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M E M O R A N D U M

To: House Judiciary Committee, Hon. Jeff Barker, Chair
From: Melissa Marrero, Deputy District Attorney
Date: March 19, 2017
Subject: House Bill 2306 -1

The Multnomah County District Attorney's Office and the Oregon District Attorney's Association respectfully offers this memorandum of opposition to House Bill 2306-1.

HB 2306-1, Section 1 directs the Oregon Health Authority (OHA) to adopt rules requiring that information concerning defendants who lack fitness to proceed be shared between OHA, state mental hospitals, law enforcement agencies, district attorneys, courts and community mental health programs. Information sharing among these entities is appropriate, and will reduce many of the challenges currently faced by the justice system when confronted with unfit defendants.

We have significant concerns regarding HB 2306-1, Section 2, however. Section 2 mandates, without exception, that a court must receive an examination report by a certified evaluator prior to ordering commitment of a defendant for fitness restoration. This is a significant change from existing law and practice. Currently, if the court finds that evidence of unfitness is clear, and that a defendant is either dangerous or cannot be sufficiently treated in the community, the court may commit that individual for treatment, even absent an examination report. Section 2 strips the court of this authority, even in cases where the judge, defense, prosecutor, and community mental health professionals are in agreement that an individual is in need of commitment. This will unnecessarily delay the provision of services to unfit defendants, leaving them to languish in the jails, as courts wait to receive completed evaluations. While we acknowledge that receipt of competency evaluations assists the court in making sound commitment decisions, requiring such an evaluation, in every case and without exception, would delay the appropriate administration of treatment, and ultimately justice.

Of even greater concern, Section 2 removes the authority of Oregon judges to determine whether defendants who are committed for competency restoration should be placed at the Oregon State Hospital, or whether they are appropriate for treatment in the community.

Under current law and under HB 2306-1, a court may only commit a defendant for fitness restoration if the court finds that the defendant is dangerous to self or others as a result of mental disease or defect, or if it is determined after consultation with the community mental health program director or the director's designee, that the services necessary to restore the defendant's fitness to proceed are not available in the community. Under current law, a defendant committed upon such findings is committed to the custody of the superintendent of the state mental hospital

or the director of a facility designated by the OHA. HB 2306-1 drastically changes this practice by requiring the court to commit the defendant to the OHA, who would then determine the location of the defendant's commitment, in consultation with the community mental health program director. In effect, HB 2306-1 gives OHA the authority to release a committed defendant for treatment in the community, negating the court's previous findings that the person is dangerous to self or others or that the services necessary to restore the defendant's fitness are not available in the community.

The courts are better equipped and more appropriate than OHA to determine dangerousness and whether community restoration is appropriate. ORS 163.365 describes the procedures to be used when there is reason to doubt a defendant's fitness to proceed. The courts may call witnesses to assist in them in making fitness determinations. By law, the courts must order community mental health program directors or designees to consult with defendants to determine whether the services and supervision necessary to safely restore fitness are available in the community. Further, the courts may order the psychiatric or psychological evaluation of a defendant, or may order a short commitment (less than 30 days) for purposes of an evaluation. Both the prosecuting attorney and the defense attorney may call witnesses and present additional evidence to the courts. The courts may hear directly from crime victims in appropriate cases, regarding safety concerns.¹ Further, the courts are located in the communities where the defendants may be released or treated, giving them greater access to and understanding of available local resources. Finally, the courts base their decisions solely upon an informed analysis of whether a person is dangerous and whether the community has sufficient resources available to safely and effectively treat the individual in a non-custodial setting.

These decisions can be critically important to community safety and to the proper administration of justice. Were OHA to be granted the authority to decide the placement of defendants committed for restorative services, as contemplated by HB 2306-1, placement decisions would be inappropriately subject to considerations aside from dangerousness and whether services necessary to achieve fitness restoration are available in the community. Specifically, OHA's placement determinations would be inappropriately impacted by the relative acuity levels of other patients and available space at the Oregon State Hospital. Finally, it is important to note that HB 2306-1 contains no mechanism for the courts, attorneys, or community mental health program directors to challenge OHA's placement decisions, if necessary. It improperly cedes all control of an unfit defendant's supervision and release status from the courts to OHA.

Thank you for the opportunity to address the Committee.

¹ Article 1, Section 42 of the Oregon Constitution affords crime victims the right to be heard at pre-trial release hearings. Article 1, Section 43 of the Oregon Constitution affords victims the right to be reasonably protected from the criminal defendant, and also the right to have decisions by the court regarding pretrial release of a defendant based upon the principle of reasonable protection of the victim and the public.