Oregon District Attorneys Association, Inc.

November 15, 2017

TO: Honorable Jeff Barker, Co-Chair
Honorable Floyd Prozanski, Co-Chair
Members of the Interim Joint Judiciary Committee

FROM: Tim Colahan, Executive Director, Oregon District Attorneys Association

RE: Non-Unanimous Juries in Oregon

For the record, my name is Tim Colahan and I am the executive director of the Oregon District Attorneys Association.

I want to start by acknowledging the work of Prof. Kaplan and her students and colleagues. Clearly significant time, energy and resources were expended in authoring the law review article that has renewed interest in this policy.

Unlike Prof. Kaplan, I have not conducted any independent research on the history of Oregon's policy and as a result I am unable to offer any significant feedback on the matter. However, my colleague, Clatsop County District Attorney Josh Marquis, who could not be here today due to a professional obligation out of state, has undertaken a review of the history of the policy. His analysis arrives at dramatically different conclusions as to the origins of this law. As with any historical assessment, there are instances when reasonable people will differ in their interpretations and this is one such time. I know that Josh reached out to each of you earlier this week and provided his thoughts via email. If you have any questions as to his findings, I assure you he will be more than happy to field an email or phone call, as I'm sure Prof. Kaplan would as well.

While I may not be a historian, I am definitely a dinosaur. In that way, I can only bring to bear my experiences with this law. Having been a prosecutor for well over 30 years, and in discussing the matter with my colleagues who collectively have hundreds of years of experience, Oregon's non-unanimous jury law, while unique, is fairly applied. I was never involved in a case in which a defense attorney alleged the outcome was unjust and certainly believe no defendant was wrongly convicted. Rather, on that mark, Oregon has an exceptional track record. The handful of cases in which a defendant was truly exonerated have almost always included the willing cooperation and, often, the outright insistence of the prosecutor. I can speak for every district attorney and deputy in the state when I say that one of our greatest fears is a wrongful prosecution.

I can also tell you with absolute certainty that the non-unanimous jury policy reduces the number of hung juries in criminal cases that go to trial. In doing so, it clearly saves scarce resources in our criminal justice system. But unquestionably one must not put a price on justice. To this end, any criminal justice provision should never be based on resources alone, but must first and foremost ensure balance in the scales of justice. To that end, Oregon's law is uniquely two sided.

While I did not see it discussed in Prof. Kaplan's article, nor have I heard it mentioned in any of the pleadings concerning Oregon's non-unanimous jury provisions, both convictions AND ACQUITTALS are subject to the 10-2 rule.

Yes, as you likely know by now, Oregon is the only state that allows non-unanimous jury convictions in all felony cases except first-degree homicide. While we are frequently lumped in with Louisiana, our policy is quite different, as Louisiana allows non-unanimous juries in ALL criminal cases, including first degree murder and death penalty cases.

What you probably did not know, is that as best we can tell we are also the only state in America that authorizes the accused to be acquitted by the same non-unanimous vote – and that includes murder cases. So, while one cannot be convicted of murder by a non-unanimous jury, in Oregon alone a defendant can be acquitted of murder without unanimity. This is never mentioned, probably because Oregon's prosecutors, to my knowledge, have never, ever challenged the outcome of a case so resolved. Yet it provides a balance to the scales of justice that are not present in Louisiana or any other state.

Finally, the law offers another unique protection for the accused. In Oregon a defendant can unilaterally waive the right to trial by jury and, instead, present his or her case to a judge. In most other states, the state can contest such a waiver. Not so in Oregon – the authors of the initiative clearly sought to design a balanced approach intended to favor neither the state nor the defendant, and, if anything, offer this extra safeguard for a defendant wary of an impartial jury. This option is used regularly in courtrooms across the state.

So, while I can't attest to the most accurate history of this law, I can attest to it reducing instances of a hung jury in cases in which a conviction or acquittal is not unanimous. It is certainly likely that if the citizens were to require unanimity that juries would work harder to get to consensus. It is also certain that there would be more hung juries, which would consume the time and resources of all parties and the courts.

Should the legislature or the citizens of Oregon seek to change this longstanding law, then the only course that meets the criminal justice balancing test is to wholly repeal Measure 302. Repeal the non-unanimous requirement for conviction. Repeal the non-unanimous requirement for acquittal. And allow the state, on behalf of the rights of citizens, to request cases be tried to a jury. But any such change should be made only after a careful study of the impacts. We believe such changes would result in very little, if any, change in outcomes, but a significant increase in costs to the criminal justice system.

Thank you for your time.