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December 30, 2011

Dear Governor Kitzhaber and members of the Commission on Public Safety:

After review of the draft report and conclusions of the Commission on Public Safety, Clackamas County District Attorney John Foote, Washington County District Attorney Bob Hermann and I determined that we would like to offer some observations on the process and on the conclusions of the Commission.

First, we would like to applaud and thank the members of the Commission for the many hours of hard work it took to assemble this report on such a short time-frame. It is remarkable that a report that encompasses such a wide range of topics could be assembled so rapidly.

Second, we want to emphasize once again that we are willing to assist the Commission in any way possible as it moves forward on this project.

Finally, we offer some observations on the process to date and on the conclusions of the Commission as determined yesterday. We recognize that in a public discussion such as this one it is impossible to expect universal agreement, but we hope our comments can be useful and constructive as the Commission continues to examine public safety in Oregon.

Again, we are always ready to assist in any way possible and you should please feel free to contact me or my staff at any time.

Very truly yours,

Mike Schrunk

MICHAEL D. SCHRUNK
District Attorney

Attachment

December 30, 2011

Members of the Commission on Public Safety:

We have reviewed the draft report and conclusions of the Commission on Public Safety and as elected officials charged with law enforcement administration, we wish to offer observations about those results and the process that led to them. We strongly support open discussions and debate about public safety issues, for there is no more effective tool for positive change than the open exchange of ideas. We believe we have always stood ready to assist leadership throughout government in understanding issues of public safety and in developing effective policies in this area. We believe we have much to contribute to the discussion, including some fundamental concerns that we have continually raised with the process of the Commission.

While we have specific concerns that will later be addressed in this letter, our primary disagreement with this process is that the most basic conclusion of this Commission appears to have been established before Commission members were even selected. The Governor's charge to the Commission, pointedly, was that "the Commission on Public Safety shall develop recommendations for comprehensive sentencing reform." Taken off the table from the outset by the Governor unfortunately was any debate about whether "comprehensive sentencing reform" was actually even necessary in Oregon. In a state where much of the sentencing structure for violent crime has been the result of direct voter participation, we believe this constitutes a mandate to a public body to simply brush aside the will of the people of this state.

If the Commission, by issuing a report recommending a continued public process, has now recognized this point and is committed to a process that re-examines its presumptions about the necessity of "sentencing reform," and will genuinely include a broader scope of ideas, this is a positive development. If, on the other hand, what is contemplated is simply better timing for the same presumptions, now with a newly expanded Commission, then the concerns outlined will remain.

While we understand the Commission was the product of an executive mandate directed at the legislature and court system, as we stated publicly at the outset of this process, the choice for the panel not to include any representatives of local prosecutors' offices, local police agencies, sheriff's offices or victims' organizations was bound to cast immediate doubt on the balance and credibility of its ultimate conclusions. It is also puzzling that, while the Commission arranged testimony from a number of sources from across the nation about sentencing policies, no attempt was made to seek the advice or testimony of local prosecutors. Prosecutors do, after all, have a

significant role in the criminal justice system in general, and in sentencing in particular, and we believe we could have contributed to the discussions. While we were able to contribute in the limited time allotted for public comment, we regret these choices and feel the Commission would have been more productive had it sought a greater range of information.

We appreciate the fact that the Commission has now recognized the need to include members of law enforcement in the process. We also applaud the inclusion of representatives of the defense, who likewise have much to contribute to this discussion. We trust that this step will allow the Commission to re-examine in its entirety the current record and conclusions. To allow to stand conclusions that were drawn without the participation of law enforcement and the defense bar would make the inclusion of those participants now a hollow gesture.

Additionally, while we understand the compressed timetable necessitated certain time-saving measures, it is difficult to see why the Commission encouraged the presentation of proposed conclusions at its very first session--before almost all testimony was even taken. The rationale for this has not been adequately explained and it presents an unfortunate appearance to many. The fact that the final conclusions of the Commission largely track these proposed findings contributes to skepticism as to whether this was a process of inquiry and fact-finding, as advertised, or simply a process of publicizing pre-determined conclusions. The fact that the Commission was directed by the Governor to establish a "Public Outreach" committee charged with promoting a message through "press conferences, media seminars, editorial boards (and) web site/web-based conversation" seems to support the inference that the Commission was devised more to educate the public than to dispassionately find facts.

Some might believe that former Governor Kulongoski said as much on November 21, 2011 in Portland when he described the necessity for "an extended discussion with the public" about updating 1989 sentencing guidelines, whose effects had been diminished by subsequent ballot measures. This followed on the heels of earlier conversations about replacing Measure 11 with a revised sentencing guidelines system. It is encouraging that the Commission has decided to extend this process, but we hope that no preconceptions will be brought to the table in the next round of discussions. We also hope the proceedings will not become the focus of a public information campaign, and can concentrate on finding facts.

Of course, you should also be assured that we are all painfully aware of the severe budget pressures all public service agencies encounter today. We assume these budget pressures are one of the reasons for this panel, and we appreciate the efforts to address them. We note, however, that state spending on corrections, including probation and parole supervision, constitutes only 8.7% of total general fund expenditures, as opposed for instance to the 51.8% of the general fund that is spent on education. As can readily be understood from those figures, even a substantial reduction in prison budgets of 10% will have no significant effect on the proportion of our general fund dedicated to other programs, although it will certainly have a significant effect on public safety.

We feel, moreover, that in attempting to address legitimate financial concerns about the costs of imprisoning convicted felons, the Commission has unfortunately focused only on reducing costs by reducing the number of prison inmates. Our position is simple—before the Commission began a discussion about reducing costs by releasing inmates, it should have entertained a serious

discussion about reducing costs by simply reducing costs. We trust this issue can be closely studied as the Commission continues its work, for we believe it can pay great dividends.

At least 30 other states spend less per day than Oregon to incarcerate state prison inmates. Oregon also led the nation in increased costs in this area from 2009 and 2010, registering an astonishing 16% increase in total prison costs at a time when half of the states were actually reducing their prison budgets. And since that figure was recorded, Oregon daily inmate costs have risen once again, from $84 per day to $93 per day, meaning that Oregon is now quite likely among the top ten or so most expensive prisons systems in the country. The tacit assumption of the Commission seems to have been either that prison operating cost reductions are impossible or undesirable. That position is difficult to understand at a time when other government agencies throughout the state, like ours for example, are being required to re-examine operating cost assumptions, and when other states' prison systems are successfully reducing costs.

We believe that Oregon is at the forefront of progressive corrections policy, a policy we have supported over the years. We have achieved one of the lowest incarceration rates in the nation and the inmates who are incarcerated in prisons here are not the national media caricature of petty drug possessors and small-time thieves. Fully 70% of Oregon prison inmates are violent felons, compared to a national average of 52%. The rest are serious drug traffickers and repeat property felons. Importantly, the majority of Oregon prison admissions are not the result of initial sentences but are for supervision violations like parole or probation revocations. The system has given these offenders an opportunity to live in the community on supervision and they have failed. The Oregon prison population, therefore, consists almost entirely of violent and repeat offenders, many of whom have proved unable to live successfully in the community. By any measure we believe these inmates deserve to be in prison, and we are convinced that the vast majority of Oregonians would agree. Reducing the prison budget by keeping these types of offenders out of prison will unquestionably result in increased criminal activity in our communities. Before the Commission seriously considered recommending measures which would result in these types of convicted felons remaining out of prison and in our communities we feel it should have made a serious attempt to determine if we could save money in our prison system by other means, as other states have clearly accomplished.

We remain proud of the advances that have been made in recent years in our corrections system, advances which mix a robust community corrections program, a low incarceration rate and a prison inmate population targeted at violent offenders. The system is rightly perceived throughout the nation as an example of the very best practices in the field. It is a system that has led the nation in violent crime reduction while still maintaining one of the lowest incarceration rates among the states. In short, Oregon has already accomplished what is now only being debated in the rest of the nation. It is invalid, therefore, to ascribe national media perceptions of prison problems to Oregon when this state has already addressed those problems. California, for instance, has an incarceration rate approximately 30% greater than Oregon, and its prison population consists of a significantly greater number of non-violent offenders than ours. It could be reasonably suggested that our experts have far more to teach California than the experts who came from that state to testify before the Commission.

It was even more troubling that the Commission chose to highlight the penal system of Texas as an

example of the direction Oregon should take in corrections policy. For all that the state of Texas might have done to reduce its number of prison inmates, the incarceration rate in that state is still twice as high as it is in Oregon, almost half of whom are non-violent offenders, and the state's violent crime rate is almost twice as high as ours. Prison economization there has been achieved by turning vast segments of their prison system over to private corporations, leaving a trail of lawsuits. We doubt that Oregonians would choose to trade higher violent crime rates, higher incarceration rates and private prisons for the system that exists in our state today. The solicitation of testimony from officials in Texas, therefore, when the Commission chose to call no prosecutor or police officer from our own state, has been considered a rebuke by many of our colleagues who believe we have been instrumental in building what is perhaps the best criminal justice system in the nation.

Unfortunately, it would seem that during the Commission's initial three months of work its process has been informed predominantly by one point of view. That view, we believe, considers this nation's incarceration rate a sad and negative commentary on our society and advocates alternatives to incarceration which may be unproven and risky. Led by eerily similar motives and even by some of the same advocates, many decades ago our nation engaged in a similar massive de-institutionalization, in that case the de-institutionalization of mental health patients. The same promises of community support we hear today in favor of reducing prison incarceration rates were heard then, and similar science was brought to bear in that campaign. But the science proved faulty and the promises of community support proved illusory.

Enthusiasm, advocacy, and commitment are no substitute for sound judgment, and sound judgment requires the consideration of many points of view. We believe that the inclusion of additional members will now allow that to happen, and we hope that all the members of the Commission will be free to re-examine the entire spectrum of ideas about which testimony has already been presented.

With this in mind, we have several observations regarding some of the subjects discussed by the Commission:

Budget amelioration issues. We certainly support the proposition that if our government can safely save money we should do that. However, we do not believe the only way to save prison costs is to release inmates. Doing so will increase crime rates and before that step is taken, a concerted effort to examine prison costs should be undertaken. No attempt to do so was made by the Commission. As noted, Oregon has the dubious distinction of having the prison system which led the nation in prison budget increases between 2009 and 2010, while maintaining a virtually static inmate population. Twenty-three other states managed to actually reduce their prison budgets during this period. At a time where austerity is being demanded from government throughout the nation, it is unfortunate that the Commission has steered clear of any attempt to find economies in prison administration and has focused instead on simply releasing inmates into the community. Our recommendation is for the Commission to take a detailed look at how coordinated policies might reduce costs throughout the justice system, from the level of police arrests, to the court system and through incarceration and supervision of offenders.

Recidivism rate definition. Any public discussion of sentencing policies must include reasonable

terms and definitions that Oregonians agree with and understand. The current definition of "recidivism," a key term that was used repeatedly in the public hearings of this Commission, is in our opinion a far cry from what would be considered recidivism by average citizens. The term as used by the Department of Corrections means only that an offender was not convicted of a new felony within three years of being sentenced for a previous felony. Effectively, in many felony cases therefore, the standard only measures the offender's success on supervision (if even that), since in many cases probation supervision continues through the entire three year period. Unless our legislature is inclined to establish lifetime probation terms, measuring simply how an offender performs while under supervision tells us little about whether that offender no longer presents a threat to commit future crimes.

More importantly perhaps, the current definition of recidivism only measures "success" in a manner unrecognizable to an average citizen. For instance, because it counts as recidivist behavior only felony convictions within three years of being sentenced for an offense, a sentenced felon who is then arrested and awaiting trial for a subsequent murder but not yet convicted by the end of the three year period would be considered a success under the Department of Corrections definition. A sentenced felon who is actually convicted of, for instance, three misdemeanor assaults and two DUIIs within three years of being convicted of a felony would also be considered a success under the Department of Corrections definition of recidivism. This definition, upon which so much of the data for the success of probation programs is based, is so fundamentally at odds with what an average citizen would consider success in the conduct of a probationer as to make any conclusions drawn from it illegitimate in the eyes of the public, once they understood how their officials define the term "recidivism." In our estimation, the current definition of "recidivism" amounts to misleading the public. Any public discussion on how to achieve success in sentencing policy must center on a definition of success that Oregonians accept. We are confident that few Oregonians would accept the standard of recidivism success used currently.

Assertions that sentencing procedures strip the judicial branch of authority. One of the most troubling developments of the current debate about sentencing policy, certainly reflected in discussions of the Commission, is the bald assertion that current sentencing policies need to be drastically reformed because they have deprived courts of much of the sentencing authority they had exercised in the past. As district attorneys we are extremely mindful of our obligations to the justice system and the public. The argument that sentencing policy has stripped the judicial branch of authority by giving prosecutors overwhelming power to dictate plea settlements is not supported by an actual examination of the facts.

First, as anyone who has practiced or presided over criminal procedures can attest, for over 100 years our criminal justice system has operated through the process of plea negotiation. Prosecutors and defense attorneys, along with their clients, agree to negotiated settlements in virtually all cases. This settlement is presented to a judge whose authority, as a practical matter, is simply to accept or reject the offer. Few offers are ever rejected by the courts. Nothing has been changed in that process by new Oregon sentencing laws. Although one might reasonably argue that the plea bargaining system itself has stripped judges of authority they previously exercised in sentencing offenders, that development occurred long before mandatory sentences in Oregon.

Second, the true measure of the power wielded by prosecutors to dictate negotiated pleas is the rate

at which cases go to trial. Another way of looking at the trial rate is to see it as the rate at which defendants reject negotiated plea offers. Low trial rates in major crime categories will indicate that the government has such a strong hand that it can dictate the terms of a settlement. In federal courts, for instance, the trial rate is less than 3%. In Oregon Ballot Measure 11 cases the trial rate is 16%, over five times the federal rate. Furthermore, and more importantly, the 16% trial rate for Measure 11 crimes is exactly the same as the trial rate for the same serious violent crimes before the advent of Measure 11. Clearly, defendants and defense attorneys have not been deterred in any way from asserting their rights to a trial by this measure. The only effective difference has been that offenders now serve longer sentences, which is exactly what voters sought in enacting Measure 11 in 1994.

Finally, this discussion about an asserted transfer of judicial power to the executive branch is not complete without pointing out a fundamental and troubling contradiction in the position taken by those who have suggested it. At the same time these critics have bemoaned a purported but unproved shift of power from judges to prosecutors they have roundly applauded the real and significant transfer of judicial power from judges to probation officers. There can be no question that the use of structured sanctions, where probation officers have replaced judges in punishing probation violators, has stripped judges of virtually all authority to supervise their probationers in most felony cases. Curiously, not only has there been no objection to this clear diminution of judicial power, but there has been a wholehearted endorsement of the development. If the protection of judicial authority was a real concern rather than just a talking point in favor of amending current sentencing laws, structured sanctions should have been the primary target. This contradiction raises the suspicion that the defense of judicial autonomy is no more than a cynical position taken by those whose real goal is to change Oregon sentencing laws.

We encourage the Commission to abandon this justification for policy changes. It is unsupported by data and we believe that if the Commission had initially included prosecutors in this discussion this would have become evident.

Evidence based practices. We certainly support the belief that certain offender characteristics or markers are predictive of future behavior and the notion that various programs can be more effective than others in addressing offender needs. Employment, substance abuse, and age at first offense, for instance, are all obvious indicators of potential future criminal conduct. This is not new, but relies on common sense and experience as much as science, and has been used by advocates in courtrooms for many years. Applying a scientific weighting system to these factors is not new either. The Department of Corrections has used a risk assessment tool for over 30 years to determine projected inmate release dates, and the Oregon legislature has mandated the use of evidence based community corrections policies since 2003. So the process is not novel, but the results are far from clear and in our estimation the science is far from perfected.

Some examples are instructive. In the first three years that the Oregon Department of Corrections began collecting recidivism figures, 1990 through 1992, well before the required use of evidence based sentencing, the average three-year recidivism rate for Oregon probationers was 21.7%.[1] In

[1] As noted above, we disagree with the calculation of recidivism used by the Department of Corrections because it is unrealistic and does not conform to what a citizen in the community believes the term means. Because it is the only record available, however, we use it here for comparison of the effectiveness of probation supervision.

the most recent three year period from the last half of 2005 until the middle of 2008, after the advent of required use of evidence based supervision practices in Oregon, the three-year average probation recidivism rate was 22.5%. Because the rates during these periods were essentially the same, it is difficult to understand a claim, as heard so often in the testimony before the Commission, that we now know how to successfully supervise probationers, when similar success

was achieved in the past without the use of these practices. In fact, during this entire 18 year period the recidivism rate, as measured in six month increments, has fluctuated from 26.7% in 1997 to 20.1% today, not a particularly striking difference.

Additionally, some of the county supervision departments in this state are leading advocates and practitioners of evidence based practices and have fully integrated those practices into their supervision policies. Some of the leaders in those departments, in fact, testified before the Commission. Yet for many years the Department of Corrections has collected data on specific supervision performance measures from around the state, and those statistics reveal that the performance measure results of departments with sophisticated and fully integrated evidence based practices are no better, and in some instances worse, than the results in the rest of the state.

In short, while there is cause for optimism that scientific tools can assist decision makers in assessing the risk of offenders, the process is as yet insufficiently reliable to justify massive sentencing realignment policies.

Justice. We understand the drive to apply metrics to the management of public safety issues, but in many ways we believe this may miss a key point of a justice system. Actual public safety can be largely quantified in crime rate statistics. Justice, on the other hand, cannot be so readily expressed. Providing justice demands a complex and intimate understanding of the beliefs of the citizens of a community and an understanding of how those citizens accept and relate to the institutions of their government.

More importantly and seemingly avoided by the Commission up to this point, is the fact that the community's perception of justice may require something far different than a cold adherence to recidivism statistics, even if those statistics are assumed to be reliable. Justice requires government actions that are endorsed by the people, whether or not they prove to be the most dispassionately efficient. For instance, while it may be statistically demonstrable that certain murderers present a very low potential for future dangerousness, justice in the eyes of our citizens demands significant, even costly, sanctions for their behavior.

For policymakers to override the accepted perception of justice in the community risks eroding the fundamental legitimacy of our government's institutions. Yet this is precisely the message that seemed to predominate in testimony before the Commission, as witness after witness testified in favor of sentencing policies that essentially eliminate sanctions for huge classes of property and drug offenders. Widespread adoption of such measures, unless accepted by the public, will only lead to the erosion of public credibility and legitimacy in our justice system. That will signify a return to the state of affairs that existed over twenty years ago, before truth-in-sentencing laws and victim's rights legislation restored legitimacy to our justice system.

Rather than attempting to persuade Oregonians to change their way of thinking, we believe our leadership should be attempting to comply with the considered decisions of the electorate by the most effective means available. After all, events of the recent past have generally proved the decisions of the electorate to have been correct ones.

Once again, we stand ready to collaborate with any group, at any time, to discuss public safety policy. We believe, in fact, that collaboration has been a hallmark of this state's government for some time and is actually the reason that our justice system is as successful as it has proved to be. We feel we have much to contribute to the discussions and hope to be involved in the process as the Commission continues with its work.

Respectfully submitted,

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John S. Foote
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Robert W. Hermann
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