



**DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**

**TESTIMONY ON SENATE BILL 201
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Presented by:

NAME: Deena Ryerson

Title: Sr. Assistant Attorney General

Unit/Section: Criminal Justice Division

SUMMARY

Senate Bill 201 seeks to reinstitute legislative intent in two areas of Oregon's DUII laws. This legislation results from two Oregon Supreme Court cases. The first, *State v. Hedgpeth*, blurs the line as to what constitutes impairment when using blood alcohol evidence in a DUII case. The second, *State v. Guzman*, makes it virtually impossible for Oregon courts to consider a person's previous out-of-state DUII convictions when sentencing a DUII in Oregon.

BACKGROUND

***State v. Hedgpeth* – Time of Test**

In *State v. Hedgpeth*, 365 Or 724 (Or. 2019), the Oregon Supreme Court considered evidence of a person's blood alcohol content of .09 almost 2 hours after the time of the stop. Despite the fact that the defendant had been in police custody between the time he was stopped by police and the time the blood alcohol test was performed, and despite clear evidence in the record that the defendant had not consumed alcohol after driving, the court determined that this was not enough evidence for a jury to decide that the defendant was at least .08 when he was driving.

One way to prove a DUII in Oregon is to establish that a person's BAC was .08 at the time of driving. The intent of SB 201 is to re-establish a bright-line rule that everyone is considered

impaired if they test above .08. This is not a new concept and stretches across the country, with the exception of Utah, which has now adopted a .05 standard.

Unfortunately, some trial courts are interpreting *Hedgpeth* to require prosecutors to use an expert in almost every case in order to prove that a .08 BAC constitutes impairment at the time of driving. SB 201 resolves this problem by providing that if a person's BAC is .08 or higher within two hours of driving, that will constitute impairment. This "*time-of-test*" law exists in the majority of the states, with some states allowing for a three-hour window.

SB 201 also includes an affirmative defense for those who can show that they drank alcohol *after* driving, meaning that their BAC may have been lower at the time of driving. This allows for a permissible shift in the burden of proof to the defendant, who ultimately is the one with knowledge of their post driving post driving consumption.

These time-of-test laws have long been supported by science, as alcohol is a substance that has been tested for many decades. The Oregon State Police crime lab can point to many studies that support the fact that a person's BAC *decreases* over time. It is therefore straightforward and logical to understand that a person was above the legal limit while driving if they were pulled over by law enforcement, arrested and held in custody while waiting for a BAC test, and then tested above the legal limit. Yet, because of *Hedgpeth*, juries are unable to draw this logical conclusion on their own accord.

***State v. Guzman* – DUII Statutory Counterpart**

In *State v. Guzman*, 366 Or 18 (Or. 2019), the Oregon Supreme Court opined on when an out-of-state DUII conviction can be considered a prior DUII conviction when sentencing someone for a DUII committed in Oregon. Under the Supreme Court's analysis, only states with DUII statutes that are virtually identical to Oregon's can be considered "statutory counterparts" to the

Oregon DUII statute and may therefore be counted as a prior conviction for sentencing and enhancement purposes.

The court applied their analysis to Colorado's statute, which requires a person to be:

“affect[ed] ****to the slightest degree* so that the person is less able than the person ordinarily would have been, either mentally or physically, or both mentally and physically, to exercise clear judgment, sufficient physical control, or due care in the safe operation of a vehicle.”

The court stated this was not close enough to Oregon's law, where impairment is found when a person's:

“mental or physical faculties were adversely affected by the use of intoxicating liquor *to a noticeable or perceptible degree*....” and “includes not only the well-known and easily recognized conditions and degrees of intoxication, but also *any* abnormal mental or physical condition that results from consuming intoxicating liquor and that deprives the person of that clearness of intellect or control that the person would otherwise possess.”

Despite the close similarity of the “slightest degree” and “noticeable or perceptible degree” thresholds in each statute, the Supreme Court found that they were not similar enough to be statutory counterparts. This essentially wiped the defendant's record clear of his Colorado DUII conviction.

This requirement that statutory counterparts be nearly identical is compounded by the issue discussed above: the majority of states, including our bordering states of Washington and California, have *time-of-test* laws whereas Oregon has *time-of-driving* laws. This means that a person could have two DUII convictions from just over the state border and still be treated as a first-time offender in Oregon. Yet if the same person had two prior convictions in Oregon, those convictions would automatically count and elevate the third-time offense to a felony DUII.

This bill addresses this problem by providing that another state's DUII law must have the same use, role, or characteristics as Oregon's statute. This focuses the court's analysis on the prior conduct of the defendant instead of requiring the mirroring of words in statutes.

It is important to understand that this is the same well-understood standard Oregon courts had been using up until December 2019, when the Supreme Court decided *Guzman*. It accurately captures the Legislature's intent to count out-of-state DUII convictions, ensures proper treatment and services for repeat offenders, and—most importantly—considers the safety of Oregonians.

CONCLUSION

This bill seeks to correct two damaging interpretations of Oregon DUII law. It seeks to restore the intent of the legislature by having a bright-line rule for when BAC evidence constitutes impairment. It also restores how prior out-of-state DUII convictions are analyzed, so courts will once again be able consider a person's prior DUII convictions in cases where Oregonians have been put in danger by impaired driving on our roads.

DOJ Contact

For further information, please contact

Kimberly McCullough (kimberly.mccullough@doj.state.or.us), (503) 931-0418

Deena Ryerson (Deena.a.ryerson@doj.state.or.us), (503) 378-6347