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SENATE JUDICIARY COMMITTEE
Senator Floyd Prozanski, Chair
Senate Bill 65
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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 SB 65. While I believe that restorative justice programs can be very useful, and am generally supportive of them, the empowering of the Psychiatric Security Review Board to create and oversee one for individuals under the jurisdiction of PSRB/ OHA would be ill-advised.

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. To date, my office has represented more than two-thousand individuals under PSRB/ OHA jurisdiction in many more thousands of hearings. The issue of "Restorative Justice" is not a new one.

In April 2015, the PSRB assembled a task force to consider the establishment of a "Restorative Justice" Program for individuals found "Guilty Except for Insanity". The group of about one dozen, included myself, another attorney, mental health professionals, and a parole and probation officer. Initially, I inquired whether PSRB had the authority to establish such a program. We were told that it did, and that an opinion letter from the Attorney General's Office had been issued. The group was then shown a film about the process, followed by a brief presentation. No support for the effort was voiced by those gathered. A second meeting produced the same result, as did the third. Finally, the task force was asked if someone else would like to lead the review effort. I agreed, and became part of a smaller group. Our charge was to recommend whether or not a "Restorative Justice" program would be appropriate for this population and, if so, whether PSRB should move forward with it as a subset of its authority. Cost was not to be considered.

Because PSRB staff did not have Restorative Justice certification or mediation training, it seemed important that someone in our subgroup obtain it so that we could knowledgeably explore the issue posed to us. At our expense, one of my staff agreed. Through that process, as well as our own investigation, we were unable to discover any comparable “Restorative Justice” models involving individuals successfully using the “Insanity defense”. Collateral resources were then explored, including: 1) US Department of Justice Model; 2) United Nations Model; 3) Mental Health Courts, including Oregon (aka Therapeutic Jurisprudence); 4) Established Restorative Justice Programs, including Oregon’s DOC; Scholarly reviews; Local and National Providers (OSH Staff, OHSU Staff; Pacific University; Non Profit Providers); and, Concerned Individuals. Through this process, we discovered that, although the possible use and related outcomes are discussed in related literature, the success of “Restorative Justice” in the mental health system is unknown, and is the subject of ongoing discussion and study.

All discovered programs generally require: Participant capacity; Confidentiality; Voluntary participation/ Non coercion of the parties; Participation/ Cooperation must have no impact on the case (sentence or privileges); Appropriate screening of the parties; No harm to any of the parties must result. This would include a relapse of mental health related systems induced by participation in the proceeding.

We also identified several key obstacles which would disqualify PSRB from participating in this process:

Confidentiality. SB 65 proposes that all “Restorative Justice” records and communications are confidential, and not subject to public records disclosure. By statute, at all PSRB/OHA hearings, Victims are allowed to make unsworn Victim Impact Statements in open public hearings. There is no current way to stop a Victim from repeating what might be said in a “Restorative Justice” setting. The outcome could be highly prejudicial.

PSRB staff would be required to maintain client “Restorative Justice” records and related information away from Board members to ensure that this data not influence PSRB decisions. In addition, staff would be prohibited from discussing this material. Maintaining this “in house” secrecy seems problematic.

Procedural Justice. “Procedural Justice” requires that decision makers be viewed as unbiased, consistent, and neutral. Combining Board functions could negatively influence its perception by the community.

Voluntary participation/ Non coercion of the parties. A key feature of “Restorative Justice” is that the participation, or not, of the client have no impact on their sentence or the disposition of the case, especially release. This works well in criminal actions where sentences are established by the Court, and post trial reconciliations cannot be deemed to influence release status. Including “Restorative Justice” responsibilities with PSRB’s existing judicial functions is contrary, by definition, to the “Restorative Justice” Model. The Board is constantly reviewing cases to determine the propriety of release. PSRB involvement in “Restorative Justice” could

have a coercive effect on a client's participation. This includes those who may be deemed as psychiatrically fragile. The potential negative impact on victims is no less important..

Appropriate screening. Rather than merely adjudicating cases, enactment of SB 65 will require that PSRB to involve itself in treatment and screening related matters for those seeking involvement in the "Restorative Justice" program.

Given the concerns noted, our subgroup made some suggestions as to how these impediments might be addressed. However, because of concerns about PSRB involvement in this process at all, we also identified four alternative or existing programs for consideration. The two most promising include:

a) The Oregon State Hospital (OSH).

Assets Include:

- Familiar with client population and issues;
- Testing and evaluations for client competency, as well as the ability to participate in "Restorative Justice", already exist;
- Trained staff, especially in the Psychology Department, who already practice "Restorative Justice", particularly when family are victims;
- Letter Bank Program. The collection of letters written by clients seeking to make amends for their wrongdoing has existed for years, and has been especially useful in OSH 12 Step Programs where a victim is deceased, or has a restraining or related contact prohibition.
- Existence of therapeutic relationships already exist, which could maximize beneficial outcomes (Part of Procedural Justice);
- Providers are more likely to "do no harm" to the client due to their familiarity with the person, and that person's limitations;

- A possible, related and positive, impact on client treatment needs.
- OSH is independent of the PSRB, State, and Defense Bar. Use of OSH eliminates conflicts and the potential that the PSRB will be exposed to unintended materials.

b) Department of Corrections (DOC).

Assets include:

- DOC already has an existing “Restorative Justice” Program.
- It is separate from PSRB and so does not have the various associated confidentiality and other potential “Restorative Justice” conflicts.
- DOC has a large number of mentally ill inmates, so the issues posed are not new.

Although we were specifically told not to consider it, and did not, the cost to establish a new PSRB program should be studied. There will be an expenditure of funds should the Board take on restorative justice responsibilities. Although difficult to know exactly, the cost will not be small.

Instead of funding a new Board function, I would respectfully request that the Board comply with the existing statutory mandate, ORS 161.346 (10) requiring that it issue its Orders within fifteen days. The failure to issue timely Orders, sometimes for many months, is prejudicial to clients seeking appellate review of Board decisions. OHA Orders are generally issued within one day of a hearing. Similarly, by statute, PSRB is mandated to schedule a hearing date no more than sixty days from receipt of a hearings request. A number of years ago, when it was understaffed, the Board determined that, through presumed Legislative oversight, this mandate did not apply to “Outpatient Hearings”. Now, there is no statutorily mandated time limit within which to schedule “outpatient” initiated hearings. These can take four to six months, or longer, to be heard. The cost of unnecessarily prolonging an outpatient under Board jurisdiction has both financial and human costs. Again, I would advocate that PSRB resources be directed toward reducing this time, and not seeking new responsibilities.

We were also not asked to consider the necessity of a PSRB “Restorative Justice” program. As an attorney who has practiced before the Psychiatric Security Review Board for

almost thirty years, I am aware of only instance where it might have been useful. This was a very unusual case where, working with the State, following a hearing, and out of the Board's presence, my client and the Victim met and spoke. It occurred at the Oregon State Hospital, and did not require any Board involvement. The situation was monitored by Hospital staff. The PSRB has often cited this single case as a reason to create its "Restorative Justice" Program.

For the reasons set forth above, I oppose the enactment of this Bill. Thank you for the opportunity to address the Committee.