

**TESTIMONY ON SB 295A
BEFORE HOUSE COMMITTEE ON JUDICIARY, HOUSE SUBCOMMITTEE ON CIVIL LAW
APRIL 26, 2021**

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

Chair Power, Vice-Chair Wallan, and Members of the Committee:

I am here today to speak to SB 295A on behalf of the Oregon Judicial Department (OJD). We support SB 295A. SB 295A represents the consensus of a multi-stakeholder work group as well as great staffing from all three branches. The Senate supported the measure by a vote of 27-1-2.

For several 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 because of a mental 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.

The Legislature passed SB 24 (2019) as a step 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 (Regular Session) 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 295A provides needed reform to Oregon's aid and assist statutes, including the following important changes:

Hospital Level of Care

SB 295A narrows the criteria permitting a judge to commit a defendant to OSH for competency restoration if the defendant is charged with misdemeanor crimes only. The measure also modifies the criteria that a certified evaluator must consider regarding the need for "hospital level of care," omitting the requirement 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 proposed change was crafted from 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.

Federal Constitutional Requirements

In the *Mink* case, the U.S. Court of Appeals for the Ninth 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 295A conforms Oregon law to

federal constitutional requirements. It accomplishes this by limiting the time that a defendant who has been found unable to aid and assist 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.

Involuntary Medication

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 295A 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.

Community Mental Health Program Consultations

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. Current law requires the court to order community mental health programs to consult with every defendant that the court identifies as potentially unable to aid and assist. SB 295A 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 three 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 still to do 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.

We believe that SB 198-2 is the appropriate vehicle for discussing the issues of immunity and shifting liability to the state for those providing community restoration. SB 295A is a consensus product focused on entirely different statutes and addressing procedural improvements. OJD is neutral on the policy choices that the SB 295-A4 amendment raises.

OJD, under the leadership of the Chief Justice, is fully committed to improving the practices of our courts for those with behavioral health needs. Addressing the needs of those 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 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 brick and mortar services, such as a 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.