

**TESTIMONY ON SENATE BILL 295  
BEFORE SENATE COMMITTEE ON JUDICIARY  
MARCH 4, 2021**

**PRESENTED BY: HON. NAN WALLER, JUDGE, MULTNOMAH COUNTY CIRCUIT COURT  
OREGON JUDICIAL DEPARTMENT**

Chair Prozanski, Vice Chair Thatcher, and Members of the Committee:

I am here today to speak to SB 295 on behalf of the Oregon Judicial Department (OJD). We support SB 295. SB 295 represents the consensus of a multi-stakeholder work group as well as great staffing from all 3 branches.

For a number of years, Oregon and most other states have seen an increase in the numbers of criminal defendants who are unable to understand the nature of the proceedings and assist in their own defense as a result of a mental disorder. If a defendant is unable to aid and assist in their own defense as a result of a mental health disorder, due process requires that that defendant be provided restoration services. The increase in cases where a defendant has been found unable to aid and assist led to capacity issues at the Oregon State Hospital (OSH) and delays of defendants waiting in jail until an opening for admission to the hospital becomes available.

As a step towards addressing these issues in 2019 the Legislature passed SB 24 to improve the competency restoration process and increase the use of community-based services as an alternative to commitment to OSH for competency restoration. The 2020 Legislature considered SB 1575, which would have modified the aid and assist statutes. The measure passed the Senate and House Judiciary Committee and was waiting for a vote on the House floor when the session ended.

Like SB 1575A, SB 295 restructures the aid and assist statutes. SB 295 narrows the criteria permitting a judge to commit to OSH a defendant charged with only misdemeanor crimes. The bill modifies the criteria a certified evaluator must consider in recommendations for "hospital level of care" to omit requirements that the evaluator opine on a defendant's dangerousness. As modified, an evaluator must consider the acuity of the defendant's symptoms, current diagnosis and ability to engage in treatment, appropriate restoration services, and general safety concerns. This change is a result of feedback from evaluators about the difficulty of completing an evaluation of dangerousness within the context of a competency evaluation. To improve consistency within the statute, the bill also modifies the criteria for OSH to find that a defendant no longer needs a hospital level of care, replacing consideration of defendant's dangerousness with present public safety concerns.

In the *Mink* case the 9<sup>th</sup> Circuit found that "[h]olding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals" *Oregon Advocacy Center v. Mink*, 322 F.3d 1101 (9th Cir. 2003). SB 295 conforms Oregon law to the federal requirements by limiting the time that a defendant who has been found unable can be held in jail by requiring a judge, within seven days of the finding, to determine an appropriate action using current release criteria under the criminal code and to enter an order in line with the defendant's constitutional right to due process.

When a court finds that a defendant's competency cannot be restored because the defendant is unwilling to take medication voluntarily, the competency statute establishes a process for the court to order involuntary administration of medication. SB 295 authorizes courts to provide certain needed documents to OSH as part of this process and, given the sensitive and personal nature of this medical information, requires reports, motions, and orders concerning involuntary medication to be held confidentially.

SB 24's focus on limiting OSH commitment to defendants who need a hospital level of care has increased the workload for community mental health programs as more defendants are being assessed for appropriateness for community restoration as well as being provided restoration in the community. SB 295 allows the court discretion on whether to order a community mental health consultation when the defendant is charged with certain serious crimes. While we have made progress in this bill towards clarifying the roles and responsibilities of the stakeholders in the competency system, the workgroup knows that we have additional work to address the aid and assist crisis and improve the ability of the criminal justice system to respond effectively to the growing number of mentally ill defendants. It is heartening that all 3 branches have responded to the aid and assist crisis by coming together and committing to address needed system improvements after this session is over.

It will be no surprise that at the top of that list of work is the need to increase the availability of community resources, including appropriate supportive housing, and access to certified evaluators and community restoration services across the state. Sustainable and successful reduction of state hospital commitments is possible **only** if community resources are adequately resourced and funded. The capacity crisis at OSH is the canary in the coal mine. While it is necessary to contain the hospital population, it is cold comfort if this only increases the crisis in our jails and on our streets.

OJD, under the leadership of the Chief Justice, is fully committed to improving the practices of our courts for those with mental health needs. Addressing the needs of mentally ill individuals coming before the court is part of OJD's two-year strategic plan. The Chief Justice's Behavioral Health Advisory Committee has developed an aid and assist data dashboard that will allow for more accurate analysis of gaps in services. I can describe to you case after case where I am certain we are neither meeting the needs of the individual in front of me nor the needs of our community. However, while anecdotes are helpful illustrations of the problem the data undeniably describes the scope of the problem. Our goal is that the data from the aid and assist data dashboard will inform our future planning and funding efforts.

OJD is also continuing to move forward on our work with the Gather, Assess, Integrate, Network, and Stimulate (GAINS) Center to develop a plan for regional coordination between the behavioral health and justice systems for individuals at all points on the Sequential Intercept Mapping (SIM) model from prior to justice system involvement to transition after justice system involvement. In some communities this may be a plan for virtual coordination, in others, this may be a plan for a brick and mortar crisis assessment/stabilization center. We look forward to briefing you on our efforts to develop these plans for better coordination of assessment, stabilization, and coordination of services for people in a behavioral health crisis.

As a judge I am heartened by the focus on a population that is complex and too often marginalized. Having nothing to offer a highly delusional mentally ill defendant other than a return to the streets is the deeply discouraging reality that all of us in the criminal justice and

behavioral systems face daily. We must do better. I am confident with the current momentum and working together that we will do better.