Legislative Testimony

Oregon Criminal Defense Lawyers Association

May 17, 2019

The Honorable Representative Paul Holvey, Chair
House Committee on Rules, Members

Re: Testimony in Support of HB 3419

Dear Chair Paul Holvey and Members of the House Committee on Rules:

My name is Bryan Francesconi. I am an Assistant Federal Public Defender[1] and longtime former staff attorney at Metropolitan Public Defender, Inc. I am writing today to urge passage of House Bill 3419. With this important bill, the Oregon Legislature will be moving towards implementation on a multitude of objectives this body has endorsed over the years. This bill will ensure that more individuals become eligible for drug treatment through alternative incarceration programing already enacted into law. This bill will ensure more incarcerated children are eligible for early release just as Juvenile Second Look intended. This bill will allow more individuals to earn transitional leave as the Legislature deemed appropriate and necessary. This bill will give probation officers the statutory authority already delegated to them to use evidence-based best practices. And with this bill, the Legislature will ensure that when someone is revoked off of probation and sent back to prison, the individual deserved and earned that sentence.

One of the primary articulated concerns regarding HB 3419 is whether prosecutors will retain sufficient leverage to incentivize the efficient resolution of cases. I write to assure you that they will. Plea negotiations in criminal cases have always had, and always will have, an inherent asymmetry to them. Only one side to the negotiation has the authority to impose punishment. And for the criminal defendant, while trial is always an option, it is usually a terrifying one. Criminal defendants facing the possibility of trial often wonder: What if my jury just doesn't like me? What if my judge decides to "max me out?" What if my counsel isn't up for this? I have been convicted of crimes in my past, will anyone believe me if I testify? The option of trial for most criminal defendants usually brings with it so many unknowns and potentials for harm, the certainty of a plea deal becomes enticing. While the criminally accused may or may not believe the ultimate sentence is just, it is at least an outcome they understand and have some say in.

When evaluating how and why defendants plead, it can be helpful to split up the considerations into categories. By far the largest driving factor in plea negotiations are the

[1] The views articulated are mine alone and do not represent an official position of Oregon Federal Public Defender Lisa Hay, nor do they necessarily encapsulate the views of all attorneys within the FPD.

"punishments," e.g., incarceration time, fees, community service, the length and terms of supervision, registration requirements, location restrictions, etc. Of less significance, but still important to defendants, are restrictions on positive constitutional rights such as the right to bear arms, the right to travel, the right of association, and privacy rights. Programs incentivizing reformation such as Second Look and AIP only become a part of negotiations in those counties where prosecutors are willing to negotiate.[2] Finally, defendants are least likely to express interest in statutory and constitutional rights protecting the integrity of the criminal process, such as due process and confrontation rights, and thus waiver of these rights is almost never a contested issue of negotiation. By their very nature, the relevancy and applicability of these rights is hypothetical.[3]

An all too common example easily demonstrates the point. An individual is facing 30 months prison on two counts. The four-page plea offer allows them to serve 20 months' prison on Count 1 and a five-year probation sentence on Count 2. The secondary probation will promote reformation. However, that probation will carry a 30-month suspended sentence, receive the "strict compliance" designation, and the defendant must waive confrontation rights at all future hearings. The defense attorney hates the onerous probation terms, but also routinely sees them and has given up pushing back on every case. What should the defendant do? Turn down the 20-month sentence and face the unknown of trial because of the defense attorney's concerns about the integrity of the criminal justice system without confrontation rights at a future hypothetical hearing? Or take the sentence and hope they never have the future hearing?

In this familiar scenario, the defense and the prosecutor have negotiated heavily over all "punishment" terms: the 20-month prison sentence up front, the length of the secondary probation, the number and nature of counts resolved, and the amount of time the defendant gets on a probation violation revocation. However, no negotiation ever occurred over the future process rights. Both sides understand those are dictated by local DA office policies and the assistant district attorney would never bend on these conditions anyway.

During negotiations, prosecutors and defense attorneys have the experience and legal training to focus on legal details such as confrontation rights and judicial discretion. However, our process concerns are not always completely in-sync with the concerns of the criminally accused. Defense attorney process concerns regarding future dangers are, to many clients, just hypothetical. The criminally accused often care about the here and now—the jail they are facing, the money they owe, and where they will sleep when they are released. This asymmetry in priorities is central to understanding why HB 3419 is so necessary.

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[2] In Multnomah County, the District Attorney had a policy not to negotiate regarding Juvenile Second Look until a few years ago. Similarly, almost all AIP offers include the requirement that the defendant offset the possible incarceration reduction benefit by agreeing to more upfront time.

[3] Much like an NDA or an arbitration clause in an employment contract, a defendant does not yet know if this future forfeiture of a right will ever matter.

A review of what remains and what is being taken "off the table" by HB 3419 demonstrates why concerns over the efficacy of plea negotiations may be genuine, but also overstated. These negotiation terms will remain after passage of HB 3419:

1. Incarceration Length – Be it prison or jail incarceration, this factor will always be the primary negotiating driver of whether a case resolves. For prison presumptive or mandatory minimum cases, it is almost the exclusive determinative consideration.
2. Record of Conviction – Along with detention duration, this is the primary concern for most individuals charged with crimes. For individuals charged with felonies not facing prison, being a "felon" is often the most important consideration.
3. Number of Convictions – If a defendant is charged with multiple counts, how many counts they must plead to can be important.
4. Number of Probations – If a defendant is charged with multiple counts, a point of contention is often regarding the number of probations the defendant must be on. The larger the number, the higher the number of times the defendant may be facing revocation.
5. Duration of Probation – This is often an important consideration for individuals charged with misdemeanor crimes. Sometimes, negotiation can involve whether successful compliance can lead to early termination.
6. Probation Conditions – Everyone wants to know whether they will be on an active probation, what treatment will be required, and what other conditions they are signing up for.
7. Fees – Fees are often an important consideration for individuals without substantial means.
8. Alternative Community Service – While community service is good for all of us, large amounts of hours can be routine and may become an important point of contention.
9. Specialty Court Participation – Placement in court programs such as drug or diversionary courts. A critical point of negotiation in a certain subset of cases.
10. Association Limitations – Will the court limit the defendant's ability to associate with a partner, family member or friend? This is a point of contention in the right kind of case. However, office policies often mean it is not heavily negotiated over.
11. Felony Reduction – In a small subset of cases, parties can negotiate on future petitions to reduce a felony conviction if the defendant is probation compliant.

These considerations already constitute the vast majority of contention points in criminal negotiations. And there is an intuitive reason for that—these are the things a criminal defendant cares about *because these things affect their lives now*.

By comparison, the items addressed in HB 3419 are primarily items that involve future incentivizing opportunities or procedural rights. Some of the primary negotiation terms that HB 3419 removes from consideration:

1. Restitution Culpability – While restitution is mandatory, absent a waiver, it does require judicial review to confirm that the defendant's criminal actions caused the requested for monetary damage. Systemic waiver of this right is a current impediment to case resolutions because defendants are forced to stipulate to unknown monetary amounts. As HB 3419 will allow defendants to challenge these later requests, it will remove this point of contention from plea negotiations.
2. Eligibility for Earned Discharge, AIP, or Transitional Leave – Some district attorneys' offices proscribe this from negotiations by policy. In those counties that do not, these programs can affect incarceration length and may be a current point of contention in criminal negotiations.
3. Administrative or Structured Probation Sanctions – Rarely a point of contention as affects hypothetical future due process and statutory rights. However, the removal of this condition from plea offers in a small set of serious cases could have real impacts.[4]
4. Waiver of a Preliminary Hearing – Rarely a point of real contention as affects a statutory right the defendant is usually not attached to.
5. Confronting Witnesses at Subsequent Hearings – Rarely a point of contention as affects hypothetical future due process and statutory rights.
6. Challenging a Conviction by Writ of Habeas Corpus; Challenging a Conviction or Sentence as Unconstitutional; Challenges Based on New Evidence – Rarely a point of contention as affects hypothetical future due process and statutory rights.
7. Ability to Pay Attorney Fees or Stipulate to Unconstitutionality of Existing Law – Unknown to this writer. Multnomah County practice does not address these circumstances in plea offers.
8. Stipulating to Prosecuting as an Adult – Writer lacks sufficient familiarity to address the relevance or import of this circumstance.

A review of HB 3419's proposals is best understood as addressing two overarching categories: incentivizing statutes that reduce prison time, such as AIP and transitional leave, and due process-related provisions such as the right to a hearing and cross-examination. Regarding programming, where defense attorneys are capable of negotiating, they will do so. However, these negotiations are often hampered by unofficial offsetting requirements[5] or office policies restricting or barring these negotiations all together. Regarding procedural rights, the limitations placed in plea offers are overwhelmingly treated as fine print and rarely negotiated over in my experience.

Finally, it is important to recognize that the Oregon Legislature has already long restricted various areas of potential negotiation for public policy reasons. In this way, HB 3419 is not novel. A brief review of negotiation points the Legislature has already removed from consideration:

[4] It is unclear how often the situation will arise where a prosecutor would have given probation if this option were available but will not if HB 3419 removes it. Complicating this analysis is the unknown percentage of defendants thereafter revoked who end up serving longer prison sentences anyway.

[5] As a Multnomah County practitioner, my clients were routinely given an AIP and a non-AIP offer. The AIP offer was a couple of months longer than the non-AIP offer.

1. Restitution Responsibility – For public policy reasons, the Oregon Legislature has determined all individuals found culpable for financial loss of a victim must be held liable for monetary loss, regardless of circumstance or ability to pay.
2. Sex Offender Registration – For public policy reasons, the Oregon Legislature has determined all individuals convicted of a sex offense must register as a sex offender.
3. Driver's License Suspensions – For public policy reasons, the Oregon Legislature has determined all individuals convicted of driving related crimes must have their license suspended for proscribed periods.
4. Gun Rights – For public policy reasons, the Oregon Legislature has determined all individuals convicted of certain crimes may not possess a firearm.
5. Right to Travel – The Interstate Commission for Adult Offender Supervision determines when and how an individual convicted of certain crimes can move out of state.
6. Substance Abuse Classes – For public policy reasons, the Oregon Legislature has determined individuals convicted of a DUII must attend substance abuse classes.
7. Post-prison Supervision – For public policy reasons, the Oregon Legislature has determined individuals convicted and sent to prison will be on a term of supervision after their release.

Many of these items are of immediate impact upon criminal defendants and would be valuable points of negotiation if that were allowed. However, public policy considerations have overridden their utility as negotiating tools. If public policy arguments are sufficient to mandate post-prison supervision, why aren't they sufficient to necessitate structured sanctions? If all DUII offenders must have substance abuse treatment, why can't all eligible prisoners be given the opportunities provided by AIP programs? If the Legislature has mandated sex offender registration as a public good, why isn't there an equal public good in ensuring a judge decides who has earned a probation revocation?

Thank you to the bill Sponsors Madam Chair Williamson, Senator Winters, and Senator Prozanski. HB 3419 is an important bill and it deserves your vote. It ensures and protects individual constitutional and statutory rights. Moreover, it protects and insulates many of the legislative goals and priorities this body has already adopted. For these reasons, I urge passage of HB 3419.

Respectfully yours,

/s/ Bryan Francesconi

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