

WILLAMETTE VALLEY FORENSICS, LLC
Kenn Meneely, Consultant

January 31, 2021

To: Senate Judiciary committee

Subject: SB 201

Opposition to SB 201 - relating to DUI I

Re: Addition of the following language to ORS 813.010: "**within two hours after driving a vehicle, has a 0.08% or more by weight of alcohol in the blood of the person, as shown by chemical analysis of the breath or blood of the person....**".

I have worked in the field of forensic toxicology for over 40 years. This includes 28 years with the Oregon State Police Forensic Division and the remaining as a private forensic consultant. I have addressed concerns with blood, breath, and instrumental issues throughout this period in Oregon, Idaho, and Washington.

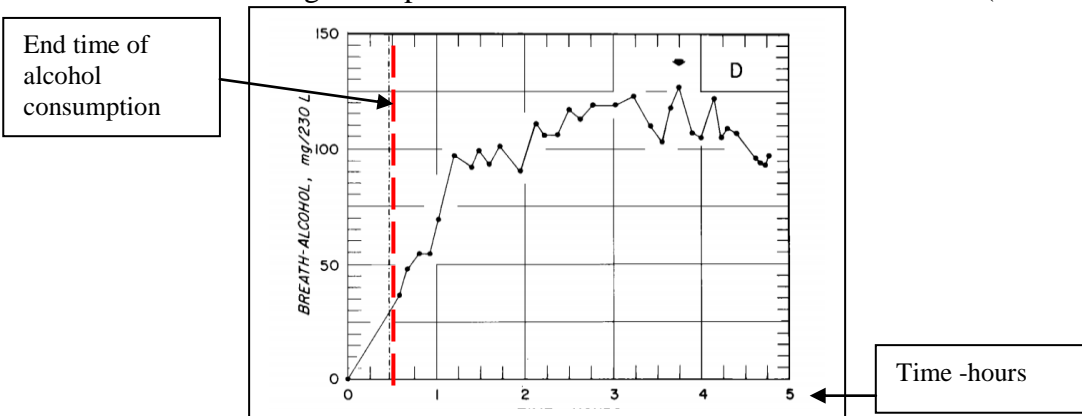
In an effort to address the "rising BAC defense" that may provide a prosecutor a convenient method to avoid contacting a forensic scientist to testify as to the "theoretical" BAC level at the time of driving; the defense would be prevented from having any opposing testimony as to the actual science supporting the "rising BAC defense".

Given that each alcohol-related driving case is unique in its circumstances; the most critical factor is the drinking pattern ⁽¹⁾(ie. time or pattern of alcohol consumption) in relation to the initial contact by law enforcement. In order for this language to be applied; it must be "assumed" that the alcohol consumed by an individual is completely absorbed at the time of the officer's contact. However, forensic science cannot operate on "assumptions" that apply to every case.

Scientists from the Oregon State Police Forensic Division have attended alcohol training seminars ⁽²⁾ that specifically state that

"conditions in which the BAC at the time of driving may actually be lower than at the time the samples collected" are due to a "significant amount of unabsorbed alcohol in the G.I. tract".

Highly recognized researchers such as Dr. Kurt Dubowski ⁽³⁾ have reported that, in certain alcohol consumption circumstances, there can be a dramatic increase of the BAC level between the end time of drinking and a potential breath or blood test 1-2 hours later. (refer to example))



Rodney Gullberg⁽⁴⁾ has also reported in 968 cases, that the BAC level in 305 cases (ie. 32%) was lower at the time of law enforcement contact. In fact, Gullberg noted that the highest increase between law enforcement contact and the breath alcohol level was 0.07%.

In contradiction to this "two hour concept" and, as an illustration of the BAC level "on the rise"; members of the Oregon State Police Forensic Division⁽⁵⁾ have testified that

"I wouldn't count any alcohol he drank within the last half hour before driving"

This refers to the issues that any alcohol consumed within 30 minutes of law enforcement contact would have to be subtracted from the final BAC result. In other words, the BAC level at the time of police contact would be increasing due to unabsorbed alcohol.

Even in cases that are designated as social drinking situations; research presented by the Oregon State Police Forensic Division⁽⁶⁾ has stated that

" in social drinking situations, absorption of alcohol can continue for up to 2 hours after the end of drinking".

This also refers to a BAC level that can be increasing over a period of time.

In spite of published research and testimony provided by the Oregon State Police Forensic Division regarding potential unabsorbed alcohol at the time of police contact resulting in an increase of the BAC level 1-2 hours later; it would be disingenuous for a prosecutor to attempt to solicit testimony from the Oregon State Police Forensic Division that, in support of this two hour concept where the BAC does not change or increase, 100% of individuals in an alcohol related case have the same BAC within a two hour timeframe and that the possibility of an increasing BAC does not exist.

However, should this "2 hour" concept be adopted; one should also be able to utilize the same principle that a BAC that is less than 0.08% (ie. 0.03%) at the time the breath or blood test is taken is also the same within the two hour timeframe.

Respectfully submitted,

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(1) Garriott; Medical-Legal Aspects of Alcohol (note: required reading by Oregon State police forensic division)

(2) Robert F Borkenstein Course on Alcohol and Highway Safety

(3) Dubowski; absorption, distribution and elimination of alcohol; Highway safety aspects, Journ of studies on alcohol 1985 (note: required reading by Oregon State police forensic division)

(4) Gullberg; Differences Between Roadside and Subsequent Evidential Breath Alcohol Results and their Forensic Significance, Journ of Studies on Alcohol, 1991 (note: required reading by Oregon State police forensic division)

(5) St v Elbert Amos; Douglas County Case No. 07CR0167 FE, testimony by OSP forensic scientist L. Howard-currently employed as a DDA in Lincoln County

(6) Ganert; Evaluation of Breath Alcohol Profiles Following a Period of Social Drinking, Can. Soc. Forens Sci, 2000 Presented by M. Jackson PhD -OSP forensic scientist