Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 19, 2013

The Honorable Floyd Prozanski, Chair
The Honorable Betsy Close, Vice-Chair
Members, Senate Judiciary Committee

RE: Senate Bill 421

Dear Chair Prozanski and Members,

I have been a lawyer in the criminal justice system for 17 years. I regularly speak and write on issues at the intersection of mental health and criminal justice, including civil commitment and competency. I wrote a bench book for the Oregon State Bar on civil commitments and a book for the Oregon Criminal Defense Lawyers Association on Mental Health and Criminal Defense. I have worked on many cases and sat on several work groups trying to figure out the best course when a criminal defendant is not competent to proceed on their case and unlikely to ever become so.

There is no doubt there are problems with the current laws connecting criminal competency and commitment that can and should be addressed. There is, in fact, a package of fixes included within the array of bills before the Legislature; among those with broad support are notice provisions for the district attorney [SB 88 and 89] and extensions of civil commitment periods. SB 421 is not a modest fix. It is a radical new quasi-criminal commitment that would essentially allow for the permanent incarceration of a person with acute mental illness or cognitive disability accused of a Measure 11 crime. As such, I urge you not to support SB 421.

SB 421 starts at the point where a person is found unlikely to become competent to proceed on their Measure 11 criminal case. That is, as the result of a mental illness or a cognitive disability the person is unable to understand what is happening and participate in their case.

In such situations, SB 421 would allow the court in a criminal case to hold a hearing to decide whether the person should be incarcerated in the State Hospital. The commitment process contemplated in SB 421 would very much be part of the criminal case:

- The criminal court retains jurisdiction over both the criminal case and the commitment “arising out of” the criminal case. [Section 4]

- The person is committed to a locked facility, not to the authority in charge of that facility.
- The criminal court retains the power to decide how long the person should be incarcerated. In fact, this appears to be the point: to bar alternative options such as placement in a secure group home, and essentially use the State Hospital to keep the person confined.
- Much like a criminal trial, the focus of the hearing will be whether the person committed the alleged crime. [Section 2 (2)(b)]
- SB 421 makes it clear that this new type of commitment is not part of the normal civil commitment scheme. It is a whole new type of commitment that uses none of the structure that currently exists.

Even more concerning than the underlying criminal nature of the commitment is its potentially permanent nature. Because none of the essential terms in the statute are defined, there is no legal basis on which either the Hospital or the defendant can argue for release. Terms like "dangerous" and "in need of commitment" may be filled in by the criminal court judge in each case as he or she sees fit. The most obvious way to define the essential terms, assuming there is any attempt to do so at all, will be to use the definitions from the Psychiatric Security Review Board (PSRB). Under the PSRB definitions, a person is a "substantial danger to others" if the person "previously has demonstrated" "reckless" or "negligent behavior" that placed another person at risk of injury. [OAR 859-010-0005(7)] Even 50 years after an incident, it is still true that the person "previously has demonstrated" risky behavior. The PSRB can use a definition that essentially makes people permanently dangerous based on very old behavior because the PSRB has the power to step people down from the Hospital into a group home and out into the community. Under SB 421, no one would have the power to move the person to a secure group home. The criminal court is the only entity with any power and that power is limited to either committing the person to the State Hospital or to end the commitment.

An additional problem with a quasi-criminal commitment is that it makes discharge planning impossible. The Hospital has no power to release the person to a secure group home so there is no ability to start the lengthy process of applying to group homes for placement. Instead, the Hospital can only send the person to a hearing before the criminal judge. The judge in the criminal case, however, will be looking at a situation where the person has been incarcerated at the Hospital with no plan for how the person will be cared for if released. That makes it more likely that the court will recommit. If the court does decide to release, the person will be released without a plan, thereby maximizing whatever risk actually exists. This will be true even after the person has been locked up for 20 or 25 years, long past the time accounted for by a criminal sentence.

Finally, it is important to note that because the hearing will be taking place in the county of prosecution, it may be many hundreds of miles away from the Hospital where the person is being held. In addition to the increased costs of litigating such hearings, it again sets up an impediment to a low-risk person being released. It makes it difficult for the attorney who will have to be appointed in the county of the criminal court to meet with the client, interview witnesses and present evidence to the court. And it creates a significant disincentive to the Hospital to even try to fight for an appropriate level of care.

In summary, SB 421 would allow for a new quasi-criminal, potentially permanent commitment to a locked facility. There are less draconian and less costly paths to addressing the very real problems with the current system.

Thank you for your consideration of these difficult issues. Again, I urge you not to support Senate Bill 421.

Respectfully submitted,

Alex C. Bassos, JD
Training Director and Director, Multnomah County
Metropolitan Public Defender, Inc.