

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.

HOUSE COMMITTEE ON JUDICIARY CRIME AND CORRECTIONS

February 20, 1991Hearing Room 357 1:00 p.m.Tapes 30-32

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

VISITING MEMBER:Rep. Kelly Clark

STAFF PRESENT: Greg Chaimov, Committee Counsel Kathy Neely, Committee Assistant MEASURES CONSIDERED: HB 2390 PH (Enhanced Penalties) HB 2389 PH (Public Defender) HB 2570 PH (Unlawful Entry) HB 2600 PH (Motion)

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TAPE 29, SIDE A

003 REPRESENTATIVE MILLER, CHAIR: Calls the meeting to order at 1:00 p.m.

PUBLIC HEARING/WORK SESSION ON HB 2390 Witnesses: Verah Tarno, Norm Frank, Dale Penn

010 GREG CHAIMOV: Comments on opinion of Court of Appeals (EXHIBIT A), amendments dated 2-7-90 (EXHIBIT B) and 2-13-91 (EXHIBIT C). Discusses difference between the amendments. Comments on letter from Multhomah County DA containing their proposed amendments (EXHIBIT D). Prepared to explain the differences are between amendments.

076 REP. MASON: The DA submitted two version of amendments?

GREG CHAIMOV: Yes. The amendment the committee was working with was proposed to be a free standing statute. The DA's amendments direct the sentencing guideline board to amend appendix 4 describing enhanced crime categories for drug offenses. The DA's amendment were specific on category, has similar factors as the committee amendments. Three factors are enough in DA's amendments to trigger enhancement. Includes expanded weapon's definition, change in quantities of drugs, and have added two new sections to get an enhanced penalty.

081 VERAH TARNO, COOS COUNTY SHERIFF, OREGON STATE SHERIFFS: Offers testimony in favor of HB 2390. Line 14, subsection g of the original bill states "modification of structures ..." consider adding "fortification or fortified dwelling". The Oregon Sheriff's Association

supports this bill. Discusses bypassing electrical wiring, circumventing power company and reading by the power company.

107 REP. PARKS: Addressed in line 14, that is covered right now the way it is?

VERAH TARNO: Yes.

109 REP. SUNSERI: Why are they tapping into 220 wires, just to avoid paying power bills?

VERAH TARNO: Yes and detection.

112 REP. BAUM: Working off of the original HB 2390 and cold on other amendments.

VERAH TARNO: Comments on the issue of eluded drugs. A percentage of actual drug is used.

124 NORM FRANK, MULTNOMAH COUNTY DA: Lays out the thinking that went into the amendments of the DA. Phrased amendments in terms of amending those portion of Appendix 4 on the subcategories found offensive to Court of Appeals and substituted a system along lines of house bill. 1. Speaks in terms of a mixture or compound with detectable amounts of a drug. A significant change in actual operation of law. Based on federal experience it is impossible to litigate quantities. Crime labs estimate if have to determine exact amount, budgetary expenses to prepare lab report might be in excess of \$500,000. 2. Specific amounts laid out in Subsection 1 which made certain deliveries or manufacture presumptively prison, based on quantity of substance involved. Tried to make quantities in reasonable relation to each other based on street value. 3. Tried to give Subsection 2 an overall label, commercial drug offense. DAs are required to plead subcategories in the sentencing guidelines. Under this subsection it would be sufficient to plead commercial drug offense as subcategory.

216 REP. PARKS: Would be sufficient to state in charging document it was a commercial drug transaction?

NORM FRANK: Right. The defense would know and have discovery on any specific things. 4. Changed quantities listed on subsection L. Other changes are more or less housekeeping. 5. Added 2 additional section dealing with presumptive prison within 1,000 feet of school and one directed at labs set up to manufacture controlled substances. 6. Amended possession categories. Crime category 6 would still be presumptive probation. Estimate current issue about 44% of drug cases in Multnomah County as scheme or network cases. About 18% of drug cases would be presumptive prison cases. Under proposed amendments, 22 to 24% would be. Even with changes, not a huge increase in numbers and that it is a significant decrease in numbers, at least in Multnomah County, in issuing presumptive prison cases. No real negative effect.

REP. BAUM: When bill first came, DAs were anxious to have some leverage over people who were delivering drugs without any other factors. Wanted to give prison time. Now it has gone off the deep end with this. Expresses concerns on where the bill will go. Wants to know where the DAs are coming from.

321 NORM FRANK: Understood the request was to phrase amendments in terms of basic formate of 2390. There are and were other approaches

that would simplify things. Discusses proposals from meeting earlier. Endeavored to bring a proposal in the context of what was then existing in the bill.

345 REP. PARKS: Thinks did a good job. On page 6, the offender in possession directly or by proxy of real or personal property without plausible means of lawful income. That is so vague unless there is some real good reason to have it in there. Better not to have it in there.

357 NORM FRANK: Believes it was a factor listed in 2390 prior to review.

363 DALE PENN, DA ASSOCIATION: Discusses letter from Michael Shrunck (EXHIBIT D). It is a simple bill.

390 ROSS SHEPARD, OCDLA: To allow the DA to merely allege commercial drug transactions within an indictment and say discovery will alert the defense what the prosecution intends to prove will run into same problems scheme and network problem did. It is not definite and certain.

419 REP. PARKS: This really does get the commercial dealer rather than the monster net. Do you agree?

ROSS SHEPARD: Cannot answer.

426 CHAIR MILLER: Recesses work session on HB 2390.

TAPE 31, SIDE A

PUBLIC HEARING ON HB 2570 Witnesses: Rep. Markham, Rep. Schoon, Dale Penn

028 REPRESENTATIVE JOHN SCHOON: Offer testimony for HB 2570. Discusses reasons and incident for the bill. This bill expands ability to use physical force against someone unlawfully entering own home. Upon looking at language unless person is there committing a burglary, homeowner is at risk himself.

061 REPRESENTATIVE BILL MARKHAM: Discusses HB 2570 and own bill emanating from a former member. Comments on similar incident in home district. Would change the bill on line 9 in sub 2 to add "or around a dwelling".

093 REP. JOHNSON: "Unlawfully entering" on line 10, what is meant or intended by that not in the existing statutes?

103 REP. SCHOON: Goes back to original comment so they can claim self defense if something happened in the dwelling without authorization. As written it means being there without being invited. It appears that it expands the ability of an individual to defend under a wider range of circumstances.

REP. MARKHAM: Sure own bill is substantially close to this and after printed, will say to put it in the back booth.

130 DALE PENN, DA ASSOCIATION: Comments the example given to the committee. Concerned with many homicides that occur in residents. By changing this to trespass could open up the door for unreasonable claims.

CHAIR MILLER: Closes hearing on HB 2570.

WORK SESSION ON HB 2390

209 MOTION:REP. BAUM: Makes the following conceptual amendments:

1. Make category 6 a crime that the DAs have presented in their amendments.
2. Use four factors instead of 3.
3. Keep category 8 at 3 factors.
4. Take out sub 4 at top of page 5.
5. Insert an emergency clause.
6. Take out the "no plausible means" on pages 3 and 6.
7. Add "fortified structure" at appropriate locations of bill.

257 REP. MASON: Appreciates concern but the idea of putting these in the rules find it is not going to work. Have followed this issue from the very start. Problem with scheme and network was that they were administrative rules. Argument can be made since they are in administrative rules, that don't have to plead and prove these things. Need to avoid more litigation on scheme and network. Comments on Rep. Baum's suggestions.

296 REP. PARKS: Does not understand. They amend one administrative rule and the rest of these are statutes.

REP. MASON: All administrative rules.

304 NORM FRANK: There is a statute that specifically requires subcategories in administrative rules be plead and proven. Not intent of bill these be plead and prove. Commercial drug offense will not fall under same trap as scheme and network because the problem with that was it was not defined. Commercial drug offense is defined in a very specific manner. There is not a need to plead factors at the charging stage for this.

REP. MASON: That is point. No one ever knew exactly what one was charged with under scheme and network and did not have ability to defend. Comments on charging instruments.

357 NORM FRANK: Speaks to that. Outlines why concern would not actual occur under the bill. Submits that it is more effective to just plead a term that is specifically defined in the statute. Problem with scheme and network is there was no definition.

386 REP. PARKS: Don't understand objections to Rep. Mason's ideas.

393 NORM FRANK: Don't have a strong objection. There are some things, for example, on page 3, the offender is using public lands, might be a factor that may find out later, the offender was taking security measures with potential of injuring persons, needs investigation to find that out. Moreover, the crime lab is geared to give rush basis whether a substance is cocaine or not in time to issue the case. It is more cumbersome, on a rush basis for them to give specific amounts. Expands on factors and how items might be discovered.

TAPE 30, SIDE B

013 REP. PARKS: Understands examples but in ordinary course of events, not going to charge to day and be plead this afternoon. This will develop overtime.

NORM FRANK: True. Discusses a county that issued 7000 drug offense, and to have to come back before the grand jury because charge was changed is not good. It creates a cumbersome problem that does not advance the defendant's rights.

025 REP. JOHNSON: We are in work session? Rep. Mason, isn't it best the statute outline the elements of the crime to be charged with specifically? Shouldn't the detailed elements be set out somewhere? They suggest putting them in OAR instead of ORS, should it be in the statutes?

039 REP. MASON: Uncomfortable with something in this bill. Wants a simple bill and instincts say this is not simple.

082 NORM FRANK: Responds favorably about original bill. Attempted to work within parameters as amended last week. There is another approach that could be made.

093 REP. MASON: Comments on the February 13, 1991 amendments from Greg Chaimov. Has 2 categories for enhanced penalties. Proposes three categories of mandatory time: 1) delivery for consideration; 2) substantial amounts; and 3) factor approach.

121 REP. PARKS: The net is too big. Should be more precise, not trying to get the casual users who share with friends in a social situation. Likes DA's redraft. Uncomfortable to say any sale for consideration, means any kind of transaction, is a prison offense.

144 REP. MASON: Would like the committee to consider. Places it in the form of a motion.

CHAIR MILLER: Comments on Chair's intent first. With some deference to Rep. Baum, would like to make it a version we can be proud of, and would like to bring this back in front of the subcommittee on Tuesday. Closes work session.

(Tape 30, Side B) PUBLIC HEARING ON HB 2389 Witnesses: Ross Shepard, Bill Linden, Ed Jones.

176 GREG CHAIMOV: Grants a tax exemption to public defender organizations. Gives background. There is a revenue impact. If passed out must go to Revenue. No fiscal impact.

193 ROSS SHEPARD, OCDLA: This issue deals with tax exempt status of 9 public defender offices within Oregon. They are nonprofit corporations that have been granted a full tax exemption by the IRS and until last year, the county tax assessors had not tried to collect from them. Comments on assessment in Coos County. Mr. Linden, State Court Administrator has estimated that the fiscal impact on this issue is \$260,000 over the next biennium. The public defender offices currently do not have that money within budgets, would have to be added to the indigent defense fund. Committee must decide if state is going to pay these taxes or if the county is.

228 REP. PARKS: In Klamath County, it is a nonprofit corporation?

BILL LINDEN, STATE COURT ADMINISTRATOR: The Klamath is a consortium, not nonprofit defender organization and this would not affect them.

236 REP. PARKS: Do you set up the corporation and pay self a salary?

ROSS SHEPARD: Employed by the corporation. The Board of Directors sets up corporation.

REP. PARKS: Does the state pay the office operating expenses?

ROSS SHEPARD: Contract with State Court Administrator on a year by year basis to provide indigent defense Lane County.

REP. PARKS: It is the Corporation's responsibility to pay for the secretary, lights, etc.?

ROSS SHEPARD: The corporation's responsibility.

REP. PARKS: Continually give local folks expenses and that is what this does because it gives them the obligation to provide free fire, police and other protection that taxes pay for. When say these offices do not have to pay, getting it free, that is objection.

ROSS SHEPARD: Public defenders are in a different circumstances than other exempt organizations.

259 BILL LINDEN: Judicial Dept. does not have an position on the merits of this bill. If don't have legislative relief on the issue will have to ask Ways and Means for about \$250,000.

257 REP. BAUMAN: This is kind of robbing from Peter to pay Paul. Seems there is an intense need in local government to collect additional money to pay for basic services. They have cast eyes on traditional exempt entities to get more money. Real issue is for the state, going to make a transfer to local government of an additional amount to support mandate to provide indigent defense. Discusses property tax exemption.

305 REP. PARKS: This is a state expense, the landlord gets the money the way the law works. Discusses why.

ROSS SHEPARD: Suggests amendment on line 6 to insert "real and personal property". Landlord figures that in when negotiate rent.

324 REP. PARKS: Rents for what can if gets exemption landlord gets better deal. Only affects 9 counties and believes it is a legitimate state expense that should not be passing on to locality.

338 ED JONES, DIRECTOR OF MULTNOMAH DEFENDERS: Currently dealing with this issue. Discusses business done in a year. Because Defenders have been tax exempt, landlord gets a rebate on property taxes in proportion and landlord turns back to Defenders. Saves \$5,000 or \$6,000 per year. Comments on situation Multnomah County Defenders office is in with regard to personal property and taxes.

388 REP. BAUMAN: Question for Mr. Linden on how put together indigent defense funds. It is distributed with consideration of a per case cost on a state wide basis?

410 BILL LINDEN: Discusses way contracts are negotiated on own merits. Start with a budget and try to estimate on a county by county basis for case load and mix. Try to have competitive bids, negotiate the best price for the case load.

TAPE 31, SIDE B

018 REP. BAUMAN: Ask questions in contract process like what office overhead is?

BILL LINDEN: Bidders give complete break down of costs.

REP. BAUMAN: If pay property tax on property occupy in consortium in Klamath county, that is considered into the blend of contract proposal.

029 BILL LINDEN: Would identify as an expense of doing business, include occupancy expenses.

031 REP. BAUMAN: Not allow that expense as part of operating expense in a contract from Multnomah County where they are exempted.

BILL LINDEN: No. This would create a new expense not historically expended.

038 REP. BAUMAN: Puts a general expense on the statewide indigent defense budget when cost of providing that defense goes up for one county.

BILL LINDEN: It increases the expense of providing services in those counties where they are nonprofit.

REP. BAUMAN: Could insolate counties where the defense is provided by profit organizations from consequence based on the increase to the budget.

BILL LINDEN: Could not expect them to "eat" part of this additional expense. Would like to find money for those affected.

054 CHAIR MILLER: Closes hearing on HB 2389.

(Tape 31, Side B) PUBLIC HEARING ON 2600 Witnesses: Rep. Mason, Ross Shepard, Dale Penn

059 REP. MASON: There may be situations where a defendant is charged with a particular crime and they did something but not that particular crime. Observes in 99% of criminal defense situations the defendant did do something. Many defense situations are controversies over the charge and much of the trial comes down to whether or not the charge is appropriate. Discusses an example. The bill allows the defendant to approach the judge and plead to the lesser charge. The bill extracts a price from the defendant for that. If judge does not accept plea, the jury is informed that defendant attempted to enter it and has admitted the elements of the lesser crime. Bill is designed to not be used every time. No standards for a judge, proposes three possible one: 1. No serious injury to any victim. Serious injury being a term of art. 2. Punishment for lesser offense would be commensurate with actions of defendant. 3. Interest of justice would be fully served by accepting lesser plea.

128 CHAIR MILLER: Asks about "commensurate penalty."

134 REP MASON: Comments on penalty for hypothetical.

147 CHAIR MILLER: Asks about "interest of justice".

REP. MASON: Number three is a little loose.

CHAIR MILLER: As a practical matter, have allowed guilty plea to be entered to the lesser offense unless court overrules.

REP. MASON: DA would be party to this and would oppose and make arguments.

CHAIR MILLER: Comments on conditions currently with respect to hypothetical case. What is being done differently?

163 REP. MASON: Nothing in this bill for the DA. Taking a bit of the negotiating tool away from DAs. Might avoid some trials. Charging is sensitive. This is directly related to lesser included jury instructions where they decide this exact issue. This accelerates the process.

185 REP. SUNSERI: With illustration of person who kicks down door, what about a crime such as a rape? and then judge decides to charge with a lesser crime when more serious crime should have been charged. Does this provide for the judge to allow to plead to lesser crime?

REP. MASON: A defendant could come in and say that but cannot conceive a judge accepting that. Defendant's admissions are the factual elements necessary for the crime. The way the bill is written, needs to plead to the elements of the lesser offense.

214 ROSS SHEPARD, OCDLA: Testifies in favor of the bill. It allows defense to end run a DA when DA states no plea bargaining in a case where there should be. Allows judicial scrutiny in cases where DA is taking an unreasonable stance. Would be few trials. Discusses admissibility of entering a plea. Comments on ORS 135.445. Needs to be a conference in judge's chambers prior to the hearing where judge can state whether they would accept the lesser plea. Concerning standards for the judge, should be incorporated into bill along with defendant's prior record and the size of the monetary damages involved. \*Proposes amendment on line 16 after "hearing" to include "to be held at least 7 days before trial". Addresses local county practices.

279 DALE PENN, DAs ASSOCIATION: The Association opposes the bill. Addresses examples given in prior testimony. Comments on sentencing guidelines. Do not like bill because: 1) separation of power's issue; 2) removes the DA from authority whatsoever; 3) expands plea bargaining with no standards; 4) no mechanism to advise jury of reasons for DAs and Judge's decision on plea. Discusses way to try a case under this. This encourages unequal treatment, discusses.

364 REP. MASON: If a plea was rejected and jury was informed of the rejections, the DAs would want the jury to be informed of the reasoning of the plea. Discusses effect of this.

DALE PENN: Yes. Jury should have the total picture.

405 REP. JOHNSON: Questions distinction. What is wrong with defense attorney coming to the judge and saying "we admit that defendant did this or that and want the judge to take a different look at the facts and decide whether should have been charged with one crime or another". Sees as the criminal equivalent of a summary judgment motion of sorts.

TAPE 32, SIDE A

018 DALE PENN: That is the way the defense would be presented any way.



Don't like it because 1) if judge is going to say it is a lesser crime then defense attorney waives jury, or 2) there will be a negotiation. Talking about 8% or less of all criminal charges in the state go to court anyway under any circumstances. Not huge amounts of cases. This procedure would take out the executive branch and enable the judaical branch to encompass that power in one person. Discusses that point.

035 CHAIR MILLER: Closes hearing on HB 2600. Adjourns meeting at 2:55 p.m.

Submitted by:      Reviewed by:

Kathy Neely          David Harrell Assistant Office Manager

EXHIBIT LOG:

A            -            Testimony on HB 2390 - Court of Appeals Opinion - 12 pages  
B            -            Amendments to HB 2390 - 2 pages C            -            Amendments to HB  
2390 - 2 pages D-            Testimony on HB 2390 - Norm Frank - 8 pages