
TO: John Foote

FROM: Chris Owen

DATE: 1/18/18

RE: Conversation with Solicitor General Ben Gutman

I spoke with Solicitor General Ben Gutman today regarding our challenge to HB 3078. This was a follow up to my conversation with Senior AAG Jennifer Lloyd who informed me that, pursuant to her conversation with Mr. Gutman, it was DOJ's position that there was not a conflict in handling both a criminal appeal and civil matter as DOJ's official position is captured in its response in the civil suit. Therefore, DOJ would therefore decline to pursue the prosecution's position on any appeal in the criminal case.

Mr. Gutman confirmed that this was the position of the Department of Justice and the DOJ would concede error regardless of the ruling in the Clackamas County Circuit Court, absent some insight or argument made during arguments or delivered by a Circuit Court Judge he hadn't previously considered. I pointed out that the impact would be to render the motion in the criminal case meaningless. He said the prosecution has no recourse in representing itself on appeal and could only file an amicus brief along with DOJ's position that it is conceding error. I pointed out that I haven't seen a situation where the DOJ conceded error but the Court of Appeals took the argument anyway. He agreed and said that there was a "95%" chance that if DOJ conceded error, the Court of Appeals would not take the case.

I asked who vetted and analyzed the legal argument. He said he had along with the individual who filed the response in the civil matter, and "some other people." I said I don't think this was subject to a true, thorough objective analysis and appears to be more of a political position. Mr. Gutman disagreed. I asked him to send me an email confirming DOJ's position and he agreed to do so.

Foote, John

From: Owen, Chris
Sent: Thursday, January 18, 2018 9:56 AM
To: Foote, John
Subject: FW: HB 3078 criminal appeals

From: Gutman Benjamin [mailto:Benjamin.Gutman@doj.state.or.us]
Sent: Thursday, January 18, 2018 9:55 AM
To: Owen, Chris <ChrisOwe@co.clackamas.or.us>
Subject: HB 3078 criminal appeals

Chris,

As you requested, I am following up with this email on our phone conversation earlier today about how criminal appeals involving the constitutionality of HB 3078 would be handled. The Attorney General is charged by statute with representing the state in all criminal cases in the Court of Appeals and Supreme Court. ORS 180.060(1)(a), (c). Based on the information and arguments that the Department of Justice has reviewed thus far, the department has concluded that HB 3078 is constitutional. Thus, I do not anticipate that we would authorize a state's appeal to argue that the statute is unconstitutional, and in a defendant's appeal I anticipate that we would concede the constitutionality of HB 3078. I also anticipate that ORS 180.060 would preclude the District Attorney's office from seeking to represent the state in a criminal case on appeal.

Regards,
Ben

Benjamin Gutman
Solicitor General | Appellate Division
Oregon Department of Justice
503.378.4402

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