For Submission as Testimony Before the House Rules Committee, 2020 Session, Regarding Senate Bill 1575

House Members:

I submit the following material in support of my request that you amend the language in *Section 7, Sub-Paragraph (5)* of Senate Bill 1575 to read as follows, "If the most serious offense in the charging instrument is a violation of a municipal ordinance, the court may not commit the defendant to a state mental hospital or any other state facility"

Introduction

Let me quickly introduce myself. I am a retired Circuit Court Judge from Lane County. After my retirement form the bench, besides working as a court management consultant in thirteen developing countries around the world, I was privileged to serve as Governor Kulongoski's Special Master for the Oregon State Hospital in 2008 and part of 2009, early in the transformation process at the hospital. I worked with hospital staff on a daily basis on numerous legal issues the hospital was facing at that time. One such issue was the practice by some municipal courts around the state of sending those found unfit to proceed to trial to the hospital, ostensibly under the provisions of Oregon Revised Statutes, Chapter 161. In early 2009 I wrote a legal memorandum demonstrating that municipal courts have no jurisdiction to send *anyone* to the hospital. Base on that memorandum, the Attorney General's office ordered the hospital to forthwith release such defendants from the hospital and directed municipal courts to discontinue that practice. A copy of that memorandum is appended below.

Senate Bill 1575 and "Violations"

Section 7, Sub-Paragraph (5) of this Bill reads as follows: "If the most serious offense in the charging instrument is a violation, the court may not commit the defendant to a state mental hospital or other facility". This is very similar language to that used in *Senate Bill 24* that became law in 2019. There, the language used in *Sub-paragraph (5)(a)* was, "If the most serious offense in the charging instrument is a violation, the court may not commit the defendant under subsection (3) of this section." Neither of these provisions make any legal sense.

Both of the above provisions deal with changes to *ORS 161.370*, which is part of the Oregon criminal code. That code contains a number of definitions that apply to certain terms used in it. One such definition is for the term, "violation". The definition of that term is as follows:

> **"153.008 Violations described.** (1) Except as provided in subsection (2) of this section, an offense is a violation if any of the following apply:
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> (c) The offense is created by an ordinance of a county, city, district or other political subdivision of this state with authority to create offenses, and the ordinance provides that violation of the ordinance is punishable by a fine but does not provide that the offense is punishable by a term of imprisonment. The ordinance may provide for

> punishment in addition to a fine as long as the punishment does not include a term of imprisonment."

Subsection (2) of ORS 153.008 provides: "(2) Conviction of a violation does not give rise to any disability or legal disadvantage based on conviction of a crime."

Thus, as can be clearly seen from the above quoted statutory provisions, a "violation" under the Oregon criminal code is an offense that carries only a fine as a penalty and is not a crime.

Since the Oregon criminal code, by definition only deals with criminal offenses, and the whole statutory scheme set out in Chapter 161 clearly only deals with those charged with the commission of criminal offenses, the language in both Senate Bill 24 as enacted as well as in *Senate Bill 1575* as proposed, is totally meaningless. With or without this language *no court* has the authority to commit a defendant for evaluation or treatment at the Oregon State Hospital (or any place else for that matter) based on a charge of a "violation."

Senate Bill 1575 and Municipal Courts

After the enactment of *Senate Bill 24*, I discussed the above quoted language with people at Disability Rights Oregon, who participated in the drafting of *Senate Bill 24,* as well as this Senate Bill 1575. It was explained to me that the word, "violation", as used in the two bills, was intended to *mean*, "violation of a municipal ordinance." That is clearly not what it says.

ORS 174.010 declares the legislative policy when it come to the interpretation of statutes. It states:

> "**174.010 General rule for construction of statutes.** In the construction of a statute, the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; …".

This statute has been resorted to by both the Oregon Supreme Court and Court of Appeals on a number of occasions. The result has been uniform; the statute means what it says and that statutes must be interpreted as the legislature enacted it, not as some (including the legislature itself) may have thought it was enacted or may wish it had been enacted. If the intent of *Section 7, sub-paragraph (5)* of Senate Bill 1575 is intended to forbid municipal courts from committing a defendant to a state mental hospital, or some other facility, it must explicitly say so.

Section 7, Sub-Paragraph (5) of Senate Bill 1575—just as was with the case with Senate Bill 24 last session—would prohibit using a "violation" as a basis for commitment to the Oregon State Hospital, which is already not legally permissible. But an issue remains with municipal courts that does need to be addressed.

Besides creating municipal code “violations”, municipalities also have, and exercise, the authority to create misdemeanor crimes through their city codes. Under the provisions of Senate Bill 24 and the current Senate Bill 1575, these municipal misdemeanors are not directly addressed, as was apparently the intent of the drafters of each bill.

Even though municipal misdemeanors are not addressed in Senate Bill 1575, municipal courts already lack the authority to send defendants to the Oregon State Hospital if they are found to lack the mental capacity to proceed to trial. As indicated in the introduction to this presentation, I have attached below a copy of a memorandum of law demonstrating this.

While municipal courts do not currently have—nor have they ever had—the legal authority to send defendants to the Oregon State Hospital, (See the memorandum appended below) this unlawful practice has re-emerged over the last few years, with the Eugene Municipal Court being far-and-away the most egregious and persistent offender. During the period of July 1, 2018 and July 1, 2019, seventeen municipal court defendants were admitted to the Oregon State hospital for “aid and assist” treatment. Sixteen of those defendants were from Eugene Municipal Court. In addition, other research has shown that this court has probably sent at least seventy-six such defendants to the hospital between 2014 and 2019. Four judges and six defense attorneys working in the Eugene court are currently under investigation by the Oregon State Bar for their participation in this unlawful activity.

Since my work with the Orgon State Hospital apparently only put the unlawful commitment of defendants from municipal courts into remission and did not permanently eradicate this unlawful practice, I urge the legislature to codify the existing law on this topic in one, easy to find and easy read statute that clearly says, “If the most serious offense in the charging instrument is a violation of a municipal ordinance, the court may not commit the defendant to a state mental hospital or any other state facility”

Respectfully Submitted

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The Question

Do municipal courts, prosecuting defendants for crimes defined by municipal ordinance have the legal authority to send defendants to the Oregon State Hospital for treatment when the court finds them unfit to proceed?

Legal Analysis

To resolve this issue, we need to go back and start at the basics. The federal constitution and legislation apply to everyone and every governmental entity in the United States, unless expressly excluded. The federal constitution provides for the existence of states. States cannot control the actions of the federal government through their own constitutional or legislative provisions.

States have constitutions and legislatively made law that apply to everyone and every governmental entity in the state. States in turn provide for the formation of cities. Cities have the powers the states give them and within those powers the city can make ordinances that direct the conduct of those who reside within the city. Just like the state cannot control the actions of the federal government, cities cannot control the actions of the state. In our form of government power runs down but not up.

The second basic concept to remember is that there are two different kinds of laws at all three levels of government; legislatively made law and constitutional (charter at the city level) law.

With that civics lesson out of the way we turn to the issue at hand.

Statutory Issues Relating to Powers of Cities

The powers that cities may exercise in Oregon are pretty much delineated in ORS Chapter 221. Cities use the authority granted them under this chapter to adopt a charter and pass ordinances to regulated conduct within the city. Many cities, but not all, by ordinance, establish a municipal court and adopt a criminal code making certain acts illegal within the city. However, these ordinances only apply within the city. These ordinances are in addition to the general criminal laws of the state which still apply within the city. Many cities, instead of writing their criminal statutes and procedure codes “from scratch” create criminal ordinances by adopting by reference the language of various state criminal statutes. The most common form of this adoption is the adoption of the state traffic code as a municipal ordinance. These are still ordinances; they just use language derived from another legislative source.

There are three levels of state trial courts provided for in the Oregon statutes; circuit courts, justice courts, and county courts. These three courts have the exclusive jurisdiction to apply the

state statutes relating to criminal offenses and criminal procedure set forth in Oregon Revised Statutes unless the legislature gives that authority to some other body.

By the provisions of ORS 221.339(2), the state specifically gave municipal courts jurisdiction to enforce most state misdemeanor and major traffic crimes statutes. This was a grant of power to the cities by the state, to enforce state law. It is very important to note however, in enforcing state statutes, the municipal court is acting in the role of a justice court (a part of the state court system), and not as a municipal court. As such, prosecutions must be commenced in the name of the State of Oregon, on an accusation of a violation of a state criminal statute, and the case must be prosecuted by the district attorney of the county (See ORS 8.660(1)). All of the Oregon criminal code applies to such prosecutions.

Given the powers the legislature has granted to cities, the municipal court in a city has the option of wearing one of two hats; the municipal judge hat or the justice of the peace hat. Which hat the court wears makes a significant difference in the power of the court. So far, the cases involving municipal court defendants being sent to the state hospital on fitness to proceed issues have all come as a result of prosecutions under municipal ordinance and not prosecutions based on state misdemeanor laws.

The issue is how does municipal court, prosecuting a municipal ordinance violation, get the authority to use the provisions of ORS Chapter 161to commit a defendant to the state hospital for lack competency to proceed to trial? The answer is, it doesn't.

There are only three ways that the municipal court could get authority to send defendants who are unfit to proceed to the state hospital: by state statute, by the provisions of the state or federal constitution, or by having the power to direct the state to do something the court wants done.

Going back to the civics lesson in the beginning, power runs down hill, not up. The cities cannot impose on the state a burden that it has not assumed. An excellent example of this is found in the case of Lines v. Milwaukie 15 Or. App. 280, (1974). In that case there was an appeal to circuit court of a municipal court criminal conviction for the violation of a municipal ordinance. The state statute creating the right to appeal to circuit court called for an appeal on the record. The municipal ordinance called for any appeal to be de novo. The Court of Appeals held that the city had no power to override state statute and require the circuit court to conduct a de novo review.

Another case dealing with this same principle is City of Eugene v. Roberts 305 Or. 641, (1988). In that case the Supreme Court held that the City of Eugene could not force the elections clerk of Lane County to put something on the ballot that did not meet the requirements of state election laws. At page 650 the court said, "…The City here seeks to compel action by state and county officials. Home rule does not extend so far. The source of any duty to comply with the City's request must be in state law."

One argument that has been posed for finding that municipal courts have the authority to send defendants to the hospital under the provisions of the Oregon criminal code is based on the provisions of ORS 161.035(2) which reads as follows:

> (2) Except as otherwise expressly provided, or unless the context requires otherwise, the provisions of chapter 743, Oregon Laws 1971, shall govern the construction of and punishment for any offense defined outside chapter 743, Oregon Laws 1971, and committed after January 1, 1972, as well as the construction and application of any defense to a prosecution for such an offense." (Emphasis added)

The argument made is that municipal ordinances define criminal offenses outside of the Oregon criminal code, so they are covered by the criminal code by virtue of the language above. However, those who make that argument have not read City of Portland v. Dollarhide, 300 Or. 490, 500 (1986) in which the Oregon Supreme Court specifically held that the language in ORS 161.035(2) does not apply to municipal ordinances.

Given the Oregon statutory and case law, it is clear the municipal court cannot force the state hospital to accept, hold and treat a municipal court defendant who is found mentally incompetent to stand trial on a criminal charge arising out of an alleged violation of municipal ordinance.

Statutory Authority of the Oregon State Hospital

Even though the law is clear that municipalities cannot force the Oregon State Hospital to accept, hold and treat a municipal court defendant who is found mentally incompetent to stand trial on a criminal charge arising out of an alleged violation of municipal ordinance, one other statutory issue needs to be dealt with. That is the issue of whether the hospital even has the authority take these defendants from municipal court. The simple answer to that question is, no.

Because the Oregon State Hospital is a creature of statute and has no authority or duties apart from those conferred by legislation, *(City of Klamath Falls v. Environ. Quality Comm*., 318 Or 532, 545, 870 P2d 825 (1994) "…as creatures of statute, agencies derive their authority from the enabling legislation and general laws affecting administrative bodies"), the necessary starting point for addressing the question are the statutes that govern its affairs.

The authority of the Oregon State Hospital to accept, hold and treat defendants who are mentally incompetent to stand trial is derived from the provisions of ORS 161.365 and ORS 161.370. Since the authority of the hospital to provide this service is found in the Oregon criminal code, the hospital only has authority to accept patients from courts that operate under the provisions of that code. Those courts are the circuit, justice and county courts. Recognition

of this restriction on from which courts the hospital may accept these patients is found in ORS 161.365(6)[1], which provides:

> "(6)(a) When upon motion of the court or a financially eligible defendant, the court has ordered a psychiatric or psychological examination of the defendant, a county or justice court shall order the county to pay, and a circuit court shall order the public defense services executive director to pay from funds available for the purpose:
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> (A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or psychologist in private practice; and
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> (B) All costs including transportation of the defendant if the examination is conducted by a psychiatrist or psychologist in the employ of the Oregon Health Authority or a community mental health program established under ORS 430.610 to 430.670.
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> (b) When an examination is ordered at the request or with the acquiescence of a defendant who is determined not to be financially eligible, the examination shall be performed at the defendant's expense. When an examination is ordered at the request of the prosecution, the county shall pay for the expense of the examination." (Emphasis added)

As can be seen in Subsection (6)(a) above, the legislature clearly believed that it had only authorized the hospital to accept patients from the three state courts, as these are the only courts for which they provided a fee structure.

Constitutional Issues

Since there is no statutory basis for municipal courts to commit these defendants to the Oregon State Hospital, and no statutory authority for the hospital to accept, hold and threat these defendants, we turn to some constitutional issues and arguments.

An argument that a city would probably make would be that conviction of a municipal ordinance is a crime and that under constitutional law of the United States no person can be prosecuted for a crime unless they can "aid and assist" to use the shorthand vernacular for being fit to proceed. Since criminals in circuit court being prosecuted for state crimes have the ORS 161.365 process if they are charged and are not fit to proceed, a municipal court defendant must have the same right as well. While at first blush this might seem to be a reasonable argument, it is totally erroneous.

We start by looking at the constitutional protection for the defendant. *The constitutional protection is not being prosecuted for a crime if the defendant, because of a mental illness, is not fit to proceed.* Everyone gets that, whether in circuit court, municipal court, justice court or county court. That is the basic right. So, at this point everyone is treated equally in circuit and municipal court and there is no issue.

[1] In the 2019 edition of Oregon Revised Statutes this provision will be renumbered as (7)

The process outlined in ORS 161.365 is in fact for the benefit of the defendant. This is how it is determined under the state criminal code whether or not the defendant is fit to proceed. However, if the defendant is found unfit to proceed, the provisions of ORS 161.370 are almost entirely for the benefit of the state. That process is not one that is a protection for the defendant. It is in fact a process adopted by the state to try to force people to "get well" so they can be convicted of the crime for which they have been charged. The process is one that allows the state to further its own interest in seeing that defendants answer for their crimes by forcing treatment upon the defendants.

Under the U. S. Constitution states have a limited right to force treatment on people who are not fit to proceed to trial. States are not constitutionally mandated to have such a scheme. If they don't and the defendant is found unfit to proceed the proceedings must be suspended until such time as the defendant is fit to proceed, or be dismissed. In either event, the defendant cannot be continued in custody. The State of Oregon has chosen to have such a scheme for its state courts. The City of Eugene, neither by charter nor ordinance, has chosen to adopt any such scheme (assuming that a municipality has the legal authority to even do so).

To put this in perspective, one needs to ask, how could a process like that set out in ORS 161.370 be a "right" of the defendant? The ultimate right of the defendant is to not be prosecuted and not go to jail unless he or she can understand the proceedings and effectively aid and assist in his or her own defense. Why would a defendant claim it is his or her right to be forced into some sort of treatment so he or she could then be convicted of a crime and sent to jail? Without such a process, the defendant goes free if he or she is not fit to proceed. That is a defendant's ultimate goal; not having his mental condition alleviated so he or she can go to jail. All criminal defendants have the right not to be prosecuted if they are not fit, but not all have the burden of being forced into treatment so they can be convicted. The ORS 161.370 type process is a right of the state, not a right of the defendant.

It is an open legal question whether a municipality may set up their own program to hold and treat those found unfit to proceed to trial in their municipal court on a municipal ordinance violation. What is not in question is that they can't force such treatment on a defendant under the state law. If a municipal court doesn't have its own process for forcing treatment on the defendant who is found to be unfit to proceed, the defendant is legally entitled to be released and not prosecuted unless and until he or she is fit to proceed. Anything short of that is a violation of the defendant's constitutional rights.

While not a part of the legal framework around this issue, courts (and, unfortunately some attorneys) often have the idea that the court is "helping" defendants who are unfit to proceed by sending them to the state hospital. This is questionable at best and exactly what the Chief Justice of the Oregon Supreme Court warned the circuit court judges against a number of years ago, in the use of the civil commitment statutes. Further in this vein is the same warning as expressed by the Oregon Court of Appeals in State v. MR, 225 Or App 569 (2009). There the court said, "We emphasize that a civil commitment is not the mechanism to deal with

uncomfortable or unwanted social behaviors, or even to protect an individual's right of privacy against persons exhibiting invasive or intrusive behaviors…*See State v. Pike…* Involuntary commitment for a mental disorder constitutes a serious deprivation of personal liberty and cannot be imposed constitutionally solely to achieve desirable social goals…."

This same warning is equally applicable to the use of the fitness-to-proceed process in criminal cases as set forth in ORS 161.360-370. In fact, the temptation for judges to use this process to achieve "desirable social goals" surely must be much higher than in the civil commitment arena. That is for several reasons.

The fitness-to-proceed process is both quick and easy. There is no time-consuming and cumbersome process of holds, evaluations and due process hearings required. The judge and the attorneys can take care of the problem in five minutes. There is no need for exhaustive mental exams or expert opinions. There is no requirement of a finding of dangerousness. There is no need for the prosecution to show that there is even probable cause for the charge that brings the defendant before court.

Just as with a civil commitment, commitment for lack of fitness to proceed is "a serious deprivation of personal liberty." Under the current statutory interpretation even felons who could never see the inside of the penitentiary for the crimes with which they have been charged are subject to being confined in the Oregon State Hospital for up to three years based solely on a finding that they are unable to understand and assist in the court proceedings.

Misdemeanants fare little better. They are often charged with a number of usually minor offenses. The court then often "stacks" (runs consecutively) the commitments to bring about a commitment that can reach a period of one year. This again usually far exceeds any local jail time the defendant would receive as a sentence for the crime or crimes.

Setting aside the proposition that using the criminalization of a mentally ill person to "help" them is a good thing, let's deal with to what extent, if any, these people are really being helped.

The first thing that needs to be understood is that treating a defendant at the state hospital for fitness to proceed is very different than treating him or her upon a finding of guilty except for insanity. In the latter, the treatment goal is to treat the defendant so that his or her dangerousness level is reduced to the point where further treatment can take place in the community under the supervision of the Psychiatric Security Review Board. In the former, dangerousness is not even an issue. The only issue is getting the defendant to the place where he or she can understand the nature of the criminal proceeding and assist in the defense. That's all. Nothing else matters. Having said that is not to imply these defendants do not get otherwise useful treatment; they generally do. However, this treatment is only enough to allow the person to understand the nature of the criminal proceedings and assist his or her attorney in the defense.

So, what happens if or when a defendant returns from the state hospital now fit to proceed? It appears that in virtually all cases, deals are made, the cases are either dismissed or the defendant gets a sentence of "time served" and is released to the community to do as he or she will.

So, what does this exercise of sending defendants to the state hospital as unfit to proceed really accomplish? (1) Clean streets for a period of time. In short, the municipal court violates defendants' statutory and constitutional rights for the purpose of cleaning the streets of undesirable mentally ill people. (2) Making the state pay the cost of this "street sweeping."

Relief

So, if there are defendants in the state hospital on the basis of being prosecuted in municipal court for municipal ordinance violations, how does someone get them out? There may be a couple of approaches, only one of which is really efficient. One could conceivably file mandamus proceedings against each of the municipal judges seeking an order of the circuit court directing the municipal judge to release the defendant because the court does not have the authority to put them in the hospital. The problem here of course is having to go from jurisdiction to jurisdiction to file these individual cases.

It appears that the quickest and most efficient way to attack this problem would be to find a defendant at the hospital and file a habeas corpus proceeding under ORS Chapter 34 on his or her behalf and ask for class action status under ORCP 32 to cover all other municipal defendants similarly situated. This would have to be done in Marion County Circuit Court, or perhaps in federal court base on at least due process violations.

Conclusion

The Constitution of the United States, case law from the Supreme Court of the United States, and Oregon statutory and case law, taken together, make it irrefutably clear that when a defendant is charged in a municipal court in Oregon for a municipal code violation, that the defendant has a constitutional right to not to be prosecuted unless he or she is mentally capable of understanding the nature of the charges and is further capable of meaningfully assisting in his or her own defense.

Oregon law is also irrefutably clear that if a defendant, in a municipal court prosecution, is found not to be mentally capable, the court may not send the defendant to the Oregon State Hospital for evaluation and treatment under the statutory scheme set forth in Chanpter161 of the Oregon Revised Statutes, and the Oregon State Hospital does not have the statutory authority to accept such defendants.