

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks

report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

HOUSE COMMITTEE ON JUDICIARY CRIME AND CORRECTIONS

May 8, 1991Hearing Room 357 1:00 p.m.Tapes 101 - 102

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

MEMBER EXCUSED: Rep. Judy Bauman Rep. Tom Brian

VISITING MEMBER:Rep. Kevin Mannix

STAFF PRESENT: Greg Chaimov, Committee Counsel Kathy Neely, Committee Assistant MEASURES CONSIDERED: HB 2846 WS (Crime) HB 2219 WS (Crime) HB 2805 PH (Indigent Defense) HB 3554 PH (Criminal Procedure) HB 3546 PH (Criminal Procedure) HB 2806 PH (Indigent Defense) HB 3225 PH (Indigent Defense)

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TAPE 101 SIDE A

003 REPRESENTATIVE MILLER, CHAIR: Calls the meeting to order at 1:15.

HB 2846 - WORK SESSION

009 GREG CHAIMOV: Grants the AG subpoena power without having to go through the grand jury. Discusses amendments (EXHIBIT A) which address concerns about the AG "hauling witnesses around the state to testify" and limits what information the AG can use.

013 MOTION:REP. SUNSERI: Moves the amendments.

CHAIR MILLER:Rep. Sunseri moves the amendments. Hearing no objection, so adopted.

MOTION:REP. SUNSERI: Moves HB 2846 as amended to the full committee.

CHAIR MILLER: Rep. Sunseri moves HB 2846 as amended to the full committee.

VOTE: 5-0 Motion passes AYE: Baum, Johnson, Parks, Sunseri, Miller NO: 0 Excused: Bauman, Brian, Mason

CHAIR MILLER: HB 2846 is passed to full committee. Rep. Parks will carry.

(Tape 101, Side A) HB 2219 - WORK SESSION

036 GREG CHAIMOV: Makes using children to commit Class A and B felonies subject to enhanced penalties. \*Fiscal impact is indeterminate.  
\*Comments on memorandum from House Committee Researcher (EXHIBIT B).  
\*There will be no current prison impact because the bill will lengthen the sentences but in a few years there will be an impact.

049 CHAIR MILLER: This was to be Class A and B and all C felonies. Comments on previous discussion regarding the Cs. Consensus was for the As and Bs.

056 MOTION:REP. SUNSERI: Moves the amendments to the bill (EXHIBIT C).

CHAIR MILLER: Rep. Sunseri moves the amendments. Hearing no objection, so adopted.

060 REP. BAUM: Need to discuss the list a little bit more. (EXHIBIT B)

REP. JOHNSON: All the class B felonies in Oregon are on these pages (EXHIBIT B)?

GREG CHAIMOV: Correct.

081 REP. BAUM: If someone uses a minor to entice another minor to violate a custody agreement, getting in to domestic relation, in ORS 163.257. \*This raises the penalty from a B to an A.

CHAIR MILLER: Would like to have the list (EXHIBIT B) as encompassing as possible.

MOTION:REP. BAUM: Moves to delete except for "custodial interference in the 1st degree". Have that as an exception. Is that a possibility, all Class B felonies except that one?

106 GREG CHAIMOV: Yes.

107 REP. BAUM: Dealing with the combination of a criminal act with a familial relationship.

111 CHAIR MILLER: Rep. Baum has moved the deletion of custodial interference in the first degree from the list of the Class B subject to this act. Hearing no objection, so adopted.

127 REP. BAUM: Custodial interference is in a category by itself.

MOTION:REP. SUNSERI: Moves HB 2219 as amended to the full committee with a do pass recommendation.

CHAIR MILLER: Rep. Sunseri moves HB 2219 as amended to the full committee with a do pass recommendation.

VOTE: 5-0 Motion passes. AYE: Baum, Johnson, Parks, Sunseri, Miller  
NO: 0 EXCUSED: Bauman, Mason, Brian

CHAIR MILLER: HB 2219 is passed to the full committee.

(Tape 101, Side A) HB 2805 - PUBLIC HEARING Witnesses: Ross  
Shepard, OCDLA Kingsly Click, State Court Administrator's Office Ann  
Christen Bill Linden, State Court Administrator

144 CHAIR MILLER: Invites witnesses to testify on all bills.

147 GREG CHAIMOV: Remaining bills deal with indigent defense in light of Measure 5. \*Current law requires a convicted defendant to repay the cost of a court appointed attorney. HB 280 5 expands recoupment to include contempt and post-conviction relief cases where there is an appointed attorney. \*Discusses amendment proposed by the State Court Administrator (EXHIBIT D) regarding computing the amount to be recouped under general recoupment statutes. \*Questions the need of changes in the contempt and post conviction statutes or if changing the general recoupment statute is enough. \*HB 2806 is similar. When defendant goes into diversion or civil compromise, the court may dismiss the charge so the defendant is not convicted. \*Discusses US District Court case stating it is okay to recoup cost of lawyer from a convicted defendant but not from an acquitted defendant (EXHIBIT E). \*HB 2806 raises the question of whether a person who goes through diversion or a civil compromise is considered a "convicted defendant" or an "acquitted defendant". \*Believes this bill will be struck down by local district court because it does not cover convicted defendants. Believes the US Supreme Court will uphold it. \*HB 3554 has a subsequent referral to Ways and Means. It combines HB 2805 and 2806 and adds language regarding where the recouped money goes. \*HB 3546 repeals statutes authorizing payment for attorneys in post conviction cases. Cannot have a "free attorney". There is no Constitutional right to counsel in a post conviction case. \*HB 3546 proposes to repeal the statutes discussing whether a criminal can proceed as an indigent in a post conviction case. \*HB 3225 redefines indigency. Would require defendant to try and obtain a lawyer before court appoints a lawyer. Comments on memorandum from Committee Researcher (EXHIBIT F) about constitutional limits of indigency standard which covers more than being eligible for public assistance. Comments on American Civil Liberties Union letter opposing the bill (EXHIBIT G). \*HB 3225 has a subsequent referral to Ways and Means.

257 ROSS SHEPARD, OCDLA: OCDLA's position is it is appropriate for defendants to repay court appointed attorneys fees. \*SB 376, revision of contempt law in Oregon, discussed having right to court appointed counsel. \*It is another financial obligation for the defendant. \*HB 2805 - is unclear about post conviction cases. Suggests amending line 1, page 3 to read "when the petitioner in a proceeding under ORS 138.510 to 138.680 in no way prevails..." \*Vast number of post convictions are filed by inmates in state institution and there is very little chance that money will be recovered. \*HB 2806 - Discusses Fitch v. Belshaw. Discusses the three types of diversion. The bill would face strong constitutional challenges. Believes it would be declared unconstitutional. \*HB 3554 incorporates these two bills and adds the money would go to the indigent defendants fund. It should go back to the state general fund. \*HB 3546 eliminates court appointed attorneys in post conviction relief cases. It is a bad idea. Comments on "pro sa" representation. \*Discusses post conviction relief.

403 REP. PARKS: In this area, very few of these cases, on their face, would reflect merit.

412 SHEPARD: Agrees that the pro say ones would not. Most petitions for post conviction relief allege ineffective assistance of counsel at time of conviction.

TAPE 102, SIDE A

013 REP. PARKS: Could this be restructured to provide there is no right to court appointed attorney but set some minimum standard that would empower the court to assign an appointed attorney.

SHEPARD: Believes the same thing would happen if an attorney were appointed first and be able to do an investigation. They could then determine if there was merit and be able to withdraw from th case.

024 REP. PARKS: Questions a defendant being able to use court appointed attorneys through an appeal.

SHEPARD: This is not a direct appeal.

026 REP. PARKS: Asks about cases where appeal pleading state there is no merit to the case.

SHEPARD: The Anders case.

030 REP. BAUM: Is there constitutional problems?

040 SHEPARD: No. Discusses the recent Santago Venturios Moralis case. \*The idea HB 3225 is trying to reach is good. A better way would be a directive from the Chief Justice to the trial courts where, in determination of indigency, the courts would see if the individual tried to get an attorney and the cost.

074 GREG CHAIMOV: Asks about the State Court Administrator's proposed amendments to HB 280 5 (EXHIBIT D).

SHEPARD: Have reviewed. Judge should have the ability to tailor the amount ordered to a "reasonable amount of hours" taking into account the case and the comparing to hours usually spent on that type of case.

090 KINGSLEY CLICK, STATE COURT ADMINISTRATORS OFFICE: Neutral position. \*Discusses fiscal impacts on the bills. \*HB 2805 deals with recoupment of costs in cases of post conviction relief. No problem with this bill. There should be an avenue to recoup costs if possible.

113 GREG CHAIMOV: Is there a problem with Ross Shepard's amendment?

CLICK: No. It clarifies intent of the bill.

120 ANN CHRISTEN: Would like to have the amendment repeated.

122 SHEPARD: Discusses amendment on page 3, line 1: "when the petitioner in a proceeding under ORS 138.510 to 138.680 in no way prevails..."

CHRISTEN: As it stands, only those who prevail in post conviction relief proceedings would be ordered to pay any costs. It should be as Mr. Shepard suggested.

138 GREG CHAIMOV: Suggested amendment to ORS 161.665, general recoupment statute, is it enough to cover the definitions on how much can be recouped on HB 2805? HB 280 5 discusses costs which can be recouped and includes the compensation of appointed counsel. "Reasonable amount of hours" is not specified. Should that be in other parts of the bill or is it enough to have for ORS 161.665?

CHRISTEN: 161.1665 deals only with recoupment of persons convicted. That is what the amendments address. It would be necessary to put it in

other places of the bill.

159 CLICK: HB 2806 provides recovery of the indigent defense cost in civil compromise and diversion cases. Comments on revenue this would bring in, estimated \$186,000 to \$744,000 a biennium on cases covered. \*Points out that it includes the marijuana diversion. Comments on HB 2623, the marijuana re- criminalization bill.

186 CHIRSTEN: Judicial department does not take a position.

198 CLICK: HB 3554 is both HB s plus creation of new funds that would benefit the indigent defense fund. Concept behind the revolving fund was to create a safety net for the fund.

217 CHAIR MILLER: Recommendation of Mr. Shepard is that the funds go to the general fund.

CLICK: All monies collected by the court do go to the general fund.

224 REP. BAUM: Asks about the conflict that might arise. Trying to separate the funds out.

248 CLICK: Comments on HB 2416 in House Rules regarding funding.

253 REP. BAUM: Need to have an indigent defense fund.

259 CLICK: There is a conflict either way. \*HB 3546 has to do with removing the right to counsel in post conviction proceedings and removes the right to state paid transcripts and other expenses on the relief proceeding. Neutral on policy decision. Concerns regarding courts and the work load impact on the courts. \*Indigent defense account estimate is close to \$500,000 not including cost savings to states public defenders by not having them represent these cases. \*Does not amend ORS 138.590.

298 REP. BAUM: Like the bill or not?

CLICK: Do not have a formal position. As a judicial department, don't think it is a wise approach but as custodian of the indigent defense fund, it saves a fair amount of money.

309 REP. BAUM: What might the AG's position be on this?

312 CLICK: Concern for the same reasons, they would be defending against people not represented by counsel.

319 REP. BAUM: Discusses last session regarding a similar bill.

327 CLICK: HB 3225 concerns the definition of indigency for defense.

CHRISTEN; Reviewed the bill a number of times regarding the proposed amendments to current law. Understands the aim of this bill is to insure only persons who are "dead broke" receive court appointed counsel. \*Indicates that a person would be required to go out and try to make alternative financial arrangements, ie to seek counsel outside. \*The notion is good and is in place to a certain degree with the verification program. \*Discusses the verification guidelines used by judges for final determination on who receives counsel and who does not. 1. Required to fill out a detailed affidavit of indigency: employment, dependents, assets, real property, and debt. 2. Based on that information, it is

reviewed for qualification for food stamps, the federal poverty line. If they meet the federal poverty line, deemed to be qualified for court appointed counsel.

TAPE 101, SIDE B

007 CHRISTEN: Continues describing the guidelines. \*Those that have income and assets that would not allow them to receive federal system, the verifiers have a schedule of retainer rates, state wide, by the classification of crime. \*There is a system in place that looks at whether a person can go out and obtain counsel.

011 CHAIR MILLER: Asks about the verification program. What extent are the applications checked out?

CHRISTEN: Verification involves checking the bank accounts and screening to make an initial determination. Out of those requesting counsel, about 50% are reviewed by verification specialist. Emphasis is on "out of custody people".

033 CHAIR MILLER: Is the 50% the same as it was a few years ago?

CHRISTEN: Did not keep records in the past regarding the numbers of affidavits reviewed by a judge. Believes that number is "grossly up". \*Comments on what the verification examiners do that the judges did before regarding making an indigency determination.

CHAIR MILLER: Of those who apply and are checked out, how many are not granted counsel?

CHRISTEN: About 14% where counsel is denied at beginning or after verification process.

062 REP. PARKS: Discusses how much money was recovered. In most counties, they don't know what the amount is.

CHRISTEN: That is not correct. The courts are currently on a computer system for their accounting system. Some courts cannot come up with that information currently. \*Can provide a "gross amount of money that has been collected, paid by defendants" as recoupment. It is about \$3.6 million every biennium.

085 REP. PARKS: No way to tell as a percentage? Understood that there was a unified fee.

097 BILL LINDEN, STATE COURT ADMINISTRATOR: The unitary assessment bill, SB 103, will be heard when the budget is heard in Ways and Means.

100 REP. PARKS: What about the proposal to allow the counties to retain some sort of portion of the monies collected?

LINDEN: That concept will be an amendment to the budget bill. It would give courts an incentive to do a better job of collecting receivables because they would be able to use some of the additional monies for programs in their court.

112 REP. PARKS: Is that in a bill?

LINDEN: It will be an amendment to the Judicial Department budget bill.

117 CHAIR MILLER: Closes hearing on HB 2805.

(Tape 101, Side B) HB 3225 - PUBLIC HEARING Witnesses: Representative Del Parks Ross Shepard, OCDLA

127 REPRESENTATIVE DEL PARKS, KLAMATH FALLS: Discusses an Oregon Chapter 13 bankruptcy case, indication of no resources to get a lawyer, which is not true. \*Offers examples of bankruptcy compared to indigency and arranging for an attorney. \*Comments on situation with local Indians claiming indigency but receive federal funds for boundary disputes. \*May not effect a lot of people.

186 CHAIR MILLER: On line 8, page 3, Section 3, suggests language reading: "have the right to counsel when a person is indigent if the person is" delete "determined to be" and say "financially unable" delete "at the present time", keeping "to retain adequate counsel."

\*That would incorporate concern whether "you have it or you don't" or have access to it now or later.

203 REP. PARKS: Agrees. It is a simple way.

209 REP. MASON: One of the things that is included is the financial hardship of the defendant. \*Criminal lawyers don't do "credit but get it up front".

231 REP. PARKS: Comments on indigent cases. In a majority of cases the lawyer will want the money up front.

CHAIR MILLER: Proposal was "financially unable to retain adequate counsel".

264 REP. BAUM: Discusses case in Union County and fact it has to be a "big" case before private counsel will take it on.

280 REP. PARKS: Have runaway cost of indigent defense.

292 ROSS SHEPARD, OCDLA: Proposed amendment might cause difficulties in different kinds of cases: If person is in custody, they are not able to go and find an attorney. For those out of custody, if determined indigent, anything that happens between the arraignment and final determination of indigency without an attorney, if convicted, might be reversed because of the denial of counsel during that time.

315 CHAIR MILLER: Closes hearing on HB 3225.

(Tape 101, Side B) HB 2805 - WORK SESSION

324 REP. MANNIX: Comments on the amendments from the State Court Administrator to the bill. (EXHIBIT D)

332 MOTION:REP. BAUM: Moves the amendments [listed below].

CHAIR MILLER: Rep. Baum moves on line 1, page 3 deleting "defendant" and insert "petitioner"; and insert "in no way" modifying "prevails".  
\*Hearing no objection, so adopted.

350 MOTION:REP. PARKS: Moves the State Court Administrator's amendments (EXHIBIT D).

356 CHAIR MILLER: Rep. Parks moves the State Court Administrator's amendments (EXHIBIT D). Hearing no objection, so adopted.

362 REP. MANNIX: Noticed there is no effective date in HB 2805. This will go into effect under standard passage. There is a specific date on HB 2806.

381 LINDEN: Suggests January 1, 1992.

REP. MANNIX: Recommends an amendment that the effective date be January 1, 1992.

MOTION:REP. SUNSERI: So moves.

CHAIR MILLER: Rep. Sunseri moves the effective date be January 1, 1992. \*Hearing no objection, so adopted.

390 GREG CHAIMOV: Suggests adopting in concept the Court Administrator's amendments and have them put in a few places in HB 2805 where costs need to be defined the same way as in those amendments.

CHAIR MILLER: Language already adopted above is to be inserted in additional sections where appropriate.

MOTION:REP. SUNSERI: So moves.

CHAIR MILLER: Hearing no objection, so adopted.

409 MOTION:REP. SUNSERI: Moves HB 2805 as amended to the full committee with a do pass recommendation.

CHAIR MILLER: Rep. Sunseri moves HB 2805 as amended to the full committee.

VOTE: 6-0 Motion passes AYE: Baum, Johnson, Mason, Parks, Sunseri, Miller NO: 0 EXCUSED: Bauman, Brian

CHAIR MILLER: HB 2805 is passed to the full committee. Rep. Mannix will carry.

TAPE 102, SIDE B HB 2806 - PUBLIC HEARING

CHAIR MILLER: Defers to the testimony presented earlier.

HB 2806 - WORK SESSION

023 GREG CHAIMOV: Does the same as HB 2805 and deals with recouping costs when there is civil compromise or diversion. Raises substantial constitutional questions.

028 REP. MANNIX: Comments on the constitutional issues. Does not believe they exist. \*If the defendant decides to take diversion or civil compromise, may have to pay. \*Suggests: changing the date of offense in HB 2806 to September 1, 1991.

045 MOTION:REP. PARKS: Moves changes proposed by Rep. Mannix.

CHAIR MILLER: Rep. Parks moves the effective date be September 1, 1991. \*Hearing no objection, so adopted.



055 REP. MASON: Comments on the opinion (EXHIBIT E). \*Unacceptable to use the criminal court sanction to collect money from defendants. \*Seems applicable to collect under civil quantum meruit theory of having to pay for it anyway.

091 REP. MANNIX: Contempt sanction might be considered a criminal or civil sanction in certain circumstances. The contempt power is being used as the traditional enforcement power of the court regarding areas within its authority.

100 REP. MASON: What if the bill said "the court has a cause of action against the defendant" approaching as a collection matter. Pull out of the criminal arena.

REP. MANNIX: Open to changing the enforcement side of this.

112 REP. MASON: Uncomfortable with the idea of a judgment against them. \*Essentially incurred a debt to the state.

REP. MANNIX: Have to get a separate judgment?

REP. MASON: Most will be paid upon demand.

126 GREG CHAIMOV: Under current law, the state has the authority to collect a criminal judgment as if it were a civil judgment.

123 REP. MASON: There is no criminal judgment.

REP. MANNIX: What about amending the bill to say this may be treated as a civil judgment.

128 REP. MASON: Don't know if a civil judgment can be created out of a criminal dismissal.

132 REP. MANNIX: People do it on restitution matters.

136 REP. MASON: There is no conviction.

REP. MANNIX: None in juvenile court either.

139 REP. PARKS: With all that in there, it takes the economics out and then it will be meaningless.

150 GREG CHAIMOV: Would be appropriate for the committee to adopt some amendment like those on HB 2805 that can have the definition of what is a reasonable attorney's fee included.

MOTION:REP. PARKS: Moves the inclusion of attorney fee language.

156 CHAIR MILLER: Rep. Parks moves the inclusion of the attorney fee language to be incorporated in the appropriate section. \*Hearing no objection, so adopted.

MOTION:REP. PARKS: Moves HB 2806 as amended to the full committee with a do pass recommendation.

CHAIR MILLER: Rep. Parks moves HB 2806 to the full committee as amended.

VOTE: 6-0 Motion passes AYE: Baum, Johnson, Mason, Parks, Sunseri, Miller NO: EXCUSED: Bauman, Brian

CHAIR MILLER: HB 2806 is passed to the full committee.

(Tape 102, Side B) HB 3225 - WORK SESSION

186 MOTION:REP. PARKS: Moves to amend the bill along the lines of Chair Miller's previous discussion.

CHAIR MILLER: Rep. Parks moves to amend the bill: on line 8 after "is" delete "determined to be", delete "at the present time". Delete the last words on line 9, 10, and 11. Incorporate that language in Section 2 after "able to pay". \*Hearing no objection, so adopted.

206 MOTION:REP. PARKS: Moves HB 3225 as amended to the full committee with a do pass recommendation.

CHAIR MILLER: Rep. Parks moves HB 3225 as amended to the House with a do pass recommendation.

VOTE: 6-0 Motion passes. AYE: Baum, Johnson, Mason, Parks, Sunseri, Miller NO: EXCUSED: Bauman, Brian

CHAIR MILLER: HB 3225 as amended is passed to the full committee. Rep. parks will carry.

(Tape 102, Side B) HB 3546 - WORK SESSION

230 GREG CHAIMOV: Repeals the entitlement to appointed counsel in post conviction proceedings.

247 REP. PARKS: Agrees with Mr. Shepard's testimony. Don't know if it will save anything. Will vote for it to get it to the full committee.

256 REP. MASON: Uncomfortable with this one.

261 REP. JOHNSON: Need to look at this bill for its merits but in relationship to other things that may want to spend money on that may be more important.

CHAIR MILLER: Not prepared to move this bill to the full committee.

278 REP. MASON: Commend Rep. Johnson's recommendation.

293 CHAIR MILLER: Closes hearing. Adjourns meeting at 3:05 p.m.

Submitted by: Reviewed by:

Kathy Neely, Assistant Office Manager

EXHIBIT LOG: A - Amendments to HB 2846 - 2 pages  
B - Research memorandum on HB 2219 - Lydia Grimm - 2 pages  
C - Amendments on HB 2219 - 2 pages D - Testimony/Amendments  
on HB 2805 - 6 pages E - Court opinion for HB 2806 - 15 pages  
F - Research memorandum on HB 3225 - Lydia Grimm - 3 pages  
G - Letter on HB 3225 - Carl Neil - 2 pages