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April 2, 2019

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony in opposition to Senate Bill 965

Dear Chair Prozanski and Members of the Committee:

My name is Richard Oberdorfer and I am a member of OCDLA and the Oregon State Bar. I am licensed to practice law before all Oregon courts, the U.S. District Court for the District of Oregon and the U.S. Ninth Circuit Court of Appeals. I am a frequent lecturer on DUII, alcohol and drug pharmacology, and driving-related topics. I am a lifelong Oregonian, graduating cum laude from the Lewis & Clark Law School in 2001 after an undergraduate History degree from the University of Oregon in 1996. I have been involved in the criminal defense function of our justice system since 1997. I am a trial lawyer, and have litigated hundreds of DUII and other driving prosecutions in state court.

I oppose Senate Bill 965 for three primary reasons:

(1) Senate Bill 965 robs citizens of meaningful notice.

"Meaningful notice, at a meaningful time," is the touchstone of Due Process. Senate Bill 965 takes us back to the pre-1991 days, when DUII "was charged generically without reference to the particular intoxicant involved." *State v. Stiles*, 165 Or App 584, 998 P2d 703, 707 (2000) (recounting the legislative history behind Oregon's current DUII statute).

Oregon's current DUII statute requires a prosecutor to affirmatively allege if controlled substances are involved in the underlying DUII, at the time of charging. Prosecutors may of course amend the charging instrument at any time that does not prejudice the defendant – meaning, in practice, any time before the day of trial. Sometimes a day of trial amendment may be granted, but the defendant would likely be granted a postponement to respond to the state's new theory.

This means that when the prosecutor charges you with the crime of DUII, you know what the theory is before a jury is empaneled, or before you plead guilty and enter DUII Diversion.

Senate Bill 965 would end that specificity. A prosecutor could simply charge "DUII," and it would be up to the defendant to discern what the prosecutor's theory might be. Under SB 965, the theory could be: anti-depressants and alcohol, or nicotine and a prescription drug, or caffeine and ADHD medication. But you wouldn't know until the prosecutor's closing argument, at the end of trial, what theory they were electing.

In contrast, Oregon's current law permits a DUII to be prosecuted for a combination of each of the examples above – but you would be aware of that theory. Oregon's current jury instruction on "Person's Physical Condition" can be sought in any case that involves a non-controlled substance or other physical condition that rendered you more susceptible to the use of a controlled substance, or alcohol, and it provides:

UCrJI No. 2708

PERSON'S PHYSICAL CONDITION

> If you find from the evidence that [*defendant's name*] was in such a physical condition that [he / she] was more susceptible to the influence of intoxicants than [he / she] would otherwise be, and as a result of being in that physical condition [*defendant's name*] became under the influence by a lesser quantity of intoxicants than it would otherwise take, [*defendant's name*] is nevertheless under the influence of intoxicants.

The current DUII statute – even with its protections, its requirements of notice of the prosecutor's theory – is *still* subject to abuse. In one case, a "Drug Recognition Expert" (DRE) testified without objection that "*the common antacid Zantac* is a prescription depressant or pain medication." *State v. McFeron*, 166 Or App 110, 999 P2d 470, 471 n 1 (2000) (emphasis added). The jury went back to deliberate with that false information, and convicted Mr. McFeron. His conviction was, thankfully, overturned because the prosecutor had failed to allege a controlled substance theory, and the defense attorney had objected to that problem. Had SB 965 been the law, Mr. McFeron's conviction would have stood.

(2) SB 965 endangers Oregon's federal highway funding.

Stiles reviewed the legislative history behind *why* we switched from the generic "intoxicants" DUII statute pre-1991 to one that requires prosecutors to affirmatively allege their theory if it includes controlled substances. In short: federal funding. *Stiles* explains:

> ORS 813.010(2) was enacted in 1991, Or. Laws 1991, ch. 835, 7, as part of omnibus legislation overhauling Oregon's laws pertaining to suspension of licenses for driving under the influence of intoxicants. The legislative history of that bill, which was proposed by Citizens for a Drug Free Oregon, shows that

the legislation was enacted in response to federal highway funding legislation. See Tape Recording, Senate Committee on Judiciary, HB 2585 7, June 26, 1991, Tape 244, Side B (comments of committee counsel, Ingrid Swenson). That federal legislation provided for withholding five percent of highway funding from any state that did not suspend the licenses of persons driving "under the influence of such a [controlled] substance." See 23 U.S.C. § 159(a)(3), (c)(2)(B) (1998). **As the Judiciary Committee's counsel explained, under then-current Oregon law, driving under the influence of intoxicants was charged generically without reference to the particular intoxicant involved.** Thus, if a person drove under the influence of a controlled substance, neither the charging instrument nor the conviction would, necessarily, describe the crime as one involving the use of controlled substances. Section (7) of the Oregon legislation—now **ORS 813.010(2)—was designed to comply with the federal suspension mandate by insuring that persons convicted of driving under the influence of controlled substances were, in fact, identified as such, triggering the required suspension.** Thus, ORS 813.010(2) is, at base, a record-keeping or "tracking" mechanism:

> "And what [section (7) of HB 2585] does is require in the prosecution * * * of a driving under the influence case, for the state to allege and prove [that] the driver was under the influence of controlled substances. Currently, these cases are prosecuted as driving under the influence of intoxicants, and the jury can convict based on evidence showing that there might be drugs and alcohol, one or the other, or both, and no specificity is required. And in order to limit the application of this suspension to those persons who are driving under the influence of controlled substances to comply with the federal act, it will be necessary for that distinction to be made." Tape Recording, Senate Committee on the Judiciary, June 26, 1991, Tape 244, Side B (statement of Ingrid Swenson).

State v. Stiles, 165 Or App 584, 998 P.2d 703, 707 (2000) (emphasis added). The federal statute cited above is still in effect and still good law – meaning Oregon's DUII statute should *not* be changed in the manner suggested by SB 965, if we do not wish to endanger federal highway funds.

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(3) Judges have power to impose probation conditions related to the crime.

I have reviewed materials from the previous attempts of the Attorney General to make Oregon's DUII law more generic, and to include non-controlled substances. I am concerned that they do not reflect Oregon courtroom realities.

The examples given posit that a trial court judge would somehow lack the authority to order a defendant to not consume a non-controlled substance, or to mandate drug treatment, as part of a probation sentence for Reckless Driving, or Criminal Mischief II (recklessly damaging property in a car crash), or Recklessly Endangering Another Person. That is not the case.

Each of the crimes listed above is, like DUII, a Class A misdemeanor punishable by up to almost a year in jail and fines of $6,250, plus full restitution to crime victims.

My experience in Oregon trial courts is that our judges are deeply committed to discovering the root causes of poor driving conduct. All they need, to impose probation conditions related to non-controlled substances, is reasonable grounds that the non-controlled substance related to the crime of conviction. It is **not** necessary that a person be charged with the separate crime of DUII to impose such conditions, such as drug treatment, drug abstinence, and urine testing.

OCDLA as an organization seeks to protect peoples' constitutional rights, including the Due Process right to meaningful notice at a meaningful time. As a lawyer I have spent decades working in Oregon's justice system handling these types of cases. I care deeply about Oregonians involved here – in any capacity – and with the police officers and prosecutors who work with me in this system. OCDLA and I urge you to vote no on SB 965 for the reasons articulated above. We oppose this bill.

Sincerely,

s/ Richard E. Oberdorfer

Richard E. Oberdorfer

4080 N WILLIAMS AVENUE | SUITE 200 | PORTLAND, OR 97227 | 503-223-2313 OFFICE | 503-243-3257 FAX | OBERLAW.COM