OCDLA
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

TO: **Senate Committee on Judiciary and Ballot Measure 110 Implementation**
FROM: **Mae Lee Browning, Oregon Criminal Defense Lawyers Association**
DATE: **February 2, 2021**
RE: **Opposition to SB 201 – Problematic Expansion of DUII Law**

Chair Prozanski, Vice Chair Thatcher, and Members of the Committee:

The Oregon Criminal Defense Lawyers Association is an organization of experts, private investigators, and attorneys who represent Oregon's children and parents in juvenile dependency proceedings, youth in juvenile delinquency proceedings, Oregon citizens in criminal prosecutions at the trial and appellate level, as well as civil commitment proceedings throughout the state of Oregon.

We urge a NO vote on SB 201. SB changes DUII law from 0.08% BAC at the time of driving to within two hours after driving, includes problematic affirmative defense language, and creates a definition of statutory counterpart that is over inclusive and will be costly.

If the bill is to bring Oregon in line with other states, the process to do so was lacking. **There was no stakeholder engagement, no workgroup where defense providers were invited, there was no study conducted of the states, and there was no information was presented to the Legislature so that it can make a thoughtful and informed decision**.

This bill is modeled after WA's statute. But when you look at the entirety of DUII laws in WA and OR, WA is more lenient than OR in two ways. SB 201 does not adopt the other parts of WA DUII law that are more lenient. Plea bargaining is allowed in DUII case in WA. It is not in OR. Also, driver license suspensions are not as severe in WA as they in OR.

An "affirmative defense" is not a sufficient protection against wrongful arrests and convictions. An affirmative defense requires a defendant to prove the defense by a preponderance of the evidence. An affirmative defense requires a defendant to prove the defense by a preponderance of the evidence. If a defendant has no other witnesses to call to corroborate his or her version of the events, it will be difficult to convince jurors that the defendant should be believed. Prosecutors will argue that any such testimony is not worthy of belief, and the defendant is lying to save himself or herself from conviction. **An "affirmative defense" is not a sufficient protection against wrongful arrests and convictions.**

Shifts the burden of proof onto the defendant by the creation of an affirmative defense. One fundamental premise of criminal law is that the State bears the sole burden of proof in all criminal cases. Requiring a criminal defendant to prove, through an affirmative defense, that they should be acquitted of DUII because they weren't above the legal limit at the time of driving is inherently offensive to the most basic notions of fundamental fairness and due process.

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People will be wrongfully arrested under SB 201. Public embarrassment, private embarrassment, financial strain of hiring an attorney and expert witness, missing work for court appearances, possible loss of employment, and the mental and familial burden of being subjected to a criminal prosecution are just several injustices that a person faces when they are wrongfully accused of a crime.

SB 201 also seeks to create a new definition for "statutory counterpart" (defining it as "use, role, and characteristics" in section 2 of SB 1503). The DOJ made this argument to the Oregon Supreme Court in *State v. Guzman* and *State v. Heckler* and that definition was rejected. *Guzman/Heckler* turned on the meaning of "statutory counterpart" in ORS 813.011, a statute enacted by the voters through a ballot measure approved in 2010. "Statutory counterpart" refers to what Oregon would consider a prior conviction from another state.

The legislature already addressed "statutory counterpart" language back in 2007 when it passed HB 2651 (at the request of Multnomah County DA Mike Schrunk). The legislature was given a list of variations in other states' DUII laws, it considered proposed language on how to count offenses from other states, and it added that language to all of the existing DUII statutes. **The 2007 language is broad enough to count most other state's DUII laws.**

The proposed language in SB 201 that is in response to *State v. Guzman* will cost the state a lot more in terms of jail space, cause a loss in jobs due to the inability to get a hardship permit, and force more cases to trial with no discernable benefit to public safety. Under SB 201, Oregon would essentially give an exponentially harsher punishment to those who had no option of diversion in their state under the guise that they can send a small percentage of the repeat offender cases to prison. **OCDLA would prefer to see strategic investments in the health care delivery system addressing addiction and treatment over expanding the criminal circumstances related to drug and alcohol abuse.**

Respectfully submitted by,
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