TO: **Se. Floyd Prozanski, Chair**
Sen. Kim Thatcher, Vice-Chair
Members of the Senate Committee on Judiciary

FR: **Oregon District Attorney's Association**

RE: **SB 1179 - Oppose**

March 18, 2025

Thank you for the opportunity to share our concerns with SB 1179.

SB 1179 has the well intentioned goal of allowing sentence reductions for survivors of domestic violence who have committed crimes as a direct result of the trauma they've experienced. However, the language in SB 1179 makes it vulnerable to being used more often by domestic abusers, not survivors.

ODAA's specific concerns with SB 1179 include:

"Domestic abuse" as defined in SB 1179 is overbroad and will be a tool for domestic abusers to receive sentence reductions.
The mitigation factor created by SB 1179 is predicated on the defendant having suffered "domestic abuse," which goes well beyond the legal definition of domestic violence by including items like emotional abuse, threatening to blame or humiliate someone, and more. To further muddy the analysis, the "domestic abuse" need only be a "contributing factor" to the criminal behavior, not a significant factor or but-for cause. Having such unclear, untested terms will likely lead to domestic abusers using this bill to their advantage.

For instance, a domestic abuser who's been convicted of strangling his wife could argue that the strangulation was due in part to compounding frustration because his wife was (1) always blaming him for their problems, (2) was economically abusing him because she didn't have an income and was using his income to buy things without his approval, (3) would often humiliate him in public or in front of friends with her unenlightened comments, and (4) said that she would take him to court for all of his money if he left her thereby preventing him from leaving the relationship. If a defendant were to argue the above, the state and the victim would be required to gather evidence and present a case to show that while the defendant would likely meet the first two elements of the test, he should fail on the third. Establishing that the defendant failed to meet the third element (circumstances of the crimes, abuse, and defendant) would further

invade the privacy of the victim and make it less likely that victims cooperate with prosecution of violent DV offenders.

Judges can already account for a defendant being a victim of domestic violence in most sentencing hearings.

Judges already have discretion in the vast majority of cases to consider the fact that the defendant was a victim of domestic violence. In any misdemeanor sentencing other than a DUII, the judge has full discretion to impose a sentence ranging from zero days jail, no fine, and no probation all the way up to the statutory maximum of all three. In any felony sentencing to which the felony sentencing guidelines apply, a judge can depart from the presumptive sentence based provided that the judge finds that there are substantial and compelling reasons to do so—while there are enumerated mitigation factors, OAR 213-008-0002(1) expressly states that the enumerated factors are "nonexclusive."

Judges may consider the fact that the defendant was previously a victim of domestic violence for many Measure 11 (ORS 137.700) crimes. ORS 137.712 allows a court to revert to the felony sentencing guidelines and even depart from those for certain Measure 11 crimes.[1] If a judge finds that there is a substantial and compelling reason under OAR 213-008-0002(1) (as discussed in the paragraph above) and the particular findings necessary for each crime.[2]

ORS 137.717, the repeat property offender statute, also has an exception to its sentencing requirements upon a finding of substantial and compelling reasons and a few other findings.[3] ORS 137.719 and ORS 137.725, which have mandatory minimum sentences for repeat felony sex offenders also have escape valves for when the court finds substantial and compelling reasons to not impose the mandatory minimum.[4]

As demonstrated above, for the vast majority of offenses, judges may already take into consideration the role that domestic violence has played in the defendant's life and in the offenses committed by the defendant to determine whether there are substantial and compelling reasons to reduce the defendant's sentence. Judges have the authority described

[1] Manslaughter II, Assault II, Kidnapping II, Rape II, Sodomy II, Unlawful Sexual Penetration II, Sexual Abuse I, and Robbery II.

[2] E.g., to remove an Assault II from Measure 11 and return to the felony sentencing grid, a judge could find that there is a substantial and compelling reason to do so because the defendant was previously a victim of domestic violence, and then under ORS 137.712(2)(b)(A)-(C), the judge would need to find that the weapon used was not a "deadly weapon" (meaning a weapons specifically designed and presently capable of causing serious physical injury), the victim did not suffer a significant physical injury, and the defendant doesn't have a previous conviction for a Measure 11 crime or a handful or other very serious offenses. After making those findings, the defendant's sentence would be removed from Measure 11. A judge could even grant a downward departure from the presumptive sentence on the felony sentencing grid if they were to find an additional substantial and compelling mitigation factor, that a sentence of probation would better prevent recidivism and protect society. ORS 137.712(1)(b)(A)-(C).

[3] ORS 137.717(4)-(6).

[4] ORS 137.719(2); ORS 137-725(2).

above after a conviction at trial or as a result of a plea (even if the plea agreement did not contemplate a departure sentence).

SB 1179 is expressly retroactive which will harm crime victims.
Section 12 of SB 1179 makes the bill expressly retroactive, allowing anyone who is presently incarcerated to petition for resentencing if they believe that they would receive a reduced sentence with this new mitigation factor. SB 1179 also sets a low bar for resentencing, requiring only that the petition shows by a preponderance that this mitigation factor would apply and requiring the judge reviewing the petition to assume the contents of the petition are true—even if they are patently false and not believable.

SB 1179 will retraumatize victims who believed their abuser's sentence to be final, but find out years later that the sentence may be overturned and likely reduced. Victims will have to work with law enforcement to gather evidence of their home life from years ago and will be forced to recount the traumatic events that they suffered.

SB 1179 should not apply to recidivist statutes and mandatory minimums.
Sections 2-11 of SB 1179 apply to recidivist and mandatory minimum sentencing structures. Those statutes are in place because of the serious nature of the crime and/or the fact that the defendant needs to have an aggravated sentence because they continue to commit the same offenses.

Additionally, many of the minimum sentencing statutes were enacted by the voters. If those statutes are modified, we believe they may fall under the control of the Legislature and a 3/5th vote will no longer be required for future amendments, which places the assurances the mandatory minimum sentencing statutes present to crime victims at risk of future reductions.

Legislative Counsel (LC) recently opined that HB 3583 (a substantially similar bill to SB 1179) would not bring ORS 137.700 (Measure 11) and other voter enacted mandatory minimums under the control of the Legislature. However, LC's opinion is based on *State v. Vallin*, 364 Or 295 (2019), which addressed whether a legislative pause on the enactment of an entire statute (ORS 137.717 – repeat property offender statute) made the statute a creation of the Legislature—the Supreme Court concluded that it does. Here, the question is whether the application of a sentencing mitigation factor turns a voter-enacted law into a legislative creation. Therefore, *Vallin* does not address the issue here and is not adequate authority to rely upon.

LC asserted that the HB 3583 is more like the enactment ORS 137.712 than the pause of ORS 137.717 addressed in *Vallin* because HB 3583 would create a subset of folks to whom ORS 137.700 would not apply, therefore ORS 137.700 would still be intact as to the rest of the population and would still be a voter-enacted law as to the rest of the population. However, that theory has not been upheld by the courts as to ORS 137.712 and was not discussed in *Vallin*. Rather, LC is likely relying on (but did not cite to) the *McGinnis* quote in *Vallin*:

"…where a section of an act is amended 'so as to read as follows,' and the later law sets forth the changes contemplated, the parts of the old section that are incorporated in the new are not to be treated as having been repealed and re-enacted, but are to be considered as portions of the original statute, unless there is a clear declaration to the contrary, in the absence of which it is only the additions that have been made to the original section that are to be regarded as a new enactment."[5]

The above principle of law is not essential to the *Vallin* decision, so it is likely dicta.

McGinnis (an Oregon Supreme Court case from 1910) is obviously not at all about Measures 10 or 11, rather it is about a change in statutes criminalizing the operation of brothels and the interplay between that change and the evidence code. Its conclusions aren't on point here and should not be relied upon to defend the integrity of Measure 11. *McGinnis* relies on a series of cases from the 1800s and early 1900s, which are also not on-point and are muddy at best.

Accordingly, there is limited authority to suggest that SB 1179 would not make M11 a creation of the Legislature. If the Court of Appeals and Supreme Court were to take this issue up on appeal, it would have wide latitude in making its decision because of the lack of case law evaluating whether a sentencing mitigation statute that applies to a voter-enacted law turns that law into a creation of the Legislature.

SB 1179 will ultimately be harmful to victims and to our state.

SB 1179, though well intentioned, is misguided and won't achieve its goal of protecting survivors of domestic violence. Without significant changes to the three-step test, the definition of "domestic abuse," the crimes to which the mitigation factor applies, and an elimination of the retroactivity section, SB 1179 will be used by domestic violence abusers to reduce their sentences and harass their victims. SB 1179 in its present form will likely harm those that it seeks to protect—survivors of domestic violence.

[5] *State v. Vallin*, 364 Or 295, 307-08 (2019) citing *State v. McGinnis*, 56 Or 163, 165 (1910)