KEIR E. BOETTCHER
BRENDAN P. MURPHY
AMY M. QUEEN
DAVID R. WILSON
ADULT PROSECUTION
TRIAL TEAM SUPERVISORS

DAWN THOMPSON
ADMINISTRATIVE SERVICES MANAGER

PAIGE E. CLARKSON
DISTRICT ATTORNEY

CONCETTA F. SCHWESINGER
SUPPORT ENFORCEMENT
TRIAL TEAM SUPERVISOR

SUSANA ESCOBEDO
VICTIM ASSISTANCE DIRECTOR

ROBERT ANDERSON
CHIEF MEDICAL LEGAL DEATH
INVESTIGATOR

MARION COUNTY DISTRICT ATTORNEY
P.O. BOX 14500, 555 COURT ST NE
SALEM, OREGON 97309

June 5, 2019

Representative Paul Holvey
Chair, House Committee on Rules

RE: Testimony in opposition to Senate Bill 1002

Chair Holvey and Members of the Committee:

My name is Katie Suver. I am a Deputy District Attorney in Marion County. I have served as a prosecutor in Oregon since September of 1997, first with the Linn County District Attorney's Office and over 19 years with the Marion County District Attorney's Office. I am here on behalf of my office and the Oregon District Attorney's Association. Both oppose Senate Bill 1002.

Oregon law provides prosecutors with the authority to engage in plea negotiations. "In cases in which it appears that the interest of the public in the effective administration of criminal justice would thereby be served, and in accordance with the criteria set forth in ORS 135.415, the district attorney may engage in plea discussions for the purpose of reaching a plea agreement." ORS 135.405(1). Plea negotiations have long been recognized as a crucial aspect to a properly functioning criminal justice system.

In 2011, then Chief Justice Paul DeMuniz wrote the opinion in State v. Heisser, 350 Or 12 (2011). On pages 21-22 of that opinion, Justice DeMuniz wrote at length about the necessary function of plea negotiations recognized under Oregon Law in ORS 135.405. It is excerpted below:

"We begin by first examining the nature of plea agreements and their role in our judicial system. As both the United States Supreme Court and this court have explained, plea agreements are crucial to the proper functioning of the criminal justice system. *See* Santobello v. New York, 404 U.S. 257, 260-61, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) (characterizing plea agreements as both "essential" and "highly desirable"); State v. McDonnell, 310 Ore. 98, 103, 794 P2d 780 (1990) ("the legislature [has] concluded that plea negotiation is an essential component of an efficient and effective judicial system"). The ability to resolve criminal charges through plea agreements offers numerous benefits both to the criminal justice system as a whole and to criminal defendants in particular. Some benefits of the use of plea agreements include:

> It eases the administrative burden of crowded court dockets; it preserves the meaningfulness of the trial process for those cases in which there is a real basis for disputes; it furnishes defendants a vehicle to mitigate the system's harshness, whether the harshness stems from callous infliction of excessive punishment or from the occasional inequities inherent in a system of law based upon general rules; and it affords the defense participation in and control over an unreviewable process that often gives the appearance of fiat and arbitrariness.

William F. McDonald, Plea Bargaining: Critical Issues and Common Practices 4 (1985) (internal quotation marks and citation omitted); *see also* Santobello, 404 U.S. at 261 (articulating other benefits of plea agreements, including the "prompt and largely final disposition of most criminal cases" and "avoid[ing] much of the corrosive impact of enforced idleness during pretrial confinement for those who are denied release pending trial").

Since 1973, an Oregon prosecutor's authority to enter into plea negotiations and plea agreements has been "formally organize[d] and control[led]" by statute. McDonnell, 310 Ore. at 102-03. As part of a plea agreement, the prosecutor may give concessions to the defendant in exchange for a plea of guilty or no contest. ORS 135.405(3). Those concessions can include, among others, agreeing to seek dismissal of other charges if a defendant pleads guilty to a charged offense; agreeing to seek dismissal of the charged offense if defendant pleads guilty to another reasonably related offense; and agreeing to make favorable recommendations on sentencing. *Id.*"

There have been several proposals in the last few sessions, some of which that have been enacted into law, which have changed a permissive statute (ORS 135.405) to a more restrictive one. The ODAA has consistently opposed those restrictions because of the very reasons Justice DeMuniz cited in his 2011 opinion.

Senate Bill 1002 further restricts the tools that prosecutors *and defense attorneys* can use to appropriately resolve criminal cases. If a prosecutor extends a plea offer to a defendant, and the defense attorney responds with a counter offer that includes a defendant's willingness to waive good time or AIP eligibility in exchange for avoiding consecutive sentences or prosecution of as-yet uncharged crimes, Senate Bill 1002 would prohibit the prosecutor from agreeing to such a counter offer.

The legislature agreed when ORS 135.405 was enacted that plea negotiation was an essential component of an efficient and effective judicial system. That policy should remain in effect to avoid the many unintended consequences that the prohibitions of Senate Bill 1002 would create.

Many district attorney's offices in Oregon offer defendants facing presumptive prison sentences the opportunity to be placed on probation and participate in treatment courts or other programs that divert defendants from prison. These crimes include Delivery of

substantial quantities of Methamphetamine, Burglary in the First Degree, and Identity Theft. A condition of participation in those treatment courts or programs may include a defendant's waiver of their eligibility for certain programs in the Department of Corrections if their probation is revoked. If Senate Bill 1002 becomes law it will likely have a negative impact on treatment courts and similar programs.

Furthermore, the encumbrances to plea negotiations like those in Senate Bill 1002 will have a negative impact on crime victims. I cannot emphasize enough that victims of crime, particularly children and domestic violence victims, are harmed by these types of policies.

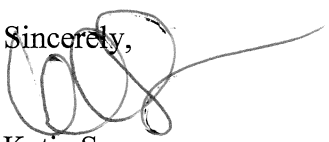
By way of example, if I have a defendant charged with Sexual Abuse in the First Degree of a child under the age of 14, that defendant faces a 75 month prison sentence pursuant to ORS 137.700 (Ballot Measure 11) upon conviction. For most defendants, that is both the minimum and maximum sentence (because of the crime seriousness of Sexual Abuse in the First Degree on the sentencing guidelines).

As you might imagine, children who have been sexually abused are particularly vulnerable to the trauma that a trial may inflict. If a defendant is willing to plead guilty to a less serious charge that will not carry a 75 month mandatory prison sentence the state needs every tool at its disposal to craft an appropriate sentence that (1) keeps that child victim safe and (2) keeps the community safe. It is *very common* for prosecutors and defense attorneys to agree to less than the mandatory sentence in criminal cases. The defendant is willing to do it to avoid additional prison time. The state's incentive is to spare a young child from the trauma of trial and the risk of an acquittal to a crime where there are typically no witnesses and no physical evidence.

Finally, the passage of Senate Bill 1002 will create more contested sentencing hearings. That is so because the decision of whether to grant good time or AIP eligibility is up to the sentencing judge, not the prosecutor. If the law prohibits a prosecutor from conditioning a plea offer on eligibility for a reduction in sentence, the decision will rest with the sentencing judge. Many times a defendant wants to avoid the sentencing judge making that decision because the defendant has a lengthy criminal history or a history of prior prison incarceration. Furthermore, if the defendant committed crimes against victims (e.g. Burglary in the First Degree or Identity Theft), the defendant may want to avoid the possibility of the court considering a victim's impact statement when imposing a sentence.

On behalf of the Marion Count District Attorney's Office and Oregon District Attorney's Association I strongly urge you to vote no on Senate Bill 1002.

Sincerely,



Katie Suver
Deputy District Attorney