Legislative Testimony

Oregon Criminal Defense Lawyers Association

April 2, 2019

The Honorable Floyd Prozanski, Chair
Senate Judiciary Committee, Members

Re: Testimony Opposing SB 965

Chair Prozanski and Members of the Committee,

As OCDLA's Legislative Director, I am reaching out to you to register our deep concerns with SB 965 that seeks to expand Oregon DUII law.

I. Deep Concerns with SB 965:

SB 965 is a proposal introduced by the Oregon District Attorneys Association (ODAA) to once again attempt to convince the legislature to ***significantly expand*** long-standing DUII law to the detriment of fairness and logic, due process, and notice requirements of criminal proceedings.

Similar proposals introduced by ODAA have been rejected multiple times over many sessions by the legislature because their proposals are broad re-writings of the law that would result in *more prosecutorial discretion* and *over criminalization of otherwise potentially non-criminal behavior.* Their proposal to do away with specific pleading requirements is a clear *rejection of due process and long standing notice requirements*. This proposal is no different.

II. SB 965 Seeks to Illogically Expand Already Comprehensive DUII Law:

Section 2, Page 1, lines 8-14 of SB 965
SB 965 creates an overly broad definition of **"intoxicant"** to include not only **liquor, inhalants, cannabis, and controlled substances** but also ***"any drug"*** that is used in combination with liquor, inhalants, cannabis or a controlled substance. "Any drug" is so broad that it includes nearly everything except for food (OR 475.005).

What this means practically is that if a person takes any over the counter medication such as Dayquil, Tylenol, ant-acids or a prescribed medication such as an anti-depressant, migraine medication, or any other non-controlled substance, and they drink even a small amount of alcohol or have remnants of marijuana in their system, this law would mandate that the combination in their system is per se "an intoxicant," even if there is no known chemical interactions or actual intoxicating effect.

Current DUII law already allows the prosecutor to argue someone is under the influence of an intoxicant including intoxicating liquor, cannabis, inhalants, or controlled substances if they blow a "BAC of .08" or "are under the influence" of intoxicants (ORS 813.010)[1]. This inclusion of "any drug," even in combination with

[1] **(1)** A person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person:**(a)** Has 0.08 percent or more by weight of alcohol in the blood of the person as shown by chemical analysis of the breath or blood of the person made under ORS **813.100 (Implied consent to breath or blood test)**, **813.140 (Chemical test with consent)** or **813.150 (Chemical test at request of arrested person)**; **(b)** Is under the influence of intoxicating liquor, cannabis, a controlled substance or an inhalant; **or (c)** Is under the influence of any combination of intoxicating liquor, cannabis, a controlled substance and an inhalant.

alcohol or controlled substances means that a given prosecutor will be able to argue as a matter of law, without any evidence or scientific support, that the fact someone was taking even an innocuous over the counter medication with one sip of wine means they have a per se "intoxicant" in their system and can thus argue the person was "under the influence of intoxicants" without a scientific basis for the alleged "intoxication."

This is irrational and illogical—even the Webster's definition of "intoxicant" is defined as "something that intoxicates." It presents a serious danger to write into law that the combination of "Tums" and one glass of wine is per se an intoxicant without actual scientific support for some interaction or intoxicating effect.

Prosecutors will state that they are kept honest by the fact that the law also requires them to prove "impairment" at trial. However, as we now know, over 95% of cases resolve in a plea deal and NOT trial. This broad rewriting will allow prosecutors to charge "lighter" evidentiary cases without real oversight. More people will be arrested and haled into the criminal justice system to face an array of collateral consequences where many will plead guilty and not exercise their right to have a prosecutor prove their alleged criminality beyond a reasonable doubt.

I**f this change is made, prosecutors will have even greater charging discretion as well as have the ability to argue that someone who is well under the legal limit of .08 (ie, one beer) has "multiple intoxicants" in their system even if the other "intoxicant" is something that does not in fact intoxicate.** Experienced practitioners predict the State will begin charging lower BACs (.02, .03 etc.) with DUII should this legislation pass due to the fact that prosecutors will have the leverage to reason that even if the person is well under .08, they were still "under the influence of intoxicants" because any amount of alcohol with any over the counter drug is a per se "intoxicant."

III. SB 965 Seeks to Eliminate Long-standing and Fair Pleading Requirement:

Page 1, Section 3, lines 25-28 of SB 965

SB 965 thwarts due process and requirement of notice by allowing DA's to omit the pleading process to prove that a person was under the influence of alcohol, cannabis, a controlled substance, or an inhalant in a given case against a defendant. **This means the prosecutor no longer has to give NOTICE to the accused of what they're being accused of before the person is in trial.** A given defendant could show up to their trial having no idea of the charges against them in relation to the consumption of liquor, inhalants, cannabis, and controlled substances or any other drug while operating a vehicle. Prosecutors have a depth of discretion, and the people of Oregon deserve to know the "theory" with which the state is prosecuting them under, and this law is attempting to ***delete the state's obligation to provide notice*** of its theory of prosecution

It is difficult to understand the legitimacy of eliminating this requirement of notice. An accused person is entitled to know what they are being charged with and what the state's theory of prosecution is. This is part of basic due process owed under the US Constitution.

Thank you for taking time to consider these serious matters.

s/ Mary A. Sofia
Legislative Director
OCDLA