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 217 – Costly Expansion of Statutory Counterpart**

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 217.

"Statutory counterpart" refers to what Oregon would consider a prior conviction from another state.

The statutory counterpart language in SB 217 that is in response to the Oregon Supreme Court case, *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 217, 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.**

The statutory counterpart language in SB 217 will affect more misdemeanor DUII cases than felony DUII cases. The change in the language makes more people subject to felony DUII, which the proponents want. However, it will disproportionately affect those people who received an out of state conviction where diversion was not eligible. The felony cases are only a small percentage of who will get exponentially harsher sentences.

Adopting the statutory counterpart definition in SB 217 is significantly over-inclusive. It would include the Colorado Driving While Ability Impaired offense, which only requires 0.04 BAC (Oregon requires a 0.08 BAC) and Kansas's attempted DUII (Oregon law does not include attempted DUII).

Increased sentence enhancements in SB 217 will lead to longer prison stays for Oregon defendants. Allowing or counting identified Oregon offenses plus offenses from other jurisdictions that are "like" Oregon offenses (but that would not be crimes in Oregon) broadens the availability of qualifying offenses for sentence enhancement purposes, likely resulting in more sentence enhancements, which will cause longer prison stays for qualifying defendants, and increased costs

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to DOC due to longer sentences, as well greater impacts to AICs and their families (financial and social). This is especially concerning considering that one of Oregon's sentence-enhancement-through-conviction-counting statutes is ORS 137.719, providing for life in prison with no possibility of release.

Allowing consideration of Oregon offenses plus out-of-state offenses that are "like" Oregon offenses, but are not crimes in Oregon, punishes differently folks with out-of-state history, those who move a lot, and increases prosecutorial discretion immensely. People with only Oregon offenses will have a smaller universe of sentence-enhancement-qualifying offenses for sentence-enhancement purposes than out-of-staters who will have, for example, Oregon offenses, plus foreign offenses that are identical to Oregon's, plus foreign offenses that are close to Oregon offenses that will qualify them for enhanced punishment. As a result, some offenders with only Oregon offenses will not qualify for enhanced punishment, but some offenders with foreign offenses will. The bearers of the burden of that discrepancy will be those who move a lot.

By applying the definition of statutory counterpart to every other recidivist scheme in Oregon, it would have a completely unknown effect. Prosecutors could search a defendant's out-of-state history, not just criminal convictions but non-criminal infractions, for any offense that seemed even arguably like an Oregon offense. **The state could charge felonies or even seek mandatory minimum prison sentences based on a person's non-criminal infractions in another state, whenever another state has an infraction that is roughly similar in some way to an Oregon crime. At minimum, it would result in a significant amount of litigation, a significant amount of prosecutorial discretion, and potentially disparate treatment with people being punished in Oregon for out-of-state conduct that would not have been illegal in Oregon.**

The definition of "statutory counterpart" derives from Court of Appeals case law that is over-inclusive of out-of-state offenses. For example, in *State v. Donovan*, 243 Or App 187, 256 P3d 196 (2011), the court held that a New York traffic violation was a statutory counterpart to Oregon DUII, even though New York also had a criminal DUII statute. **Under this bill, someone with no criminal history could be deemed a recidivist due to out-of-state infractions that would not even be illegal in Oregon. That person could then be convicted of a felony, sentenced to mandatory incarceration, and subject to a lifetime driver's license revocation.**

SB 201 adopts a definition of "statutory counterpart" that the Oregon Supreme Court rejected. SB 201 defines "statutory counterpart" as "use, role, and characteristics." The state argued for this definition in the Oregon Supreme Court in *State v. Guzman* and *State v. Heckler* and lost. *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.

The 2007 legislature already considered this issue. The legislature already comprehensively addressed the issue of variations in other states' DUII laws in 2007. Multnomah County DA Mike Schrunk presented a thorough analysis of other state's DUII laws and recommended language that would treat some—but not all—of them as prior DUIIs in Oregon. That led to the provisions of

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ORS 813.010(5)(a)(B) and (C), which are also included in the diversion eligibility and license suspension statutes. The only reason for the *Guzman* decision is that those provisions were not added to Measure 73 (2010), which enacted the third-time-felony DUII law. Moreover, this bill would potentially reach out-of-state traffic offenses that the legislature already decided against including in 2007.

The definition in SB 217 could pose constitutional problems. Only the Oregon legislature can define what conduct will be punished as criminal in Oregon. If the felony DUII law increases a person's punishment based on their conduct in another state, and our legislature leaves it to the other state's legislature to define what conduct will be punished in Oregon, **it arguably violates the nondelegation principle in the Oregon Constitution.** The nondelegation principle would only be satisfied if our legislature specifies the elements that would have to be satisfied for an out-of-state offense to count in Oregon, which is exactly what it did in 2007 with HB 2651.

OCDLA urges you to vote NO on SB 217.

Respectfully submitted by,
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