PUBLIC HEARING

HB 2692 - Relating to criminal homicide

010 DAVE FROHNMAYER, Attorney General, representing the Department of Justice, testified in favor of HB 2692. He explained that there were two related bills dealing with the problem of criminal responsibility or more broadly speaking, the insanity defense in criminal trials.

There has been growing concern in the psychiatric community and the public at large about what appears to be a misuse or overuse of the insanity defense in criminal trials. It appears that Oregon courts find criminal defendants not guilty by reason of insanity at a rate of approximately nine times that per capita of the State of New York which has the identical law. In absolute numbers, about as many people were found not guilty by reason of insanity in the period of the middle and late 70's in the State of Oregon as were found not guilty in the State of New York which is nine times more populated than Oregon.

He felt that the psychiatric community is in disarray about the appropriateness of the standard that is embodied in the law. In a real since it is not a medical term but rather a legal term that courts, defense council, prosecutors and expert witnesses have a great deal of difficulty achieving any agreement on. It is because of that concern that HB 2692 and HB 2693 was introduced.

HB 2693 - Relating to criminal responsibility

066 CHAIRPERSON MASON stated that he didn't quite understand the gest of HB 2693.

068 DAVE FROHNMAYER stated that one of the problems with HB 2693 is that the bill was not correctly printed. The bill as printed doesn't do anything but change gender. He submitted a corrected version of the bill (Exhibit C, HB 2693). He explained the amendments.

095 REP. RUTHERFORD asked how many insanity defenses have been sucessful in Oregon.

099 MR. FROHNMAYER thought that the figure for 1979 was in excess of 200. That is a figure that needs further exploration because it may be that some of those not guilty by reason of insanity judgments were by stipulation rather than by jury or court finding. If you ask the psychiatrists in the state of Oregon how they feel they will tell you that anywhere from 25% to 40% of those admissions were inappropriate.

148 BYRON CHATFIELD, Department of Justice, made reference to the term "substantial" in the amendments presented. He felt it was important to recognize that in saying exactly what substantial is, you are

069 CHAIRPERSON MASON asked Mr. Nissman to explain the McNaughton test and why it was changed.

071 MR. NISSMAN explained that McNaughton was a case that occured in the 1830's in England. The law that came out of that was that every man was presumed sane until the contrary was proven to the courts satisfaction. Originally the defense was created as an affirmative defense in English law. To establish a defense on the grounds of insanity it must be clearly proven that at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature or quality of the act he was doing or, if he did know it he did not know what he was doing was wrong.

The problem with that test is that psychiatrist do not like dealing with it on those cold legal terms. They felt that they wanted to expand it and deal with behavioral problems.

111 STEVE GRIFFITH asked Mr. Nissman to explain to the subcommittee why a prison disposition is the proper thing to do.

138 MR. NISSMAN stated the very basis of the criminal law is that a person should be held accountable and responsible for their actions. When you change this statute it doesn't necessarily mean that everybody is going to go to prison. It means that they will be convicted to a crime and they will be under the supervision of the criminal law. The key to the bill is holding these people accountable for their actions.

MR. GRIFFITH AND MR. NISSMAN discussed the Nicholas case and what should have happened with that case.

168 REP. RUTHERFORD asked, if the bill passed, if the judge would have the right to send these people to the state mental institution.

172 MR. NISSMAN replied that they would not have the right to send them to the mental institution, but they could be required to go to another type of facility.

<u>HB 2692 - Relating to criminal homocide</u>

191 BRIAN BARNES, Lane County District Attorneys office, felt that it should be recognized that all the bill is doing is changing the burden of proof. It will change it to the exact same burden of proof that the defendant now has with the insanity defense. The change would be that this provision would cause the jury to decide the question of extreme emotional disturbance only if the defense puts forth some evidence of it. It is a provision that is only applicable to a murder prosecution and it is a mitigation to reduce it to manslaughter.

The law presently allows the defendant to put on a whole history of a relationship of another person other than the person he kills.He puts on a miniture mental disease and defect defense, but strictly related to an emotional condition. The psychiatrist has to decide whether the defendant acted under an emotional disturbance.

He told the committee about a case that he handled relating to this subject. He stated that New York did the same thing as Oregon with the present statutes. New York did the same thing in 1964 and in 1965 they came back to the legislature and changed it to put the burden of proof on the defendant. That case went up to the U.S. Supreme Court in Patterson vs New York and that procedure has been upheld against the due process challenge.

396 REP. COURTNEY and MR. BARNES discussed the differences between insanity and extreme emotional disturbance.

TAPE 350
SIDE B

015 MIKE SCHRUNK, District Attorney, Multnomah County, spoke in favor of HB 2693. He reinforced what Mr. Barnes said about extreme emotional disturbance. He didn't see any problem with shifting to the defendant. Within the framework of the constitutional law we can make an affirmative offense and require its proof by a preponderance.

Frequently, all of the offenses are raised in a package and the jurors are presented with a package of mental disease and extreme emotional disturbance. They find this comes up in the more serious cases.

In Multnomah County they try a large number of felony cases in the state. In 1978 total jury not responsible or not guilty by reason of insanity verdicts were 3; by the court, 17. The bulk of those were substantially heavy felonies. In 1979 the jury verdicts were 6 not responsible; court verdicts 32. One percent of the felony case load were found not responsible. In 1980, jury verdicts were 12 and court findings were 26.

When this defense is raised, they are presented with a psychiatric report from mental health professionals and under the two-pronged test, they frequently find themselfs in the situation where all the mental health officials agree that the defendant is under either one or the other of the prongs of the mental disease defense. What they have been doing is getting put into the situation of a stipulated trial and the results usually end up with the person coming under one of the prongs of mental disease.

086 REP. RUTHERFORD asked if that was consistantly 1% of the case load.

087 MR. SCHURNK replied that in 1980 it was exactly 1% of the felony case load and it came out a little under 1% in 1979 and it was .6% in 1978.

When there is a waiver of jury trial and there is no mental health professional who will say that the defendant is responsible they hire independant psychiatrists and spend $17,000 to $20,000 a year out of the budget for professional witness fees. On occasion they hire, on a consulting basis, the state hospital mental health.

120 Regarding deletion of the word substantial, he felt the word was just used to argue. It protects the truly sick person. You can agrue about improper and proper dispositions. There are good agrugments to abolish this as a defense in looking at it for disposition only. He suspected that in the future, that would be presented to the legislature.

167 MR. SCHRUNK felt that adequate protections are being provided with HB 2693. By putting in the two prongs of the statute you give a lot of room to an area that is not an exact science.

198 PAUL J. DEMUNIZ, Oregon Trial Lawyers Association, spoke in opposition to HB 2692. He felt that HB 2692 would be found unconstitutional by the appelate courts.

214 REP. RUTHERFORD stated that one of the other witnesses stated that this identical law had been upheld as being constitutional in New York.

216 MR. DEMUNIZ replied that was untrue. He pointed out ORS 163.115 1(a), and stated that the analysis that the court will have to place on this is to determine what the elements of murder are. To do that they would look at the definition in ORS 163.115 which defines the word intent as "committed intentionally by a person who is not under the influence of an extreme emotional disturbance". Under this statute the state would still have the burden of proving that the person does not come under an extreme emotional disturbance.

233 CHAIRPERSON MASON felt that could be deleted.

237 MR. DEMUNIZ felt it could be deleted and that if it was deleted it would come close to the statute that was approved in Patterson vs New York. Under the present scheme, it would be creating nothing but difficulties.

While extreme emotional distrubance is not codified as an affirmative defense in Oregon,a homocide trial in Oregon is conducted just exactly as if it was an affirmative defense. Never is a defense motion at the conclusion of the states case granted. He didn't feel there was anything wrong with the present system.

HB 2692 - Relating to criminal homocide

272 MR. DEMUNIZ, regarding the deletion of the word substantial, felt that one of the factors that emerged from the comments from the prosecutors is that they would like everyone to believe that each individual is the same. He submitted to the committee that the word substantial helps juries and judges to recognize that each person is an individual.

He didn't think that by deleting the word substantial it would change any difficulties that the psychiatrists have. He felt that the system is working propertly and it should be retained.

319 REP. RUTHERFORD asked Mr. Demuniz what his reaction was towards the idea that the defense be abolished and that it be treated in a dispositional phase.

321 MR. DEMUNIZ didn't feel that would be such a difficult system to work under. He felt it was possible that it would save court time and money.

334 REP. COURTNEY asked Mr. Demuniz if he had any problem with extreme emotional disturbance.

338 MR. DEMUNIZ replied that the use of the mitigation device of extreme emotional disturbance, even though the scholars say there is no longer the heat of passion idea, anyone who practices in this area would say that is exactly what it is.

Extreme means farthest out. To the outer most point. He felt that the word was a good tool to channel juries thinking.

HB 2656 - Relating to certain records

388 DR. ROBERT LARSEN, Peer Review for the Oregon Dental Association, spoke in favor of HB 2656 (Exhibit A, HB 2656).

TAPE 351
SIDE B

008 NAN DEWEY, Oregon Dental Association, spoke in favor of HB 2656 (Exhibit B, HB 2656).

020 REP. SPRINGER asked if the Peer Review Board had powers or authority.

023 DR. LARSEN replied that they act as an arm of the Oregon Dental Association. The members of the Oregon Dental Association who are coming under Peer Review have to abide by the decisions of the Peer Review as a commitment to being a member to the Oregon Dental Association. It is not a statutory function that they are serving.

HB 2692 - Relating to criminal homicide

252 JAMES A. SANDERSON, representing the Department of Justice, spoke in favor of HB 2692 and submitted proposed amendments (Exhibit A, HB 2692). The amendments were pulled out from the appropriate language of the New York statute to accomplish making extreme emotional disturbance an affirmative defense.

In answer to REP. COHEN'S question of why he felt the bill was needed, he stated that extreme emotional disturbance is the subjective emotional defense that always goes to the subjective state of mind of the defendant at the time the crime was committed. The person who is in the best position to know what his subjective state of mind is, is the defendant. In a rule in this state called Shepard vs. Bow, you cannot compel the defendant to talk to you about what his state of mind was at the time of the crime. The state has to disprove beyond a reasonable doubt a negative proposition.

344 JOHN HINGSON, Oregon Trial Lawyers Association, spoke in opposition to HB 2692. He felt that the prosecution has been handling the distinction of what was going on in the defendants head for many years.

354 MARK CROSS, Metropolitan Public Defender and the American Civil Liberties Union, stated that the language that is presently in the statute on extreme emotional disturbance is based on the Model Penal Code language. It is an expansion of the traditional heat of passion defense which has been available to defendants throughout this country. This expansion is a recognition of the way that the human mind works with stress. This defense is not a stranger to stranger situations. It is not available to a person committing rape who kills because the victim does not go along with his wishes.

He felt that this statute has a place as it is presently written. For example, deterence does not fit these situation because a person acting under extreme emotional disturbance is not, by definition, thinking clearly legally or personally. As far as retribution is concerned, our constitution, Article 1, Section 15, states that the law should be based on reformation so retribution should not be a factor in the criminal justice system. As far as protection of society is concerned, these people are the least likely to repeat their crimes.

He didn't feel this statute placed an undue burden on the State. As the Supreme Court of the U.S. stated in Malany vs. Wilbur, it is not unusual in the criminal justice system to place the burden of proof on the state to disprove a negative.

TAPE 384
SIDE B

Because of the notice requirements the state does have ample notice of the type of defense that is going to be used and the types of testimony that will be brought forth in order to bring forward that defense.

By changing the burden of proof, he felt it was complicating the jury instruction situation tremendously and the roll of the jury tremendously.

044 MOTION: REP. LOMBARD moved the amendments presented by Mr. Sanderson (Exhibit A, HB 2692).

054 REP. COHEN stated that she objected.

053 Voting Aye: Rep. Courtney, Rep. Lombard and Rep. Rutherford. Voting Nay: Rep. Mason and Rep. Cohen. Excused: Rep. Springer. The motion was adopted.

058 MOTION: REP. LOMBARD moved HB 2692 to the full committee with a do pass recommendation as amended.

062 Voting Aye: Rep. Courtney, Rep. Lombard and Rep. Rutherford. Voting Nay: Rep. Mason and Rep. Cohen. Excused: Rep. Springer. The motion passed.

HB 2693 - Relating to criminal responsibility

094 REP. RUTHERFORD summarized the testimony of the last hearing.

116 GEORGE SUCKOW, representing the Mental Health Division, spoke in favor of HB 2693 and submitted a statement from J. H. Treleaven (Exhibit A, HB 2693). The Division supports the bill primarily because they believe it will cut down the number of inappropriate admissions to the State Hospital. He was talking about the individual who should have been committed because of a mental illness and had stemmed as a result of committing a minor offense. He clarified himself by saying he was talking about the individual who should have gone through the civil commitment process who ends up coming through the NGI process. These individuals are not that dangerous to the public at large.

143 REP. COHEN felt it was a long hard way to go to change the law just to get rid of a few people who are coming in who should be civilly committed and are committed through NGI because they have done some shoplifting.

152 MR. SUCKOW stated that he disputed the mechanism from which they come because it is costly and it keeps them in the hospital far longer than they should have been.

The motion carried 5 - 2 with Rep. Bugas, Courtney, Hendriksen, Smith and Mason voting aye and Rep. Lombard and Rutherford voting nay. Rep. Cohen and Springer were excused.

112 ALLISON SMITH, District Attorneys Association, testified that the Association had no position on this bill, however, he wondered if this would take away arrest powers.

115 Discussion followed between committee members, Mr. Cutter and Mr. Smith.

146 MOTION: REP. BUGAS moved HB 2380, as amended, to the floor with a "do pass" recommendation.

171 The motion carried 5 - 2 with Rep. Bugas, Hendriksen, Smith, Rutherford and Mason voting aye and Rep. Courtney and Lombard voting nay. Rep. Cohen and Springer were excused. Rep. Bugas volunteered to carry the bill on the floor.

HB 2061

189 CHAIRPERSON MASON reviewed the bill and the work done and noted the City of Portland would like the original language returned and an effective date of January 1, 1982, be established.

194 MOTION: CHAIRPERSON MASON moved that the original language be restored to HB 2061, and an effective date of January 1, 1982, be added.

There being no objection, the motion was adopted.

199 MOTION: REP. BUGAS moved HB 2061, as amended, to the floor with a "do pass" recommendation.

The motion carried 5 - 2 with Rep. Bugas, Courtney, Hendriksen, Smith and Mason voting aye and Rep. Lombard and Rutherford voting nay. Rep. Cohen and Springer were excused. Rep. Hendriksen volunteered to carry the bill on the floor.

HB 2692

215 CHAIRPERSON MASON reviewed bill and work done.

222 MR. GRIFFITH reviewed the amendments.

250 CHAIRPERSON MASON set the bill over temporarily.

249 MOTION: REP. SMITH moved HB 3199 to the floor with a "do pass" recommendation.

The motion carried 5 - 2 with Rep. Bugas, Courtney, Lombard, Smith and Rutherford voting aye and Rep. Hendriksen and Mason voting nay. Rep. Cohen and Springer were excused.

HB 3155

284 LINDA ZUCKERMAN, Committee Counsel, reviewed the bill and the work done.

319 Discussion followed.

327 MOTION: REP. HENDRIKSEN moved amendment on line 23, the penalty provision which reads "vehicular trespass is a Class C misdeamnor" be changed to read "vehicular trespass is a violation with a fine of $250."

The motion failed 2 - 5 with Rep. Hendriksen and Mason voting aye and Rep. Bugas, Courtney, Lombard, Smith and Rutherford voting nay. Rep. Cohen and Springer were excused.

397 MOTION: REP. BUGAS moved HB 3155, as amended, to the floor with a "do pass" recommendation.

422 ED BARTON, Boise Cascade Corporation, entered discussion.

435 The motion carried 6 - 2 with Rep. Bugas, Courtney, Lombard, Smith, Rutherford and Mason voting aye and Rep. Cohen and Hendriksen voting nay. Rep. Springer was excused. Rep. Rutherford volunteered to carry the bill on the floor.

HB 2692

449 CHAIRPERSON MASON reviewed the bill.

456 REP. RUTHERFORD summarized the work done.

TAPE H-81-JUD-398, SIDE B

030 MOTION: REP. RUTHERFORD moved HB 2692, as amended, to the floor with a "do pass" recommendation.

The motion carried 5 - 3 with Rep. Bugas, Courtney, Lombard, Smith and Rutherford voting aye and Rep. Cohen, Hendriksen and Mason voting nay. Rep. Springer was excused. Rep. Courtney volunteered to carry the bill on the floor.

HB 2711

047 REP. COURTNEY reviewed the bill and the work done.

057 MR. GRIFFITH presented an amendment to the previous amendments already passed in subcommittee (Exhibit F, HB 2711).

House Committee on Judiciary
Exhibit A, HB 2692
May 14, 1981 - 1:50 pm
1 Page Exhibit
Presented By: Mr. Sanderson

Proposed amendments to HB 2692, by Oregon District Attorneys Association.

Page 1 of the printed bill, at line 6, after "intentionally" delete the rest of the line and insert; "except that it is an affirmative defense that, at the time of the homicide, the defendant was under the influence of an extreme emotional disturbance."

Delete line 7.

At line 21, after the first period, delete the rest of the line and insert, "Extreme emotional disturbance shall not constitute a defense to a prosecution for, or preclude a conviction of, manslaughter in the first degree or any other crime."

On page 2, after line 8, insert "Section 2. ORS 163.118 is amended to read:

"163.118. Manslaughter in the first degree. (1) Criminal homicide constitutes manslaughter in the first degree when:

"(a) It is committed recklessly under circumstances manifesting extreme indifference to the value of human life; or

"(b) It is committed intentionally under circumstances [not constituting murder.] which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (2) of ORS 163.115. The fact that homicide was committed under the influence of extreme emotinal disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution.

"(2) Manslaughter in the first degree is a Class A felony."

House Committee on Judiciary
Exhibit B, HB 2692
May 14, 1981 - 1:50 pm
1 Page Exhibit
Presented By: Staff

CIRCUIT COURT OF OREGON
FOURTH JUDICIAL DISTRICT
MULTNOMAH COUNTY COURTHOUSE
1021 S.W. 4TH AVENUE
PORTLAND, OREGON 97204

JOHN C. BEATTY, JR., JUDGE
Department No. 5
Circuit Court of Oregon
Fourth Judicial District

512 Multnomah County Courthouse
1021 S.W. Fourth Avenue
Portland, Oregon 97204
248-3187

May 5, 1981

M E M O R A N D U M

TO: House Committee on the Judiciary

RE: HB 2692 - Making extreme emotional disturbance an affirmative defense to homicide.

By way of comment, I report to the Committee that the Conference Legislative Committee has no objection to the above measure which appears to be logical and consistent with the structure of the Criminal Code.

Respectfully submitted,

John C. Beatty, Jr., Chairman
Legislative Committee
Judicial Conference

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GARY said many cases were submitted on the briefs, it wasn't necessary for there to be oral argument on the case.

TAPE 310B

025 <u>HOUSE BILL 2692 - Relating to criminal homicide</u>

028 BRYAN CHATFIELD, Attorney General's Office, said this bill made extreme emotional disturbances an affirmative defense as it related to murder itself. In effect, extreme emotional disturbance was a mitigating factor when the state proved that the person intentionally killed a victim.

050 WYERS asked Mr.Chatfield if he had investigated, in depth, the case law in Oregon and then asked Mr. Chatfield what would happen to the case law if a period was put after intentionally on line 6. That would take the affirmative defense of extreme emotional disturbance out. WYERS clarified there would be a separate crime of manslaughter after that.

General discussion by Mr. Chatfield and members on case law and extreme emotional disturbances.

130 GARDNER questioned why extreme emotional disturbance be a mitigating factor and if it was intentional, why should it reduce it from murder to manslaughter.

1(WYERS asked if this was the kind of defense where there had been a very violent domestic relationship, one spouse beating another, and finally one day, not in a self-defense situation, one spouse killed the other spouse,

CHATFIELD that was a typical example, but that was not the only place it was raised. He said it was raised in the Ulrich homicide prosecution down on the coast.

164 GARDNER asked what would be the arguments against the more radical approach of abrocating it all together as a defense.

CHATFIELD and GARDNER discussed that approach.

200 GARDNER asked if this defense could have been raised in the Samples case.

236 MARC CROSS, representing Metropolitan Public Defender, ACLU, said they were opposed to the amended language and to HB 2692. They felt the present state of law was appropriate for Oregon and an enlightened law. The present extreme emotional disturbance language in the present statute was based on the model penal code language.

GARDNER asked what Mr.Cross's position would be if they abrocated the defense entirely.

CROSS stated he would be very opposed to that.

CROSS, CHATFIELD and members discussed cited cases in this area, policy issues, defense of emotional disturbance.

Page 8

CROSS spoke to the fiscal aspect, saying if they were incarcerating people who would not be a future threat to society, it was a tremendous fiscal impact on the state. He said the lowest recidivism rate was for those people involved in extreme emotional disturbances.

456 MOTION: CHAIR moved that a period be inserted after "intentionally" on line 6 and make the appropriate change on page two to coincide with it.

TAPE 311A

035 WYERS asked if the Attorney General's Office could support that amendment. There was an affirmative answer.

90 JERRY COOPER pointed out the charges that would be applied in different situations.

100 WYERS said an added part of his motion was to delete subsection (2) of section one.

104 COOPER explained that HB 3262, aggravated murder, incorporated basically the same language and the same approach as in HB 2692.

142 ROLL CALL VOTE on Motion by Chairperson Wyers. Aye - Senator Wyers. No - Senators Brown, Fadeley, Gardner, Jernstedt, Kulongoski. Excused - Senator Smith. MOTION FAILED.

170 HOUSE BILL 3127 - Relating to damages

171 WYERS explained this bill was originally at the request of Portland Chamber of Commerce and prohibited punitive damages, but had been changed since.

197 KRISTENA LAMAR, Legal Counsel, said there had been testimony in the House Committee that present law would allow an insurance company or reliable party to delay a case.

GARDNER clarified that the bill as it passed the House deleted the $25,000 limitation in wrongful death for the damages which were heard before the death, and deleted the categories. He asked who had proposed the amendments.

242 MOTION: SENATOR GARDNER moved HB 3127 to the Senate Floor with a do pass recommendation. Also included in that motion was a directive for Counsel to contact Portland Chamber of Commerce to see if they wanted to be removed as requestors of the bill.

264 PAUL SNIDER, AOC, stated he had no interest in the bill, but had been present when the amendments were proposed by Rep. Rutherford.

282 WYERS stated that as a trial lawyer, he did have a conflict.

ROLL CALL VOTE: Aye - Senators Brown, Fadeley, Gardner, Kulongoski, Wyers. No - Senator Jernstedt. Excused: Senator Smith. MOTION CARRIED.

2[illegible] HOUSE BILL 3180 - Relating to security release