



Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 13, 2018

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: HB 4149: Testimony in Support

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

The Oregon Criminal Defense Lawyers Association is an association of attorneys who represent juveniles and adults in delinquency, dependency, criminal prosecutions, appeals, civil commitment and post-conviction relief proceedings throughout the state of Oregon.

Thank you for the opportunity to submit the following comments in support of HB 4149. As an organization, we strongly support passage of HB 4149.

From Court to the Capitol

After 5 years practicing criminal defense for both court appointed and public defense clients, I began working for OCDLA as their legislative representative in January 2017 with an eye towards criminal justice reform. As a lawyer, I practiced adult criminal defense, juvenile dependency, and juvenile delinquency in Douglas County, Washington County, and Multnomah county. I represented hundreds of clients and stood by their side as the vast majority of them plead guilty.

While attending law school, I interned at a prosecutor's office for two years. While there, I prosecuted misdemeanor crimes. Yet, it was not until I stood silently in court next to my very first client pleading guilty that I truly understood the imposing power of the state.

The Criminal Justice System is a “system of pleas, not a system of trials.”¹

The right to a jury trial is the bedrock of the American justice system. In your mind's eye, you can imagine two lawyers battling it out to find truth in the courtroom. And yet, the reality in America, and in Oregon, is that the accused plead guilty the majority of the time.

¹ *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

In fact, almost 95% of state convictions are the result of a guilty plea.² The United States Supreme Court recently stated, the criminal justice system is “system of pleas, not a system of trials.”³

But Why Do Defendants Plead Guilty?

As a lawyer, I represented adults and juveniles, and most of them ultimately chose to take a deal. A common theme among my clients was that they would rather take a deal that promised certainty versus risking going to trial and being subject to a “trial tax” by the court or risk being convicted of the most serious crime they were charged with that carried a mandatory minimum sentence.

Oftentimes, my clients struggled to make decisions to exercise their constitutional rights to trial or even their simple right to review the evidence against them as they were faced with strict offers that promised release right away or offers that expired that same day. My clients would frequently, against my best advice, take offers that subject them to large prison sentences hanging over their head simply because they were unable to make bail and needed to return home to care for their children and pets and return to their job and responsibilities. They would agree to anything to be released, even if they were truly unable to comply.

Many of my clients struggled with drug addiction, were victims of abuse, and had very little resources and support. Faced with an offer that required them to waive a myriad of rights and access to resources, and often against my best advice, my clients plead to offers that were unfair at best and coercive at worst.

My clients, some of whom were innocent, plead guilty because of punitive bail statutes, mandatory minimum sentencing⁴ and statutory maximums that are increasingly designed to extract a guilty plea.⁵

Prosecutors are the primary decision makers in the criminal justice system as they decide:

- what cases to file;
- what charges to bring;
- whether to charge crimes requiring mandatory minimum sentences;
- which witnesses to rely on in grand jury and at trial;
- what potentially exculpatory information to provide to defense attorneys;
- what plea offers to make;
- when that plea offer expires;
- whether to consider counteroffers and mitigation from the defense;
- when to offer treatment and specialty courts;

² Id.

³ Id.

⁴ Longitudinal Study of the Application of Measure 11 and Mandatory Minimums in Oregon, March 2011, Criminal Justice Commission, 2011: http://www.oregon.gov/cjc/SAC/Documents/measure_11_analysis_final.pdf

⁵ Johnson, Vida; *Effective Assistance of Counsel: The 7 Rules to Follow, The Champion*, November 2013 Issue, Page 24 citing *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). (acknowledging the reality that “longer sentences exist on the books largely for bargaining purposes”) (citing Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 Stan L. Rev. 989, 1034 (2006)).

- when to recommend probation, downward departures, prison, and upward departures to prison;
- when to offer and allow transitional leave to incarcerated defendants;
- when to offer and allow alternative incarceration programs (AIPs) to incarcerated defendants;
- when to offer and allow good time and earned discharge to incarcerated defendants; and
- when to offer and allow treatment and programs to incarcerated defendants.

This list is not exhaustive, yet it does highlight how much discretion prosecutors have in every single case. Given this landscape and the fact that 95% of cases resolve through a guilty plea, plea bargaining is one of the most important aspects of representation.

HB 4149 Addresses Common and Important Problems with Plea Bargaining in Oregon

HB 4149 takes a comprehensive look at the types of plea bargains that have been made in Oregon. During my time practicing in three different counties, I saw provisions in offers and plea agreements that mirror those included in HB 4149. My clients struggled most with the provisions required by prosecutors that foreclosed the court from granting them access to treatment and programs in prison including access to AIPS, good time/earned time, and transitional leave. They often faced long prison sentences without hope for reformation and treatment simply because the prosecution desired they do “day for day.”

The reforms in HB 4149 are good for the system as it places some of the decision making power into the hands of our judges. Defendants will be forced to waive fewer of their rights in order to be released and in order to secure plea agreements, two of the most significant points in a criminal case.

Respectfully submitted,

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