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29 April 2025

Re: House Bill 2471

Dear Chair Prozanski, Vice Chair Thatcher, and Members of the Senate Judiciary Committee,

Thank you for considering my thoughts on the draft language for HB 2471. I have been a licensed psychologist in Oregon since 2006, and have been a certified forensic evaluator since the advent of the Oregon Forensic Evaluator Training Program in 2012. I am training faculty in the Oregon Forensic Evaluator Training Program. I worked in the Forensic Evaluation Service at the Oregon State Hospital from 2008 to 2023, and I co-founded Northwest Forensic Institute, LLC, a group forensic evaluation practice based in Portland, Oregon. As a person who routinely conducts criminal responsibility (guilty except for insanity) evaluations, this bill is of great interest to me, as forensic evaluators will be tasked with applying the law in developing a nexus for the Court.

At the time I am writing this letter, there are three primary changes in the draft legislation. These qualify the presence of a qualifying mental disorder that causes an examinee to lack the substantial capacity to appreciate criminality and/or conform conduct to the requirements of the law as a threshold issue, specifying that in addition to the presence of a qualifying mental disorder:

a) But for the qualifying mental disorder, the person would have had such capacity;
b) A mental disorder other than a qualifying mental disorder is not the primary cause of the lack of capacity; and,
c) The lack of substantial capacity is not the result of involuntary intoxication in combination with a qualifying mental disorder, a mental disorder other than a qualifying mental disorder, or both.

I appreciate (a), and I believe this would be a useful and welcome addition to the statute. I also find (b) to be clear and helpful, as it specifies that a qualifying mental disorder must be the primary cause of the lack of capacity.

I am concerned about (c). The wording indicates that the lack of substantial capacity "is not the result of voluntary intoxication in combination with a qualifying mental disorder." I realize from reviewing the written testimony of Melissa Marrero that the intent of (c) is not to impose an absolute prohibition on GEI findings for people with a qualifying mental disorder who also used intoxicants,

> The intent is that the voluntary intoxication cannot combine with other qualifying or non-qualifying disorders to produce the lack of substantial capacity that is the basis of a GEI defense. But the use or presence of intoxicating substances in a person's system does not *per se* make the defense unavailable. There may be cases where a certified evaluator finds that the intoxication is not a causal contributor to the lack of substantial capacity, and that person would still be able to argue that they were guilty except for insanity.

Although it may not be the intent of the proposed legislation to impose a complete moratorium on the GEI defense in people who used intoxicants at the time of the incident, I believe that many evaluators, attorneys, and finders-of-fact will interpret the plain language of the proposed legislation as barring GEI for people who have used intoxicants at all at the time of the incident.

Many individuals with severe and persistent mental illness use drugs, often as a way of attempting to reduce the distress associated with their symptoms. If a defendant has schizophrenia and also uses cannabis, and his or her cannabis use somewhat exacerbates their symptoms, but their schizophrenia is the primary cause of the lack of capacity, should the door be closed on the possibility of a GEI? I believe that (c) is likely to be interpreted, in many cases, as disqualifying this hypothetical examinee from being eligible for GEI, even when the contribution of substance use is small.

I understand that the intent of (c) is not to exclude people with any degree of intoxication from pursuing a GEI. While I know that this could be gleaned from the

legislative history, most evaluators – and many other professionals – will not be familiar with the legislative history, and will assume it to be a prohibition. In addition, the language offers vague guidance for an evaluator trying to advise the court. If the intent is that voluntary intoxication is not a *primary* cause of the lack of capacity – as seems to be implied in (b) – that is a clear standard. However, if standard is "as a result of" or "not a causal contributor," then the task of the forensic evaluator becomes less clear. If substance use contributes a scintilla of exacerbation to the underlying symptoms, should the defendant be barred from the GEI defense? Or is this a "but-for" standard, where the lack of capacity would not have been present had the examinee not been intoxicated?

I, and other certified forensic evaluators, would appreciate clarity on the standard we should be considering when attempting to advise the finder-of-fact. If the intent is to ensure that a qualifying mental disorder is the primary cause of the lack of capacity, then perhaps (b) could be revised to reflect that. Perhaps something like:

> (b) A mental disorder other than a qualifying mental disorder, voluntary intoxication, or both is not the primary cause of the lack of capacity.

If the intent of the law is to ensure that a qualifying mental illness is the primary cause of the lack of capacity, then the above wording provides clarity of regarding the standard that evaluators should apply in conducting GEI assessments.

Again, I appreciate your consideration of my thoughts. Should you have any questions or concerns, please do not hesitate to reach out.

Sincerely,

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