

March 30, 2023

To: Senate Committee on Judiciary

**Re: In support of SB 1070 – a response to opposition points**

Senate Bill 1070 is a prudent and thoughtful measure necessary to ensure access to justice for all survivors of domestic violence, including those who have been criminally convicted. The purpose of the testimony that follows is to correct misconceptions raised by opponents of the legislation.

***Would SB 1070 allow abusers to “weaponize mitigation”?***

**No.** Getting relief under SB 1070 would not be a matter of simply uttering the words “domestic abuse” and receiving a lesser sentence. The defendant has the burden of proving not only that the claimed “domestic abuse” actually occurred, but that it was a contributing factor to the crime, and that the presumptive or mandatory sentence would be unduly harsh in light of the crime, the defendant’s circumstances, and the abuse they suffered. As the finders of fact in sentencing hearings, judges routinely evaluate mitigating and aggravating evidence, determine the reliability and weight of that evidence, and impose penalties accordingly.

Also, SB 1070 defines “domestic abuse” as *“a pattern of behavior in a relationship by which one person in the relationship gains or maintains power and control over the other person, consisting of physical, sexual, emotional, economic or psychological actions or threats of action that influence another person, including but not limited to actions or threats of action that frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound the other person.”* This is a more accurate and narrower definition of domestic abuse than the definition of “domestic violence” currently applied to crimes.

The definition of domestic abuse as defined in SB 1070 and the burden carried by the defendant ensures that abusers will not be able to “weaponize” mitigation.

The statement that SB 1070 allows abusers to “weaponize mitigation” is highly speculative and not actually based on any real facts or a facial reading of the proposed law.

***Does SB 1070 protect crime victims and survivors alongside defendants?***

**Yes.** SB 1070 addresses the very real problem of overincarceration of survivors of domestic violence—a problem that arises because victims and defendants are often one and the same. The opposition’s suggestion intentionally muddies the water by creating a binary of victims or

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defendants. SB 1070 is an attempt to address the complex realities of our society that there are victims who become defendants because of actions they take for survival. SB 1070 recognizes that there is a population of crime victims who are defendants. We ask that you reject this attempt to misdirect from the core population of survivors that SB 1070 recognizes.

To be clear, the considerations made by the sentencing court about the harms experienced by crime victims remain the same for cases implicated by SB 1070. Currently, judges may not consider mitigating information relating to abuse suffered by a defendant facing a mandatory minimum sentence. Contrastingly, judges are required to consider aggravating factors related to the victim, allowing for sentences above and beyond the mandatory minimum. For example, “[w]hen a court sentences a defendant convicted of any crime involving a physical or sexual assault, the court shall give consideration to a victim’s particular vulnerability to injury in such case, due to the victim’s youth, advanced age or physical disability. Such particular vulnerability of the victim is a fact enhancing the seriousness of any assault, and the court shall consider it as such in imposing the sentence within the limits otherwise provided by law.” (ORS 137.085). Judges may also impose increased sentences based on “the degree of harm or loss” caused to the victim or a defendant’s “persistent involvement in similar offenses or repetitive assaults” (e.g., serial domestic abuse committed by the defendant). (OAR 213-008-0002).

In each sentencing hearing, including any resentencing hearing that occurs pursuant to SB 1070, judges will consider all relevant mitigation and aggravation presented, including factors specific to victims of the defendant.

***Does SB 1070 have any time limitation on when the abuse suffered by the survivor-defendant must have occurred?***

**Yes.** With the –1 amendment, the abuse must have been ongoing at the time of the survivor-defendant's crime.

***Will it be easy for defendants to meet the legal standard for relief under SB 1070 given that the abuse must only be a “contributing factor” to the crime to be considered by a judge?***

**No.** Put into proper context, the language of SB 1070 (–1 Amendment) will result in a narrow class of defendants eligible for relief. In addition to proving that the domestic abuse occurred and that it contributed to the crime, defendants must also prove that the presumptive or mandatory sentence would be unduly harsh under the totality of the circumstances – the circumstances of the crime, the circumstances of the defendants, and the abuse the defendant suffered. Each case of domestic abuse will manifest differently and the individuality of each presentation of domestic abuse will be balanced against the totality of the circumstances unique to each criminal case.

The opposition point of focusing on whether domestic abuse is a “contributing factor” or a “significant factor” to the crime shows a failure to understand the dynamics of domestic abuse and its impact on the lives of survivors. It misdirects from the core issue SB 1070 is addressing, that there are survivors who are being criminalized and our system must be responsive to this problem.

Again, just by stating and even proving that domestic abuse occurred and contributed to the crime does not result in a lesser sentence. If the court determines imposing the mandatory sentence would not be unduly harsh, the judge may not deviate from that mandatory sentence.

***Will SB 1070 apply to all felony sentences?***

Yes, if the survivor-defendant meets eligibility criteria. The application to all sentences regardless of the crime of conviction is a feature of SB 1070. Excluding those convicted of certain crimes would close the door on survivor-defendants whose abuse was most egregious and most tied to their crime, simply because of the nature of the crime itself.

Consider the case of the abused woman charged with killing her partner to save her or her children’s lives, but whose actions do not fit into the legal definition of self-defense. Excluding murder from survivor-defendant consideration would mean that a judge would be required to give her the same mandatory sentence as someone who kills in cold blood, without any regard for the mitigating circumstances of her offense. And it would deprive the survivor-defendant of justice just when the stakes are highest. This is not hypothetical. This is a generalized example of multiple real-world cases.

SB 1070 was written to ensure that it is responsive to the actual dynamics of domestic violence.

***Will SB 1070 allow for significant sentencing disparities?***

**No.** Significant sentencing disparities currently exist because of prosecutorial charging decisions that leave judges without discretion to deviate from mandatory sentences despite wildly varying levels of culpability among defendants.

The opposition’s point is a highly speculative assertion that is not grounded in fact. There is no evidence to support that the introduction of mitigation evidence of this nature will cause significant sentencing disparities across the state. Importantly, this assertion lacks credibility because it assumes that there is a mechanized or standardized manner by which survivors can be treated. Those who have a basic understanding of domestic violence understand that it manifests and presents differently in each case. SB 1070 allows the system to be responsive to the uniqueness of each case and the domestic abuse experienced by each individual.

***Is the language in SB 1070 clear enough for judges to avoid arbitrariness in sentencing?***

**Yes.** The terms “contributing factor” and “unduly harsh” are in line with other plain legal terms interpreted by judges on a regular basis. Judges and juries in civil cases determine whether tort claim plaintiffs were “contributorily negligent” (ORS 31.600); judges may exclude evidence from a trial if its introduction would cause “undue delay” (ORS 40.160); judges may reduce certain felony convictions to misdemeanors when a felony conviction would be “unduly harsh” (ORS 161.705), and so on.

This language was intentionally used to ensure that the courts had enough guidance to effectuate the intent of the law and with enough space to be responsive to the actual dynamics of domestic violence. SB 1070 was written in consultation with the Oregon Judicial Department and other legal experts to ensure the language is understood by practitioners. Comparatively speaking these are not complicated terms.

***Is SB 1070 retroactive?***

**SB 1070 permits resentencing hearings for survivor-defendants that meet the narrow eligibility criteria.** This opportunity is incredibly important and is responsive to the needs of domestic violence survivors. For many reasons, survivors may not be able to disclose the domestic abuse to their defense attorneys during the criminal proceedings. They may still be under the control of their abuser; they may be too deep in a state of trauma to verbalize the abuse; or they may not fully understand the abusive nature of their relationship at the time of the criminal proceedings. We often hear from incarcerated survivors that it was not until they had space from the relationship that they could talk about the abuse.

**SB 1070 will not allow any convictions to be undone.** Survivor-defendants deserve sentences that are reflective of their true culpability regardless of when they are able to speak about it. This all remains true for those currently incarcerated.

The relief provided by SB 1070 is crucial to ensuring survivors who meet eligibility criteria have a path to justice.

***Does SB 1070 require victims to go through two hearings?***

**No.** SB 1070 permits a court to grant a resentencing hearing *only* if the petition of a survivor-defendant is meritorious and to deny it without a hearing if it is not, while facilitating a possible amended petition. Any victim would receive notice of both the petition and the hearing, if any.

***Does SB 1070 have notice provisions to protect crime victim rights?***

**Yes.** SB 1070 requires that petitions for resentencing be delivered to the district attorney and that the district attorney inform the victim. Victims also have the right to appear and be heard at any re-sentencing that may result.

***Is “domestic abuse” broader than the definition of “domestic violence” that applies to crimes?***

**No.** Currently, Oregon law defines “domestic violence” as applied to crimes as “abuse between family or household members” (ORS 135.230(3)) and “abuse” as a singular act of causing physical injury, placing someone in fear of physical injury, or committing sexual abuse in the first degree (*see* ORS 135.230(1)).

SB 1070 recognizes the same “family or household relationships” currently used by prosecutors to charge and convict domestic violence offenses. However, SB 1070 requires the abuse to be a “pattern of behavior” to “gain or maintain control over the other person, consisting of physical, sexual, emotional, economic or psychological action.” The definition of “domestic abuse” in SB 1070 is as defined by the United Nations. **This is a more accurate definition of domestic abuse and is narrower than the term “domestic violence” as currently applied to crimes.**

Not all people who have been victims of a single crime that resulted in a “domestic violence” conviction will qualify for consideration under SB 1070 because of the more accurate definition of “domestic abuse” in SB 1070.

We urge you to pass SB 1070 to open a path for survivors to have their stories heard and to provide a tool for judges to decide that they matter.

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