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The Honorable Representative Jeff Barker, Chair
The Honorable Representative Jennifer Williamson, Vice-Chair
The Honorable Representative Andy Olson, Vice-Chair
House Committee on Judiciary, Members

RE: House Bill 4149—Testimony in Support

Dear Chair Barker, Vice-Chairs Williamson and Olson, and Members of the Committee:

I am a criminal defense attorney in Clatsop County, primarily handling an indigent defense caseload as part of a consortium. I have been exclusively practicing criminal defense work my entire career, first as a court certified law student in Lane County and now as an attorney after returning to my hometown of Astoria. I currently sit on our county's Mental Health Treatment Court as the defense attorney for participants. I recently participated in a Pretrial Release Workgroup that was tasked with overhauling Clatsop County's pretrial release system, and I have been active in discussions over how our county should handle Justice Reinvestment. I am also the president of the Clatsop County affiliate of the National Alliance on Mental Illness (NAMI) and have been active with Clatsop Community College as a member of its Criminal Justice Advisory Committee and as an adjunct instructor.

I strongly support House Bill 4149, and I urge you to pass it in its entirety.

This bill corrects several significant power imbalances that affect the rights of criminal defendants every day in our state's court system. Too often these men and women are put in a position of choosing a bad outcome over a worse one, and in the process they are regularly asked to give up cherished constitutional, statutory, or administrative rights in the process. I want to highlight a few specific sections where this bill will make positive changes in our judicial system, protecting the rights of the accused and giving our supervision and rehabilitation systems the ability to work as intended.

Waivers of Appearance at Trial

Of particular concern in my county is the practice of requiring a defendant in a misdemeanor case to waive his or her right to appearance at trial if they miss a court date. These "Waiver[s] of Appearance for Trial and Jury Waiver" are generally sought as a condition of release from jail, or as a condition of staying out of jail, and as such are coercive. They ask a defendant to make an on-the-spot decision to waive their constitutional right to be present and face their accusers at trial, and to present a defense. Often the defendant is under pressure to get out of custody to return to work and family obligations, or they are intoxicated or mentally ill. Not uncommonly, this very important decision is made without the benefit of counsel to answer questions and advise.

Depending on the case and the circumstances, these waivers are sometimes signed at the jail after booking, perhaps in the middle of the night after a DUII investigation. They may be signed at an arraignment hearing, frequently a "cattle call" arraignment that is on a crowded docket without defense

counsel present. In these instances, the judge will do her best to explain the consequences, but is also not allowed to give legal advice and can only answer basic questions about the procedure. Even in the best of circumstances, when a defendant is asked to sign a waiver with counsel present, the choice is a forced one, as refusing to sign could mean much longer pre-trial incarceration.

Once these waivers are signed, they allow the courts to set a trial date should the defendant fail to appear at a preliminary hearing. Since the defendant is not present, the court usually does not know the reasons for missing the hearing, whether they be illness, incarceration in another jurisdiction, sleeping through an alarm, carelessness, or absconding. Furthermore, due to direction from the Oregon State Bar, if a defense attorney does not know why their client is not present or has not had contact, the attorney is then required to withdraw from representation. This may mean that a trial is held in the absence of the defendant, and in the absence of that defendant's advocate. This leads to the absurd and troubling spectacle of a criminal case being tried, often in front of a jury, with an empty table where the defendant should be sitting. As one might imagine, the outcome in such cases is practically assured, and a guilty verdict is the result. Once the court's warrant is served a defendant is brought back to court for a sentencing hearing, but does not have the opportunity to face his accusers in court, cross examine witnesses, or present a defense.

I have seen these waiver trials go forward in cases where defendants had lost their housing or transportation and were unable to come to court. I have also seen them where a defendant had missed court due to incarceration in another jurisdiction, misunderstanding of their court date, or ignorance of the court system. Perhaps most troubling is cases where the defendant is mentally ill or hopelessly addicted, and they either could not or would not abide by the directions of the court. While some who fail to appear in court are people who lack respect for the system or are trying to escape judgment, many of the defendants who are caught up in these waivers are the most vulnerable in the criminal justice system. The poor, the uneducated, the addicted, or the mentally ill may be in no position to knowingly, voluntarily, and intelligently give up these important rights, and as a result they may face harsh consequences once their warrants catch up to them. The only plausible argument I can think of for these waivers is judicial economy, or that these people are wasting the court's time or resources by failing to come to hearings as scheduled. While this may be a problem and an inconvenience for the courts, it is not an excuse to abrogate the rights of the state's citizens.

The only criticism I have for this section of HB 4149 is that it may not go far enough. Section 4, subsection 1 says that "A prosecuting attorney may not condition a defendant's release on…" various conditions and waivers of rights. While it is may be a prosecutor requesting these conditions, it should also restrict judges from imposing these conditions on their own.

Plea Agreements

Another section of HB 4149 that is extremely important is the strengthening of controls placed on prosecutors in plea negotiations. In our system prosecutors wield incredible power, in many ways greater than that of judges, defense attorneys, police, or any other players in the criminal justice world. Not only do prosecutors get to choose which actions to initiate in the first place, but they also can largely dictate the terms throughout much of the process. Mandatory minimum sentences are regularly mentioned as one instance where prosecutors are given immense leverage, but plea negotiations outside of those schemes may be just as imbalanced. Prosecutors can create plea offers that box a defendant in, forcing choices that are often not in the best interest of the accused, and arguably not in the best interests of the criminal justice system or the community.

Particularly troubling in my experience has been prosecutors cutting off the effectiveness of treatment and community supervision by tying the hands of probation officers, and then limiting the ability of defendants to seek treatment if and when they end up at the Department of Corrections. This is

addressed in Section 2 of HB 4149, which bars prosecuting attorneys from conditioning plea agreements on waivers of earned discharge, alternative incarceration programs, work release, transitional leave, reduction in term of sentence, and administrative or structured sanctions.

Frequently these conditions are made part of a plea agreement to a defendant facing prison time. In exchange for agreeing to some or all of these waivers, the defendant may be offered an up-front probation sentence or a reduced prison term. However, they incentivize short-term thinking, daring defendants to agree to something they cannot or should not do in exchange for an immediate benefit. The cost of those ill-advised short-term decisions often comes due pretty quickly, but it is paid not only by the defendant but also by society.

I'll give an example that is not uncommon in my practice. A defendant is charged with a crime that would presumptively land him in prison for 24 months according to the Oregon felony sentencing guidelines. He is a long time heroin addict who has a criminal history and has been on supervision (probation or parole) before. He has largely been unsuccessful with outpatient treatment before, though he has had a few runs of 9-10 months sober in the past before relapsing. He has been in jail for 45 days awaiting trial, and while he may have a defense to present, the state has a good enough case that he is concerned he may be convicted at trial. Defense counsel enters into plea negotiations with the state, and the prosecutor offers what's called a "downward departure," meaning the defendant can go on probation for three years, engage in outpatient treatment, and if successful go on his way. However, if the defendant is not successful then his probation is revoked and he would go to prison, not for the 24 months presumed by the sentencing guidelines, but for 36 months. This added prison time is considered an extra incentive to follow the rules of probation.

In addition to taking more time "hanging over his head," the plea also calls for the defendant to agree to extra conditions of his probation and sentence. In my county, nearly all downward departure offers include

- "No structured sanctions" – All violations of probation are reported to the court rather than being handled by the probation office per usual practice. Each violation then results in probation violation hearing in front of a judge.
- "No earned discharge" – The defendant must serve his entire probation term, even if he would otherwise be eligible for early termination of his probation per state statute.
- "No alternative incarceration programs" if probation is revoked – This includes programs that are offered to prisoners that give them additional drug and alcohol or mental health treatment, job training, reentry programs, halfway houses, etc.

In the eyes of the prosecutor, these conditions are an incentive to abide by probation, and an assurance that the defendant will face a much more severe penalty if they do not do so. I do not doubt that the district attorneys who make these offers do so in a good faith belief that they are giving these defendants a chance to stay out of prison, and that they are taking a risk in doing so. However, in my experience and practice, it is disastrous for defendants, and undermines the community rehabilitation goals of probation and parole officers. I often counsel defendants not to accept these agreements, but it is ultimately their choice to make. In the end most choose to accept these terms, even though they may serve significantly more prison time if revoked, so they can get out of jail, back to their jobs and family, and try to piece their lives back together. This is regularly a tragic choice.

Defendants who are given these offers are forced to choose between going to prison now after a likely conviction, or putting that prison sanction off, perhaps indefinitely. While this may seem like a simple decision, the deck is stacked against them with these plea conditions, virtually guaranteeing failure and a longer prison sentence than would otherwise be necessary.

Taking structured or administrative sanctions away from probation officers takes away many of their tools to redirect behavior and encourage compliance with sanctions short of long jail sentences or prison. Rather than being able to give a probationer a sanction of community service, increased treatment support, or a research-supported swift and short jail sanction, they have to report the violation to the court. The court then issues a detainer, detains the defendant, and holds a full probation violation hearing. At these hearings sanctions may be handed out and probation continued, or the defendant may be sent to prison. In my experience, probation on a downward departure usually does not survive more than one or two of these hearings before the prison sentence is imposed. Addicts are especially prone to relapses, missteps, misjudgments, and new minor offenses while on probation. Taking away structured sanctions greatly increases the chances that they go to prison rather than get the benefit of the deal they struck.

Earned discharge is generally offered to people on probation if they have been compliant and have completed half of their probationary sentence. Taking this statutory right away from defendants gives them more opportunity to have missteps, relapses, and other problems on probation, and going to prison.

Finally, alternative incarceration programs, work releases, transitional leave, or reductions in sentences give defendants the ability to get treatment, job training and experience, and supportive reentry. Waiving the ability to get in to these programs may make sure that the defendant does all of the time they were originally sentenced to without reduction, but it also means that defendant comes out of prison less prepared to stay sober, get work, support their families, and stay out of prison in the future.

If we are going to have a system of rehabilitation and treatment, then we need to create the circumstances in which it can work. The alternative is to warehouse those convicted of crimes, putting them back out on the street with fewer coping mechanisms, fewer relapse prevention skills, and further diminished prospects in society.

To protect the rights of our citizens, and to protect the effectiveness of our criminal justice system, I urge your yes vote.

Sincerely,

Kirk Wintermute
Attorney at Law