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TO: **Chair Jeff Barker**
Members of House Judiciary Committee

FR: **Oregon District Attorneys Association**

RE: **HB 4149 -1 Amendments**

February 13, 2018

On behalf of our 36 elected District Attorneys and hundreds of deputy district attorneys across Oregon, ODAA offers the following comments on HB 4149 and the -1 Amendments.

Our broader concerns include:

- Possible violation of separation of powers – many of the proposed restrictions on plea petitions would shut down current avenues available to elected executive branch district attorneys and judges.
- ODAA believe the practical effects of HB 4149 would actually have adverse impacts on defendants – this bill would remove much of the flexibility and discretion judges, prosecutors and defense attorneys currently have to tailor offers to defendants regarding their pre-trial/arraignment release, deferred sentencing agreements, entrance to specialty courts, etc.
- Current law allows prosecutors and defense attorneys to negotiate off of an "Information" charging document. This charging instrument provides far more flexibility than a felony indictment, which is what HB 4149 would force.
- The changes proposed in HB 4149-A1 would have a significant impact on the fundamental daily activities of the criminal justice system and needs more time than a 35-day session provides.

Our specific concerns for HB 4149-A include:

SECTIONS (2)(1)(a) and (c)

In 2013 and 2017 the Legislature added a provision prohibiting a prosecuting attorney from conditioning a plea agreement on a requirement that the defendant waiver:

(a) The disclosure obligation of ORS 135.815 (1)(g); or

(c) The ability to receive the audio recording of grand jury proceedings as permitted under section 3 of this 2017 Act, if the indictment has been endorsed "a true bill." (Act become operative on March 1, 2018).

HB 4149-1 is accordingly duplicative.

SECTION (2)(1)(b)

In 1973, ORS 135.405 (the Plea Discussions and Plea Agreements statute) was enacted. Negotiated guilty pleas were disfavored and criticized by the public because they were perceived as resulting in dispositions overly favorable to a defendant. However, the Legislature recognized negotiated pleas were an essential component of an efficient and effective justice system. By codifying the plea-bargaining process through ORS 135.405 the legislature hoped to legitimize the process in the eyes of critical Oregonians. The legislative commentary for this statute from the proposed criminal procedure code articulated the importance of addressing this misunderstanding by quoting a Presidential Commission report stating in part:

> "…It would be a serious mistake, however, to assume that the guilty plea is no more than a means of disposing of criminal cases at minimal cost. It relieves both the defendant and the prosecution of the inevitable risks and uncertainties of trial. It imports a degree of certainty and flexibility into a rigid, yet frequently erratic system."

ORS 135.405's proposed purpose was to statutorily *permit* a prosecuting attorney to negotiate resolutions that provide a benefit to a defendant in exchange for their guilty plea. The criteria adopted in ORS 135.415 governing that authority illustrate the priorities of the criminal justice system that are supported by the plea process, such as promptness and certainty of punishment. "The swift and certain punishment of a given defendant aids in deterrence of others and in accomplishing rehabilitation of that defendant." (Proposed Criminal Procedure Code, 1973, commentary, pgs. 158-160).

The proposed amendment to ORS 135.405 reflected in HB 4149-1, specifically SECTION(2)(b), directly conflicts with the principles behind the enactment of this statute. It removes the flexibility the statute was designed to provide, a flexibility which is necessary for a productive plea-bargaining process to function.

HB 4149-1 also conflicts with the current legislative policy goals of reducing prison populations. Many of the newly implemented treatment court programs, encouraging probation and deferred sentencing over prison sentences, will be undermined by this amendment. A healthy plea-bargaining system requires "quasi-consideration" which the State receives for the defendant's guilty plea to one of several charged offenses or a lesser offense.

Balance is necessary for a plea bargain system to benefit the interests of all the involved parties, including the State, victim and defendant. Prison sentences contemplating the waiver of eligibility for sentencing reductions are almost exclusively the result of a negotiation that weighs heavily in the defendant's favor. The offer necessarily provides sufficient incentive to the defendant to warrant a waiver of those privileges. Plea negotiations are always a voluntary exchange of consideration and the terms are dictated by the interested parties who are free to accept or reject the terms as they see appropriate. If no balance of benefits is reached, a case simply moves ahead to trial.

Some of the circumstances warranting a defendant's stipulation to such a waiver, which would likely no longer be feasible with adoption of the -1 Amendment. Specifically:

1. In cases where a defendant is indicted for a crime carrying a mandatory minimum sentence (i.e. ORS 137.719 sex offenses; 137.710 BM11; 161.610 firearm minimums). A defendant may attempt to negotiate a departure to a lesser prison sentence on a lesser charge. In exchange for that departure often a defendant proposes to waive the same privileges which would have been denied him per statute if he were serving a sentence under the original charge. A defendant is never forced to agree to any plea offer, but this amendment reduces the defendant's flexibility to negotiate certain guarantees with the State. This ultimately limits a defendant's ability to fashion a resolution that both benefits the defendant while satisfying the State's obligation to prioritize the safety of the named victims and the general public.

2. In treatment court scenarios, including 416 programs or other similar programs, where a plea offer contemplates a departure to supervised probation on a crime carrying a presumptive prison sentence. This typically involves defendants facing a presumptive prison term under ORS 137.717 (REPO statute) or presumptive prison terms for drug offenses (ORS 925). These "downward departure" plea agreements provide defendants with the opportunity to avoid prison altogether. The State often requires a stipulation by the defendant to no eligibility for AIP or earned discharge to encourage strict compliance with the conditions associated with treatment court participation.

In any of the above scenarios a defendant may also agree to a prison sentence that does *not* contemplate the waiver of the above-mentioned privileges. Currently, the statute allows the parties to negotiate these terms on a case by case basis acknowledging that the interested parties are in the best position to decide what concessions are appropriate in the particular circumstances. If the goal of the legislature is to encourage fair and balanced resolutions that benefit community safety, judicial efficiency, and effective criminal justice, then the committee should not vote to pass HB 4149-1.