



February 1, 2021

To: Chair Prozanski, Vice Chair Thatcher, Members of the Senate Committee on Judiciary and Ballot Measure 110 Implementation

From: Bridget Budbill, Legislative Director, Office of Public Defense Services

Re: SB 217, SB 214, and SB 201

Dear Chair Prozanski, Vice Chair Thatcher, and members of the Senate Committee on Judiciary and Ballot Measure 110 Implementation:

The Office of Public Defense Services (OPDS) is neutral on Senate Bill (SB) 217, SB 214, and SB 201. The agency seeks to submit a summary of potential issues for the committee to consider, as noted during oral testimony given February 1, 2021.

SB 217:

SB 217 raises two issues of which to be aware: (1) the potential for running afoul of Article III, section 1, of the Oregon Constitution; and (2) the potential for additional procedural steps per *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

(1) Article III, Section 1, of the Oregon Constitution

Article III, Section 1, of the Oregon Constitution, contains our state's separation of powers clause, which provides that, "[t]he powers of the Government shall be divided into three separate branches, the Legislative, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these branches, shall exercise any of the functions of another, except as in this Constitution expressly provided." The "statutory counterpart" language in SB 217 bill is broad enough that it may allow for violation of the Oregon Constitution's separation of powers provision.

Oregon law currently provides for an element-driven analysis of "comparable offenses" when determining whether a person's out-of-state convictions should count against that person for purposes of, among other things, presumptive life sentences. See, e.g., *State v. Carlton*, 361 Or 29, 42 (2017) (concluding that "legislature likely intended for the term 'comparable' in ORS 137.719(3)(b)(B) to require close element matching" between Oregon and out-of-state offenses). Specifically, the *Carlton* court, in construing existing Oregon law, explained that comparable offenses from other jurisdictions "refers to offenses with elements that are the same

as or nearly the same as the elements” of an Oregon crime, rather than offenses that “merely share a core similarity with such an offense.” 361 Or at 43.

Senate Bill 217 proposes a new approach to considering which out-of-state offenses count against defendants in Oregon by creating a “statutory counterpart” definition that, rather than focus on element-matching between offenses, instead allows out-of-state offenses to be equivalent when they have “the same use, role or characteristics as an identified Oregon statute.”

Senate Bill 217 also provides that an out-of-state jurisdiction’s statute “*need not be the same* or nearly the same as the identified Oregon statute to be considered a statutory counterpart.” (Emphasis added). Compare the proposed language to the existing analysis in *Carlton*, 361 Or at 43, which explains that, “[w]here the purpose of considering a prior conviction is to identify and then ‘count’ specific criminal history, generally speaking, the legislature has required that the historical offense be *the same* as or nearly the same as a qualifying Oregon offense” (emphasis added).

The Article III, section I, separation of powers issue arises in the broad scope of the proposed “statutory counterpart” definition. The terms “use, role, or characteristics” allow for much greater breadth in how prosecutors and judges – executive and judicial branch employees – construe which out-of-state convictions will count against defendants in Oregon for such things like sentencing enhancements and presumptive life sentences. The existing “comparable offenses” analysis requires the executive and judicial branch to *match elements* of out-of-state offenses with the criminal elements selected by the legislative branch in its lawmaking capacity. Attempting to determine whether an out-of-state offense has the same “use, role, or characteristics” of an Oregon offense goes far beyond element matching. See *Carlton*, 361 Or at 42 (“It is the prerogative of the Oregon legislature to determine what factual elements will give rise to criminal responsibility under Oregon law.”).

If the Oregon legislature seeks to expand the scope of what may be a comparable out-of-state offense beyond the existing element-matching analysis, the legislature would be best suited in determining more specifically which offenses to include and which to exclude. The statutory counterpart definition in SB 217, as presently drafted, may require narrowing in order to avoid delegating this authority.

(2) Additional steps required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000)

In *Apprendi v. New Jersey*, the United States Supreme Court ruled that the Sixth Amendment right to a jury trial requires that any fact that leads to a sentence longer than the maximum established in law, such as a sentencing enhancement factor,



must be found to exist by the jury, beyond a reasonable doubt. 530 U.S. 466, 476 (2000).

Under the narrow *Apprendi* exception in *Almendarez-Torres*, 523 US 224, 226-27 (1998), the state not need provide a jury trial to establish the simple fact of a prior conviction. However, that exception likely would not apply to the broader question of whether a prior conviction is for an offense that has the same, “use, role, or characteristics” as a particular Oregon offense, as SB 217 proposes.

Presently, under *Carlton*, the Oregon Supreme Court’s element-focused “comparable offenses” analysis may be performed by the judge. Under the proposed language, litigation concerning whether an offense has the same “use, role, or characteristics” would likely require factual findings about another state’s practices. Those factual findings would likely need to be made by a jury under *Apprendi*. Increased jury involvement may pose a resource issue for all participants at the circuit court level and spur appeals concerning what counts as “use, role, or characteristics.”

Senate Bill 214:

SB 214 includes a provision that allows a prosecutor to introduce any record, bill, estimate or invoice as evidence of a restitution amount, and places the burden on the defendant to prove that the record, bill, estimate or invoice is unreasonable, rather than the state having to demonstrate that it is reasonable, as is currently the law. This burden shift may increase costs of defense services, if attorneys need to rely on additional experts or other investigations.

Senate Bill 201:

SB 201’s affirmative defense only allows for a person to demonstrate that the person consumed a sufficient quantity of alcohol *after* driving and before chemical analysis. To avoid potentially convicting a person of driving under the influence of intoxicants when the person was not driving a vehicle above a .08 blood alcohol content or otherwise impaired, the affirmative defense should permit a defendant to establish that his/her/their blood alcohol content was under .08 percent and that he/she/they were not otherwise impaired at the time of driving, even if the alcohol consumption occurred *before* driving.

Please direct any questions to Bridget Budbill, Legislative Director, Office of Public Defense Services, at 503-779-7329 or bridget.budbill@opds.state.or.us.