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SENATE JUDICIARY COMMITTEE
Senator Floyd Prozanski, Chair
Senate Bill 64
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Testimony of Harris S. Matarazzo, Attorney at Law

Chair Prozansky and Members of the Senate 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 oppose the changes proposed in SB 64. Specifically, any re-naming of, or attempt to re-define, the term "Mental disease or defect" to "qualifying psychiatric or developmental condition" should be avoided. In my opinion, the meaning of that term has been well established, and a change for any reason would have profound negative impact on our criminal justice system, as well as our State's fiscal resources.

I have almost thirty years of experience representing individuals before the PSRB, OHA, and Oregon's appellate courts in mental health matters involving criminal law. In addition, since 1994, I have co-authored each version of the Oregon State Bar's Chapter entitled "Mental Illness and Incapacity" in its "Criminal Law" publication, as well as made presentations on the subject at the undergraduate, graduate, and practicing mental health professional levels. Similarly, I am involved in the credentialing process of mental health professionals allowed to evaluate persons alleged to be mentally ill, and facing criminal action. My appellate experience includes a thirteen year review of the law relating to "Mental Disease or Defect", which ended in 2004 with a decision by the Oregon Court of Appeals in Beiswenger v. PSRB , 192 Or App 38 (2004) and, a year later, in an opinion by the Oregon Supreme Court, Tharp v. PSRB, 338 Or 413(2005).

In 2004, one-hundred and twenty-six individuals were found "Guilty Except for Insanity", and placed under the jurisdiction of the Adult PSRB. This was a record. By 2009, the Board had seven-hundred and fifty-two individuals under its authority, also a record. Beginning in 2004 though, the number of PSRB "clients" has decreased to its lowest level since at least before 1999. This trend continues and is due to three factors, all resulting from judicial and legislative action. These include: Appellate decisions; Adoption of a statutorily mandated certification for mental health professionals seeking to evaluate individuals wanting to employ an "Insanity Defense"; and, the Diversion of less serious offenders to the Oregon Health Authority's State Hospital Review Panel (SHRP), modeled after the PSRB.

Decisions by the Oregon Court of Appeals and Supreme Court in Beiswenger and Tharp determined that the term "mental disease or defect" did not include conditions related solely to

substance abuse and sexual disorders. This was in contrast to the position of the PSRB. In arriving at these decisions, the Courts relied entirely upon the Board's 1983 testimony to the Oregon Legislature, in which the Board proposed, and the Legislature adopted, exclusionary language seeking to better define that term. Unlike most cases seeking to determine legislative intent, the Court found the evidence presented in support of its conclusion to be overwhelming. The Board's decision to completely disregard the law has never been explained. However, the consequences of its action have had a substantial impact, negatively affecting our criminal justice and mental health systems, as well as our State's finances. This should not be allowed to reoccur.

The Board's failure to uphold the law for decades resulted in encouraging more inappropriate placements under its jurisdiction, and significantly contributed to overcrowding at the Oregon State Hospital. Because these inappropriately placed persons did not have mental illnesses, the community had been unwilling, and unable, to accept them into their "conditional release" programs which were designed to treat those with mental illness. As such, many remained hospitalized, at an extraordinary financial cost to the State and, often, to the detriment of their truly mentally ill peers.

With the issuance of Tharp and Beiswenger, the legal community was placed on notice that inappropriate use of the "Insanity Defense" would no longer be tolerated. At the same time, a significant number of individuals began being discharged from the Oregon State Hospital due to the absence of "mental disease or defect".

Later, in order to better ensure the appropriate use of the "Insanity Defense", the Legislature adopted a mandatory certification process for forensic mental health evaluators. Credentialing for mental health professionals seeking to evaluate individuals wanting to employ an "Insanity Defense" is now required. Its purpose is to ensure continuity of quality in reports relied upon by the trial court, so that inappropriate placements of individuals under PSRB and OHA do not result.

Finally, due to a statutory change in 2012, individuals found "Guilty Except for Insanity" are no longer placed under PSRB exclusively. Instead, depending upon the underlying criminal act, jurisdiction over these individuals has been divided between PSRB and OHA/ SHRP. Since OHA's creation of the State Hospital Review Panel, a significant number of individuals previously under PSRB, and later transferred to SHRP, have been deemed inappropriate for retention.

With better evaluations at the trial level, and the noted Appellate Court decisions, new PSRB/ OHA placements by the trial Courts have declined from a high of one-hundred and twenty-six in 2004, to just fifty-five in 2016. The cost savings, at more than $25,000 per person/ month, at the Oregon State Hospital has also been substantial. For the first time in years, the forensic population at the Oregon State Hospital does not outnumber the remaining residents. Since the implementation of the changes noted, those under PSRB/ OHA jurisdiction now number less than a decade ago. Despite this reduction, the new Hospital remains at or near capacity.

With a system now working so well, it is unclear why new legislation is being proposed. As an appellate attorney, I would be concerned that any change in nomenclature would signal a different legislative intent, ie a disagreement with decades of case law. A change would invite additional appeals, and the possibility of a greatly expanded Oregon State Hospital population.

Within Senate Bill 64, it is also proposed that PSRB adopt "[ ] rules that define the conditions that qualify as qualifying psychiatric or developmental conditions". (Section 3.ORS 161.295(3)) This too is problematic. In December 2015 the Board proposed, and later adopted, rules defining "Mental Disease or Defect". (OAR 859-010-0005(11)) In pertinent part, this rule provides:

> "A qualifying mental disease or defect includes [ ] [a] mental disease or defect that could become active as a result of a non-qualifying mental disease or defect."

(OAR 859-010-0005(11)(b)(B)) Non-qualifying mental disease or defect includes those identified by the Oregon Supreme, and Court of Appeals in Tharp and Beiswenger.

Read together, the Board has determined that the voluntary ingestion of alcohol or drugs, resulting in, or the activation of, psychosis, is a "mental disease or defect". This rule is inapposite to the 2005 Oregon Supreme Court decision in Tharp v. PSRB. Again, that decision is based upon your clearly stated intent in 1983 that such conditions be excluded from "Mental Disease or Defect".

If challenged on appeal, I believe that rule would fail under current law. However, to change the statute as currently proposed in SB 64 would be to severely weaken that position. Giving PSRB the sole authority to determine "mental disease or defect", or "qualifying psychiatric or developmental condition", as proposed, would be problematic, potentially inviting a far greater use of the "Insanity Defense".

Thank you for the opportunity to address the Committee.