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March 16, 2021

Honorable Senator Floyd Prozanski
Chair, Senate Committee on Judiciary

RE: Testimony in support of Senate Bill 752

Chair Prozanski, 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. I am here on behalf of the Oregon District Attorney's Association in support of SB 752.

SB 752 is the product of a work group convened in the fall of 2020 to discuss legislative options in response to the Oregon Supreme Court's decision in *State v. Haltom*, 366 Or 791 (2020). Convened by Chair Prozanski, participants from OCDLA, Oregon DOJ, and ODAA met to discuss different proposals. During the same discussions, a different issue raised by OCDLA became part of the discussion. SB 752 reflects the group's consensus on both issues.

Section 1

Section 1 of the bill addresses the specific issue raised in *Haltom*.

In *Haltom*, the Oregon Supreme Court, after a lengthy discussion of the legislative history of ORS 163.425(1)(a), concluded that in a prosecution for Sexual Abuse in the Second Degree (subjecting a person to sexual intercourse, oral or anal intercourse, or penetration of the vagina or anus with an object *without consent*), the state had to prove beyond a reasonable doubt that **the defendant knew the victim did not consent** and that the jury had to be so instructed.[1]

[1] The *Haltom* case held that it was error for the trial court to instruct the jury that the element of "knowingly engaged in sexual intercourse with the victim without her consent" required proof that the defendant knowingly engaged in sexual intercourse but that, with respect to the victim's non-consent, the jury could find that the defendant acted with a criminally negligent or reckless mental state. "In this case, that means that the trial court erred in instructing the jury that it could find defendant guilty if he acted negligently, recklessly, or with knowledge with respect to that element." Before the *Haltom* decision, the issue of

The work group turned to the current exceptions for sex crimes for guidance, basing this "fix" on language that already existed in ORS 163.325 (an affirmative defense for certain age based sex offenses). Under the language of SB 752, in a prosecution for Sexual Abuse in the Second Degree, the state would be required to prove beyond a reasonable doubt that the defendant knowingly engaged in the sexual act (as specified above) and the state would have to prove beyond a reasonable doubt that the victim did not consent to that sexual act. The "knowledge" requirement would not extend to the victim's non-consent.

Rather, the burden would shift to a defendant to prove by a preponderance of the evidence (see ORS 161.005(2)) that they reasonably believed the victim did consent. A defendant could raise this affirmative defense by relying on evidence already adduced during the state's case in chief, or by offering their own evidence.

Societal norms and expectations demand that consent be obtained prior to any sexual act, and that if a victim says "no" or there is other evidence of non consent (i.e. the victim was incapable of consent, ORS 163.315), the state can proceed with the prosecution. This "fix" is a reflection of those societal norms and expectations.

The intent of SB 752 is to overturn *Haltom*, so that if the state proves the defendant knowingly engaged in sexual intercourse and the victim did not consent to it, it would be the defendant's burden to prove that they reasonably believed the victim did consent.

Section 2

Section 2 involves an issue raised by OCDLA.

OCDLA asked ODAA to look at sex offender registration for Sexual Abuse in the Second Degree. OCDLA brought up a disparity that ODAA agreed should be corrected.

For certain misdemeanor or Class C felony sex offenses where non-consent is based on the victim being under the age of 18,[2] if the defendant and victim are less than 5 years apart in age, the law does not require registration.

For Sexual Abuse in the Second Degree charged under the same theory (i.e. the victim was under 18 and therefor incapable of consent), the law still requires the defendant to register as a sex offender. The OCDLA proposed, and ODAA agreed, that such a requirement created unnecessary disparities when the conduct was essentially the same.

By way of example, if a victim was 17 (and therefore legally incapable of consenting to a sexual act) and the defendant was 21, the 21 year old would have to register as a sex

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whether "knowledge" applied to both the sexual act as well as the victim's non-consent was undecided and courts were instructing juries differently.

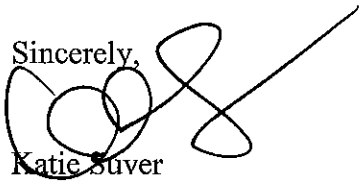
[2] Rape or Sodomy in the Third Degree (Class C felonies), Sexual Abuse in the Third Degree and Contributing to the Sexual Delinquency of a Minor (Class A misdemeanors), and Sexual Misconduct (Class C misdemeanor), or attempts to commit the same crimes.

offender if convicted of Sexual Abuse in the Second Degree (which can be charged for victims over 16 but under 18). But if a victim was 15 and a half, and the defendant was 20 (i.e. less than 5 years age difference), the defendant would not have to register if the conviction was for Rape in the Third Degree. Both are Class C felonies.

SB 752 only creates an exception for age based non consent (as opposed to affirmative non-consent). Additionally, if a victim is under 18 and the defendant 5 or more years older (30, 40, 50 years of age, etc.), this exception does not apply. The purpose of Section 2 was to bring Sexual Abuse in the Second Degree in line with the similar age based sex crimes where a victim and defendant are less than 5 years apart in age.

The Oregon District Attorney's Association urges passage of SB 752. Thank you for your consideration.

Sincerely,



Katie Suver
Deputy District Attorney