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HOUSE JUDICIARY COMMITTEE  
Representative Jeff Barker, Chair  
Senate Bill 64  
May 8, 2017

Testimony of Harris S. Matarazzo, Attorney at Law

Chair Barker and Members of the House Judiciary Committee:

As an attorney who works closely with the mental health community and individuals under the jurisdiction of the Adult Psychiatric Security Review Board (PSRB) and Oregon Health Authority (OHA), I opposed the PSRB's previous drafts of SB 64. These would have substantially changed Oregon law to inappropriately expand the "Insanity" defense and allow the Board to retain individuals under its jurisdiction with only substance abuse, sexual disorders, or other conditions now deemed insufficient for that purpose.

Mr. Josh Nasbe, Judiciary Committee Counsel, shared my concerns and, together, substituting the term "qualifying mental disorder" for "mental disease or defect" was agreed upon. I do not oppose this proposal as long it remains clear that adoption does not reflect a change in underlying legislative intent, ie an approval by the Legislature of this Bill is not meant to change the meaning of what is now known as a "mental disease or defect", and that the PSRB is not being empowered to adopt a meaning which is contrary to previous pronouncements of the Legislature or Oregon's Appellate Courts.

In the previous drafts of this Bill, PSRB has stated that its motivation was merely to remove the negative stigma associated with terms such as "disease" and "defect". Unfortunately, their proposals did not reflect this. As an attorney who is very familiar with the Board, and has substantial experience in litigating the issue of what is, or is not, a "mental disease or defect" in the appellate courts, my concern is that the adoption of this change not be later cited by the PSRB as a change of your intent as to the meaning of that term.

In its initial draft, the Board sought to define the term "Mental disease or defect". This definition was contrary to what we currently understand that to be. It was much more broad, and included language that had been clearly rejected by the Legislature in 1983. More recently, it proposed changing "mental disease or defect" to "mental disorder". As the agency knows, this is a term of art contained in the "Diagnostic and Statistical Manual of Mental Disorders" (DSM), which, among others, included substance, and sexual conditions. The inclusion of such conditions was specifically rejected by the 1983 Legislature. Later decisions by the Oregon Court of Appeals and Oregon Supreme Court affirmed this, despite PSRB protests. (See Beiswenger v. PSRB , (Sexual Disorders do not constitute "mental disease or defect"), 192 Or

App 38 (2004) and Tharp v. PSRB, (Substance use does not constitute a “mental disease or defect”), 338 Or 413(2005)). In fact, at the time of the PSRB’s creation in 1977, the Legislature specifically rejected use of the term “mental disorder” because of its association with DSM.

From a purely legal perspective, I remain very concerned that a change in the term “mental disease or defect” may result in the inappropriate placement, or retention, of individuals under PSRB. However, I believe that the substitution of that phrase with “qualifying mental disorder” is likely sufficient to prevent this as long as the legislative record is clear that the meaning remains unchanged.

It is troubling that, in December 2015, the Board amended its administrative rules to include language which has been interpreted by my firm, as well as representatives of the State Attorney General’s Office in Board hearings, as inapposite to the holdings in Tharp and Beiswenger. This, considered with previous Board-submitted versions of SB 64, makes me apprehensive about any change to the law. I am not in a position to recommend whether or not the term “mental disorder” is less offensive, or more acceptable, than “mental disease or defect”. This determination has been made by PSRB.

Thank you for the opportunity to address the Committee.