OCDLA
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

TO: House Committee on Judiciary
FROM: Mae Lee Browning, Oregon Criminal Defense Lawyers Association
DATE: April 17, 2023
RE: Concerns with SB 867

Chair Kropf, Vice Chairs Wallan and Andersen, and members of the House Committee on Judiciary:

My name is Mae Lee Browning. I represent the Oregon Criminal Defense Lawyers Association. OCDLA's 1,200 members statewide include public defense providers, private bar attorneys, investigators, experts, and law students. Our attorneys represent Oregon's children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, adults in criminal proceedings at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon. Our mission is championing justice, promoting individual rights, and supporting the legal defense community through education and advocacy.

I am testifying to make recommendations to SB 867.

The defense is concerned with changing the language such that it imposes no obligation on the prosecution to do anything to produce the witness, including extremely basic and reasonable measures such as informing the witness of the trial date or even requesting that the witness to appear voluntarily. With this sort of language, the state can put forward evidence that the defendant engaged in any wrongdoing to incentivize the witness's absence, the forfeiture by wrongdoing exception is met, and the state can freely use both reliable *and* unreliable hearsay.

What if the witness failed to appear because of mundane complications such as traffic, forgetting the trial date, or some other innocuous cause? What if the witness was directed to wait in front of the DA's office instead of directed to the courtroom? In these situations, relatively simple actions would be sufficient to produce the witness.

At minimum, the defense needs to be assured that the witness knew the time and place to testify. OCDLA suggests a couple options to achieve this goal.

1. Add to sub f on line 19 after the period:

and the proponent of the evidence has done the following:
(i) Served or made a good-faith attempt to serve the declarant with a subpoena, or
(b) If service of a subpoena did not occur, notified the declarant of the time and place of the hearing at which the declarant's testimony is required.

2. In the alternative, we suggest adding the following language to the beginning of sub f on line 17:

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having been personally served with a subpoena to the proceeding unless the declarant cannot be located by reasonable means

Background on Forfeiture by Wrong-Doing

There are two elements to the forfeiture by wrongdoing exception: (1) wrongdoing intended to prevent the witness's appearance, and (2) the witness's unavailability. Currently, trial courts decide whether the first element is proven during a OEC 104 hearing, in which the Evidence Code does not apply. Proof that a defendant engaged in wrongdoing is often based on hearsay statements by the absent witness (*e.g.*, the DA may represent that the witness refused to come to trial because of the defendant's threats). That accusation of wrongdoing is not subject to cross-examination. If the court accepts those allegations, the defendant's confrontation rights fall away, and the state has the unfettered ability to introduce the witness's hearsay statements, regardless of their reliability. Confrontation rights exist, in part, to prevent false accusations, but a false accusation about witness tampering skirts around that constitutional protection.

In such situations, a defendant is found to have forfeited his or her constitutional confrontation right based on unconfronted hearsay statements. This circularity is known as "bootstrapping." *Jenkins v. United States*, 80 A3d 978, 997 n 49 (DC 2013). While the current forfeiture by wrongdoing exception in OEC 804 does not directly prevent this problem, the current unavailability standard ensures that the exception is applied only when the witness is *actually* unavailable. In such situations, the court is assured that the state cannot secure witness's attendance, and the allegations of the defendant's wrongdoing simply explain the witness's reluctance and gives the state more freedom to use the witness's hearsay statements.

A danger of lowering the standard for unavailability is the incentives it creates for the state to avoid live testimony. As it has been for centuries, live testimony is strongly favored. For example, the drafters of OEC 804 acknowledged that live testimony is the gold standard. *See* OEC 804 Commentary (1981) ("This rule expresses preferences: testimony given on the stand is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant."). In situations where the prosecution does not have helpful hearsay evidence to offer at trial, it will have every incentive to get the witness to court. But, should the unavailability standard be weakened, where the prosecution has compelling hearsay evidence in hand, or it deems the witness to be a risk to trial strategy, it has little to no incentive to produce the witness. Therefore, the efforts used to get a witness to court will largely depend on the state's desire to produce the witness.

Even when a defendant has engaged in wrongdoing, the truth-finding function of trial is best served by the appearance and cross-examination of the witness. The current unavailability rule requires the state to make equal efforts to produce a witness regardless of the strength of the hearsay evidence it has in hand, and thus promotes the equal treatment by the state and furthers the truth-finding function of the trial itself.