TESTIMONY OPPOSING **HB 2263**, Given By

Judge William C. Snouffer

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Mr. Chairman, Members of the Committee: Thank you for spending some additional time on HB 2263 and giving me the opportunity to testify. I am a Circuit Judge from Multnomah County. After the 1973 Criminal Procedure Code was adopted by this legislature -- and it included significant bail reforms -- I wrote a detailed study of the legislation, its history and its intent. [The article is printed in 53 Oregon Law Rev. 273 (1974).] I am here this afternoon speaking as an individual, and I hope I can shed some light on this Bill and its significance.

The philosopher George Santayana, in his book The Life of Reason, included a famous aphorism with which you are all familiar: "Those who cannot remember the past are condemned to repeat it."

HB 2263 seeks to revive the corrupt bailbond system and inject it back into Oregon criminal law. The Bill should be resisted strenuously by all who care about the quality of our criminal justice system.

HB 2263 is identical to SB 856 introduced in the 1987 Session. SB 856 was defeated. Nothing has happened in the past two years that justifies adopting this Bill now.

HB 2263 has probably been pitched to you as an added tool that will help the criminal justice system and reduce the problem of FTA's -- Failures to Appear in Court. You probably got a nice soft sell that the present system is not working well and this Bill will help. You may have been told that, by adding some private enterprise to the system, the public will save money. But beware

of the soft sell. Bailbondsmen [please excuse the male pronoun, I mean no offense], bondsmen are a cancer on the body of criminal justice -- they cannot and do not help improve it. And they will not save money for the system -- they will make it more costly to the public as a group and to citizens individually.

Let me talk first about the cancerous aspect of the bail bond system, and then talk about some of the financial aspects.

If you were not practicing law or involved in the criminal justice field before 1973 -- in other words, if you're not an old fogie like me, which you aren't -- you probably don't recall the sleazy and corrupt side of the bail bond business. You don't remember how they corrupted police, lawyers and even judges.

The essence of the bail bond practice is to get a person out of custody who posts a bond that the person buys from the bondsman. To get the good risks and "the cream of the crop" -- that is, those who are most likely to reappear in court --bondsmen have to get there first, before another bondsman or a court release officer. They have to get that contract signed and the money paid before the prisoner is released from custody on some other form or release. In order to do that, the prisoner has to know about and call the bondsman. How does the prisoner know the name of a bondsman? He gets it from the cop who arrested him. How does the cop make the referral? He has business cards given to him by the bondsman in exchange for drinks after work, tickets to a ball game, dinner, a weekend at a beach cottage, and so on. If you want your Oregon police behaving like that then go ahead and reinstate the bondsman system.

Other aspects of the sleaze in the bailbond business are the free bottles of booze that appear at Christmas on the desks of

young district attorneys who work at the intake and arraignment levels of the system. The same goes for judges who find free tickets to ball games on their desks and "Christmas cheer" in their offices, and free dinners at their favorite restaurants. Frankly, we just don't need that kind of additional sleaze back in Oregon. (I hope nobody takes this criticism personally; I'm not referring to anyone presently supporting this Bill; I'm just pointing out that it worked this way in the past and can do so in the future.)

One might say, well that's not fair criticism -- this Bill will require bondsmen to be regulated by the Dept. of Insurance and Finance. I say nonsense. That's just a soft, fuzzy sop thrown into the Bill to try to make it more acceptable. Where's the money to finance that aspect of the Bill? Where is the appropriation? How much will it cost to add an unknown number of regulators to the Dept?

And isn't there some curious language in the Bill on this point? As it is presently written it says only that the insurance company that issues the bond is to be regulated --it says nothing about the agents, the bondsmen. Who is going to regulate them? Where is there a provision that establishes licensing and testing for these agents? Where is there in the Bill a provision for disciplinary review? Where does the Bill say anything about a Code of Ethics? Where is there a requirement of public accountability and reporting?

The reality is that there will be no controls over bondsmen. If you were to add the kind of controls and regulations that I refer to, in order to insure against corruption, you won't find a lot of eagerness from the industry to support the Bill.

Let me turn next to some of the dollar items involved here. I've already pointed out that no additional funds are provided for Insurance Division regulation. That provision is a sham.

Look next at diminished revenue to the State that this Bill will cause. Under our existing system, if a person posts money with the court, 15% of it is retained by the public as a service fee. All of that revenue will disappear for those who are taken out of custody by a bondsman. Under the existing system, money deposited with the court to secure release can be applied after sentencing to pay for fines and court appointed attorney fees. It may surprise you that the present pretrial release system actually does return some money to the Indigent Defense Fund. All of that revenue will be lost for those who are taken out by bondsmen.

There are "soft" costs to the public that are hard to measure, but they will be increased if the Bill is adopted. These are the time and logistic costs to all the police and sheriffs in the state. They will be required to make prisoners accessible to bondsmen -- corrections people will have to move people around in jail, will have to schedule interviews, will have to transport prisoners, and space will have to be provided where interviews can take place. It may be that in some counties space is already available; but the manpowers costs of time and scheduling are there regardless. There is another financial aspect that should be touched on. That is the remission of forfeitures. When a defendant FTA's, the money deposited is forfeited and the state gets a judgment for the full amount of the bail. In our present system, about all we ever get is the 10% that was first deposited. Under the bondsman system, there would be a judgment for the full amount against an insurance company that presumably could pay it if

the judgment stood. On that point, it probably has been pitched to you that this Bill would generate revenue to the State.

But that is utter nonsense. Why? Because forfeitures are remitted. When the bondsman "finds his man," and returns a defendant to custody, he goes to the local judge and asks for his money back. Because he and the judge are buddies, the money gets paid back. And the public looses all of the "soft" costs of delayed hearings and rescheduled trials. Notice that this Bill [Sec. 6, p. 4, line 11] extends the forfeiture judgment time for 30 to 180 days, which gives the bondsman 6 months to locate the defendant before a judgment can even be entered against the bond. Why is that done? Because most people who miss their court dates are found again by the police (not the bondsmen) within that time. So if the police rearrest the FTA, and he is back in custody, no judgment is entered against the bond, and the public has to eat the expenses of disruption of court and corrections schedules and the costs of the rearrest process. But even if the FTA is not back in custody within 6 months, and a judgment is entered, the bondsman can go to his pal, the local judge, tell a sad story of woe about how difficult and expensive is was to find the FTA, and get some if not all of the bond money back.

I should hasten to add the Oregon has a fine judiciary; they are not corrupt. What I am pointing out is the prime opportunity for abuse that exists under the Bill. And where there is opportunity, someone eventually will cave in to the pressure. It has happened in the past; it will happen again.

I'd like to cover one other area before closing, and that has to do with Lane County. That county is one of the most beautiful in the State; it has a wonderful major city and lots of nice towns,

great scenery, beautiful rivers. It's a wonderful place to live and I love Lane County. But I've never been able to comprehend why Lane County loves bondsmen. They resisted the changes in 1973; and now they are flaunting a study saying the bondsmen should return.

That study was published in a recent issue of the Oregon Law Review [vol. 66, p. 661 (1988)]. After massaging some very elementary statistics the author concludes that bondsmen might add something to the criminal justice system. It would be easy to dismiss a study financed by a bailbond company with the quip that that is like the Cigarette Institute publishing its own studies to show that cigarettes do not cause cancer.

But on its merits the study is too simple and doesn't really analyze the problem fully. I'm no statistician so I can't debate the proper methodology for such a study. What I do know is that the study does not take into account a lot of variables, such as demographic and personality criteria, which have a substantial impact on FTA's. And there are no controls for the types or kinds of criminal charges and no correlations between those and the FTA's. Finally I'm sure it is statistically invalid to compare these figures to the few figures available from 1973.

But let's take the report at face value anyway. There is no question that we have a serious FTA problem in Oregon. FTA rates are too high. But it does not follow that the FTA rate is caused by the 1973 release system. In fact, you can read the statistics in the report to stay that those who are released on recognizance or conditional release have a significantly higher return to court rate than those released on a money deposit. That was one of the main goals of the 1973 reform, so maybe the reform has worked.

But the FTA rate is caused by too little jail space for the numbers of people we are dealing with, and the federal court caps that have been placed on jail populations. We are required to release from custody those whom nobody (not even bondsmen) would take out. Then when they fail to appear, as they will, another FTA statistic is generated. Some where there is the proper ratio of jail bed space to the FTA rate; I know that in Multnomah County, now that we have some new, added jail space, more people are making their court dates on time and the FTA rate is dropping. So it doesn't follow that our bad FTA rates are caused by the 1973 bail reform.

Nor does it follow that bondsmen will improve the FTA situation. I think it would be just the reverse. The reason for that is that bondsmen work very hard to get "the cream of the crop." They want to take out the very best prisoners, those who are most likely to reappear. (These are the prisoners who should be released on recog or conditional release to a third party.) If the most reliable persons are out on bail bond, then the rest of the prisoners must be combed through by the release officers to find the next level of reliability, who are recogged. After that you get the unreliable ones who are most likely to FTA. But the bondsmen won't touch these folks -- they won't release them. They won't take them out of jail and reduce population problems. Instead, those folks have to be kicked out by the sheriff, given a recog release and a new court date and a guaranteed FTA. So it should be clear that bondsmen will not add anything to the system and will not help to reduce population problems in jails, because they will be taking out of custody only those who would have been recogged anyway.

Bondsmen may be presenting themselves to you as altruistic and willing to help the system. I suggest they are in it to make money, and that's all. If they are really benevolent and have a public service desire to help the public with its jail population problems, then I have a proposed amendment to test that. Simply amend the statutes to say that bondsmen cannot interview or release anyone from custody until after the release assistance officers and courts have released people on recog or conditional release. In other words, limit their customers to those who must rely on money or property to secure their release. My guess is they would want no part of that because their risks would be too great and they would loose money. Make no mistake, money is the driving force of this legislation; not public service altruism.

One final aspect of this business, and then I'm done. I want to touch on what I call the Canadian Mounties' image that bondsmen like to perpetuate. They like to have people think that "we always get our man." In other words, if a defendant leaves the jurisdiction, we'll travel to the ends of the earth and bring them back. That's horse puckey, and you should recognize it as such. For every story about a bondsmen who tracks someone down across country, there's another story like the one in the case of MaCaleb v. Peerless Ins. Co., 250 F.Supp. 512 (D. Neb. 1965): Defendant left Nebraska and went to California; the bondsmen chased him there, arrested him, seized his car, and then they drove around California for 4 days, with the Defendant in shackles around his waist and wrists; when they got back to Nebraska, the bondsman forced defendant to sell his car to the bondsman; only then did he surrender defendant back into the local jail. [Other similar cases are collected in an article in 25 Washburn Law J. 437 (1986).]

The "Mounties'" image is a myth. The reality is that most FTA's who have skipped are rearrested by public officials -- the police. Police agencies then arrange the return of prisoners through extradition. Many states have extradition compacts that facilitate exchange of each others' prisoners at economical -- but public -- expense. If it is cheaper to use the public system, bondsmen let it work. Then, as I said earlier, after the prisoner is back in custody, they go to the judge and try to get their money back. Judges often will do that, keeping however the extradition expenses the public has incurred. So the reality is that it is the public system that gets FTA's back into custody for court appearance purposes.

In closing, this Bill will do nothing to improve the workings of our criminal justice system. Instead, it injects risks of undermining the system: (1) by eliminating revenues the system now generates; (2) by adding costs the system does not now spend; (3) by failing to have any substantial impact on jail populations; (4) by failing to reduce FTA rates; and (5) by adding a significant potential for corruption to our police and criminal justice system participants. We don't need that.

My final word is this quote: "The most intensive study and the deepest reflection on the role of the bondsmen fail to disclose any meaningful service which these aggressive businessmen render to the administration of criminal justice." Kamin, Bail Administration in Illinois, 53 Ill. Bar J. 674, 680 (1965).