

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 FAMILY JUSTICE

June 5, 1991Hearing Room 357 3:00 p.m.Tapes 144 - 145

MEMBERS PRESENT:Rep. Kelly Clark, Chair Rep. Marie Bell Rep. Kevin Mannix Rep. Del Parks Rep. Ron Sunseri

MEMBER EXCUSED: Rep. Judy Bauman Rep. Jim Edmunson Rep. Tom Mason

STAFF PRESENT: Holly Robinson, Committee Counsel Kathy Neely, Committee Assistant

MEASURES HEARD:HB 2451 PH/WS (Incompetency to Stand Trial)

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TAPE 144, SIDE A

002 CHAIR CLARK: Opens Subcommittee on Family Justice at 3:30 p.m.

HB 2451 - PUBLIC HEARING

006 HOLLY ROBINSON: Discusses the issues with HB 2451. *Currently, if a person is charged with an offense, and found to not be able to aid and assist in their own defense, they are committed to the state mental hospital for that period of time. Also, if a person is not brought to trial within 5 years, the criminal charges automatically have to be dismissed. *Statute of limitations for murder cases is unlimited however, on felonies it is not. *Concern in this bill is for individuals who go from the criminal mental health system where they are maintained in that system that, once that period of time runs and the charges are dismissed, there is a possibility that they will be discharged from the mental health system and could not have the old charges brought against them after they had been dropped. *Concerns raised are with homicide and sex offense cases. She discusses amendments (EXHIBIT A).

037 CHAIR CLARK: Does it make sense to move these amendments one-by-one or do we need to walk through all of them.

039 ROBINSON: Probably easier to track if they're done one-by-one.

040 CHAIR CLARK: Opens work session on HB 2451.

HB 2451 - WORK SESSION

041 MOTION, CHAIR CLARK: Moves Amendment 1 on the -1 amendments (EXHIBIT A, 1st paragraph).

053 REP. BELL: What if they're too incompetent to show the burden of proof?

056 HOLLY ROBINSON: The attorney appointed to represent the defendant would present the case or situation.

062 No objection. Motion passes.

063 CHAIR CLARK: Instructs committee to mark the next 2 paragraphs as Amendment 2.

064 HOLLY ROBINSON: This addresses the same issue as the last long paragraph, so you might want to include this one too. This gives the court the ability to appoint a psychologist as well as a psychiatrist to do the incompetence examinations.

073 MOTION, REP. MANNIX: Moves the Amendment 2 (paragraphs 2, 3 and ORS 161 .365 changes (paragraph 8 on), EXHIBIT A)

085 CHAIR CLARK: My understanding of the term psychologist is that it covers the PhD level-- psychiatrist being a medical doctor, psychologist being a PhD in psychology or some related social science.

090 DALE PENN, DISTRICT ATTORNEY'S ASSOCIATION: Yes. That's certainly the way the courts have utilized it in every other type of testimony, so it would be a PhD psychologist.

094 CHAIR CLARK: But we're not talking about a master's level counselor or a master's level social worker.

095 No objection. Motion passes.

098 ROBINSON: Explains Amendment 3 (paragraph 6, EXHIBIT A).

104 CHAIR CLARK: States that paragraph (6) beginning with "On page 2, line 18 should be considered Amendment 3.

105 REP. PARKS: Why wouldn't we just reference the perpetuation statute in the Civil Code as the way to do it?

109 CHAIR CLARK: In other words, is there a perpetuation of evidence rule in the rules of criminal procedure?

111 REP. PARKS: What I mean is why don't we say we're going to use, for this purpose, the civil procedure perpetuation.

113 PENN: There is one statute that allows perpetuation of testimony in criminal cases and that is as a condition of a continuance. *Allows preservation of testimony in cases where witnesses die.

121 REP. PARKS: My suggestion is that we use that instead of the way it's done in this section.

122 CHAIR CLARK: Asks Penn if he has any objection to that, saying he can't really see that there would be a difference.

124 PENN: That may be an easy way to deal with it.

126 CHAIR CLARK: The suggestion also has merit in that there may be some case law or other precedence around that rule that wouldn't be available to a new piece of legislation.

128 PENN: The only difficulty is that it says "evidence may be preserved". *The specific continuance statute refers only to the perpetuation of testimony, which may mean not releasing evidence.

135 REP. MANNIX: We're dealing with an unusual circumstance as to when the evidence will be needed in the future. The civil code normally anticipates heading for a date for trial. There is no certain date for a trial here and there is a separate issue of preserving evidence and having the obligation of releasing some evidence. *Cautions not to parallel the civil procedure statute.

149 REP. PARKS: Believes the procedure for taking oral testimony should remain as it is now. The property ought to be given back. *It is tricky because if it is given back and then the case comes up for trial and the property, which was in the control of the prosecutor and he gave it back, is gone, then there goes the case.

157 MOTION, CHAIR CLARK: Moves Amendment 3 (EXHIBIT A).

160 REP. MANNIX: We could modify the amendment to handle those concerns by taking the phrase: "Procedures for the taking..." (last sentence) and changing to: "Procedures shall parallel those of the rules of civil procedure insofar as possible," to make it clear to the court to try to make it a parallel provision.

167 REP. PARKS: Adds suggested friendly amendment to state that the prosecutor has the right to release evidence subject to court order and substitute a "picture" in its place. That gives the prosecutor the opportunity but not the requirement to give the evidence back.

176 MOTION, REP. MANNIX: Moves to amend Amendment 3 to add the following sentence: "The procedures shall parallel insofar as possible the rules of civil procedure."

183 REP. PARKS: Discusses conceptual amendment to give prosecutor right to petition the court for release of evidence and substitute a "picture" which is considered admissible evidence.

190 CHAIR CLARK: So the prosecution will have the right to petition the court to release evidence and substitute other evidence. Asks Mr. Penn how he would feel about that.

196 PENN: That would be fine.

200 REP. MANNIX: Could state: "The procedures shall parallel, insofar as possible, the rules of civil procedure and shall provide for release of evidence with substitution of other evidence which would then be admissible, upon petition of the district attorney."

207 CHAIR CLARK: Will leave wording to Counsel.

208 MOTION, REP. MANNIX: Moves Amendment 3 to include that the procedures shall follow the ORCP as far as possible and the prosecution has a right to petition the court to release evidence and substitute other evidence which would be admissible at trial.

214 REP. MANNIX: This is a great idea because there will be a lot of impounded vehicles and other materials that will be released.

222 No objection. Motion passes.

228 HOLLY ROBINSON: Discusses Amendment 4 (EXHIBIT A, paragraphs 4 & 5) *The proponents' original idea was to delete the requirement that the charges had to be dismissed at some certain date. *Alternative has been suggested that the language on page 2 be inserted and the language on line 6 beginning with "dismiss the charge and shall" be deleted. *The sentence then reads: "Upon receipt of the notice that the statutory period is about to lapse, the court shall order the defendant to be discharged or cause the proceeding to be commenced under the civil commitment statutes."

254 CHAIR CLARK: So in the situation where a person is not able to aid in their own defense and that situation continues for some time, right now--if 5 years pass--the court must dismiss the charges. If that person later regains capacity, the prosecution is out of luck. *So, as the law stands, the civil commitment process isn't really going to hold these people in a way that will protect individuals. *So the proposed amendment eliminates the dismissal and kicks the issue back to the court.

274 HOLLY ROBINSON: Brings up related ancillary issues that may face the committee later: *What happens to the hospitalized person in the meantime (concern of the mental health groups)? *What happens to the criminal charges?

289 CHAIR CLARK: So if you take out the phrase "or for five years, whichever is less," that sentence reads: "A defendant who remains committed under this section to the custody of the state mental hospital for a period of time equal to the maximum term of the sentence which could be imposed if defendant were convicted of the offense shall be discharged at the end of the period." *So a person can be committed up to the full length of time that they would have received had they been convicted, at which point they will be discharged. Then the case is brought back in front of the judge under the proposed amendments.

314 REP. MANNIX: Someone is already adjudicated as unfit to proceed. *Concerned that backing it up into the civil commitment statute will allow someone with a 5-year time limitation--someone who has committed murder--to not be covered by the system because of the shift.

339 CHAIR CLARK: HB 3417 is a similar bill. The Multnomah County DA's office added an amendment that eliminated the provisions to homicides and another which stipulated that after expiration the defendant shall be entitled to a hearing determining defendant's dangerousness; if found dangerous, the defendant shall be entitled to a hearing once a year thereafter until discharged.

348 PENN: There needs to be some kind of due process hearing once they're out beyond the five years. Suggesting amendments as a way to

continue to have due process hearings beyond the 5 years and to deal with issue that Rep. Mannix brought up. Wanted to leave the charge available and yet have hearings.

368 CHAIR CLARK: Asks if there is a problem with those concepts being added into the bill.

369 PENN: No.

377 BOB JEUNDEF, OREGON ADVOCACY CENTER: Comments on the 5 years. Recalls why there is a special section dealing with this population. *People who have come under it have not been convicted of any crime; the law now gives maximum sentence that they might be incarcerated if they were convicted as a holding period even though not convicted of a crime. *There were problems under case Jackson v. Indiana, where supreme court held the period of commitment. *Federal congress passed a law that sets up a system whereby a person is held for 4 months in order to make a determination as to whether it's likely that they would regain competency within a reasonable period of time; if person does not, they move into another commitment-type procedure where there is an evaluation of their dangerousness, mental illness, or incompetency and if so found, they move into a different commitment structure. *Different from civil commitment but does have mandatory review periods in it. *The ninth circuit recently ruled on that and found 2-1 in favor of it. *As long as there is a period of time which is arbitrary, like 5 years, or a maximum criminal sentence which has nothing to do with the purpose of commitment, which is to evaluate competency. *Would be better off reforming the entire statute to conform with the purpose of the aid and assist and then move to a different time.

TAPE 145, SIDE A

004 CHAIR CLARK: What would happen if you removed the mandatory dismissal of the charge provision and told the statute of limitations for the period of time that the person was committed. At whatever time the individual is released from commitment, the DAs can make a determination whether the person is able to assist in their own defense. If they are not, they enter the process again for "round two." Is that conceptually a better way to go?

014 JEUNDEF: In terms of Jackson, yes. The problems there have to do with perpetuation of evidence/timeliness of the charge. Also, there is the situation where you might have a person prepared for discharge on the basis that they don't need hospitalization any more--do they automatically get picked up on a warrant or do they exist in a "grey" area?

021 CHAIR CLARK: You'd have to have some notice to the DA so the person isn't running at that point. Asks Penn for opinion.

024 PENN: Has no problem with concept. Our purpose is to say these people are dangerous and shouldn't be dismissed without review. *Would only like the court's involvement before that release takes place.

034 DAVID FINDANQUE, ACLU: Believes 5-year limitation was there because there was the presumption that beyond 5 years, there would be a speedy trial problem and charges ought to be dismissed at that point. *Need to consider issue of dealing with people who have not been tried or convicted of the offense; that is the time line that needs to be looked at--how they would be treated had they been found guilty. Take lesser

of time lines to apply as a place where the court would review the dangerousness.

060 CHAIR CLARK: The bill may do that because of the language: "...For a period of time equal to the maximum term of the sentence which could be imposed..."

063 FINDANQUE: Understands that was adopted before the guidelines were and is concerned about the interpretation.

066 CHAIR CLARK: The judge would consider the statute to be constitutional in that way.

069 HOLLY ROBINSON: Respectfully disagrees. The way the guideline statutes and this statute is written, all offenses are classified as A, B, or C felonies or misdemeanors and have statutory determinant sentences even though at the point of sentencing they go into the grid. *For the purposes of this, it's the A, B and C felony or misdemeanor determinant statutory numbers that would be plugged in, not guidelines.

077 CHAIR CLARK: Could clarify it, one way or the other. *Main concerns--whatever is done, a judge is taking a look at the situation and the prosecution hasn't lost time under the statute of limitations for that period of time.

086 REP. MANNIX: This is not supposed to be a sanction we're imposing; it's supposed to be akin to a civil commitment but circumstances of commitment were different. *If a person was sentenced to maximum of 5 years for a crime but they're found incompetent. We're not supposed to be treating that holding as a sanction but as a time when they're receiving treatment and assistance. *But we still need time limits and there's no reason they shouldn't be within the time limits which might be imposed for the crime the person was charged with. *Can be achieved by Chair's proposal: (1) tolling while the person is deemed incompetent; (2) calling for court review on a regular basis after a certain time line. Regular basis would be 5 years or--if the maximum sentence was less than 5 years--the review would begin at whatever that point is. *With a judicial review process and the tolling of statute of limitations, we could put together a package that maintains the rights of the individual but also makes sure that the concerns of Mr. Penn are addressed. *We don't want someone who's dangerous and incompetent out on the streets.

118 CHAIR CLARK: Have no problem with that. Shares concern of Mr. Findanque that a person is committed to 5 years, because that's the maximum on the books, and yet that same individual-- if competent and convicted--gets 20 months. There's a constitutional problem. The person who has never been convicted is getting 2 1/2 times the sentence. Needs to be a provision. The language "which could be imposed" needs to refer to guidelines, or whatever system.

132 REP. MANNIX: The guidelines provide for no sentences; you may be reviewing people pretty soon.

135 PENN: The person is not in a punitive setting but in the treatment setting, as opposed to confinement. There is a rational basis for that commitment--the ability to aid and assist or the ability to be dangerous to other people, depending on what area you shift it into. *Complies constitutionally. It is a different framework and a different issue but they do have due process.

155 HOLLY ROBINSON: Isn't the statute of limitations in civil cases tolled during periods of incapacity?

158 PENN: Am not a civil case expert but the difficulty you face is if you expand it into other types of crimes--sex offenses or the lesser degrees of homicides--and we have the mandatory 6-year cap on statutes of limitation.

165 REP. MANNIX: Statute of limitations has to do with charges being filed. Wouldn't you already have charges filed here and then there's a determination of incompetence?

167 PENN: Yes.

168 REP. MANNIX: Clarifies that a provision can be made that those charges may be maintained so long as the person is deemed incompetent and so it does not have to be addressed in terms of tolling. What if we just delete "shall dismiss the charge" and word it so the defendant shall be discharged or cause the proceeding to be commenced under the civil commitment statute.

176 PENN: No problem with that. Just trying to deal with the issue of not coming up against a brick wall at five years.

179 REP. MANNIX: Could leave in the 5-year cap but take out the dismissal. Dangerous to others is still a civil commitment. *Won't have an automatic dismissal but you would issue commitment proceedings. *Is 5 years too generous?

191 JEUNDEF: It is a good solution for your purposes.

194 REP. MANNIX: So, leave in the 5 years and take out the language that says the court shall dismiss the charge, so there's no automatic dismissal but instead, after 5 years or the maximum term--whichever is less--the court shall order the defendant to be discharged or cause a civil commitment proceeding to be commenced.

200 CHAIR CLARK: Does maximum period of time mean maximum statutory or maximum guidelines?

202 REP. MANNIX: Could be 5 years statutorily. Don't expect that this will happen other than in personal crimes where there will already be some kind of decent amount of sentencing available under guidelines.

207 CHAIR CLARK: What happens during that 5 years? Is that person constantly being evaluated or just being warehoused?

211 JEUNDEF: After reviewing files of people who meet these criteria at Oregon State Hospital, I'd say "warehoused" is the term. There is no mandate for regular evaluation. It is a Ways and Means issue.

217 PENN: The Hospital, because of staffing crunches, wants most people out of there as soon as possible. Some cases go beyond 2 weeks, and that's what this bill deals with--usually cases of homicides or aggravated situations.

230 CHAIR CLARK: Then I would like the review to be at 3 years rather than at 5.

238 REP. MANNIX: Why not do a civil commitment at that point; they don't need to assist in their defense on a civil commitment.

240 JEUNDEF: Some of the people that fall under this law have mental retardation and brain damage; they're very unlikely to ever become competent. *Again, the purpose of the statute is to evaluate them to determine if they will regain competency.

247 MOTION, REP. MANNIX: Moves to amend HB 2451 to put in "or for 3 years, whichever is less" and delete requirement on line 6 of page 2 about the court dismissing the charge. So it would read, "Upon receipt of the notice, the court shall order the defendant to be discharged or cause a proceeding to be commenced forthwith under the civil commitment statutes."

263 No objection. Motion passes.

264 CHAIR CLARK: Asks if clarifying amendment needed to specify that statute of limitations get tolled during this period of time.

269 HOLLY ROBINSON: It is not a clarifying amendment. If committee wants to tack on additional time, they can. My impression was that in civil cases, statutes of limitations are tolled during periods of incapacity; I assumed that criminal charges were likewise tolled but they do not appear to be. If you put that into the bill, it is not a clarification but a policy decision.

277 REP. MANNIX: Raises the important issue of a worst case scenario: Someone deemed incompetent for a certain amount of time under another charge and then, after the 3 years have run, that person can get out of trial because this charge was pending and other charges couldn't be filed. *It's a pretty careful process to prove incompetence but I would be comfortable with a statutory provision.

301 FINDANQUE: It's more of a speedy trial issue than a statute of limitations issue. If the charges have already been filed, then there is no need to toll the statute of limitations; the issue would be whether or not the defendant's rights were prejudiced by the amount of time that had passed while being held for purposes of determining competency.

312 CHAIR CLARK: Because charges have already been filed.

313 FINDANQUE: Yes. Under current law, DAs know that if someone's being held because they're incompetent, there are other possible charges that could be filed. Nothing would preclude them from filing those charges.

317 PENN: Would endorse Rep. Mannix's and the Chair's concept. There are those situations. The speedy trial issue is one we'll have to deal with. You could assist by saying that the statute is tolled by a judicial determination of incompetence. 329 CHAIR CLARK: Statute on any offense which might have been prosecuted, arising out of the transaction.

330 REP. MANNIX: Or just on any offense. It parallels the civil statute. Any charge that might have been filed is tolled while the person is deemed incompetent; they're protected from criminal process while they're incompetent.

339 HOLLY ROBINSON: Sees problems with free-floating orders unless the

order of incompetence is attached to it.

351 REP. PARKS: Would not favor tolling the statutes indefinitely for charges not filed. Bill also provides that if the court is of the view that so much time has lapsed as a commitment, it would be unjust to continue to try the defendant and he has to be discharged.

367 CHAIR CLARK: Is that a concern that would cause you undue stress if adopted into the bill?

372 REP. PARKS: I'll go along with the consensus but I think it's real serious.

378 REP. MANNIX: Tolling of the statutes of limitations is a separate concept and not necessary to this bill but may require more discussion.

382 MOTION, REP. MANNIX: Moves HB 2451 as amended to the full committee, do pass.

389 VOTE: Motion

AYE: REP. BELL, REP. MANNIX, REP. PARKS, REP. SUNSERI, CHAIR CLARK NO:
EXCUSED: REP. BAUMAN, REP. EDMUNSON, REP. MASON

395 CHAIR CLARK: Chair to carry the bill. Adjourns at 4:25 p.m.

Transcribed by: Reviewed by:

Darcie Jackson

Office Manager

EXHIBIT LOG:

A - Summary on Proposed Amendments to HB 2451 - Staff - 2 pages

B -Neil Goldschmidt letter dated May 31, 1991 in favor of HB 3417 -
Submitted For the Record - 1 page