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- *Driving Under the Influence*
- *Marijuana DUI*
- *DMV License Hearings*
- *Diversion Entry and Re-Entry*
- *Reckless Driving*
- *Attempt to Elude*
- *Hit and Run*
- *Criminal Mischief*
- *Reckless Endangering*
- *Driving While Suspended*

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We represent good people.

TO: Senate Committee on Judiciary
FROM: Michelle Thomas, Attorney at Law, on behalf of Reynolds Defense Firm
DATE: January 30, 2021
RE: Opposition to SB201; SB217 – Relating to DUII

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

Reynolds Defense Firm comprises a group of six attorneys who represent individuals across the State of Oregon charged with DUII and related crimes. Combined, our attorneys have more than 80 years' experience practicing criminal law from a wide variety of backgrounds, both in criminal prosecution and defense. As a firm that specializes in DUII, we are thankful for the opportunity to submit comment opposing Senate Bills 201 and 217.

Senate Bills 201 and 217 at first blush appears to be a legislative fix to two "problems" identified in recent cases *Hedgepath* and *Guzman*. Proponents of the bill argue that as a result of the holdings in these two cases, alleged DUII offenders have benefited in ways originally unintended by the legislature.

We can report that we have seen no such benefits to our clients.

SB201's "fix" to *Hedgepeth* is overbroad; it would provide an additional prosecutorial tool at the expense of Oregonians' ability to appropriately defend against unfair charges.

There has been no ease of defense to alleged DUII offenders as a result of *Hedgepeth*.

As the law exists, DUII may be proven in several ways by the prosecution. As pertains to alcohol-based DUII's, the State has a robust and extremely effective toolbox when it comes to prosecution of DUII's. This is why most of our cases resolve with guilty pleas and individuals taking responsibility. One of these tools is the administration of Standardized Field Sobriety Tests (SFST's), which have been scientifically validated to confirm alcohol impairment. Officers receive detailed, lengthy training in administering these SFST's roadside, for the particular purpose of obtaining the *best* and *most reliable* evidence of alcohol impairment. The reason that these test are so effective and utilized in almost every alcohol DUII is that

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they show an individual's impairment as close as possible to the time of driving. In defining the crime of DUII, Oregonians are assured that criminal penalty only attaches to those who actually commit the offense of operating a motor vehicle impaired; as opposed to those who safely drove home before becoming impaired. It is a scientific reality that a person's BAC fluctuates over time, and can involve many factors. As it stands, current Oregon law ensures that Oregonians are only criminalized for behavior that is in fact a danger — operating a motor vehicle while impaired.

The SFST's are in addition to the many tools an officer has at his disposal at the time of the traffic stop or initial contact: odor of alcohol, bloodshot watery eyes, slurred speech, difficulty in producing documents, confusion, issues with balance . . . the list goes on.

The legislature afforded prosecutors two paths toward proving impairment, to be pursued individually or, most effectively, jointly:

1. A per se proof of impairment by showing that the driver's BAC was .08 at the time of impairment, and/or
2. A showing that an individual is, through observed behavior, "under the influence."

"Under the influence" means that the person's "physical or mental faculties were adversely affected by the use of intoxicating liquor to a noticeable or perceptible degree." This "includes not only 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." Oregon Uniform Criminal Jury Instruction 2701.

This means that the State may, and often does, prove to a jury or a judge that an individual committed DUII without any evidence of a BAC whatsoever. This is because the signs and symptoms of alcohol impairment, as a matter of common knowledge, are easily observed and understood.

The problem for the State in *Hedgpeth* was not that it lacked the tools to prosecute. The problem was that its prosecutor at trial didn't use the tools, instead proceeding to argue impairment based solely on a per se theory (the BAC) without producing sufficient evidence that the human being was actually physically or mentally affected in of the presumably many interactions leading up to the breath sample. This would be like trying to use

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a screwdriver to hammer a nail, when the hammer itself would merely require reaching over.

SB201 proposes the use of a sledge hammer for a nail.

It opens the dangerous door to convicting individuals who were not in fact impaired at the time of operation of a vehicle, and therefore penalize Oregonians for conduct that we would all agree should not be punished. It risks the scenario that an individual makes the responsible decision to drive home and *then* consume in her own home; is in the meantime reported to police for perceived bad driving; and then is contacted in her home, provides the implied consent we hope to see from all of our motorists to submit a breath sample for testing; and is then convicted, wrongfully, of the crime of Driving Under the Influence, when what she in fact did was imbibe in the privacy of her own home.

The proposed affirmative defense in fact highlights the issues inherent in the bill. The affirmative defense appears to be a "fix" to a "fix." It does no more than reinforce the current substantive state of the law, while creating a *presumption* of impairment and shifting the burden from the State to the accused. Whereas, as the law currently stands, the State must bear the burden of proving impairment, while the accused enjoys a constitutional and sacred right to innocence until proven guilty, the cornerstone of our American justice system.

This proposed "fix" risks Oregonians to prosecution and conviction merely for consuming alcohol *following* operation of a vehicle. This is not conduct that we should intend to criminalize.

Individuals with out-of-state convictions do not enjoy unfair leniency due to current "statutory counterpart" laws; SB217 does not provide a fix to a problem.

Proponents SB217 suggest that Oregon's definition of "statutory counterpart" must be amended to assure that individuals with prior convictions out of state do not enjoy unintended leniency.

We can confirm that, under the current state of the law, they do not.

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Proponents describe a scenario in which an individual has a dozen DUII convictions out of California, who then incurs a DUII charge in Oregon and will be allowed the option at DUII diversion.

We would be shocked, even with the most zealous advocacy, to see such a result. The DUII diversion statute itself allows a Judge discretion to consider a number of factors, including prior offenses involving impaired driving, whether or not the prior offense constituted a "statutory counterpart." ORS 813.220(7)(b).[1] We can also confirm that when it comes to individuals charged with DUII, who are not eligible for the diversion program, that prosecutors across every county in Oregon absolutely consider prior offenses in rendering pre-trial offers. As is allowed in their discretion, prosecutors may and do consider a wide number of factors in rendering these offers, who most often result in a final sentence. These include prior DUII offense, whether or not they fulfill the "statutory counterpart" definition in the law.

As we discuss with Oregonians facing these charges, prior DUII offenses in other states will certainly be considered by a Judge or a prosecutor in determining how the case should fairly resolve. There is no escaping that prior conduct. Under the current framework, prior convictions for DUII or DUII-related offenses will come in to play and will affect the resolution of the case. The legislature's intention that prior offenses have an effect on how a new DUII resolves is fulfilled under current law.

For these reasons, we urge this committee not to pass SB201 nor SB217, which provides overbroad "fixes" to problems that do not exist.

Respectfully submitted by,

Michelle Thomas, on behalf of Reynolds Defense Firm
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[1] Noting that a petition for DUII diversion shall be denied by the Judge, in her discretion, upon a finding of:
(a)An offense of driving while under the influence of intoxicants in violation of:
(A)ORS 813.010 (Driving under the influence of intoxicants); or
(B)The statutory counterpart to ORS 813.010 (Driving under the influence of intoxicants) in another jurisdiction;
(b)A driving under the influence of intoxicants offense in another jurisdiction that involved the impaired driving of a vehicle due to the use of intoxicating liquor, cannabis, a controlled substance, an inhalant or any combination thereof; or
(c)A driving offense in another jurisdiction that involved operating a vehicle while having a blood alcohol content above that jurisdiction's permissible blood alcohol content.