

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.

Measures Heard HB 2390 (Public) HB 2392 (Public) HB 2393 (Public)

HOUSE COMMITTEE ON JUDICIARY CRIME AND CORRECTIONS

January 30, 1991Hearing Room 357 1:00 p.m.Tapes 11-12

MEMBERS PRESENT:Rep. Randy Miller, Chair Rep. Ray Baum Rep. Judy Bauman Rep. Rod Johnson Rep. Tom Mason Rep. Del Parks Rep. Ron Sunseri

MEMBER EXCUSED: Rep. Tom Brian

STAFF PRESENT: Greg Chaimov, Committee Counsel Kathy Neely, Committee Assistant

WITNESSES: Tom Mason (HB 2390, 2392) Ross Shepard, ODCLA (HB 2390, 2393) Brenda Peterson, Dpt. Justice (HB 2392, 2393) Steve Williams, OCDLA (HB 2392, 2393)

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TAPE 11, SIDE A

007 REPRESENTATIVE MILLER, CHAIR: Calls the meeting to order at 1:00 p.m. HB 2391 will rescheduled at a later time.

PUBLIC HEARING ON HB 2390

008 GREG CHAIMOV: Describes HB 2390 which supplies factors for the court to consider with regard to "scheme or network". Describes materials in the packet. There is no fiscal impact statement on the bill yet.

097 CHAIR MILLER: Asks Rep. Mason to begin with comments on the bill.

103 TOM MASON, REPRESENTATIVE, HOUSE DISTRICT 11: Offers testimony in favor of HB 2390. Under sentencing guidelines, the delivery of a controlled substance and the other the possession, are enhanced by finding either the possession or deliver was part of a scheme or network. If convicted of delivery, it is a crime category 4 but when delivery is part of a scheme or network it is a category 8. Discusses the crime grid (see Exhibit A). Discusses the same for possession. Problems occurred when prosecutors could not figure out what the legislature meant. There is no legislative record on it. Basically when the DAs were charging either possession or delivery of a controlled substance as a part of a scheme or network, they would put that language

into the title of the charge but not plead any specific factors to prove it was part of a scheme or network. The courts, until Judge Haas, put it off until sentencing. See Judge Haas' opinion, Exhibit B. There was nothing specific for the DA to actually plead or for the defense to defend on. The DA points out that under current guideline there is no mandatory guidelines (jail time) for the sale or possession of cocaine, methamphetamine, or heroin. No way to sanction people who sold these unless they plead scheme or network. The other concern is with the large number of Hispanics in Old Town, Portland and that this was an on going network. The bill comes up with enhanced penalties which come about in two ways:

1. Under Section 1, Subsection 1, you can deliver for consideration the above listed drugs. The operative word is "deliver for consideration". Consideration is a limiting word because the term "delivery" is a very broad term. If you sell you are subjected to an enhanced penalty. The argument against may be for sales to friends.

2. Subparagraph 2 will get you under the enhanced status.

a) "The DA pleading and proving one or more of following factors". The number of factors is left blank as a decision for the legislature. Poses that question to the committee body.

b) On line 8 one of the factors is to prove the presence of a "substantial amount cash" on the premises. What does "substantial amount of cash" mean. Das like the vague definition. Suggests between \$2,000 and up.

c) On line L, the presence of "substantial quantities of controlled substances on the premise". Need to define "substantial". Suggests putting in specific terms and leave a 'trap door' or 'escape' for drugs that we do not have experience with currently.

Concludes the point is to clear an on-going situation before the Court of Appeals. Intents to have a drug law that allows the DA something to plead and the defense something to defend on.

145 REP. PARKS: Want is the enhanced penalty?

149 REP. MASON: Current penalty on possession goes from 30 to 90 days up to 25 to 30 months Discusses distribution. Does not propose changing the actual penalties. The bill does not address the enhanced penalties themselves. The issues is definition of "scheme and network".

161 REP. PARKS: It doesn't say what the penalty would be with or without the enhancement?

REP. MASON: The grid would tell.

REP. PARKS: Why won't "substantial" be void for vagueness?

170 REP. MASON: Believes leaving the term in there might open it up to a Constitutional attack for being void for vagueness.

178 REP. JOHNSON: The term "scheme or network" is not found in the statutes correct?

REP. MASON: It is in sentencing guidelines.

183 REP. JOHNSON: Asks about the history of this bill.

REP. MASON: Discusses the grid and the appendix.

REP. JOHNSON: Was that term inserted after the legislature passed this?

REP. MASON: The term is out of the sentencing guidelines as promulgated by the Criminal Justice Counsel. Discusses the guidelines and the sentencing history.

REP. JOHNSON: Is there statutory language tied to the phrase?

219 REP. MASON: Never went into it "scheme or network". Concentrated on penalties for more violent crimes.

225 REP. PARKS: Does not understand how the grid works?

REP. MASON: The judge uses the chart.

REP. PARKS: Comments on personal experience in this regard.

235 REP. MASON: Sentencing guideline as two effects: 1. presumptive probation where there is no motivation to enter a plea and 2. mandatory jail time, where there is extreme pressure to get a plea lowered.

249 REP. BAUM: Comments on the guidelines and gives an example.

269 ROSS SHEPARD, OCDLA: Offers testimony on the scheme and network. One problem is scheme and network is not ordinary language, it is prejudicial, and not definite and certain. The bill goes the right way in the direction of solving the problem. Realization any monetary transaction involving drugs results in a jail sentence. That is what will happen to a first time offender no matter what the amount of drugs is.

305 REP. MASON: If they are selling?

ROSS SHEPARD: Right. The seller goes to jail. The seller would be category 8 of the grid.

322 REP. PARKS: What does the time equal to actually?

ROSS SHEPARD: This is essentially hard time. They are allowed to earn 20% (earned time) reduction off of the time and no more. Discusses Lane County. Believes there are a lot of friendship deals and many circumstances that are not dealing with a racketeering, but these are petty criminals. Afraid that under proposed bill they would go to jail also.

361 REP. BAUM: Depends on the criteria to be proved.

ROSS SHEPARD: If it is sale of the above mentioned drugs, aggravating factors are not discussed. It is a scheme or network in itself. It is an aggravated offense. Believes scheme or network is confusing as a term. If it is any other drug offense then other factors are considered.

376 REP. BAUM: Why isn't it one factor?

379 REP. MASON: In considering this bill the major concern of the DAs was there was no mandatory time for sale. Discusses subsection 1 of the bill because it does not include marijuana. In subsection 2 there is an enhanced penalty if it is a large amount. There are two ways to get into an enhanced penalty: 1. get caught selling and 2 drop into subsection

2 and bring in lower factors.

415 ROSS SHEPARD: There should be more than one aggravating factors, three comes to mind. Suggests the aggravating factors be in furtherance of the drug offense and asks for an amendment to line 7 after the words "factors" to insert "in furtherance of the offense" so that possession of weapons or a large amount of cash is directly related to the drug offense itself.

TAPE 12, SIDE A

021 ROSS SHEPARD: Continues testimony. Without this amendment there is the possibility of switching the burden of proof back to the prosecution by showing the item was not associated with the offense. The Constitution does not allow that. Need some language to this effect so the aggravating factor is tied to the drug offense itself. Believes paragraphs 2a, b, c, d, and f will be challenged under the vagueness of the scheme and network definition unless the amounts of cash, what heavy traffic is, kinds of weapons, packaging materials, and quantities of stolen properties are made more definite.

044 HARL HAAS, JUDGE OF MULTNOMAH COUNTY CIRCUIT COURT: Offers testimony on the bill to give a judge's point of view. Comments on experience with definition of scheme and network. Needs a statute that is very clear. With the exception of the word "substantial" and "large quantities", is a good approach. Look to federal guidelines which have specific amounts in them.

089 CHAIR MILLER: Asks about "heavy traffic on the premises".

093 JUDGE HAAS: Will be a discretionary call with the DA. Everything else is identified in other parts of the law and that term will be challenged.

098 CHAIR MILLER: Comments on sentencing guidelines.

109 JUDGE HAAS: The problem is people don't fit into boxes. They are all different. Currently we sentence the crime not the person. Discusses examples.

133 REP. MASON: Any suggestion on the quantity for the amounts of various drugs?

139 JUDGE HAAS: No. Discusses cases in state court. Most large cases are taken to the US Attorney's office.

146 REP. PARKS: Wants a comment on no. 1. Concerned about a hard and fast policy.

156 JUDGE HAAS: Can only respond to what was done in Multnomah County. Discusses that Florida is treating the defendant as a person who has a drug problem with legal consequences as opposed to treating as a criminal with a drug problem. They divert a lot of people out of the system and into treatment. Believes we are doing very little about the problem except for labeling people. A treatment program is more productive.

187 REP. JOHNSON: Asks to define some of the terms and blanks. In number 2, how many factors?

JUDGE HAAS: About 3.

193 REP. JOHNSON: How much cash?

JUDGE HAAS: Discusses reasons for answer. Answers at about \$5,000.

204 REP. JOHNSON: What would be considered heavy traffic?

JUDGE HAAS: This can mean anything. There should be some linkage.

212 REP. MASON: Two of these factors evolved out of the Parole Board Guidelines into the Sentencing Guidelines. Would say heavy traffic, presence of stolen goods, and possession directly or by proxy of real or personal property of substantial value without possible means of lawful income are too slippery to keep in.

223 JUDGE HAAS: Might put the defendant in the position of having to testify in those circumstances.

REP. JOHNSON: On weapons, could the term be changed to firearms to clarify.

231 JUDGE HAAS: Comments on this point.

238 REP. JOHNSON: Discusses linkage and asks if firearms was a better term.

242 JUDGE HAAS: Uncertain.

252 REP. PARKS: Wants to know Judge's background.

258 JUDGE HAAS: Comments on his legislative experience, being a DA, his private practice, and coming to the bench in 1984.

263 REP. PARKS: What was private practice concerned with?

JUDGE HAAS: Personal injury, plaintiff side.

266 REP. MASON: Comments on Judge Haas as a DA.

273 CHAIR MILLER: Closes the hearing on HB 2390.

WORK SESSION ON HB 2390

278 REP. PARKS: Comments on written material. Uncomfortable with some of the bill's features.

CHAIR MILLER: Not suggesting it will be moving out soon.

282 REP. PARKS: Review of the guidelines might be in order.

286 CHAIR MILLER: Asks Rep. Mason to review the testimony brought before the committee.

288 REP. MASON: Ross Shepard's suggestion in line 7 inserting the phrase "in furtherance of the defense" helps out the whole bill. Gets around the problem of a weapon being on the premises and it not having anything to do with the offense.

300 CHAIR MILLER: In these cases if there was the language in sentence 1 to connect it to the rest of the factors, if had the presence of the drug transaction and customer list on the premise, do any of these factor have to be connected to a particular case or relating to past business also.

320 ROSS SHEPARD: Suggests "furtherance of controlled substance offenses" to deal with someone who is dealing over a period of time.

328 REP. MASON: Discusses background of bill relating to this point.

342 CHAIR MILLER: Asks Ross Shepard to comment on Judge Haas' suggest of \$5,000 as a monetary figure.

ROSS SHEPARD: States that none of his clients have \$5,000. The public defender does most of this work and that amount will exclude a lot of defendants.

353 REP. BAUM: Comments on his experience with this point.

CHAIR MILLER: This is one of several factors.

REP. BAUM: If the monetary limit is too high, will be excluding 9 out of 10 people who manufacture drugs.

369 REP. JOHNSON: The higher the number is for an enhanced penalty, more factors need to be considered.

REP. BAUM: More in favor of playing with factors and getting the standards down. Wants multiplicity. Wants them down to level that will catch the lower level dealers.

386 REP. PARKS: Discusses eastern Oregon.

395 CHAIR MILLER: Questions heavy traffic.

ROSS SHEPARD: Suggests it be stricken because it will not equate from area to area.

405 REP. PARKS: Comments on sentencing guideline being hard and fast. Concerned about line 1 of the bill.

426 REP. MASON: Wants to emphasis this bill is meant to eliminate any major problems in guidelines and it will be better with the bill than without.

TAPE 11, SIDE B

024 REP. MASON: Continues discussion on the bill.

028 REP. JOHNSON: Judge Haas referenced some federal guidelines that could be looked at for incorporating into this bill to help with clarity.

REP. MASON: Thinks the guidelines are high and wants to go lower.

CHAIR MILLER: Closes work session. Opens hearing on 2392.

PUBLIC HEARING ON HB 2392

043 GREG CHAIMOV: Discusses the bill. Comments on the materials included in packet. There is no fiscal impact.

055 BRENDA PETERSON, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE: Offers testimony in favor of the bill, see Exhibit C. Discusses the amendments proposed and that they are only grammatical.

095 REP. MASON: Testifies in favor of the bill which relates to another bill which will be heard on Feb. 5. States the bill is very necessary but to hold off on working it until 2440 comes up. It is one of several major problems with Oregon's murder, death penalty scheme.

114 CHAIR MILLER: Are there provisions in 2440 the committee may find more difficult than those in this bill?

REP. MASON: It is much more comprehensive. HB 2392 is already in 2440 or there is place for it. The two are related. 123 CHAIR MILLER: Wonders if 2440 may have more difficulty in passing.

REP. MASON: HB 2392 does not have opposition but 2440 may have. It is a comprehensive. Where as this is mainly housekeeping.

134 REP. JOHNSON: Is HB 2440 directed only at death penalty?

REP. MASON: HB 2440 renames the murder title, narrows murder 1st degree which has the death penalty or life without parol. It clarifies when emotional disturbance can be used.

148 CHAIR MILLER: Asks for other witnesses

155 STEVE WILLIAMS, STATE PUBLIC DEFENDER ON BEHALF OF OCDLA: Offers testimony in favor of HB 2392. It takes care of all the problems and OCDLA supports it.

REP. MASON: Asks for him to take a look at HB 2440 for the future hearing.

CHAIR MILLER: Closes hearing on HB 2392.

WORK SESSION ON HB 2392

165 REP. MASON: Moves bill to full committee with a do pass recommendation.

CHAIR MILLER: Rep. Mason moves the bill.

COMMITTEE ASSISTANT: Roll call vote:

Rep. Baum: Aye Rep. Bauman: Aye Rep. Brian: excused Rep. Johnson: Aye Rep. Mason: Aye Rep. Parks: Aye Rep. Sunseri: Aye Chair Miller: Aye.

CHAIR MILLER: The bill is passed to the full committee with a do pass recommendation.

PUBLIC HEARING ON HB 2393

180 BRENDA PETERSON: Offers testimony in favor of the bill. See Exhibit C for written testimony. Discusses the bill Section by Section. Comments on the proposed amendments attached to the written material.

311 REP. JOHNSON: What is the status of the US Supreme Court case law on the issue of jurors in the penalty phase being different from jurors in the trial phase.

319 BRENDA PETERSON: Discusses State v. Prat. Comments on arguments they can not be participants because the language in statute talks about trial jury making decision in sentence of death and unless juror participates during the trial they cannot participate in sentencing. It is a statutory problem.

347 GREG CHAIMOV: Explains the packet material and the staff measure summary. This bill involves post conviction release. Defines use of habeas corpus. Do not have a fiscal impact statement.

385 REP. BAUM: The habeas corpus language was not properly used.

393 SCOTT WILLIAMS, OCDLA: Offers testimony on the bill.

1. Thinks it is a good idea to have appeals go straight to the Supreme Court.

2. Regarding the provision on page 2 of Section 2, sub 3 where Supreme Court can provide procedures for summarily approval or dismissal. It applies to frivolous appeals.

3. Section 3. Discusses State v. Prat. There was an Oregon Constitutional challenge but the Court reversed the case on another grounds and never reached this issue. There is the possibility of another challenge.

TAPE 12, SIDE B

027 SCOTT WILLIAMSON: Continuing:

4. Sections 4 and 5 provide for stays prior to the filing of a post conviction case after the denial of a case in the USSC. It is important to maintain these stays. Discusses Wagner case. Provides that there is a 90 day stay that can be obtained.

5. This bill provides another choice of life without parole with a 30 year minimum.

064 REP. JOHNSON: Questions Section 1?

065 SCOTT WILLIAMS: Agrees if the 120 day rule is not repealed it would be likely to have a second petition. Not sure this would solve the problem. In a death penalty case can see this happening. Troubled by this language. There should be some mechanism to show a state right was denied.

089 ROSS SHEPARD: Specific concern is Section 1. The language from line 16 to 17 is in conflict with ORS 138.510(2) that provides a petition must be filed within 120 days but there after allows for subsequent petitions to be filed with leave of court if the grounds could not reasonably be found in 120 days. This new language would force the petitioner to waive any further claims of relief. Thinks there is a conflict.

106 REP. BAUM: Is not for repealing the statute. Concerned about language states no other issues are reasonably ascertainable and the petitioner waives any other claims for relief. Does not view as a complete waiver that exists in the bill currently because it has escape language.

121 ROSS SHEPARD: Discusses the difficulty with the substantive phrase "and that the petitioner waives any other claims for relief". Believes the waiver could be taken beyond 120 days.

126 BRENDA PETERSON: Does not see same conflict. ORS 138.510(2) provides a post conviction petitioner must file within 120 days unless there is good cause for not doing so. There are provisions for late filing in



that case. HB 2393 in subsection 1 is not in conflict, it is directed more at the successive petitions. Says a petitioner only gets to file one petition and waives any other claims not raised in that first petition. Essentially they have 120 days to file first and only petition and the time limit would work with Section 1.

147 CHAIR MILLER: Closes hearing HB 2393.

WORK SESSION ON HB 2393

150 REP. JOHNSON: Moves to amend paragraph 3 of subsection 2 to read: "may summarily affirm appeals or dismiss non meritorious appeals". Believes this is the intent.

161 CHAIR MILLER: Rep. Johnson moves to insert language on line 8 of page 2: "may summarily affirm appeals or dismiss non meritorious appeals."

REP. JOHNSON: To make it clear, add "summarily dismiss non meritorious appeals".

174 CHAIR MILLER: Any discussion on amendment.

177 REP. BAUM: Need to decide whether we will require the Supreme Court to hear these and this provision says that they don't have to decide every case. Do we need to add anything because we hope the internal workings will make it so they are not hearing frivolous appeals.

188 REP. JOHNSON: This makes the intent clear. Did not feel it was clear as applies to death penalties.

191 REP. PARKS: Restate the motion

201 CHAIR MILLER: Repeats: "The Supreme Court by rule may provide procedures by which the Supreme Court may summarily affirm appeals or summarily dismiss non meritorious appeals."

210 REP. BAUM: Discusses language.

REP. JOHNSON: Defends language. Restates final amendment language.

232 GREG CHAIMOV: Discusses a hypothetical situation to make the point of what would happen with this language. Unclear of purpose. What is being achieved?

246 REP. JOHNSON: "Affirm" and "dismiss" were already in there. Offers to take out "affirm" and have it state "summarily dismiss non meritorious appeals".

259 CHAIR MILLER: Any objections to the amendment?

REP. JOHNSON: Clarifies the amendment.

276 CHAIR MILLER: Any objections? Hearing none, it is adopted.

279 REP. PARKS: Does the amendment change the effect of the sentence at all?

CHAIR MILLER: Counsel will have time to comment on that before this bill is up for further work session.

290 REP. BAUMAN: A judgment can be reviewed only as to questions of law. Confused as to Brenda Peterson's testimony where it is states the Oregon Supreme Court will already be familiar with the extensive trial record which will usually if not always be admitted as a post conviction exhibit. Asks for clarification. Where, in the appeal process, will the record be reviewed?

302 BRENDA PETERSON: In Section 2 where it discusses being familiar with the trial court record, that would be an amendment to post conviction statute. Explains reason to by-pass the Court of Appeals. The scope of review on appeal refers to a new sentence added to the death penalty statute. Not directed at the post conviction review but at the direct appeal. The intent was to make it clear the Supreme Court would not review errors not raised or preserved at trial.

347 CHAIR MILLER: Closes work session. Adjourns the subcommittee meeting at 2:55 p.m.

Submitted by: Reviewed by:

Kathy Neely David Harrell Assistant Office Manager

EXHIBIT LOG:

A - Guideline Grid for HB 2390 - Tom Mason - 2 pages  
B - Judge Haas' Opinion for HB 2390 - 9 pages C - Testimony  
on HB 2392 - Brenda Peterson - 4 pages D -Testimony on HB 2393 - Brenda  
Peterson - 5 pages