



Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 8, 2016

The Honorable Floyd Prozanski, Chair
The Honorable Jeff Kruse, Vice-Chair
Senate Judiciary Committee, Members

Dear Chair Prozanski and Members,

Thank you for the opportunity to speak to this committee regarding proposed SB 1556. When we met as an organization to prepare for this legislative session, we looked at the presentation from this past November's legislative days, including the concepts in this bill. We read the materials, and we looked at the appellate case law. We currently oppose the proposed legislation.

A physical injury can be proven two ways under ORS 161.015. There is an objective standard – impairment of physical condition. In addition, there is a more subjective standard – substantial pain. What we heard the advocates saying is that the government cannot prove physical injury in certain cases. Specifically, we heard them say that it cannot prove substantial pain in cases in which the victim is either unable or unwilling to testify. There was a hole in the law, the advocates said, that needed to be filled.

We disagreed. We did not believe that there was a hole in the law. The case of *State v. Wright*, cited by the advocates, stated very clearly that the Court of Appeals was not issuing an opinion as to whether the bruising was sufficient evidence of substantial pain. Further, we knew that any case can be proven through direct, or circumstantial, evidence.

We then read the introduced version of SB 1556. This proposal seemed to pivot from the presentation in November, which discussed those vulnerable victims who, because of age, capacity, or disability, were unable to articulate the pain they experienced. We thought the population group in this new bill was overbroad, as it applied to all those under 18 and over 65, regardless of individualized capacity. In addition, we thought the new bill abandoned objective concepts of "reasonableness," which exist under current law.

Two weeks ago, the Oregon Court of Appeals issued a legal opinion in the case of *State v. Guzman*. The defendant in *Guzman* was convicted of domestic violence assault for causing the victim substantial pain. The victim in the case did not testify at trial, nor did any witness testify about how much pain the victim experienced. Rather, the

prosecution made the best case they could, relying upon photographic evidence and other circumstantial evidence.

The Oregon Court of Appeals affirmed the conviction, stating that a victim's pain can be proven through circumstantial evidence. The Court wrote:

"Thus, when the victim does not provide direct evidence of his or her subjective experience of the degree and duration of the pain, as in this case, a trial court ruling on an MJOA must determine whether the evidence would permit a rational jury to reasonably infer that the victim suffered considerable pain and whether the duration of the pain was more than fleeting."

This opinion confirmed our position that there was no hole in the law. Rather, the proposal in SB 1556 is a policy change, and one that we would urge this committee not to make without a significant and thorough discussion with a diverse set of affected stakeholders.

And while the proposed (-1) amendment limits the concept to dependent persons, it continues to be an overbroad population group in response to the issue framed by the advocates – those who cannot appropriately articulate their pain. The advocates have framed the amendment as responsive to cases of child abuse, but nothing limits the concept to those types of cases. It applies to any alleged assault, including those committed between teenagers, who currently are adjudicated in the juvenile justice system.

More importantly, SB 1556, both in its original form and with the (-1) amendment, eliminates an important safeguard built into the definition of physical injury – reasonability. Impairment of physical condition is an objective concept that allows the trial court and the appellate courts to perform a gatekeeping role. Similarly, substantial pain has a reasonability standard – there must be evidence that would allow a reasonable person to conclude the victim experienced substantial pain.

During the 2015 legislative session, OCDLA and ODAA came close to an agreement on this bill concept, and the language included "reasonable person" language. And in this session, we developed proposed amendment language of our own, which also tethered the concept of physical injury to that of a reasonable person.

As drafted, SB 1556 requires a finding of physical injury if the victim experiences any of the listed criteria or other wound, without any judicial oversight or gatekeeping functions. Those safeguards are eliminated. Any de minimis cut, scrape, or bruise would constitute a physical injury eligible for an assault prosecution.

Despite our association's title, many of our members do not practice criminal law at all. The constitutional right to counsel arises in several areas – including those cases in which a person may lose their parental rights. Many of our members practice exclusively in juvenile dependency cases involving child welfare issues. These

attorneys are appointed by the court to be the voice for and advocate on behalf of young children. They have a unique perspective, as they work up close with children who are victims of abuse and see first-hand the impact of that abuse. They choose this difficult work and care deeply about protecting children.

Because of that, OCDLA is open to participating in a broader discussion about whether our criminal statutes need to be adjusted to the realities of child abuse cases. The current definition of physical injury is a product of the Oregon Criminal Law Revision Commission which met from 1967-1971. The language mirrors that of the Model Penal Code, and has not been changed since its inception. And while OCDLA is not wedded to the past, we do think a more deliberate and collaborative discussion needs to occur before any policy change occur. Un-tethering physical injury from the concept of objective reasonability is a significant policy change.

Respectfully submitted,



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