OCDLA
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

TO: **Senate Committee on Judiciary**
FROM: **Randall Snow, Attorney at Law, on behalf of OCDLA**
DATE: **February 4, 2020**
RE: **Opposition to SB 1503 – Relating to DUII**

Chair Prozanski, Vice Chair Thatcher, and Members of the Senate Committee on Judiciary,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and parents in juvenile dependency proceedings, juvenile delinquency proceedings, adult criminal prosecutions and appeals, and civil commitment proceedings throughout the state of Oregon. Thank you for the opportunity to submit the following comments in opposition to Senate Bill 1503.

SB 1503 is a poor response to two extremely recent cases, *State v. Hedgpeth*, which was issued on November 21, 2019, and *State v. Guzman*, which was issued on December 27, 2019. A short session does not provide adequate time to contemplate and debate the issues raised by SB 1503. Further, SB 1503 will lead to unintended consequences, unlawful arrests, cost the State more money because it will force more cases to trial, and it will not lead to increased public safety.

The State's response to *State v. Hedgpeth* is essentially saying they don't have enough evidence to prove a case if a police officer thinks someone is impaired and there is a breath test of .08 or above. Do we really want to convict people where the evidence of impairment to a noticeable or perceptible degree is not proven beyond a reasonable doubt and it is possible the person was under .08 at the time of driving? That is what would happen under SB 1503. If people are impaired below .08, then the State should be able to present there be evidence of impairment to present to a jury.

Hedgpeth is an extremely narrow holding and factually driven case. The State's fears about this case are unwarranted. The only question decided in *Hedgpeth* was whether, based on the "**extremely limited record**," the State could survive a motion for judgment of acquittal. The Oregon Supreme Court held, "The only evidence was that defendant's blood alcohol level was over the legal limit when measured almost two hours after he drove, and that he had consumed no alcohol in the interim. In the **absence of any other evidence**, the jury's common knowledge of the **generic (and incomplete) proposition** that alcohol dissipates from the blood over time is not sufficient to constitute the 'something more' that – as we said in *Eumana-Moranchel* – is necessary for a **nonspeculative connection** between the BAC test results and defendant's blood alcohol concentration when he was driving approximately two hours earlier." *Hedgpeth*, 365 Or at 744.

As written, SB 1503 is not merely a "fix" to *Hedgpeth*, but would apply to the following scenario:

Police get a report of music being played too loud at a house (noise complaint). Officers arrive and hear the loud music from outside the house and decide to knock on the door to contact the occupants. Owner of the house answers.

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Ofc: Hey, we are here on the report of a noise complaint, so could you please turn the music down?
Owner: Yeah, totally sorry about that, we were dancing and celebrating, and I guess we didn't know how loud things were getting. We'll keep it down. Sorry.
Ofc: I smell alcohol on your breath, and your eyes are red. I also noticed you had a hard time pronouncing "officer" when you addressed me. Is that your car in the driveway?
Owner: Yes it is.
Ofc: When I walked by the car, although I didn't touch it, I could tell there was heat coming from the hood. That indicates to me it's been driven recently. Has anyone else driven your vehicle in the last couple hours?
Owner: No – I'm the only person who drives that car.
Ofc: How long ago did you drive it?
Owner: A while ago – I don't know. We've been celebrating, and I haven't been keeping track of time.
Ofc: Would you consent to performing voluntary field sobriety tests so I can make sure you are safe to be driving?
Owner: I'm not driving.
Ofc: (reads *Rohrs*) (asks again for field sobriety tests). I know you drove that vehicle in the last two hours because you've just admitted to me that no one else drives it, and I can tell there is heat from the hood.
Owner: This is crazy. I'm not taking field sobriety tests, and I'm not answering any more questions without a lawyer.
Ofc: Put your hands behind your back, you're under arrest for DUII.

It now becomes the house owner's burden to prove that they weren't under the influence at the time of driving. They will have to call all of their friends at the party to testify in a criminal trial and hire an expert witness to engage in retrograde extrapolation.

Regarding the second "fix," which is in response to *State v. Guzman*, it is worth noting the hypothetical dangerous driver with 9 DUII's is not going to be treated as a first offender. No judge would give a minimum sentence in that circumstance. The State would probably ask for the maximum on reckless driving and any additional charges. The real result will be punishing the high percentage of people who have one out of state conviction because there was no diversion in their home state and then hammering the person with much more jail, fines (possible license suspension with no hardship permit) compared to a person who completed diversion and then is arrested in Oregon. Under SB 1503, Oregon would essentially give an exponentially harsher punishment to those who had no option of diversion under the guise that they can send a small percentage (compared to the large percentage of people with 1 out of state conviction) of the repeat offender cases to prison. This will cost the state a lot more in terms of jail space, cause a loss in jobs due to the inability to get a hardship permit, and force more cases to trial.

OCDLA has the following concerns about SB 1503:

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(1) SB 1503 presumes guilt and requires a defendant to prove his or her innocence.
One fundamental premise of criminal law is that the State bears the sole burden of proof in all criminal cases. SB 1503 creates a presumption that a person is guilty of DUII, when they may not have committed any crime. Requiring a criminal defendant to prove, through an affirmative defense, that they should be acquitted of DUII because they weren't above the legal limit at the time of driving is inherently offensive to the most basic notions of fundamental fairness and due process.

(1) An "affirmative defense" is not a sufficient protection against wrongful arrests and convictions.
An affirmative defense requires a defendant to prove the defense by a preponderance of the evidence. If a defendant has no other witnesses to call to corroborate his or her version of the events, it will be difficult to convince jurors that the defendant should be believed. Prosecutors will argue that any such testimony is not worthy of belief, and the defendant is lying to save himself or herself from conviction. Further, this proposed affirmative defense implicitly requires a defendant to concede that the breath test results obtained were valid.

(2) A "sufficient quantify of alcohol" is an undefined term.
Under the proposed bill, a defendant is required to prove the amount of alcohol he or she consumed after driving was "sufficient" to cause his or her BAC to become over 0.08%. In practice, this requires the defendant to prove: (1) how many ounces of alcohol were consumed, (2) what type and percentage of alcohol was consumed, (3) was food involved, (4) what is the absorption and dissipation rate for the type of drink consumed, (5) what is the absorption and dissipation rate for the person, (6) are there independent witnesses to corroborate the affirmative defense, and (7) quite likely require the defendant to pay for an expert witness to discuss the above factors in front of the jury.

(3) Innocent people will be arrested for DUII.
Arrest and prosecution is a traumatic experience for anyone, but a wrongful arrest for DUII where the person is presumed guilty until proven innocent should not be tolerated. This proposed bill casts too wide of a net and will lead to the arrest and prosecution of the innocent. The cascade of effects on one's life is often overlooked by the State. Public embarrassment, private embarrassment, financial strain of hiring an attorney and expert witness, missing work for court appearances, possible loss of employment, and the mental and familial burden of being subjected to a criminal prosecution are just several injustices that a person faces when they are wrongfully accused of a crime. It is certain that people will be wrongfully arrested under the SB 1503.

(4) Public confidence in the criminal justice system will be decreased even further.
SB 1503 authorizes police to arrest people for DUII without the police being able to prove the person drove while under the influence. An attitude of "let them prove they aren't

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guilty" will lead to a further erosion of confidence in a criminal system already under pressure. The burden of proof should be left squarely on the shoulders of the State to prove beyond a reasonable doubt that a person has committed a crime.

(5) "Driving" under the influence is the basic element of DUII.
The harm sought to be prevented by DUII laws are to prevent and punish those who "drive" while under the influence of intoxicants. In Oregon, requiring the State to prove that element beyond a reasonable doubt strikes the proper balance between the rights of the accused and the interests of the State.

(6) **Burden shifting is always inappropriate in criminal law**.
In any legal action, the burden of proof is always on the person who brings a claim in a dispute. Under current law, the State properly bears the burden to prove each and every element of a DUII case. SB 1503 would absolve the State of its responsibility to prove each and every element, and unjustly requires a defendant to prove his or her innocence.

For these above reasons, OCDLA strongly urges this committee to NOT pass SB 1503.

Respectfully submitted by,

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