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OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 24, 2019

The Honorable Jennifer Williamson, Chair
The Honorable Sherrie Sprenger, Vice-Chair
The Honorable Chris Gorsek, Vice-Chair
Members of the House Judiciary Committee

Re: Support for youth justice reform, SB 1008

Chair Williamson, Vice-Chairs Sprenger and Gorsek, and members of the House Judiciary Committee:

My name is Kathie O. Berger and I am a member of the Oregon Criminal Defense Lawyers Association. I am a criminal defense attorney specializing in representing youth charged with serious offenses both in criminal and juvenile court.

As you all know in 1994, the Oregon voters passed Measure 11 which did two things - youth 15 years or older were automatically tried as adults in criminal court and any person convicted of any of the offenses listed in Measure 11 would receive, at least, a mandatory minimum sentence.

At the time, all juvenile justice programs in Oregon - including the "training schools" (MacLaren and Hillcrest) - were under the control of Children's Services Division (CSD). Their capacity was limited and their successes were limited. Experts were predicting a wave of "super-predator" youth without conscience or morals with a resulting exploding juvenile crime rate. Tough on crime laws were sweeping across the country.

During the 1995 Oregon Legislative session, the legislature implemented and, more importantly, amended Measure 11 with the passage (by a 2/3rd majority) of SB 1 (1995), and codified at ORS 137.705 and 137.707. The amendments made by this body to the plain language of the voter passed initiative are important in light of the Oregon Supreme Court decision in *State v. Vallin*, 364 Or 295 (2019). Several amendments have been made throughout the past twenty-four years, but I want to highlight for this committee three lesser-known amendments made in SB 1 (1995) that bear upon the bills in front of this committee today.

The first amendment is to the youth that were affected by Measure 11. As passed, Measure 11 applied to youth that were 15 or older at the time of charging. The legislature restricted the measure's applicability to youth who are 15 years or older at the time the crime was allegedly committed. This change cut out of Measure 11 youth who could have committed crimes at 14, 13 or even younger but were not charged until after the youth turned 15.

The second amendment was to the waiver process. Under Measure 11, affected juveniles are not "waived" into circuit court for prosecution because they are automatically treated as adults. The Oregon Legislature changed this policy. Now, juvenile court jurisdiction attaches when the youth is taken into custody. When the State files charges listed in ORS 137.707 and goes through the process of notifying the juvenile court, juvenile court jurisdiction is "divested" and the youth is legally in circuit court for prosecution as an adult.

Finally, the Oregon legislature changed the nature of the sentences in ORS 137.707 by making all of the sentences "presumptive." The legislature did not use this same language in ORS 137.700, which is the codification of Measure 11 as it applies to adults.

Our understanding of adolescent brain development and Oregon's improved ability to work with youth in the juvenile justice system over the last twenty-four years makes this the time to revisit and re-imagine our juvenile justice system. The Oregon Youth Authority did not exist when the voters passed Measure 11. Now, OYA - thanks to this body's commitment to properly funding the agency- has developed a system that holds youth accountable, provides them the opportunity to repair the damage they have done as well as heal from their own trauma and gives them the treatment and training necessary for the youth to re-enter society as productive members that is a national model.

Additionally, we know have a better understanding of how and when the adolescent brain develops and matures. The prevailing thought in 1995 was that the only brain development period for children occurred from 0-3, so most of the resources were targeted to those age groups. While it is undeniable that is an important period in brain development, we now know that a child's brain also goes through a second period of significant development and maturation during the adolescent years. This is not "pop" science. There is a significant and continually increasing body of research that shows us what we already know. Who we are at 15 years of age and what motivates us is significantly different than who we are and what motivates us at 30 years of age.

Our youth should not be thrown away. They are a resource we can not afford to waste. I have seen tremendous changes in former clients as they have taken advantage of the programs and services available to them at youth correctional facilities. I have seen young men and women grow into responsible and repentant young adults eager to show that they are more than their worst acts.

We should value forgiveness. We should value second chances. We should recognize that a teenager who commits a terrible crime has the ability to grow into a repentant and rehabilitated adult.

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The Oregon Criminal Defense Lawyers' Association supports SB 1008. This bill holds youth accountable and yet allows for the rehabilitation of those youth.

SB 1008 ends the automatic waiver of youth for prosecution as adults. Any youth accused of any crimes, including serious ones, would be in the juvenile justice system. If the State wants to try the youth as an adult, and possibly subject him/her to a sentence prescribed by ORS 137.707, a waiver hearing would occur and a judge would decide whether the youth should be prosecuted as a youth or as an adult.

I have tried twenty (20) waiver hearings - both before the passage of Measure 11 and after. Judges are presented with evidence about the youth's background, experts who have evaluated the youth and information about the crimes the youth is alleged to have committed. The waiver statute (ORS 419C. 349) gives the court a framework on how to make this important decision and the due process afforded gives the decision the mantle of fairness and impartiality. One size cannot fit all when we are looking at youth.

SB 1008 eliminates the sentence of Life Without the Possibility of Parole (LWOP) for youth who committed their crimes when they are under eighteen years old. SB 1008 establishes a process to ensure that any youth convicted of a crime receives a chance for parole after fifteen years of incarceration.

The United States Supreme Court has held in *Miller v. Alabama,* 567 U.S. 460 (2012) and *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016) that a juvenile offender may not be sentenced to life without parole unless he or she is the rare juvenile who is "irreparably corrupt." Many states in response to these two decisions have eliminated life without parole as a sentence for youth offenders who commit their crimes before they turn 18 years of age. This process gives these youthful offenders a meaningful opportunity for release, but does not require release.

Additionally, this bill sets out the factors to be considered by the Board of Parole and Post-Prison Supervision when the youthful offender has a parole hearing and reduces the time that any juvenile is incarcerated without an opportunity for release to fifteen years, in recognition that youth have a great capacity for rehabilitation and growth.

SB 1008 extends Second Look hearings to all your who are convicted in criminal courts as adults. Second Look hearings were established by the legislature in 1995 as part of then SB 1 (1995), but these hearing are currently only available to youth who are judicially waived into criminal court for prosecution as adults and not those youth who are automatically waived pursuant to ORS 137.705 and 137.707.

At a Second Look hearing, which occurs halfway through a youth's sentence, the youth has the burden of proving to a judge that s/he has been rehabilitated and has taken responsibility for his/her crime, and if a judge so determines, the youth is allowed to serve the rest of his/her

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sentence under community-based supervision rather than being incarcerated. If the youth violates the conditions of supervision, the youth is returned to prison to serve the remainder of the sentence.

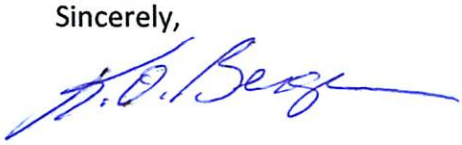
This provision gives discretion back to judges and allows youth to show that they have taken advantage of the opportunities provided to them to change and grow. This proposal allows youth to take responsibility and make a positive contribution to society to help repair the damage created by their acts.

SB 1008 also requires an additional review before a youth with a long sentence would be transferred to an adult prison. Currently youth who are convicted as adults can be placed in an Oregon Youth Authority youth correctional facility until age twenty-five, and then youth are transferred to an adult prison. This proposal would allow for hearing for a limited number of those youth to have a hearing before the transfer occurs so a judge can determine whether the twenty-five year old has been sufficiently rehabilitated so they can serve the rest of their sentence under community-based supervision rather than an adult prison.

And, finally, **SB 1008** includes a technical fix to clarify that all youth who are convicted as adults and who have committed their crime prior to their 18th birthday should be given the opportunity to serve their sentence - at least until they turn twenty-five - in an OYA youth correctional facility. Throughout the years, there have been a handful of cases where the timing of legal procedures have excluded youth who were otherwise eligible to serve the first part of their sentence at a youth correctional facility from doing so. This bill will close those loopholes.

Thank you for your consideration of my testimony. I am willing to answer any questions that anyone may have or provide any additional information that would be of assistance to this body during this important decision-making process in front of you.

Sincerely,



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