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DATE: February 17th, 2020

TO: Honorable Representative Tawna Sanchez, Chair of the Senate Judiciary Committee

FROM: Aaron Knott, Legislative Director

SUBJECT: Senate Bill 1503A – Protecting our DUII Laws

This testimony is presented in support of Senate Bill 1503A.

BACKGROUND

In Washington and California, along with the majority of other states,[1] in order to commit the crime of driving under the influence, the state must demonstrate that a person had a blood alcohol content (BAC) of 0.08% or above within a period of time after driving in order to establish that a person is under the influence of intoxicants.[2] Oregon is in the minority of states which require that the state demonstrate that a person was at a 0.08% BAC at exactly the moment they were driving. Additionally, under Oregon law, a DUII is elevated to a felony if the defendant has previously been convicted of DUII or a "statutory counterpart" from another jurisdiction on two occasions within the last ten years of the current offense.

Last year, the Oregon Supreme Court issued decisions in two cases which impact DUII in related ways. Both holdings were based on an interpretation of legislative intent rather than of constitutional principle: Otherwise stated, the court did not find that a defendant's rights had been violated, but instead that the legislative intent, as they understood it, required a particular result.

In *State v. Hedgpeth*[3], the Oregon Supreme Court held that evidence that a defendant's BAC was 0.09% approximately 1 hour and 45 minutes after driving was insufficient to demonstrate, without additional evidence, that a defendant was at least 0.08% at the time of driving. In most other states, including Washington and California, this evidence would be sufficient to satisfy that the person was intoxicated. Under *Hedgpeth*, the court held that more evidence was necessary. Since that decision, trial courts have held that, in order to proceed under the bright line for impairment of .08 or higher, the state is obligated to introduce expert testimony of

[1] Jurisdictions with time of test laws include: AL, AK, AZ, CA, CN, CO, DE, DC, FL, GA, KA, KN, IN, IL, IO, LA, MD, MI, MN, MO, MS, NC, ND, NH, NY, OK, PN, SC, SD, TN, VI, WA, WV, WS.

[2] In Oregon, as in most states, the prosecution also has the option of proving a person was impaired "to a noticeable or perceptible degree." This method of proof does not rely on a measurement of blood or breath. ORS 813.010(b).

[3] State v. Hedgpeth, 365 Or 724 (2019)

dissipation in cases even with strong evidence that the person was intoxicated. The Supreme Court explicitly noted within this decision that a two hour window could be more efficient, but noted that only the legislative branch could make that decision.[4]

In *State v. Guzman*[5], the Supreme Court found that two states, Kansas and Colorado, had DUII statutes different enough from Oregon's that they could not be considered "statutory counterparts" because although the conduct was the same, they had elements different from ours. Washington and California are like the majority of states insofar as any breath test taken in a window of time after driving (2 hours in Washington, 3 in California) establishes intoxication. Because Oregon does not follow the majority model, there is a very real concern that Washington, California, and many other state DUII convictions will no longer be admissible in Oregon, creating a real possibility that a person with a dozen DUII convictions in Washington could drive drunk in Washington, cross the border while intoxicated, and enter diversion as a first time offender under Oregon law.

SENATE BILL 1503 SOLVES BOTH PROBLEMS AND MOVES OREGON TO THE MAJORITY MODEL

SB 1503 aligns Oregon with the majority of states by establishing that evidence of a person's BAC being .08 or higher and obtained within two hours of driving establishes the offense of DUII, while allowing an affirmative defense if they present evidence that they drank alcohol after they drove and therefore not a .08 or higher at the time of driving. This is a defense that the defendant is uniquely suited to raise, since they are the only ones who know when they drank, how much, and other important factors that will almost always be unknown to the state.

Secondly, this bill adds a definition of "statutory counterpart" which comports with how the Oregon Court of Appeals had interpreted that provision prior to the holding in *Guzman*. This definition provides that a statutory counterpart is any statute which has the same use, role or characteristics as Oregon's statute. This is a long-standing definition in Oregon, and is well understood by judges. More important, it will allow convictions from neighboring states to continue to be relevant for judges in Oregon when calculating the appropriate penalty for chronic drunk drivers.

The Department of Justice urges the passage of Senate Bill 1503.

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[4] "As the state points out, other states have adopted DUII statutes that capture the policy reflected by such a rule of proof. But Oregon has not. Whatever the practical advantages of such a policy may be, deciding whether to adopt that policy is a matter for the legislature." *Hedgpeth*, 365 Or at 744.
[5] State v. Guzman, 366 Or 18 (2019)