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### M E M O R A N D U M

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**TO:** Honorable Sen. Prozanski, Chair

**FROM:** Aaron Knott, MCDA Policy Director

**SUBJECT:** Testimony in support of SB 867

**DATE:** 2/27/23

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Generally speaking, a person accused of crime has the constitutional right to confront their accusers. This is required by the Confrontation Clause contained within both the Oregon and Federal constitutions. However, there is a longstanding exception under both constitutions for those instances where a victim does not come to court because of the defendant's actions. This can include tampering with the victim, intimidation, and outright threats of violence, and is particularly common in domestic violence cases. This legal doctrine, called "**Forfeiture by Wrongdoing**," stands for the principle that if a defendant causes a victim not to come to court through these unlawful behaviors, they should not benefit from the victim's absence. If the State is able to establish that the defendant's wrongdoing is the reason for the victim's absence in court, the state is permitted to use a victim's statements to be introduced in court even in their absence.<sup>1</sup>

Beginning in 2017, the courts have required the State to make ever more intrusive attempts to procure a victim's presence in court even when the victim's unavailability is caused by the defendant's wrongdoing.<sup>2</sup> As a practical matter, this requires repeated and deeply traumatizing efforts to force the victim to court, including multiple attempts at personal service, contempt findings and, in at least a few cases, a requirement of a material witness warrant for their arrest. For a victim with a credible fear of retaliation

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<sup>1</sup> See *State v. Supanchick*, 354 Or 737 (2014) ("...when a defendant has intentionally made a witness unavailable to testify, the defendant loses the right to object that the evidence should not be admitted on constitutional grounds." *Id.* at 766.

<sup>2</sup> See *State v. Harris*, 362 Or 55 (2017), *State v. Cecconi*, 308 Ore. App 534 (2021).

of personal harm to themselves, their family or their pets if they visibly cooperate with the state, the trauma of having a state investigator or law enforcement detective coming repeatedly to your home or place of work to attempt personal service can be very significant. In many cases, victims simply go underground or actively flee the area, forcing them into further difficulty. Under existing case law, the State may be required to attempt these measures even when they are not reasonably likely to succeed. None of this is required by the constitution.

### **SENATE BILL 867 WILL PROTECT OREGON'S CRIME VICTIMS**

Developed in consultation with victims groups and multiple District Attorney's offices, SB 867 would keep Oregon in alignment with constitutional requirements while no longer requiring the State to continue to engage in repeated attempts to compel a victim's attendance in court.

The prosecution would still be required to prove that the reason a witness or victim did not appear to court was directly due to the actions taken by the defendant to scare, threaten or intimidate them, but would no longer be required to keep pursuing an already terrified victim with additional subpoena attempts, home visits from investigators, contempt orders or other highly intrusive measures. We urge the passage of SB 867.

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