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TESTIMONY ON SENATE BILL 295
SENATE COMMITTEE ON JUDICIARY
AND BALLOT MEASURE 110 IMPLEMENTATION

March 8, 2021

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

My name is Melissa Marrero. I am a Deputy District Attorney for the Multnomah County District Attorney's Office (MCDA). I write to you today to voice support for Senate Bill 295, including the -1 amendment, on behalf of MCDA and also the Oregon District Attorney's Association.

This legislation represents years of cooperative collaboration between a diverse group of stakeholders who have worked tirelessly to create a very deliberate bill that will improve aid and assist processes across the state. While we do very much support the passage SB 295 and the -1 amendment, there are two provisions of the bill for which I would like to provide additional context. Additionally, I am compelled to voice our opposition to the -2 amendment, for the reasons stated below.

SB 295 Removes the Term "Dangerousness" From ORS 161.365 and 161.370

The law as currently written requires the state hospital and certified forensic examiners to opine on whether a defendant requires a hospital level of care due to dangerousness. Senate Bill 295 completely removes the term "dangerousness" from ORS 163.365 and 163.370.

In practice, requiring mental health professionals to opine on dangerousness proved to be complicated, implicated ethical concerns for evaluators, and resulted in the courts at times not receiving the information that they needed to make informed decisions regarding hospitalization versus community restoration. The issue was tied to the actual term ("dangerousness") and the clinical and legal implications of that term.

Although the term dangerousness is removed from the statutes by SB 295, this change is by no means intended to remove safety considerations from the analysis the courts must undertake when deciding whether to commit a defendant to the hospital. SB 295 replaces dangerousness with two distinct terms—present safety concern and public safety concern.

The distinction between the two terms is an important and intentional one. "Public safety concern" means that the defendant presents a risk to self or to the public if not hospitalized or in custody. The determination of whether someone presents a public safety concern takes into account all of the information available to the evaluator, the court, the prosecutor, or any other reliable source.

"Present safety concern," on the other hand, is intended to capture the clinical considerations undertaken by mental health professionals and any information that they have at their disposal.

The workgroup understood that the hospital, an evaluator or a treatment provider may not have immediate safety concerns due to a defendant's mental status for a variety of reasons. For example, a defendant could be properly medicated, controlled within a treatment setting, and receiving necessary care, and as a result, may not be immediately or imminently dangerous from a clinical perspective. However, there are other considerations that are directly relevant to public and victim safety that the Court should be taking into account when making decisions about hospitalization, release, and community restoration. These include the statutory release criteria under ORS 135.230, victim-related considerations and input, and any other information that is determined to be reliable and relevant to the issue. SB 295 is specifically designed to provide prosecutors the ability to provide that information to the court and have that information be considered. This is a technical, but very important distinction. Although the term dangerousness has been removed, this change is by no means intended to remove safety considerations from the analysis. Rather, SB 295 makes it clear that safety considerations are extremely important and relevant to the issue of whether someone requires hospitalization.

SB 295 Requires Communication Between Jurisdictions Related to Hold and Warrants

Stakeholders described experiencing challenges carrying out treatment planning when holds or warrants from outside jurisdictions prevent release of an otherwise eligible defendant for community restoration. Communication between jurisdictions is an important tool for resolving these issues. The -1 amendment requires communication between jurisdictions when this scenario arises.

The language in the -1 amendment mandates communication. However, the workgroup understood that in some cases, warrant lifts or other process may not be available or appropriate for a variety of different reasons. As a result, although SB 295-1 requires communication, there is no specific action that must be taken on another jurisdiction's warrant, hold or criminal case as a result of this provision.

Opposition to the -2 Amendment

The -2 amendment was not a collaborative product of the workgroup, and we respectfully oppose it's inclusion with SB 295. Our concerns about the -2 amendment are as follows:

The -2 amendment uses new and undefined terms that will result in confusion and litigation. For example, the amendment contemplates that the treatment provider will notify the court of a defendant's noncompliance with program policies. Non-compliance is not defined, nor is program policies. Unclear standards reporting noncompliance to the court will lead to uneven application of standards to defendants. It will lead to an increase in warrants, potentially disrupting defendants' treatment or stability, and requiring significant court and jail resources to clear the warrants. It also places treatment providers in a supervisory role, which they have sought to distance themselves from due to liability issues and due to concerns about negatively impacting therapeutic relationships. Further, the -2 does not address what is to happen to a defendant who is arrested or whose release order is revoked. If a person remains unable to aid and assist, they are unable to simply be revoked to the jail. We have concerns that this provision has the potential to result in an increased demand on the state hospital.

The -2 amendment requires that an order for a defendant to engage in community restoration services must include the address to which the defendant will be released, but is silent regarding how the court

will houseless individuals.

The -2 amendment requires the court to specify the duration of community restoration services in an order. However, courts are not equipped to make this determination at the outset of community restoration. Even certified forensic evaluators are unable to give a definitive timeline at the start of treatment, and timelines may be affected by instability, availability services, substance abuse, etc.

The -2 amendment mandates that a defendant may not be required to engage in community restoration services for a period of time exceeding the length of the presumptive sentence for the offense in the charging instrument. This provision is highly problematic for a number of reasons:

- Related to Misdemeanors: There is no "presumptive sentence" for misdemeanors charges. Misdemeanors are defined by a maximum sentence only. Further, misdemeanors often accompany more serious felony charges. Under the -2, courts could be required to dismiss only certain, lower level charges on a charging instrument, while leaving the more serious charges for trial if and when a defendant is ultimately found able to aid and assist. Such dismissals will very likely have negative implications for evidentiary admissibility and sentencing.
- Related to Felonies: The presumptive sentence on felony charges may be increased significantly if a prosecutor alleges and proves upward departure enhancement. The -2 amendment caps community restoration to the presumptive sentence, which could be as low as six months for some felony cases, even if the actual available sentence could be significantly higher.
- Generally: The -2 amendment contemplates a shorter restoration timeline than is available for a defendant committed to the state hospital. Statistics provided to the workgroup confirm that it takes longer to restore a defendant in the community than in the hospital. Additionally, a person being treated in the community is not subject to the same deprivation of liberty that a committed person faces during restoration. It does not make sense to allow less time for an individual to be restored in the community than would be allowed if the person were hospitalized.

For the reasons stated above, we urge support of Senate Bill 295 and the -1 amendment, and oppose the -2 amendment. Thank you for the opportunity to address the Committee regarding this critical legislation.

Respectfully Submitted,

Melissa Marrero

Deputy District Attorney
Multnomah County District Attorney's Office
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