

Senate Bill 48-Enrolled

Brief Overview for the Oregon Pretrial Justice Network



Oregon Criminal Justice Commission
26 August 2021

Senate Bill 48-Enrolled

BACKGROUND: PRETRIAL LEGAL FRAMEWORK

Personal Recognizance

Release of the individual upon the promise of that person to appear in court.

Conditional Release

Release imposing regulations on the activities and associations of the individual.

Security (“Bail”) Release

Promise to appear in court secured by cash, stocks, bonds, or real property.
An immediate payment of 10% is required prior to release.

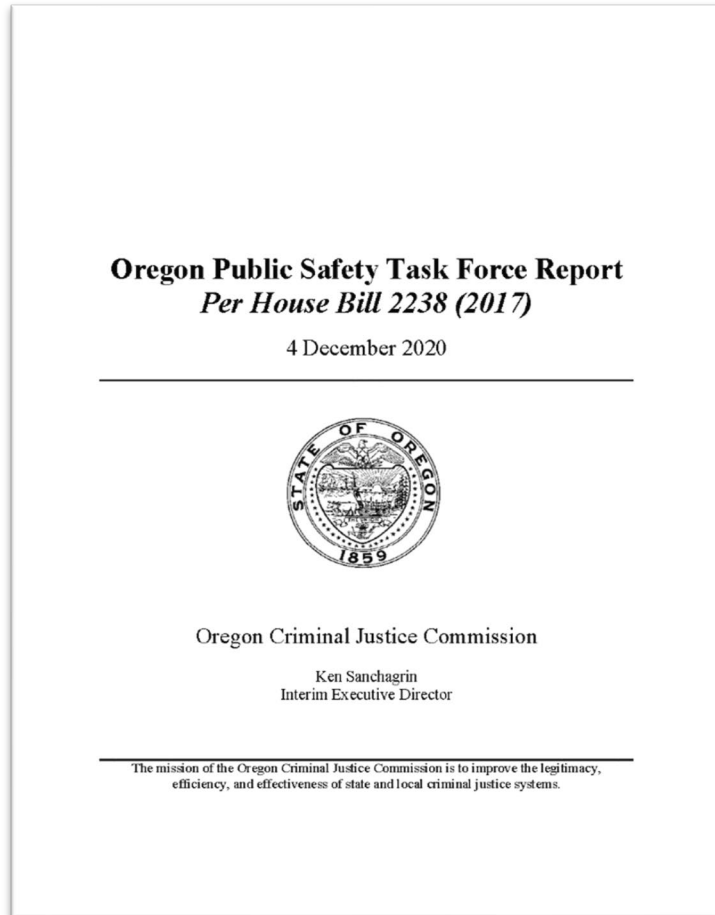
Preventative Detention

Offenses that are not bailable per the Oregon Constitution (i.e., murder, treason, and violent felonies).

- The Oregon Constitution provides a **right to bail** except for murder/treason (Art. I §14) or when the defendant is charged with a violent felony (Art. I §43), so long as certain evidentiary thresholds are met. **Preventative detention** is often referred to as a “no bail” hold.
- Otherwise, courts must consider whether to release the defendant on **personal recognizance, conditional release, or security release** (e.g., cash bail).
- When determining the form of release, the court considers the **primary and secondary release criteria** (e.g., danger to victim/public, nature of the charge, prior FTAs and criminal history, ties to the community). ORS 135.230(7), (11).

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BACKGROUND: THE PUBLIC SAFETY TASK FORCE



- In 2017, the Legislature reconvened the Public Safety Task Force (PSTF) and asked the PSTF to study security release (e.g., cash bail).
 - The PSTF was to focus on racial/ethnic disparities,
 - Examine the possibility of repealing statutes authorizing security release,
 - Study the utilization of pretrial risk assessments, and
 - Examine methods of reducing failure to appear at court hearings.
- In December of 2020, the PSTF submitted its final report to the Legislature, which included policy and legislative recommendations.

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BACKGROUND: CURRENT PRETRIAL PROCESS

Current Practice



- Prior to first appearance, defendants are given a bail amount based on Presiding Judge Order (often called "security" or "bail" schedules). If a defendant has the means, they can be released on security without a consideration of victim or community safety or the risk of failure to appear.
- While judges may make release decisions at first appearance, in current practice, judges have discretion as to whether these decisions will be made at that time.
- While preventative detention is an option, it is used relatively rarely, and high bail amounts are often used in its place.

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BACKGROUND: SB 48 DEVELOPMENT

81st OREGON LEGISLATIVE ASSEMBLY—2021 Regular Session

A-Engrossed
Senate Bill 48
Ordered by the Senate April 23
Including Senate Amendments dated April 23

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Governor Kate Brown for Oregon Criminal Justice Commission)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

[Directs Oregon Criminal Justice Commission to study pretrial release and to provide results of study to Legislative Assembly no later than December 31, 2021.]
[Takes effect on January 2, 2022.]
[Takes effect on 91st day following adjournment sine die.]

Directs Chief Justice of Supreme Court to establish guidelines for order.
Requires magistrate to make release decision at arraignment or first appearance except in specified circumstances. Requires magistrate to find that release on personal recognizance is unwarranted before considering conditional release, and requires magistrate to find that conditional release is unwarranted before considering security release.
Requires magistrate to set as security amount lowest possible amount necessary to reasonably ensure defendant's appearance. Requires magistrate to make specified findings before requiring defendant to deposit 10 percent of security amount for security release. Authorizes defendant not required to deposit 10 percent of security amount to execute promissory note for security amount. Provides that if defendant does not comply with conditions of release agreement, court may enter order declaring that promissory note is due or security deposit is forfeited for entire security amount or any other amount court deems appropriate.
Repeals minimum bail amounts for persons charged with Ballot Measure 11 (1994) crimes and certain methamphetamine offenses.

A BILL FOR AN ACT

Relating to pretrial release; creating new provisions; amending ORS 135.240, 135.245, 135.265, 135.270, 135.280 and 137.050; and repealing ORS 135.242.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2021 Act is added to and made a part of ORS 135.230 to 135.290.

SECTION 2. (1) The presiding judge of a judicial district shall enter a standing pretrial release order specifying to the sheriff of the county, or to the entity supervising the local correctional facility responsible for pretrial incarceration within the judicial district, those persons and offenses:

(a) Subject to release on recognizance;

(b) Subject to release with special conditions as specified in the order; and

(c) That are not eligible for release until arraignment.

(2) The Chief Justice of the Supreme Court, with input from a criminal justice advisory committee appointed by the Chief Justice, shall establish release guidelines for the pretrial release orders described in this section.

NOTE: Matter in boldfaced type in an amended section is new; matter [italic and bracketed] is existing law to be omitted. New sections are in boldfaced type.

LC 440

- Staff from CJC, the OJD, and the Governor’s Office drafted the initial substantive amendment to SB 48.
- In March, a public hearing was held in Senate Judiciary and a workgroup was convened. In April, SB 48 was referred to Senate Rules.
- The SB 48 Workgroup consisted of approximately 20 individuals, including representatives from:

Oregon District Attorneys Association

American Civil Liberties Union

Oregon Department of Justice

Oregon Law Center

Oregon State Sheriffs Association

Oregon Criminal Defense Lawyers Association

Oregon Judicial Department

Oregon Criminal Justice Commission

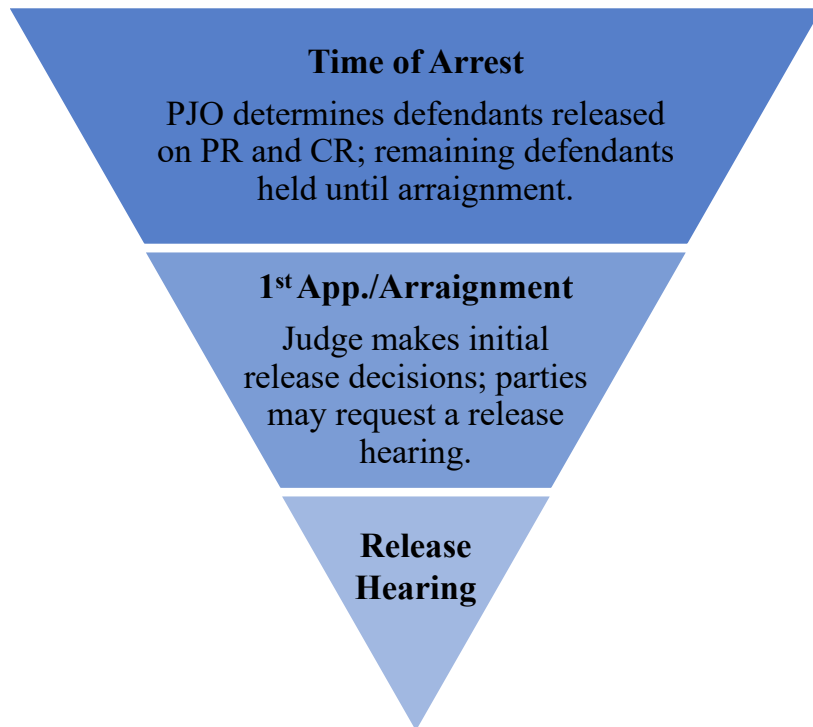
Clackamas Women’s Services

Governor’s Office

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OVERVIEW OF CHANGES

Provides statewide guidance as to the types of defendants who should be released without bail and clarification to existing pretrial release statutes.



- The Chief Justice, with input from the Criminal Justice Advisory Committee, will create state-level guidance for pretrial release orders.
- Local Presiding Judges will adopt pretrial release orders that will replace current security schedules and specify which persons or offenses:
 - Are subject to recognizance release,
 - Are subject to conditional release, and
 - Those who should be held until arraignment.
- Existing statutes will be amended to clarify the pretrial process.
 - Requires judges must make a release decision at first appearance unless there is good cause for delay.
 - Specifies the stepwise release decision process, starting with evaluation of recognizance release and conditional release before considering security release.

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OVERVIEW OF CHANGES

Eliminates statutory pretrial security release (“bail”) amounts in favor of case-by-case analysis by a judge.

- Currently, two statutory provisions mandate minimum security amounts for defendants.
 - ORS 135.240 provides for \$50,000 minimum security amounts for Measure 11 defendants, and
 - ORS 135.242 provides for \$250,000 minimum security amount for certain methamphetamine offenses if the prosecutor can demonstrate that the defendant will fail to appear, commit a new crime, or poses a threat to the public.
- SB 48-Enrolled eliminates statutory minimums security amounts and requires a case-by-case determination by the judge.

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OVERVIEW OF CHANGES

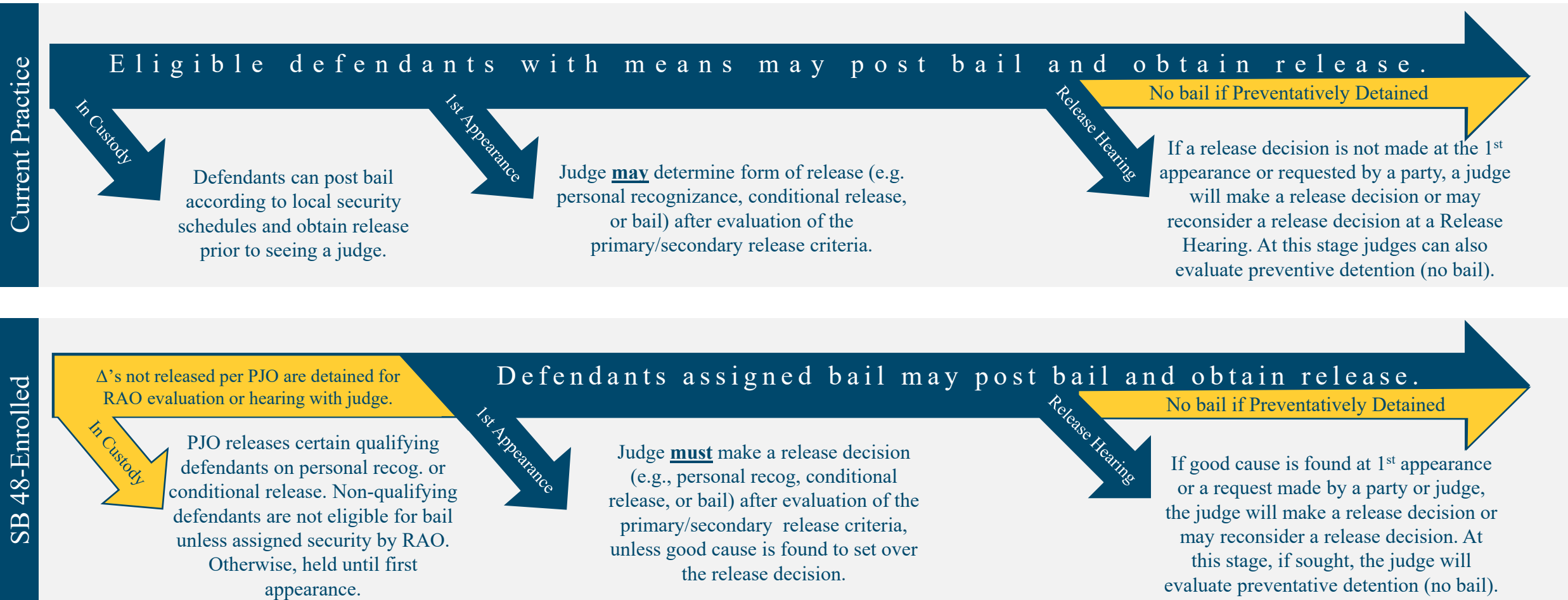
Balances the rights of the defendant and presumption of pretrial release with the risk of failure to appear, and community and victim safety.

- Reduces reliance on the use of security;
- Increases consistency and equity in Oregon's pretrial release system; and
- Includes provisions for victim notification and input at first appearance and arraignment.
 - Requires RAOs to contact victims of person felonies and misdemeanors and, if contact is made to:
 - Obtain information regarding the victim's position on release, including whether special conditions should be imposed, shall be included in the report to the court and considered by the release assistance officer if making a release decision, and
 - If the information is available, inform the victim of the location, date, and time of arraignment or first appearance.
 - Requires the district attorney to make reasonable efforts to inform the victim of the location, date, and time of arraignment or first appearance and to determine if the victim is present at the arraignment or other first appearance.
 - Allows victims present at the arraignment or first appearance to reasonably express view relevant to the issues at the hearing.

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OVERVIEW OF CHANGES

Moves Oregon toward risk-based and data-informed decision making in the pretrial release system.



OVERVIEW OF IMPLEMENTATION

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- SB 48-Enrolled: \$2,210,910.0 for OJD
 - 3 central staff will develop judicial orders and work with counties.
 - 10 analyst positions will support pretrial program development work required by SB 48.
- HB 5006, Sect. 35: Emergency Board
 - \$2.5 million allocated to OJD for implementation of SB 48.

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OVERVIEW OF IMPLEMENTATION

Criminal Justice Advisory Committee - Pretrial Subcommittee

- Currently meeting on a monthly basis with the mission to develop recommendations to the Chief Justice based on the guiding principles of SB 48.
 - Provide consistent release decision-making structure across the state.
 - Reduce reliance on the use of security,
 - Include provisions for victim notification and input, and
 - Balance the rights of the defendant and presumption of pretrial release against community and victim safety and the risk of failure to appear.
- November 2021:
 - Finalize guideline recommendations and forward to CJAC.



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OVERVIEW OF IMPLEMENTATION

Criminal Justice Advisory Committee - Pretrial Subcommittee

Discussion Topics

- | | |
|---|--|
| <ul style="list-style-type: none">▪ Offenses subject to form of release<ul style="list-style-type: none">▪ <i>e.g.</i> ROR, conditions, hold until arraignment▪ Conditions of release<ul style="list-style-type: none">▪ General v. Special Conditions▪ Current practices▪ Non-Compliance▪ Consistency in resources | <ul style="list-style-type: none">▪ Risk Assessment Tool Selection and Use<ul style="list-style-type: none">▪ Validation▪ Effect of score on presumptive form of release▪ DV offenses▪ Security and Preventative Detention▪ Warrants, PVs, and Restraining Orders (2022) |
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OVERVIEW OF IMPLEMENTATION

Criminal Justice Advisory Committee - Pretrial Subcommittee

Personal Recognizance

- Non-person misdemeanor
- Non-person Class C felony
- Driving while suspended ORS 811.182 (Class B felony and Class A misdemeanor)
- Other offenses subject to the citation in lieu of arrest under ORS 133.055

Conditional Release

- Person misdemeanor
- Person Class C felony
- Person Class B felony or any person felony

Not Eligible for Release Until Arraignment

- Ballot Measure 11 offenses
- Violent felony, as defined in ORS 135.240
- Domestic violence felony or misdemeanor

Note: Initial consideration of potential crime types and correlating forms of release.

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OVERVIEW OF IMPLEMENTATION

- OJD is requested to submit a report by February 1, 2022, regarding the Chief Justice release guidelines.
- The report is to also address:
 - How the guidelines accomplish the intended objectives of SB 48 and
 - Provide a fiscal estimate related to:
 - Chief Justice release guidelines and
 - Continued Legislative investment in the state's pretrial release programs and activities.



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Questions



Enrolled Senate Bill 48

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CHAPTER

AN ACT

Relating to pretrial release; creating new provisions; amending ORS 135.235, 135.240, 135.245 and 135.247 and section 1, chapter _____, Oregon Laws 2021 (Enrolled House Bill 3273); and repealing ORS 135.242.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2021 Act is added to and made a part of ORS 135.230 to 135.290.

SECTION 2. (1) The presiding judge of a judicial district shall enter a standing pretrial release order specifying to the sheriff of the county, or to the entity supervising the local correctional facility responsible for pretrial incarceration within the judicial district, those persons and offenses:

- (a) Subject to release on recognizance;
- (b) Subject to release with special conditions as specified in the order; and
- (c) That are not eligible for release until arraignment.

(2) The Chief Justice of the Supreme Court, with input from a criminal justice advisory committee appointed by the Chief Justice, shall establish release guidelines for the pretrial release orders described in this section to:

- (a) Provide consistent release decision-making structure across the state;
- (b) Reduce reliance on the use of security;
- (c) Include provisions for victim notification and input; and
- (d) Balance the rights of the defendant and presumption of pretrial release against community and victim safety and the risk of failure to appear.

SECTION 3. ORS 135.235 is amended to read:

135.235. (1) *[If directed by the]* A presiding judge for a judicial district~~, a release assistance officer, and release assistance deputies who shall be responsible to the release assistance officer, shall be appointed]~~ **may appoint release assistance officers** under a personnel plan established by the Chief Justice of the Supreme Court.

(2) *[The]* A release assistance officer shall, except when impracticable, interview every person detained pursuant to law and charged with an offense. **If the person is charged with a person felony or person Class A misdemeanor, as those terms are defined in the rules of the Oregon Criminal Justice Commission, or with contempt of court for violating a court order protecting or prohibiting contact with another person, the release assistance officer shall make reasonable efforts to contact the victim prior to submitting a report or making a release**

decision under subsection (3) of this section. If the release assistance officer is able to contact the victim:

(a) Information regarding the victim's position on release, including whether special release conditions should be imposed, must be included in the report described in subsection (3) of this section, and considered by the release assistance officer if the officer makes the release decision; and

(b) If the information is available, the release assistance officer shall inform the victim of the location, date and time of the defendant's arraignment or other first appearance.

(3) The release assistance officer shall verify release criteria information and may either:

(a) Timely submit a written report to the magistrate containing, but not limited to, an evaluation of the release criteria and a recommendation for the form of release; or

(b) If delegated release authority by the presiding judge for the judicial district, make the release decision.

(4) As used in this section, "victim" means an individual that the charging instrument indicates is the victim of the alleged offense or the person protected by the court order, whether or not the individual is specifically named, so long as the release assistance officer is able to confirm the identity of the individual.

SECTION 4. ORS 135.240 is amended to read:

135.240. (1) Except as provided in subsections (2)[,] **and** (4) [and (5)] of this section, a defendant shall be released in accordance with ORS 135.230 to 135.290.

(2)(a) When the defendant is charged with murder, aggravated murder or treason, release shall be denied when the proof is evident or the presumption strong that the person is guilty.

(b) When the defendant is charged with murder or aggravated murder and the proof is not evident nor the presumption strong that the defendant is guilty, the court shall determine the issue of release as provided in subsection (4) of this section. In determining the issue of release under subsection (4) of this section, the court may consider any evidence used in making the determination required by this subsection.

(3) The magistrate may conduct such hearing as the magistrate considers necessary to determine whether, under subsection (2) of this section, the proof is evident or the presumption strong that the person is guilty.

(4)(a) [Except as otherwise provided in subsection (5) of this section,] When the defendant is charged with a violent felony, release shall be denied if the court finds:

(A) Except when the defendant is charged by indictment, that there is probable cause to believe that the defendant committed the crime; and

(B) By clear and convincing evidence, that there is a danger of physical injury or sexual victimization to the victim or members of the public by the defendant while on release.

(b) If the defendant wants to have a hearing on the issue of release, the defendant must request the hearing at the time of arraignment in circuit court. If the defendant requests a release hearing, the court must hold the hearing within five days of the request.

(c) At the release hearing, unless the state stipulates to the setting of security or release, the court shall make the inquiry set forth in paragraph (a) of this subsection. The state has the burden of producing evidence at the release hearing subject to ORS 40.015 (4).

(d) The defendant may be represented by counsel and may present evidence on any relevant issue. However, the hearing may not be used for purposes of discovery.

(e) If the court determines that the defendant is eligible for release in accordance with this subsection, the court shall set security or other appropriate conditions of release.

(f) When a defendant who has been released violates a condition of release and the violation:

(A) Constitutes a new criminal offense, the court shall cause the defendant to be taken back into custody and shall order the defendant held pending trial without release.

(B) Does not constitute a new criminal offense, the court may order the defendant to be taken back into custody[,], **and** may order the defendant held pending trial [and may set a security amount of not less than \$250,000] **or may make a new release decision.**

[(5)(a) Notwithstanding any other provision of law, the court shall set a security amount of not less than \$50,000 for a defendant charged with an offense listed in ORS 137.700 or 137.707 unless the court determines that amount to be unconstitutionally excessive, and may not release the defendant on any form of release other than a security release if:]

[(A) The United States Constitution or the Oregon Constitution prohibits the denial of release under subsection (4) of this section;]

[(B) The court determines that the defendant is eligible for release under subsection (4) of this section; or]

[(C) The court finds that the offense is not a violent felony.]

[(b) In addition to the security amount described in paragraph (a) of this subsection, the court may impose any supervisory conditions deemed necessary for the protection of the victim and the community. When a defendant who has been released violates a condition of release and the violation:]

[(A) Constitutes a new criminal offense, the court shall cause the defendant to be taken back into custody, shall order the defendant held pending trial and shall set a security amount of not less than \$250,000.]

[(B) Does not constitute a new criminal offense, the court may order the defendant to be taken back into custody, may order the defendant held pending trial and may set a security amount of not less than \$250,000.]

[(6)] (5) For purposes of this section, “violent felony” means a felony offense in which there was an actual or threatened serious physical injury to the victim, or a felony sexual offense.

SECTION 5. ORS 135.245 is amended to read:

135.245. (1) Except as provided in ORS 135.240, a person in custody has the right to *[immediate security release or to]* be taken before a magistrate without undue delay. *[If the person is not released under ORS 135.270, or otherwise released before arraignment, the magistrate shall advise the person of the right of the person to a security release as provided in ORS 135.265.]*

[(2) If a person in custody does not request a security release at the time of arraignment, the magistrate shall make a release decision regarding the person within 48 hours after the arraignment.]

(2)(a) A magistrate shall make a release decision at the time of arraignment or other first appearance after the defendant is taken into custody unless good cause to postpone the release decision is shown, in which case a release hearing shall be held pursuant to subsection (7) of this section.

(b) The district attorney shall make reasonable efforts to inform the victim of the location, date and time of the arraignment or other first appearance and to determine if the victim is present at the arraignment or appearance. If the victim is present, the victim has the right to reasonably express any views relevant to the issues at the appearance.

(c) As used in this subsection, “good cause” includes circumstances in which:

(A) The district attorney plans to seek preventative detention; or

(B) There is a reasonable belief that additional evidence exists and would be relevant to the release decision, but is not currently available.

(3) If the magistrate, having given priority to the primary release criteria, decides to release a defendant or to set security, the magistrate shall impose the least onerous condition reasonably likely to ensure the safety of the public and the victim and the person’s later appearance and, if the person is charged with an offense involving domestic violence, ensure that the person does not engage in domestic violence while on release. A person in custody, otherwise having a right to release, shall be released upon the personal recognizance unless:

(a) Release criteria show to the satisfaction of the magistrate that such a release is unwarranted; or

(b) Subsection (6) of this section applies to the person.

(4) Upon a finding that release of the person on personal recognizance is unwarranted, the magistrate shall *[impose either]* proceed to consider conditional release *[or security release.]* under ORS 135.260. Only after determining that conditional release is unwarranted, or if otherwise

required by ORS 135.230 to 135.290, may the magistrate proceed to consider security release under ORS 135.265.

(5) At the release hearing:

(a) The district attorney has a right to be heard in relation to issues relevant to the release decision; and

(b) The victim has the right:

(A) Upon request made within the time period prescribed in the notice required by ORS 147.417, to be notified by the district attorney of the release hearing;

(B) To appear personally at the hearing; and

(C) If present, to reasonably express any views relevant to the issues before the magistrate.

(6) If a person refuses to provide a true name under the circumstances described in ORS 135.060 and 135.065, the magistrate may not release the person on personal recognizance or on conditional release. The magistrate may release the person on security release under ORS 135.265 except that the magistrate shall require the person to deposit the full security amount set by the magistrate.

(7)(a) After the postponement of a release decision under subsection (2) of this section, upon the request of either party, or upon the magistrate's own motion, the magistrate shall make a release decision or reconsider the release decision, as applicable, at a release hearing. The release hearing must be held within 48 hours of arraignment or other first appearance after the defendant is taken into custody unless both parties agree, or the court finds good cause, to hold the hearing at a later time. Under no circumstances may the release hearing be held more than five days after arraignment or other first appearance after the defendant is taken into custody unless the defendant consents to holding the hearing at a later time.

(b) A hearing held under this subsection may not be used for purposes of discovery.

[7] (8) This section shall be liberally construed to carry out the purpose of relying upon criminal sanctions instead of financial loss to [assure] **ensure** the appearance of the defendant.

SECTION 6. ORS 135.247 is amended to read:

135.247. (1) When a release assistance officer [or a release assistance deputy] makes a release decision under ORS 135.235 involving a defendant charged with a sex crime or a crime constituting domestic violence, the release assistance officer [or deputy] shall include in the decision an order that the defendant be prohibited from contacting or attempting to contact the victim, either directly or through a third party, while the defendant is in custody. The release assistance officer [or deputy] shall provide the defendant with a written copy of the order.

(2) When a defendant who is charged with a sex crime or a crime that constitutes domestic violence is arraigned, the court shall enter an order continuing an order issued under subsection (1) of this section or, if no such order has been entered, enter an order prohibiting the defendant from contacting or attempting to contact the victim, either directly or through a third party, while the defendant is in custody.

(3) Except as provided in subsection (4) of this section, an order described in subsection (1) or (2) of this section:

(a) Shall apply at any time during which the defendant is held in custody on the charge; and

(b) Shall remain valid until the defendant is sentenced for the crime, the charge is dismissed or the defendant is acquitted of the crime.

(4) Upon petition of the victim, the court may enter an order terminating an order entered under subsection (1) or (2) of this section if the court finds, after a hearing on the petition, that terminating the order is in the best interests of the parties and the community.

(5) An order described in subsection (1) or (2) of this section shall not limit contact with the victim by the defense attorney, or an agent of the defense attorney other than the defendant, in the manner prescribed by ORS 135.970 (2).

(6) As used in this section:

(a) "Domestic violence" has the meaning given that term in ORS 135.230.

(b) "Sex crime" has the meaning given that term in ORS 163A.005.

SECTION 7. ORS 135.242 is repealed.

SECTION 8. If House Bill 3273 becomes law, section 1, chapter_____, Oregon Laws 2021 (Enrolled House Bill 3273), is amended to read:

Sec. 1. (1) Notwithstanding ORS 192.311 to 192.478, a law enforcement agency may not release a booking photo except as provided in subsection (2) of this section.

(2) A law enforcement agency may release a booking photo described in subsection (1) of this section:

- (a) To the person depicted in the booking photo;
 - (b) To another law enforcement agency, or to a law enforcement officer employed by another law enforcement agency, for a law enforcement purpose;
 - (c) To the public, if the law enforcement agency determines that there is a law enforcement purpose for the release, including but not limited to assistance with the apprehension of a fugitive or a suspect in a criminal investigation, or the identification of additional criminal activity;
 - (d) To a state mental hospital upon the admission to the hospital of the person depicted in the booking photo;
 - (e) To a party in a criminal proceeding resulting from the arrest during which the booking photo was obtained;
 - (f) To the victim of the offense for which the person depicted in the booking photo was arrested;
- [or]

(g) To the court, if the booking photo is part of a pretrial release report or is provided to the court as part of the pretrial release process for the purposes of confirming the identity of a defendant; or

[(g)] (h) Upon the conviction of the person depicted in the booking photo, if the conviction results from the arrest during which the booking photo was obtained.

(3) As used in this section:

- (a) “Booking photo” means a photograph of a person taken by a law enforcement agency for identification purposes when the person is booked into custody.
- (b) “Law enforcement agency” has the meaning given that term in ORS 131.915.
- (c) “Law enforcement officer” means an officer, deputy, member or employee of a law enforcement agency.

SECTION 9. (1) Section 2 of this 2021 Act, the amendments to ORS 135.235, 135.240, 135.245 and 135.247 by sections 3 to 6 of this 2021 Act and the repeal of ORS 135.242 by section 7 of this 2021 Act become operative July 1, 2022.

(2) The Judicial Department may take any action before the operative date specified in subsection (1) of this section that is necessary to enable the department to exercise, on or after the operative date specified in subsection (1) of this section, all the duties, functions and powers conferred on the department by section 2 of this 2021 Act, the amendments to ORS 135.235, 135.240, 135.245 and 135.247 by sections 3 to 6 of this 2021 Act and the repeal of ORS 135.242 by section 7 of this 2021 Act.

SECTION 10. Notwithstanding any other provision of law, the General Fund appropriation to the Judicial Department by section 1 (2), chapter _____, Oregon Laws 2021 (Enrolled House Bill 5012), for the biennium beginning July 1, 2021, for operations, is increased by \$2,210,910, for the purpose of implementing this 2021 Act.

Passed by Senate June 23, 2021

.....
Lori L. Brocker, Secretary of Senate

.....
Peter Courtney, President of Senate

Passed by House June 25, 2021

.....
Tina Kotek, Speaker of House

Received by Governor:

.....M.,....., 2021

Approved:

.....M.,....., 2021

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2021

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Shemia Fagan, Secretary of State