



April 9th, 2021

Senator Susan Deschambault, Chair
Representative Charlotte Warren, Chair
Joint Committee On Criminal Justice and Public Safety
State House, Room 436
Augusta, ME 04333

Re: Testimony Neither for Nor Against **LD 769** *An Act To Increase the Availability of Mental Health Services for a Defendant Who Has Been Found Incompetent To Stand Trial*

Dear Senator Deschambault, Representative Warren, and Members of the Joint Standing Committee on Criminal Justice and Public Safety,

My name is Kevin Voyvodich and I am an attorney at Disability Rights Maine. Thank you for the opportunity for Disability Rights Maine (DRM) to provide testimony neither for nor against LD 769.

DRM would like to offer the comment that great caution should be used for any legislation that puts those who have not been convicted of a crime in a state prison for security purposes, especially when that person has been found incompetent to stand trial (IST). That being said, DRM would like to make three points:

1) The State of Maine must provide restoration treatment to those found incompetent to stand trial:

All pre-trial detainees have the right to due process in the criminal justice system, in fact even their incarceration must be “rationally related to a legitimate nonpunitive governmental purpose.”¹ Further, the Supreme Court of the United States has made it clear that there are specific due process protections that attach to a person found IST. In *Jackson v. Indiana*² the Supreme Court pointed out, “indefinite commitment of a criminal defendant solely on account of his incompetency to stand trial does not square with the Fourteenth Amendment’s guarantee of due process.” In addition, they pointed out that, “even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment *must be justified by progress toward that goal.*”

¹ *Bell v. Wolfish*, 441 U.S. 520, 561 (1979).

² 406 U.S. 715, 731 (1972).

(emphasis added)³. This bill proposes to transfer individuals to the mental health unit of a correctional facility. DRM would like to point out that regardless of the setting, those found IST must be receiving restorative treatment. Any change in the law such as this must be accompanied by the guarantee that, as the 9th Circuit Court of appeals pointed out, “[i]ncapacitated criminal defendants have liberty interests in freedom from incarceration *and in restorative treatment.*” (emphasis added)⁴

2) Clear and Convincing Evidence, Not Preponderance of the Evidence should be the standard.

Section 1. (A) of this bill uses a “more probable than not” standard of evidence of an individual’s actions and behaviors to then have them sent to a correctional environment. This language tracks the preponderance of the evidence, or lowest, standard of evidence to prove that a person must be transferred from hospital to a state prison. DRM offers that civil commitment standard in in MRSA Title 34B requires clear and convincing evidence, a much higher standard. DRM submits that the standard to send someone IST, to a state prison, when the state’s only interest at that time is to restore that person to competency to stand trial, should at least be the same standard used in civil commitment proceedings.

3) If this bill does pass, should it contain a sunset provision in order to ensure it is not being misused to send those with serious mental illness to prison?

While DRM has heard from those in favor of this legislation why they think it is needed, and why they think it will only be a small proportion of individuals, DRM would suggest that this type of legislative change needs to be done with extreme caution. DRM would suggest that after a certain number of years, a report back should be done to the legislature, with the option of letting the statutory language sunset if not re-enacted. The purpose of this would be to ensure that the statute is only being used in the most serious cases only related to safety, and not, due to their psychiatric disability.

Thank you for your time.

Sincerely,

Kevin Voyvodich, Esq.
Managing Attorney
Disability Rights Maine

³ Id. at 738

⁴ *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1106, 1121-22 (9th Cir. 2003).