPARD: Testifies in support of the bill.
>Provision held constitutional in Barts v. Oregon, 314 OR 353.

266 DAVE GROOM: Testifies in support of the bill.
>Reviews example of sentencing "horror story".

342 SEN. BRYANT: 10 years seems a little long?

SHEPARD: Tried to change 120 days to months, but Legislative counsel
changed to 10 years.

349 SEN. BRYANT: Isn't there danger that if case sent back to trial
it would conflict with three year statute of limitations?

SHEPARD: Thinks that it is right. Possible it could happen that way.
>Statute of limitations on legal malpractice is 2 years.

364 GROOM: Court might rule that prisoner waived right to statute
of limitations because it was his own motion.

372 CHAIR SPRINGER: Before 120 days was there any limitation on
post conviction relief filing?

SHEPARD: No.

379 CHAIR SPRINGER: Average in different states?
>Do other states have a similar provision?

SHEPARD: Has no information from other states.

386 CHAIR SPRINGER: Number of cases clogging the system?

SHEPARD: Most cases filed in Salem or Pendleton. No specific
numbers.

394 CHAIR SPRINGER: Comments on personal experience.

>Amendment for indigent defense cost issue would be appropriate.

415 TAYLOR: Back to 120 day amendment, what was Legislative
Fiscal's
estimate of savings?

SHEPARD: Don't remember.

423 CHAIR SPRINGER: Will we need additional language about what happens
in
between, will this renew right that didn't exist?
>Is this retroactive?

SHEPARD: Point well taken.

432 CHAIR SPRINGER: Don't want to create question about intent.
SHEPARD: Will review.

TAPE 37, SIDE A

014 LYNN LARSEN: Submits and reviews written testimony in opposition to
the
bill (EXHIBIT B).

120 FRED AVERA: Testifies in opposition to the bill.
>Significant evidentiary and trial problems to retry case.
>Need for finality in criminal cases.

SB 408: Provides that aggravating factors must be proven beyond
reasonable
doubt in order to be considered by court for purposes of imposing
departure sentence under sentencing guideline rules.

WITNESSES:

JESSE BARTON, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION
FRED AVERA, OREGON DISTRICT ATTORNEY'S ASSOCIATION
DAVID FACTOR, CRIMINAL JUSTICE COUNCIL

190 JESSE BARTON: Submits and reviews written testimony in support of
the
bill (EXHIBIT C).
>Suggests amendment to section 1.

289 SEN. BRYANT: Current practice is constitutional?

BARTON: Yes, in some death penalty cases such as State v. Ferrar but
this is a unique situation for sentencing.

304 SEN. BRYANT: In a non-death penalty case, district attorney
can
introduce previous crimes in sentencing phase and that has been held
constitutional?

BARTON: Doubts it is a settled question outside of death penalty
situation.

318 SEN. BRYANT: But it hasn't been done in Oregon?

BARTON: Not as it applies to sentencing guidelines.
>Guidelines specify what can be considered and that is what judge uses
to determine sentence. This seems contrary to that principle.

329 SEN. BRYANT: Can accused call own witnesses?

BARTON: Yes.

335 SEN. BRYANT: If increasing burden of proof, evidence and preparation
by district attorney and defender, what is the cost?

BARTON: Cost would increase if sentencing were made that formal.
>Preponderance standard is constitutional, but reasonable doubt should
be used when considering unproven crimes is issue.

354 TAYLOR: Could aggravating factors be entered into sentencing,
not having been included in trial and effect sentence?

BARTON: Correct.

366 SEN. SHOEMAKER: Possible where a fact could be established in
trial, considered aggravating by the judge but not alter the sentencing under
guidelines?

BARTON: Clarifies question.
>Under Washington sentencing reform act it could.
>Provision states facts proven in trial can be used for sentencing.
>OCDLA didn't want to use trial facts because they may be abused. It
may be difficult for individuals to remember facts from a lengthy
trial.

403 SEN. SHOEMAKER: There is a record of the trial?

BARTON: Correct, but record may not be available or clear.
>Sentencing hearings tend to be quick.

408 SEN. SHOEMAKER: Hearing for reasonable doubt could be extended
hearing?

BARTON: In Washington, trial facts could be used without evidentiary
hearing.
>Defendant would have to object to fact not proven, and necessitate
evidentiary hearing. Allowing for trial facts is superfluous.

434 SEN. SHOEMAKER: If defendant didn't say, then under bill no way
for fact to used by sentencing judge?

BARTON: Correct.

443 SEN. SHOEMAKER: Not convinced it shouldn't.

BARTON: Use of trial facts possible under the Washington system. Not strongly opposed.

TAPE 36, SIDE B

013 FRED AVERA: Testifies in opposition to the bill.
>Drafting flaw in section 1. Identified by Barton.

040 SEN. SHOEMAKER: If you allow facts that establish more serious crime as
aggravating factors, defendant is sentenced without benefit of jury trial? Is that the effect?

AVERA: Defendant could only be sentenced for convicted crime.

046 SEN. SHOEMAKER: Interrupts and disagrees. If sentence extended because
of additional crime then in effect defendant is being sentenced for that
crime.

AVERA: Disagrees on semantic point. Yes, it would increase sentence based on another crime.
>Historically that is the procedure.

051 SEN. SHOEMAKER: But is it right, there's no jury trial?

AVERA: Doesn't believe court would increase sentence on spurious or insufficient facts.

055 SEN. SHOEMAKER: If reasonable doubt standard imposed you still have a
judge making the decision not a jury.

AVERA: That's correct. Only way to correct would be to allow juries in sentencing hearings.

059 SEN. SHOEMAKER: Or not allow additional crimes as element of
aggravation.

AVERA: Yes, that's one way. Continues.
>Redundant, conflicts with existing laws.
>Unclear if bill applies to upward or downward departures.
>Believes the bill would be very expensive.

121 SEN. SHOEMAKER: On mitigation, what is the current procedure for
decreased sentence with mitigating factors?

AVERA: Downward departure is handled the same as an upward departure. Describes process.

145 SEN. SHOEMAKER: Roles are reversed for downward departure?

AVERA: Yes, essentially.

170 DAVID FACTOR: No position, but available for questions.

175 SEN. SHOEMAKER: Troubled by stepping outside guidelines without

standards of proof and evidentiary requirements in sentencing?

FACTOR: Correct in concerns.

>Guidelines have increased formality of sentencing hearings.

>Substantial and compelling reasons are needed to change presumptive sentence.

213 SEN. SHOEMAKER: Missing piece is establishment of facts?

FACTOR: Correct. Currently no standard for proof of facts.

215 SEN. SHOEMAKER: Appellate court cannot go beyond facts?

FACTOR: They may look beyond record to ensure facts are supported.

222 SEN. SHOEMAKER: Court could make an error of fact however?

FACTOR: Correct.

225 SEN. SHOEMAKER: Defendant doesn't have the protection of jury and fact-finding in trial?

FACTOR: OCDLA is trying to move forward in the process that fact-finding determination and set standard.

236 SEN. SHOEMAKER: Could Criminal Justice Council consider and advise?

FACTOR: Yes.

243 SEN. SHOEMAKER: Could it be done promptly?

FACTOR: Meeting scheduled March 12, will put on agenda?

247 TAYLOR: Is possible to for district attorney to avoid aggravating

factor in trial and introduce at sentencing?

257 FACTOR: Burglary may be bad example but there probably are offenses where that could happen.

265 TAYLOR: Element would have to be proven beyond reasonable doubt?

FACTOR: Required by statute.

270 TAYLOR: What would standard be at sentencing?

FACTOR: Standard is the subject of current discussion. Believes

preponderance would be upheld.

Public Hearing and Work Session

HB 2105: Requires Department of State Police to furnish certain forms to firearms dealers.

WITNESSES:

CINDY BECKER, STATE PRINTING

CAPTAIN LEE ERICKSON, OREGON STATE POLICE

296 CINDY BECKER: Testifies in support of the bill.
>Bill cleans up statute to reflect practice.

311 SEN. SHOEMAKER: Any opposition?

BECKER: None.

314 CAPTAIN LEE ERICKSON: Submits and reviews written testimony in support of the bill (EXHIBIT D).

345 MOTION: SEN. HAMBY: moves HB 2105 be sent to the floor with a DO PASS recommendation.

VOTE: In a roll call vote all members present vote AYE. SEN. KERANS is excused.

353 CHAIR SPRINGER: The motion CARRIES.

357 SEN. BRYANT will lead discussion on the floor.

Work Session

SB 112: Authorizes State Board of parole and Post-Prison Supervision to make determination regarding dangerousness of offender based on certain mental conditions.

372 TAYLOR: Reviews bill and amendments from Oregon Criminal Defense Lawyers Association (EXHIBIT E).

401 FAATZ: Has spoken with Ross Shepard, OCDLA about amendments and has no objection.

407 TAYLOR: Reviews OCDLA amendment to page 2.

FAATZ: No objection.

424 SEN. HAMBY: Has a note to leave provision in the bill.

430 TAYLOR: Reviews language proposed by Shepard.

443 CHAIR SPRINGER: Requests witnesses to review amendments.

448 ERIC WASP, ASSISTANT ATTORNEY GENERAL, ODAA: Generally supportive
of
bill but concerned about OCDLA amendments.
>Opposed to transactional immunity created by amendment to page 2.

471 TAYLOR: Shepard has amendments.

477 CHAIR SPRINGER: Proposes Faatz and Wasp meet with Shepard to
resolve
differences and get back to committee before it adjourns.
>Recesses on SB 112 and takes up consideration of SB 251.

TAPE 37, SIDE B

SB 251: Allows court to award same temporary relief pending appeal of
certain
domestic relations suits as court can award prior to issuing
decree.

042 TAYLOR: Reviews bill and amendments; hand-engrossed (EXHIBIT I) and
SB
251-2 (EXHIBIT H).

065 CHAIR SPRINGER: Calls witnesses.

067 SEN. BRYANT: Notes vote in favor of HB 2105.

072 SEN. HAMBY: Explain how bill applies to battered women,
mandated
visitation, etc.? Did section consider during drafting?

MICHAEL WELLS, OREGON STATE BAR: Submits written testimony in support
of the bill (EXHIBIT F).
>Section 5 does not change the law, in answer to Sen. Hamby's
question.

080 SEN. HAMBY: Lets make it work better?

WELLS: OSB Juvenile law section open to that.
>Listing of factors was intended to provide guidance to attorney's and
court.

092 SEN. WEBBER: What is case law on custody relating to proximity
of
custodial parent residence and child's residence?

WELLS: There are reported cases where court has considered distance
between parents as part of determination of residence and payment of
transportation costs.
>Custody has not been determined on distance.

105 SEN. WEBBER: Comments on policy issues and implications of the
bill.
Expresses opposition if that is the effect.

113 DAVID NEBEL, OREGON LEGAL SERVICES: Testifies in opposition

to

amendments.

>Custody should be determined on custody factors not visitation factors.

>Bill confuses issues, not clarifies.

159 SEN. SHOEMAKER: Can problem be corrected with separate sections?

NEBEL: That would be acceptable with a statement concerning best interests of child.

167 WELLS: Problem is that it implies sections don't relate.

>Section 5 does not change the law. Court must determine visitation

when it determines custody. Factors listed are commonly used.

>OSB would rather remove section 5 completely than kill the bill.

183 CHAIR SPRINGER: Bill will probably only move without section 5.

189 MOTION: SEN. WEBBER: moves to AMEND SB 251 to delete section 5 of the bill.

195 SEN. WEBBER: Comments on complexity of the issue.

202 VOTE: Hearing no objection, the amendment is ADOPTED.

203 MOTION: CHAIR SPRINGER: moves to ADOPT SB 251-2 amendments which are included in hand-engrossed version, with elimination of last line due to previous amendment.

208 VOTE: Hearing no objection, the amendments are ADOPTED.

213 MOTION: CHAIR SPRINGER: moves SB 251, AS AMENDED, be sent to the floor

with a DO PASS recommendation.

VOTE: In a roll call vote all members present vote AYE. SEN. KERANS is excused.

217 CHAIR SPRINGER: The motion CARRIES.

SEN. WEBBER will lead discussion on the floor.

223 TAYLOR: Reviews LC drafts.

LC 3033: At the request of Senate Judiciary Committee (EXHIBIT J).

LC 3525: At the request of Senate Judiciary Committee (EXHIBIT K).

LC 3725: At the request of Williams and Troutwine (EXHIBIT L).

LC 3608: At the request of Oregon Association of Chiefs of Police,

Oregon Council of Police Associations and Oregon State Sheriffs Association (EXHIBIT M).

233 MOTION: CHAIR SPRINGER: moves introduction of LC drafts.

VOTE: Hearing no objection, LC drafts are introduced.

SB 112: Authorizes State Board of parole and Post-Prison Supervision to make determination regarding dangerousness of offender based on certain mental conditions.

236 CHAIR SPRINGER: Reconvenes on SB 112.

240 FAATZ: Agreement on amendments.
>Strike language on line 17-18, 39-40, page 2.

250 SHEPARD: In addition on page 1, line 30 change "may" to "shall" and on page 4, line 22 change "may" to "shall".

256 CHAIR SPRINGER: Is there a question on top of page 5?

TAYLOR: Dale Penn addressed question adequately.
>Reviews amendments to SB 112 included in SB 112-1 and described above.

283 CHAIR SPRINGER: Is it accurate to state this relates to sentencing of dangerous offenders, does relating clause need change?

290 FAATZ: It really relates to release decision-making.

298 SEN. WEBBER: Relates to dangerous offenders, or to release procedures of dangerous offenders.

319 MOTION: CHAIR SPRINGER: moves to ADOPT amendments, described above.

320 SEN. SHOEMAKER: Concerned about changing "may" to "shall" on page 1, line 30.

SHEPARD: Don't think that necessary treatment and supervision are available in that circumstance.

343 FAATZ: Would read that treatment is not available.

360 SEN. WEBBER: Tell me again why the change to "shall"?

SHEPARD: Gives the Parole Board clear direction.

366 SEN. WEBBER: Does give them discretion. "May" will avoid suits.
>Urges leaving as much discretion with the Board as possible.

377 CHAIR SPRINGER: Amends motion to leave "may" rather than "shall" on page 1, line 30 and page 4, line 22.

389 SEN. SHOEMAKER: Are you comfortable with second provision on line 22, page 4, "may" rather than "shall".

SEN. WEBBER: Prefers "may".

404 CHAIR SPRINGER: "That would be the chairs motion."

VOTE: Hearing no objection, the amendments are ADOPTED.

409 MOTION: CHAIR SPRINGER: moves SB 112, AS AMENDED be sent to the floor

with a DO PASS recommendation.

VOTE: In a roll call vote all members present vote AYE. SEN. KERANS is excused.

420 CHAIR SPRINGER: The motion CARRIES.

SEN. WEBBER will lead discussion on the floor.

SB 223: Allows parties to support orders to initiate proceedings to modify

support obligations in same manner as public enforcement agencies.

429 TAYLOR: Reviews bill and fiscal analysis.

444 WELLS: Submits written testimony in support of the bill (EXHIBIT G).

TAPE 38, SIDE A

025 TAYLOR: Reviews amendment included in Wells testimony.

035 CHAIR SPRINGER: Amendment is a new bill, correct?

WELLS: Correct.

039 CHAIR SPRINGER: Linden has no objections? Requests it go to Ways and Means?

WELLS: They did not comment on that.

044 TAYLOR: Doesn't think it has referral to Ways and Means.

046 CHAIR SPRINGER: Suggests approach to move the bill. Recommends

referral to Ways and Means.

>Or carry over to work session.

058 SEN. SHOEMAKER: Adopting amendments and refer to Ways and Means?

CHAIR SPRINGER: Correct.

066 TAYLOR: There is a fee that is blank, need to check with Legislative Revenue to determine if that needs referral to Revenue committee.

072 CHAIR SPRINGER: Carries bill over for another hearing to allow amendments to be drafted in LC form and appropriate referrals determined.

082 CHAIR SPRINGER: Adjourns hearing at 3:00 pm.

Submitted by:

Reviewed by:

Kirk Bailey
Assistant

Bill Taylor
Administrator

EXHIBIT LOG:

- A - Testimony on SB 353 - Frank Hall - 1 page
- B - Testimony on SB 393 - Lynn Larsen - 6 pages
- C - Testimony on SB 408 - Jesse Barton - 3 pages
- D - Testimony on HB 2105 - Lee Erickson - 5 pages
- E - Amendments to SB 112 - Ross Shepard - 1 page
- F - Testimony on SB 251 - Michael Wells - 3 pages
- G - Testimony on SB 223 - Michael Wells - 5 pages
- H - Amendments to SB 251 - Staff - 1 page
- I - Amendments to SB 251 - Juvenile Department - 9 pages
- J - LC 3033 - 7 pages
- K - LC 3525 - 20 pages
- L - LC 3725 - 1 page
- M - LC 3608 - 1 page