TO: House Committee on Judiciary
FROM: Andrew D. Robinson
DATE: February 2, 2022
RE: Concerns with HB 4075
Chair Bynum, Vice Chairs Noble and Power, and Members of the Committee:

I write to express concerns with Section 1 of HB 4075, which would amend ORS 137.106. I ask that you remove Section 1 from HB 4075.

I have been an Oregon attorney for fifteen years. I spent two years as a public defender in Umatilla County and the last twelve at the Office of Public Defense Services, Appellate Division.

Section 1 of HB 4075 would change the law to provide that "[a]t a restitution proceeding, economic damages will be *presumed reasonable* if the damages are documented in the form of a record, bill, estimate or invoice from a business, health care entity or provider or public body as defined in ORS 174.109." (Emphasis added).

Under the new rule, the court must presume that damages are reasonable, no matter how unreasonable they actually are, so long as they are "documented."

I assume the bill's drafters intend to allow defendants to rebut that presumption in court. But, as an initial matter, Section 1 of HB 4075 does not make that explicit.

More fundamentally, a presumption that damages are reasonable is fundamentally unfair. It is unfair in the civil context, and it is unfair for the same reasons in the criminal context.
Of course, bills, invoices, and the like are not always reasonable. For a variety of economic and business reasons, providers of goods and services sometimes overcharge. Consequently, in some cases, HB 4075 will oblige trial courts to order the defendant to pay restitution for *unreasonable* damages – in other words, restitution that is more than the loss the defendant caused – unless the defendant can rebut the presumption of reasonableness.

The proposal would shift the normal burden of proof without good reason. Ordinarily, a party seeking damages – or any legal remedy, for that matter – bears the burden of proof as to the facts supporting their claim. By creating a presumption of reasonableness for "documented" restitution claims, Section 1 of HB 4075 would reverse that policy, shifting the burden of proof on whether the state's restitution claim is reasonable from the state to the defense. In that way, the proposal would effectively impose the risk that the victim was billed unreasonably upon the defendant. That is fundamentally unfair, because the provider's decision to bill the victim unreasonably was not the defendant's fault.

What justifies shifting the burden here, and not in the parallel context of a civil suit? Why impose a burden on criminal defendants that's not imposed on tortfeasors?

The answer can't be that crime victims are more deserving of restitution than tort victims are of economic damages. Tort victims are equally deserving.

The answer also can't be that criminal defendants are better able to rebut presumptions about damages than civil defendants. On the contrary, a typical tort defendant will have deep pockets, or at least a deep-pocketed insurer, whereas criminal defendants are disproportionately poor, and thus typically represented by an overworked, underpaid, understaffed, and under-resourced public defender.

Instead, the more likely answer would appear to be that the legislature is more interested in protecting tortfeasors (*i.e.* the rich) from paying unreasonable damages than criminal defendants (*i.e.*, the poor). That, at least, is the attitude this proposal appears to me to reflect.

In addition to being fundamentally unfair, the proposal would impose significant added costs on the public defense system. Assuming the bill would allow defendants to rebut the presumption of reasonableness, OPDS will be obliged to pay for extensive litigation to prove that the bill was unreasonable – including expert witnesses, investigations, hearings, *etc.* – whether the defendant has a strong chance of success or not.

The cost to the defense of proving unreasonableness will often be much higher than the cost to the state of proving reasonableness. And unlike civil defendants, a criminal defendant's interest in litigating the reasonableness of damages is not limited by economic factors. In the civil system, a tort defendant typically pays their own legal expenses, so what a tort defendant will rationally spend litigating whether damages are reasonable is inherently limited by the amount of damages sought and the tort defendant's estimate of their chance of success. But a criminal defendant's decisions are not so constrained, because the criminal defendant's legal expenses are typically paid for by the public defense system. For that reason, in some cases, the public defense resources that zealous defense counsel will have to spend on rebutting the presumption of reasonableness could be greater than the damages themselves. They will almost certainly be greater than the prosecution would have spent proving reasonableness in the first place.

Under current law, it is ordinarily very easy for the state to present sufficient evidence of reasonableness. *See State v. Aguirre-Rodriguez*, 367 Or 614, 623, 482 P3d 62 (2021) (detailed repair estimate and photographs of damage were sufficient evidence that damages claimed in restitution were reasonable). When the state's case is supported by even minimal evidence of reasonableness, defense counsel may determine that it would be futile to conduct an expensive and time-consuming investigation to overcome that evidence.

But by placing the initial burden of proof on the defense, this proposal puts defense counsel in the position of doing the initial investigation into that issue. Without that investigation, counsel cannot know whether contesting reasonableness would be

worthwhile or not. There is a significant information disparity between the prosecution and the defense on this issue. The victim and the prosecution will initially have more information about the harm caused by the crime and the expenses incurred to repair it than the defense. In many cases, because of that information disparity, the added expense of placing the cost of the initial “reasonableness” investigation on the defense could be far more than the state would have incurred to prove reasonableness, and, indeed, more than the damages themselves.

That unfairness and inefficiency might be justified if there were some strong reason to impose the presumption that "documented" damages are reasonable. But there isn’t. If crime victims are missing out on restitution, it’s not because proving reasonableness is especially difficult. A bill alone may not be sufficient evidence of reasonableness. But, as *Aguirre-Rodriguez* demonstrates, prosecutors can readily make up that deficiency with even very modest additional evidence that what the bill says is reasonable. There’s just no good reason to take the radical step of shifting the burden of proof on reasonableness to the defense, with all the inherent unfairness, inefficiency, and additional expense that would involve. The prosecution is already well-equipped to do the necessary work to ensure that victims are made whole, if it chooses to.

For those reasons, ensuring that crime victims are made whole does not seem to be this proposal’s purpose. It’s really about shifting the cost of investigating and litigating the reasonableness of restitution claims onto the public defense system, in the hope that we will, as usual, be unable to provide effective representation. *See* American Bar Association, *The Oregon Project: An Analysis of the Oregon Public Defense System and Attorney Workload Standards* (2022) (concluding that Oregon’s public defense system has only 31% of the attorneys it needs). Given the staggering challenges the public defense system is already facing, the last thing the legislature should do right now is impose on that system the additional untold cost of rebutting a presumption that crime victims’ economic damages are reasonable.

I urge you to remove Section 1 from HB 4075.