

REGARDING HB 4149

February 22, 2018

Dear Chair Prozanski and Members of the Senate Judiciary Committee:

I have just learned that HB 4149 has been posted for a hearing tomorrow, Friday February 23, at 0800 at your committee. Although this bill will have devastating effects on the justice system of Clatsop County, and I'm unsure if the committee would even have time to take my testimony, I ask that my remarks and response to written and oral testimony of Astoria criminal defense attorney Kirk Wintermute (made on 2/12/18) be made part of the record.

As amended HB 4149 will forbid any court from conditioning "a defendant's release on the defendant's waiver of appearance in person at trial." The subsection of the bill, apparently pursuant to Mr. Wintermute's request, also forbids a release agreement from containing "a provision prohibited by subsection 1 (what appears above)."

I've served almost 25 years as the elected District Attorney of Clatsop County, the one county in Oregon where this bill will have the greatest effect. Because of a combination of two factors - the lack of virtually any jail space and a high percentage of out of county defendants, the judges in my county have chosen to use limited waivers of appearance - in misdemeanor cases only - as a method of trying to ensure appearance and resolution of criminal cases. This bill will bar that even though the Oregon Court of Appeals specifically ruled that this practice was constitutional in an opinion authored in 2006 by then-Justice Ellen Rosenblum. in *State vs. Skillstad*, 204 Or App 241 (2006) <http://caselaw.findlaw.com/or-court-of-appeals/1217566.html>

Unlike the written testimony of a defense attorney from Clatsop County, Kirk Wintermute, whose letter to this body is dated 2/12/18, the jail does not issue these waivers. For over a year, ONLY judges in open court can authorize them. Unlike what Mr. Wintermute claims, these are not "on-the spot decisions coerced out of mentally ill and drug addicted defendants."

Instead while accompanied by a lawyer, one of our three judges will tell a defendant charged with DUII or Assault 4 or any other misdemeanor, after they've failed to appear likely multiple times, that they can be released - without posting any bail whatsoever, if they waive their appearance at trial, I have sat through hundreds of these appearances and our judges ALWAYS warn the defendant NOT to fail to appear. They consistently tell defendants that not appearing is a bad idea, that their lawyer will be forced to withdraw by Oregon State Bar ethical rules, and that because the prosecution will appear alone at trial, they will likely be convicted.

Mr. Wintermute speaks of "cattle call arraignments." I have doing many of these arraignments for over two decades and our judges NEVER force a defendant or require them to do anything they don't appear to knowingly, voluntarily, and willingly waive. Mr. Wintermute talks about defendants being required waive appearance at "a preliminary hearing." This simply does NOT happen - ever. A preliminary hearing implies a felony and no defendant can be allowed, under almost any circumstances to waive appearance on a felony charge.

Clatsop County has the not uncommon problem of too little jail space....our county is self-capped at 60 beds. Numerous studies have said we need at least 150 to 200 beds. I regularly see people released on charges of Burglary, felony assault, assaulting a police officer, DUII, domestic violence and Delivery of Meth or Heroin. These release decisions are mandated because of a lack of jail space. They are no indicia of a lack of care or concern by any of our judges or our sheriff. All would keep more accused and violent criminals in custody...if there was room. There is not, which is not a highly unusual situation in Oregon,

where some legislators claim increasing custodial capacity is "mass incarceration," despite Oregon's relatively low incarceration rate compared to other states. As the DA, I often join in their recommendations, when I realize that unless we release someone charged with dealing meth a repeat domestic violence defendant might well be released instead for want of space.

The other reason Clatsop County is apparently almost alone (at the present) in regularly using this constitutional tool is that a very high percentage of defendants do not live in Clatsop County - as many as 40% based on studies done by both my office and the local daily newspaper. This results in no ability of local police to "encounter" a defendant who has repeatedly failed to appear in court. Clatsop County has an ever-growing tourist industry whose dark side is that a small percentage of them commit crimes.

Clatsop County already has about a 33% failure to appear rate, likely higher in misdemeanor cases. This bill will only drive that rate higher.

If - when - this bill passes - this what will happen in my county:

A man from Gresham will beat up his girlfriend at a Seaside hotel and will be arrested. Because he has little or no record and we have so little jail space, the jail will release him. He may fail to appear, but eventually he'll be released...again...without posting any money....and eventually the case will get old. Then the defendant gets arrested again (say 6 years later) and his court appointed lawyer files a Motion to Dismiss for Lack of Speedy Trial. The defendant testifies that he's lived at the same address in Gresham (not the same one he gave the jail) for at least 3 years and nobody came and arrested him. Case law in Oregon REQUIRES the state/prosecution to track the defendant down and if in a case like this I cannot specifically explain why Clatsop County officers didn't track this guy down in his home in Gresham, the defendant wins...it's a constitutional violation of speedy trial, and the case is dismissed with prejudice...meaning forever. Hopefully he doesn't eventually kill his girlfriend, but he certainly can get the arrest without conviction set aside..

This is not justice and it's not fair.

Oregon spends more money per capita than almost any state on indigent defense and most lawyers providing indigent defense services will get excellent representation from lawyers like Mr. Wintermute. The people who repeatedly fail to appear do not do so because they have "lost their housing or are hopelessly addicted" ...as Mr. Wintermute testified. They do so because they simply don't care and our current system provides very little in the way of negative consequences for both violating the law and then ignoring a judge's order to appear, or even worse their own supposedly solemn promise that they will appear.

We are a time in America when violence against women is allegedly not going to be tolerated any longer. This body has passed laws its members say will bring that point home, making real consequences for violent behavior against women and others. Yet this bill will allow many of those very crimes to go un-prosecuted and ultimately be dismissed without the victim ever having THEIR constitutional rights under Article 1, Section 42 of the Oregon Constitution.

Thank you for reading my testimony.

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