

HOUSE COMMITTEE ON JUDICIARY SUBCOMMITTEE ON CRIMINAL LAW AND
CORRECTIONS

March 12, 1991 Hearing Room 357 1:00 p.m. Tapes 51- 54
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. Bill Dwyer Rep. Kevin Mannix
Rep. Bill Markham STAFF PRESENT: Holly Robinson, Committee Counsel
Jeff Steve, Committee Assistant Holly Blanchard, Transcriber MEASURES
HEARD: HB 2488 - Murder/Race, PH HB 2451 - Defendant/State Hosp., WS HB
2545 - Child Neglect 1st Degree, WS HB 2597 - DUII/Urine Testing, WS HB
2829 - DUII/Blood Testing, PH HB 2841 - Fleeing Penalties, PH/WS HB 2898 -
Fleeing Penalties, PH HB 2921 - Peace Officers/Stops, PH/WS HB 3103 -
Fingerprints/Children, 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
51, SIDE A 004 CHAIR MILLER: Opens Subcommittee on Criminal Law and
Corrections at 1:20 p.m. 282 9 - BLOOD TESTING - PUBLIC HEARING

017 HOLLY ROBINSON, COMMITTEE COUNSEL (EXHIBIT A): Summarizes HB 2829
which expands the implied consent law to allow that a person be subject
to drawing of blood if they cannot be taken to where a breathalyzer
machine is available. House Committee on Judiciary March 12, 1991 - Page
2

022 REPRESENTATIVE BILL MARKHAM, DISTRICT 46: Want to close the loophole
under the implied consent law concerning an intoxicated driver (.08
alcohol level, or more) who refuses a blood test.

040 CHAIR MILLER: Oregon is one of only three states that limits its
reach of the implied consent law to breath tests only. The other states
are Alaska and New Jersey. 053 REP. MARKHAM: Supports HB 2841 which
would provide the same penalties for fleeing on foot from a police
officer as with driving a vehicle.

HB 2488 - AGGRAVATED MURDER/RACE - PUBLIC HEARING 070 ROBINSON:
Summarizes HB 2488 which extends the provisions of Oregon's aggravated
murder statutes to apply to situations where the victim was killed as
the result of the victim's race. 073 REPRESENTATIVE BILL DWYER,
DISTRICT 42: Supports HB 2488 and emphasizes the need for it is more
obvious than its first introduction during the 1989 legislative session.
Must bring a message of disgust to people who would kill because of
racial hatred. HB 2488 is unambiguous in that regard and sends a message
to Skinheads, Neo-Nazis and other hate groups of any race that if you
kill in Oregon, you face a harsh penalty. Names people who were killed
in Oregon due to their race. Mentions the Metzger trial in Portland and
crimes of prejudice in Oregon and nationwide. Asks the Committee to
strongly endorse this legislation and recommends to the full body that
Oregon slam the door on this monstrous brutality. 121 MYRON "MIKE"
HALL, CHAIRMAN, OREGON COALITION TO ABOLISH THE DEATH PENALTY (EXHIBIT
B): We are opposed to HB 2488 and the death penalty on principle.
Advises the Committee that the statement in EXHIBIT B does not argue the
philosophy of the death penalty but argues in terms of how the
demographic material is used to support the death penalty. We oppose the
death penalty because we are opposed to murder. Think the death penalty
is an inappropriate way to solve the problem and think HB 2488 obscures

the issues which lay beneath racially motivated murder. The American Civil Liberties Union is also opposed to HB 2488. 155 REP. SUNSERI: How do you consider the death penalty to be murder? 159 HALL: From our point of view, it's the state taking a life and it's therefore murder. I don't want to be associated with murder-that's the philosophical argument. 167 JOHN BRADLEY, MULTNOMAH COUNTY DISTRICT ATTORNEY'S OFFICE: Supports HB 2488. Reviews with the Committee the Stanley Reed case. Mr. Reed was black and was murdered on his way home from work while riding his bicycle. Thinks murder solely motivated on the basis of race should be more than murder. Doesn't think HB 248 8 should be a debate on the death penalty-Oregon has a death penalty. The question is: Is this type of conduct as serious as the types of things that bring with it the potential of the death penalty? Suggests that it is. Explains that the burden of proof for murder and then racial motivation is

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on the DAs, so there won't be any doubt about the crime (as raised in Mr. Hall's testimony, EXHIBIT B).

HB 2921 - PUBLIC HEARING

236 REPRESENTATIVE KEVIN MANNIX, DISTRICT 32: Sponsored HB 2921 at the request of the Oregon Peace Officers Association. HB 2921 parallels HB 2250 from last legislative session which passed the House but not the Senate. HB 2921 seeks to expand circumstances under which a peace officer can stop a person. This bill addresses stopping someone the peace officer thinks is about to commit a crime--currently it cannot be done.

256 GARY MICHEL, SALEM POLICE DEPARTMENT (EXHIBIT C): Representing the Oregon Peace Officers Association in support of HB 2921. Reads from testimony. HB 2921 will allow police officers to provide better service to the public and community. HB 2921 will allow police officers to take a more proactive role in the prevention of crimes. Understand the need for consistency between federal guidelines and Oregon's state laws. Gives example of a possible burglary situation in which nothing could be done due to current laws. We don't want this to be a license to trample on civil rights and recognize the limits imposed by the law and courts. We believe there are adequate safeguards against any types of infringements on civil rights caused by the passage of HB 2921.

299 BOB KEIZER, OREGON COUNCIL OF POLICE ASSOCIATIONS: Support HB 2921 and urge its passage. 314 ROSS SHEPARD, OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION: The statute HB 2921 addresses has remained unchanged since 1973. If HB 2921 is passed with its present language, there will be increased litigation, specifically motions to suppress the legitimacy of a stop by a police officer and any ensuing search. It's important to remember that an officer need not reasonably believe that a crime has been committed before the officer has the authority to stop and frisk. If there's a substantial step taken toward the commission of a crime, there is an attempt that has been committed and "attempt" is a crime in Oregon. Gives examples of attempted burglaries. Suggests the proposed language is not needed. The statute has served us well and

should be left as is. 346 REP. PARKS: Isn't there a requirement that when a person is stopped by a police officer, the person must produce identification? 349 SHEPARD: Don't believe that's the law, unless it's a traffic stop. 352 REP. BAUM: What exactly is defined by "is about to commit"? Gives example of a black person stopped in a white neighborhood simply because of color. 369 SHEPARD: Hope that wouldn't be the case. This language strikes me as being ambiguous and why there would be an increase in litigation concerning the legitimacy of the stop. 373 REP. MANNIX: Refers to the Terry v. Ohio case which said an officer may stop and inquire and that there had to be reasonably articulable factors that the officer could point to as the House Committee on Judiciary March 12, 1991- Page 4 ~

occasion for stopping and inquiring. It came down to reasonable suspicion. Other cases have said someone's race, creed, color, or origin are not appropriate, objective factors. The language, "or is about to commit a crime" is no different from an extrapolation on that. The statute presently says a peace officer who reasonably suspects a person has committed a crime, may stop. Not changing the reasonable suspicion standard but allowing an anticipation factor. This bill is not intended in any way to allow any officers to go outside their constitutional confines. TAPE 52, SIDE A

003 FRED AVERA, POLK COUNTY DISTRICT ATTORNEY, OREGON DISTRICT ATTORNEYS' ASSOCIATION (ODAA): ODAA supports HB 2921. Prior to 1968, it was assumed that police officers had the authority to stop and inquire about a person who was committing or about to commit a crime. That assumption was made official with the Terry v. Ohio case by U.S. Supreme Court. In the early '70s when the legislature adopted the Criminal Procedure Code, it adopted a statute that memorialized that, however, the phrase, "or is about to commit a crime. was left out. That put Oregon statutory law in conflict with U.S. federal constitutional case law and Oregon constitutional case law. That conflict has existed for nearly two decades. HB 2921 would create consistency between Oregon law, the federal law, and the law of every other state. This bill would give police the authority in limited circumstances to prevent crimes.

029 REP. BRIAN: Would it be helpful to qualify the language "is about to commit"? Maybe add, "based upon objective actions or circumstances of the person is about to commit. indicating a standard or measure for the police officer to use. 036 AVERA: That language or something similar would be implicit-it's in the statute now. Only concern is with stating a laundry list of factors-it's impossible to anticipate all possible factors. Prefers to leave the language to read, "the reasonableness of the officer's action based upon all the circumstances 048 REP. BRIAN: Trying to help the legislative members understand the intent and point out any safeguards to concerns raised last session. 054 REP. JOHNSON: Refers to HB 2921, Section 1, line 5. Has the word "reasonably" been the subject of many court decisions since 1973? 056 AVERA: Probably hundreds. 057 REP. JOHNSON: So, there's a well-defined body of law concerning what that word means in relation to one who has committed a crime and the same body of law would apply to someone a police officer stops who he believes is about to commit a crime? 059 AVERA: Yes. HB 2921 - WORK SESSION 063 REP. JOHNSON: Moves HB 2921 to the Full Committee with a "do pass" recommendation. House Committee on Judiciary March 12, 1991- Page 5

073 VOTE: 6-2 AYE: Baum, Brian, Johnson, Parks, Sunseri, Miller NO: Bauman, Mason EXCUSED: None

Motion passes, Representative Mannix to carry.

HB 3103 - FINGERPRINT FILES - PUBLIC HEARING 085ROBINSON: Summarizes HB 3103 which modifies the way that fingerprint files and records of juveniles are recorded into the law enforcement data systems and would allow information about runaways, and lost or missing children to also be entered into the system for identification purposes.

095 REPRESENTATIVE KEVIN MANNIX, DISTRICT 32: Sponsor of HB 3103 along with committee member Representative Jim Edmunson. 099 CAPT. LEE ERICKSON, SECTION CHIEF, OREGON STATE POLICE IDENTIFICATION SERVICES SECTION (EXHIBIT D): We support HB 3103 which seeks to make current law effective and efficient in the use of juvenile fingerprints. (Reads from written testimony.) Emphasizes that HB 3103 does not seek to change the criteria under which children are fingerprinted rather to use the fingerprints with the available technology that the Automated Fingerprint Identification System (AFIS) has brought to Oregon. Even though law enforcement agencies throughout the state have fingerprint cards of serious juvenile offenders and missing children, current law prohibits storing or using those fingerprints in the state's central repository. Entire criminal justice community would benefit from the use of this fingerprint information. Outlines areas under Oregon law that currently allows for fingerprinting juveniles (EXHIBIT D). The issue is that the fingerprints cannot be stored in a central repository which would assist in juvenile cases and the recovery of kidnapped and missing children. Explains submission of these fingerprints would be with the consent of the parents and upon return of the child, they would be removed from the computer and the file index number would be destroyed. Talks about problems storing selected serious juvenile records at a central repository who account for many crimes. (Continues to read written testimony, EXHIBIT D.) 189 ROBINSON: One of the changes made in the statute deals with maintaining the juvenile records separate from adult records. Why is that language there and what would be the impact for removing it? 197 ERICKSON: They initially did not want to have all the juvenile fingerprint cards mixed in with the adult records. Can't answer how it would affect the Bureau files maintained in LEDS, the main index. 208 REP. MANNIX: Bill has an old-fashioned concept from the old law. Problem now is that effective use of the computerized identification system cannot be made. Can't keep two separate systems. House Committee on Judiciary March 12, 1991 - Page C

229 GARY MICHEL, OREGON PEACE OFFICERS: Oregon police officers have an incredible tool in the AFIS system but are not able to use it fully because of the stipulation in the law. Urges support of HB 3103.

237 REP. BRIAN: Asks Capt. Erickson about the destruction of records once a missing child is returned to the parent.

245 ERICKSON: The removal of a missing child record would be part of our administrative rules because the purpose would no longer be there. The bill does not mandate that it has to be removed. We would do that because the purpose for keeping them in the system would no longer exist. It's merely a personal identification issue.

253 REP. BRIAN: Same approach on the runaway?

258 ERICKSON: That certainly is an option we could put in the bill.

268 REP. MANNIX: One answer is that the records would eventually be expunged just as juvenile records are expunged under other statutory provisions. Not sure the removal factor should be mandated due to some unforeseen exceptions. Gives example of a three-time runaway.

281 REP. MASON: Might want to leave the missing children category in the records for a long time. Not sure about confidentiality of fingerprints. Aren't military fingerprints kept forever?

295 ERICKSON: Those are kept in the military's files until they receive a death notice, then the file is closed.

298 REP. MASON: Under the impression that fingerprints can be used to track people down.

307 ERICKSON: This may apply, for example, to the endangered child-throwaways in the 13-17 year age range. We would leave those records (from the parents) in the system as an endangered person until that person is located.

HB 3103 - WORK SESSION

335 CHAIR MILLER: According to the fiscal impact statement, HB 3103 will generate a \$45,000 impact. 345 CAPT. LEE ERICKSON, SECTION CHIEF, OREGON STATE POLICE: Although our initial impact is \$45,000, prioritizing will show no additional increase in manpower or AFIS fee assessments. 363REP. MASON: Wants to carry the bill on the Floor.

374 REP. BRIAN: Are you saying it won't cost \$45,000?

377 ERICKSON: We can do this without adding personnel and without an increase in computer costs because we're becoming more efficient and prioritizing what we're doing. House Committee on Judiciary March 12, 1991 - Page 7

385 REP. BRIAN: Any other costs? 386 Erickson: No.

389 REP. BAUMAN: Concern of Ways and Means co-chair was that he would be revisited in EBoard with the result of some this committee's decisions. The record indicates you're able to do this with no additional cost. That record and the inclusion of your reassurance to this committee that this will not be an item for E-Board will satisfy their anxiety.

409 MOTION, REP. MASON: Moves HB 3103 to the Full Committee with a "do pass. recommendation.

TAPE 51, SIDE A 009 REP. BAUMAN: Where does this fit in with the state's policy concerning protective privacy of juveniles than with adults.

014 ROBINSON: The issue was they were being fingerprinted with no way for them to be used for the purposes intended under the underlying statutes.

027 REP. BAUMAN: Then there is no issue of juvenile confidentiality?

028 . REP. MANNIX: Refers to HB 3103, lines 4 and 5, to take out the separation requirement; lines 11 and 12, include identity of lost, missing, and runaway children. Otherwise, the access provisions have not been touched. 034 ROBINSON: In answer to Representative Bauman's question, refers members to Page 1, lines 12 and 13 that requires the parent's consent for fingerprinting. 040REP. JOHNSON: The testimony seemed to be clear concerning the kinds of children who will be fingerprinted and their records maintained with the State Police. Refers

to Page 1, Paragraph 4, line 27 and suggests some language changes to maintain fingerprint records of serious juvenile offenders. 063 REP. MANNIX: This gets right back to the current problem of fingerprints which can and cannot go into the system. This bill is not intended to revisit careful statutory policy about when fingerprints can be taken and obtained. Urges committee against such an amendment because it would create a two-tiered system. 073 REP. JOHNSON: Refers to Capt. Erickson's testimony, EXHIBIT D, Page 8, which refers to "serious" juvenile offenders. Proposal was to conform to that testimony. 087 ROBINSON: Refers members to HB 3103, Section 7 (a) and (b) addresses concerns raised by Representative Johnson. 099REP. BRIAN: Don't think there's an innocent way the system would end up with a child's fingerprints.

House Committee on Judiciary March 12, 1991- Page 8

110 REP. JOHNSON: Seems the bill does not conform with the testimony.

118 VOTE: 70 AYE: Baum, Bauman, Brian, Johnson, Mason, Sunseri, Miller NO: None EXCUSED: Parks

Motion passes, Representative Mannix to carry.

HB 2545 - WORK SESSION 129 REP. TOM MASON (EXHIBIT E): HB 2545 was previously defeated by committee and is being revived for consideration. Refers members to HB 2545 Hand-Engrossed Proposed Amendments (EXHIBIT E) which rewrites HB 2545. Gets around concern about controlled substances and children living within their vicinity. Walks the committee through the proposed amendments which have tightened up the original bill. 160 REP. MANNIX: Notes there were some previous amendments and asks these amendments be added as further amendments. Finds the amendments acceptable and supports them. 173 RUSS SPENCER, OREGON STATE SHERIFFS' ASSOCIATION: Supports HB 2545. Original purpose of bill was to target children in crack houses where methamphetamine is manufactured or in large grow operations. Commends Representative Tom Mason on language in Section 3, "in the presence of said child." That makes this bill more palatable to us because of the felony factor. 188 REP. MASON: Moves HB 2545 Hand-Engrossed Amendments (EXHIBIT E).

192 REP. JOHNSON: Prefers the specific amendments be noted for the record (EXHIBIT E, Page 2). 204 CHAIR MILLER: Refers to HB 2545, Section 1, line 6, the wording will begin, "child to stay in a vehicle or on premises for controlled substances" which is repeated in line 13. There being no objection to the amendments, they are adopted.

214 REP. MASON: Moves HB 2545 as amended to the Full Committee with a "do pass" s HB 2545 as amended to the Full Committee with a "do pass" recommendation. recommendation. VOTE: 7-0 AYE: Baum, Bauman, Brian, Johnson, Mason, Sunseri, Miller NO: None EXCUSED: Parks Motion passes, Representative Peter Courtney to carry. House Committee on Judiciary March 12, 1991 - Page 9 . . HB 2898 - PUBLIC HEARING

243 ROBINSON: Summarizes HB 2898 which enhances penalties for attempting to elude a peace officer from a Class A misdemeanor to a Class C felony. 250 LT. MIKE GARVEY, PORTLAND POLICE BUREAU: Supports HB 2898 and explains the elevation to a Class C felony as a result of police pursuits which can endanger the public. 294 LT. GLEN RADER, OREGON STATE POLICE PATROL DIVISION: The Law Enforcement Legislative Council which is composed of several police officer associations support the elevation to a Class C felony. They have indicated this is their No.

1 concern for this session. Talks about all parties endangered by police pursuits. 322 LT. DICK WEES, OREGON STATE POLICE, SPRINGFIELD: Gives an example in the Eugene area where a driver was stopped for driving while intoxicated. The driver fled on foot into a residential area and tried to get into a number of residences before he was apprehended. This happens continually statewide. 352 GARVEY: The states of California and Washington also consider this a very serious crime and have positioned eluding a police officer in the felony category. Passage of this bill and HB 284 1 would send a clear message to those who would elude police officers. 374 CHAIR MILLER: Would you prefer HB 2898 over HB 2841? 389 RADER: Believe the law enforcement community would prefer HB 2841 which enhances HB 2898 by adding "attempting to elude on foot" and making that a Class A misdemeanor.

TAPE 52, SIDE B ~

001 REP. JOHNSON: Refers to language in HB 2841 concerning a possible loophole about how someone could elude a police officer; i.e via a wheel chair, a skate board, etc.

HB 2841 - PUBLIC HEARING

020 LT. GLEN RADER, OREGON STATE POLICE PATROL DIVISION: Supports HB 2841 and its companion bill, SB 194 which is exactly the same. Incidences of people fleeing on foot from police officers is increasing. Gives two examples: Person is stopped for a traffic offense and flees from the vehicle; after the person is stopped and is then outside the vehicle and during the contact with the police officer, the person flees on foot. In these cases, the officer usually has no knowledge as to why the person is fleeing. Most traffic offenses are traffic infractions which means a person cannot be arrested and therefore officers are restricted from pursuing or arresting a person fleeing on foot for violating a traffic infraction. This bill would give police officers the authority to arrest the offender. 072 REP. BRIAN: If someone fleeing from a vehicle on foot got someone's bicycle and took off, that's a crime the police could pursue? House Committee on Judiciary March 12, 1991 - Page 10

079 RADER: That's correct.

087 REPRESENTATIVE JOHN MINNIS, DISTRICT 20: Fully support the concepts of HB 2898 and HB 2841. Suggest that the words, "while on foot" are not necessary in the statute. (tape inaudible.) Gives examples of people fleeing from a police officer in other than a motorized vehicle.

137 CHAIR MILLER: What would we lose if we took out "on foot"?

141 RADER: The present statute covers everything that deals with a vehicle. Reviews the two situations (listed above). 154 CHAIR MILLER:

What if a person gets out of the vehicle, has a discussion with the officer, and gets back into the vehicle and takes off. Are they eluding in the vehicle? 158 GARVEY: In some court cases, if there aren't some specifics with regard to the statute listed, then sometimes it allows the courts to interpret the statute as vague with regard to these areas.

168 CHAIR MILLER: Have you come across folks who have reached into the back seat and taken off on a skate board? 170 GARVEY: Have had people exit a vehicle on a bicycle.

178 WEES: Had a case in Eugene where a suspect swam the Willamette River.

181 RADER: The fact is a person has to be on foot before they get

onto the skate board, bicycle, or go for a swim. 187 REP. SUNSERI: If there is any interpretation on the part of a judge it's going to be "while on foot." If "while on foot" were to be removed, it still says, "when the person gets out of the vehicle then knowingly flees or attempts to elude." There would be no interpretation then as to a skate board, took a boat or swam, he was knowingly fleeing and attempting to elude.

HB 2841 - WORK SESSION

203 REP. SUNSERI: Moves to remove "while on foot," on line 13.

208 REP. BRIAN: Friendly amendment to remove the first "," before the words "while on foot,."

216 There being no objection to the amendment, it is so adopted. 218 ROBINSON: Asks Lt. Rader if the bill addresses a situation where the person has been out of the car for 10 minutes and then attempts to disappear.

235 CHAIR MILLER: Understands the bill to mean that even if the person was engaged in conversation with the officer and the officer had to go back to his vehicle and left the person waiting for 10 minutes, the person would still be considered eluding. House Committee on Judiciary March 12, 1991 Page 11

239 RADER: That's the intent of what we want to be able to cover.

242 REP. SUNSERI: Moves HB 2841 as amended to the Full Committee with a "do pass. recommendation. 261 VOTE: 6-0

AYE: Baum, Brian, Johnson, Parks, Sunseri, Miller NO: None EXCUSED: Bauman, Mason Motion passes, Representative Sunseri to carry.

293 REP. BRIAN: Moves to suspend the rules and to reconsider to bring HB 259 7 back before the Subcommittee. There being no objection, it is so ordered. HB 2597 - WORK SESSION

303 ROBINSON (EXHIBIT F, : Summarizes HB 2597 which deals with obtaining urine samples for the purpose of drug tests under the implied consent law. 356 REP. JOHNSON: Requested Lt. Rader to investigate the situation concerning refusal to blow v. blow and fail. It turns out there's federal restriction that if there isn't at least a year's waiting period for someone to get a hardship license, if they're repeat offenders, the state will lose federal funds. Therefore, need to make the repeat offender's refusal to blow a 1 1/2 year wait instead of a year's wait. Then the person who blows and fails will only have to wait a year. 382 BECKY HAMPTON, MOTOR VEHICLES DIVISION (EXHIBIT D) Understands that the proposed amendments to the HB 2597-1 amendments were at the request of our legal counsel.

TAPE 53, SIDE A

003 REP. BAUM: Is concerned about the amendment proposal that the tests be done by clinical laboratories approved by the Health Division. There was previous testimony about the toxicology aspects of this urine test and it was clear there was no way present drug testing of urine allow any determination as to a precise point and space in time that a drug that showed up positive was consumed. 021 KEN MENEELY, TOXICOLOGIST, STATE POLICE CRIME LAB: Basically you want to know if there's any we can precisely detect when a person ingested a drug-no, there isn't. Cocaine

or methamphetamine may in the system for two days, marijuana may be in the system for three days or even three weeks. That's not the issue. *Gives education and experience to substantiate knowledge of the subject matter.

. House Committee on Judiciary March 12, 1991- Page 12

025 REP. BAUM: Wants to establish what the test will be used for. It's been established it's difficult to determine when a drug was ingested. In the case of alcohol and because of the nature of the drug, an intoxilizer can pretty much place in time and space as to having directly affected the driver's ability to drive in a perceptible degree or manner. But you're telling the committee that a urinalysis will not provide the same kind of testing certainty that an intoxilizer does. 043

MENEELY: Again, there is no way we can tell that a person is directly impaired for the drug. The impairment is due to the officer's observations on the road and his evaluation. We combine that with the presence of the drug and the known physiological effects of that drug.

046 REP. BAUM: If a person takes the intoxilizer and passes it (comes up 0.0), then takes the urine test . . . how is this going to play out?

058 RADER: When we have the ability to obtain the urine sample to check for drugs, we're asking for that so we can confirm our belief that the person is under the influence of controlled substance. The toxicology is only to validate the fact that the officer believed that the

manifestations by the person on the road while driving were caused by what the officer believed to be a certain category of the controlled substance and that confirmation is made. That evidence can be used in court. Also discusses field sobriety tests. 083

LT. CHUCK HAYES, OREGON STATE POLICE PATROLD DIVISION: I am trained in the drug recognition field. Uses standardized field sobriety tests at the roadside and maybe at the booking facility. The tests are also conducted to eliminate any possibility of a physical or mental impairment. When a person is arrested, they are given an intoxilizer test as standard procedure. If

the intoxilizer test comes back 0.0, the officer must then determine what's causing the impairment. Then other tests are performed such as checking a person's blood pressure, their pulse rate, pupil size, reaction to light, etc. that all can be manifested by certain drug categories. Then we ask for the urinalysis test; if there's a positive result on that test, it can substantiate that there has been some drug used by the individual. It is another stepping stone that can help us determine whether a person was impaired by something other than alcohol.

113 REP. BAUM: Seems like alcohol would need to be determined to be present before you would do the urinalysis. Otherwise, there's no probable cause at the scene to stop. 121

RADER: When the person is stopped it's for some driving error or for driving erratically. The person will be given the field sobriety test and if they don't pass it, they will be placed under arrest for driving under the influence of intoxicants. 126

REP. BAUM: What if there's no alcohol on their breath? 131

RADER: They're still being arrested for driving under the influence of intoxicants which doesn't mean just alcohol. 132

REP. BAUM: What is the probable cause that allows the officer to ask the person to get out of the car and do the sobriety test? Because the person was weaving the car? 142

HAYES: There is a set of field sobriety tests an officer can do that sometimes is not even House Committee on Judiciary March 12, 1991 Page 13

apparent to the driver at the time they're being conducted. Might see an abnormal eye pupil size which when combined with slow reactions, impaired, divided attention, gives us probable cause to bring the person out of the car and then go through a continued set of field sobriety

tests. Gives examples of no apparent alcohol present but the person is having problems with the field sobriety tests.

166 REP. BAUM: What's the procedure if they fail the breathalyzer test at the jail and you give them the urinalysis test. Are they going to hold them for a night? Results from a urinalysis test can take days.

176 RADER: When we arrest the person and take them down to the jail, they are no longer held overnight. They're cited and released. We only need the evidence of a urine sample to back up the suspicion that the person was under the influence of some type of controlled substance. They're not going to be held overnight waiting for the results of that test to come back.

192 REP. BAUM: Some counties do hold them.

204 RADER: The urinalysis is considered additional evidence and we're asking that we be allowed to take a urine sample to show that the person was under influence of controlled substance.

205 REP. BAUM: There's no intent to have the urinalysis as being a conclusive or determinative factor of the person's impairment. Wants to make it clear that the intent is not to use the urinalysis like the intoxilizer is being used in present law (refers to jury instruction: guilty if blowing over .08 for alcohol consumption).

210 RADER: That's correct, that's not our intent.

212 REP. CLARK: Is it possible for a person to flunk the urinalysis and test positive for controlled substances in the blood stream and not be under the influence of intoxicants? 220 RADER: It is possible.

222 REP. CLARK: Reviews the process of field sobriety tests, arrest, pass the breathalyzer (less than .08) and give the urinalysis test. If they flunk the breathalyzer (blow 1.2), why do you need the authority to require a urine test? You already have what you need for a DUII. Where is the new probable cause for a search for controlled substance abuse?

240 RADER: Many of the people we arrest under the influence at the .08 or higher level of a breath test are also under the influence of a controlled substance. Anyone who is convicted of DUII or has taken the diversion in the first arrest for DUII is required to go through an evaluation of their problem and through a treatment program. These people are currently being treated for alcohol when in fact their problem may be a drug problem. That's not being addressed at the present time.

261 REP. CLARK: When you ask a person to take an intoxilizer or provide a urine sample-that is a search by constitutional law. Searches normally require a search warrant or some exception to the search warrant. The search warrant is waived in the case of an intoxilizer test due to the \ House Commiffee on Judiciar, March 12, 1991 Page 14

rapid dissipation of alcohol If it's your testimony that drugs stay in the system for a longer period of time, then why should there not be a requirement that a warrant be necessary to get a urine sampling? What is the nature of the exception to the warrant requirement?

278 RADER: We haven't test)fied that some of the drugs stay in the body or don't leave it very rapidly. We've been asked the question, are there

some drugs that will stay in the body for some period of time? Yes, there are. But some drugs will be voided the first time the person urinates and therefore they're gone. 288 REP. BAUM: Talks about probable cause for stopping someone. When someone's urine is tested, we're going to have prescription substances and the law states that people aren't allowed to drive under medication if it affects their driving, particularly if it's mixed with alcohol. There's concern about the measuring of urine tests and accuracy. How will a prescription drug thrown into the scenario be and how accurate is the test in differentiating between the different types of drugs, including prescription and illegal?

329 MENEELY: Detection limits that were set are primarily set for the abuse level situation. The test isn't designed to show a person positive on a one-pill type situation but rather to show a person's abuse of a drug which would be demonstrated by the field sobriety tests or impaired driving. 348 REP. BAUM: Thought the original testimony was that the test could detect trace amounts of drugs. 350 RADER: In drug testing a threshold is set of how much of the substance you're going to find in the body that comes up positive in the test. The established thresholds for urine tests would indicate heavy use of that particular controlled substance. We don't stop with just one test but also conduct a confirmation test on positive first samples.

365 REP. BAUM: How do you determine thresholds?

369 MENEELY: The levels are set by the National Institute for Drug Abuse (NIDA). Those levels are nationwide and are high enough to eliminate the prescription or casual, prescribed drug scenarios. They represent drug abuse levels.

391 REP. BRIAN: In addition to levels, does the analysis identify the specific drug or drugs?

402 MENEELY: The initial screening test detects the potential of the abused drug which then goes on to a confirmation of drugs which specifically identifies them.

TAPE 54, SIDE A 002 REP. BRIAN: You could then tell if it's a prescription drug versus other controlled substances?

003 MENEELY: Yes.

004 REP. JOHNSON: Refers to HB 2597, Page 1, line 12, that currently refers to alcohol testing. House Committee on Judiciary March 12, 1991 Page 15

Do you contemplate applying the urine test in every single case where someone is stopped for drunk driving?

019 RADER: No. Reviews meeting certain standards before asking for a breath test and a urinalysis.

028 REP. JOHNSON: Assuming someone has consumed alcohol . . .

031 CHAIR MILLER: Intoxicants is the key here. Don't think the officer has to determine what kind of intoxicant it was that caused the erratic behavior that was justification for the stop. Recognize there are now additional intoxicants that cause problems on the road.

040 REP. JOHNSON: Intoxicants now means any and all illicit drugs by

definition? 041 RADER: Yes. 043 REP. BRIAN: When a person is arrested and takes a breathalyzer at .04, will the person automatically be required to give a urine sample or is it more discretionary than that? 047 RADER: That would be up to the discretion of the police officer whether to require a urine sample but it wouldn't be mandatory upon the police officer to request a urine sample. 051 REP. BAUMAN: This net is broad enough to make warnings on the back of a pill bottle that says, "Don't drive or operate machinery after you take this," to be enforceable if that drug should show up in urine. Is that correct? 055 RADER: Yes, because most prescription drugs are listed as controlled substances. 058 REP. BAUMAN: There are even controlled substances in some over-the-counter drugs, true? 061 MENEELY: One good illustration is the Vicks inhaler which has methamphetamine in it. We'll determine if it's the illicit methamphetamine or over-the-counter methamphetamine. There are two different types and we can tell the difference between them. 066 REP. BAUMAN: Would a defense be to say it was an over-the-counter drug or prescription drug? 073 RADER: No, it would not be a defense to say it was a prescription drug or an inhaler the person bought over-the-counter. It would assist us in showing the cause of the impairment by the person. 077 MENEELY: Again, the Vicks inhaler issue is designated to be an abuse situation. It's not just a typical prescribed method; it has to be literally abused before we can even reach the level of detection. 087 REP. BRIAN: Moves the HB 2597-1 Proposed Amendments as Hand-Engrossed (EXHIBIT 1) be adopted. 097 ROBINSON: These Proposed Amendments came from legal counsel for the Department of House Committee on Judiciary March 12, 1991 Page 16

Motor Vehicles. The issue they address is how the bill addresses double waiting periods if a breath test and a urine test is refused.

098 There being no objections to the Proposed Amendments, they are so adopted. 100 REP. JOHNSON: Moves to HB 2597, Page 8, line 38, delete "one year" and insert "eighteen months." This is to encourage people to blow when stopped as opposed to refusing to blow.

126 REP. BAUM: Discussed this with Lt. Rader and other officers and it fits fine with them. 130 REP. JOHNSON: Lt. Rader provided information about this that the federal law requires repeat offenders to wait one year regardless of whether they blow or not blow. Therefore, the waiting period cannot be shortened for people who blow and fail to create the distinction. The only option is to increase the waiting period for people who refuse to blow. 138 There being no objection to the amendment, it is so adopted. 140 REP. BRIAN: Moves HB 2597 as amended to the Full Committee with a "do pass. recommendation. 150 VOTE: 6-1

AYE: Baum, Brian, Johnson, Parks, Sunseri, Miller NO: Bauman EXCUSED: Mason Motion passes, Representative Baum to carry.

HB 2451 - WORK SESSION

165 ROBINSON: Summarizes HB 2451 which modifies the maximum term of convicted defendant's sentence to state mental hospital. 176 JOHN BRADLEY, MULTNOMAH COUNTY DISTRICT ATTORNEY'S OFFICE (EXHIBITS G & H): HB 2451 arose from a case in Multnomah County whereby a man killed his psychiatrist. The man was considered dangerous and five years had elapsed and the case had to be dismissed. The man was still considered dangerous, making calls from the Oregon State Hospital. Since that time, he has been civilly committed. We're going to reindict to find out whether or not the dismissal has to be with prejudice or without

prejudice. 198 Drafted HB 2451 and would remove from Page 2, line 2, "or for five years, whichever is less. and that would solve the problem. At the bill's last hearing, someone made reference to Jackson v. Indiana and indicated there might be constitutional problems with the bill. Reviews proposed amendments (EXHIBIT H). Refers to the summary for HB 2451 concerning an error referring to "convicted defendant's sentence" which should be changed because it refers to people who have not yet come to trial. Should be changed to "the defendant can be sentenced pretrial". Also notes on Page 2, line 16, should be changed from "of" to "or". Cannot say the bill is House Committee on Judiciary March 12, 1991Page 17

unconstitutional or constitutional. Think other things should be addressed in this area of the law but maybe during interim. 326 REP. PARKS: This is pretty complex, agreed?

331 BRADLEY: Don't think it's as complex as talking about the rights of hearings. Have established the burden of proof which is currently used by judges. Have addressed that a psychologist and psychiatrist can examine the defendant. 341 REP. PARKS: You're adding a whole class of people to make this determination by adding the psychologists. Can they do this now?

348 BRADLEY: Currently, a psychologist could testify about a defendant's ability . . . and make opinions as to whether or not the defendant had a mental disease or defect at the time of the offense that rendered the defendant not responsible under the law. Psychologists can do a lot of things except for some reason when HB 2451 was passed years ago, they were left out. Don't think it's critical but think the Oregon State Hospital would utilize psychologists. 363 REP. PARKS: The psychologists' testimony is admissible and the issue is how much weight would be given. In the original bill, there was a provision concerning Page 1, line 27 about time elapsed. That's a vague standard, agreed? 381

BRADLEY: Don't disagree but that's the existing law. 395 REP. PARKS: Refers to the possibility of a defendant later claiming he was in such bad shape, he wasn't able to assist in his own defense. TAPE 53, SIDE B 007 BRADLEY: Found a catch-all in the Evidence Code at the end of the hearsay exceptions that talks about if there's no other exception to the hearsay rule and the testimony is reliable and relevant, and give notice to the other side, it may be admissible. This is probably more of a benefit to a defendant who wants to perpetuate testimony than to the state. 017 EVA KUTAS, MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES SERVICES DIVISION: We have met with Mr. Bradley and believe these proposed amendments are a positive improvement over the originally proposed bill. However, it does not address some remaining significant issues and it is a complicated piece of legislation that needs more work concerning the length of time people are held (varies from state to state, Oregon is at the higher end with five years). The other issue concerns regular hearings and evaluations at the State Hospital. The Division would like this statute and a couple of criminal statutes in which mentally ill and mentally retarded individuals come in contact with the law or have some sort of criminal conduct, looked at together by the Criminal Justice Council or other relevant groups. 062 BOB JOONDEPH, OREGON ADVOCACY CENTER: There's nothing wrong with the amendments offered by John Bradley. The question is whether it's appropriate to act right now and we'd agree with the Mental Health Division that it makes more sense to look at these areas it makes more sense to look at these areas House Committee on Judiciary March 12, 1991 Page 18

of concern by a variety of special groups. As long as the five year standard isn't eliminated, we don't have a position on the bill. The additional standards don't change the law in this area with the possible exception of the perpetuation of testimony but think the confrontation clause will address that.

079 REP. BAUM: Senses that there is some problem with reference to five years. If HB 2451 in its original form had the repeal of the five years, you'd oppose it but you have no objection to the hand-engrossed HB 2451-1 proposed amendments? 092 JOONDEPH: That's correct because they restore the language. 094 REP. BAUM: Gives example of a murder in Portland committed by a mentally ill person and asks how that type of situation would be addressed without doing something like what's being proposed? 100 JOONDEPH: There are other avenues available to keep people in a hospital if they're mentally ill and dangerous, right now through the civil commitment roots. Under most commitment processes, both criminal and civil, they almost all require a periodic review. Most commitment processes that have been reviewed by courts require some type of report from a hospital or a court review on a periodic basis which is usually every six months. 110 REP. PARKS: What did happen to the person that is raising this discussion? 112 JOONDEPH: At the conclusion of his five-year period, he was civilly committed; assume the hospital initiated a civil commitment process as the end of his five-year term approached. He was committed to the Oregon State Hospital. 117 REP. PARKS: So, every six months he'd be eligible to have a hearing? 118 JOONDEPH: That's correct. 121 REP. BAUM: Was he released in order to kill the psychiatrist? 125 JOONDEPH: No. When a person is in a hospital the person is evaluated by psychiatrists and treatment personnel to decide if it's appropriate to release the person into the community. This person was committed through a civil commitment process before the end of the five-year period. 134 REP. BAUM: Thought this person had been in the institution and had been released under this statute. 145 BRADLEY: The defendant had a history of mental problems. He went to his psychiatrist's office and killed him. He was arrested and found unable to aid and assist and was committed to the Oregon State Hospital. 152 REP. BAUM: The tragedy here is that the case was dismissed-not that the law didn't keep him incarcerated.

House Committee on Judiciary March 12, 1991- Page 19

154 BRADLEY: Right. It's the fact that it was automatically dismissed after five years. We're asking that it not be an automatic dismissal.

158 REP. BAUMAN: So the civil commitment proceeding is still available for a person who is found to be dangerous to themselves or to others.

164 REP. BAUM: What is the need of this, how many will it affect?

176 BRADLEY: You are not talking about a lot of people. Not everybody is civilly committed to the Oregon State Hospital who is found unable to aid and assist. The court can release a defendant on supervision if it determines that would be better. Our concern is primarily murder cases and we're concerned that after the five-year period there's no reason these cases need to be automatically dismissed.

193 REP. BAUMAN. If this person were well after five years elapsed, would you try him?

198 BRADLEY: Yes. If it was a C or B felony, the law provides they get credit for any time they served. But if it was a murder case, yes, if we

~- These minutes contain materials which paraphrase and/or summarize
statements made during this session. Only text enclosed in quotation marks
in this report is the speaker's exact words. For complete content of the
proceedings, please refer to the tapes. -