

February 21, 2018

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

Re: Optional Probation Amendment to Senate Bill 1543 (Dash-25)

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

I write in support of a proposed amendment to one of the time-served credit provisions created by the 2015 Legislature's House Bill 2310.

HB 2310's Section 2 amended ORS 137.372. It was intended to reform the system of awarding credit for time served in jail, against the incarceration sanctions defendants incur when their sentences of probation are revoked. Unfortunately, the bill inadvertently omitted from its system a class of probation, called "optional probation." The proposed amendment would correct that omission.

HB 2310 extended its time-served credit system to persons revoked from **departure** probation. This type of probation is imposed in cases of such seriousness that the Felony Sentencing Guidelines presume imprisonment is the proper sentence. But the guidelines permit the court, upon finding "substantial and compelling reasons" based on mitigating factors, instead to impose probationary sentences. The criminal code **allows** the state to appeal the imposition of departure-probation sentences.

HB 2310 also extended its time-served credit system to persons revoked from **presumptive** probation. This type of probation is imposed in cases of such low seriousness that the guidelines presume probation is the proper sentence. Unlike the provision for revocations of departure probation, where there is a 90-day "cap" on time-served credit, in presumptive-probation revocation situations, there is no cap. Also unlike departure probation, the criminal code **prohibits** the state from appealing the imposition of presumptive-probation sentences.

By inadvertence, HB 2310 failed to extend its time-served credit system to the guidelines' third class of probation, **optional** probation. This type of probation is reserved for cases of such seriousness that the guidelines presume imprisonment is the proper sentence, but where the defendants have minor or no criminal records. In their cases, the court may impose

probationary sentences without making departure findings, thus establishing that optional probation is **not** departure probation. Instead, the court may impose optional probation if it finds (i) the defendant can be admitted to an “appropriate treatment program” in a timely manner, and probation “will serve community safety interests by promoting offender reformation”; and (ii) none of the provisions excluding optional-probation eligibility applies (*e.g.*, use of a firearm in the crime). Like presumptive-probation sentences, the criminal code **prohibits** the state from appealing the imposition optional-probation sentences.

The proposed amendment corrects HB 2310’s inadvertent omission of optional probation from ORS 137.372’s time-served credit system. Because optional probation by definition is not departure probation, and more closely resembles presumptive probation, the proposed amendment would add optional probation to ORS 137.372(1)(b). That is the part of the system, which regulates time-served credit in presumptive-probation revocation situations, and which has no cap.

I appreciate your consideration of this proposed amendment, and urge your support of it.

Respectfully,

s/Jesse Wm. Barton _____
JESSE WM. BARTON
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