Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 12, 2015

The Honorable Floyd Prozanski, Chair
The Honorable Jeff Kruse, Vice-Chair
Senate Judiciary Committee, Members

RE: Senate Bill 391-1

Dear Chair Prozanski and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in support of Senate Bill 391-1.

1. Senate Bill 391-1 prohibits law enforcement agencies from seizing money that is deposited, or attempted to be deposited, with a jail administrator in order to obtain release of someone in custody, unless the law enforcement agency first secures a court order authorizing them to do so. This is necessary because seizures without court orders have occurred around the state.

2. Senate Bill 391-1 also allows a person posting bail to do so with the clerk of the court rather than through the jail administrator. This is necessary in order to allow a person to avoid use of a private enterprise kiosk that charges a percentage fee, over-and-above the bail amount.

Problem: Law enforcement seizure of bail money without judicial oversight

3. The right to bail is a protected civil liberty under both the Eighth Amendment of the US Constitution and Article I Section 14 of the Oregon's Constitution. The setting of the bail amount and the posting of bail is a function of the Judicial Department. ORS 135.230 *et seq.* Specifically, ORS 135.270 provides that a person may post bail with either the clerk of the court, or the court's designee. If a designee receives the bail, the designee "shall" deposit the security with the clerk of the court "within a reasonable time" after receiving the bail.

> **ORS 135.270 Taking of security.** When a security amount has been set by a magistrate for a particular offense or for a defendant's release, any person designated by the magistrate may take the security and release the defendant to appear in accordance with the conditions of the release agreement. The person designated by the magistrate shall give a receipt to the defendant for the security so taken and within a reasonable time deposit the security with the clerk of the court having jurisdiction of the offense.

4. Across Oregon, many county courts have designated the jail administrator as its designee for receiving bail security. Initially, this was viewed as a convenience, as the jail may be distant from the courthouse and the person posting the bail would need to travel to only one location to complete the transaction.

5. The problem arises in that law enforcement agencies will internally "flag" certain cases for special attention by the jail administrator if a person arrives at the jail with the intent of depositing or attempting to deposit bail money. In so "flagging" the case, law enforcement officers interrupt the bail transaction, interrogate the individual attempting to post the bail as to the source of funds and their associations with the inmate, and seize the money. This seizure occurs outside the knowledge or oversight of the court.

6. Parenthetically, this phenomenon only occurs in states which operate without bail bondsmen. (There are four: Oregon, Wisconsin, Illinois and Kentucky.) In states with bail bondsmen, the bondsmen complete the bail transaction outside the observation of law enforcement.

Problem: Transfer of seized money to federal government in contravention of current state law

7. Additionally, often the law enforcement agency will not hold onto the bail money but rather will simply transfer the money to the federal government under the federal Equitable Sharing Program. 21 U.S.C. §881. The motivations for doing so are legion. Under the federal Equitable Sharing Program, the federal government will do the work of initiating forfeiture proceedings; it can forfeit the money with a lower burden of proof than is required under Oregon forfeiture law; and most importantly, it will share 80% of the forfeited proceeds with the local seizing agency, whereas under Oregon forfeiture law the seizing agency receives a smaller percentage of the forfeiture proceeds. ORS 131A.360.

8. Recently, Attorney General Eric Holder has issued an order limiting the use of the federal Equitable Sharing Program, but there are exceptions to Mr. Holder's order such that use of the federal program is not obsolete.

9. Transferring the bail money to the federal government without a court order is already prohibited by state law. Article XV Section 10 (13) of the Oregon Constitution provides:

> **(13) Restrictions on State transfers**. Neither the State of Oregon, its political subdivisions, nor any forfeiting agency shall transfer forfeiture proceedings to the federal government unless a state court has affirmatively found that:
>
> (a) The activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer;
>
> (b) The seized property may only be forfeited under federal law; or
>
> (c) Pursuing forfeiture under state law would unduly burden the state forfeiting agencies.

Solution: Expressly prohibiting seizure of bail money without a court order

10. SB 391-1 corrects these abuses by clearly proscribing the following:

Section 2 subsection (1): Prohibits law enforcement agencies from seizing any deposit, or attempted deposit of bail with the clerk of the court, or the clerk's designee, without first obtaining either: (a) a search warrant application issued upon probable cause under ORS 133.545, or (b) a court forfeiture seizure order under ORS 131A.060.

Section 2 subsection (2): If the bail money is seized by court order, a law enforcement agency is prohibited from transferring or distributing the bail proceeds without a further court order specifically authorizing the transfer or distribution. This provision is necessary in order to force compliance with Article XV Section 10 (13) of the Oregon Constitution.

Problem: Mandatory posting of bail through private enterprise kiosks

11. When bail money is not seized by law enforcement, jail administrators will often require that a person posting bail must do so through a private enterprise kiosk in the jail lobby. These privately operated kiosk systems charge a fee of approximately 4% of the bail amount. This percentage fee is the kiosk company's profit, over-and-above the $750 that is kept by the State of Oregon after bail is posted. ORS 135.265 (2). Increasingly, it is becoming impossible to avoid use of these private kiosk systems because court clerks refuse to take bail deposits at the courthouse, and instead direct the person posting bail to its designee, which is the jail administrator.

Solution: Requiring the clerk of the court to accept bail deposits during normal business hours of the court

12. Section 3 of the Dash 1 Amendment: Specifically allows a person to make the deposit of security with the clerk of the court, rather than a designee, during normal business hours of the court. This provision allows a person posting bail to avoid the percentage fee charged by the private kiosk company.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

Respectfully submitted,

Gail L. Meyer, JD
Legislative Representative
Oregon Criminal Defense Lawyers Association
glmlobby@nwlink.com