



**Testimony of Kimberly McCullough, Policy Director
In Support of HB 4149 – Prohibiting Unjust Waivers in Plea & Release Agreements
House Committee on Judiciary
02/13/2018**

Chair Barker and Members of the Committee:

The American Civil Liberties Union of Oregon¹ supports HB 4149, which would prohibit the waiver of access to rehabilitative programs and the waiver of crucial constitutional and procedural rights in plea petitions and release agreements.

Close to 95% of cases in Oregon’s justice system get resolved through plea agreements. In these cases, criminal defendants are often required to waive access to rehabilitative programs as a condition of their plea agreement. This practice is ripe for reform.

Waiver of programs which have been designed by this legislature to encourage rehabilitation and to help put the lives of criminal defendants back on track is counterproductive. For example, the Family Sentencing Alternative Program promotes healthy relationships between children and their parents, reduces recidivism, and keeps children out of the foster care system, all of which contributes to safer communities. Sentence reductions for work, skills development, or good behavior promote safety in our correctional facilities and help create pathways for reintegration and productivity after incarceration. Allowing waiver of access to these important programs undermines the purposes they were created for and disregards the intent of this legislature.

In some cases, prosecutors have also included the waiver of crucial constitutional and procedural rights in plea agreements. **Waivers of constitutional and procedural rights run contrary to justice and in some cases are profoundly unfair.** For example, we were shocked to learn that in some cases plea agreements have included provisions waiving a defendant’s right to post-conviction relief based on a claim of inadequate assistance of counsel. Such a waiver could lead to grossly unjust results in a case where counsel’s assistance was indeed inadequate, particularly if counsel failed to adequately advise the defendant of the consequences of signing the plea agreement itself.

¹ The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan, nonprofit organization with more than 42,000 members in the State of Oregon.

In some cases, waivers of constitutional and procedural rights may even violate the constitution itself. It gives us limited solace that a court could strike down some provisions of a plea agreement as unconstitutional. Rather, we believe that many criminal defendants will believe the conditions of their plea agreement are completely legal and will not seek review by a higher court. And for those criminal defendants who wish to seek judicial review, **the hurdle of having to prove such a provision is unenforceable due to its constitutional infirmity will only create more disparity in our criminal justice system, as not everyone has the means to pay for legal representation in criminal appeals.**

Similar waivers are sometimes found in jail release agreements. For example, we have recently become aware of instances of jail release agreements that include provisions waiving a defendant's right to appear at their own trial. The right to be present at trial, where our liberty and substantial rights are at risk, is an essential part of the due process of law required by the Constitution. **Waivers of rights that strike at the core of due process in our justice system should not be a matter of course.**

While there may be some reasons that a criminal defendant may not want to appear at trial, a defendant's absence at trial must be truly voluntary for justice to be served. We have deep reservations that such a waiver in a release agreement involves true freedom of choice, particularly when an individual feels they must sign the agreement in order to return to their home, family, and responsibilities. We also fail to see any legitimate reason why such waivers should ever be included in a jail release agreement.

This bill imposes reasonable limitations on the conditions that a prosecuting attorney can place on a plea offer or that can be required in a jail release agreement, including:

- The right to a preliminary hearing
- The right to a hearing on the issue of restitution
- Rights under international laws and treaties
- The right to confront witnesses and object to hearsay evidence in subsequent hearings
- The right to raise the issue of the defendant's fitness to proceed
- The right to challenge convictions with newly-discovered exculpatory evidence
- The right to challenge a sentence as unconstitutionally cruel and unusual
- The right to file a petition for post-conviction relief, or a motion for DNA testing

The bill also prohibits prosecutors from conditioning a plea offer on the defendant's waiver of eligibility for a number of programs this legislature created, including:

- Earned discharge
- Alternative incarceration programs
- Work release
- Transitional leave
- Reductions of sentences for work, skills development, or good behavior while incarcerated

The ACLU of Oregon urges you to Support HB 4149. Please feel free to contact me if you have any questions, comments, or concerns.