

HOUSE COMMITTEE ON JUDICIARY CRIME AND CORRECTIONS

February 26, 1991

Hearing Room 357 1:00 p.m.

Tapes 33-36

MEMBERS PRESENT: Rep. Randy Miller, Chair Rep. Ray Baum · Rep.
Judy Bauman Rep. Tom Brian Rep. Rod Johnson Rep. Tom Mason Rep. Del
Parks Rep. Ron Sunseri VISITING MEMBER: Rep. Kelly Clark Rep. Bill
Markham STAFF PRESENT: Holly Robinson, Committee Counsel Greg
Chaimov, Committee Counsel Jeff Steve, Committee Assistant

MEASURES HEARD: HB 2443 - FED./ARRESTS OF STATE VIOLATORS (PH) HB 2156 -
BOATERStDRUG USE (WS) HB 2390 - ENHANCED PENALTIES FOR DRUG OFFENSES
(VVS) HB 2597 - DUII/URINE TESTS (PH/VVS) HB 2598 - DUII/BLOOD ALCOHOL
RATIO (PH/WS)

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 33, SIDE A

004 CHAIR MILLER: Opens Subcommittee on Criminal Law and Corrections at
1:00 p.m.

HB 2443 - FEDERAL OFFICERS - PUBLIC HEARING

Witnesses: Major D.L. Renfrow, Oregon State Police Pierce B.
McIntosh, Postal Inspection Service John Elms, Postal Inspection Service
Ted Weimann, Special Agent, INS Al Bosco, U.S. Secret Service Dave Cook,
Benton County S.D./OSSA House Committee on Judiciary Februs~ 26, 1991
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Jerry Tate, U.S. Bureau of Alcohol, Tobacco-Firearms Representative John
Minnis, District 20 Jerry Freshour, BPST

020 ROBINSON: Summarizes HB 2443 which expands the definition of
federal officers to include about 10 different federal agencies. HB 2443
also revises another part of the criminal code which defines the powers
of a federal officer (EXHIBIT L). 030 REP. MASON: If there's no one
present in opposition to HB 2443, suggests maybe one summary witness
testify and move on the bill. All witnesses present are in favor of its
passage. 040 CHAIR MILLER: Appreciates the suggestion and asks
witnesses to share comments. 047 MAJOR DEAN RENFROW, DIRECTOR,
CRIMINAL INVESTIGATION DIVISION, OREGON STATE POLICE, ALSO CHAIR, OREGON
LAW ENFORCEMENT LEGISLATIVE COMMITTEE (EXHIBIT A): The Department
supports HB 2443 and requests additional amendments. HB 2443 will
increase the number of enforcement officers who can take action on
offenses, increase cooperation between state and federal enforcement
agencies, and provide more service at no additional costs to the state.
It's the intent of federal agents to enforce the state criminal offenses
but not their intent to specifically go out and try to enforce state
laws without notifying local law enforcement agencies. This may actually
reduce costs for the state. Names various law enforcement groups that
unanimously support HB 244 3 (EXHIBIT A, Page 2) but requests the
following amendments: -16 hours of training in criminal law in the
subjects of the use of force, felony, culpable mental state and defense
to crime; -8 hours of procedural law covering laws of arrest, search and
seizure, Miranda, rules of evidence, juvenile procedures, and the Oregon

criminal justice system; -That federal officers be given a two-year period to meet this training requirement; - -The Sheriffs' Association requested an extension to this training to cover a two-week training and orientation period. 090 RENFROW: Approximately 350 federal officers are in the State of Oregon that would fall in the category of HB 2443. 095PIERCE B. MC INTOSH, INSPECTOR IN CHARGE, POSTAL INSPECTION SERVICE (EXHIBIT B): Supports HB 2443 and reads written testimony. Reiterates unanimous endorsement of HB 2443 by state and local law enforcement officials. Talks about federal officers coming into contact with individuals committing state felony violations both while investigating their investigations and while off duty. Federal officers do what's necessary to assist in apprehension of these individuals, but at their own peril because they don't have effective authority from the state. There is a statute which grants arrest powers but it's not effective because of constraints contained within it. Other states have enacted legislation granting state arrest powers to federal law enforcement officers. Worked with state Attorney General's Office to craft HB 2443 which also has their support.

165 Important to note HB 2443 does not make federal law enforcement officers "peace of ficers~ under Oregon law. That term denotes additional powers which federal law enforcement agents don't

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need and which are not necessarily desirable. HB 2443 would grant federal law enforcement officers the same protection as Oregon peace officers under the limited circumstances when confronted with felony crimes and wanted felony criminals. Our agency supports the amendments recommended by Major Renfrow's agency and also a "sunset" provision for 1995. Believes impact on local law enforcement agencies, such as sheriffs, will be minimal.

191 CHAIR MILLER: With respect to the "sunset" provision, do you really think it's necessary?

199 MC INTOSH: In my own view and that of my agency, a "sunset" review is not necessary at all. There was support for it in the Oregon Law Enforcement Legislative Committee. We don't object to it but don't think it's necessary.

203 REP. BAUMAN: We've gone all this time without acknowledging a broader law enforcement role for federal officers. Wonders if HB 2443 is a federaliSMquestion about the difference between the role of the state, the independence of the state, the enforcement of the state's law, and the power of the state to decide, and then within its jurisdiction to enforce its own law as separate from that body of law that is federal. Has this come up before-or is this new?

223 MC INTOSH: There is legislation on the books--the part that is suggested to be repealed. The terms of that legislation did allow arrest power for all federal law enforcement officers. However, a certification provision in that legislation proved to be bureaucratically unworkable, the result being no federal law enforcement officers have been certified as peace officers in the State of Oregon. This is not a new situation. The current practice of federal law enforcement officers is that when confronted with those situations, we are making those arrests right now--but primarily as citizens, or we're just detaining

individuals until state or local law enforcement officers can effect an arrest. Don't think there's any danger of federal law enforcement agencies impinging or encroaching on the powers of the state. It's quite the opposite. Budgets and resources are terribly constrained now, and now more than ever, there are more joint federal/state task forces operating, there's more cooperation between federal and state/local officers than ever before, and federal law enforcement agents are running into people with outstanding state felony warrants much more often than they used to. From our standpoint, there isn't a federalism issue.

270 REP. SUNSERI: Give an illustration of when the post office would carry guns and make arrests. 273 MC INTOSH: We are authorized by federal statute to carry firearms and to make arrests for violations of the United States Code that pertains to the postal service. There are about 100 federal statutes for which we investigate jurisdiction. Postal inspectors are armed almost all the time in their daily investigations. We're probably the lead federal agency in investigations of child pornography. We spend a lot of time working on mail fraud cases and narcotics shipped in the mail. There are burglaries and robberies of post offices, assaults on postal employees on duty, and a number of other instances where it's necessary to make arrests--sometimes based on probable cause, so we are armed.

293 REP. MASON: Believes the largest law enforcement agency listed in HB 244 3 is probably the Dept. of Agriculture that works on timber theft.

There rminutes co_ metoriab which paraphrase and/or summarize relevant material during this recollection. 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 February 26, 1991 - Page 4

312 JOHN ELMS, POSTAL INSPECTOR, POSTAL INSPECTION SERVICE (EXHIBIT C): Been involved in law enforcement for about 30 years which includes being a former police officer in Los Angeles and Albuquerque. Gives example of an arrest he made in 1978 wherein he was advised by the deputy district attorney that he didn't actually have authority to make the arrest. Has been concerned about these types of situations for the past 15 years. Gives examples of federal investigations that led to cooperation with state/local law enforcement agencies to make arrests.

TAPE 34, SIDE A

037 REP. JOHNSON: Refers to HB 2443 (EXHIBIT L), page 1, list of law enforcement agencies, (m). It's kind of a catch-all referring to "any special agent . . . who is empowered to make an arrest" and "who is authorized to carry firearms." Any problem with making sure that anyone to be called a federal officer on this list is also someone who can do those two things--is already authorized by federal law to make arrests and carry a firearm? 046ELMS: No problem at all. 048 REP. SUNSERI: Refers to Criminal Code 133.310 that says a peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed an offense (gists offenses). Refers to HB 2443, Page 2, Line 2, concerning federal officers making arrests. Would understand from that that the federal officers have more authority than state officers. 055ELMS: This is an important point we've discussed with the Attorney General's Office. We certainly don't want to

have more authority than Oregon peace officers. Would have no problem limiting it to a felony in a Class A misdemeanor. 068 TED WEIMANN, SPECIAL AGENT, IMMIGRATION SERVICE: Not present officially representing the Immigration Service but rather to answer any questions. (No questions were asked of Mr. Weimann.) 073 REPRESENTATIVE JOHN MINNIS, DISTRICT 20: Strongly supports HB 2443. Met with the agencies involved and they were very amenable to working out solutions to some of the differences that exist in terms of procedure for Oregon police officers and those of the federal government. Suggests members focus on the intent and direction of the bill. Hopes that the bill doesn't get tangled in some very complex training requirements. 096 REP. BRIAN: There are recommendations that there be some BPST training connected to this bill. Do you desire that training not be required as part of the bill? 101 REP. MINNIS: No, not saying that. Refers to discussions with Steve Bennett, Director of the Board of Police Standards and Training. Have also dealt with their budget in Ways and Means. They have broadened their ability to approve training programs for police officers throughout the state via a new network of 24-hour law enforcement television that the state now subscribes to for training police officers, plus the approval of video cassette training programs that are part of that training. Hopes that rather than recreating a training wheel and force federal agents into a federal agents police academy, that we're respective of the nature and type of training they have. House Committee on Judiciar~ February 26, 1991- Page 5

Not saying no training, just saying an appropriate amount that is thought through. 118 REP. BRIAN: Refers to Major Renfrow's written testimony, Exhibit A, concerning their proposed amendments. Wondering if we should be as directive as these amendments or just say, BPST shall establish, or . . .

145 REP. MINNIS: Think there are some areas within Major Renfrow's suggestions that are already being taught to federal law enforcement agents now. Where there's an overlap is where we need to be sensitive and not force federal agents to retrain in areas they're already trained. As a Portland police officer, a lot of our training of firearms and tactical situations comes from the federal agents and their schools. So there already is some training overlap. Sees differences in the area of constitutional matters where our Search and Seizure Rules of Evidence are different than those of federal custom agents. They need training to show those differences so there aren't violations of Oregon constitutional rights. Suggests that Steve Bennett and the BPST are very capable of reviewing the training of federal officers and looking for consistencies within that framework.

150 REP. BRIAN: Does BPST have the authority to require federal agencies to participate in whatever they determine?

156 REP. MINNIS: Framework of HB 2443 is such that if you require training, those federal agencies that would not agree to have the training would not have the power. Don't think BPST has the power to compel them but think we do. 173 CHAIR MILLER: Notes that it appears members of the committee are in support of HB 2443. 179 ALFRED S. BOSCO, SPECIAL AGENT IN CHARGE, U.S. SECRET SERVICE (EXHIBIT D): Submits written testimony. Any questions? 178 REP. BAUM: What does the Secret Service do in the State of Oregon? 182 BOSCO: Explains that the U.S. Secret Service is an agency under the umbrella of the Treasury Dept., sister agencies being Bureau of Alcohol, Tobacco, Firearms, Customs and the IRS. As a federal agency, we're more famous for the protection of the President, Vice-President, and visiting heads of states from foreign

governments that come to our country. In addition, we have field offices throughout every large city in the United States where we conduct investigations of crimes relating to securities and obligations produced by our Treasury Dept.; namely, counterfeit currency, forgery of U.S. Treasury checks and bonds, credit card fraud, and investigating those individuals who threaten the life of the President, Vice-President, or others we protect. In that category, the majority of those individuals are mentally ill persons. 205 REP. BAUM: Who is responsible for tracking any potential terrorist activity in the state? 207 BOSCO: That's under the jurisdiction of the FBI whenever it regards a terrorist activity. We get involved whenever there is a specific threat made against the President or Vice-President. Any attempts or groups leaning that way are usually handled by the FBI.

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223 DAVE COOK, BENTON COUNTY SHERIFF, REPRESENTING THE OREGON STATE SHERIFFS' ASSOCIATION: Favors passage of HB 2443. Proposes one amendment concerning training. Appears to be confusion about what may be required, and should be required. Personally believes the BPST is quite capable in working with the federal agencies and whatever advisory committees to establish a training curriculum. The Oregon State Sheriffs' Association thought something in the neighborhood of 40-48 hours of training, having reviewed the curriculum of the Career Officers Course which is required of all out-of-state officers who become certified in Oregon. Sure an appropriate length of training can be worked out between the federal agencies. 250 JERRY W. TATE, RESIDENT AGENT IN CHARGE, BUREAU OF ALCOHOL, TOBACCO & FIREARMS (ATF), U.S. DEPT. OF TREASURY (EXHIBIT E): Favors HB 2443. Seems like the agencies have become more dependent on each other for enforcement which has made them more inter-related. For example, ATF has a state police detective and a Portland police detective assigned full time to our office to work on Armed Career Criminal Task Force. Two of our special agents are assigned to the Gang Strike Force Unit operated by the Oregon State Police. This interrelationship has caused our agents and our officers to become more involved in other persons' violations. Does have concern about the training amendment which would result in two categories of federal law enforcement officers. Those that have had the training or not had the training. We frequently bring agents in from out of state to do special assignments such as high risk warrants or work on major investigations such as arson. Wants consideration to be given to the amendment noted. 310 REP. JOHNSON: Any connection between your office and the Internal Revenue Service? 313 TATE: ATF left the Internal Revenue Service approximately 20 years ago. We predominantly enforce the federal firearms, explosives and arson laws--but primarily the gun laws. 323 REP. JOHNSON: You talked about cooperation between the federal agencies and the state. Are you aware of the same kind of cooperation with IRS agents? 327 TATE: Yes, I am. Believe you're talking about the IRS Criminal Investigation Division. They get involved in a lot of drug violations from the standpoint of tax violations. Knows that IRS Criminal Investigation does work with state and local agencies as well as federal agencies. 356 JERRY FRESHOUR, ASSISTANT DIRECTOR, BOARD ON POLICE STANDARDS AND TRAINING (BPST): The 24 hours of training recommended by BPST were what we thought were the critical components of our 80-hour course required for out of state police officers coming into Oregon after they've been certified in another state. To have the powers they were requesting, we picked an area we felt the federal agents would need to know in order to operate with Oregon law. We're willing to work with the federal agencies in the delivery of the training. We have no intention of starting a federal agents' academy or anything of that

nature. 379 CHAIR MILLER: Do you see any problem with a special agent who is here on special assignment and hasn't gone through the training? (Refers to Mr. Tate's concern.) 382 FRESHOUR: NO, think they would continue to operate in the same mode and don't see any disadvantage this bill would present to that. House Cmnmitttee on Judiciary February 26, 1991- Page 7

HB 2156 - IMPLIED CONSENT PROCEDURES - WORK SESSION

Witnesses: Art Keil, Oregon Health Division Paul D. Heffner, Marine Board

TAPE 33, SIDE B 018 ROBINSON: Summarizes HB 2156 which establishes implied consent procedures for operators of boats who are allegedly operating boats while under the influence of intoxicating liquors. Revises current laws prohibiting operation of a boat by any person under the influence of intoxicating liquor or controlled substance and:
-Establishes "under the influence" as a .08 blood alcohol level
-Requires boat operators to submit upon reasonable suspicion to sobriety or chemical tests for the purpose of determining blood alcohol content
-Establishes procedures for informing individuals about rights and consequences -Allows failure to submit to testing to be admissible in criminal proceedings -Enhances penalties for convictions by sanctioning periods of time under which one would not be able to operate a boat.

041 ART KEIL, OREGON HEALTH DIVISION: The Division strongly supports HB 2156 and suggests a friendly amendment which would include testing saliva for alcohol and drug intoxication for when that procedure becomes in use. 067 MOTION, REP. JOHNSON: Moves to make amend HB 2156, Page 1, Section 1, line 7, after the word "boat" and after the first word "boat" on line 8, insert "which is powered by an engine or motor capable of generating more than five horse power." Also, on line 8, the second time the word "boat" appears, insert the word "such" for it to read, "in control of such a boat 094 REP. JOHNSON: Refers to ORS 830.005 (2) which defines a "boat" to include just about anything that floats on water except air mattresses, beach and water toys, or single inner tubes, flying airplanes and things of that nature are also excluded. For purposes of discussion and the statute, anything like an inflatable raft, a row boat, kayak, canoe, or any kind of non-motorized water vehicle is included as a "boat." Notes two other important statutes. ORS 830.305 already makes it a crime of unsafe operation of a boat if a person operates a boat in a manner that endangers or would likely to endanger any person or property. ORS 830.315 makes it a crime of reckless operation of a boat if the boat is operated carelessly and hediously in willful or wanton disregard of the rights, safety, or property of others and Sub. 2 makes it a crime of reckless operation of a boat if any is operated at a rate of speed greater than will permit the person to exercise reasonable care to bring the boat to a stop within the assured clear distance ahead. 129 There are already statutes that deal with people who are driving boats unsafely. They can be as sober as a stone but if they're driving unsafely there are sanctions for that. For purposes of this bill, we need to think in terms of only people who happen to be innocently sitting in their boat in their boat not doing anything except being inebriated or having drunk too much. That's what this bill not doing anything except being inebriated or having drunk too much. That's what this bill addresses. But doesn't want to make it a criminal act for someone to take his boat out on water to watch the sunset with a six pack. House Comlnittee on Judiciarg February 26, 1991 - P - e 8

132 REP. MASON: Appreciates Representative Johnson's comments but the

five horse power definition does not include large vessels, like a 100-foot catcher sloop, under sail power without motorized power but which should be included in the bill.

149 PAUL DON HEPPNER, DIRECTOR, MARIME BOARD: Raises four points of concern: -The current law applies to all boats and isn't attempting to broaden the number of people HB 2156 would apply to -It sends the wrong message to operators by indicating that it's alright to be intoxicated and operating a boat under five horse power, but not over five horse power. The boat operator can be drunk if the boat has a 4.4 engine but not if it's a six horse motor. This sets up a double standard that is not appropriate, consistent public policy. -Under this bill, if people aren't over .08 alcohol level, they have nothing to worry about under HB 2156. This is not an open container bill. -Notes that non-motorized boats can be hazardous to others, for example, in white water rivers, in swift moving streams. If the operator of that boat is intoxicated and cannot maintain control of it, passengers and other boats can be endangered. There is a substantial social cost to the search and rescue for people who die each year in boating accidents. Whether they be in a non-motorized boat or otherwise, there is a significant cost to the law enforcement community.

188 CHAIR MILLER: Are we desirous of apprehending those individuals who are relaxing on the lake, for example, with a six pack? Are we being too aggressive with this bill?

198 HEPPNER: We're not specifically targeting that type of individual. Thinks if a person is in a nonmotorized boat, enjoying the sunset and has had a few beers, it's doubtful that a marine officer would have any reason or suspicion to stop that vessel to try to establish probable cause and test the person. Don't know if we really want to send a message to that person that it's okay to become highly intoxicated in any type of boat.

211 REP. PARKS: Has concerns about the cost of this. If HB 2156 is enacted, breathalizers will be necessary in terms of potential court cases.

224 HEPPNER: We anticipate there will be testing of persons arrested under this statute. Presently, there is testing that goes on with people arrested for boating under the influence-even though there is no implied consent to require or compel them to be tested. They are, in fact, routinely being tested today.

230 REP. PARKS: It would not be practical in some places to use a breathalizer. What do you anticipate the cost for breathalizers to be?

238 HEPPNER: There presently are breathalizers positioned strategically throughout the state that are for highway purposes. For example, in Marion County, there is a breathalizer in the City of Detroit for Detroit Lake. They are also at county and state police offices throughout the state. Don't anticipate a great additional cost.

249 REP. PARKS: People who give this test have to be certified by the state, right? So we'll need to have all the marine officers state certified to give these tests. Refers to 13 people in the state that were arrested for this-was it 13 people in a year, or two years? House Committee on Judiciary February 26, 1991 - Page 9

258 HEPPNER: Likely to be 13 people arrested in one year. The number of

arrests in a year has ranged from 13-21.

260 REP. PARKS: Concerned about people who are drunk but also own a sail boat and it's not possible to sail one if you're drunk. Understands that this bill addresses \$30,000 - \$40,000 not to catch people because you don't catch people with a breathalyzer--you catch them with good police work. You convict the doubtful cases with a breathalyzer--and that's a small percentage, maybe about 30 percent that you couldn't convict otherwise. We're spending a lot of money to achieve a worthwhile result. Also concerned about the .08 alcohol level that's very significant because it is then a crime--a serious matter.

295 ROBINSON: What is the difference between an engine and a motor?

297 REP. JOHNSON: A motor is electric and an engine is a combustion.

306 VOTE: 4-4

AYE: Baum, Johnson, Parks, Miller NO: Bauman, Brian, Mason, Sunseri
EXCUSED: None

Motion fails.

325 REP. BAUM: Moves for the same amendment but add the words, "or sail".

330 REP. BRIAN: Seems to be some sense to separate motorized from non-motorized except for maybe certain sizes. Concern with the amendment was the five horse power because the two and a half horse powered rubber raft cause as much trouble as five horse powered. Doesn't mind reference to motorized, especially if it were to include the larger class sail-type which can cause real problems on larger lakes and rivers.

347 MOTION, CHAIR MILLER: Moves that on lines 7 and 8, subsequent to the word "boat" add "which is powered by an engine or motor or sail, capable of generating more than five miles per hour." 362 REP. BAUVIAN: Going to oppose this motion. Reason HB 2156 came before the committee was to enable us to apply the same measure to boating under the influence that is currently applied to driving under the influence of intoxicants. The bill doesn't expand or limit the public impacted by the original enactment. 383 REP. JOHNSON: Appreciate Representative Bauman's concern about having the same rules apply to boating as driving, but remember that most people on the boats are there for recreational purposes as opposed to driving destinations. Driving a car puts people at risk for an accident but two rafts tied together doesn't mean they will automatically be dangerous. Need to make a distinction between driving and boating situations.

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019 HEPPNER: Asks that law enforcement not be hindered with this in terms of trying to establish speed of vessels, etc. This is difficult to do on the matter. Suggest this amendment eliminate the "speed" issue.

031 REP. BAUM: Knows as time becomes available, people will cruise around the waters looking for people appearing to be drinking. Any tipping of the can will bring someone to your boatside who's looking for opportunities to find an intoxicated boater. Wants to start off with the bill at this level and if it turns out there are massive violators, it can be reviewed at a later date. We're really after a person in a

high-powered speed boat who is really a DUII.

049 REP. MASON: We left out a larger group that would be affected by the bill and that's the driftboaters going down the rapids. Considers this critical because these boats have no power whatsoever. Gives example of an intoxicated person taking out a driftboat with adults and children. The idea of that is unacceptable.

064 BAUM: Think that's already covered under existing law.

065 VOTE: 7-1

AYE: Baum, Brian, Johnson, Mason, Parks, Sunseri, Miller NO: Bauman
EXCUSED: None

Motion passes. 082 REP. PARKS: Moves HB 2156 as amended to the Eull Committee with a "do pass" recommendation. 087 HEPPNER: Notes HB 2598, Section 4, dealing with alcohol level, is also before today's committee. Suggests that if the technical amendments to the bill are merited, would like those amendments to conform with those of HB 2156 for consistency. 111 VOTE: 8-0

AYE: Baum, Bauman, Brian, Johnson, Mason, Parks, Sunseri, Miller NO: None
EXCUSED: None Motion passes to Full Committee with a "do pass" recommendation. Rep. Brian to carry.

HB 2597 - IMPLIED CONSENT LAW - PUBLIC HEARING

Witnesses: Lt. Glen Rader, Oregon State Police Patrol Div. Ken Meneely, Criminalist, Oregon State Police Tony DeLorenzo, Motor Vehicles Div./DMV Representative Kelly Clark, District 27 Representative Bill Markham, District 46 David Fidanque, ACLU House Committee on Judiciary
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David Schuman, University of Oregon Law School John Harp, Marion County District Attorney's Office Dale Penn, Marion County District Attorney Mike McCallum, Oregon Restaurant Association

125 ROBINSON: HB 2597 expands the provisions of the implied consent laws to allow urine testing for the presence of controlled substances for the purposes of driving under the influence laws. 132 LT. GLEN RADER, OREGON STATE POLICE PATROL DIVISION (EXHIBIT F): Supports HB 2597 and reads written testimony. The evidence (urine sample) will be used to prosecute DUII cases, especially where the breath test indicates a low amount of alcohol or no alcohol at all. The evidence will also be used to treat drug abuse rather than alcohol abuse through the Diversion Program. Talks about high percentage of those tested for drugs had a controlled substance in their system. ' 189 REP. PARKS: Did you screen these people before giving the urine test, or was the test given to everyone? 190 RADER: Yes, these people were identified as being drug users by the police officer and were asked for a sample of urine. These are the ones that provided it voluntarily. 194 REP. JOHNSON: Does the controlled substance you refer to include alcohol? 196 RADER: No. 216 RADER: Preliminary results of a study conducted by our Agency and the Criminal Justice Crime Analysis Center indicates 50 percent of the people requested to give urine samples are not providing them. The problem facing law enforcement for many years has been the inability to obtain the evidence needed to show drug use. HB 2597 is not a new concept; the majority of states permit officers to obtain urine samples under their state's implied consent law. HB 2597 is supported by

virtually every segment of the criminal justice system. Urges the passage of HB 2597 so law enforcement can identify offenders who are presently not being prosecuted because of the inability to provide proper evidence. 219 REP. BAUM: When a person is faced with taking two tests and refuses to take both the intoxalizer and the urine analysis, the suspension is doubled, correct? 224 RADER: That's correct. 225 REP. BAUM: The first-time offender who refuses the intoxalizer now gets a year's suspension. 228 RADER: With respect to their driving record, yes. 231 REP. BAUM: What if they take one test and not the other? 233 RADER: If they were to take the breath test there would be no suspension for that, except that under the implied consent law, there is the penalty for a breath test that shows .08 alcohol level or higher. If they were below .08 on a breath test, there is not a suspension on that. If they House Committee on ,Judicialy February 26, 1991 - Yage 12

refuse the urine test, there would be a suspension for that.

241 REP. BAUM: If they take the urine test, what happens then?

246 RADER: We did not attach a sanction upon a person who provides a urine sample because presently, the scientific community does not universally agree upon a quantitative value of any given controlled substance that might be in a person's body. They have done this with alcohol but not with controlled substances.

255 REP. BAUM: The reason for doing this is because these drugs are per se illegal in any quantities. Is the intent of this bill is to draw a direct connection between drug use and bad driving

266 RADER: That's correct. Basically, it's not just illegal drugs but also includes abuse of prescription drugs. This will allow us to separate those under the influence of alcohol and those under the influence of a controlled substance or combination of both.

277 CHAIR MILLER: Need to make a connection between the use of the controlled substance and driving. Is there any other use to be made of the evidence of the use of the controlled substance other than the person shouldn't have used it while driving?

282 RADER: When a person is arrested for driving under the influence of intoxicants, it's because they are impaired to some perceptible degree. After they've been arrested and taken into custody, we obtain evidence of the breath test to identify that may have been the cause of that impairment. Other symptoms manifest in someone under the influence of drugs. In those cases, we'd obtain information that there was an amount of a controlled substance in their body at the time, and then we'd have to prove the connection between that and the driving--which was the reason for the arrest.

299 CHAIR MILLER: Is there a further penalty other than suspension of the driver's license that could be attributed to the fact that a person was found using a controlled while driving?

302 RADER: It would make prosecution of those cases presently that are below a .08 or even .08 or higher, that are indicative of drug use, where we cannot obtain the evidence to show that drugs were involved in a particular driving case. 311 CHAIR MILLER: Am going beyond driving. . . to possession of drugs. 312 RADER: This ability to obtain the urine sample only applies to the implied consent law and to driving

under the influence. 318REP. PARKS: What are the mechanics of how do you do it now? Is a tape put in the urine, and are there costs and training involved? 327 REP. BRIAN: That questions implies that urine testing is being done in the field?

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332 RADER: That's incorrect. The urine sample is obtained in the field at the jail, just like the breath test. The evaluation of that sample is done at the crime laboratory by crime laboratory people.

337 REP. PARKS: Wants to know the costs involved and how it's going to be done.

341 KEN MENEELY, CRIMINALIST, OREGON STATE POLICE: The people doing the toxicology aspect are already trained. The cost per test for screening involves using an enzyme immuno assay, with an automated analyzer so the on-hand preparation time is very minimal. The cost is \$4.50 for a total screening test of the urine specimen. If the test is positive, confirmation takes more hands-on time. The Oregon State Police already have equipment for this purpose. We anticipate a slight increase in caseload which might necessitate an automated system in the Portland crime laboratory. We have one in the Springfield laboratory.

359 REP. PARKS: We are not going to have a police officer testify about the mechanics of this test?

354 RADER: That's correct. If there's a question as to the content of the urine, someone from the crime lab will come to testify regarding this. They do that now.

372 REP. BAUM: These tests will be conducted by state certified laboratories?

381 RADER: Yes, we are not going to use field tests. The samples will be obtained at the jail, will be packaged just like blood is drawn at a hospital and put into a vial and sent to the crime laboratory for analysis.

386 REP. BAUM: Wants to make it clear as to what this bill is going to do. Whether that test is going to be available from the probation end of it as well. . . how far are we going to go? Wants to know: Is this going to be used for probation violations? Are we going to be able to prosecute any kind of drug possession offenses by virtue of the fact that the urinalysis comes back testing positive for cocaine?

TAPE 35, SIDE A

004 RADER: This bill only pertains to arrests made for DUII, under Chapter 813 of the Motor Vehicle Code. It's not going to apply to parole or probation or anything else. Nothing says that evidence can't be used. In answer to the second question, directs the committee to HB 2597, Page 4, Section C, regarding who will do the chemical analysis and under what circumstances it will be performed. Refers to an amendment

that the testing be conducted at a certified laboratory approved by the Oregon Health Division under their standards.

018 REP. JOHNSON: Have a concern on Page 8, Section 9, lines 17 and 18 that refers to a 90-day suspension for test refusal and the length of suspensions that encourage people to take the test. Notes that in Paragraphs 3 and 4 there is no discrepancy in length of suspensions which doesn't encourage people to take the test. Suggests Paragraph 3 be changed to a four-month suspension if they take the test, as opposed to a year's suspension in Paragraph 4 if they refuse to take the test.
031 RADER: Have no problem with that (suggestion).

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054 ANTHONY DE LORENZO, MOTOR VEHICLES DIVISION (EXHIBIT G): Reads written testimony. Addresses two issues; workability and cost/workload. The concept of the bill is workable for the Motor Vehicles Division excepting two technical concerns. One concern is in Sections 5 and 7. It's very clear what happens when a person refuses both tests, there are two suspensions that run consecutively. But the bill does not appear to address what happens if a person fails the breath test and refuses the urine test. The second technical concern, raised by Representative Johnson, refers to Section 9 which are the waiting periods for eligibility for a hardship permit. The bill drafter used the term "suspensions" which are really waiting periods. It's also not clear what happens to the waiting periods when there are two suspensions--one for the breathalyzer test and one for the urine test. Should the waiting periods be lumped together or separated--it's not clear in the bill.

086 The cost to actually process these suspensions should be minimal because most of these people are already being suspended under the implied consent law now. Don't know what the impact might be in the hearings branch. There is concern that longer suspensions might increase the hearing request rate.

092 REP. BRIAN: If a person fails a breath test, why would they be asked to take a urine test? Referring to your Memo (EXHIBIT G), Item 1.

103 DE LORENZO: Thought the state police have some field tests that enable them to detect the presence of drugs. If they suspect the presence of drugs based on those tests, they might very likely ask for a urine test even if the person fails the breath test.

108 RFP. BRIAN: If it is over .08, that gets the prima facie evidence for impaired driving for under the influence, why would you pursue a urine test?

113 DE LORENZO: You might now but if your field test indicated the presence of drugs and you wanted to be certain with more evidence in court to make sure you'd get the conviction.

116 REP. KELLY CLARK, DISTRICT 27: We have the implied consent law because we have tremendous evidence of the scope of the drunk driving problem. Asks for discussion about the increase of people driving under the influence of drugs. How does this problem compare to the drunk driving problem?

128 DE LORENZO: That's an issue for the police.

137 REP. BILL MARKHAM, DISTRICT 46 Have been trying to get a bill passed on the same subject for six years. There's a glitch in the implied consent bill that allows an intoxicated person to keep from being tested for alcohol and drug use. Refers to HB 2829.

167 DAVID FIDANUE, ACLU: ACLU is opposed to HB 2597. Talks about what urine tests show. It is widely recognized that urine tests currently do not, and probably never will, be possible to use as a test for impairment. Urine tests look for the metabolites of controlled substances, that is, not the controlled substance itself but something the body has spun off in response to the drug. Metabolites take time to appear in the urine. This is important because a number of people who may exhibit symptoms of use of controlled substances that may be stopped for driving under the influence, are not going to have a positive urine test even though they may be under the influence

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of a controlled substance. However, with most controlled substances, the metabolites in the urine are present for extended periods of time long after there is any impairment of the person. This is important in showing any cause and effect between the two events (taking the drug and driving).

220 There's significant evidence that the EMET test which the state police plan to use not only shows a significant rate of false/positives which will then be screened out by the more reliable confirming test the state crime lab will use, but there's also a very high rate of false/negatives with the EMET test. Thinks a blood test would be the best way to test but even that may not be definite evidence.

230 DAVID SCHUMAN, LAW PROFESSOR, UNIVERSITY OF OREGON, FORMERLY WITH OREGON DEPARTMENT OF JUSTICE: I was the main author of the Attorney General opinion on the constitutionality of random, mandatory drug tests--urine tests for athletes at the state schools. Currently teach courses in constitutional law and state constitutional law at the University of Oregon Law School. Am speaking independent of current and past employers but want to address the constitutional implications of HB 2597. First, it's universally accepted that urine testing is a form of search under both state and federal constitutions. Therefore, under equally accepted principles of constitutional law, a warrant or an exception to the warrant requirement is needed to obtain urine sample testing. When the implied consent statute with respect to breathalizers and blood for the presence of alcohol was tested in the courts, it passed that test under the constitution under one of the exceptions to the warrant requirement. That exception was the so-called exigency exception--no warrant is required because there is probable cause and there's a need to test the material quickly. So quickly, you couldn't get a warrant. The reason for that was that the presence of alcohol dissipates quickly in both blood and breath. That was the only reason that the implied consent statute for presence of alcohol in the blood and breath passed constitutional scrutiny, in a case called State v. Newton, Oregon Reports, Vol. 291, page 788. 260 CLARK: Was that a state constitutional determination? 262 SCHUMAN: Yes, state and federal constitutional issues were reached. The court holds that under neither the state nor federal constitution. 268 SCHUMAN: Seems that

this situation which deals with the presence of controlled substances in urine, this is an entirely different situation. As heard in earlier testimony, this material isn't even going to be tested until hours or days later. There is no rapid dissipation of the evidence. Therefore, it is not in the same exception to the warrant requirement that applies when dealing with alcohol. So, the entire constitutional foundation that supports the implied consent statute with respect to alcohol simply doesn't apply in this case. Think the bill as written, has real serious constitutional problems. 280 REP. BRIAN: Doesn't dissipation vary if it's in the body or out of the body? 281 SCHUMAN: I'm not a toxicologist but I do know that the testing of urine simply doesn't occur until hours or days after the urine is taken.

These minutes contain materials which paraphraae and/or summarize statenents made during this session. Only text enclosed in quotation marlcs report a speaker's exact words. For complete cor.tents of the proceedings, please refer to the tapes. . House Committee on Judiciary February 26, 1991 - Page 16

285 REP BRIAN: So, the urine is not in the body being oxygenated-it doesn't dissipate as though it's in the body, does it?

288 SCHUMAN: I don't know.

289 REP. BRIAN: Think that would be an important piece of information in your statement.

290 SCHUMAN: What I'm saying is that if there's some sort of evidence that the presence of controlled substances does dissipate rapidly in urine outside of the body, then you have the same justification for alcohol under State v. Newton. The material I've read indicates that the traces of substance remain in the urine for a period of up to months, and that science is unable to detect a correlation between the quantity that remains in the urine and the extent of impairment, if any, at a particular time.

300 CHAIR MILLER: Heard testimony that a majority now permit officers to obtain these urine samples. How is it that the majority of the states get away with these unconstitutional actions?

304 SCHUMAN: Don't know--not familiar with those cases. Do know that Oregon's interpretation of its own Search and Seizure provision, in its own state constitution which would govern this bill, is applied more stringently than other constitutional provisions. Don't know if those statutes have been challenged under the constitution.

312 REP. CLARK: You're saying that the bill, as written, is unconstitutional because you can't make the case from the exception of the warrant requirements. It follows then that an officer could go get a warrant and do this directly.

322 SCHUMAN: Absolutely. This statute purports to authorize a warrant with search, and that you can't do.

326 CLARK: Thought your concern was going to be with probable cause itself for the search and not the warrant requirement.

334 CLARK: Mr. Fidanque, from a policy standpoint, are you telling us that if we rewrote the bill, or if the bill had come to us in a different way so that it contemplated a warrant, the ACLU would not

oppose it?

340 FIDANQUE: There are two separate problems here. One problem is whether there is any correlation between the results of the test, depending on when it's taken, and what the person's behavior was at the time they were stopped under suspicion of driving under the influence. That may be an insurmountable problem based on some of the material I've read. The other problem which I see as separate, is if that link could be made, that you were taking the sample at a time where scientific evidence showed that the results of the test would directly correlate to the person's behavior and impairment at the time they were stopped, then you would still have the problem of--why don't you go out and get a warrant? So, you don't need legislation if there's a warrant requirement. As long as you have probable cause, you can get a warrant anytime.

370 Reads some testimony by Dr. Arthur McBay, the chief toxicologist in the State of North Carolina, given for a case in California. Dr. McBay talked about the relationship regarding

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marijuana and the results of urine tests. He pointed out that in his testing for metabolites, there is no connection. (Reads from Dr. McBay's testimony.) "The psychoactive affect of THC generally lasts no more than several hours. However, the metabolites which are nonpsychoactive and do not cause intoxication or impairment, are retained in the body stored in fatty tissues for a relatively long period of time. They may be released over a period of several weeks and can cause a positive test result even though actual consumption and 'high' terminated weeks before and no drugs or metabolites are detectable in the blood. There exists no correlation between urinary concentrations and time elapsed since drug use."

405 In other words, even if you had the results that showed a certain level of metabolites in the system, there's no correlation with when the drug had been ingested, necessarily. In another journal article from the New England Law Review, written by Dr. David Greenblat, Professor of Psychiatry, Pharmacology and Medicine at Tufts University, he says, "No scientific or medical conclusions can be drawn on the basis of a positive urine test. A positive result from a urine drug test bears no documented relationship to intoxication by that drug either at the time the sample was taken or any time prior to that impairment or performance on any intellectual or motor tasks or to abuse of the drug, or to addiction to the drug. Furthermore, the measured drug concentration in urine does not tell what quantity of drug was taken, when it was taken, or how often it was taken. In the case of cocaine, a 'high' due to cocaine inhalation is of short duration yet a positive urine test may occur for up to three or four days after a single exposure." Dr. Greenblat gives similar data regarding marijuana.

TAPE 36, SIDE A

004 REP. CLARK: You're making a very fine argument--fine in the sense that a hair is fine. You're saying that, you may have ingested a controlled substance, you may test positive for a controlled substance, you may have been stopped with or without probable cause for suspicion of driving under the influence of intoxicants--but that you may, in fact, not have been driving under the influence of controlled substance. That's the point you're making?

012 FIDANQUE: Yes. And also the other corollary point may be that there will be a significant proportion of people who, ofScers will be convinced, were under the influence but will have ingested the controlled substance soon enough before they were tested that the metabolites may not yet show up in the urine. So, you'll have a negative urine test coming back on someone who actually was under the influence. That may, in fact, make it more difficult to get convictions in those cases.

018 CHAIR MILLER: Would you be more in favor of Representative Markham's bill regarding blood testing as opposed to urine testing since it would provide better evidence?

020 FIDANQUE: Haven't had a chance to look at that closely. My understanding is that implied consent for blood tests would not hold up because of the intrusive nature of blood tests.

023 CHAIR MILLER: What test are you suggesting we adopt? It's not urine; it's not blood--it's what?

025 FIDANQUE: I'm not aware of anything that's out there yet.

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026 CHAIR MILLER: So, we shouldn't be testing for it?

027 FIDANQUE: I think you should be going on the basis of expert police testimony that correlates with people being under the influence of controlled substance. Think that's going to be more reliable than the results of a urine test in terms of showing a direct connection.

029 CHAIR MILLER: Are you saying that the testimony we've heard prior to yours was just a bunch of nonsense?

032 FIDANQUE: I wouldn't characterize it that way. I think most people who support urine testing are concerned primarily with identifying people who may have been exposed to controlled substances or may have used controlled substances. If the primary purpose of the legislation was to identify people who had driver's licenses who had, at some time, been exposed to controlled substances, then urine tests given properly (with a confirmation test) might be reliable for that purpose. Don't think it's a reliable indicator that someone was driving under the influence-and that's the distinction I'm trying to draw.

045 CHAIR MILLER: But it's certainly possible to be under the influence of intoxicants and be seen driving erratically because of the influence of those intoxicants?

046 FIDANQUE: Absolutely.

047 CHAIR MILLER: Yet, if someone is pulled over, you don't want any test administered that would disclose the use of those controlled substances?

050 FIDANQUE: That's not what I intend to be testifying to today. What

I am saying is that unlike the research done around breathalizers which shows the direct connection between levels of alcohol in the system and impairment at the time the test is taken and also correlates to make a determination as to when that alcohol was ingested, those kinds of links are not possible with urine tests.

057 CHAIR MILLER: Not possible, or just less likely to be convincing or conclusive?

058 PIDANQUE: Understands that it's currently not possible to make those connections.

059 REP. MASON: Mr. Fidanque, you've said you'd would rather rely on the observations of the police officers as opposed to objective tests. After being on the other side, would much rather be relying on the objective test than these objective police officers. If you're just relying on the police officers, you're going down for the count. Let's be frank. The officers' testimony is subjective and damning. That's just an observation.

070 FIDANQUE: Didn't mean to imply that testimony of police officers was necessarily going to be dispositive as to whether someone was under the influence. What I am trying to get across is that results of urine tests will not add anything to that officer's testimony, if what you're after is convicting people of driving under the influence because they were under the influence of controlled substances. There are so many holes, that a good defense attorney will be able to poke in that test and the methodology of the test, that it may make the officer's testimony less credible. House Committee on Judiciary~ February 26, 1991
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085 JOHN HARP, DEPUTY DISTRICT ATTORNEY, MARION COUNTY: I was a Deputy Sheriff in Multnomah County. For the past several years working for District Attorney Dale Penn, Marion County, I prosecute mostly DUII cases. Probably more than 90 percent of the cases I take to trial every day are for driving under the influence of intoxicants. The Oregon District Attorneys' Association supports HB 2597.

100 Want to addresses a couple of topics. One topic deals with the affect on prosecution. We file a number of DUII cases which account for a major job we perform in district court-probably more than all other cases combined. Most of those cases involve driving under the influence of alcohol. There is a small number of cases HB 2597 would affect, driving under the influence of alcohol and controlled substances, but don't know that figure at this time. It's a fairly small number of cases. The case usually comes up where the officer had already made an arrest. HB 2597 would apply after the officer has already developed probable cause and made an arrest for the crime of driving under the influence of intoxicants. The probable cause has already been established. After the arrest, the officer takes the person to jail for a breath sample. Gives example of a person who blows into the breathalyzer which comes back with no results. The officer is then faced with a situation that shows probable cause, the person has been arrested, the person's actions indicate the presence of intoxicants, and yet the test shows no alcohol in the system. So, the officer asks for a urine sample--sometimes it is provided and sometimes it isn't. HB 2597 would affect those times when we don't get the urine sample.

133 From a prosecutorial standpoint, we know that the person has been driving while under the influence of intoxicants-but we can't prove a

case. There just isn't the connection of evidence. HB 2597 would give us another tool to use to close that gap. There would be very little impact on the court. We'd be prosecuting more cases because of the evidence. However, with that evidence, there would be fewer cases going to trial. Also, expert witness testimony for urinalysis from the crime lab would be limited.

160 Don't feel the process of taking this evidence is intrusive. It's really just securing some evidence. We view it as consensual because the person consents to it by virtue of being under the jurisdiction of the laws of this state and driving a motor vehicle on the highway. So, they are, in effect, consenting to this, so it's a consensual search. Consent is an exception to the warrant requirement. This is an admitted bodily fluid--it's an emission, same as breath, and it's no more intrusive than giving a breath sample. It's less intrusive than taking a blood or hair sample. The implied consent statute is already in effect for taking a breath sample. Taking a urine sample would be no more intrusive than tarring a breath sample.

174 CHAIR MILLER: In light of the previous testimony, how good is the evidence you now have is it reliable (urinalysis)?

178 HARP: Yes, very reliable. When we go into court and look at what we're going to present to the jury or the bench, we have a series of facts to prove our case. Those facts come in the form of the person's driving, attitude, physical agility, their breath, eyes, and how they address the officer. The officer also looks for things in the car such as containers of alcohol, a pipe, syringe, an empty bindle. These are all facts we'd want to prove in the court. To put it all together, the urinalysis--to show the connection between the facts and what the person had in his system at the time, in order to prove the case. House Committee on Judiciary~ February 26, 1991- Page 20

194 CHAIR MILLER: So, it's helpful but not conclusive? Going back to the previous testimony, it didn't sound like there was some debate as to whether or not the tests by themselves mean much--other than they spot a presence of controlled substance in the person.

199 DALE PENN, MARION COUNTY DISTRICT ATTORNEY: Wants to respond to the ACLU concerns and to that attack on what this evidence shows. The evidence will show the presence of narcotics in the body. The earlier question was, does that mean we could prosecute people for possessing those narcotics? The answer is 'No.' We do have a bill that would allow us to do that but under present law, it would not allow us to. The crime lab would be able to establish the presence of the narcotics. That would be one factor, together with the officer's observations, the driving involved, any physical impairment observed, all of that information from which the jury could draw a conclusion as to whether or not they believe the person was under the influence of intoxicants. Presently, unless we find narcotics in the car, we will not prosecute a case on a 0.0 or 0.2 breathalyzer reading even though it appears the person was under the influence of narcotics, if we don't have some other evidence of that; i.e. narcotics in the car or the urine test. We are not going to be successful and that's why we think HB 259 7 is a big plus.

228 PENN: Concerning the constitutional analysis of whether or not this is an unconstitutional search--we do not believe it is clearly unconstitutional as it was test) fied to. There must be probable cause, first. I would refute the statement that because the sample itself would not disintegrate or would not diminish over time, it would necessitate

the presence of a warrant. State v. Lowry was a decision by Justice Lindy which established a year ago that when you take a narcotics sample, that the sample doesn't change, we would have to get a search warrant to actually have the crime lab test the drug substance. The Supreme Court overruled itself later saying that wasn't what they intended. Think that same analysis is here. The issue is: Does the body diminish the effects of the substance over time? If, 'Yes,' then we believe there's an exigent circumstance. In alcohol, we know that's true. In narcotics that also is true, although depending on the narcotic, it may be a different time line. Some very quickly, some over a longer period of time. When we have multiple urine samples, we may be able to establish when that person ingested the narcotic substance and, in fact, that they were under the influence. In other cases, we may be only able to show that they did have the substance in their body at the time of driving. It's not conclusive, though it may be, but in most cases it's a factor that with all of these other things, would allow us to show that this person is under the influence at the time of driving. Given the fact that we see more and more of these cases now, and that narcotics use is still prevalent in our society, we believe it's a danger that we should have that tool available to us.

253 CHAIR MILLER: Part of your answer is that this would certainly help where you otherwise simply had the officer testifying as to the field sobriety tests, etc. It seems to that a urinalysis is a bit more intrusive than a breathalyzer. Does that mean the person would come to the station for it--don't know how that's administered. 264 PENN: Yes, certainly it is more intrusive because of the privacy interests involved. Refers to it not being as intrusive as giving hair samples which are ripped and there is some pain involved. A blood sample involves the piercing of flesh and maybe a little pain. But this does not mandate that catheters will be strapped on or anything else. This is a voluntary sample of urine. House Committee on Judiciary February 26, 1991 - Page 21

275 CHAIR MILLER: Voluntary, however, with the knowledge that failure to volunteer does have a consequence.

276 PENN: Yes, it will have a suspension cost.

272 REP. BAUMAN: That was exactly my observation. Thinks we ought to acknowledge the difference in bodily functions. It doesn't help promote HB 259 7 to deny that there is a difference. It's pretty fundamental.

293 PENN: We acknowledge there's a difference and we're not saying there isn't. We endorse the idea of the other bill that allows the blood sample because we think that's an important avenue of dealing with this problem also. There are privacy interests that make this different.

298 REP. BAUMAN: Need to recognize there are other activators to a denial than guilt, for example, modesty or possibly in the case of a blood sample, the fear of needles. Those other activators of a denial are going to operate on a person in the same way as any other refusal. There's no difference for denying because you're guilty or denying because you find that that is unacceptably intrusive.

319 MIKE McCALLUM, OREGON RESTAURANT ASSOCIATION: We strongly support HB 259 7. There are many serious ramifications and potential liability to the alcohol server and licensee who serves an intoxicated patron. We accept responsibility for our actions but do think there are circumstances where multiple drugs are involved that make it difficult

to discern where that responsibility lies. Current OLCC sanctions for serving VIPs can range to cancellation of liquor license. Talks about liquor liability cases that can and do determine responsibility based on the degree of liability. Information obtained as a result of HB 2597 may be of value in determining the degree of responsibility that a licensee can be held to in a third party liability case.

HB 2597 - WORK SESSION

353 REP. BRIAN: There were amendments mentioned. Were any prepared or is there any advice about correcting the errors test) fied to?

350 CHAIR MILLER: Lt. Rader, your comments please as to whether it makes sense to blend HB 2598 with HB 2597, or if they're able to proceed by themselves.

371 LT. GLEN RADER: Those are two separate issues that have nothing to do with each other. I talked with legal counsel prior to coming to the meeting and they provided some technical changes that DMV had concerns with regarding the suspension and how they interact. Mr. DeLorenzo already addressed those. Also have an amendment from the Oregon Health Division to Page 4, Section C, which begins on line 35. It should read, "Chemical analysis of a person's urine shall be performed by a individual shown to be qualified to perform such analysis. The analysis shall be conducted by clinical laboratory approved by the Health Division or those accredited by the American Society Accreditation Board of Crime Laboratory Directors for determining the presence of controlled substance in the urine.. (Will provide this written amendment.)

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TAPE 35, SIDE B

003 REP. BRIAN: Moves the amendment as read by Lt. Rader. There being no objection to the amendment, it is so adopted.

013 ROBINSON: Explains amendment that was brought to Legislative Counsel's Office by the Attorney General's Office. The amendment clarifies the current law regarding how to do suspensions 30 days after an arrest, if there's been an error regarding the date of the suspension on the police report of the notice (EXHIBIT N).

017 REP. MASON: Moves the amendments to HB 2597 in the hand-engrossed, Page 2/2 version. There being no objection to the amendments, they are adopted (EXHIBIT N). 023 ROBINSON: Wants clarification about refusals running consecutively. Thinks the language on Page 3, lines 9-12 will require clarification. 031 TONY DE LORENZO: Think there needs to be clarification in Sections 5 and 7 concerning what happens when someone fails the breath test and refuses the urine test. Lt. Rader has confirmed there will be situations where the police will ask for a urine test even when someone has failed the breath test. Talking about Section 5, Subsection 1, Paragraphs A and C. And Section 7, Subsections 1 and 2, and perhaps Section 3 that refers to the rights and consequences. 046ROBINSON: Understand it conceptually and assume that what it's saying is if a person refuses and fails under those circumstances, the person ends up with consecutive suspensions. 048 DE LORENZO: That's right. 049 REP. BRIAN: Moves to include amendments. There being no objection, the amendments are adopted. 050 REP. BAUM: Wants to see the amendments in draft form before it's

moved forward.

HB 2598 - DEFINES "PERCENT BY WEIGHT OF ALCOHOL" - PUBLIC HEARING

Witnesses: Lt. Glen Rader, Oregon State Police Capt. Rich Brooke, Crime Lab Div., Oregon State Police

070 LT. GLEN RADER, OREGON STATE POLICE (EXHIBIT H): Reads written testimony. We support HB 2598 which is a housekeeping measure that makes a technical change to the statute that will clearly define that breath alcohol and blood alcohol will be expressed in their proper terms of measurement. Talks about methods of taking blood samples to determine blood alcohol ratio. First method is expressed in terms of grams of alcohol per 100 milliliters of blood. The second method is the breath test that's expressed in grams of alcohol per 210 liters of breath. The change in the definition of "percentage by weight of alcohol in the blood" does not change the .08 percent by weight of alcohol limit which establishes whether a person is under the influence of intoxicants in Oregon.

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097 HB 2598 will establish the Nexact measurement. of the amount of alcohol in a person's breath in accordance with Widmark's Formula-a formula which correlates alcohol in one's blood with the amount in one's breath. This change will eliminate disputes by either the prosecution or the defense concerning the amount of alcohol in the defendant's blood at the time the sample was taken. The current method of determining the blood alcohol ratio is "grams of alcohol per 100 cubic centimeters of blood" which has resulted in many trials arguing DUII cases concerning breath/blood alcohol ratio. Research indicates breath tests show lower alcohol levels than actual blood alcohol results. HB 2598 will eliminate court arguments about the differences of alcohol content in breath versus blood. 126 REP. MASON: Please cite Widmark's formula. 130 RICH BROOKE, CAPTAIN, CRIME LABORATORY DIVISION, OREGON STATE POLICE: Will provide a copy of Widmark's formula which was determined by a Swedish pharmacist (published in 1921). 142 RADER: This is not an obscure formula. Widmark's formula is time-consuming in court and is used for arguments.

WORK SESSION

159 MOTION, REP. MASON: Moves HB 2598 to the Full Committee with a "do pass" recommendation. 160 VOTE: 6-0

AYE: Baum, Bauman, Brian, Mason, Sunseri, Milla NO: None EXCUSED: Johnson, Parks

Motion passes, Representative Mason to carry. HB 2390 - "SCHEME OR NETWORK" - PUBLIC HEARING

Witnesses: Ross Shepard, OCDLA Norm Frink, Multnomah County Dist. Attorney Thomas A. Sieg, Douglas County Dist. Attorney

175 REP. MASON: Summarizes HB 2390 and notes the "substantial quantities" provision in Section 1 of the Proposed Amendments (EXHIBIT I) submitted by Committee Counsel and explains them to the committee.

234 GREG CHAIMOV, COMMITTEE COUNSEL: Two points of clarification. On Page 5, Section 3, line 19, to be consistent with the criminal code, the

words "charging instrument" should be changed to "accusatory instrument." Also, on Page 4, line 3, the word "involved" should be changed to "constituted" or some other term so that it only refers to the deliverer. House Committee on Judiciary February 26, 1991 - Page 24

265 ROSS SHEPARD, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION: The proposed amendments are well taken. For clarity sake, would ask that the last two paragraphs of the District Attorney's proposed amendments to HB 2390 to make it certain that if an individual doesn't end up as a Category 8 or Category 6, then the person falls back to a Category 4 or Category 1. That would make it clearer for practitioners. Might want to reconsider the amount of drugs that have been denominated as being aggravated factors. Five ounces of marijuana would not be sufficient to have somebody go to the penitentiary with some chance of probation. Doesn't think five ounces of marijuana equates with 200 hits of LSD or 100 grams of hashish. Other than the amounts of drugs involved, thinks this is a good bill and urges the committee to pass it.

295 NORM FRINK, MULTNOMAH COUNTY DISTRICT ATTORNEY: Important to note what HB 2390 does by placing certain offenses in Category 8. This means that almost all drug offenses are now presumptive probation in the State of Oregon. For Category 8 offenses, this bill will put those individuals in a presumptive prison stance where they'll be looking at a year in the penitentiary. It's not an extremely onerous penalty being imposed even in Category 8 offenses. Urges the committee to stay with three factors outlined by the DA's proposal. Refers to counsel's Proposed Amendments (EXHIBIT I), Page 2, line 5, that names "four" and urges that it be changed to "three." This would be a qualitative increase in the number of commercial drug dealers that would be impacted, about a 2 percent overall increase in total drug cases.

332 REP. BAUMAN: With a big commercial dealer, would assume the Multnomah County DA's office is also going to pursue a forfeiture. Is that good or not?

335 FRINK: That depends on whether forfeital property has been seized. Often times a dealer can be caught without property that's subject to forfeiture. Want to address Page 5, Section 3 regarding pleading and proving. Has concerns about language used in this section because it could be interpreted to imply that the state needs to plead and prove all the factors under commercial drug offenses. Would propose some language:

373 "If the state wishes to establish the factors of a commercial drug offense under Section 1 and 2 of this act, it shall plead and prove them in the accusatory instrument and to the extent that such factors are proved, they must be proved beyond a reasonable doubt." 368 REP.

MASON: Your point is well taken. On line 19, what if we put in the words "sufficient factors" which should reflect that if it requires four, four is all you need to prove? 378 FRINK: That sounds adequate although maybe it should be prefaced by some non-mandatory language because there may be cases where the state might not wish to prove a given drug offense is a commercial drug offense. 397 THOMAS A. SIEG, DISTRICT

ATTORNEY, DOUGLAS COUNTY (EXHIBIT I & K): Has concern about counsel's Proposed Amendments (EXHIBIT I), Page 4, Section 2, Paragraph 1 referring to the delivery for consideration. Suggests language be added on line 4 after the word "methamphetamine" add "for amounts less than those listed in Section 1, Paragraph 1." This would ensure that it refers to deliveries for amounts less than what's already listed in Section 1. Notes the amounts of substances were recommended from ODDA

members. The ODDA has a concern about laboratory equipment and submits proposed amendments (EXHIBIT K). House Committee on Judiciary February 26, 1991- Page 25

TAPE 36, SIDE B

045 REP. SUNSERI: Moves that on Page 2, line 5 of counsel's Proposed Amendments (EXHIBIT 1), that the word "four" be stricken and substitute with "three."

055 VOTE: 5-0

AYE: Baum, Brian, Johnson, Sunseri, Miller NO: Bauman, Mason EXCUSED: Parks

Motion passes, the amendments are adopted.

056 REP. MASON: Moves that on Page 4, line 3, (the Penn amendment) delete the word "involved" and insert the word "constitutes."

There being no objection, it is so ordered.

063 REP. MASON: Moves that on Page 4, line 4, (the Sieg amendment) after the word "methamphetamine" insert "for amounts less than those listed in Section 1, Paragraph 1."

There being no objection, it is so ordered.

071 REP. MASON: Moves that on Page 5, line 19, insert before the first word "The" the following language: "If the state wishes to prove a commercial drug offense" and then continue with the sentence, "the state shall plead in the" delete "charging instrument" and insert "accusatory instrument" continue with "all the" and insert the word "sufficient factors . . ."

084 PRINK: Would suggest taking the word "all" out because the word "sufficient" takes care of the concern.

088 REP. BAUMAN: The way this is being drafted, you could plead four factors and prove three. Doesn't want this to cause technical problems.

092 REP. MASON: Moves the changes on Page 5, Section 3 as noted above.

099 There being no objection, the amendments are adopted.

108 REP. BAUMAN: Moves the Douglas County amendment (EXHIBIT K) to be adopted.

109 SIEG: Explains purpose of the proposed amendment (EXHIBIT K). Current law limits possible charges against individuals who have a methamphetamine laboratory, for example. This amendment would give the state grounds to proceed on an aggravating factor, if the state wishes to proceed and charge.

130 REP. MASON: Refers to EXHIBIT I, Page 2, line 18, Factor (h) that already addresses this concern.

. House C - nmittee on Judiciary February 26, 1991 - Page 26

137 SIEG: The intent of this is to escalate it to a Crime level 8 if

the person has all the equipment necessary for processing a controlled substance.

147 SIEG: Those factors mentioned by Representative Mason are only one of many factors. It doesn't have to be all laboratory equipment. If a person has some of the equipment, that is one of the factors under that section of the bill.

150 REP. MASON: Think we should go with what we already have.

154 REP. JOHNSON: Might feel more comfortable if it were made a Category 6. If someone gets caught about to start a lab, they would be charged with something but it wouldn't necessarily be automatic imprisonment as if they'd been manufacturing pills for months.

168 SIEG: If it were going to be put in Category 6, we'd rather just leave the list of factors the way they are and proceed that way. . . 170
REP. BAUMAN: Withdraws the motion to adopt the Douglas County amendments (EXHIBIT K).

172 REP. JOHNSON: Notes Mr. Sieg's written testimony (EXHIBIT J) on Page 6, that suggests an amendment that would separate dried marijuana from growing plants for the purposes of evidence at trial. Would like to do this, especially in crime Category 8.

192 REP. JOHNSON: Moves that on Page 1, lines 14-15 of counsel's Proposed Amendments (EXHIBIT 1), insert a subcategory for 1) Dried leaves, stems or flowers 150 grams; or 2) Growing plants, 15;

197 REP. BAUMAN: Concerned that this committee has so many definitions for drug possession. Law enforcement officials can use polaroid cameras to photograph evidence, and probably already do this. Plants can get to crime lab to be tested before it turns into a gooey mess. Concerned about all the detail we're getting into. 215
REP. MASON: Feel uncomfortable with numbaing plants again. Think it's asking for trouble. 224
REP. SUNSERI: Moves the amendments dated 2/26/91 to HB 2390 be adopted.

There being no objection, the amendments are adopted.

237 REP. MASON: Moves HB 2390 to the Full Committee with a "do pass" recommendation as amended. 247 VOTE: 7-0

AYE: Baum, Bauman, Brian, Johnson, Mason, Sunseri, Miller NO: None
EXCUSED: Parks House Committee on Judiciary February 26, 1991 - Page 27

Motion passes. HB 2390 is passed to the Full Committee with a "do pass" recommendation as amended. Representative Mason to carry. 266
CHAIR MILLER: Adjourns the meeting at 5:00 p.m.

Transcribed by,
Harrell

Reviewed by, Holly Blanchard

David

EXHIBIT LOG: A - Written testimony, Major Dean Renfrow, Oregon State Police, 3 pages B - Written testimony, Pierce McIntosh, Portland Postal Div., 5 pages C - Written testimony, John Elms, Portland Postal Div., 6 pages D - Written testimony, Alfred Bosco, U.S. Secret Service, 2 pages E - Written testimony, Jerry Tate, Bureau of Alcohol, Tobacco & Firearms, U.S. Dept. of Treasury, 3 pages F - Written testimony, Lt. Glen Rader, Oregon State Police, 5 pages G - Written testimony, Anthony DeLorezo, Motor Vehicles Division, 2 pages H - Written testimony, Lt.

Glen Rader, Oregon State Police, 4 pages I - Proposed Amendments for HB 2390, Greg Chaimov, Committee Counsel, 6 pages J - Written testimony, Thomas A. Sieg, Douglas County Interagency Narcotics Team, 13 pages K - Proposed Amendments for HB 2390, Thomas A. Sieg, Douglas County Interagency Narcotics Team, 1 page L - HB 2443 Staff Measure Summary "/attachments, Holly Robinson, Committee Counsel, 4 pages M - Written testimony (only), James N. Damitio, USDA Forest Service, 1 page N - Proposed Amendments (P.2/2) for HB 2597, Legislative Counsel (authored by the Oregon Attorney General's Office), 1 page

These minute~ contain tneteriols which perophrese .nd/or - mnurlze do :ments m_k duriq' this sesuon. Only text o - :losed ~ quobtioD mstb report . spelllcer's oxect words. For co~nploto contenb of the proceedi gs, pl_ refer to the tapor.