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M E M O R A N D U M

To: Senate Judiciary Committee, Hon. Floyd Prozanski, Chair
From: Chuck Sparks, Chief Deputy
Date: February 13th, 2017
Subject: SB 64 -1, -2

Senate Bill **64 -1** changes Oregon criminal law at its intersection with mental illness. On the adult side, it changes the “guilty except for insanity” defense (GEI) under ORS 161.395 by replacing the phrase “mental disease or defect” with the term “mental disorder.” It makes essentially the same changes in the Juvenile Code. *See* ORS 419C.378, et seq. The current phrase “mental disease or defect” has been extensively litigated over the past 45 years and is thoroughly analyzed in appellate case law. Exchanging settled statutory language for the vague term “mental disorder” will trigger increased litigation over the meaning of this phrase and, in the process, may further open the doors to the Oregon State Hospital (OSH).

Compounding the problem, SB **64 -1** also inserts this change into the “aid and assist” sections at ORS 161.360, et seq. (adult) and 419C.411 and 419C.520, et seq. (juvenile). The new term may then become the gate through which more “aid and assist” cases will proceed to litigation with uncertain implications for state hospital admissions.

Of even greater concern, Senate Bill **64 -2** proposes to alter existing law to exclude from the definition of “mental disease or defect” (or whatever the new term might be if -1 passes) an “abnormality... consisting solely of ...a[n] addictive or substance abuse disorder;”...or...[s]ubstance intoxication or withdrawal.” This seems entirely reasonable until one realizes that, under existing law, when alcohol and drug-related conditions combine with mental illness to cause criminal behavior, a defendant is disqualified from the GEI defense because his conduct was caused—at least in part—by substance abuse or a substance abuse disorder. SB 64-2 would change this GEI exclusion so it is effective only when substance abuse is the sole cause of behavior and this will allow more substance abusers with some mental illness to invoke GEI. Currently, it is the defendant’s burden to prove that a drug or alcohol-related condition was not responsible, in whole or in part, for his actions or behavior. If a drug or alcohol related condition contributed to a defendant’s actions, then the GEI defense is not available. SB 64 -2, on the other hand, would allow defendants to invoke GEI even when substance abuse was a partial cause of their conduct, so long as it was not the sole cause. This change will increase drug and alcohol-using defendants’ eligibility for GEI while increasing state-paid evaluations, litigation and, very likely, OSH admissions. *See generally*, *State v. Peverieri*, 192 Or App 229 (2004), *Beiswenger v. PSRB*, 192 Or App 38 (2004), and *Tharp v. PSRB*, 338 Or 413 (2005).