Preface

The 2005 Edition of the OREGON JUDGES CRIMINAL BENCHBOOK was developed by the Judicial Education and Criminal Law Committees of the Oregon Judicial Conference with staff direction provided by Jean Ann Quinn, former Staff Counsel, Nancy Cozine, current Staff Counsel and Mollie Croisan, Education Manager, Court Programs and Services Division, Oregon Judicial Department.

The Oregon Judicial Department would like to express sincere thanks and gratitude to Christian Malone, former Court Programs and Services Law Clerk, for his excellent, painstaking work in revising, updating, and reformatting the OREGON JUDGES CRIMINAL BENCHBOOK to produce the 2005 Edition and to Gina Zejdlik, the current Court Programs and Services Law Clerk, for her diligence in keeping it current through 2006. We are also indebted to the many judges who reviewed and edited individual chapters of the BENCHBOOK and provided thoughtful suggestions for practice tips and other useful resources. Their names appear at the front of each chapter. Finally, we would like to thank Chief Justice Paul J. De Muniz for graciously allowing us to include his work as chapters five and six.

The 2005 Edition of the OREGON JUDGES CRIMINAL BENCHBOOK incorporates the 2005 Oregon Session Laws and the relevant case law of Oregon’s appellate courts, the Ninth Circuit Court of Appeals, and the United States Supreme Court through December, 2005. The revised BENCHBOOK includes OJD’s model scripts for waiver of counsel and accepting a guilty or no contest plea, as well as model forms for waiver of counsel (in both Spanish and English) and waiver of jury trial. In addition to the table of authorities following each chapter, a comprehensive index of authorities was added to improve the usefulness of the BENCHBOOK as a reference tool. Lastly, the format of the BENCHBOOK was redesigned and now includes sidebar features that provide check lists, cross-references, practice tips, and additional, related information.

Online Users:
An Adobe PDF of the 2005 Edition of the OREGON JUDGES CRIMINAL BENCHBOOK is available for download at www.ojd.state.or.us. The electronic version of the BENCHBOOK features bookmarks and hyperlinked cross-references for quick, easy navigation, and is fully searchable. The electronic BENCHBOOK is also updated to reflect significant developments that occur between revisions of the printed publication. The current online version is up-to-date through June, 2006, and reflects significant changes in case law since December, 2005.

The following sections have been UPDATED:

- **Chapter 1, Section IV.A.3.**
  - a. Calculating 5-day Time Period for Defendant in Custody
  - b. Calculating 30-day Time Period for Defendant on Release

- **Chapter 3, Section II.A.4.** Informing Non-citizen Defendants of Potential Deportation

- **Chapter 16, Section IV.E.1.** Restitution and Compensatory Fines

- **Chapter 16, Section IV.G.2.e.** Further Considerations Concerning Restitution

The following sections have been ADDED:

- **Chapter 1, Section III.D.** Defendant’s Right to Waive Appearance at Trial
- **Chapter 2, Section V.** Right to Speedy Trial

Questions and comments should be directed to the Oregon Judicial Department, Court Programs and Services Division, Education & Training, 503.986.5925, or benchbookcomments@ojd.state.or.us.

**Note:** The OREGON JUDGES CRIMINAL BENCHBOOK was originally created in 1987 by the Judicial Education
Committee of the Oregon Judicial Conference with Paula L. Abrams serving as its editor. It was subsequently revised in 1996 under the direction of Nori J. McCann Cross.

**Purpose**

The *Oregon Judges Criminal Benchbook* is designed to summarize statutes and case law in select areas of Oregon criminal law in order to assist trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority. The Oregon Judicial Department cannot give legal advice and will not answer any questions concerning the content of the *Benchbook* or how it may pertain to any individual case.

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**Acknowledgement**

We wish to acknowledge the extensive support of the members of the 2004-2005 Judicial Education Committee and the 2004-2005 Criminal Law Committee in the 2005 revision of the *Oregon Judges Criminal Benchbook*. Their faithful devotion of experience and expertise has once again improved a resource that we are confident will provide valuable assistance to our colleagues on the bench. We sincerely appreciate their contribution.

Hon. John L. Collins, Chair, 2004-2005 Judicial Education Committee
Hon. Patricia A. Sullivan, Chair, 2004-2005 Criminal Law Committee

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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 1: PRETRIAL

I. COMMENCING AN ACTION

A. Initiating a Criminal Case

An action in a criminal case is initiated by filing one of the following accusatory instruments: (1) grand jury indictment; (2) complaint; (3) district attorney’s information; or (4) complainant’s information.

1. Necessity of an Accusatory Instrument

The court’s personal jurisdiction over a defendant “requires a charging instrument which properly accuses a defendant of the crime for which a conviction is obtained.” *Riggs v. State*, 50 Or App 109, 113 (1981); *Villanueva v. Board of Psychologist Examiners*, 179 Or App 134, 138 (2002) (“The state may not try a criminal defendant for a crime for which he or she has not been charged.”).

2. An Accusatory Instrument Cannot be Waived

Regardless of whether the defendant knowingly and voluntarily consented to a criminal prosecution, the trial court lacks authority to enter judgment on a crime for which the defendant has not been charged. *State v. Guzman*, 140 Or App 347, 353 (1996).

B. Grand Jury & Indictments

1. Grand Jury Composition

A grand jury consists of seven persons drawn at random from the jurors in attendance upon the court at a particular jury service term. ORS 132.010; ORS 132.020.

   a. Disqualifications for Grand Jury Service

   Persons who have been convicted of, or served a sentence for, a felony within 15 years, or who have been convicted of, or served a sentence for, a misdemeanor involving violence or dishonesty within 5 years, are ineligible for grand jury service. Or Const Art I, § 45. See ORS 10.030 (providing qualifications for jury service).

   b. Oath

   The oath provided at ORS 132.060 must be administered to jurors before they begin their duties.

See ORS 131.005(1) (definition of accusatory instrument).

See Or Const Art VII, § 5(2) (requiring a grand jury to consist of seven jurors).
c. Selection of Officers
The court appoints a grand jury foreman and an alternate foreman. ORS 132.050. A clerk is also appointed to keep minutes of the proceedings, except individual jurors’ votes, and of the substance of the evidence presented. ORS 132.080.

d. Discharging Jurors
After the grand jury has been formed and sworn, the court may discharge a grand juror who: (1) becomes sick, is out of the country, or fails to appear when the grand jury reconvenes; (2) is related within the third degree to an accused being investigated or held for the commission of a crime; or (3) is unable to continue in the discharge of duties as a grand juror. ORS 132.110(1).

e. Replacing Jurors
To replace a discharged grand juror, the court may draw a replacement from the regular jury in attendance or, if none are in attendance, from the county jury list. ORS 132.110(2).

f. Proceeding With a Lesser Number of Jurors
After the grand jury is formed, the court may allow at least five grand jurors to proceed upon a showing of good cause. ORS 132.110(3).

State v. Conger, 319 Or 484, 492 (1994): Although Article VII (amended), § 5(2) of the Oregon Constitution clearly requires seven jurors be empaneled to create a grand jury, it does not require a quorum of seven to vote, but only five—the same number that must concur to find an indictment.

g. Grand Juror May Not Also Sit on Petit Jury
A grand juror who participates in returning an indictment may not sit on the petit jury that hears the case against the same defendant. State v. Gortmaker, 295 Or 505, 519 (1983).

h. Additional Grand Juries
The court may allow one or more additional grand juries if needed for the administration of justice. ORS 132.020(2).

i. Improperly Drawn Grand Jury
An indictment returned by an unconstitutionally selected grand jury is invalid; however, inconsequential irregularities or technical statutory violations will not

**j. Continuance of Grand Jury**

The court may continue a grand jury for such period of time as the judge deems advisable. ORS 132.120.

**2. Power to Inquire**

In private, the grand jury may inquire into crimes committed or triable within the county and present them to the court, either by presentment or indictment. ORS 132.310.

**a. Piecemeal Investigations Prohibited**

An indictment must be based only on evidence presented to the grand jury returning the indictment. An inquiry or investigation not made entirely by the same grand jury is void. ORS 132.020(4).


“The grand jury which indicts can rely only upon evidence presented to it, regardless of what evidence another grand jury may have heard.”

**b. Investigation by Another Grand Jury**

An indictment is not automatically void simply because another grand jury investigated the same matter. *State v. Oregon City Elks*, 17 Or App 124, 127 (1974).

**3. Challenging the Grand Jury**

Neither the grand jury panel nor an individual grand juror may be challenged; however, the court may disqualify a juror from service for the reasons specified in ORS 10.050. ORS 132.030.

**4. Procedure**

**a. Persons Allowed to Be Present at Grand Jury Sitting**

**i. District Attorney and Witness**

Except as provided in ORS 132.090(2)-(3), no person other than the district attorney or a witness actually under examination may be present during the grand jury’s sittings. ORS 132.090(1).

**ii. Court Reporter**

On the district attorney’s motion, the circuit court may appoint a reporter to record the testimony. *See State ex rel. Drew v. Steinbock*, 286 Or 461, 466 (1979)
(concluding that an order to appoint a court reporter requires that all testimony before the grand jury be recorded or reported in that case). ORS 132.090(2).

A) Only District Attorney Can Request Recordation
A circuit court on its own motion or that of the defendant lacks the power to order wholesale recordation of grand jury proceedings; only the district attorney may file such motion. State ex rel. Johnson v. Roth, 276 Or 883, 887 (1977).

B) No Constitutional Right to Recordation
Defendant’s constitutional rights are not violated by a failure to record grand jury testimony. State ex rel. Johnson v. Roth, 276 Or 883, 888 n.6 (1977). See State ex rel. Woodell v. Wallace, 89 Or App 478, 482 (1988) (Article I, § 20 of the Oregon Constitution, providing the right to equal privileges or immunities, does not provide a potential criminal defendant the right to record grand jury testimony simply because the district attorney has that right).

iii. Parent, Guardian, or Other Appropriate Person
On the district attorneys’s motion, the court may appoint a parent, guardian, or other appropriate adult to accompany a child age 12 or under, or any person with mental retardation, during appearance before the grand jury. ORS 132.090(2).

iv. Other Necessary Persons
On the district attorneys’s showing that it is necessary for proper examination of a witness, the circuit court may appoint, a guard, medical or other special attendant or nurse to be present in a grand jury room. ORS 132.090(2).

v. Interpreter
The district attorney may designate a “certified” interpreter to interpret the testimony of witnesses appearing before the grand jury; a “qualified” interpreter may be designated if a certified interpreter is not available. ORS 132.090(3).

vi. No Other Person Present When Grand Jury Votes
The members of the grand jury deliberate and vote in secret. ORS 132.090(4).
b. **Duties of the District Attorney for the Grand Jury**
ORS 132.340 requires the district attorney, when requested by the grand jury, to:

1. Prepare indictments or presentments;
2. Attend its sittings;
3. Advise it in relation to its duties; and
4. Examine witnesses in its presence.

c. **Instigation by the District Attorney**
If the district attorney has good reason to believe a crime has been committed, the district attorney may submit an indictment to the grand jury. ORS 132.330.

d. **Subpoena of Witnesses by the District Attorney**
The district attorney may subpoena witnesses within the state on behalf of the prosecution or as the grand jury directs. ORS 136.563.

e. **Instigation By a Grand Juror**
If a grand juror knows or has reason to believe that a crime has been committed, the juror must disclose that information to fellow jurors who may investigate the crime. ORS 132.350(1).

i. **Grand Juror’s Personal Knowledge of Facts**
The fact that a grand juror has personal knowledge of the events under investigation does not require the constitution of a new grand jury to investigate the matter, but only that the juror reveal that knowledge to fellow jurors. *State v. Oregon City Elks*, 17 Or App 124, 128 (1974).

ii. **Grand Juror as Witness**
To find an indictment or presentment on the statement of a grand juror, the juror must be sworn and examined as a witness. ORS 132.350(2).

iii. **Grand Juror Who Testifies May Not Vote**
A grand juror who testifies cannot vote on the indictment or be present during the deliberations. ORS 132.350(3).
f. **Swearing and Questioning Witnesses**
The foreman or, in the foreman’s absence, any other grand juror, administers the oath to any witness appearing before the grand jury. ORS 132.100.

i. **Compelling a Witness to Testify**
The district attorney may assist the grand jury in examining witnesses. ORS 132.340. However, the “inquisitorial power to compel testimony resides in the grand jury, not in the district attorney.” *State ex rel. Frohnmayer v. Sams*, 293 Or 385, 388 (1982). Absent such demand from the grand jury, a circuit judge lacks the power to order a witness to answer the prosecution’s questions. *Id.*

ii. **Contempt Proceedings Against a Reluctant Witness**
“A witness who asserts a privilege or other similar ground for refusal to answer should not be forced to guess whether his refusal is justified or whether he is subject to contempt. His refusal should be treated similarly to an objection in trial in open court; until there is a ruling by the court on the objection, the failure to respond is not contemptuous. Grand jury witnesses are not required to answer every question put to them. . . . [W]hether the refusal is legally unjustified is a determination to be made by the court, not by the prosecutor or the grand jury.” *State ex rel. Grand Jury v. Bernier*, 64 Or App 378, 382 (1983).

g. **Presentments**
If a grand jury is in doubt whether the facts as shown by the evidence constitute a punishable crime, it may make a “presentment” to the court, without mentioning the names of individuals involved, to ask for instructions on the law. ORS 132.370(1).

i. **Presentment Is Made to the Court**
The foreman makes the presentment to the court in the presence of the grand jury. The presentment is not to be filed in court or preserved beyond the sitting of the grand jury. ORS 132.370(3).

5. **Consideration of Evidence**
OEC Rule 101(4)(b) prevents the application of the Oregon Evidence Code to proceedings before grand juries, except privileges, and as provided in ORS 132.320. ORS 40.015(4)(b).
a. **General Rule**
For the purpose of indictment, ORS 132.320(1) prevents the grand jury from receiving any other evidence than that which might be given at trial of the person charged with the crime in question, except the following.

i. **Expert Reports**
The grand jury may receive evidence in the form of certified copy of a written report from certain technicians or professional persons concerning the results of an examination, comparison or test performed by such person in connection with the case. ORS 132.320(2).

ii. **Affidavit of Witness Who is Unable to Appear**
Upon application by the district attorney and a showing of good cause for the witness’s inability to appear, the judge may authorize an affidavit of the witness to be received in evidence. ORS 132.320(3).

iii. **Affidavits and Reports Concerning Certain Investigations**
A grand jury investigating **Criminal Driving While Suspended or Revoked** under ORS 811.182 may receive in evidence an affidavit and a report or copy of a report concerning a peace officer’s investigation. ORS 132.320(4).

A grand jury investigating a **DUII** charge under ORS 813.010 may receive in evidence a peace officer’s affidavit regarding whether defendant was driving, whether defendant took or refused to take tests and the administration and results of those tests, and the officer’s observations of the defendant’s physical or mental impairment. ORS 132.320(10) as amended by 2005 Or Laws, ch. 529, § 1 (effective Jan. 1, 2006).

iv. **Live Video Testimony**
A grand jury may receive a witness’s testimony via simultaneous television transmission. ORS 132.320(5).

v. **Affidavit Certifying That Defendant Failed to Appear**
A grand jury investigating a charge of failure to appear may receive in evidence a court employee’s affidavit. ORS 132.320(6).

The grand jury may consider the following **evidence**:
- That which might be given at the accused’s trial;
- Written expert reports;
- Affidavit of an absent witness;
- Testimony via live video;
- Court employee’s affidavit;
- Information from Peace Officer’s official report;
- Sex offender registration forms (on or after Jan. 1, 2006); and
- Exculpating evidence.
vi. Information From Another Peace Officer’s Official Report
Where both peace officers are involved in the same criminal investigation under grand jury inquiry, the testimony of one peace officer concerning information in the other peace officer’s official report may be received in evidence. ORS 132.320(7)(a).

If the official report contains evidence other than chain of custody, venue or the name of the suspect, the grand jury must be notified that the evidence is being submitted by report and that the officer who compiled the report will be made available to testify upon request. ORS 132.320(7)(b). The peace officer may testify by telephone if the peace officer’s presence would constitute an undue hardship. Id.

vii. Exculpating Evidence on Behalf of Defendant
If the grand jury believes evidence exists that will explain away the charge against the defendant, it should order such evidence to be produced and may require the district attorney to issue process for the witnesses. However, in general, the grand jury is not required to hear evidence on behalf of the defendant. ORS 132.320(9) as amended by 2005 Or Laws, ch. 529, § 1 (effective Jan. 1, 2006).

A) Due Process Issue
Due process requires only that the district attorney present evidence to the grand jury which objectively refutes the State’s evidence; it does not require the State to present evidence on behalf of the defendant that merely explains or contradicts its own evidence. State v. Harwood, 45 Or App 931, 939 (1980). “No case, however, requires a prosecutor to present all evidence which may be exculpatory, only that which ‘clearly would have negated guilt or undermined the authority of the grand jury to act at all.’” Id. at 938 (quoting U.S. v. Mandel, 415 F Supp 1033, 1042 (D. Md. 1976)).

B) Defendant as Witness
A grand jury may not compel a defendant to testify. ORS 136.643.

viii. Sex Offender Registration Forms
A grand jury that is investigating a charge of failure to report as a sex offender under ORS 181.599 may
receive in evidence certified copies of the form required by ORS 181.603(2) and sex offender registration forms and an affidavit of a representative of the Oregon State Police certifying that the certified copies of the forms constitute the complete record for the defendant. 2005 Or Laws, ch. 529, § 1(8) (effective Jan. 1, 2006).

b. **Hearsay**

The fact that a grand jury may have been prejudiced by inadmissible hearsay evidence is not grounds to set aside an indictment because the exclusive grounds for setting aside an indictment are provided in ORS 135.510, which does not include the admission of hearsay. *State v. Stout*, 305 Or 34, 41 (1988). However, ORS 132.320 “does not mean that prosecutors may use hearsay testimony before grand juries.” *Id.* at 41; see OEC Rule 101(4)(b), 1981 Conference Committee Commentary (stating that the Legislative Assembly intends that ORS 132.320 “mean what it says”). *Cf. State v. Gonzalez*, 120 Or App 249, 254 (1993) (the court may not go behind the indictment to exclude testimony or other evidence from the trial except as specifically allowed by statute).

*State v. McDonald*, 231 Or 24, 35 (1961): “[T]he fact a grand jury may have been prejudiced by hearsay evidence or prejudicial publicity which it ought not to consider is not grounds for dismissing or quashing an indictment, for the trial court would then be required to inquire into and determine in advance of each trial the sufficiency of all of the evidence to sustain or reject an indictment, which it may not do.”

c. **Preliminary Hearing Statement**

Defendant’s unsworn statement given at preliminary hearing may be presented to the grand jury. ORS 135.105.

6. **Return of the Indictment**

a. **Number of Jurors Required to Find an Indictment**

A grand jury may indict or present facts to the court for instruction with the concurrence of five of its members, if at least five jurors voting for indictment or presentment heard all of the evidence. ORS 132.360. *See State v. Conger*, 319 Or 484, 502 (1994) (holding that a quorum of five grand jurors may find an indictment provided all five concur); see also ORS 132.110(3).
b. Whom the Grand Jury May Indict
When the grand jury believes a person has committed a crime it may indict that person, whether or not the person has been held to answer for the crime. ORS 132.380.

_Anderson v. Gladden_, 234 Or 614, 627 (1963): The grand jury may indict a person it believes to be guilty of a crime regardless of whether that person has been held to answer at a preliminary hearing.

c. Standard for Finding an Indictment
The grand jury may find an indictment when all the evidence presented, if unexplained or uncontradicted, would warrant conviction by a trial jury. ORS 132.390.

d. Indorsed as “A True Bill”
Indictments must be indorsed “a true bill” and the indorsement signed by the grand jury foreman. ORS 132.400.

_State v. Cox_, 12 Or App 215, 220-21 (1973): Grand jury foreman was not required to handwrite “a true bill” on the indictment which was found to comply with ORS 132.400 when “a true bill” was printed on the indictment form and the foreman signed immediately thereunder.

e. Filing of Indictment
When found and indorsed, an indictment becomes a public record when filed with the clerk of the court; unless it is designated as “confidential” by the district attorney. ORS 132.410.

i. Secret Indictment
Upon designation by the district attorney as “confidential,” the indictment or any order or process in relation thereto may not be inspected by any person other than the judge, court clerk, district attorney, or a peace officer discharging a duty related to the indictment until after defendant’s arrest. ORS 132.410.

A) Disclosure of Secret Indictment Prohibited
No grand juror, reporter, or other person, except the district attorney and the peace officer executing the arrest warrant, may disclose any fact concerning a secret indictment until it becomes a public record. ORS 132.420.
B) Remedy for Premature Disclosure
Premature disclosure of a secret indictment is punishable as contempt. ORS 132.990.

f. Finding Against Indictment—“Not a True Bill”

i. After Bind-Over
When a person has been held to answer a criminal charge and fewer than five grand jurors vote to indict, the indictment must be indorsed as “not a true bill,” signed by the foreman, and filed with the court clerk where it must remain a public record. ORS 132.430(1).

ii. Secret Indictment Must be Destroyed
When a person has not been held to answer and the indictment is found to be “not a true bill,” the grand jury must destroy the indictment and the minutes of the evidence. ORS 132.430(1).

iii. Effect of Finding Against Indictment Is Dismissal
When an indictment indorsed “not a true bill” is filed, the effect is to dismiss the charge and prevent resubmission for further inquiry, except on the court’s order. ORS 132.430(2).

g. Successive Indictments Are Permitted
Unless prevented by a legal obstacle such as former jeopardy or the statute of limitations, the same or different grand jury may return successive indictments against the same person for the same offense. State v. Mitchell, 9 Or App 17, 22-24 (1972).

h. Concurrent Indictments Are Permitted
An indictment on a lesser charge does not automatically render an indictment on all greater charges, based on the same set of facts, as “not a true bill.” State v. Rankin, 21 Or App 721, 724 (1975). A grand jury may find a valid indictment on greater charges notwithstanding the fact that another indictment on lesser charges is pending against the accused based on the same act or transaction. Id. at 723.

i. Resubmitting the Case to the Grand Jury
When a case is resubmitted, the grand jury is free to indict for any crime it believes the accused committed. State v. Nichols, 236 Or 521, 527 (1964). “A grand jury properly having a matter before it should be free to indict for any See Chapter 2, “Pretrial Motions” (regarding challenges to the accusatory instrument and their effect on resubmitting the case to the grand jury).
crime that has been committed, and in whatever degree the evidence will warrant.” *Id.* at 528. See ORS 132.380.

i. **Resubmission After Dismissal Without Prejudice**
   A defendant’s successful motion to dismiss the indictment without prejudice has no bearing on the district attorney’s authority to reindict the defendant. *State v. Johnson*, 172 Or App 29, 34 (2001) (original indictment dismissed under speedy trial statute).

ii. **Resubmission After Appeal**
   Resubmission and indictment for additional charges after an appellate court reverses defendant’s conviction does not violate defendant’s constitutional rights. *State v. Gaylor*, 19 Or App 154, 158-59 (1974) (defendant’s negligent homicide conviction reversed and remanded on appeal; reindictment did not subject defendant to double jeopardy).

   *State v. Sieckmann*, 3 Or App 454, 457 (1970): Where the State’s appeal was dismissed because the order dismissing the indictment was not appealable, the district attorney was not required to obtain leave of the appellate court to resubmit the case to the grand jury.

7. **Amendment of the Indictment**

   a. **Form Versus Substance**
      The Oregon Constitution authorizes the district attorney to file an amendment to an indictment held to be defective in form. Or Const Art VII (amended), § 5(6). An amendment of substance must be authorized by the grand jury or by law. *State v. Moyer*, 76 Or 396, 398-99 (1915). See *State v. Russell*, 231 Or 317, 322-23 (1962) (criminal pleadings cannot be amended to conform to the proof; the proper time to amend the substance of an indictment is while the indictment is before the grand jury).

   b. **Matters of Form**
      **Matters of form** are those that are not essential to the charge and merely clerical matters, the amendment of which cannot mislead or prejudice the defendant. *State v. Wimber*, 315 Or 103, 114 (1992).

   i. **Examples**

**State v. Moyer**, 76 Or 396, 398-99 (1915): Because a material element of arson is that a person wilfully burn the property of another, an indictment charging that offense must include that element. Thus, an amendment adding that the stable was the property of another was an impermissible amendment of substance.

**State v. Wimber**, 315 Or 103, 115 (1992): The court’s shortening of the time period stated in the indictment so that the alleged offenses fell within the statute of limitations was an amendment of form.

**State v. Woodson**, 315 Or App 314, 319 (1993): An amendment to an indictment changing the crime charged from first degree rape to attempted rape was found to be an amendment of form because attempted rape is a lesser included offense of rape, of which the jury could have found the defendant guilty regardless of whether the indictment was amended.

**State v. Hansz**, 167 Or App 147, 155 (2000): An amendment to the charging instrument changing the identity of the controlled substance in question from cocaine to methamphetamine was one of form because it was not essential to show the particular identity of the Schedule II substance possessed in order to sufficiently charge the defendant with unlawful possession of a controlled substance.

8. **Discovery of Grand Jury Proceedings**

   a. **Pretrial Discovery of Grand Jury Proceedings**

      i. **Nondiscernable Items**

         Transcripts, recordings, or memoranda of testimony of witnesses before the grand jury are not subject to pretrial discovery; however, transcripts or recordings (not memoranda) of the defendant’s statements are discoverable. ORS 135.855(1)(c).


     b. **Examining Grand Jurors in Later Proceedings**

        Oregon’s discovery statutes recognize a long-established policy to preserve the secrecy of grand jury proceedings

See ORS 135.805-873 (pretrial discovery provisions).

i. **Immunity of Grand Jurors as to Official Conduct**

A grand juror cannot be questioned about anything the juror says while acting as a grand juror or any vote given on a matter before the grand jury, except questions relating to perjury or false swearing of which the juror may be guilty. ORS 132.210.

ii. **Disclosure of a Witness’s Testimony**

A grand juror may be required by any court to disclose the testimony of a witness called before the grand jury:

1. To ascertain whether it is inconsistent with the witness’s testimony before the court. ORS 132.220(1).

2. When the person is being charged with or tried for perjury or false swearing. ORS 132.220(2).


c. **Discovery of a Witness’s Testimony**

Recorded testimony of a witness examined before the grand jury is discoverable at trial.

i. **Hartfield Rule**

If a witness’s testimony was recorded at the grand jury proceedings, the defendant is entitled to discovery of that recording after the witness has testified on direct examination by the state. *State v. Hartfield*, 290 Or 583, 592 (1981) (holding that defendant was entitled to examine an existing tape recording of the witness’s grand jury testimony). However, “wholesale orders for disclosure of grand jury recordings” are not authorized under *Hartfield*. *Id.* See *State v. Christopher*, 55 Or App 544, 551 (1982) (*Hartfield* requires turnover at trial of any existing recordings of a witness who testified on direct examination and who testified before the grand jury). *Cf. State v. Cox*, 87 Or App 443, 449 (1986) (declining to extend the *Hartfield* rule to handwritten notes of grand jury testimony).

See OEC Rule 801(4)(a)(A) (prior statement exception to the hearsay rule).
State v. Wood, 67 Or App 218, 227 (1984): Trial court erred in denying defendant’s request to inspect transcripts of grand jury testimony when the State refused to disclose the transcripts on grounds that the testimony was consistent and not exculpatory, but it in fact turned out to be favorable to the defendant and substantially impeached the State’s witnesses.

Note: Although the terms are seemingly similar, there is a procedural difference between “disclosure,” i.e., calling a grand juror to testify about a witness’s testimony before the grand jury, and “discovery” of a witness’s testimony for impeachment purposes at trial. “ORS 132.220 deals with the power of a court to require a grand juror to testify as a means of proving what took place before the grand jury. Unless the defendant is afforded the right to inspect the tape of [the witness’s] testimony, defendant has no practical method of discovering whether to call a grand juror to testify as to inconsistencies, if any.” State v. Hartfield, 290 Or 583, 592 (1981) (discussing the confusion between “discovery” and “manner of proof”).

d. Grand Jury Minutes
The defendant has no right to discovery of the grand jury’s minutes. State v. Goldsby, 59 Or App 66, 72 (1982).

C. Sufficiency of the Indictment
ORS 132.540(1) provides that the indictment is sufficient if it can be understood therefrom that:

1. Defendant is named;
2. Crime was committed within the jurisdiction of the court; and
3. Crime was committed prior to the finding of the indictment and within the statute of limitations.

1. Name of Defendant
If the defendant’s name is unknown to the grand jury, a fictitious name plus a statement that defendant’s true name is unknown must be substituted. ORS 132.540(1)(a). See ORS 135.743 (providing for insertion of defendant’s true name when discovered).

a. Aliases
Aliases may be used unless they prejudice the defendant, such as when an alias tends to classify the defendant as a criminal type. State v. Kibler, 1 Or App 208, 215-16 (1969).
An indictment serves four objectives:
“(1) to provide notice—i.e., to furnish the defendant with sufficient notice so as to enable him or her to properly prepare a defense; (2) to secure a defendant’s right against double jeopardy—i.e., to identify the crime so as to provide protection against further prosecution based on the same crime; (3) to facilitate judicial review—i.e., to inform the court as to the facts charged, so that the court may determine whether the prosecution’s case is based on a legally valid interpretation of the offense; and (4) to secure the court’s jurisdiction—i.e., to ensure that the defendant is tried only for an offense that is based on facts found by a grand jury.” State v. Crampton, 176 Or App 62, 67 (2001), overruled on other grounds, State v. Caldwell, 187 Or App 720 (2003).

i. Motion to Strike Alias
By motion, defendant may request that aliases be stricken from any accusatory instrument read or submitted to the jury. ORS 135.065(2).

2. Jurisdiction of the Court
If the crime was committed outside the county in which the court sits, the indictment must make clear that the crime is nevertheless triable within the court’s jurisdiction as provided by law. ORS 132.540(1)(b).

3. Lack of Return Date Not Fatal to Indictment
State v. Perry, 12 Or App 585 (1973): District attorney’s error in omitting the date the grand jury returned the indictment did not facially void the instrument’s compliance with ORS 132.540(1)(c) (requiring the indictment to allege that the crime was committed at some time prior to the finding of the indictment) because the reasonable interpretation of the indictment was that the grand jury returned it sometime between the alleged date of the crime, which was stated in the past tense, and the date it was filed.

4. Prior Convictions
ORS 132.540(2) states that the indictment “shall not” contain allegations of defendant’s prior convictions which may subject the defendant to enhanced penalties, except where the conviction constitutes a material element of the crime charged. However, 2005 Or Laws, ch. 463, § 2 (effective July 7, 2005) provides that the State may fulfill its obligation to notify the defendant of its intention to rely on any enhancement fact by pleading that fact in the accusatory instrument.

State v. Reynolds, 183 Or App 245 (2002): Where proof of previous conviction determined whether offense was a felony or misdemeanor, existence of defendant’s previous conviction constituted a “material element” pursuant to ORS 132.540(2) and therefore was properly included in the indictment. A “material element” refers to one that is necessary to state the crime charged. Id. at 250.

a. Proof of a Prior Conviction is Not Barred by Offer to Stipulate
If the defendant offers to stipulate to the fact of a prior conviction, the State is not required to accept the offer and may proceed to prove the defendant’s prior conviction where it is an essential element to the crime charged. State v. Garrett, 187 Or App 201, 204-06 (2003)
(State allowed to prove that defendant was convicted of previously assaulting the same victim on a felony assault charge in spite of defendant’s offer to stipulate to the prior conviction).

5. Defects in Form Not Fatal to Indictment
An indictment is not rendered insufficient by a defect or imperfection in form that does not prejudice defendant’s substantial rights upon the merits. ORS 135.715.

D. Contents of the Indictment
ORS 132.550 requires the indictment to contain substantially the following:

1. Name of the Court

2. Title of the Action
   Plaintiff is designated by name of governmental unit bringing the action; no specific form is required.

3. Accusation: Statement That Accuses Defendant of an Offense

4. Separate Counts for Multiple Offenses
   An accusatory instrument that charges more than one offense must have a separate count for each offense. ORS 132.550(4); ORS 135.630(3).

   State v. Merrill, 135 Or App 408, 411 (1995): “[E]ach offense in an indictment must be alleged in a separate count or the indictment is subject to a demurrer.”

a. Offense-Subcategory Facts
   Although the State must specifically allege alternative offense-subcategory facts in the affected count of the accusatory instrument, ORS 135.711, such allegation of more than one ground to enhance the charged offense’s sentence on the crime-seriousness scale does not improperly charge the defendant with more than one offense. State v. Merrill, 135 Or App 408, 411 (1995). The subcategory factors required for sentencing purposes are alleged in addition to the underlying elements of the offense. Id. at 412.

i. Subcategory Facts Must Be Pledged In a Single Count
   In addition to the elements of the crime, the State must specially plead in a single count in the indictment any

An indictment must contain:
- Defendant’s name
- Name of the court
- Title of the action
- Accusation
- Separate counts
- Venue
- Time of crime
- Acts constituting offense
- Signatures
- Filing date
- Names of witnesses.

See ORS 132.560(1)(b) (providing for joinder of counts).
subcategory fact on which it intends to rely to enhance the crime for sentencing purposes. ORS 132.557.

b. Incorporation by Reference
In a multiple count instrument, if one count alleges the required information, the other counts may incorporate it by reference, however, “a criminal defendant is not required to infer a missing element from extrinsic material.” State v. Huckins, 176 Or App 276, 283 (2001).

c. Lesser Included Offenses
“Whether one offense is a lesser included of another is determined by satisfying either one of two tests: (1) that one offense is ‘necessarily included’ in the other, by virtue of the elements of the former being subsumed in the latter; or (2) that the facts alleged in the indictment expressly include conduct that describes the elements of the lesser included offense.” State v. Guzman, 140 Or App 347, 351 (1996); State v. Riehl, 188 Or App 1, 3 (2003).

State v. Guzman, 140 Or App 347, 351 (1996): “A court does have jurisdiction to enter a conviction on an offense not expressly charged in the indictment if that offense is a lesser included offense of one that actually does appear in the indictment.”

i. Lesser Included Offenses
A lesser included offense need not be alleged as a separate count. ORS 136.465. In order to determine if an offense is necessarily included, “the court should limit itself to an analysis of the relationship between the two offense categories, i.e., the statutory definitions of the offenses.” State v. Washington, 20 Or App 350, 354 (1975). Lesser included degrees of the charged offense do not need to be included in the accusatory instrument. ORS 136.460(1).

ii. Lesser Offenses Not Included
A lesser offense not necessarily included in the charged offense or alleged by the express facts of the indictment must be separately charged, notwithstanding the existence of sufficient evidence at trial to support a conviction of the lesser offense. State v. Washington, 273 Or 829, 838-39 (1975) (second degree theft was not necessarily included in the statutory definition of burglary nor was it alleged in the indictment).
**State v. Gibbons**, 228 Or 238, 241-42 (1961): It is “unnecessary verbiage” to include in the indictment lesser included degrees of the charged offense. *See State v. Wilson*, 172 Or 373, 378 (1943) (indictment charging murder in the first degree included the lesser degrees of homicide, specifically, manslaughter).

5. **Venue**
   The indictment must state that the offense charged was committed in a designated county. ORS 132.550(5).

   *State v. Huckins*, 176 Or App 276 (2001): ORS 132.550(5) expressly requires an allegation of venue in a “designated” county, a necessary element that must be proved pursuant to Article I, § 11 of the Oregon Constitution guaranteeing a “right to a public trial by an impartial jury in the county in which the offense shall have been committed.”

   **a. Exact Place of Crime**
   The exact place a crime was committed must be alleged if it is a *material element*. *State v. Kelsaw*, 11 Or App 289, 293-94 (1972), *rev’d on other grounds*, 14 Or App 313 (1973).

6. **Time of Crime**
   The indictment must contain a statement that each count was committed on or about a designated date, or during a designated period of time. ORS 132.550(6).

   **a. Precise Time of Crime**
   The precise time of crime must be alleged only if time is a *material element*. ORS 135.717; *State v. Kelsaw*, 11 Or App 289, 293 (1972), *rev’d on other grounds*, 14 Or App 313 (1973).

   *State v. Tidyman*, 54 Or App 640, 651 (1981): “Time is a material element if the act charged is a crime if committed at one time but not if committed at another.”

   *State v. Presley*, 175 Or App 439, 444 (2001): In general, time is not an essential element of a crime unless a time requirement is included in the statutory definition of the crime.

   *State v. Long*, 320 Or 361, 367 (1994): Defendant was not prejudiced when evidence at trial proved actual date of crime of sodomy to be outside the period of time alleged in the indictment because time was not a material element of the crime.
crime.

*State v. Baldeagle*, 154 Or App 234, 239-40 (1998): “If the date of a crime is not a material element of the offense, variance between the date alleged and the date proven is not a fatal flaw, unless the date proven is outside the statute of limitations, or the defendant is prejudiced by the variance.”

b. **Alibi Defense**
   

c. **Impossible or Future Date**
   
   An impossible or future date makes the accusatory instrument void on its face.

   *State v. Perry*, 12 Or App 585 (1973): The test for an indictment’s sufficiency in providing that the crime was committed prior to the finding of the indictment is whether the indictment charges an impossible or future date.

d. **Time and Place Generally Need Not be Alleged in Indictment**
   
   “Thus the rule applicable to most criminal cases is that at the time a trial of a defendant commences, he is not entitled to know for certain upon what date within the period of the statute of limitations, or at what place within the county the state proposes to prove the alleged crime was committed.” *State v. Kelsaw*, 11 Or App 289, 294-95 (1972), rev’d on other grounds, 14 Or App 313 (1973).

7. **Statement of Acts Constituting the Offense**
   
   The statement of the acts constituting the offense must be in *ordinary and concise language* such that a person of common understanding knows what is intended. ORS 132.550(7).

   *State v. Cooper*, 78 Or App 237, 241 (1986): Accusatory instrument failed because there were no specific facts identifying the acts which constituted the alleged crime.

   a. **Definite and Certain Requirement**
      
      The face of an accusatory instrument must be definite and certain. ORS 135.630(6).

      *State v. Johns*, 20 Or App 249, 251 (1975): A statement of the acts constituting the offense in ordinary and concise language that enables a person of common understanding
to know what is intended satisfies the requirement of ORS 135.630(6) that the face of an accusatory instrument be “definite and certain.”

b. **Essential Elements**
An indictment must allege each essential element of the offense that must be proven for conviction. *State v. Wimber*, 315 Or 103, 109 (1992) (“An indictment fails to state facts constituting an offense when it fails to allege each of the essential elements of the offense.”).

i. **Pleading Essential Elements With Statutory Language**

**Note:** The indictment need not strictly follow the words of the statute; it may use other words conveying the same meaning. ORS 132.540(3).

c. **Sufficient Facts Must Be Alleged For Each Count**
For any **felony**, the accusatory instrument must allege facts sufficient to constitute a crime or a specific subcategory of crime in the Crime Seriousness Scale. ORS 135.711.

*State v. Johnson*, 80 Or App 350, 355 (1986), overruled on other grounds, *State v. Caldwell*, 187 Or App 720, 723 n.1 (2003): “Each count must separately allege sufficient facts to charge a crime. To require a defendant to search separately stated charges to determine the precise charge against him does not satisfy the requirement for a ‘statement of the acts constituting the offense in ordinary and concise language’ that would ‘enable a person of common understanding to know what is intended.’”

d. **Discovery Procedures May Cure Imprecision In Indictment**
Where pretrial discovery procedures are adequate to provide defendant with notice of the specific acts constituting the offense, a demurrer on grounds that the
indictment lacks specificity is less likely to be sustained because “the potential for confusion from the charging instrument itself is greatly reduced.” *State v. Wright*, 167 Or App 297, 311 (2000). However, in cases where the nature of the crime is complex, or the volume of potential discovery is significant, greater specificity in the indictment may be required. *Id.* at 307. *See generally, id.* at 303-11 (discussing the sufficiency of the availability of pretrial criminal discovery to cure imprecision in charging instruments).

*State v. Andrews*, 16 Or App 144, 146 (1974): “The availability of pretrial discovery and, if necessary, a continuance during the trial fully protect a defendant’s right to notice of what he must defend against.”

e. **Implied Words**
Where the indictment uses words that necessarily imply other words, it need not use the implied words.

*State v. Jim*, 13 Or App 201, 220 (1973): The indictment permissibly used the term of art “theft” because it was defined in the statute, which required the defendant to look no further than the statute to discover what crime was being charged.

f. **Statutory Definitions**

g. **Specific Examples**
*State v. Sanders*, 280 Or 685, 691 (1977): In *burglary* cases, the indictment must allege the specific crime that defendant intended to commit in the building.

*State v. Nussbaum*, 261 Or 87, 93-97 (1972): An indictment charging defendant with *rioting*, a crime which required three or more persons to act together, was sufficiently definite and certain even though it did not name the other co-rioters because their names were not facts “necessary to constitute” the crime.

*State v. Shadley*, 16 Or App 113 (1973): Indictment that charged defendants with *furnishing marijuana* sufficiently stated a crime even though the person to whom the drug
was furnished was not named therein. “[A]s a matter of law, the identity of persons connected with a criminal offense need not be stated in an indictment unless such identity is an essential element of the crime charged.” Id. at 121.

*State v. Coleman*, 130 Or App 656, 660 (1994): Although the identity of a coconspirator was not an essential element of the crime of *conspiracy*, which required the performance of some criminal act “with one or more persons,” the indictment was insufficient because it failed to allege the “existence” of any coconspirators.

*State v. Fair*, 326 Or 485, 490 (1998): An indictment in the language of the statute is sufficiently specific in an *Oregon RICO* case. However, the indictment must precisely allege the nature of and the incidence of the predicate offenses. *See State v. Romig*, 73 Or App 780, 789 (1985); *State v. Harris*, 157 Or App 119, 122 (1998) (finding that it is not necessary to specify the particular nexus between the predicate acts); *see also State v. Kincaid*, 78 Or App 23, 29-30 (1986) (requiring the state to particularize the underlying offenses in the indictment).

*State v. Cooper*, 78 Or App 237, 242 (1986): An accusatory instrument that charges defendant with promoting unlawful *gambling* by restating the language of the charging statute must also include the acts allegedly committed.

8. **Required Signatures**

Both the grand jury foreman and the DA must sign the indictment. ORS 132.550(8).

9. **Date of Filing**

The indictment must contain the date it was filed. ORS 132.550(9).

10. **Names of Witnesses**

The foot of the indictment must contain a list of the witnesses’ names who were examined before the grand jury and those who submitted an expert report pursuant to ORS 132.320(2). The indorsement of witnesses must show whether the witness testified in person, by affidavit, by simultaneous video transmission, or by telephone, or filed a report. ORS 132.580(1).
a. Effect of Failure to List Names of Witnesses
   The court may not permit a witness examined before the grand jury whose name does not appear on the indictment to testify at the trial without defendant’s consent, unless the court finds that: (1) the name of the witness was inadvertently omitted from the indictment; (2) the name of the witness was furnished to defendant at least 10 days before trial; and (3) the omission will not prejudice defendant. ORS 132.580(2).

b. Court May Not Look Behind Indictment That Appears Valid
   The court may not look behind an indictment that appears valid on its face. State v. Johnson, 19 Or App 355, 358-59 (1975) (defendant’s motion to set aside indictment on grounds that only witness indorsed thereon did not testify before the grand jury denied because a court may not go behind an indictment that is valid on its face).

c. Witnesses Not Appearing Before Grand Jury
   ORS 132.580(2) prohibits only witnesses examined before the grand jury who were not listed on the indictment from appearing at trial; thus a witness who does not appear before the grand jury returning the indictment may be permitted to testify at trial provided the State makes a good faith attempt to comply with ORS 132.580(2). State v. Flygare, 18 Or App 292, 296-97 (1974) (witness who did not appear before the grand jury that returned the indictment but did appear before a subsequent grand jury also investigating defendant’s conduct was allowed to testify at trial).

E. Waiver of Indictment

1. Waiver Is Not A “Critical Stage” Of A Criminal Proceeding
   Waiver of indictment is not a “critical stage” of a criminal proceeding that requires assistance of counsel.

   State v. Miller, 254 Or 244, 249 (1969): “We do not believe that waiver of indictment is a critical stage in the proceedings because of any possible danger that informations will be filed under circumstances in which an indictment could not have been secured. We believe that [Hamilton v. Alabama, 368 US 52 (1961)] requires, in the absence of an intelligent and knowing waiver of counsel, legal representation for an accused at a time when he must take steps or make a choice which is likely to have a substantial effect on the prosecution against him. We do not perceive that waiver of grand jury is such
a choice, as we do not believe that such a waiver is actually
determinative of whether criminal proceedings could or would
be brought.”

2. **Written Waiver Is Not Necessary**
There is no statutory or constitutional requirement that waiver
of indictment be in writing or signed by defendant. *Eubanks
v. Gladden*, 236 F Supp 129, 131 (D. Or. 1964). However, the
court should ensure, on the record, that defendant knowingly
and intentionally made such waiver. See e.g., *State v. Meyrick*,
313 Or 125, 133 (1992) (discussing standard for waiver of right
to counsel).

F. **Complaint**

1. **Definition**
A “complaint” is a written accusation, verified by oath and
bearing an indorsement of acceptance by the district attorney,
filed with a magistrate that charges another person with the
commission of a *nonfelony* offense. ORS 131.005(3).

2. **Purpose**
The complaint serves both to commence an action and as the
basis for a nonfelony prosecution. ORS 131.005(3).

G. **Complainant’s Information**

1. **Definition**
“Complainant’s information” means a written accusation,
verified by oath and bearing an indorsement of acceptance by
the district attorney, filed with a magistrate that charges another
person with the commission of an offense punishable as a
*felony*. ORS 131.005(4).

2. **Purpose**
A complainant’s information commences a felony action but is
not a basis for prosecution of the felony. ORS 131.005(4).

H. **District Attorney’s Information**

1. **Definition**
A district attorney’s information is a written accusation filed
with a magistrate by the district attorney, which may charge a
person with *any offense*, including a felony. ORS 131.005(9).
2. Purpose
If the district attorney’s information charges a nonfelony offense, it may serve both to commence the action and as a basis for the prosecution. ORS 131.005(9)(a).

Except as provided in ORS 131.005(9)(c), if the district attorney’s information charges a felony offense, it may serve to commence the action, but not as a basis for the prosecution thereof. ORS 131.005(9)(b).

3. Authorization to Serve as Basis For Felony Prosecution
When the district attorney’s information charges a felony, ORS 131.005(9)(c) allows it to be the basis for prosecution in a circuit court when authorized by law if:

a. The person charged in the information appears in circuit court and knowingly waives indictment. Or Const Art VII (amended), § 5(4).

b. After a preliminary hearing, the person is held to answer on a showing of probable cause that the person committed a felony. Or Const Art VII (amended), § 5(5). Or

c. The accused knowingly waives a preliminary hearing. Or Const Art VII (amended), § 5(5).

State v. Shaw, 68 Or App 693, 697 (1984): “A person can be charged with a felony in Oregon in one of two ways. A district attorney can, after a showing of probable cause, charge a person on an information filed in Circuit Court. Or Const, Art VII (amended), § 5. A person can also be charged by grand jury.” See State v. Gortmaker, 60 Or App 723, 731 (1982) (“[A]n information can serve as the charging instrument only after probable cause that the person named committed a felony is established in a preliminary hearing before a magistrate — unless the person knowingly waives indictment or preliminary hearing.”).

I. Sufficiency of Information or Complaint
ORS 133.007(1) provides that an information or complaint is sufficient if it can be understood therefrom that:

1. Defendant is named;

2. Crime was committed within the jurisdiction of the court; and

3. Crime was committed prior to the finding of the indictment and within the statute of limitations.
1. **Name of Defendant**  
   If the defendant’s name is unknown to the complainant, a fictitious name plus a statement that defendant’s true name is unknown must be substituted. ORS 133.007(1)(a). See ORS 135.743 (providing for insertion of defendant’s true name when discovered).

2. **Jurisdiction of the Court**  
   If the offense was committed outside the county in which the court sits, the information or complaint must make clear that the crime is nevertheless triable within the court’s jurisdiction as provided by law. ORS 133.007(1)(b).

3. **Prior Convictions**  
   The information or complaint may not contain allegations of defendant’s prior convictions which may subject the defendant to enhanced penalties. ORS 133.007(2).

4. **Defects in Form Not Fatal to Information or Complaint**  
   An information or complaint is not rendered insufficient by a defect or imperfection in form that does not prejudice defendant’s substantial rights upon the merits. ORS 135.715.

J. **Contents of Information or Complaint**  
   ORS 133.015 requires the information or complaint to contain substantially the following:
   
   1. **Name of the Court**
   2. **Title of the Action**
   3. **Accusation: Statement That Accuses Defendant of an Offense**
   4. **Separate Counts for Each Offense**
      An accusatory instrument that charges more than one offense must have a separate count for each offense. ORS 133.015(4); ORS 135.630(3).
      
      a. **Offense-Subcategory Facts**
         Although the State must specifically allege alternative offense-subcategory facts in the affected count of the accusatory instrument, ORS 135.711, such allegation of more than one ground to enhance the charged offense’s sentence on the crime-seriousness scale does not improperly charge the defendant with more than one offense. *State v. Merrill*, 135 Or App 408, 411 (1995).
         The subcategory factors required for sentencing purposes

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An information or complaint must contain:
- Defendant’s name
- Name of the court
- Title of the action
- Accusation
- Separate counts
- Venue
- Time of crime
- Acts constituting offense
- Verification (complaint)
- Date of signing.
are alleged in addition to the underlying elements of the offense. *Id.* at 412.

b. *Incorporation by Reference*

In a multiple count instrument, if one count alleges the required information, the other counts may incorporate it by reference, however, “a criminal defendant is not required to infer a missing element from extrinsic material.” *State v. Huckins*, 176 Or App 276, 283 (2001).

c. *Lesser Included Offenses*

i. *Lesser Included Offenses*

A lesser included offense need not be alleged as a separate count. ORS 136.460(1).

ii. *Lesser Offenses Not Included*

A lesser offense not necessarily included in the charged offense or alleged by the express facts of the indictment must be separately charged, notwithstanding the existence of sufficient evidence at trial to support a conviction of the lesser offense. *State v. Washington*, 273 Or 829, 838-39 (1975) (second degree theft was not necessarily included in the statutory definition of burglary nor was it alleged in the accusatory instrument).

5. *Venue*

The information or complaint must state that the offense charged was committed in a designated county. ORS 133.015(5).

a. *Exact Place of Crime*

The exact place a crime was committed must be alleged if it is a *material element*. *State v. Kelsaw*, 11 Or App 289, 293-94 (1972), rev’d on other grounds, 14 Or App 313 (1973).

6. *Time of Crime*

The information or complaint must contain a statement that each count was committed on or about a designated date, or during a designated period of time. ORS 133.015(6).

a. *Precise Time of Crime*

The precise time of crime must be alleged only if time is a *material element*. ORS 135.717; *State v. Kelsaw*, 11 Or
b. Alibi Defense

7. Statement of Acts Constituting the Offense
The statement of the acts constituting the offense must be in *ordinary and concise language* such that a person of common understanding knows what is intended. ORS 133.015(7).

*State v. Cooper*, 78 Or App 237, 241 (1986): Accusatory instrument failed because there were no specific facts identifying the acts which constituted the alleged crime.

a. Definite and Certain Requirement
The face of an accusatory instrument must be definite and certain. ORS 135.630(6).

*State v. Johns*, 20 Or App 249, 251 (1975): A statement of the acts constituting the offense in ordinary and concise language that enables a person of common understanding to know what is intended satisfies the requirement of ORS 135.630(6) that the face of an accusatory instrument be “definite and certain.”

b. Pleading Essential Elements With Statutory Language

**Note:** The information or complaint need not strictly follow the words of the statute; it may use other words conveying the same meaning. ORS 133.007(3).
c. **Sufficient Facts Must Be Alleged For Each Count**
For any *felony*, the accusatory instrument must allege facts sufficient to constitute a crime or a specific subcategory of crime in the Crime Seriousness Scale. ORS 135.711.

*State v. Johnson*, 80 Or App 350, 355 (1986), *overruled on other grounds, State v. Caldwell*, 187 Or App 720, 723 n.1 (2003): “Each count must separately allege sufficient facts to charge a crime. To require a defendant to search separately stated charges to determine the precise charge against him does not satisfy the requirement for a ‘statement of the acts constituting the offense in ordinary and concise language’ that would ‘enable a person of common understanding to know what is intended.’”

8. **Verification and Date of Signing**
The complaint must contain the complainant’s verification and the date of signing; the information must contain the date of signing. ORS 133.015(8).

II. **PROBABLE CAUSE DETERMINATIONS FOR WARRANTLESS ARRESTS**

A. **Scope**
A probable cause determination following a warrantless arrest is “addressed only to pretrial custody,” and differs from the preliminary hearing where a showing of probable cause forms the justification for charging the accused with an offense. *Gerstein v. Pugh*, 420 US 103, 123 (1975). In contrast, a grand jury indictment is prima facie evidence of probable cause. *Shoemaker v. Selnes*, 220 Or 573, 581 (1960). See *Gerstein, 420 US* at 117 n.19 (a proper indictment “conclusively determines the existence of probable cause”).

B. **Constitutional Standard**
The search and seizure clause of the Fourth Amendment of the U.S. Constitution requires an arrest without a warrant to be based on probable cause. Wayne R. LaFave, Jerold H. Israel & Nancy J. King, *Criminal Procedure* § 3.3(a), 83 (West Group 1999). See *Gerstein v. Pugh*, 420 US 103, 114 (1975) (concluding that as a prerequisite to extended custody the Fourth Amendment requires a judicial determination of probable cause). See also Or Const Art I, § 9 (providing language similar to the Fourth Amendment).
1. **Probable Cause Determinations Must be “Prompt”**
   
   In *Gerstein v. Pugh*, 420 US 103, 125 (1975), the Court held that a state must adopt a criminal procedure that provides “a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”

2. **“Prompt” Means Within 48 Hours**
   
   In *County of Riverside v. McLaughlin*, 500 US 44, 56 (1991), the Court addressed the issue of what time limit would qualify as “prompt,” concluding that “judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*.” However, the Court qualified the time limit by providing that a probable cause determination that included “delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill-will against the arrested individual, or delay for delay’s sake,” but nevertheless made within 48 hours, would not pass muster under the Fourth Amendment. *Id.* at 56.

3. **Emergencies or Extraordinary Circumstances**
   
   If probable cause is not determined within 48 hours, the State must “demonstrate the existence of a bona fide emergency or other extraordinary circumstance,” which does not include consolidation of pretrial proceedings or intervening weekends. *County of Riverside v. McLaughlin*, 500 US 44, 57 (1991).

4. **Probable Cause Determination Is Not a “Critical Stage”**
   
   A determination of probable cause is not a “critical stage” of the prosecution requiring adversary safeguards such as counsel, confrontation, cross-examination, etc.; “[t]he sole issue is whether there is probable cause for detaining the arrested person pending further proceedings.” *Gerstein v. Pugh*, 420 US 103, 119-122 (1975).

C. **Probable Cause Defined**
   
   A determination of probable cause means that a substantial objective basis exists to believe that more likely than not an offense has been committed and the arrested person has committed it. ORS 131.005(11).

D. **Burden of Proving Probable Cause Is on the State**
   
   The State bears the burden of proving the lawfulness of a warrantless arrest, including the existence of probable cause. *State v. Jones*, 248 Or 428, 432 (1967). “Mere suspicion or belief, unsupported by facts or circumstances, is insufficient.” *Id.*
E. Incorporating Other Proceedings
Probable cause determinations may be incorporated into other pretrial procedures, e.g., release decisions and arraignments, provided the combined proceeding still meets the promptness requirement. *County of Riverside v. McLaughlin*, 500 US 44, 58 (1991).

III. DEFENDANT’S RIGHT TO COUNSEL

A. Constitutional Right to Assistance of Counsel
The Sixth Amendment to the U.S. Constitution provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic].” Article I, § 11 of the Oregon Constitution provides: “In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel.” *See Powell v. Alabama*, 287 US 45 (1932) (incorporating the Sixth Amendment’s right to counsel into state prosecutions for capital offenses via the due process clause of the Fourteenth Amendment); *Gideon v. Wainwright*, 372 US 335 (1963) (holding that an indigent criminal defendant has a fundamental right to the assistance of counsel).

*Stevenson v. Holzman*, 254 Or 94, 102-04 (1969): Article I, § 11 of the Oregon Constitution, as well as the Sixth Amendment of the U.S. Constitution, provide a right to counsel, or court-appointed counsel for indigent defendants, in any criminal prosecution where the loss of liberty is at stake, including misdemeanors and violations of municipal ordinances. “The denial of the assistance of counsel will preclude the imposition of a jail sentence.” *Id.* at 102.

1. “Critical Stages”
A criminal defendant, including an indigent defendant, is entitled to be represented by counsel at any “critical stage” in a criminal proceeding. *Coleman v. Alabama*, 399 US 1, 7-10 (1970); *Powell v. Alabama*, 287 US 45, 57 (1932).

B. Waiver of Counsel
If the defendant wishes to waive counsel, the court must determine whether the defendant has made a *knowing and voluntary* waiver of counsel and accept such waiver; unless the defendant is charged with a capital offense, in which case the court may decline to accept the waiver of counsel. ORS 135.045(1)(c).

Appendix A provides a Model Script for *Waiver of Counsel* prepared by the Oregon Judicial Department.

Appendix B provides a *Waiver of Counsel form* prepared by the Oregon Judicial Department.
1. **Meyrick Standard For Waiver of Counsel**


a. **Make a Record of Defendant’s Understanding of Waiver**

“A colloquy on the record between the court and the defendant wherein the court, in some fashion, explains the risks of self-representation is the preferred means of assuring that the defendant understands the risks of self-representation. The more relevant information that a trial court provides to a defendant about the right to counsel and about the dangers and disadvantages of self-representation, the more likely it will be that a defendant’s decision to waive counsel is an intentional relinquishment or abandonment of a known right or privilege and that the record will so demonstrate.” *State v. Meyrick*, 313 Or 125, 133 (1992) (emphasis added). See *State v. Jackson*, 172 Or App 414, 423 (2001) (“‘Understanding’ under Meyrick means that a defendant, in the totality of the circumstances, substantially appreciates the material risks of self-representation in his or her case.”); *State v. Curran*, 130 Or App 124, 127-28 (1994) (finding trial court’s description of jury trial procedures insufficient to advise defendant of “pitfalls and consequences of proceeding pro se”); *State v. Lasarte*, 203 Or App 222 (2005) (concluding that the court’s cursory warnings that an attorney would be “helpful” in trial management and that defendant would need to be familiar with evidentiary, procedural, and other rules was an insufficient colloquy to establish a “knowing” waiver where defendant’s first language was not English, he had a ninth grade education, the record reflected that appointed counsel had some concerns about his mental status, and his closing argument included a confession).

2. **Nonattorney Representation**

C. Right to Court-Appointed Counsel

ORS 135.050(5) provides the right to court-appointed counsel for a defendant who is before the court on any of the following matters:

1. Charged with a crime;
2. For an enhanced sentence hearing that may result in the imposition of a felony sentence;
3. For extradition proceedings; and
4. For any probation proceeding.

1. Municipal, County, and Justice Courts

When the defendant has a right to counsel, requests the aid of counsel, and provides to the court a written and verified financial statement, ORS 135.050(1) requires a municipal, county, or justice court to appoint suitable counsel at public expense if the court determines that defendant is financially unable to retain adequate representation without substantial hardship in providing basic economic necessities to defendant or defendant’s dependent family.

2. Circuit Courts

When the defendant has a right to counsel, requests the aid of counsel, and provides to the court a written and verified financial statement, ORS 135.050(2) requires a circuit court to appoint suitable counsel if:

1. The defendant is determined to be financially eligible under ORS 151.485 and the standards established by the Public Defense Services Commission under ORS 151.216; or
2. The court finds substantial and compelling reasons why the defendant is financially unable to retain adequate representation without substantial hardship in providing basic economic necessities to defendant or defendant’s dependent family despite not meeting the eligibility standards established by the commission.

3. Financial Eligibility For Appointed Counsel

A person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial hardship in providing basic economic necessities to the person or the person’s dependent family. ORS 151.485(1).
a. **Determination of Financial Eligibility**

A determination of the person’s financial eligibility for appointed counsel is made upon (1) the basis of information submitted by the person in a financial statement in the form prescribed by the Public Defense Services Commission, and (2) the uniform statewide guidelines and procedures adopted by the commission that prescribe how to use the form and determine eligibility. ORS 151.485(2).

i. **Contents of the Financial Statement**

The person’s financial statement must disclose all assets, liabilities, current income, dependents, and any other necessary information. ORS 151.485(2). Additionally, ORS 135.050(4)(a)-(e) requires the financial statement to include the following information concerning the defendant and the defendant’s spouse:

1. A list of bank accounts and the balance in each;
2. A list of interests in real property;
3. A list of automobiles and other personal property of significant value;
4. A list of debts and the total of each; and
5. A record of earnings and other sources of income and the total of each.

b. **Resources of Friends or Relatives Can Not Be Considered**

The court cannot deny appointed counsel simply because the defendant’s friends or relatives have sufficient resources to retain counsel. ORS 135.050(3).

i. **Resources of Defendant’s Spouse Will Be Considered**

Appointed counsel may be denied to a defendant whose spouse has adequate resources which the court determines should be made available to retain counsel. ORS 135.050(3).

c. **Depositing Security For Release Wont Disqualify Defendant**

Appointed counsel may not be denied to a defendant on grounds that the defendant has deposited or is capable of depositing security for release. ORS 135.050(3).

d. **Court Has Discretion in Determining Indigency**

The determination of financial eligibility may be reviewed only for an abuse of discretion. *State v. Freeman*, 96 Or.
Financial Eligibility Subject to Review

If, after the appointment of counsel, the court finds that the defendant is financially able to obtain counsel, the court may terminate the appointment of counsel; if, during the proceedings, the court finds that the defendant is financially unable to pay retained counsel, the court may appoint counsel. ORS 135.050(7).

Confidentiality

All information supplied by a person seeking court-appointed counsel or collected to determine financial eligibility is confidential. ORS 151.495(1).

Exceptions: Confidential information may be: (1) introduced in a criminal or civil proceeding arising from a determination of financial ineligibility; (2) introduced in a criminal or civil proceeding arising from an allegation that the person provided false information in seeking appointed counsel; (3) used by the court in a sentencing proceeding; and (4) used by the court or the Department of Revenue to collect delinquent amounts owed to the State by the person. ORS 151.495(2).

4. Application Fee & Contribution Amount For Public Defense

The court must order the defendant to pay an application fee ($20) and a contribution amount toward the cost of appointed counsel if the court finds that the defendant has the financial resources to pay these amounts without creating substantial hardship in providing basic economic necessities to the person or the person’s dependent family. ORS 151.487(1).

a. Consequences of Non-Payment

1. A person cannot be denied the opportunity to apply for state-paid counsel.

2. Appointment of counsel cannot be denied or delayed until payments are made.

3. Appointed counsel cannot be withdrawn because payments have not been made.

4. Order to pay can be enforced as a civil judgment.

ORS 151.487(2).
b. Contribution Determination Subject to Review
The court’s determination regarding the person’s ability to pay the amounts ordered is subject to review at any time. ORS 151.487(5).

5. Recoupment of Indigent Defense Costs
At the end of a case, the court may order the person to repay in full or in part the actual costs incurred in providing court-appointed counsel; amounts so ordered must be reduced by any contribution amounts previously ordered. ORS 151.505(1); ORS 161.665 (indigent costs regarding criminal conviction); CJO No. 04-031. See also ORS 135.050 (8)-(9).

a. Ability to Pay
The court may not order a recoupment of costs unless the person is or may be able to pay the costs. ORS 151.505(4).

i. Method and Amount of Payment
The court must consider the person’s financial resources and the nature of the burden that repayment will impose when determining the amount and method of repayment. ORS 151.505(4).

ii. Petition for Remission
A person ordered to repay costs for court-appointed counsel who is not in default may at any time petition the court for remission of the repayment; if the court finds that repayment will impose manifest hardship on the person or the person’s immediate family, the court may remit all or part of the amount due or modify the method of payment. ORS 151.505(5).

b. Failure to Pay Costs
Amounts ordered to be paid that are not paid may be enforced against the person as a civil judgment or as otherwise permitted by law. ORS 151.505(7).

D. Defendant’s Right to Waive Appearance at Trial
ORS 136.040(1) confers on defendants a right to appear at trial in person or by counsel, however, this right is not absolute or unwaivable.

State v. Skillstad, 204 Or App 241, 246 (2006): “[I]f a defendant validly waives the right to be present, ORS 136.040(1) does not prevent trial from proceeding even if both the defendant and counsel are absent, and whether or not the defendant is represented by counsel.” See also, State v. Harris, 291 Or 179 (1981).
IV. PRELIMINARY HEARING

A. Generally

1. Advising the Defendant of Rights on Felony Charge
   When the defendant against whom an information has been filed in a preliminary proceeding appears before a magistrate on a felony charge, ORS 135.070 requires the magistrate to read the information to the defendant and inform the defendant of the following:

   1. Right to counsel;
   2. Defendant is not required to make a statement;
   3. Any statement made by the defendant may be used against the defendant;
   4. Defendant is entitled to a preliminary hearing;
   5. Nature of the preliminary hearing;
   6. That if defendant is on parole, evidence received and the outcome of the preliminary hearing may be used by the parole board to determine if a parole violation has occurred; and
   7. That if a defendant is on parole and waives the right to a preliminary hearing, such waiver will also constitute a waiver of a hearing by the parole board.

   a. Effect of Failing to Advise Defendant of Rights
      Any evidence obtained directly or indirectly as a result of the magistrate’s failure to comply with ORS 135.070 is not admissible before the grand jury. ORS 135.073.

2. Nonfelony Charge
   When the information charges the defendant with a nonfelony, the defendant is not entitled to a preliminary hearing on that charge. ORS 135.070.

3. Time Period Within Which Hearing Must Be Held
   If the defendant requests a preliminary hearing, the court must hold it as soon as practicable, but no later than 5 days if defendant is in custody, or 30 days if not in custody, unless the court extends the time for good cause shown. ORS 135.070(2).

   a. Calculating 5-day Time Period For a Defendant in Custody
      The 5-day time period for a defendant in custody begins to run the day following the day on which the defendant was

Note: In any criminal proceeding in which a transcript, audiotape, or videotape of the proceedings held in open court is prepared, the victim has the right to obtain a copy of the transcript or tape by paying the preparer the actual copying costs. ORS 147.419.
b. Calculating 30-day Time Period For a Defendant on Release

The 30-day period for a defendant not in custody begins to run the next day following the day on which the defendant was brought before the magistrate for the initial appearance pursuant to ORS 135.070, and, except for the last day in the period, includes intermediate Saturdays, Sundays, and legal holidays. ORS 174.120.

Note: Prior to 2002 Special Session 1, intermediate weekends and holidays were excluded from calculating a time period of less than 7 days since ORS 174.120 deferred to ORCP 10 (which states “[w]hen the period of time prescribed is less than 7 days, intermediate Saturdays and legal holidays, including Sundays, shall be excluded in the computation.”) ORS 174.120 was amended, effective 02/25/2002, and no longer defers to ORCP 10.

c. “Good Cause”

“Good Cause” to extend the preliminary hearing date is not defined by statute or case law. It depends on the magistrate’s good judgment, taking into account whether the defendant is in custody, whether the “victim” is unable to attend because of injuries received during commission of the crime, the illness of essential witnesses, or reasonable delay by the prosecution in assembling the evidence and preparing the case.

4. Opportunity to Obtain Counsel

The defendant has a right to counsel, ORS 135.070(1), and must be given a reasonable time to obtain counsel, including a legal advisor appointed under ORS 135.045; the court must adjourn the proceeding for this purpose if necessary. ORS 135.075.

5. Grand Jury May Indict Prior to Preliminary Hearing

The fact that a defendant charged on an information has not received a preliminary hearing does not affect the right of the grand jury to indict on the same charge.

a. Obtaining Indictment Terminates Right to Preliminary Hearing

State v. Marsh, 132 Or App 416, 420-21 (1995): If the prosecutor’s decision to dismiss the prior information and obtain an indictment was not made “haphazardly” or on an “impermissibly discriminatory basis,” the defendant’s right to a post-indictment preliminary hearing terminates.
State v. Sanford, 245 Or 397, 405 (1966): “The purpose of a preliminary hearing is to determine whether sufficient cause to answer to the charge exists prior to indictment. A grand jury may indict a person it believes to be guilty of a crime whether or not that person has been held to answer. If it does, no preliminary hearing is necessary.”

6. Purpose
The purpose of a preliminary hearing is for a magistrate to determine whether probable cause exists to believe that a crime has been committed and that the defendant committed it. ORS 135.175. The preliminary hearing also affords the defendant an opportunity to evaluate the State’s case and aid in the preparation of a proper defense. Coleman v. Alabama, 399 US 1, 9 (1970).

a. Defendant May Not Enter Plea
Because the purpose for the preliminary hearing is to determine probable cause, the defendant cannot enter a plea at the preliminary hearing or give notice of any defenses such as alibi, entrapment, or mental disease or defect.

7. Philosophy
The preliminary hearing provides an adversary proceeding designed to safeguard against preindictment detention of the accused on a groundless charge. State v. Clark, 291 Or 231, 235 (1981).

a. Preliminary Hearing is Not a Criminal Prosecution
“[T]he preliminary hearing is not a criminal prosecution of the accused, but only a judicial inquiry to determine whether there is probable cause to believe that a crime has been committed and that the defendant committed it . . . .” 1981 Conference Committee Commentary to OEC Rule 101(4)(g).

B. Procedure

1. Rules of Evidence Apply
ORS 135.173 makes the Oregon Evidence Code applicable to preliminary hearings, except that the court may admit hearsay if:

   1. The court determines that requiring the primary source of evidence to be produced at the hearing would impose unreasonable hardship on a party or witness; and
2. The witness provides information bearing on the informant’s reliability and how the information was obtained.

2. **Motion to Suppress Evidence**
   The trial court must hear and determine motions to suppress evidence before trial. ORS 133.673(1). However, the court may allow defendant to renew a previously denied motion to suppress on the ground of newly discovered evidence, or as the interests of justice require. ORS 133.673(2).

3. **Subpoenaing Witnesses**
   Both the defendant and the district attorney may require the court to issue subpoenas for witnesses within the state. ORS 135.085(1).

4. **Subpoenaing More Than Five Witnesses**
   If either party desires to subpoena more than five witnesses at public expense, the party must move for additional subpoenas as provided in ORS 136.570. ORS 135.085(2). Defendant may, at defendant’s expense, subpoena any number of additional witnesses without a court order. ORS 136.567.

5. **Examination of Adverse Witnesses**
   Witnesses must be examined in defendant’s presence and may be cross-examined by either party. ORS 135.090.

6. **Advice of Right to Make or Waive Making a Statement**
   When the State has completed the examination of its witnesses, ORS 135.095 requires the court to advise the defendant of the following rights:

   1. To make a statement in relation to the charge;
   2. That the statement is designed to enable the defendant to answer the charge and explain the facts alleged against the defendant;
   3. That the defendant may waive making a statement; and
   4. That the waiver cannot be used against the defendant at trial

   a. **Defendant’s Statement**
      If the defendant chooses to make a statement, ORS 135.100 requires the magistrate to take it without oath and record it, and ask the defendant no questions other than the following:

See ORS 136.555 to 136.695 (witnesses in criminal trials generally).
1. What is your name and age?
2. Where were you born?
3. Where do you reside and how long have you resided there?
4. What is your business or occupation?
5. Give any explanation you think proper of the circumstances appearing in the testimony against you and state any facts which you think will tend to your exculpation.

b. Use of Defendant’s Statement
Defendant’s statement is competent evidence to be presented to the grand jury and may be used as evidence at trial. ORS 135.105.

c. Defendant’s Waiver Can’t Be Used at Trial
If the defendant waives the right to make a statement, that fact cannot be used against the defendant at trial. ORS 135.115.

7. Examination of Defendant’s Witnesses
Following the defendant’s election to make or waive making a statement, the defendant’s witnesses, if any, must be sworn and examined. ORS 135.125.

8. Exclusion of Witnesses
The magistrate may exclude unexamined witnesses during examination of other witnesses or the defendant. ORS 135.135.

9. Privilege Against Self-incrimination Preserved
By making a statement at the preliminary hearing, the defendant does not waive the right to claim the privilege against self-incrimination at trial. Or Const Art I, § 12 (“No person shall be . . . compelled in any criminal prosecution to testify against himself.”); accord US Const Amend V.

10. Defendant Not Required to Present Evidence
Defendant is not required to produce any evidence at the preliminary hearing on any issue. See ORS 135.095 & ORS 135.125 (defendant may choose or choose not to make a statement or examine witnesses).
11. Testimony Must Be Recorded
The court must record the testimony of witnesses at a preliminary hearing. ORS 135.145.

a. Indigent Defendant Entitled to Free Transcript of Testimony
Under the federal constitution, an indigent defendant is entitled to a free transcript of the defendant’s preliminary hearing. Roberts v. LaVallee, 389 US 40, 42 (1967).

C. Bind-Over Standard
The defendant is to be held to answer (i.e., bound over to the grand jury) if the court finds from the evidence probable cause to believe:

1. A crime has been committed; and
2. Defendant committed it.
ORS 135.185; Or Const Art VII (amended), § 5(5).

1. Probable Cause
“Probable cause” means that there is a substantial objective basis for believing that more likely than not an offense has been committed and that the accused committed it. ORS 131.005(11).

2. Commitment
If the defendant is held to answer on a showing of probable cause, the magistrate must make out a commitment and deliver the defendant into proper custody. ORS 135.195.

3. Discharge
If a showing of probable cause has not been made, the court must dismiss the information and discharge the defendant. ORS 135.175.

4. Binding Over on Different Charges
Defendant may be held to answer for any crime for which there is a showing of probable cause, even though the crime was not charged in the information. ORS 135.185; Ex parte Jack Wessens, 89 Or 587, 590 (1918).

5. Trial on Information
If the prosecutor elects to try defendant on an information, the prosecutor must proceed on the charge on which defendant was bound over. Or Const Art VII (amended), § 5(5). However, the prosecutor may submit the case to the grand jury, which is
free to indict for any charge supported by the evidence. ORS 132.310; ORS 132.380.

6. Dismissal of Information
   If the magistrate dismisses the information for lack of probable cause to hold the defendant to answer, the dismissal does not bar grand jury indictment. State v. Schmid, 80 Or App 545, 549 (1986) (assault charge). Dismissal of an information charging a Class A misdemeanor or a felony is not a bar to another prosecution for the same crime. ORS 135.753.

D. Mental Condition of Defendant
   If the court has reason to doubt defendant’s fitness to proceed in the preliminary hearing by reason of incapacity, the court may order an examination of defendant as provided in ORS 161.365. ORS 161.360(1). See State v. Gilmore, 102 Or App 102, 104 (1990) (decision whether to order mental status examination is within court’s discretion).

1. When Defendant Is Unfit to Proceed
   Defendant is considered unfit to proceed if defendant is (1) unable to understand the nature of the proceedings; (2) to assist and cooperate with counsel; or (3) to participate in the defense. ORS 161.360(2).

2. Suspension of Preliminary Hearing for Unfitness
   If the court determines defendant is not fit to proceed, the court must suspend the preliminary hearing and:
   a. Commit the defendant to the custody of a state mental hospital designated by the Department of Human Services if the defendant is at least 18 years of age;
   b. Commit the defendant to the custody of the director of a secure intensive community inpatient facility designated by DHS if the defendant is under 18 years of age;
   c. Release the defendant on supervision until the court determines defendant is fit to proceed.


3. Grounds For Objection During Period of Unfitness
   The fact that defendant is unfit to proceed does not preclude the defendant’s attorney from objecting on grounds of insufficient allegations, double jeopardy, statute of limitations, or other grounds that the court, in its discretion, believes can be determined before trial. ORS 161.370(12).
V. ARRAIGNMENT

A. Time and Place of Arraignment
   The defendant must be arraigned before the court in which the accusatory instrument has been filed. ORS 135.010.

1. Defendant in Custody
   Except for good cause shown or at the request of the defendant, if the defendant is in custody, the arraignment must be held within the first 36 hours of custody, excluding holidays, Saturdays, and Sundays. In all other cases, except a person cited to appear under ORS 133.060, the arraignment must be held within 96 hours after the arrest. ORS 135.010.

2. Defendant Must Be Released If Not Timely Arraigned
   If the defendant is not arraigned within the relevant time period, the court must order release. Release, however, does not bar subsequent arrest and prosecution. See Wayne T. Westling, Oregon Criminal Practice § 17.02, 216 (Michie 1996).

   a. Delay Is Not Automatic Grounds For Dismissal of the Charge
      A delayed arraignment that does not occur within the time specified in ORS 135.010 is not automatic grounds to dismiss the charge or to suppress statements made by the defendant while in custody. State v. Nation, 54 Or App 929, 934 (1981) (defendant arraigned 39.5 hours after arrest).

B. Arraignment Procedures

1. Presence of Counsel
   a. Right to Counsel
      If the defendant appears at arraignment without counsel, the court must advise the defendant of the right to have counsel, including appointed counsel, present during the arraignment, and must ask if the defendant desires the aid of counsel. ORS 135.040; ORS 135.045(1)(a).

      b. Appointment of Counsel
         If the defendant wishes to be represented by counsel, the court must appoint counsel according to ORS 135.050. ORS 135.045(1)(b).
Appendix A provides a Model Script for Waiver of Counsel prepared by the Oregon Judicial Department.

Appendix B provides a Waiver of Counsel form prepared by the Oregon Judicial Department.

Chapter 1: Pretrial

Waiver of Counsel

If the defendant wishes to waive counsel, the court must determine whether the defendant has made a knowing and voluntary waiver of counsel and accept such waiver; unless the defendant is charged with a capital offense, in which case the court may decline to accept the waiver of counsel. ORS 135.045(1)(c). See State v. Meyrick, 313 Or 125, 132 (1992) (a valid waiver of counsel must be an “intentional relinquishment or abandonment of a known right” that is “voluntarily and intelligently made” by defendant).

A Pro Se Defendant May Not Plead Guilty or No Contest

A defendant who is not represented by counsel may not plead guilty or no contest to a felony charge at arraignment. ORS 135.380(2). See Shipley v. Cupp, 59 Or App 283, 288 (1982).

Scope of the Arraignment

As provided in ORS 135.020, the arraignment consists of:

1. Reading the accusatory instrument to the defendant;
2. Delivering a copy of the accusatory instrument to the defendant; and
3. Asking how the defendant pleads to the charge.

Rule 7 Motion

At the time of arraignment, the court may accept a plea of not guilty and set a trial date, or set a date for the defendant to enter a plea not less than 21 days after arraignment but, in any event, not later than 21 days prior to the trial date for defendants in custody, and not less than 35 days after arraignment, but not later than the 35th day prior to the trial date for defendants who are not in custody. UTCR 7.010(1)-(2).

Inquiry as to Defendant’s True Name

At arraignment, the defendant must be informed that if the name by which the defendant is charged in the accusatory instrument is not the defendant’s true name, the true name must be declared, otherwise the defendant is ineligible for release on personal recognizance or conditional release. ORS 135.060(1).

Amendment of Name

If a defendant charged by information or indictment alleges that defendant’s true name is different from that in the accusatory instrument, the court must direct that an entry
of defendant’s true name be made in the register. The case may then proceed against defendant by the name defendant gave and may also refer to the name by which defendant was charged. ORS 135.065(1).

b. **Striking of False Names**
   On defendant’s motion, the court must strike all names other than the true name of defendant from any accusatory instrument read or submitted to the jury. ORS 135.065(2).

4. **Presence of the Defendant**
   
   a. **Required When Charged with a Felony**
      When the crime charged is a *felony*, defendant must appear personally at arraignment. ORS 135.030(1).

      i. **Defendant May Be Required to Appear Via Simultaneous Transmission**
         The court may require a defendant to appear at the arraignment by *simultaneous electronic transmission* as provided in 2005 Or Laws, ch. 566, § 4 (effective July 20, 2005) without the agreement of the State or defendant if the type of simultaneous electronic transmission available allows the defendant to observe the court and the court to observe the defendant. 2005 Or Laws, ch. 566, § 5(3) (effective July 20, 2005). See also UTCR 4.080 (adopted by Chief Justice Order No. 05-026; effective July 20, 2005) (providing for simultaneous electronic transmission via telephone, television, video conference, and internet).

   b. **Not Required For Misdemeanor Charge**
      When the crime charged is a misdemeanor, counsel may appear at the arraignment for defendant. ORS 135.030(2).

5. **Pretrial Motions**
   Generally, the defendant is required to demurrer to the accusatory instrument at the arraignment unless “such other time” is allowed to the defendant for that purpose. ORS 135.610(1). See *State v. Tucker*, 252 Or 597, 600 (1969) (construing “such other time” to provide the trial court with discretion to allow a demurrer at times other than arraignment). See *State v. Wimber*, 315 Or 103, 109-12 (1992) (trial court properly allowed defendant to demurrer at the beginning of trial and to “renew” the demurrer at the end of trial).

6. **Drug-Dependency Evaluation**
   At the time of arraignment, the defendant must be informed of the right to a drug-dependent evaluation as described in ORS 430.455. ORS 430.470(2).

7. **DUII Defendant**
   The court must inform a DUII defendant at arraignment that a *diversion agreement* may be available if the defendant meets certain criteria in ORS 813.215. ORS 813.200(1). See Chapter 18, II.N. “Diversion Agreement Available to DUII Defendants.”

C. **Availability of Testing for Communicable Diseases**
   At the time of appearance before a circuit court on a criminal charge in which it appears from the nature of the charge that the transmission of body fluids may have occurred, the judge must inform the defendant and notify the alleged victim (or victim’s parent or guardian) of the availability of testing for HIV and other communicable diseases. The court must also inform the defendant and victim (or victim’s parent or guardian) of the availability of counseling. ORS 135.139(2). In the absence of the defendant’s consent to submit to a test, the district attorney may file a petition to require the accused to submit to testing. ORS 135.139(1).

   Although ORS 135.139 requires the court to inform every person “arrested” and charged with a crime, the court should give the same information to a defendant who appears on a citation charging such an offense (e.g., Assault IV involving a bite that breaks the skin, or Sex Abuse III).

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**VI. PRETRIAL RELEASE**

A. **Federal Constitutional Standard**

B. **Victim’s Rights Under the Oregon Constitution**
   Article I, § 43(1) of the Oregon Constitution provides:

   To ensure that a fair balance is struck between the rights of crime victims and the rights of criminal defendants in the course and conduct of criminal proceedings, the following rights are hereby granted to victims in all prosecutions for crimes:
(b) The right to have decisions by the court regarding the pretrial release of a criminal defendant based upon the principle of reasonable protection of the victim and the public, as well as the likelihood that the criminal defendant will appear for trial. Murder, aggravated murder and treason shall not be bailable when the proof is evident or the presumption strong that the person is guilty. Other violent felonies shall not be bailable when a court has determined there is probable cause to believe the criminal defendant committed the crime, and the court finds, by clear and convincing evidence, that there is danger of physical injury or sexual victimization to the victim or members of the public by the criminal defendant while on release.

Section 43 “supersedes any conflicting section of this Constitution;” namely, § 14 (“Offences (sic), except murder, and treason, shall be bailable by sufficient sureties.”) and § 16 (“Excessive bail shall not be required, nor excessive fines imposed.”). Or Const Art I, § 43(2). See Wayne T. Westling, Oregon Criminal Practice § 14.09, 67 (Michie Supp. 2000).

1. Murder, Aggravated Murder, and Treason

a. When the Proof Is Evident or the Presumption Strong
When the defendant is charged with murder, aggravated murder or treason, release must be denied when the proof is evident or the presumption strong that the person is guilty. ORS 135.240(2)(a); Or Const Art I, § 43(1)(b).

i. The Indictment Is Not Proof Per Se
“We conclude that the indictment alone is not the proof contemplated by our constitution and does not establish that the proof or presumption of guilt of murder is evident or strong in the applications for bail in the instant case. Other competent evidence to prove the commission of murder must be offered by the state before the accused may be denied the admission to bail. . . . Bail should be denied when the circumstances disclosed indicate ‘a fair likelihood’ that the defendant is in danger of being convicted of murder or treason.” State ex rel. Connall v. Roth, 258 Or 428, 435 (1971).

ii. Hearing to Determine Proof
The magistrate may conduct whatever hearing is necessary to determine whether the proof is evident
or the presumption strong that the defendant is guilty. ORS 135.240(3).

b. **When the Proof is Not Evident Nor the Presumption Strong**

When the proof is not evident nor the presumption strong that the defendant is guilty of murder or aggravated murder, the court must determine the issue of release as provided in ORS 135.240(5). ORS 135.240(2)(b); *State v. Sutherland*, 329 Or 359, 368 (1999) (holding that ORS 135.240(4) violated Art I, § 14 of the Oregon Constitution); ORS 135.240(5) (providing the alternative release scheme if subsection (4) is found unconstitutional).

2. **Other Violent Felonies**

Release must be denied to a defendant charged with a violent felony (other than murder, aggravated murder, or treason) when the court has probable cause to believe the defendant committed the crime, and finds, by *clear and convincing evidence*, that there is danger of physical injury or sexual victimization to the victim or members of the public if the defendant is released. Or Const Art I, § 43(1)(b).

A **violent felony** is “a felony in which there was actual or threatened serious physical injury to a victim or a felony sexual offense.” Or Const Art I, § 43(3)(b).

3. **Measure 11 Offenses**

a. **Security Release Required**

Given the court’s conclusion in *State v. Sutherland*, 329 Or 359, 368 (1999) that ORS 135.240(4) violated Article I, § 14 of the Oregon Constitution, ORS 135.240(5), the alternative provision, requires the court to use a security release and to 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 (Measure 11 offenses). The court may also impose supervisory conditions deemed necessary to protect the victim and the community. Additionally, the *Sutherland* court held that “Measure 11 defendants may challenge the constitutionality of the minimum security release amount of $50,000 in ORS 135.240(5) on an as-applied basis and may request a hearing before the trial court for the purpose of challenging the propriety of imposing that or a higher amount.” 329 Or at 368.

*See generally Wayne T. Westling, Oregon Criminal Practice § 14.09, 66-67 (Michie Supp. 2000) (discussing the Measure 11 amendments to ORS 135.240, the *Sutherland* decision, and Art I, § 43 of the Oregon Constitution).*
b. **Defendant Entitled to a Hearing on Whether Measure 11 Minimum Is “Excessive”**

A Measure 11 defendant is entitled to “a hearing or individualized consideration on the amount, if any, that must be posted as security. . . . Therefore, the $50,000 specified by [ORS 135.240(5)] as the minimum amount that ‘shall’ be imposed must be read as the minimum amount that is to be imposed initially, on arrest. Thereafter, defendant may request a hearing for the purposes of establishing that, as to him or her, requiring that or a higher amount as security is constitutionally impermissible. If defendant requests such a hearing, he or she must be given the opportunity to demonstrate that, as to that defendant, the statutory amount is ‘excessive’ and, if that demonstration is made, to have the court set some lesser amount that is not excessive.” *State v. Sutherland*, 329 Or 359, 367 (1999).

c. **Violation of Release Conditions**

When a Measure 11 defendant’s violation of a release condition constitutes a new criminal offense, the court *must* order the defendant back into custody to be held pending trial and *must* set a security amount of not less than $250,000. ORS 135.240(5)(a).

When a Measure 11 defendant’s violation of a release condition does not constitute a new criminal offense, the court *may* order the defendant back into custody to be held pending trial and *may* a security amount of not less than $250,000. ORS 135.240(5)(b).

C. **Traffic Offenses**


D. **Release Decision**

1. **Right to Security Release**

A person in custody has the immediate right to security release or to be taken before a magistrate without undue delay. If the person was not released before arraignment, the magistrate must advise the person of the right to a security release. ORS 135.245(1).

a. **Exceptions**

Exceptions to the right to release include murder, aggravated murder or treason, ORS 135.240(2), and violent
felonies, Or Const Art I, § 43. See supra, VI.B.1 “Murder, Aggravated Murder, and Treason.”

2. **48 Hours After Arraignment**

   If a person in custody does not request a security release at arraignment, the magistrate must make a release decision within **48 hours** after the arraignment. ORS 135.245(2).

3. **Objective**

   If the magistrate decides to release a defendant or to set security, the magistrate is required to establish the form of release that imposes the least onerous condition reasonably likely to **ensure the safety of the public and the victim and the defendant’s later appearance**; and, in domestic violence cases, ensure the person does not engage in domestic violence while on release. ORS 135.245(3). See also ORS 135.230(10) (defining release decision).

4. **Release Criteria**

   ORS 135.230(7) provides the following **primary** release criteria:

   1. Reasonable protection of the victim or public;
   2. Nature of the current charge;
   3. Defendant’s prior criminal record, if any, and, if the defendant previously has been released pending trial, whether the defendant appeared as required;
   4. Any facts indicating the possibility of violations of law if the defendant is released without regulations; and
   5. Any other facts tending to indicate that the defendant is likely to appear.

   ORS 135.230(11) provides the following **secondary** release criteria:

   1. Defendant’s employment status and history and financial condition;
   2. Nature and extent of defendant’s family relationships;
   3. Defendant’s past and present residences;
   4. Names of persons who agree to assist defendant in attending court at the proper time; and
   5. Any facts tending to indicate that defendant has strong ties to the community.
5. **Release Hearing**
At the release hearing, the DA has the right to be heard on issues relevant to the release decision, and the *victim* has the right, upon request, to be notified by the DA of the release hearing, and to appear personally at the hearing and reasonably express any views relevant to the issue of release. ORS 135.245(5)(a).

See ORS 135.230(6) (definition of personal recognizance).

6. **Forms of Release**

a. **Personal Recognizance**
A person in custody, who has the right to release, must be released upon personal recognizance unless consideration of the release criteria shows that such release is unwarranted. ORS 135.245(3).

If release of the person on personal recognizance is unwarranted, the magistrate must impose either conditional release or security release. ORS 135.245(4).

b. **Conditional Release**
As provided in ORS 135.260(1), conditional release may include one or more of the following conditions:

1. Release into the care of a qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court;

2. Reasonable regulations on the activities, movements, associations and residences of the defendant, including restriction of the defendant to the defendant’s own residence;

3. Release from custody during working hours; and

4. Any other reasonable restriction designed to assure defendant’s appearance.

i. **Domestic Violence Cases**
If the defendant is charged with a domestic violence offense, a conditional release must prohibit the defendant from contacting the victim, unless the condition is waived by the victim pursuant to ORS 135.250(2)(b). ORS 135.260(2).

See ORS 135.230(12) (definition of security release).

c. **Security Release**
If the defendant is not released on personal recognizance, granted conditional release, or fails to agree to the provisions of the conditional release, the magistrate must
set a security amount that will reasonable assure the defendant’s appearance. ORS 135.265(1).

i. Amount of Security

ii. Ten Percent Deposit
Defendant must deposit 10% of the set security amount, but not less than $25.00. Once discharged from the security agreement, *unless the court orders otherwise*, 85% of the deposit is to be returned to the defendant, and 15% retained by the court for costs. The amount retained for costs must not be less than $5.00 or more than $200.00. ORS 135.265(2).

A) Discretion to Withhold Security Deposit
As used in ORS 135.265(2), the phrase “unless the court orders otherwise” recognizes the authority of the court to withhold a portion of the security deposit for the payment of defendant’s obligations under the judgment, including when the security deposit is provided by a third party. *State v. Grant*, 44 Or App 671, 674 (1980). *See State v. Davis*, 116 Or App 607, 610 (1992) (recognizing court’s broad discretion to withhold all or some of defendant’s security deposit).

B) Security Deposit May Be Applied to an Unrelated Court-Ordered Obligation
The court’s authority under the phrase “unless the court orders otherwise” also allows the court to apply defendant’s security deposit to other unrelated court-ordered obligations. *State v. Baker*, 165 Or App 565, 570-72 (2000) (security deposit posted for manslaughter charge was properly subjected to defendant’s child support obligations and a writ of garnishment resulting from a civil judgment).

iii. Full Security Amount
Instead of the 10% deposit, defendant may deposit cash, stocks, bonds, or real or personal property owned by the defendant equal to the full security amount or sureties worth double the security amount. ORS 135.265(3).
7. Release Agreement

a. Required
   The defendant must not be released until a release agreement is filed. ORS 135.255(1).

b. General Conditions of Release Agreement
   ORS 135.250(1) provides that all release agreements must require the defendant to:
   1. Appear to answer the charge;
   2. Submit to the orders and process of the court;
   3. Remain in the state, unless the court grants leave; and
   4. Comply with other conditions the court may impose.

i. When Additional Conditions Can Be Imposed on a Security Release
   Under ORS 135.250(1)(d), a court may properly impose additional conditions on a security release that are reasonably related to providing assurance that defendant will appear at trial. Sexson v. Merten, 291 Or 441, 449-451 (1981). ORS 135.245(3) allows additional conditions “reasonably likely to ensure the safety of the public and the victim and the person’s later appearance.”

ii. Additional Condition in Domestic Violence Cases
   The defendant must not contact the victim of the violence unless the victim waives the condition. ORS 135.250(2).

c. Release Agreement Terminates Upon Entry of Judgment or “Discharge”
   In the absence of an appeal, a defendant’s obligation to appear under a release agreement terminates upon entry of judgment or discharge. ORS 135.250(1)(a). “Discharge” occurs when a defendant is discharged from custody upon dismissal of the case. State v. Tally, 184 Or App 715, 720 (2002). See ORS 135.753(1).

State v. Tally, 184 Or App 715, 724 (2002): Two pretrial release agreements, executed by defendant while awaiting trial on a disorderly conduct charge, were no longer in effect at the time defendant failed to appear for a probation revocation hearing because defendant was convicted and did not appeal. “[I]n the absence of an appeal, a pretrial
‘release agreement,’ as provided in ORS 135.230, properly can encompass and apply only to the time period before a judgment of conviction is entered.” Id.

8. Remedies for Failure to Appear

a. Issuance of a Warrant and Arrest
If defendant fails to comply with any condition of a release agreement or personal recognizance, the court may issue a warrant for defendant’s arrest. ORS 135.280(1).

b. Forfeiture of Security Amount
The court must order the entire security amount forfeited and give notice of such to defendant and defendant’s surety, allowing them 30 days to appear. If defendant fails to appear within 30 days, the court must enter judgment for the State for the entire security amount and the costs of the proceedings. ORS 135.280(3).

i. Security Applied to Child Support Obligations
The court may order a portion of the forfeited security amount be applied to defendant’s unsatisfied child support obligations. ORS 135.280(4).

ii. Remission or Modification of the Forfeiture
At the request of the defendant or surety, and upon good cause shown, the court may remit the forfeiture or modify or set aside its judgment, except that amount ordered to be applied to child support. ORS 135.280(3). A remission of a forfeiture is reviewable only for abuse of discretion. State v. Drake, 6 Or App 282, 286 (1971).

9. Punishment By Contempt For Breaching Release Agreement
A supervisor of a defendant on conditional release may be held in contempt if the supervisor: (1) knowingly aids defendant in breaching the release agreement; or (2) knowingly fails to report the defendant’s breach. ORS 135.290(1).

A defendant who knowingly breaches a conditional release agreement may be held in contempt. ORS 135.290(2).

10. Modification of Release Decision
If circumstances concerning the release change, the court may modify a previous release agreement or the security release on its own motion or upon request by the district attorney or defendant. ORS 135.285(1).
11. Release Pending Appeal From a Judgment of Conviction
Following a conviction, a municipal or justice court must deny, increase, reduce, or order the original release agreement and security (if applicable) to stand pending appeal; a circuit court has discretion regarding release upon appeal, except in murder and treason cases. ORS 135.285(2).

State v. Wimber, 108 Or App 1, 4-5 (1991): The authority and responsibility for deciding whether a defendant should be released pending appeal rests with the trial court.

State ex rel. O’Neal v. Pearce, 78 Or App 317, 318 (1986): A convicted defendant, who was released on personal recognizance before trial, was not entitled to an absolute right of release pending appeal. See Priest v. Pearce, 314 Or 411, 414-15 (1992) (holding that there is no absolute statutory right to release pending appeal).

E. Scheduling of Trial: The 60 Day Rule

1. Release of Defendant
The court must release defendant on personal recognizance, in the custody of a third party, or on conditional or security release as provided in ORS 135.230 to 135.290 if trial is not commenced within 60 days after the time of arrest, unless the trial is continued with the express consent of the defendant or custody is extended under ORS 136.295. ORS 136.290(1)-(2); Price v. Zarbano, 265 Or 126, 129 (1973) (ORS 136.290 clearly and unambiguously provides for defendant’s release if trial is not commenced within 60 days of arrest). See State v. Foster, 299 Or 90, 95-97 (1985) (discussing Zarbano in light of the 1973 amendments to ORS 136.290).

2. Extension of the 60-Day period
The court may extend custody and postpone the date of trial for not more than 60 additional days if a victim or witness to the crime is unable to testify within the original 60-day period because of injuries, or upon a showing of good cause as defined in ORS 136.295(b)(A)-(H). ORS 136.295(4)(a).

a. 180 days is the Maximum
A second extension of not more than 60 days may be granted for the same reasons, but in no event shall the defendant be in custody before trial for more than a total of 180 days. ORS 136.295(4)(a).
Good Cause Situations
ORS 136.295(b)(A)-(H) provides the following good cause situations for which the court may grant an extension of the 60-day period:

1. The victim is unable to attend trial and the court failed to comply with ORS 136.145, directing the court to set trial and hearing dates that are convenient for the victim when the victim’s presence is required. ORS 136.295(b)(A).

2. The victim or an essential witness for either party is unable to testify at trial. ORS 136.295(b)(B).

3. The defendant’s attorney cannot reasonably be expected to try the case, has recently been appointed and cannot be ready, or is unable to try the case because of conflicting schedules. ORS 136.295(b)(C)-(E). Note: only the defendant or defense counsel, or the court on its own motion, may request this extension. ORS 136.295(4)(a).

4. Necessary scientific evidence cannot be completed. ORS 136.295(b)(F).

5. The defendant has filed notice to rely upon an insanity defense. ORS 136.295(b)(G).

6. The defendant has filed notice of an affirmative defense within the last 20 days of the 60-day period. ORS 136.295(b)(H).

3. Computing the 60 Days
The 60-day period begins to run the next day following the day of defendant’s arrest and, except for the last day in the period, includes intermediate Saturdays, Sundays, and legal holidays. ORS 174.120.

a. Time Periods Not to Be Included Under the 60-Day Rule
The following time periods are not to be included in computing the 60 days:

1. Any period following defendant’s arrest in which the defendant is not in custody. ORS 136.295(5).

2. Any reasonable delay to examine the defendant’s mental condition or competency to stand trial. ORS 136.295(3).

3. Any reasonable delay resulting from motions or appeals filed by the defendant. ORS 136.295(3).
4. **Exceptions to the 60-Day Rule**

The 60-day rule does not apply to persons charged with **murder**, **aggravated murder**, or **treason** when the proof is evident or the presumption strong that the person is guilty. ORS 136.295(1) (making the 60-day rule inapplicable to non-releasable offenses under ORS 135.240). The 60-day rule **never** applies to persons charged with **conspiracy to commit murder**, or charged with **attempted murder**, or to **prisoners serving sentences resulting from prior convictions**. ORS 136.295(1). *See Collins v. Foster*, 299 Or 90, 94 (1985) (discussing the relationship between ORS 136.290, 136.295, and 135.240).
CHAPTER 1: PRETRIAL

APPENDIX A: MODEL SCRIPT FOR WAIVER OF COUNSEL

MODEL SCRIPT FOR WAIVER OF COUNSEL

The following script is recommended as a tool to develop a conversation regarding the pitfalls of self-representation with a defendant who has indicated a desire to proceed pro se—it is not intended to replace a written waiver of counsel. The script does not incorporate the advice of rights pertaining to the acceptance of a guilty or no contest plea, or questions to determine whether the defendant understands the nature of the charge as required under ORS 135.385, because ORS 135.040 requires the defendant’s right to counsel to be addressed first if the defendant appears for arraignment without counsel. Please refer to the script entitled “Model Script for Accepting a Guilty or No Contest Plea.”

The contents of the script should be tailored to fit the unique circumstances of each individual case.

Creating A Colloquy on the Record:

You have indicated your desire to give up your right to an attorney in this matter and represent yourself. You have that right. But before we proceed I want to discuss with you the risks of going forward without an attorney.

First, I want to know if you are under the influence of alcohol or drugs? Are you suffering from any injury, illness, or disability of any kind that could affect your ability to think or to make a rational decision?

» [If “Yes.”]: Note: If the defendant answers affirmatively to either of the questions above, the waiver of counsel may not satisfy the requirements of State v. Meyrick, 313 Or 125 (1992).

» [If “No.”]: Please listen to me carefully as I explain your right to an attorney and the risk of giving up that right.

You have a constitutional right to the assistance of an attorney. If you can’t afford your own attorney, this court may provide one for you if you meet certain standards established by the Public Defense Services Commission. To determine if you meet these standards, you will be required to provide a financial statement of your assets, debts, income, and
other information. Do you understand that you have the right to an attorney, including one provided by this court if you qualify?

» [If “No.”]: Further explain constitutional right to counsel, including appointed counsel.

» Do you have enough money to hire an attorney yourself?

◊ [If “Yes.”]: Do you plan to hire an attorney for this case?

◊ [If “No.”]: Do you want to fill out the paperwork to find out if you are financially eligible for a court-appointed attorney?

If the defendant insists on proceeding pro se, continue with the following advice:

The consequences of the charge(s) against you may include:

» Explain to the defendant the potential consequences related to the charge(s), including the following:

◊ Statutory maximums;

◊ Maximum possible sentence from consecutive sentences;

◊ Mandatory minimums; and

◊ Collateral consequences.

By choosing to proceed without an attorney and represent yourself, you are at a serious disadvantage. Here’s why:

- You lack legal training. For example, you may not realize that you have one or more defenses to the crimes you are charged with.

- You lack experience with the rules and procedures that this court will apply to you even though you are not a lawyer.

- The State will be represented by an attorney and will not have any of the disadvantages you will have without an attorney—in a sense, the State will have an advantage over you in this case.

By choosing to proceed without an attorney, you are giving up the following benefits:

- An attorney can review the facts of your case and discuss them with you to determine what defenses you may have to the charges against you. An attorney can also identify any problems with the State’s case against you.
• An attorney can advise you on how to plead to the charges against you, and, if appropriate, assist you in entering a **plea agreement**.

• An attorney can advise you on whether you qualify for **release** from jail before trial.

• If you choose to plead not guilty, an attorney would prepare your case for trial, including gathering evidence and interviewing and subpoenaing **witnesses**, preparing to cross-examine the State’s witnesses, and filing pretrial motions.

• An attorney knows the rules and procedures involving **discovery**—that is, how to get information from the district attorney that is important to your case, such as police reports and statements from witnesses.

• An attorney knows how to make sure any **defenses** available to you are investigated and properly raised—some defenses must be raised in a motion before trial, others must be raised at trial.

• An attorney understands the **rules of evidence** and can assist you in questioning witnesses and presenting other evidence that is necessary for your defense, as well as prevent the State from using improper evidence. For example, an attorney will understand how to question the legality of your arrest or raise search and seizure issues.

• An attorney can explain what **sentences** can be imposed if you are convicted of any or all of the charged crimes.

• An attorney can explain other **possible consequences** of a conviction.

• An attorney can help you decide whether you should seek a **jury trial** on the criminal charges or waive your right to a jury and have a judge decide your case.

• An attorney can help you enforce any rights you may have on **sentencing issues** and decide whether to ask for a jury on those issues.

• If you decide to have a jury trial, an attorney can help you select jurors, exercise appropriate challenges to potential **jurors**, and prepare jury instructions.

• An attorney can make legal arguments to the court during trial and present **opening and closing statements** to the jury.

If you choose to proceed without an attorney, you will not be able to rely on the judge, court staff, your interpreter, or the district attorney for legal advice or any assistance in defending yourself at trial.

In light of this information, do you understand that there are disadvantages to representing yourself?
» [If “Yes.”]: Explain to me in your own words some of the disadvantages you will face if you do not have an attorney.

» [If “No.”]: Why do you think you would not be at a disadvantage without an attorney?

Do you have any questions about the information I just shared with you?

Has anyone encouraged you to go forward without an attorney?

Has anyone threatened you with any form of punishment if you choose to have an attorney?

Have you previously been charged with any crimes?

» [If “Yes.”]: Were you represented by an attorney in those proceedings? Did you waive your right to an attorney in any of those proceedings?

Do you still wish to proceed without an attorney and represent yourself?

» [If “Yes.”]: Explain to me in your own words why you do not want an attorney in this case.

Findings:

If satisfied with defendant’s understanding of the information, find on the record that the defendant has been informed of the dangers and disadvantages of self-representation as well as the benefits an attorney would provide and knowingly, voluntarily, and intelligently waived his or her right to counsel.

Ask the defendant to sign a written waiver of counsel.

See generally Or Const Art I, § 11; ORS 135.040; ORS 135.045; State v. Meyrick, 313 Or 125, 132 (1992) (a valid waiver of counsel must be an “intentional relinquishment or abandonment of a known right” that is “voluntarily and intelligently made” by the defendant); State v. Probst, 192 Or App 337, 349-350 (2004) (concluding that a defendant’s understanding of the risks of self-representation requisite to a valid waiver of counsel can be established by either the totality of the circumstances or a colloquy on the record) review allowed by 337 Or 669 (2004).
APPENDIX B: WAIVER OF COUNSEL FORM

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF __________________________

STATE OF OREGON, )
v. ) CASE NO. __________________________
 )
 )
 )
 )
 )
 )
 )
 )
 )
 )

I am the defendant in this court case, and my initials below indicate that I have read, understand, and affirm all of the following:

1. I understand that I have a CONSTITUTIONAL RIGHT to an ATTORNEY in this case. The court will appoint an attorney for me if I qualify. ______ (initials)

2. I am _______ years of age. I have completed _______ years of school. ______ (initials)

3. I understand that my choice to go forward in this case without an attorney puts me at a SERIOUS DISADVANTAGE because:
   • I lack legal training and experience and may not realize any DEFENSES available to me;
   • The rules and procedures of a trial will apply to me even though I am not a lawyer;
   • The State will be represented by an attorney and will have an advantage over me.
     ______ (initials)

4. I understand that by waiving my right to an attorney I am giving up the following BENEFITS:
   • An attorney can review the facts of my case to determine what defenses I have and identify problems with the State’s case against me;
   • An attorney can help me in my case. For example, an attorney can help me enter a plea to the charge(s), negotiate a plea agreement, and apply to get me released before trial;
   • An attorney knows how to gather evidence, file pretrial motions, call witnesses, and cross-examine the State’s witnesses;
   • An attorney understands the rules of evidence and knows how to question witnesses and present evidence that is necessary for my defense;
   • An attorney knows when and how to object to the use of improper evidence;
   • An attorney can help me decide if I should have a jury trial or have the judge decide my case;
   • An attorney can help evaluate and challenge potential jurors;
   • An attorney knows how to make legal arguments to the court and present opening and closing statements to the jury;
   • An attorney can tell me what sentence may be imposed if I am found guilty;
   • An attorney can help present evidence and make arguments about sentencing issues;
Soy el acusado de la presente causa y mis iniciales, presentes a continuación, indican que leí, comprendo y afirmo todo lo siguiente:

1. Comprendo que tengo el DERECHO CONSTITUCIONAL de verme asesorado por un ABOGADO en la presente causa. De reunir los requisitos necesarios, el Juez designará un abogado para que me asesore. ______ (iniciales)

2. Tengo ______ años de edad. Completé ______ años de estudios. ______ (iniciales)

3. Comprendo que mi decisión de proceder sin abogado en esta causa me pone en GRAVE DESVENTAJA porque:
   • No tengo capacitación y experiencia jurídica y podría no presentar DEFENSAS a mi disposición;
   • Se aplicarán a mi causa las reglas y procedimientos de procesamiento judicial aunque no soy abogado;
   • El Estado se verá asesorado por un abogado y tendrá esa ventaja que no tendré.
      ______ (iniciales)

4. Comprendo que al renunciar a mi derecho a tener abogado renuncio a los siguientes BENEFICIOS:
   • Un abogado puede estudiar los hechos de mi caso para determinar las defensas que tengo e identificar los problemas que pueda tener el caso que el Estado presenta en mi contra;
   • Un abogado puede ayudarme con mi caso. Por ejemplo, un abogado puede ayudarme a asentar una declaración al (a los) cargo(s), negociar un acuerdo declaratorio, y solicitar mi libertad antes de que se lleve acabo el juicio oral;
   • Un abogado sabe cómo recopilar medios de prueba, presentar pedimentos preprocesales, citar testigos e interrogar a los testigos de cargo;
   • Un abogado conoce las reglas que rigen la presentación de medios de prueba y sabe cómo interrogar a testigos y presentar medios de prueba necesarios para mi defensa;
   • Un abogado sabe cuándo y cómo oponerse a la presentación de medios de prueba improcedentes;
   • Un abogado me ayudaría a decidir si debería tener juicio oral con jurados o hacer que el Juez decida la causa;
   • Un abogado puede evaluar e impugnar a los posibles jurados;
   • Un abogado sabe presentar argumentos de derecho al Juez y discursos de apertura y de cierre a los jurados;
   • Un abogado puede decimne la condena que encaro de ser fallado culpable;
   • Un abogado me ayudaría a presentar medios de prueba y alegatos relativos a cuestiones condenatorias;
• An attorney knows how to get information from the prosecutor that is important to my case, such as police reports and statements from witnesses.  
   ______ (initials)  

5. I understand that the judge, the district attorney, court staff, and my interpreter cannot give me legal advice or help me defend myself at trial. ______ (initials)  

6. I am not under the influence of alcohol or drugs. I am not suffering from any injury, illness, or disability, or taking medications that could affect my ability to make decisions. ______ (initials)  

7. No one has made any threats or promises to make me waive my right to an attorney. ______ (initials)  

8. I acknowledge that I have been advised of, and that I understand, the nature of the charges against me and the full extent of the punishment that may be imposed if I am convicted on those charges. I fully understand the disadvantages of representing myself, and I am aware of the benefits an attorney would provide as described above. However, I voluntarily WAIVE my right to an attorney in this case and request that the court allow me to represent myself. ______ (initials)  

9. ☐ I can read, speak, and understand English. ______ (initials)  
   ☐ This form was read to me. ______ (initials)  
   Read by: Print Name ___________________ Signature ___________________ Date ______  
   ☐ This form was sight translated to me. ______ (initials)  
   Translated by: Print Name ___________________ Signature ___________________ Date ______

Defendant’s Signature ___________________ Print Name ___________________ Date ________  
Address ___________________ City ___________________ State ___________________ Zip ___________________ Telephone ___________________  

FINDINGS  
The court makes the following findings regarding the defendant’s waiver of counsel and request to proceed pro se (without an attorney):  
☐ Defendant understands the information contained in this document.  
☐ The court has reviewed the elements of the crime(s) and possible maximum penalties with defendant.  
☐ Defendant has knowingly, voluntarily, and intelligently waived the right to counsel.  
☐ Defendant was advised of the right to obtain discovery.  
☐ Other finding: ____________________________________________________________

ORDER  
DEFENDANT’S WAIVER OF RIGHT TO COUNSEL IS HEREBY ACCEPTED.

Date ___________ Circuit Court Judge ___________________ Print, Type or Stamp Name of Judge ___________________  

WAIVER OF COUNSEL (8/12/05)  
OJIN Code: WVCS
Un abogado sabe obtener información del procurador que es importante en mi caso, tal como los informes de la policía y las declaraciones de testigos.

______ (iniciales)

5. Comprendo que ni el Juez, ni el Fiscal de Distrito, ni el personal de sala ni mi intérprete pueden ni asesorarme ni ayudarme a defenderme durante el juicio oral. _______ (iniciales)

6. No estoy bajo la influencia ni del alcohol ni de ninguna droga. No sufrí de ninguna lesión, enfermedad o discapacitación y no estoy tomando medicinas que afecten mi capacidad de tomar decisiones. _______ (iniciales)

7. Nadie me amenazó ni me prometió nada para hacerme renunciar a mi derecho de tener abogado. _______ (iniciales)

8. Acepto que se me informó de la índole de los cargos que encaro y que los entiendo, al igual que del alcance del castigo que se me podría llegar a imponer si se me fallara culpable de los cargos. Entiendo perfectamente las desventajas de asesorarme a mí mismo y conozco los beneficios de tener abogado, previamente descritos. No obstante, de mi propia voluntad, RENUNCIÓ a mi derecho de tener abogado que me asesore en esta causa y solicito que el Juez me permita asesorarme a mí mismo. _______ (iniciales)

9. ☐ Leo, hablo y entiendo inglés. _______ (iniciales)
☐ Me leyeron el formulario. _______ (iniciales)
   Lo leyó: Nombre y apellido en letra de imprenta ________________ Firma ______________________________
   Fecha __________
☐ Me hicieron traducción a la vista del formulario. _______ (iniciales)
   Lo tradujo: Nombre y apellido en letra de imprenta ________________ Firma ______________________________
   Fecha __________

Firma del acusado
Nombre en letra de imprenta
Fecha

Dirección Ciudad Estado Código postal Teléfono

DETERMINACIONES

Debido a la renuncia al asesoramiento jurídico del acusado y su pedido de proceder pro se (sin abogado), el Juez determina lo siguiente:

☐ El acusado entiende la información presentada en este documento.
☐ El Juez repasó los elementos que constituyen el (los) delito (delitos) y las penas máximas posibles con el acusado.
☐ El acusado renunció a su derecho consciente e intencionalmente de tener asesoramiento jurídico.
☐ Se informó al acusado de su derecho a la divulgación de medios de prueba.
☐ Otras determinaciones: ________________________________

ORDEN

POR LA PRESENTE SE ACEPTA LA RENUNCIA DEL ACUSADO AL ASESOR JURÍDICO.

Fecha ________________________________ Juez del Tribunal de Circuito ________________________________ Nombre del Juez impreso, a máquina o sello del mismo ________________________________
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Purpose
The Oregon Judges Criminal Benchbook is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 2: PRETRIAL MOTIONS

I. FITNESS TO PROCEED

A. Motion by Defense Counsel
   Although the court has discretion on whether to order a mental status examination of the defendant, it nevertheless has a duty to determine if the defendant is fit to proceed upon defense counsel’s filing of a motion for determination of fitness to proceed. *State v. Gilmore*, 102 Or App 102, 104-05 (1990).

B. Inquiry by Court
   If the court has reason to doubt defendant’s fitness to proceed by reason of *incapacity*, the court may order an examination of defendant as provided in ORS 161.365. ORS 161.360(1). *See Drope v. Missouri*, 420 US 162, 180-82 (1975) (discussing relevant factors in determining whether further inquiry into defendant’s fitness to proceed is required).

1. Timing
   The court may inquire into the defendant’s fitness to proceed at any time during the pendency of the case, including during trial. ORS 161.360(1); *See State v. Gilmore*, 102 Or App 102, 105 (1990).

2. Factors Indicating Incapacity
   Defendant is considered unfit to proceed (incapacitated) if defendant is unable: (1) to understand the nature of the proceedings; (2) to assist and cooperate with counsel; or (3) to participate in the defense. ORS 161.360(2).

3. Fitness to Proceed Is Determined By the Court
   When the defendant’s fitness to proceed is in question, the issue must be resolved by the court. ORS 161.370(1).

C. Procedure for Determining Fitness to Proceed

1. Appointment of Expert
   Whenever the court doubts the defendant’s fitness to proceed, it may call any witness for assistance in making its determination or appoint a psychiatrist or psychologist to examine the defendant. ORS 161.365(1).
2. **Commitment for Examination to Determine Fitness**

If the court determines that the assistance of a psychiatrist or psychologist would be helpful, it may order defendant committed for an examination period not to exceed 30 days to:

a. A state mental hospital designated by the Department of Human Services if the defendant is at least 18 years of age; or

b. A secure intensive community inpatient facility designated by DHS if the defendant is under 18 years of age.

ORS 161.365(2) as amended by 2005 Or Laws, ch. 685, § 5 (effective Aug. 2, 2005). See also *State v. King*, 84 Or App 165, 173-74 (1987) (additional examination ordered by court at request of prosecutor finding defendant competent to proceed was proper).

3. **Examination Report**

The report of each examination must include:

a. A description of the nature of the examination;

b. A statement of defendant’s mental condition; and

c. If defendant suffers from a mental disease or defect, an opinion as to whether defendant is incapacitated within the meaning of ORS 161.360.

ORS 161.365(2).

a. **Findings of Insanity in Report**

Except when both the defendant and the court request to the contrary, the report may not contain any findings as to whether defendant, as a result of mental disease or defect, qualifies for a defense based on insanity or was capable of having the requisite intent to commit the crime. ORS 161.365(3). See ORS 161.295-300.

b. **Filing of the Examination Report**

Three copies of the report of the examination must be filed with the clerk of the court who must deliver copies to the district attorney and defense counsel. ORS 161.365(5).

4. **Report Is Sufficient if Uncontested**

If neither party contests the finding of a report filed under ORS 161.365, the court may determine the issue based on the report. If contested, the court must hold a hearing. ORS 161.370(1).
a. Contesting the Report
The party who contests the finding of the report has the right to summon and cross-examine the person who submitted the report and to offer evidence on the issue. Both parties may introduce other evidence regarding defendant’s fitness to proceed. ORS 161.370(1).

5. Procedure if Defendant Is Unfit to Proceed

a. Suspension of Preliminary Hearing for Unfitness
If the court determines defendant is not fit to proceed, the court must suspend the preliminary hearing and:

1. Commit the defendant to the custody of a state mental hospital designated by the Department of Human Services if the defendant is at least 18 years of age;

2. Commit the defendant to the custody of the director of a secure intensive community inpatient facility designated by DHS if the defendant is under 18 years of age; or

3. Release the defendant on supervision until the court determines defendant is fit to proceed.


i. Release Versus Commitment
Release is appropriate when the court determines that care other than commitment for incapacity would better serve defendant and the community. The court may impose appropriate release conditions, including regular reporting to the Department of Human Services or a mental health program for monitoring of the defendant’s capacity to stand trial. ORS 161.370(2).

ii. Evaluating the Defendant’s Future Capacity
Within 60 days of the defendant’s delivery into custody, the superintendent of the state mental hospital or the director of the secure intensive community inpatient facility must evaluate the defendant for the purpose of determining whether there is a substantial probability that, in the foreseeable future, the defendant will have the capacity to stand trial. ORS 161.370(3) as amended by 2005 Or Laws, ch. 685, § 6 (effective Aug. 2, 2005).
iii. **Duty to Notify the Court**

The superintendent of the state mental hospital or director of the inpatient facility must immediately notify the committing court if the defendant gains or regains the capacity to stand trial, or will never have the capacity to stand trial. ORS 161.370(4)(a) as amended by 2005 Or Laws, ch. 685, § 6 (effective Aug. 2, 2005).

Within 90 days of the defendant’s delivery into custody, the superintendent or director must notify the committing court that:

a. The defendant has the present capacity to stand trial;

b. There is no substantial probability that, in the foreseeable future, the defendant will gain or regain capacity; or

c. If there is a substantial probability that, in the foreseeable future, the defendant will gain or regain capacity, the estimate of time, with appropriate treatment, in which the defendant is expected to gain or regain capacity.


iv. **Length of Commitment or Release**

Commitment or release lasts so long as defendant remains unfit to proceed, but no longer than the shorter of:

- 3 years; or

- A period of time equal to the maximum sentence the court could have imposed if defendant had been convicted.

ORS 161.370(6).

b. **Determination of Capacity in the Foreseeable Future**

When the court receives notice from the superintendent of a state mental hospital or director of the inpatient facility of the defendant’s progress or impending discharge, the court must determine (after a hearing if requested) whether the defendant presently has the capacity to stand trial. ORS 161.370(8) as amended by 2005 Or Laws, ch. 685, § 6 (effective Aug. 2, 2005). If the court determines that the defendant lacks the capacity to stand trial, the court
must further determine (after a hearing if requested) the probability that defendant will gain or regain capacity in the foreseeable future. If there is no substantial probability that defendant will gain or regain capacity in the foreseeable future, the court must dismiss, without prejudice, all charges against the defendant, and order the defendant’s discharge, or initiate commitment proceedings under ORS 426.070 or ORS 427.235 to 427.290. ORS 161.370(9).

c. **Grounds For Objection During Period of Unfitness**
The fact that defendant is unfit to proceed does not preclude the defendant’s attorney from objecting on grounds of insufficient allegations, double jeopardy, statute of limitations, or other grounds that the court, in its discretion, believes can be determined before trial. ORS 161.370(12).

6. **Procedure if Fitness to Proceed Is Regained**

a. **Resuming the Criminal Proceeding**
The court must resume the criminal proceeding if the defendant regains fitness during the period of commitment or supervision; unless, in the court’s view, so much time has elapsed that it would be unjust to resume the proceeding, in which case either party may move for dismissal and the court may discharge the defendant or initiate commitment proceedings under ORS 426.070 to 426.170 or ORS 427.235 to 427.290. ORS 161.370(2).

b. **Credit For Time Committed**
If the defendant regains fitness, the term of the defendant’s sentence if convicted must be reduced by the amount of time the defendant was committed. ORS 161.370(11).

D. **Involuntary Administration of Antipsychotic Medication**

1. **Defendant’s Liberty Interest**

2. **State’s Interests**

a. **Harper: Inmate Safety Is a Legitimate and Important Interest**
“[T]he Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is..."
dangerous to himself or others and the treatment is in the inmate’s medical interest.” *Washington v. Harper*, 494 US 210, 227 (1990). “There can little doubt as to both the legitimacy and the importance [of the interest].” *Id.* at 225.

b. **Interest in Defendant’s Competence to Stand Trial**

If the State cannot obtain an adjudication of the defendant’s guilt or innocence “by using less intrusive means,” then forcible administration of antipsychotic medication in order to render the defendant competent to stand trial is justified and may override the defendant’s liberty interest. *Riggins v. Nevada*, 504 US 127, 135 (1992).

3. **Involuntary Medication For Trial Competence Purposes Is Permissible in Rare Instances**

Based on *Harper* and *Riggins*, the Court held in *Sell v. U.S.*, 539 US 166, 179 (2003), that “the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.” Although “[t]his standard will permit involuntary administration of drugs solely for trial competence purposes in certain instances[.] . . . those instances may be rare.” *Id.* at 180.

a. **The Court’s First Inquiry: Has the State Sought Involuntary Medication Under Harper?**

If the court is asked to approve involuntary administration of medication for purposes of rendering the defendant competent to stand trial, first the court “should ordinarily determine whether the Government seeks, or has first sought, permission for forced administration of drugs on [the grounds stated in *Harper*]; and, if not, why not.” *Sell v. U.S.*, 539 US 166, 183 (2003). An inquiry into whether involuntary medication is permissible to ameliorate the individual’s dangerousness or to remove risks to the individual’s health if the medication is refused (*Harper*), “will help to inform expert opinion and judicial decisionmaking in respect to a request to administer drugs for trial competence purposes.” *Id.*

b. The Competence Inquiry Standard Announced in Sell
When the court must nonetheless answer the trial competence question, the Sell Court articulated the following standard for determining whether the State’s interest in rendering the defendant competent to stand trial is important enough to forcibly administer antipsychotic medication to the defendant. Before forcible administration can occur, the court must find that:

1. **Important governmental interests** are at stake (e.g., timely prosecution of a “serious crime” and assuring the defendant a fair trial);

2. Involuntary medication will **significantly further** those “concomitant” interests (i.e., the medication must be “substantially likely” to render the defendant competent to stand trial, and “substantially unlikely” to produce side effects that will result in an unfair trial by interfering with the defendant’s ability to assist counsel);

3. Involuntary medication is **necessary** to further the State’s interests (i.e., there is no alternative, less intrusive treatment likely to achieve the same results—e.g., ordering the defendant to take the medication under the threat of contempt); and

4. Administration of the medication is **medically appropriate** (i.e., in the best interest of the defendant given his or her medical condition).


i. **Factors to Consider**
In deciding whether a drug is permissible to “restore competence,” the court should consider whether the drug tends to:

a. Sedate the defendant;

b. Interfere with communication with counsel;

c. Prevent rapid reaction to developments at trial; or

d. Diminish the ability to express emotions.

A) Factors Apply Only to Competence Inquiry
These factors are “not necessarily relevant when dangerousness is primarily at issue” because the Sell decision does not limit the inquiry under Harper. Sell v. U.S., 539 US 166, 185, 181-82 (2003). Sell applies when the court is asked to consider whether involuntary medication will further a “particular governmental interest, namely, the interest in rendering the defendant competent to stand trial.” Id. at 181.

II. OMNIBUS HEARING

A. When the Omnibus Hearing Is to Be Held
At any time after the filing of the accusatory instrument and before trial begins, the court upon motion of any party must, and upon its own motion may, order an omnibus hearing. ORS 135.037(1).

1. Time For Filing Pretrial Motions
Motions for pretrial rulings on matters subject to the omnibus hearing must be filed in writing not less than 21 days before trial or within 7 days after the arraignment, whichever is later, unless the court permits a different time for good cause shown. UTCR 4.010.

B. Purpose
The purpose of the hearing is to rule on all pretrial motions and requests, including but not limited to the following:

1. Suppression of evidence;
2. Challenges to the prosecution’s identification procedures;
3. Challenges to voluntariness of admissions or confession; and
4. Challenges to the accusatory instrument.
ORS 135.037(2).

1. Court May Consider Any Matter That Will Facilitate Trial
In addition to ruling on pretrial motions, the court may resolve any matter that will avoid unnecessary proof or simplify the issues at trial, or that is appropriate under the circumstances to facilitate disposition of the proceeding. ORS 135.037(3).

2. Prosecution’s Specific Request For a Hearing Limits Its Scope
ORS 135.037 does not require the defendant to present evidence or argument on an issue that the State did not raise in

C. **Conclusion of the Hearing**
At the conclusion of the hearing and prior to trial, the court must file an order setting forth all rulings on the issues raised, and file a memorandum of other matters agreed upon at the hearing. ORS 135.037(4).

D. **Admissions Can't Be Used Against the Defendant**
Except in a prosecution for perjury or false swearing, or impeachment of the defendant, no admissions made by the defendant or defense counsel at the hearing can be used against the defendant, unless the admissions are reduced to writing and signed. ORS 135.037(4).

E. **Defense Counsel Is Required**
An omnibus hearing may not be used where the defendant is not represented by counsel. ORS 135.037(5).

F. **Oral Argument on Pretrial Motions**
The court must provide for oral argument on a motion if requested by either party in the caption of the motion or response. The first paragraph of the motion or response must include an estimate of the time required for argument and state whether official court reporting services are requested. UTCR 4.050(1). Either party may request that a motion not requiring testimony be heard by telecommunication. UTCR 4.050(2)-(3).

G. **The Law of the Case Is Not Established By Pretrial Rulings**
In counties where there are several trial judges, one of whom may hear and decide preliminary motions and demurrers while another conducts the trial, “... responsibility for the conduct of the trial according to the applicable law and rules of evidence is solely that of the trial judge, and though a prior ruling upon the law by [a different] judge may be and most often is persuasive, nevertheless, it is in no sense binding upon the trial court. It must be kept in mind that if error is committed upon the trial, that error is chargeable to the trial judge ...” *Highway Comm. v. Superbilt Mfg. Co.*, 204 Or 393, 403 (1955). See *State ex rel. Harmon v. Blanding*, 292 Or 752, 756 (1982) (citing *Superbilt* for the proposition that a court, acting through a different judge, may change its “institutional mind” on a prior ruling that it believes to be in error if neither party will be prejudiced).
III. CHALLENGES TO ACCUSATORY INSTRUMENT

A. Motion to Set Aside The Indictment

1. Purpose
A motion to set aside is directed at an indictment that is not properly found, indorsed, and presented according to statute. ORS 135.510.

2. Timeliness
The court must hear the motion at arraignment or within 10 days thereafter, unless the court allows additional time on a showing of good cause. ORS 135.520.

*State ex rel. Schrunk v. Bonebrake*, 318 Or 312, 317 (1994): “[A]lthough a trial judge may allow a motion to set aside an indictment to be heard more than 10 days after arraignment upon a showing of good cause, the trial judge cannot extend the time to hear the motion beyond commencement of trial.” *See Id.* at 320 (1994) (examining the text, context, and legislative history of ORS 135.520 which clearly establish motions to set aside be made pretrial).

3. Grounds
The grounds for a motion to set aside the indictment are exclusively enumerated in ORS 135.510. *State v. Stout*, 305 Or 34, 38 (1988) (introduction of inadmissible hearsay evidence before the grand jury was not a ground to set aside the indictment because it was not listed in ORS 135.510). *See Wayne T. Westling, Oregon Criminal Practice § 19.06, 250-51 (Michie 1996).* The statutory grounds include:

a. Insufficient number of grand jurors concurring in the indictment. ORS 135.510(1)(a); *see State v. Pratt*, 316 Or 561, 567 (1993) (defendant must make motion to set aside indictment due to inadequate grand jury “before trial”).

b. Failure to indorse the indictment as a “true bill” with the grand jury foreman’s signature. ORS 132.400; *see State v. Cox*, 12 Or App 215, 221 (1973) (construing ORS 132.400).

c. Failure to properly file the indictment. ORS 132.410.

d. Disclosing facts concerning the indictment while it was not subject to public inspection. ORS 132.420.

e. Failure to follow procedure when an indictment is found “not a true bill.” ORS 132.430.
f. Failure to name witnesses examined by the grand jury in the indictment. ORS 132.580.

4. Effect
If the motion to set aside is allowed, the court must discharge the defendant or, if the defendant is not in custody, discharge the release agreement and refund the security deposit as provided by law; unless the court allows the prosecutor to refile or resubmit the case. ORS 135.530(1).

a. 30 Days to Refile Or Resubmit the Case
The State must refile or resubmit the case within 30 days, ORS 135.530(2), during which time the defendant must remain in custody or, if not in custody, subject to the release agreement and security. ORS 135.540. If the case is not refilled or resubmitted within 30 days, the defendant must be released or, if not in custody, the release agreement discharged and the security deposit returned as provided by law. ORS 135.530(2).

i. Failure to Meet 30 Days No Bar to Future Prosecution
Failure to refile or resubmit the case within 30 days does not bar a future prosecution. State v. Harrison, 125 Or App 472, 476 (1993) (concluding that the similar 30-day time limit to resubmit following a demurrer in ORS 135.670(2) did not bar further prosecution but only required defendant be discharged from custody or the release agreement). See State v. Moline, 104 Or App 173, 178-79 (1990) (discussing ORS 135.670(2) and ORS 135.530(2)).

b. Future Prosecution For Same Crime Not Barred
An order to set aside the accusatory instrument does not bar a future prosecution for the same crime, except when dismissed on grounds of former jeopardy. ORS 135.560.

B. Motion to Dismiss on Grounds of Former Jeopardy

1. Purpose
A motion to dismiss on grounds of former jeopardy is used to dismiss the accusatory instrument if it appears, as a matter of law, that a former prosecution bars the prosecution for the offense charged. ORS 135.470(1).

2. Timeliness
The court must hear the motion at arraignment or within 10 days thereafter, unless the court allows additional time on a
showing of good cause. ORS 135.470(2) (timing of motion to dismiss is same as provided in ORS 135.520 for motion to set aside indictment).

3. **Effect**

   If the motion to dismiss on grounds of former jeopardy is allowed, the court must discharge the defendant or, if the defendant is not in custody, discharge the release agreement and refund the security deposit as provided by law. ORS 135.470(2) (effect of motion to dismiss is same as provided in ORS 135.530(1) for motion to set aside indictment).

   **a. Future Prosecution Barred By Former Jeopardy**

   An order to dismiss the accusatory instrument on grounds of former jeopardy is a bar to a future prosecution for the offense charged in the accusatory instrument. ORS 135.470(3); ORS 135.560. *See State v. Moline*, 104 Or App 173, 178 (1990) (the only type of dismissal that bars further prosecution for the same crime is one based on former jeopardy).

C. **Demurrer**

1. **Purpose**

   A demurrer is used to attack the sufficiency of the accusatory instrument by challenging defects that appear on its face. ORS 135.610; ORS 135.640.

   **a. In Writing, Signed, and Specific**

   A demurrer must be in writing, be signed by the defendant or defendant’s attorney, distinctly specify the ground of objection to the accusatory instrument, and be filed. ORS 135.610(2).

   *State v. Tucker*, 252 Or 597, 600-01 (1969): The prosecution’s failure to object to defendant’s oral demurrer waived the written requirement because the interests of giving adequate notice to the opposing party and creating an adequate record were fulfilled when the parties were given a recess to research the issues involved and prepare arguments, the proceedings were reported, and a transcript was made available.

2. **Timeliness**

   Defendant must enter a demurrer at the time of arraignment or at such other time as the court may allow for that purpose. ORS 135.610. *See State v. Wimber*, 315 Or 103, 112 (1992)
(demurrer was timely when defendant reserved “all rights against each indictment” at arraignment and court allowed defendant to demur at beginning of trial and renew demurrer at end of trial); State v. Tucker, 252 Or 597, 600 (1969) (court has discretion to permit demurrer at times other than arraignment); State v. Dolan, 40 Or App 447, 450 (1979) (defendant may not demur after a plea is entered on the merits of the charge).

a. **Failure to Timely Demur Constitutes Waiver**
   Objections via demurrer are waived if not timely raised. ORS 135.640 (objections provided in ORS 135.630 can only be taken by demurrer); State v. Tennyson, 30 Or App 575, 578-79 (1977) (failure to timely demur at or prior to arraignment waived opportunity to challenge definiteness and certainty of complaint).

b. **Objections That Are Always Timely**
   Defendant’s right to object to the court’s subject matter jurisdiction or that the facts stated in the accusatory instrument do not constitute an offense is *not* waived if these objections are not taken by demurrer before trial. ORS 135.640 (all other objections must be taken by demurrer). See State v. South, 29 Or App 873, 876 (1977) (“[a] demurrer for insufficiency to state a crime is always timely”); State v. Dolan, 40 Or App 447, 451 (1979) (absent exceptional circumstances, after a plea on the merits a court cannot entertain a demurrer except on the two specific grounds set out in ORS 135.640).

3. **Grounds of Demurrer Must Appear on the Face of the Instrument**
   A defendant may demur on grounds that are based upon the face of the accusatory instrument. ORS 135.630; State v. Morgan, 151 Or App 750, 755 (1997) (a demurrer sustained on the basis of facts extrinsic to the indictment is contrary to ORS 135.630).

   Any accusatory instrument may be demurred to on the following grounds:

   a. Grand jury lacked jurisdiction to inquire because the crime was not triable within the county. ORS 135.630(1).

   b. Indictment does not conform to statutory requirements of ORS 132.510 to 132.560 (sufficiency of indictment) and ORS 135.713 to 135.743 (sufficiency of accusatory instruments). ORS 135.630(2).

   c. Accusatory instrument charges more than one offense not separately stated. ORS 135.630(3). See State v.
CHAPTER 2: PRETRIAL MOTIONS

Grounds for demurrer
include:

• Grand jury lacked jurisdiction;
• Nonconformity of indictment to statutory formalities;
• Separate offenses not separately stated;
• Facts alleged do not constitute a crime;
• Facts alleged constitute a defense;
• Accusatory instrument is not definite and certain.

Sweet, 46 Or App 31, 35-36 (1980) (demurrer to criminal mischief complaint alleging damage to multiple parcels of property sustained because it was impossible to determine from the face of the complaint whether one or several property owners were involved and each allegation against a separate property owner would constitute a separate offense).

d. Facts alleged in the accusatory instrument do not constitute an offense. ORS 135.630(4). See State v. Barker, 140 Or App 82, 84 (1996) (allegations that mirrored statutory language were sufficient to state an offense); State v. Reed, 116 Or App 58, 59 (1992) (trial court erred in sustaining demurrer based on facts not alleged in the complaint when the complaint mirrored the statute and therefore sufficiently stated an offense).

e. Accusatory instrument contains facts, which if true, would constitute a legal justification, excuse of the offense charged, or other legal bar to the action. ORS 135.630(5). See State v. Wimber, 315 Or 103, 111 (1992) (ORS 135.630(5) is the proper ground for a demurrer based on expiration of the statute of limitations). See ORS 161.190-275 (statutory justification defenses).


4. Effect
If the court allows the demurrer, judgment on the accusatory instrument is final. ORS 135.670(1).

a. Demurrer May Bar Another Action For the Same Crime
The allowance of a demurrer is a bar to another action for the same crime unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new accusatory instrument, allows the State to refile or resubmit the case. ORS 135.670(1).

i. “Same Crime” Defined
“We hold that two crimes which require proof of the same elements and which are based on the same facts are ‘the same crime’ within the meaning of ORS 135.670, even if they carry different penalties.” State v. Stevenson, 79 Or App 166, 170 (1986) (demurrer sustained against prostitution charge in violation of city
code barred subsequent prostitution charged based on same facts under state law).

ii. **State Must Seek Leave to Refile the Case**
When a demurrer is sustained against an accusatory instrument, the State must seek leave to refile the case and the order allowing the demurrer must grant leave to refile. *State v. Stevenson*, 79 Or App 166, 170-71 (1986). However, the State is not required to seek leave at the time that the demurrer is allowed. *State v. Moline*, 104 Or App 173, 176 (1990).

*State v. Brent*, 23 Or App 262, 265 (1975): “Upon allowance of defendant’s demurrer, there were two alternatives available to the state: (1) it could have sought the district court’s permission to refile, ORS 135.670, or (2) it could have appealed the district court’s order to the circuit court.”

iii. **Court Lacks Absolute Discretion to Permit Refiling**
The court’s discretion to allow the case to be resubmitted or refiled is controlled by serving the purpose of “orderly resolution of disputes free from harassment by multiplicitous prosecution.” *State v. South*, 29 Or App 873, 877 (1977) (trial court’s spontaneous dismissal of criminal DUII complaint because it failed to plead a previous conviction was treated as a demurrer and therefore the court abused its discretion by not allowing the prosecution to refile a new complaint alleging the prior aggravating crime when the delay would be negligible).

b. **State Has 30 Days to Resubmit or Refile the Case**
If the court allows the case to be resubmitted or refiled, it must be refiled within **30 days**, otherwise the court must discharge the defendant or, if the defendant is not in custody, discharge the release agreement and refund the security deposit as provided by law. ORS 135.670(2).

If the court does not allow the case to be resubmitted or refiled, it must discharge the defendant or, if the defendant is not in custody, discharge the release agreement and refund the security deposit as provided by law. ORS 135.680.
i. **Failure to Meet 30 Days No Bar to Future Prosecution**
   Failure to resubmit or refile the case within 30 days does not bar further prosecution; ORS 135.670(2) “simply requires the defendant’s discharge from custody or the specific actions relating to the release agreement and the security deposit, if refiling or resubmission does not occur within 30 days.” *State v. Harrison*, 125 Or App 472, 476 (1993).

c. **State's Appeal of a Demurrer Does Not Bar Reindictment**
   The fact that the State appeals from an order allowing a demurrer is not a *per se* bar to recharging the defendant, regardless of the outcome of the appeal. *State v. Harrison*, 125 Or App 472, 477 (1993).

d. **Disallowance of Demurrer**
   If the court does not allow the demurrer, the defendant may plead; if the defendant does not plead, a plea of not guilty must be entered. ORS 135.700.

D. **Motion to Quash**

1. **Purpose**
   A motion to quash the indictment is a common law challenge to statutory or constitutional defects in the grand jury procedure. *State v. Gortmaker*, 60 Or App 723, 729 (1982) (an indictment returned by a grand jury that was not selected in the manner required by Article VII (amended), § 5(2) of the Oregon Constitution is subject to a motion to quash); *State v. Payzant*, 32 Or App 371, 374 (1978) (motion to quash indictment properly granted when offense charged was a violation and not a crime because the grand jury is statutorily authorized to inquire only “into crimes”). *Cf. State v. Pratt*, 316 Or 561, 567 (1993) (ORS 135.510(1)(a), which provides statutory grounds for motion to set aside the indictment, applies equally to constitutional challenges based on an insufficient number of grand jurors).

2. **Sustaining a Motion to Quash Does Not Prevent Resubmission**
   The State is not prohibited from resubmitting the case for reindictment if the court sustains the defendant’s motion to quash. *State v. King*, 84 Or App 165, 169 (1987) (indictment quashed on constitutional and statutory grounds).
Venue

A. Motion for Change of Venue

A motion for change of venue “presupposes that venue properly resides in the court in which the motion for a change is made.” State v. Dillenburg, 49 Or App 911, 913 n.1 (1980). “Consequently, if a defendant contends that venue does not lie in the court that is trying him, a motion for change of venue under ORS 131.335 to ORS 131.363 is not appropriate. The proper pretrial action is a motion to dismiss.” State v. McCown, 113 Or App 627, 630 (1992).

1. General Rules

a. Defendant Must Request the Motion

The defendant is the only party who may request a change of venue; only one request may be made unless causes arise after the first change was allowed. ORS 131.335.

b. Motion Can Be Made In Any Criminal Action

A motion for change of venue may be made in any criminal action when the case is at issue upon a question of fact. ORS 131.345.

c. Defendant Carries Burden of Proving Prejudice

Burden of proof is on defendant to show there is a reasonable likelihood that prejudice will prevent a fair and impartial trial. See State v. Smith, 58 Or App 458, 460-61 (1982) (murder conviction); State v. Herrera, 32 Or App 397, 401-02 (1978) (murder conviction), rev’d on other grounds, 286 Or 349 (1979); State v. Schroeder, 55 Or App 932, 935-36 (1982) (first degree burglary and sodomy convictions).

d. Objections to Venue Are Waived Unless Raised at Trial

All objections to improper place of trial are waived unless defendant makes them in the manner set forth in ORS 131.335 to 131.363. ORS 131.305(2). See State v. Jasper, 89 Or App 572, 574 (1988) (venue in terms of the proper place of trial is established by statute and any objections are waived unless raised at trial).

2. Grounds

a. Prejudice

Upon motion of the defendant, the court must order the place of trial to be changed if there exists so great
a prejudice against the defendant that defendant cannot obtain a fair and impartial trial in the county where the action is commenced. ORS 131.355.

i. Trial Court Has Discretion to Grant Motion

ii. Examples of Trial Court’s Discretion to Grant Motion
*State v. Langley*, 314 Or 247, 260 (1993): Adverse pretrial publicity in a murder case does not necessarily make it impossible for defendant to get a fair and impartial trial.

*State v. Rogers*, 313 Or 356, 364-65 (1992): The trial court did not abuse its discretion in denying a motion for change of venue in a capital murder case when it took special precautions during juror selection by ordering each prospective juror to be questioned separately and increasing the number of peremptory challenges from 12 to 48 for each party, was satisfied that the impaneled jurors would be impartial, and the jury was not exposed to media coverage that was not presented during trial.

*State v. Schroeder*, 55 Or App 932, 935-36 (1982): Media coverage that included defendant’s name and picture along with information that he was being investigated for up to 120 crimes attributed to the “masked rapist” was not so prejudicial and pervasive that denial of the motion for a change of venue constituted an abuse of discretion.

*State v. Little*, 249 Or 297, 312 (1967): The court affirmed a denial of a motion for change of venue because none of the publicity intimated that defendant committed the crime.

b. Convenience of the Parties and Witnesses
Upon motion of the defendant, the court *may* order the place of trial to be changed for the convenience of the parties and witnesses. ORS 131.363.
c. **Interest of Justice**

Upon motion of the defendant, the court *may* order the place of trial to be changed in the interest of justice. ORS 131.363.

3. **Procedures When Court Orders the Motion**

   a. The clerk of the transferring court must make and retain authenticated copies of the original papers filed in the case and transmit the original papers and a transcript of the proceedings to the transferee court. ORS 131.375.

   b. The change of venue is complete when the transcript and original papers are filed with the clerk of the transferee court; thereafter the action proceeds as if it had been commenced in that court. ORS 131.385.

   c. Expenses of change of venue under ORS 131.363 are taxed in the court in the county where the trial is held. If the recoverable costs and expenses are not recovered from the defendant, the county in which the action was commenced must repay the county in which the trial is held. ORS 131.395(1).

   d. The court must not tax expenses of change of venue under ORS 131.355 against defendant. ORS 131.395(2).

   e. The defendant, if not in custody, must appear at the transferee court at the time appointed for trial without further notice, ORS 131.405(1); defendant’s security deposit is sufficient therefor in all respects. ORS 131.405(2).

   f. If the defendant is in custody, the court must order the sheriff to deliver the defendant to the custody of the transferee county’s correctional institution. ORS 131.415.

B. **Proper Venue**

1. **Constitutional Standard**

A criminal defendant has the right to public trial by an impartial jury in the county in which the offense was committed. Or Const Art I, § 11. *Cf. State v. Lehman*, 130 Or 132, 138 (1929) (establishing constitutionality of statutory provisions that provide concurrent venue in more than one county); *State v. McCown*, 113 Or App 627, 631 (1992) (upholding constitutionality of ORS 131.315(6) that provides venue in any county whose boundary is within one mile of where the offense was committed).
2. Statutory Venue Rules

a. Venue Lies in County Where Conduct or Result Occurred
   Venue lies in the county in which the conduct that constitutes the offense or a result that is an element of the offense occurred. ORS 131.305(1). See State v. Hall, 26 Or App 17 (1976) (venue is proper in any county where conduct constituting the crime occurred or in which results of the alleged acts were intended to occur).

b. Two or More Counties
   When conduct or results constituting elements of the offense occur in two or more counties, trial may be in any of the counties involved. ORS 131.315(1). See State v. Allen, 115 Or App 347, 349 (1992) (defendant’s telephone call to a co-conspirator in another county to establish agreement to commit aggravated murder simultaneously established venue in both counties).

3. Special Statutory Venue Provisions For Certain Offenses
   ORS 131.315(2)-(14) provides special exceptions to the venue rules for unique situations, such as:
   a. When the cause of death is inflicted in one county and death occurs in another county;
   b. Offenses commenced outside the state but consummated within the state;
   c. Offenses committed on a body of water touching two or more counties;
   d. Offenses committed in or upon a type of conveyance in transit;
   e. Offenses committed on the boundary of two or more counties or within one mile thereof;
   f. Certain circumstances involving theft, burglary, robbery, solicitation, criminal conspiracy, and inchoate crimes;
   g. Criminal nonsupport actions;
   h. Prosecution of Oregon Securities Law violations; and
   i. Prosecution of false claims involving Medicaid funds.

4. When Venue Cannot Be Readily Determined
   If the offense is committed in the state and the State cannot readily determine within which county the commission took place, or a statute that governs conduct outside the state is
violated, trial may be held in the county in which defendant resides, or if defendant has no fixed residence, in the county in which defendant is apprehended or to which defendant is extradited. ORS 131.325. See State v. Rose, 117 Or App 270, 274 (1992) (ORS 131.325 is a constitutionally permissible alternative to establish venue when the county in which the crime was committed cannot be readily ascertained).

a. The State Must Prove That Venue Is Unascertainable

State v. Rose, 117 Or App 270, 274 (1992): “We cannot reasonably impute to the framers of the Oregon Constitution the intent to provide immunity to persons who commit crimes under circumstances in which the county in which they were committed is not ascertainable. In those cases, the legislature may provide for a reasonable alternative venue. However, the state must prove beyond a reasonable doubt the factual predicate for the alternative venue.”

5. Venue in Traffic Cases

a. Venue For Traffic Crimes

When a traffic offense is punishable as a crime, venue is proper in the county in which the offense occurred. ORS 131.305. See State v. McCown, 113 Or App 627, 630-31 (1992) (traffic crimes are subject to general venue provisions).

i. Traffic Crime Defined

A “traffic crime” is any traffic offense that is punishable by a jail sentence. ORS 801.545.

b. Venue For Traffic Violations

When a traffic offense is punishable as a violation, venue is proper (1) in the county where the violation was committed; or (2) any other county whose county seat is closer to where the violation occurred. ORS 153.036(1).

i. Traffic Violation Defined

A “traffic violation” is a traffic offense that is designated as a traffic violation in the statute defining the offense, or any other offense defined in the Oregon Vehicle Code that is punishable by a fine but that is not punishable by a term of imprisonment. ORS 801.557.
ii. **Change of Venue For Traffic Violations**

If a violation proceeding is commenced in a county other than the county in which the violation occurred, the defendant may request a change of venue to that county; unless the violation was committed within a city and the proceeding was commenced in that city’s municipal court. ORS 153.036(3).

iii. **General Venue Rules Apply to Violations In Circuit Courts**

Except as specifically provided in ORS 153.036, venue in violation proceedings in circuit courts is governed by the general venue provisions in ORS 131.305 to 131.415. ORS 153.036(4).

6. **Challenging Venue**

Venue is an element of a criminal offense that the State must prove beyond a reasonable doubt. *State v. Cooksey*, 242 Or 250, 251 (1965). Therefore, a defendant does not waive a challenge to venue by not raising the issue pretrial. *State v. O’Neall*, 115 Or App 62, 65 (1992) (defendant may challenge venue in same manner as sufficiency of proof of any other required fact).

a. **Motions to Challenge Venue**

The defendant may challenge venue by:

1. **Motion to dismiss** (in which case the court may authorize refiling in the proper county). *State v. McCown*, 113 Or App 627, 630 (1992) (proper pretrial action to challenge venue is motion to dismiss); *State v. Camp*, 53 Or App 599, 603 n.2 (1981) (motion for change of venue was technically incorrect when county lacked venue to try DUII case; motion to dismiss ordered as the proper instrument). See *State v. Dunn*, 99 Or App 519 (1990) (demurrer for failure to state venue in indictment erroneously denied).

2. **Motion for judgment of acquittal.** *State v. O’Neall*, 115 Or App 62, 65 (1992) (defendant’s venue challenge was properly preserved by motion for judgment of acquittal).

*State v. Roper*, 286 Or 621, 629-630 (1979): “In the present case . . . there was some evidence that defendant actually participated in the robbery in Multnomah County. Thus the state had two choices: it could prosecute him in Multnomah County as a party to the robbery itself . . . or it could prosecute
him in Clackamas County for joining the conspiracy in that county. Instead, the indictment charged a criminal agreement in Multnomah County. Since the proof showed that the offense charged, the agreement, occurred in Clackamas County, defendant’s motion for judgment of acquittal on that charge should have been granted.”

V. RIGHT TO SPEEDY TRIAL

A. Federal Constitutional Right to Speedy Trial

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial….” U.S. Const Amend VI.

1. A Right Unlike Other Rights

“The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused...there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.” *Barker v. Wingo*, 407 US 514, 519 (1972). In addition, “the right to speedy trial is a more vague concept than other procedural rights...it is, for example, impossible to determine with precision when the right has been denied.” *Id.* at 521.

2. The Barker Test

In *Barker v. Wingo*, 407 US 514 (1972), the United States Supreme Court identified four factors courts should *balance* to resolve speedy-trial claims under the Sixth Amendment:

1. Length of delay,
2. The reason for the delay
3. Defendant’s assertion of the right, and
4. Prejudice to the defendant.

*Id.* at 530. Prejudice to the defendant is the most serious of these factors and must be analyzed in light of the interests that the right to a speedy trial was designed to protect. The Supreme Court identified three such interests:

i. To prevent pretrial incarceration;

ii. To minimize the anxiety and concern of the criminally accused; and

iii. To limit the possibility that the defense will be impaired.
Id. at 532. Overall, none of the four factors are either necessary or sufficient to finding a deprivation of a defendant’s right to speedy trial, instead, these four factors must be considered cumulatively. Id. at 533.

3. Remedy
The Supreme Court held that dismissal with prejudice is “the only possible remedy” for violation of the Sixth Amendment right to a speedy trial. Strunk v. United States, 412 US 434, 440 (1973).

B. Oregon Constitutional Right to Speedy Trial
“No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay.” Or Const Art 1, § 10 (emphasis added).

1. Applying the Barker Factors - Oregon’s Approach
Oregon generally endorses the federal Barker analysis, however, not all of the Barker analysis is appropriate for evaluating speedy trial claims under Or Const Art I, §10. State v. Harberts, 331 Or 72, 87 (2000); See also State v. Ivory, 278 Or 499, 504 (1977) (finding the guarantee of a speedy trial granted by Art I, § 10 is equivalent to the speedy trial right provided in the Sixth Amendment to the United States Constitution).

a. The Burden to Proceed Is On The State
In Oregon, the burden to bring a defendant to trial promptly is on the state. State v. Harberts, 331 Or 72, 87 (2000); see also State v. Vawter, 236 Or 85, 87 (1963); State v. Emery, 318 Or 460, 468 n. 13 (1994); State v. Mende, 304 Or 18, 21 (1987).

In State v. Dykast, 300 Or 368, 375 n. 6, (1985), the court decided it was “mistaken” in adopting the requirement that a defendant demand a speedy trial because the constitutional requirement for speedy trial without delay is not a “right” of a criminal defendant but rather, a mandatory directive to the state. State v. Clark, 86 Or 464, 471 (1917). Therefore, because an individual does not have the “right” to a speedy trial, the Barker factor concerning the defendant’s assertion of his right is inapplicable under the Oregon Constitution.

b. Oregon ‘Weighs’; Barker ‘Balances’
Oregon courts must consider all relevant factors and assign ‘weight’ to them. State v. Harberts, 331 Or 72, 87 (2000);
State v. Mende, 304 Or 18, 24 (1987); Haynes v. Burks, 290 Or 75, 81 (1980) (declining to follow the Barker court’s “balancing” of defendant’s conduct against the state’s conduct in evaluating speedy trial claims).

2. Oregon Constitutional Speedy Trial Analysis

Whether a defendant has been deprived of a speedy trial under Or Const Art 1, § 10 is a fact-specific inquiry; the court must examine the circumstances of each case guided by the following factors:

1. The length of delay
2. Reasons for the delay
3. Prejudice to the defendant


a. Length of Delay

Under Barker v. Wingo, 407 US 514, 530 (1972), delay that is “presumptively prejudicial” is a “triggering mechanism” for inquiry into the three other factors. Under Oregon law, delay in and of itself may be sufficient to establish a speedy trial violation if the delay,

1. Is so long that the thought of ordering a defendant to trial “shocks the imagination and the conscience”; or
2. Was caused purposely by the government to hamper the defense

State v. Harberts, 331 Or 72, 86 (2000) quoting State v. Vawter, 236 Or 85, 96 (1963); State v. Ivory, 278 Or 499, 506 (1977). Short of these circumstances, however, the court must consider the reasons for the delay and prejudice to the defendant.

b. Reasons for Delay

Oregon courts must consider all relevant factors and assign “weight” to them. State v. Harberts, 331 Or 72, 87 (2000). “The longer the state unjustifiably delays a trial, the more heavily the ‘reasons for delay’ factor weighs in favor of the defendant.” State v. Mende, 304 Or 18, 24 (1987).

c. Prejudice To Defendant

As in Barker, Oregon has identified three different types of prejudice resulting from pretrial delays:
Damage arising from prolonged pretrial incarceration
Anxiety and public suspicion resulting from public accusation of a crime; and,
The hampering of ability to defend at trial where witnesses or records have disappeared or memories have dimmed

*State v. Ivory*, 278 Or 499, 507-08 (1977). In cases where courts must inquire about impairment of the defense, a defendant need only show that the delay caused a “reasonable possibility of prejudice” to the ability to prepare a defense. *Id.* at 508.

Similarly, courts may conclude that prejudice to the defendant is “obvious” if any of the following are true:

a. Defendant is imprisoned for a long period awaiting trial
b. The government causes delay in bad faith
c. A witness dies or disappears during the delay


d. **Effect of Pretrial Incarceration**

Because Oregon courts do not balance the speedy trial factors; “pretrial incarceration shortens, rather than counter-balances, the constitutionally permissible measure of delay.” *State v. Harberts*, 331 Or 72, 88 (2000). This is true even when pretrial imprisonment results from denial of pretrial release in a murder case or when imprisonment is caused by the trial court’s finding that defendant is not entitled to release pretrial because of a strong presumption of guilt. *Id.*

To this end, “the longer the defendant must endure pretrial incarceration or anxiety and other forms of personal prejudice, the more the prejudice to defendant’ factor weighs in the defendant’s favor.” *State v. Mende*, 304 Or 18, 24 (1987).
3. **Remedy**
   The remedy available for a violation of Or Const Art 1, § 10 is **dismissal with prejudice**. *State v. Ivory*, 278 Or 499, 505 (1977); *Strunk v. United States*, 412 US 434, 440 (1973).

C. **Statutory Right to Speedy Trial**

1. **General Speedy Trial Principles**
   In addition to a defendant’s constitutional right to a speedy trial, Oregon’s speedy trial provisions, ORS 135.747 and ORS 135.750, confer upon defendants a statutory right to be brought to trial within a reasonable period of time.

   a. **The State’s Duty to Bring Accused to Trial Within a Reasonable Period of Time**
      It is the state’s obligation to bring a defendant to trial within a reasonable period of time. *State v. Johnson*, 339 Or 69, 95 (2005). *See also State v. Vawter*, 236 Or 85, 87 (1963) (in Oregon, “it is not incumbent upon the accused to demand a trial or take affirmative action to enforce his right to a speedy trial”).

   b. **Overcrowded Trial Court Dockets Excuse Some Delay**
      *State v. Adams*, 339 Or 104, 110-12 (2005): In order to handle an unpredictable workload, a trial court has good cause to postpone a trial if its present docket is full. However, an overcrowded docket only justifies delay to a point; while each postponement may be individually justifiable, the overall period of time taken to bring the defendant to trial must be *reasonable in toto*.

   i. **Examples of Reasonable Delay**
      - A court continuing a case for lack of judicial time is considered “good cause” for denying statutory speedy trial motion. *State v. Bateham*, 94 Or 524, 529 (1919).
      - Defendant’s right to speedy trial was not contravened when “accumulation of business renders trial impossible.” *State v. Lee*, 110 Or 682, 687 (1924).
c. Failure to Object Does Not Constitute Consent
   In *State v. Adams*, 339 Or 104, 109 (2005), the statement, “the defense attorney...does not object to this reset request,” found in the state’s motion for postponement did not show that defendant consented to the delay. The court stated that “a lack of objection is just (and only) that: a lack of objection. It conveys no message that the defendant either joins in the motion or waives any rights that he has that are affected by the motion. It follows that...a recital by the state that defense counsel has “no objection” is insufficient to place a defendant’s express consent on the record...” *Id.*

d. Defendant’s Consent to Some Postponement Does Not Abrogate Speedy Trial Right
   A defendant is not categorically excluded from the protection of the speedy trial statute merely because he has occasioned some of the total delay. *State v. Johnson*, 339 Or 69, 94 (2005). *See also, State v. Crosby*, 217 Or 393, 405-06 (1959) (explaining that a defendant’s request for or consent to a postponement merely tolls the relevant speedy trial period).

   However, a defendant is excluded from a remedy for any portion of the delay to which he or she requests or consents. *Johnson*, 339 Or at 94-95.

2. A Two-Step Approach for Lack of Speedy Trial Motions
   In *State v. Johnson*, 339 Or 69, 87-91 (2005), the court explained that ORS 135.747 and ORS 135.750, when read together, establish a two-step process for considering a motion to dismiss based on an alleged speedy trial violation:

   a. First Inquiry: Was the Delay Reasonable?
      If the delay before a defendant charged with a crime was brought to trial is greater than expected, the court must determine if that delay was reasonable. This “involves an examination of all the attendant circumstances,” including the causes of the delay. *Johnson*, 339 Or at 88.

   b. If Delay was Unreasonable, Was Sufficient Reason Shown?
      If the court finds the delay to be unreasonable, it may still allow the case to proceed, but only if “*sufficient* reason therefor is *shown.*” ORS 135.747 (emphasis added).
i. **Sufficient Reason**

A ‘sufficient’ reason will have “some relevance to, and [will] not essentially undermine, the overall purpose” of the speedy trial statutes, that is, to ensure that cases do not languish in the criminal justice system. *Johnson*, 339 Or 69, 90. In light of this statutory purpose, the *Johnson* court concluded that the following reasons were not “sufficient” reasons to dismiss:

- Where defendant was awaiting trial on a more serious charge in another county, the state argued it had good cause for delay given the “importance” of trying a more serious charge against the defendant first. The court found that this reasoning “seems merely to be an attempted usurpation of defendant’s right to determine for himself whether he is willing to waive his speedy trial rights to that end.” *Id.* at 91.

- Where the state alleged that defendant engaged in obstructionist conduct the court found it irrelevant to the statutes’ “housecleaning” purposes which are “in no way undermined if an irritating defendant, even one who is insincere about his desire for a speedy trial, is permitted to force the state to demonstrate its interest in limited judicial resources.” *Id.*

ii. **The Reason Must be Shown in the Record**

The court in *Johnson* also found it “significant that ORS 135.750 requires that the ‘sufficient reason therefor’ referred to in the statute be ‘shown.’ That wording indicates that, to the extent that the trial court determines that there is ‘sufficient reason’ for delay, such reason must, in some way or another, appear in the record. Such a requirement seems incompatible with the idea that the existence of ‘sufficient reason’ is a matter of judicial discretion.” *Johnson*, 339 Or at 76.

3. **Remedy for Lack of Statutory Speedy Trial**

The remedy for dismissal under ORS 135.747 or 135.750 depends on the charged crime.

- For a Class A misdemeanor or a felony, the remedy is dismissal *without prejudice*.

- For a Class B or C misdemeanor, the remedy is dismissal *with prejudice*.

ORS 135.753(2).
VI. CIVIL COMPROMISE

The statutory requirements for civil compromise are that

- The crime is punishable as a misdemeanor;
- A civil remedy exists to compensate the victim;
- The victim acknowledges in writing before trial receipt of satisfaction for the injury; and
- The trial court exercises its discretion to dismiss the accusatory instrument on payment of the costs and expenses incurred.


A. Certain Misdemeanors May Be Compromised

When a defendant is charged with a crime punishable as a misdemeanor for which the person injured by the act has a civil remedy, the crime may be compromised and dismissed as provided in ORS 135.705. ORS 135.703(1).

1. Civil Compromise Requires a Discrete Victim

The words “the person injured by the act” used in ORS 135.703 indicate that there must be a discrete victim or victims in order for the act to constitute a crime for which civil compromise is available. State v. Dugger, 73 Or App 109, 112 (1985).

2. Satisfaction of the Injured Person

On payment of the costs and expenses incurred, the court may, in its discretion, dismiss the accusatory instrument if the injured person acknowledges in writing at any time before trial that the person has received satisfaction for the injury. ORS 135.705(1)(a).

a. Satisfaction Defined


b. Written Acknowledgement Required

A writing acknowledging receipt of satisfaction by the victim before trial is a prerequisite to compromise. ORS 135.705(1).

c. Payment of a Civil Penalty Is Not Satisfaction

The defendant’s payment of a civil penalty under ORS 30.875 (shoplifting statute) does not constitute “full satisfaction” for purposes of the civil compromise statutes. ORS 135.705(1)(b). Compare the discussion in State v. Johnsen, 327 Or 415, 419-21 (1998) (shoplifting charge compromised on defendant’s payment of the civil penalty) with ORS 135.705(1)(b), enacted in 1999, which superseded the holding in Johnsen. See also State v. Ha, 82 Or App 570 (1986).

3. Injured Person’s Consent to Compromise Is Not Required

The victim’s consent to the compromise is not required, “the court may, in its discretion, compromise the action. There is nothing in [ORS 135.705] to indicate that the court can exercise its discretion only with the consent of the injured party. To so construe the statute would vest in the injured
party discretion to allow or deny compromise. We think the legislature did not intend to make compromise subject to the whim or caprice of the injured party. If the legislature had so intended, it would have made the consent of the injured party a condition precedent to a compromise. It did not so limit the discretion of the court and we think vested the power to compromise solely in the court’s discretion.” *State v. Dumond*, 270 Or 854, 858 (1974).

4. **Payment of Costs**
   Defendant’s payment of “costs” (those expenses specially incurred by the State in prosecuting the defendant), including costs under ORS 151.505 for court-appointed counsel and fees and expenses approved under ORS 135.055, is a prerequisite to compromise. ORS 135.705(1)(a), (2).

5. **Minor Victims**
   The court should consider appointing a guardian ad litem to represent a child victim in situations where civil compromise is available. *State v. Fitterer*, 109 Or App 541 (1991) (minor victim lacked capacity to make a written acknowledgement of satisfaction and her custodial parent lacked authority to do so on her behalf).

B. **Reduction of Certain Felonies to Misdemeanors**
   Notwithstanding ORS 161.525, the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly when:

   1. A person is convicted of:
      • Any Class C felony;
      • A Class B felony of delivery of marijuana for consideration pursuant to 2005 Or Laws, ch. 708, § 31(2) (effective Aug. 16, 2005);
      • The Class B felony of possession of marijuana pursuant to 2005 Or Laws, ch. 708, § 33(2) (effective Aug. 16, 2005);
      • Any of these felonies or of a Class A felony pursuant to ORS 166.720 (racketeering activity) and has successfully completed a sentence of probation; AND
      • any of these felonies or of a Class A felony pursuant to ORS 166.720 (racketeering activity) and has successfully completed a sentence of probation; AND
      • any of these felonies or of a Class A felony pursuant to ORS 166.720 (racketeering activity) and has successfully completed a sentence of probation; AND

   2. The court, considering the nature and circumstances of the crime and the history and character of the defendant, believes that it would be unduly harsh to sentence the defendant for a felony.

1. **Felonies Reduced to Misdemeanors May Be Compromised**

C. **“Hit and Run” Cases**
   Civil compromise statutes apply to “hit and run” cases (ORS 811.700). ORS 135.703(2).

D. **Crimes Not Subject to Civil Compromise**

1. **Statutory Exceptions**
   ORS 135.703(1) provides the following *exceptions* to the civil compromise statute:
   
   a. Crimes committed against or by peace officers on duty. ORS 135.703(1)(a).
   
   b. Crimes riotously committed. ORS 135.703(1)(b).
   
   c. Crimes committed with an intent to commit a crime punishable only as a felony. ORS 135.703(1)(c).
   
   d. When an assault IV, assault III, menacing, reckless endangerment, harassment, or strangulation crime is committed by:
      
      1. One family or household member on another family or household member; or
      
      2. A person upon an elderly or disabled person. ORS 135.703(1)(d).

2. **Common Law Exceptions**
   
   a. **Public Indecency**
      “The crime of public indecency is committed against the public at large, not against the person who incidently [sic] witnessed the act, and, accordingly, that it is not subject to civil compromise.” *State v. Van Hoomissen*, 125 Or App 682, 683 (1994) (public indecency charge).
   
   b. **Crimes Endangering the General Public**
      A defendant charged with a crime that endangers the general public cannot receive the benefit of the civil compromise statute because the legislature has criminalized such acts to protect the public at large. *State v. Dugger*, 73
Or App 109, 113 (1985) (overruling State v. Yos, 71 Or App 57 (1984), which upheld a civil compromise dismissal of a reckless driving charge).

E. Judicial Discretion
Once the statutory requirements are met, the court has wide discretion in determining whether to grant the dismissal. ORS 135.705(1)(a). See State v. Dumond, 270 Or 854, 858 (1974).

F. Effect of Compromise
Dismissal based on compromise bars any further prosecution for the same crime. ORS 135.707.

VII. MOTION TO SUPPRESS EVIDENCE

A. Guidelines

1. Requirements of the Motion
UTCR 4.060(1) requires that motions to suppress evidence:

a. Make specific reference to any authority upon which it is based; and

b. Be accompanied by the moving party’s brief, which must apprise the court and the adverse party of the arguments and authorities relied upon.

2. Responding to the Motion
UTCR 4.060(2) requires any response to a motion to suppress:

a. To be in writing and served and filed together with opposing affidavits, if any, no later than 7 days after the motion to suppress has been filed;

b. To state the grounds thereof and, if the requested relief is not opposed, wholly or in part, the extent to which it is not opposed; and

c. To make specific reference to any affidavits relied on and be accompanied by an opposition brief, which must apprise the court and the adverse party of the arguments and authorities relied upon.

See ORS 133.673-133.703 (authorizing a motion to suppress evidence in relation to search and seizure provisions). See also Chapter 6, I.B. “Motion to Suppress.”
B. Purpose

1. Insulating the Jury From Inadmissible Evidence
   The motion to suppress evidence, similar to a “motion in limine,” is designed to insulate the jury from exposure to harmful, inadmissible evidence. *State v. Clowes*, 310 Or 686, 692 (1990).

   *State v. Troen*, 100 Or App 442, 444-45 (1990): “Generally, a trial court should make a pretrial ruling on the admissibility of evidence only if the evidence carries an unusual potential for prejudice.”

2. Ruling On Contested Evidentiary Issues
   Rulings on contested evidentiary issues improve the efficiency of the trial. *State v. Foster*, 296 Or 174, 183 (1983) (approving the use of a pretrial motion in limine to obtain ruling on evidence before party seeks to introduce it); *State v. Troen*, 100 Or App 442, 444 (1990) (a court may consider a motion to suppress evidence in a pretrial omnibus hearing under ORS 135.037(3)).

C. Judicial Discretion

1. Discretion to Refuse Ruling
   The court has a reasonable amount of discretion to refuse ruling on a motion to suppress evidence when the context of the evidence is insufficiently clear to form a basis for the ruling. *State v. Browder*, 69 Or App 564, 567 (1984); *State v. Coleman*, 130 Or App 656, 664 (1994) (without knowing the context of the evidence, the court was entitled to defer its decision and deny the defendant’s motion in limine as premature).

2. Amending the Ruling
   As conditions change, the court may amend its ruling on a motion to suppress evidence.

   *State v. Leach*, 169 Or App 530, 538-39 (2000) (De Muniz, J., concurring): “Although motions in limine may serve a valuable function in some cases, a trial court is always free to
revisit a pretrial ruling if the facts or theory presented pretrial
develop into something else at trial, or if, for example, a proper
foundation is not laid for the evidence subject to the pretrial
ruling.”

D. Effect of Denial of the Motion
In order to preserve the ability to object following the court’s
denial of a motion to suppress, counsel must move for continuing
objection or renew objections throughout trial before introduction
of disputed evidence. State v. Coleman, 130 Or App 656, 664
(1994) (concluding that defendant’s failure to renew objections
to evidence at trial following court’s deferred ruling on a motion
to suppress because it was premature meant objection was
unpreserved).

E. State May Take an Interlocutory Appeal
The State may appeal from a circuit court to the Court of Appeals
from a pretrial order suppressing evidence. ORS 138.060(1)(c);

VIII. PRETRIAL PROSECUTORIAL MISCONDUCT

A. Prosecutorial Vindictiveness Defined
Prosecutorial vindictiveness is defined as a criminal case filed for
the purpose of punishing legal conduct. U.S. v. Goodwin, 457 US
368, 384 (1982).

1. Objective Proof of Actual Vindictiveness Required
A claim of prosecutorial vindictiveness may succeed if it is
based on objective proof of actual vindictiveness. State v.
Halling, 66 Or App 180, 184 (1983) (charges dismissed due to
court’s finding of actual prosecutorial vindictiveness).

a. “Reprisal” For Rejecting a Plea Agreement Is Vindictive
A trial judge’s conclusion that additional charges were
brought against the defendant in “reprisal” for defendant’s
rejection of a plea bargain is the equivalent of finding that
the prosecutor was motivated by a desire to punish the
defendant for insisting on a jury trial. State v. Halling, 66
Or App 180, 184 (1983).

2. Finding Prosecutorial Vindictiveness
If the court finds prosecutorial vindictiveness, the court must
dismiss new charges or additional cases as a violation of due
B. Unethical Conduct by District Attorney
A plea offer in a pending case that may include unethical elements does not support dismissal of the original charge where the offer was not the product of vindictiveness. *State v. Simmelink*, 64 Or App 465, 468 (1983) (district attorney’s unethical conduct regarding a plea offer was in itself insufficient to warrant dismissal).

1. Enforcement of Ethical Rules
The enforcement of ethical rules against a district attorney is a matter for the Supreme Court, not trial courts. *State v. Simmelink*, 64 Or App 465, 468 n.2 (1983).

IX. PROSECUTION NOT READY FOR TRIAL

A. Motion to Dismiss
Unless the court is of the opinion that the *public interests* require the accusatory instrument to be retained for trial, it must dismiss the accusatory instrument if:

1. The case is called for trial;
2. The defendant appears; and
3. The district attorney is not ready and does not show sufficient cause for postponing the trial.

ORS 136.120. *See State v. Martin*, 25 Or App 517, 520 (1976) (dismissal was the proper remedy where the State was not ready to proceed and did not contend on appeal that the trial court’s failure to retain the charges in the interests of the public was an abuse of discretion).

1. Considerations For Determining Sufficient Cause to Postpone
In deciding whether the prosecution has shown sufficient cause to postpone the trial, the court should consider the following: “The ‘reasons for seeking the postponement,’ and whether ‘the prosecutor’s conduct constitute[d] inexcusable neglect,’ bear on the question of whether the prosecutor has shown ‘any sufficient cause for postponing the trial.’ Similarly, the ‘magnitude of the interests at stake,’ and whether the defendant would suffer actual prejudice or whether the defendant’s right to a speedy trial would be compromised, bear on whether ‘the public interests require the accusatory instrument to be retained for trial.’” *State v. Parliament*, 164 Or App 707, 712 (2000) (citations omitted).
2. Effect of Dismissal

a. Felony or Class A Misdemeanor Charge
   Dismissal of an accusatory instrument charging a felony or Class A misdemeanor is not a bar to another action for the same crime, unless the trial court so directs, in which case it must enter a judgment of acquittal. ORS 136.130. See State v. Carrillo, 311 Or 61, 67 (1991) (State lacks statutory authority to appeal a judgment of acquittal entered pursuant to ORS 136.130); cf. State v. Gunder, 154 Or App 332, 336-37 (1998) (discussing Carillo as applied to the State’s appeal of an order dismissing the accusatory instrument).

b. Other Charges
   Dismissal of an accusatory instrument charging offenses other than a felony or Class A misdemeanor bars another action for the same offense. ORS 136.130. See State v. Ibkleitan, 115 Or App 415, 418 (1992) (concluding that the “same offense” language in ORS 136.130 does not bar subsequent prosecution for “a different crime arising out of the same criminal episode”).

3. Discretion to Dismiss With Prejudice
   A trial court does not have “absolute” discretion to dismiss an accusatory instrument with prejudice under ORS 136.130—it must have a “substantial” reason for barring a subsequent prosecution. State v. Love, 38 Or App 459, 462 (1979).

a. Three Factors to Consider
   In State v. Gunder, 154 Or App 332, 339 (1998), the court identified three factors that trial courts are to consider in exercising discretion under ORS 136.130:

   1. Did the prosecutor’s conduct constitute inexcusable neglect;
   2. Would the defendant suffer actual prejudice due to the delay; and
   3. Would the defendant’s right to a speedy trial be compromised by the delay?

State v. Gunder, 154 Or App 332, 339 (1998): “Our prior decisions have not expressly discussed the appropriate relationship or interplay among those three factors. However, implicit in those decisions is a principle that we now make explicit: Although trial courts are to consider all three factors in determining whether to dismiss with
prejudice under ORS 136.130, our formulation does not require that each of the factors must be satisfied; nor does it mean that any one of the factors, by itself, is necessarily sufficient. Rather, the analysis contemplates a ‘mix-and-match’ or ‘sliding-scale’ assessment, in which, depending on the strength of any given factor or combination of factors, dismissal with prejudice may be warranted. As long as the trial court’s assessment of the factors is within the range that a reasonable judge might reach, there is no abuse of discretion.”

See also State v. Sandbach, 175 Or App 329, 334 (2001) (concluding that the court abused its discretion in dismissing charges with prejudice because prosecutor’s premature dismissal of witnesses was not “sufficiently egregious or consequential to permit a court to conclude that it outweighed the substantial public interest in resolving the charges on their merits”); State v. Hewitt, 162 Or App 47, 52-54 (1999) (trial court abused its discretion in dismissing a charge with prejudice rather than granting the State’s request for a postponement to seek appellate review of an important issue in the absence of substantial prejudice to the defendant); State v. Gutierrez, 170 Or App 91 (2000) (reversing trial court’s sua sponte dismissal with prejudice because “there was no statutory or factual ground for such a dismissal”).

X. MOTION FOR CONTINUANCE OF TRIAL

A. Motion Must Be Made Pretrial

Before trial begins of a case in which a question of fact is at issue, the court may, upon sufficient cause shown by the affidavit of the defendant or the statement of the district attorney, postpone the trial for a reasonable period of time. ORS 136.070; State v. Longoria, 17 Or App 1, 6 (1974) (stating that “compliance with ORS 136.070 must be prior to trial”).

B. Court Has Discretion to Grant Motion

C. Considerations

1. Reasonableness of the Request

“As an essential predicate, the court should consider on the record whether the request for a postponement is reasonable in the circumstances.” State v. Harper, 81 Or App 422, 425 (1986).

2. Factors Beyond the Party’s Control

Where defense counsel was not prepared due to factors beyond its control, it was improper for the court to deny a continuance. State v. Hickey, 79 Or App 200, 203-04 (1986); State v. Page, 18 Or App 109, 117-18 (1974) (continuance properly denied where failure of defendant to be prepared with counsel was of defendant’s own making).

3. Defendant’s Right to Counsel Is a Significant Consideration

“The right to counsel of one’s choice is . . . a right of such magnitude that the need of the court for expeditious administration must reasonably accommodate that right. Where, as here, the defendant’s inability to proceed with counsel of his choice was caused by circumstances in the control of others and despite his reasonable efforts to secure counsel on time, the judicial delay caused by allowance of a continuance to secure counsel of choice would be outweighed by defendant’s right to counsel. We hold that the failure to allow a continuance to allow defendant to proceed with counsel of his choice was error.” State v. Zaha, 44 Or App 103, 107 (1980).

XI. SEVERANCE AND JOINDER

A. Motion to Sever Jointly Charged Defendants

1. Joint Trial of Jointly Charged Defendants Required

The court must order a joint trial of jointly charged defendants, unless the court determines that it is “clearly inappropriate” to do so. ORS 136.060(1).

State v. Turner, 153 Or App 66, 72 (1998): “[I]n examining whether joinder is ‘clearly inappropriate,’ our cases have focused on whether joinder either violates a pertinent statute or contravenes the state or federal constitution. Substantial prejudice, by itself, is insufficient.” See State v. Umphrey, 100 Or App 433, 437-38 (1990) (joint trial not clearly inappropriate even where the possibility of prejudice to a codefendant exists.
because “ORS 136.060(1) does not provide for severance on a showing of prejudice”).

a. **In Camera Inspection of Statements Or Confession**
   In ruling on a defendant’s motion for severance, the court may order the prosecution to deliver for inspection in camera any statements or confessions made by any codefendant that the prosecution intends to introduce at trial. ORS 136.060(2). See *State v. Umphrey*, 100 Or App 433, 438 (1990) (applying ORS 136.060(2)). See also *State v. Taylor*, 125 Or App 636, 640 (1994) (permitting redacted statements in joint trial); *State v. Quintero*, 110 Or App 247, 252 (1991) (same).

b. **Mutually Exclusive Defenses**

2. **Victim’s Interests to Be Considered**
   The court must strongly consider the victim’s interests when determining whether to sever a joint trial. ORS 136.060(1).

3. **Policy**

4. **Motion For a Separate Trial Must Be Made Pretrial**

B. **Motion to Join or Consolidate Charges Against Defendant**

1. **Two or More Offenses May Be Consolidated**
   The State may charge two or more offenses in the same charging instrument in a separate count for each offense if the offenses charged are alleged to have been committed by the same person or persons and are:
   a. Of the same or similar character;
   b. Based on the same act or transaction; or
   c. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan. ORS 132.560(1)(b).
**State v. Fitzgerald**, 267 Or 266, 273 (1973): Two charges arise out of the same act or transaction and may therefore be joined under ORS 132.560(1)(b)(B) “if they are so closely linked in time, place and circumstance that a complete account of one charge cannot be related without relating details of the other charge.” See **State v. Fore**, 185 Or App 712, 717-18 (2003) (examining Fitzgerald).

2. **Two or More Charging Instruments May Be Consolidated**
   The court may order two or more charging instruments to be consolidated if it finds they meet the circumstances described in ORS 132.560(1)(b). ORS 132.560(2). See **State v. McMinn**, 145 Or App 104, 107-08 (1996) (consolidating indictments for sex abuse charges concerning multiple victims was within court’s discretion); **State v. Rood**, 118 Or App 480, 482-83 (1993) (trial court properly granted the State’s motion to consolidate three separate indictments consisting of one count of sodomy and two counts of sex abuse because the offenses were all of a similar character); cf. **State v. Armenta**, 74 Or App 219, 223 (1985) (DUII and assault charges properly joined where a later claim of former jeopardy would be avoided and defendant did not move for separate trials).

3. **Former Jeopardy Issues**

4. **State’s Motion to Consolidate Must Be Timely**
   The State must file a motion to consolidate charges at such time as will allow the defendant to make an informed response. **State v. Shields**, 280 Or 471, 478 (1977) (motion made on day set for trial was untimely).

5. **Error In Granting Motion to Consolidate May Be Harmless**
   An error in granting the State’s motion to consolidate charges is not presumptively prejudicial to the defendant. **State v. Parker**, 317 Or 225, 234 (1993) (harmless error rule applied to consolidation of separate citations charging DUII and hit and run). See **State v. Fitzgerald**, 267 Or 266, 275 (1973) (misdi joinder did not result in prejudice).
C. Defendant’s Motion to Sever Joined Charges

1. Defendant Must Show Substantial Prejudice

   If it appears, upon motion, that the State or the defendant is substantially prejudiced by a joinder of offenses, the court may order an election or separate trials of counts or provide whatever relief justice requires. ORS 132.560(3); State v. McMinn, 145 Or App 104, 107 (1996) (because consolidation always produces some adverse risk to a defendant, the prejudice required to warrant severance must be “substantial”).

   **Note:** Requiring the defendant to show substantial prejudice abrogates previous case law holding that the court normally should accept defendant’s choice regarding severance. State v. Meyer, 109 Or App 598, 603-04 (1991) (discussing requirement that the defendant show substantial prejudice to prevail on motion to sever joined charges). See State v. Rood, 118 Or App 480, 483 (1993) (defendant failed to show substantial prejudice).

   a. “Prejudice” Defined

      “[A]t its core, ‘prejudice’ means to ‘harm’ or ‘injure.’ In the context of ORS 132.560(3), the ‘prejudice’ standard authorizes the court to protect a party from the harm or injury that the party likely will suffer as a result of the joinder of multiple offenses” and “demonstrates that the legislature intended to authorize the court to safeguard the parties from potential injury or harm to their interests in a fair trial.” State v. Miller, 327 Or 622, 627 (1996).

   b. Court Not Required to Balance Prejudicial Effect of Evidence

      State v. Parker, 119 Or App 105, 109 (1993): “Although ‘prejudice’ is a factor that must be considered, we do not think that the legislature intended to require a court to undergo the six step analysis required by OEC 403 when deciding whether to sever charges for separate trials. The most compelling argument against that proposition is that to require a trial court to make such a determination at a pretrial stage deprives this court of the opportunity to consider the effect of the evidence in the context of the trial evidentiary record. Moreover, in a motion under ORS 132.560(3), the defendant must show substantial prejudice. Defendant’s proposal would shift that burden to the state.”
c. **Prejudice Not Considered When Consolidating Indictments**

2. **Mutually Admissible Evidence Justifies Denial of Severance**
   “A trial court has discretion to deny severance if evidence of the joined offenses would be mutually admissible in separate trials, or if the evidence is sufficiently simple and distinct to mitigate the dangers created by joinder.” *Warren v. Baldwin*, 140 Or App 318, 324 (1996). “‘Mutually admissible’ means ‘evidence of each crime could have been introduced on a separate trial of the other.’” *Id.* (quoting *U.S. v. Werner*, 620 F2d 922, 929 n.7 (2d Cir. 1980)).
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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 3: ENTRY OF PLEA

I. PLEAS GENERALLY

A. Types of Pleading
The only pleadings on the part of the defendant are the demurrer and plea. ORS 135.315.

B. Pleading By the Defendant
The defendant may plead guilty, not guilty, or no contest. ORS 135.335(1).

1. Not Guilty Plea
A not guilty plea denies every material allegation in the accusatory instrument. ORS 135.370. If defendant does not enter a plea by the completion of arraignment, the court must enter a plea of not guilty. ORS 135.380(3).

2. No Contest Plea

a. Entered Only With Court’s Consent
A defendant can enter a no contest plea only with the court’s consent after the court has considered the parties’ views and the public’s interest in the effective administration of justice. ORS 135.335(2).

b. Effect of Judgment
A judgment following entry of a no contest plea constitutes a conviction of the offense. ORS 135.345.

3. Alford Plea
“An Alford plea is a guilty plea in which the defendant does not admit commission of the criminal act or asserts that he is innocent. In such a situation, the trial court must determine that there is a factual basis for the plea.” State v. Sullivan, 197 Or App 26, 28 n.1 (2005) (citing North Carolina v. Alford, 400 US 25 (1970)).

The defendant need not admit guilt as long as the plea is “a voluntary and intelligent choice among the alternative courses of action open to the defendant.” North Carolina v. Alford, 400 US 25, 31 (1970). See State v. Brumfield, 14 Or App 273 (1973) (court did not abuse discretion in refusing to accept Alford plea where defendant vacillated between admitting and denying that he committed the charged acts and the record
indicated that he may not have understood what was going on at entry of the guilty plea).

4. **Conditional Plea**

With the consent of the court and the State, the defendant may enter a conditional plea of guilty or no contest reserving, in writing, the right to challenge on appeal any adverse rulings on pretrial motions; if the defendant prevails on appeal, the plea may be withdrawn. ORS 135.335(3).

5. **Oral Plea Required**

The defendant must present an oral plea that must be entered in the court’s register in substantially the appropriate form provided at ORS 135.355(1)(a)-(c); *State v. Holloway*, 57 Or 162, 165-66 (1910). *But see State v. Gray*, 275 Or 75 (1976) (concluding that defendant’s failure to formally enter a guilty plea was not grounds to set aside his convictions because the record contained a lengthy discussion between the judge and the defendant regarding his rights and understanding of the plea agreement).

   a. **Oral Plea May Be Made Via Simultaneous Transmission**


6. **Special Provisions For Presentation of Guilty & No Contest Pleas**

   a. **Presence of Defendant Required to Plead on Felony Charges**

   Except as provided in ORS 135.360(2), a defendant must be present in open court to plead guilty or no contest to a felony, unless the defendant is a corporation, in which case counsel may enter a plea. ORS 135.360(1).

   i. **Plea May Be Accepted Via Simultaneous Transmission**

   A judge may accept a plea of guilty or no contest ORS 135.360(1) by *simultaneous electronic transmission*, as defined in 2005 Or Laws, ch. 566, § 4 (effective July 20, 2005), without the agreement of the State or the defendant if the plea is entered at arraignment and the type of simultaneous electronic transmission available allows the defendant to observe the court and

i. **Exception For Felony Charge Pending In Another County**
Any circuit judge may accept a guilty or no contest plea to a felony charge pending in another county in the judge’s judicial district, and impose a sentence thereon if: (1) requested in writing by the defendant and defense counsel; and (2) one day’s notice is given to the district attorney. Judgments based upon such pleas and sentences entered upon the pleas are effective as if heard in open court in the county where the charge is pending, ORS 135.360(2) as amended by 2005 Or Laws, ch. 566, § 7 (effective July 20, 2005), and do not violate the constitutional right to be tried where the crime was committed. *Alexander v. Gladden*, 205 Or 375, 391 (1955) (in view of defendant’s express request and waiver, no constitutional right was violated when he was sentenced in another county).

A) **Exception Also Applies to Misdemeanants**
“Surely [ORS 135.360(2)] was not intended to exclude misdemeanants from the right to be sentenced at their own request in a county of the district other than that in which the charge was filed. We think the absence of any provision for so sentencing misdemeanants when they request it was because the power of an accused person to confer jurisdiction of the person by his consent was assumed even in absence of statute.” *Alexander v. Gladden*, 205 Or 375, 394 (1955).

b. **Pleading to Other Offenses In Different Counties**
A defendant who appears in one county for the purpose of pleading guilty or no contest to a criminal charge may state in writing that the defendant wishes to (1) waive indictment, venue, and trial of another charge pending in a coordinate court in a different county; (2) enter a plea of guilty or no contest on that charge; and (3) consent to disposition of that charge in the court in which the defendant appears. ORS 135.375(2). Such a request requires *written approval* from the district attorney in both counties. ORS 135.375(3)-(4).
C. Time of Entering Plea

1. Presence of Counsel
   A defendant cannot be required to enter a plea to an offense punishable by imprisonment until represented by counsel, unless the defendant waives the right to counsel. ORS 135.380(1). See Chapter 1, III. Defendant’s Right to Counsel.

2. Entering a Plea at Arraignment
   A defendant may plead guilty or no contest at arraignment or any time thereafter, except an unrepresented defendant may not plead guilty or no contest to a felony at arraignment. ORS 135.380(2). State v. Reichert, 39 Or App 905, 907 (1979) (stating that a guilty plea by an unrepresented defendant to a felony charge on the day of arraignment is the equivalent of no plea), overruled on other grounds, State v. McCallister, 69 Or App 560 (1984).

   a. Rule 7 Motion to Continue Time to Enter Plea
      At the time of arraignment, the court may accept a plea of not guilty and set a trial date; or set a date for the defendant to enter a plea not less than 21 days after arraignment but not later than 21 days prior to the trial date if the defendant is in custody, and not less than 35 days after arraignment but not later than the 35th day prior to the trial date if the defendant is not in custody. UTCR 7.010(1)-(2).

II. ACCEPTING GUILTY OR NO CONTEST PLEAS

A. Advising the Defendant

1. Nature of the Charge
   The court cannot accept a guilty or no contest plea until it addresses the defendant personally and determines that the defendant understands the nature of the charge. ORS 135.385(1). See Capps v. Cupp, 68 Or App 327, 331-332 (1984) (finding that the evidence contained in the record sufficiently advised the nature of the offense prior to defendant’s no contest plea).

2. Informing the Defendant of Rights Waived
   The court must advise the defendant that by pleading guilty or no contest, the following rights are waived:

   a. Right to a jury trial;

   b. Right to confrontation; and

Appendix A provides a Model Script for Accepting a Guilty or No Contest Plea prepared by the Oregon Judicial Department.

Appendix B provides a recommended Waiver of Jury Trial form prepared by the Oregon Judicial Department.
c. Right against self-incrimination.


Jones v. Cupp, 7 Or App 415, 417 (1971): “In Oregon there is a constitutional right to be advised of the basic legal consequences of a guilty plea.”

a. Meeting the Statutory Obligation
The court meets the statutory obligation to advise the defendant of the rights contained in ORS 135.385(2) when it addresses the defendant personally and determines that the defendant was given the opportunity to read the plea petition and confer with counsel. Lyons v. Pearce, 298 Or 554, 561 (1985). See Cruz v. Cupp, 78 Or App 303, 306 (1986) (statutory obligation met where counsel advised the court that he had explained the plea petition to the defendant who read and understood it before signing).

3. Informing the Defendant of the Maximum Possible Sentence
The court must advise the defendant of the maximum possible sentence, including that from consecutive sentences. ORS 135.385(2)(b). See Dixon v. Gladden, 250 Or 580, 585 (1968) (stating that the maximum sentence is a legal consequence of a guilty plea which the defendant must understand); cf. Jones v. Cupp, 7 Or App 415, 420 (1971) (holding that a defendant need not be advised of parole ineligibility as a consequence of a guilty plea). Additionally, the court must inform the defendant that he or she may be found to be a dangerous offender after a plea in the present action and thereby subject to a different or additional penalty. ORS 135.385(2)(c).

4. Informing Non-Citizens of Potential Deportation

a. Court’s Obligation to Inform Defendant
If a non-citizen defendant seeks to enter a plea of guilty or no contest to a felony, the court must advise defendant that, under federal law, a conviction will likely result in:

   a. Removal/Deportation;

   b. Exclusion from admission to the U.S.; or

   c. Denial of naturalization.

ORS 135.385(2)(d).

Advise defendant on the following before accepting a guilty or no contest plea:

- Defendant waives the right:
  1. To a jury trial;
  2. Of confrontation; and
  3. Against self-incrimination;

- Dangerous offender or sexually violent dangerous offender adjudication may result in additional penalty;

- Maximum possible sentence, including that from consecutive sentences;

- Conviction may result in removal of a non-citizen defendant;

- EDP plea will be honored if appropriate;

- DA’s charge or sentence recommendations are not binding on the court.
Lyons v. Pearce, 298 Or 554, 561 (1985): a court meets the statutory requirement under ORS 135.385(2)(d) if the court is satisfied that the defendant was informed of the possibility of deportation. “ORS 135.385(2)(d) does not require the trial court to address a defendant orally about the possibility of deportation. It is sufficient if the court satisfies itself that a defendant has been so informed.” Id.

b. Defense Counsel’s Obligation to Inform Defendant
As a matter of state constitutional law, defense counsel must advise non-citizen defendants that a criminal conviction “may” result in deportation. This is the minimum the state constitution requires. Gonzales v. State, 340 Or 452, 458 (2006) citing Lyons v. Pearce, 298 Or 554, 557, 567 (1985); see also Or Const Art I, § 11.

Gonzalez v. State, 340 Or 452 (2006): The court held that defense counsel is not required to predict the likelihood of deportation with any greater specificity than that required by ORS 135.385(2)(d) and Lyons v. Pearce despite recent changes in federal law that increase the likelihood of deportation for non-citizens convicted of crimes. The court reiterated the rule in Lyons and ORS 135.385(2)(d) which only requires counsel to advise the non-citizen defendant that a conviction may result in deportation, reversing the appellate court’s holding that defense counsel must advise immigrant clients that unless the Attorney General chooses not to deport the defendant, defendant will be deported.

5. Honoring an Agreed Disposition Recommendation Under an EDP
When a guilty plea is entered pursuant to a plea offer and agreed disposition recommendation under an early disposition program (EDP), the court must inform the defendant whether it will agree to sentence the defendant as provided in the recommendation. ORS 135.385(2)(e). The court is required to impose sentence as provided in an agreed disposition recommendation if the court finds that the plea is voluntary and the disposition recommendation is appropriate in the particular case. ORS 135.390(4)(a)-(b).

a. Plea May Be Withdrawn If Recommendation Inappropriate
If the court determines that the agreed disposition recommendation is inappropriate, it must advise the parties and allow the defendant an opportunity to withdraw the plea. ORS 135.390(4)(b).
6. Advising Defendant As Part of a Group
In a situation where the court advises the defendant of rights in common with other persons before the court, the court subsequently must satisfy itself that defendant: (1) was present; (2) heard the rights given the group; and (3) understood those rights. *State v. Dawson*, 57 Or App 420, 424 (1982).

7. Determining Voluntariness of the Plea

a. Defendant Must Have a Voluntary Understanding of the Plea
The court may accept a plea of guilty or no contest only if the court determines that defendant makes the plea voluntarily and intelligently. ORS 135.390(1).

*Raisley v. Sullivan*, 8 Or App 332, 335-36 (1972): A judge who accepts a guilty plea has sufficient latitude in considering the circumstances of the defendant; however, “the standard for determining the validity of a guilty plea is whether the plea was entered understandingly and voluntarily.”

i. Make the Record
A waiver of the defendant’s rights to a jury trial, confrontation, and against self-incrimination cannot be presumed from a silent record. *Boykin v. Alabama*, 395 US 238, 243 (1969) (requiring an affirmative showing that a guilty plea was intelligent and voluntary before a trial court may accept it).

b. When Plea Results From a Prior Discussion and Agreement
The court must determine whether the plea is the result of a prior plea discussion and agreement; if so the court must determine the nature of the agreement. ORS 135.390(2).

i. Trial Judge Not Bound By a Prior Plea Agreement
A trial judge is required to give a *prior* plea agreement due consideration but is not bound by it, and may reach an independent decision on whether to grant sentence concessions. ORS 135.432(4). Additionally, a trial judge may later decide that the case should not include the sentence concessions contemplated by the plea agreement, in which case the defendant must be informed and allowed the opportunity to withdraw a guilty or no contest plea. ORS 135.432(3).
c. **District Attorney’s Recommendations Are Not Binding**
   If the district attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant that the district attorney’s recommendations are not binding on the court. ORS 135.390(3).

d. **No Threats or Promises**
   A guilty or no contest plea is void if induced by threats or promises. *Rose v. Gladden*, 248 Or 520, 522 (1968).

e. **Plea Must Have a Factual Basis**
   A guilty or no contest plea must have a factual basis. ORS 135.395; *Barnes v. Cupp*, 44 Or App 533, 538 (1980).

8. **Other Consequences the Court Does Not Need to Advise On**
   The court does not need to advise the defendant of:
   
   a. Minimum sentences;
   b. Matrix computations;
   c. Eligibility of parole or parole board policies; or
   d. Suspension of driving privileges.

   *State v. Twitty*, 85 Or App 98, 102, *rev den* 304 Or 56 (1987) (“A trial court is not constitutionally obligated to detail mandatory minimum sentences, matrix computation, eligibility for parole or parole board policies.”); *Jones v. Cupp*, 7 Or App 415, 420 (1971) (“[P]leading guilty without being informed as to parole ineligibility raises no constitutional issues.”); *Gaffey v. State of Oregon*, 55 Or App 186, 191 (1981) (“We hold that mandatory suspension of a driver’s license is not a basic legal consequence of which the defendant must be advised in order to make a voluntary and informed guilty plea.”)

**B. Victim’s Rights**
   Before accepting a guilty or no contest plea from a defendant charged with a *violent felony*, the court must ask the district attorney whether:
   
   1. The victim requested to be notified and consulted regarding plea discussions; and
   2. If so, whether the victim agrees with the plea discussions and final plea agreement and the victim’s reasons for agreement or disagreement.
ORS 135.406(1)(b). See Or Const I, § 42(1) (providing the victim of a violent felony the right to be consulted regarding plea negotiations).

III. PLEA DISCUSSIONS & AGREEMENTS

A. District Attorney Authorized to Engage in Plea Discussions
   In cases in which it will serve the public interest in the effective administration of criminal justice, the district attorney is authorized to engage in plea discussions for the purpose of reaching a plea agreement in accordance with the criteria provided in ORS 135.415 (providing criteria the district attorney may consider in plea discussions and agreements). ORS 135.405(1).

B. Early Disposition Programs
   A district attorney may provide a plea offer and agreed disposition recommendation to the defendant at the time of arraignment or first appearance under an early disposition program established under ORS 135.941. ORS 135.405(5)(a).

   1. Extending the Plea Under an Early Disposition Program
      A plea offer and agreed disposition recommendation under an early disposition program cannot be extended beyond 7 days for a misdemeanor or 21 days for a felony, except for good cause. ORS 135.405(5)(b).

   2. Probationers Eligible For Early Disposition Recommendations
      A district attorney may provide an offer and agreed disposition recommendation under an early disposition program established under ORS 135.941 to a probationer at the time of the probationer’s first appearance in court for a probation violation. ORS 135.948(1)(a).

C. Judge’s Participation
   1. Trial Judge’s Participation Prohibited
      The judge who will preside at trial must not participate in plea discussions except to:

         a. Inquire about the status of discussions;

         b. Participate in a tentative plea agreement as provided in ORS 135.432(2)-(4); or

         c. Inquire into the victim’s rights as required by ORS 135.406. ORS 135.432(1)(a); Rose v. Gladden, 248 Or 520, 525 (1968).
2. Other Judges May Participate
A judge other than the trial judge may participate in plea discussions at the parties’ joint request or the presiding judge’s request. Participation is advisory only and cannot bind the parties. Neither the advisory judge nor the parties may disclose discussions to the trial judge if the parties do not reach agreement. If the parties reach a plea agreement of guilty or no contest, they may also agree to allow the judge involved in the discussion to take the plea. ORS 135.432(1)(b).

D. Judge’s Responsibilities

1. Oversight of the State’s Plea Agreement Policies
Generally, the State’s rationales concerning plea agreements is subject to the court’s scrutiny, but the court should not interfere if the State’s policy has a rational basis. State v. McDonnell, 313 Or 478, 491 (1992) (discussing plea negotiations regarding an aggravated murder conviction and death sentence); State v. Acker, 175 Or App 145 (2001) (discussing and adhering to McDonnell).

2. Concurring With a Tentative Plea Agreement
At the parties’ request, the trial judge may permit the parties to disclose a tentative plea agreement involving charge or sentence concessions. The judge may inform the parties that the judge will follow the agreement if the presentence report or other information available at sentencing is consistent with the parties’ representations to the judge. ORS 135.432(2).

a. Withdrawing Initial Concurrence
If the judge initially concurs but later decides that the final disposition of the case should not include the sentence concessions contemplated by the plea agreement, the judge must advise the defendant of that decision and allow the defendant a reasonable period of time to affirm or withdraw a guilty or no contest plea. ORS 135.432(3).

3. Trial Judge Is Not Bound By a Prior Plea Agreement
A trial judge must give due consideration to a plea of guilty or no contest that results from a prior plea agreement, however, the judge is not bound by it and may reach an independent decision on whether to grant sentence concessions under the criteria provided in ORS 135.415. ORS 135.432(4).

E. Criminal History Classification
When a plea agreement is presented to the court, the criminal history classification must be accurate. When controversy exists
as to inclusion or classification of a prior conviction or juvenile adjudication, the parties may stipulate to the inclusion, exclusion, or classification of the conviction or adjudication with the court’s approval. ORS 135.407(1).

F. Stipulations Under Sentencing Guidelines

1. Grid Block Classification
   The parties may stipulate to a grid block classification with a presumptive sentence range and the sentencing judge may accept the stipulated grid-block and impose the sentence agreed upon. ORS 135.407(2). See State v. Kephart, 320 Or 433, 441-42 (1994) (discussing stipulated sentencing agreements under ORS 135.407(2)-(5)), superseded by statute as stated in State v. Albrich, 157 Or App 64 (1998).

   a. Departure Sentences
      If the sentencing judge accepts the stipulated classification but imposes a sentence other than the presumptive sentence, the sentence is a departure and is subject to the rules of the Oregon Criminal Justice Commission (OCJC). ORS 135.407(3). See Chapter 16, VII. “Departure Sentences.”

2. Stipulating to a Specific Sentence Within Presumptive Range
   The parties may stipulate to a specific sentence within the presumptive range, which the sentencing judge must impose if the plea agreement is accepted. ORS 135.407(4).

3. Stipulating to a Specific Sentence Outside Presumptive Range
   The parties may stipulate to a sentence outside the presumptive range. The sentencing judge may accept an agreement for an optional probationary sentence or a departure sentence as provided in the Oregon Criminal Justice Commission’s rules. ORS 135.407(5).

G. Binding Effect of the Plea Agreement

1. The State Is Bound By the Terms of a Plea Agreement
   Accepting the defendant’s guilty plea “must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” Santobello v. New York, 404 US 257, 262 (1971).
H. Evidence of Discussion or Plea Agreement

Unless the defendant enters a plea of guilty or no contest and does not later withdraw it, the court may not receive in evidence either for or against defendant in any criminal, civil, or administrative proceeding:

1. The fact that defendant or defendant’s attorney engaged in plea discussions;
2. The fact that defendant or defendant’s attorney made a plea agreement; or
3. Any statement or admission that defendant or defendant’s attorney made during the plea discussions or in the plea agreement.


IV. WITHDRAWAL OF GUILTY OR NO CONTEST PLEA

A. Court’s Discretion to Allow Withdrawal

The court may at any time before judgment permit a plea of guilty or no contest to be withdrawn and a plea of not guilty substituted. ORS 135.365.

B. Defendant’s Right to Withdraw

The defendant does not have an absolute right to withdraw a guilty or no contest plea; the court has discretion to allow or deny such withdrawal. State v. Wiley, 144 Or 251, 253 (1933). However, if it reasonably appears that a person with the authority to mitigate the defendant’s punishment influenced the defendant to plead guilty, a refusal to permit the defendant to withdraw the plea would be an abuse of discretion. State v. Burnett, 228 Or 556, 558 (1961), overruled on other grounds, State v. Clevenger, 297 Or 234 (1984).

C. Evidentiary Issues

1. Withdrawal of the Plea Is Inadmissible

A guilty or no contest plea which is not accepted or has been withdrawn is not admissible against the defendant in any criminal proceeding. ORS 135.445(1).
2. **Statements or Admissions Concerning the Plea Are Inadmissible**
   Any statements or admissions made by the defendant or the defendant’s attorney concerning a plea of guilty or no contest which is not accepted or has been withdrawn are not admissible against the defendant in any criminal proceeding. ORS 135.445(2).
APPENDIX A: MODEL SCRIPT FOR ACCEPTING A GUILTY OR NO CONTEST PLEA

MODEL SCRIPT FOR ACCEPTING A GUILTY OR NO CONTEST PLEA

The court may not accept a guilty or no contest plea to a felony or other charge on which the defendant appears in person without first addressing the defendant personally and determining that the defendant understands the nature of the charge. ORS 135.385(1). A defendant may plead no contest only with the consent of the court, which must consider the views of the parties and the interest of the public in the effective administration of justice. ORS 135.335(2).

A defendant cannot be required to plead to an offense punishable by imprisonment until the defendant is represented by counsel or knowingly waives the right to counsel. ORS 135.380(1). A defendant who is not represented by counsel may not plead guilty or no contest to a felony on the day of arraignment. ORS 135.380(2). If the defendant appears without counsel, before accepting a guilty or no contest plea, advise the defendant on waiver of counsel as provided in the script entitled, “Model Script for Waiver of Counsel.”

The contents of the script should be tailored to fit the unique circumstances of each individual case and defendant.

Introduction

• Do you understand that you have the right to plead not guilty?
• Do you understand that the court’s acceptance of your plea of _____ [guilty/no contest] will result in a final conviction on the charge?
• Do you realize that pleading _____ [guilty/no contest] in this case may result in revocation of your parole, probation, or post-prison supervision and the rest of your sentence could be imposed?

Advising the Defendant

Before accepting a guilty or no contest plea, the court must inform the defendant of the following:

☆ By entering a plea of _____ [guilty/no contest], you give up: (1) the right to a trial by jury (including a right to a jury trial on sentencing enhancement facts); (2) the right to confront any witnesses against you; and (3) the right against self-incrimination. ORS 135.385(2)(a).

» Do you understand that you are giving up your right to remain silent?
» Do you understand that you are giving up your right to see, hear, and question the State’s witnesses and the chance to present your own witnesses?

☆ The maximum possible sentence on the charge(s) against you is _____ [include the maximum possible sentence from consecutive sentences]. ORS 135.385(2)(b).

» Do you realize that other adverse consequences may result from a conviction in this case?
Have you had an opportunity to talk with your attorney about this?

☆ If you are not a citizen of the United States, conviction of this crime may result in deportation/removal, exclusion from admission, or denial of naturalization under federal law. ORS
135.385(2)(d). That is, you may be removed from the United States, you may not be allowed to become a United States citizen, or, if you leave the United States, you may not be allowed to reenter. Have you had an opportunity to talk with your attorney about this?

☆ If the district attorney has agreed to seek concessions to reduce the charge or sentence that must be approved by the court, those recommendations are not binding on the court. ORS 135.390(3).

Effectiveness of Counsel
I want to ask you a few questions about your attorney.

- Have you had enough time to talk with your attorney?
- Are you satisfied with your attorney and the work that he or she has done for you?
- Is there anything that you wanted your attorney to do that has not been done?
- Are there any witnesses that should have been contacted, defenses that should have been raised, or motions that should have been filed?

Determining Voluntariness of the Plea
The court may not accept a plea of guilty or no contest without first determining that the plea is voluntary and intelligently made. ORS 135.390(1). The court must determine whether the plea is the result of prior plea discussions and a plea agreement. ORS 135.390(2).

☆ Are you entering a plea of [guilty/no contest] because you have reached a plea agreement with the district attorney?
  » [If “Yes.”]: I will consider the agreement carefully but I am not bound by it, and I may reach a different decision on how to sentence you. ORS 135.432(4).

☆ [EDP Plea]: Are you entering a guilty plea because the district attorney made a plea offer and agreed disposition recommendation under an early disposition program (EDP)?
  » [If “Yes.”]: If I determine that your plea is voluntary and the disposition recommendation is appropriate, I will sentence you as provided in the agreed disposition recommendation. If I determine that the agreed disposition recommendation is inappropriate for your case, I will allow you to withdraw your plea. ORS 135.385(2)(e); ORS 135.390(4).
  » [If the court determines that the agreed disposition recommendation is inappropriate in the case]: I have determined that the agreed disposition recommendation is not appropriate in your case; therefore, you will now have an opportunity to withdraw your plea. Would you like to withdraw your plea? ORS 135.390(4)(b).

☆ [If the parties request a review of a tentative plea agreement]: I agree with the proposed disposition in the plea agreement and I will sentence you accordingly if the information available to me at the time of sentencing, including the presentence report, is consistent with what you have represented to me in this plea agreement. If I decide later that your case should not be resolved as suggested in this plea agreement, I will allow you to withdraw your plea ORS 135.432(2), (3).
  [Or]:
  » I do not agree with the proposed disposition in the plea agreement for these reasons: ______ [state reasons]. Would you like to withdraw your plea?
- Have you read and signed the plea petition? Did you go over the plea petition with your attorney? Do you understand it?
• Has anyone threatened or forced you to plead ______ [guilty/no contest]? Has anyone promised anything to you if you plead ______ [guilty/no contest], other than the district attorney in your plea discussions?

• Are you under the influence of alcohol or drugs? Are you suffering from any injury, illness, or disability, or taking medications that could affect your ability to make decisions?

Determining a Factual Basis for the Plea

Before entering a judgment on a guilty or no contest plea, the court must inquire to its satisfaction that there is a factual basis for the plea. ORS 135.395.

★ [Guilty Plea]: Are you in fact guilty of the crime(s) charged? Tell me what you did that makes you guilty of the crime(s).

★ [Alford Plea]—“An Alford plea is a guilty plea in which the defendant does not admit commission of the criminal act or asserts that he is innocent. In such a situation, the trial court must determine that there is a factual basis for the plea.” State v. Sullivan, 197 Or App 26, 28 n.1 (2005) (citing North Carolina v. Alford, 400 US 25 (1970)).: The charge(s) against you state that you ______ [state elements of charge(s)]. Do you understand the charge(s)? Do you still want to plead guilty?

  » [If “Yes.”]: Do you believe that the State could produce enough evidence to convict you and that a guilty plea is in your best interest, even though you maintain that you are innocent?

  » [To the district attorney]: Please recite on the record the facts that make up the basis for the charge(s).

  » [To defense counsel]: Is the district attorney’s recitation of the facts consistent with your understanding of them? Are you of the opinion that a plea of guilty is in the best interest of your client?

  » [To the defendant]: Do you have any objection to the district attorney’s statements or the comments of your attorney?

    • [If the court finds a strong factual basis for the plea]: Although you refuse to admit guilt, the court finds that a strong factual basis exists for your plea of guilty. The court accepts your plea.

    • [If the court does not find a strong factual basis for the plea]: The court is not satisfied that a sufficient factual basis exists to support a guilty plea in your case. The court does not accept your plea of guilty. See State v. Brumfield, 14 Or App 273 (1973) (court did not abuse discretion in refusing to accept Alford plea).

★ [No Contest Plea]: I am going to explain to you the effect of a no contest plea. A no contest plea neither admits nor denies that you have committed a crime. What you are telling the court is that you have chosen not to contest the charge(s) to which you are pleading no contest. After you have entered your plea, I will ask the prosecutor in this case to briefly summarize the evidence the State would present if this case were to go to trial. If that evidence satisfies the elements of ______ [state charge(s) or lesser included offense(s) to which defendant is pleading no contest], then I will make a finding of guilty and a conviction will be entered. You will not have an opportunity to dispute the evidence, to call any witnesses, or to raise any defenses. Do you understand that a plea of no contest will result in a conviction on the charge(s) of ______ [state charge(s)]?

  » [To the district attorney]: Please summarize the State’s evidence on the charge(s) of ______ [state charge(s)].
CHAPTER 3: ENTRY OF PLEA

[To the defendant]: Do you have any questions about the effect or consequences of a no contest plea?

- [If “No.”]: After considering the views of the parties and the interest of the public in the effective administration of justice, the court consents to the entry of your no contest plea and finds that there is a sufficient factual basis for the plea.

Violent Felony: Victim Input on Plea Agreement

In any case involving a violent felony, defined as a “person felony” as defined in OAR 213-003-0001, before accepting a plea of guilty or no contest, the court must determine whether the victim was consulted regarding plea discussions. See ORS 135.406; Or Const Art I, § 42(1)(f).

- [To the defendant]: The victim in this case has the right to request to be consulted about any plea agreement.

- [To the district attorney]: Has the victim requested to be notified and consulted regarding plea discussions?
  
  - [If “Yes”]: Does the victim agree or disagree with the plea discussions and agreement? What are the victim’s reasons for agreement/disagreement?
  
  - [If “No”]: The district attorney’s failure to notify and consult the victim does not affect the validity of the plea. ORS 135.406(3).

- [To the defendant]: You also should be aware that at the time of sentencing, the victim (or the victim’s next of kin) has the right to appear and express any views about the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and a compensatory fine. ORS 137.013; Or Const Art I, § 42(1)(a).

Dangerous Offender & Sexually Violent Dangerous Offender

[If the State has given notice of enhancement facts that may result in a dangerous offender conviction or a sexually violent dangerous offender conviction]: After you enter your plea, this court may determine during the sentencing phase that you are a dangerous offender or a sexually violent dangerous offender and subject you to a different or additional penalty. ORS 135.385(2)(c); ORS 137.765(2). See generally 2005 Or Laws, ch. 463, §§ 2-7, 11 (effective July 7, 2005).

Sex Offender

[If charged with a “sex crime” as defined in ORS 181.594]: The crime(s) with which you are charged are sex crimes. Are you aware that once you return to the community you will be required to register and report as a sex offender? ORS 181.595; ORS 181.596; ORS 181.603(1).

Accepting the Plea

Do you still want to plead _____ [guilty/no contest]?

☆ [If “Yes.”]: The court finds that your plea of _____ [guilty/no contest] is knowingly, voluntarily, and intelligently made. The court accepts your plea.
APPENDIX B: WAIVER OF JURY TRIAL FORM
IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF ________________________

State of Oregon, Plaintiff vs. _________________________________, Defendant.

Case No. ____________________

WAIVER OF JURY TRIAL

I _____________________________, the defendant in this matter, appearing in person and with my attorney, ________________________________, understand, and my attorney has explained to me, that:

- I have the right to a jury trial on the determination of whether I am guilty or not guilty of the crime(s) charged;
- I have the right to a jury trial on sentence-enhancement facts that the state has alleged, except as to any sentence-enhancement facts that I admit;
- If the sentence-enhancement facts relate to me and not to the crime(s) charged, I am entitled to a jury trial on those facts separately if the jury finds me guilty of the crime(s) charged;
- If I waive the right to a jury trial on the issue of guilt, I also waive the right to a jury trial on any sentence-enhancement facts; the judge would decide all issues of fact as to guilt and as to sentencing.

After being fully advised, and of my own free will, I wish to waive my rights to jury trial in this matter as follows:

☐ I WAIVE my right to have a jury decide whether I am guilty or not guilty of the crime(s) charged and any sentence-enhancement facts.

☐ I DO NOT waive my right to have a jury decide whether I am guilty or not guilty of the crime(s) charged, but I WAIVE my right to have a jury decide the following sentence-enhancement facts (check all that apply):
   - Any enhancement facts related to me as the DEFENDANT.
   - Any enhancement facts related to the OFFENSES charged in the accusatory instrument.

___________________      __________________________         __________________________
DateDefendant      Defense Attorney

THE COURT FINDS: Defendant’s waiver of jury trial is intelligent, knowing, and voluntary, and the court accepts that waiver.

___________________      __________________________
DateJudge
# Table of Authorities

## Authorities

### Cases
- Alexander v. Gladden, 205 Or 375 (1955), 187
- Barnes v. Cupp, 44 Or App 533 (1980), 192
- Capps v. Cupp, 68 Or App 327 (1984), 188
- Cruz v. Cupp, 78 Or App 303 (1986), 189
- Dixon v. Gladden, 250 Or 580 (1968), 189
- Gonzales v. State, 340 Or 452 (2006), 190
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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 4: DISCOVERY

I. OVERVIEW

A. Limitation on Exclusion of Relevant Evidence
   The court may not exclude relevant and otherwise admissible evidence in a criminal action on grounds it was obtained in violation of any statutory provision, unless exclusion is required by:

   1. United States or Oregon Constitutions;
   2. Rules of evidence governing privileges and the admission of hearsay; or


B. Measure 11 Offenses
   Defendant may not use a Measure 11 offense release hearing for purposes of discovery. ORS 135.240(4)(d).

C. Victims’ Rights

   1. Discovery Rights
      The victim has certain rights in the discovery process, including:

      a. The right to have the victim’s address and phone number withheld from the defendant, unless good cause is shown to the court;
      b. If contacted by the defense, the right to be clearly informed in person or in writing by the defendant’s attorney of the identity and capacity of the person contacting the victim;
      c. The right not to talk to the defendant’s attorney or agents, unless the victim desires;
      d. The right to have a district attorney present during any interview with the defense; and
      e. The right to refuse to be interviewed or deposed by, or give discovery to, the defendant.

   ORS 135.970(1)-(3).
2. **Right to Information About Defendant**
   The victim has the right to request the following information about the defendant from the public body who retains it:
   
   a. Conviction and sentence;
   b. Criminal history;
   c. Imprisonment; and
   d. Future release from physical custody.

   ORS 147.421(1).

D. **Definition of “Disclose”**
   “Disclose” means to afford the adverse party an opportunity to inspect or copy the material. ORS 135.805(2). *Cf. State v. Warren*, 304 Or 428, 433 (1988) (holding that discovery of Children’s Services Division files is to be “by means of in camera inspection by the trial court” rather than direct access by the defendant’s attorney).

E. **Purpose of the Discovery Statutes**
   “[O]ne of the primary purposes of the criminal discovery statutes is to assure to both the state and the defendant the opportunity, in advance of trial, to be provided with the information required by these statutes so as to enable each party to prepare adequately for trial and to prevent ‘surprise’ at the time of trial. . . . However, another important purpose of the criminal discovery statutes is one of efficient judicial administration, *i.e.*, to avoid unnecessary trials, to expedite trials and to prevent the expense and delay of continuances when either party claims to be unprepared to go to trial because of failure by the other party to comply with these discovery statutes.” *State v. Dyson*, 292 Or 26, 35-36 (1981).

F. **Application of Discovery Statutes**
   The discovery statutes (ORS 135.805 to 135.873) are applicable in all criminal prosecutions in which a charging instrument has been brought in a court of record, ORS 135.805(1), and in all traffic proceedings involving a violation. ORS 153.076(3).

II. **TIMING**

A. **Disclosure Must Be “As Soon as Practicable”**
   Both parties must disclose evidence “as soon as practicable” after the filing of an accusatory instrument. ORS 135.845(1). *See State v. Harshman*, 61 Or App 711, 715 (1983) (prosecution’s disclosure of evidence on the day of trial did not comply with the
statute); State v. Lindquist, 141 Or App 84, 88 (1996) (defendant breached duty to disclose by producing witness on day of trial); State v. Girard, 106 Or App 463, 468 (1991) (disclosure by defense counsel four days before trial was not as soon as practicable).

1. **Court Supervision**
   The court may supervise discovery to the extent necessary to insure that it proceeds properly and expeditiously. ORS 135.845(1).

   State v. Kull, 298 Or 38, 44 (1984): “Where the parties do not agree on the method of discovery to be used, the trial judge should exercise supervisory authority to ensure that discovery proceeds properly, that the parties’ rights are not adversely affected, and that the trial is not unreasonably delayed.”

B. **Continuing Duty to Disclose**
   Both the prosecution and the defense have a continuing duty to disclose evidence as it becomes available, both before and during trial. ORS 135.845(2). See State v. Dillard, 100 Or App 645, 648 (1990) (disclosure on second day of trial allowed when evidence first found then); State v. Beaty, 127 Or App 448, 456 (1994) (prosecution’s intention to call rebuttal witnesses did not violate ORS 135.845(2) when on the morning of trial it learned of the defendant’s intent to introduce new evidence).

III. **DISCLOSURE BY THE PROSECUTION**

A. **Mandatory Disclosure to the Defendant**
   Except as provided in ORS 135.855 (material and information exempt from discovery) and ORS 135.873 (protective orders), ORS 135.815(1) requires the prosecution to disclose to the defendant the following material and information within its possession or control:

1. **Names and Addresses of Witnesses**
   The prosecution must disclose names and addresses of persons it intends to call as witnesses at any stage of the trial. ORS 135.815(1)(a).

2. **Pretrial Statements of Witnesses**
   The prosecution must also disclose relevant written or recorded statements or memoranda of any oral statements made by witnesses it intends to call at trial, ORS 135.815(1)(a), including a prosecutor’s handwritten notes of a witness’s statements if they contain “no opinions, theories or conclusions...”

   See infra, VIII. “Exemptions From Discovery.”
The prosecution must disclose to the defendant:

- Names and addresses of witnesses;
- Pretrial statements of witnesses;
- Defendant’s pretrial statements;
- Reports or statements of experts;
- Tangible objects;
- Prior criminal convictions;
- Search and seizure evidence;
- Testimony of grand jury witnesses (at trial);
- Portions of CSD files containing written reports of witness State intends to call;
- Exculpatory evidence.

that could be characterized as work product.” State v. Gallup, 108 Or App 508, 511 (1991). See State v. Pena, 108 Or App 171, 175 (1991) (State had no duty to disclose the identity of a witness whom it did not intend to call at trial). “Relevant” statements are those that “pertain to the testimony of the specific witnesses that the party intends to call, rather than to general relevance of evidence to the case.” State v. Divito, 152 Or App 672, 679-80 (1998).

State v. Divito, 152 Or App 672, 677 (1998): “The statutory duty of the district attorney to disclose a witness’s pretrial statements is triggered by the prosecutor’s intention to call that person as a witness.”

State v. Norman, 114 Or App 395, 399 (1992): A 911 tape recording of a conversation between the defendant’s wife and the dispatcher was not subject to discovery when there was no evidence that the State intended to call either as a witness because ORS 135.815(1)(a) applies only to statements made by “persons whom the district attorney intends to call as witnesses.”

a. Witness Availability Not Required

3. Defendant’s Pretrial Statements
   The prosecution must disclose written or recorded statements or memoranda of any oral statements made by the defendant or a codefendant in a joint trial. ORS 135.815(1)(b).

a. Defendant’s Request For Circumstances of Disclosure
   Upon the defendant’s written request, the prosecution must disclose the circumstances of the acquisition of any specified statements from the defendant. ORS 135.825(2).

4. Reports or Statements of Experts
   The prosecution must disclose any reports or statements of experts made in connection with the case, including results of physical or mental examinations and scientific tests, experiments, or comparisons that the prosecution intends to offer in evidence at trial. ORS 135.815(1)(c). See State v. Cervantes, 130 Or App 147, 152 (1994) (disclosure of scientific tests).
5. **Tangible Objects**

The prosecution must disclose any books, papers, documents, photographs, or tangible objects that it intends to offer in evidence at trial, or that were obtained from or belong to the defendant. ORS 135.815(1)(d). See *State v. Farrar*, 309 Or 132, 160, *cert den* 498 US 879 (1990) (a photocopy of a photograph was sufficient).

6. **Prior Criminal Convictions**

The prosecution must disclose known records of prior criminal convictions of persons it intends to call as witnesses, and must make a good faith effort to determine if such convictions have occurred. ORS 135.815(1)(e). The prosecution must also disclose all of the defendant’s prior convictions that would affect the determination of the defendant’s criminal history for sentencing purposes. ORS 135.815(1)(f).

   a. **Victim’s Prior Convictions**

   The prosecution may be required to disclose the victim’s prior convictions. *State v. Williams*, 11 Or App 255, 260 (1972) (victim’s “rap sheet” should have been disclosed because it would have enabled the production of evidence of substantial significance to the defense).

7. **Search and Seizure Evidence**

The prosecution must disclose that a search or seizure took place and, if defendant requests in writing, the fruits obtained by that search or seizure, including any statements by defendant. ORS 135.825.

8. **Testimony of a Witness Examined Before the Grand Jury**

The recorded testimony of a witness examined before the grand jury is discoverable at trial.

   a. **Hartfield Rule**

   If a witness’s testimony was recorded at the grand jury proceedings, the defendant is entitled to discovery of that recording after the witness has testified on direct examination by the state. *State v. Hartfield*, 290 Or 583, 592 (1981) (holding that defendant was entitled to examine an existing tape recording of the witness’s grand jury testimony). However, “wholesale orders for disclosure of grand jury recordings” are not authorized under Hartfield. *Id. See State v. Christopher*, 55 Or App 544, 551 (1982) (*Hartfield* requires turnover at trial of any existing recordings of a witness who testified on direct examination and who testified before the grand jury). *Cf.*
State v. Cox, 87 Or App 443, 449 (1986) (declining to extend the Hartfield rule to handwritten notes of grand jury testimony).

B. Disclosure to a Non-Represented Defendant
If a defendant is not represented by a lawyer, the district attorney must disclose all of the information required by ORS 135.815(1) except the personal identifiers of the victim and any witnesses, unless the defendant requests the information and the court orders the disclosure based on a finding that the victim or witness is a business or institution not at risk by the disclosure, or the need for the information cannot reasonably be met by other means. ORS 135.815(2) as amended by 2005 Or Laws, ch. 545, § 1 (effective Jan. 1, 2006). See generally 2005 Or Laws, ch. 545, § 1(4) (effective Jan. 1, 2006) (defining “personal identifiers” to include a person’s address, telephone number, Social Security number and date of birth, and the identifying number of a person’s depository account at a financial institution, as defined in ORS 706.008, or credit card account).

IV. DUE PROCESS DISCLOSURE

A. Scope of Disclosure

1. Due Process Requires Disclosure of Exculpatory Evidence
Due process requires the prosecution to disclose voluntarily all evidence of substantial significance that, if believed, would be seriously considered by the trier of fact in determining guilt or innocence or would affect sentencing. Brady v. Maryland, 373 US 83, 87 (1963) (“[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”); State v. McDonnell, 313 Or 478, 500 (1992) (the State has an affirmative due process obligation to make exculpatory evidence available to the defense); State ex rel. Dooley v. Connall, 257 Or 94, 99-100 (1970) (same); Hanson v. Cupp, 5 Or App 312, 320 (1971) (concluding that under Brady the sole questions are whether the State possessed evidence favorable to the defendant, and whether that evidence, if believed by the trier of fact, would be seriously considered in determining guilt or innocence).

a. Establishing the Materiality of Exculpatory Evidence
If the prosecution does not disclose evidence that “creates a reasonable doubt that did not otherwise exist, constitutional
error has been committed.”\footnote{U.S. v. Agurs, 427 US 97, 112 (1976) (discussing the standard of materiality concerning disclosure of exculpatory evidence).} “[T]he prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant’s right to a fair trial.”\footnote{Id. at 108.}

b. Duty to Disclose Exculpatory Evidence Known to Others

The prosecution “has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in the case, including the police.”\footnote{Kyles v. Whitley, 514 US 419, 437 (1995). See id. at 432-41 (potentially exculpatory evidence raised a “reasonable probability” that had it been disclosed, it would have produced a different result at trial).} However, ORS 135.815 does not impose on the prosecution “a duty to expand the scope of existing documents, such as police reports, to incorporate additional information of which only the police are aware.”\footnote{State v. Divito, 330 Or 319, 328 (2000).}

See also Or. R. Prof. Conduct 3.8(b) (2005) (prosecution has an ethical duty to make timely disclosure of exculpatory evidence).

2. Burden On Defense to Show Evidence Is Favorable and Material

In a case where the evidence is not clearly favorable to the defendant, such as when the question can be determined only through scientific tests of the evidence, “it is proper to require that the defendant make at least some showing, to the extent reasonable under the circumstances of the particular case, to support at least a belief and contention in good faith that the evidence demanded is ‘favorable’ to the defendant and ‘material’ to his guilt or innocence.”\footnote{State v. Koennecke, 274 Or 169, 179 (1976). See State v. Guinn, 56 Or App 412, 417 (1982) (defendant’s assertion that an exculpatory fingerprint might be found by another expert dismissed as mere speculation).}

3. Informants

If an informant did not witness the crime or go beyond the “preliminary stage of providing facts which helped form the basis of probable cause” for the search and arrest of the defendant, the informant’s testimony is “not significant in establishing the guilt or innocence of the defendant” and, therefore, disclosure of the informant’s identity is not required.\footnote{State v. Jessie, 17 Or App 368, 372 (1974); McCray v. Illinois, 386 US 300 (1967) (holding that court’s refusal at a preliminary hearing to determine probable cause for defendant’s arrest and search to compel disclosure of identity of informant who had informed officers that defendant was}
selling narcotics and had narcotics on his person did not violate defendant’s due process rights).

V. SPECIFIC EXAMPLES

A. Police Notebooks

1. Fragmentary Notes Are Not Discoverable
   Fragmentary notes created by police that are not a full account of the event, or are “rough drafts that are merely steps in the preparation of a statement” are not within the discovery statutes. State v. Wrisley, 138 Or App 344, 353 (1995). See State v. Divito, 152 Or App 672, 676-84 (1998) (discussing the requirements of ORS 135.815(1)).

2. Notes Intended As Full Report Are Discoverable
   A handwritten report by a law enforcement officer that provides a complete account of the crime and is adequate to form the basis for initiating prosecution is discoverable. State v. Bray, 31 Or App 47, 50 (1977); State v. Wrisley, 138 Or App 344, 353 (1995) (“police notes are not discoverable when their substance is incorporated into a report disclosed to the defendant”).

3. Notes of Defendant’s Statements Must Be Disclosed
   The prosecution must disclose any notes of defendant’s oral statements. ORS 135.815 (1)(b). See State v. Fritz, 72 Or App 409, 411, rev den 299 Or 313 (1985) (officer’s notes of defendant’s statements made during interrogation were discoverable “memoranda” even though the officer subsequently prepared a report that was provided to the defendant).

B. Police Personnel Files
   Defendants may not have routine access to the personnel records of police officers who testify against them, unless the evidence contained therein is relevant to the defendant’s guilt or innocence. State v. Fleischman, 10 Or App 22, 32-33 (1972). See State ex rel. Glode v. Branford, 149 Or App 562, 567-69 (1997) (trial court lacked statutory or constitutional authority to order inspection of police chief’s personnel file).

1. In Camera Inspection to Determine Discoverability
   The court may inspect the records in camera to determine whether the records are discoverable. State v. Leslie, 119 Or App 249, 251 (1993) (in camera inspection of the files was
appropriate procedure to determine whether they contained exculpatory material).

a.  **Note on In Camera Inspections and Judicial Discretion**

“It is difficult to formulate a precise rule to indicate what showing must be made before an in camera inspection of evidence is essential. Accordingly, this is an appropriate area to vest considerable discretion in the trial court. In exercising this discretion, trial courts should be guided by a balancing test: The greater the burden of production would be, the greater should be the showing of possible materiality and favorableness by the moving party.” *State ex rel. Johnson v. Schwartz*, 26 Or App 279, 283-84 (1976).

C.  **Police Weapons**

The prosecution must make police weapons available for scientific testing upon a good faith showing that the defendant believes the weapons constitute evidence that is favorable to the defendant and material to the defendant’s guilt or innocence. *State v. Koennecke*, 274 Or 169, 179 (1976).

D.  **Children’s Services Division (CSD) Files**

1.  **Disclosure of CSD Files**


*State v. Wood*, 112 Or App 61, 66-67 (1992): “Regardless of whether the prosecutor has physical possession of them, portions of CSD files pertinent to an investigation are presumed to be in the prosecutor’s possession or control and must be made available to the defendant.”

2.  **In Camera Inspection of CSD Files**

The court must make an in camera inspection of CSD records, guided by the defendant’s discovery request, to determine what the court should disclose to the defendant. *State v. Warren*, 304 Or 428 (1988) (discussing in camera inspection of CSD files as the proper method to determine existence of exculpatory evidence). See *State v. Weaver*, 139 Or App
207, 209-10 (1996) (without a description of what further exculpatory information is believed to exist or a summary of a defense theory as a basis for assessing the evidence in the files, an appellate court will not review a victim’s CSD files for additional exculpatory evidence simply because the defendant claims that the trial court’s *in camera* inspection was insufficient).

a. **The Court Can’t Delegate the Inspection**
   Although CSD files are voluminous and an inspection may require considerable time, the *in camera* examination must be made by the trial judge, not by a party or counsel for a party. *State ex rel. Carlile v. Lewis*, 310 Or 541, 545 (1990); *State ex rel. Dugan v. Tiktin*, 313 Or 607, 609 (1992); *State v. Rood*, 118 Or App 480, 485 (1993) (defendant’s motion to inspect CSD files was properly denied).

E. **Results of Body Sample Testing**
   Due process requires the prosecution to provide the defendant with an opportunity to conduct an examination and analysis of breathalyzer test ampules used to measure the defendant’s blood alcohol content at the time of arrest because the results of a breathalyzer test “constitute material evidence on the issue of guilt or innocence.” *State v. Michener*, 25 Or App 523, 529-30 (1976).

F. **Automobile Search**
   The defendant has a discovery right to ascertain whether police searched the defendant’s car, what evidence the police may have seized, and the results of any tests conducted on that evidence. ORS 135.825(1). *See State v. Sweet*, 122 Or App 525, 529 n.4 (1993).

VI. **PRESERVING EVIDENCE**

A. **Duty to Preserve Evidence**

1. **Defendant Must Prove Favorableness of Unpreserved Evidence**
   “Defendant has the burden of proof to establish with some particularity that the evidence will be favorable. It is not sufficient that the showing disclose merely a hoped for conclusion from examination of the destroyed evidence, nor is it sufficient for the defendant to show only that the examination
of the evidence would be helpful in preparing his defense or cross-examining the state’s witnesses.” State v. Oliverez, 34 Or App 417, 423 (1978) (citations omitted). See State v. Peters, 39 Or App 109, 113-14 (1979) (defendant’s claim that lost audio tape recording of his arrest “might” be favorable was insufficient to establish a due process violation).

2. Scientific Testing

“[T]he defendant must be given an opportunity to replicate the scientific tests conducted by the state and if that opportunity is frustrated because the sample is not properly maintained, he is entitled to suppression of the test results if the proper showing is made.” State v. Ketchersid, 52 Or App 931, 934 (1981).

State v. Kersting, 50 Or App 461, 474-75 (1981) (citations omitted): “Thus, where evidence sought to be disclosed has been functionally destroyed, but was subjected to scientific testing by the state prior to its destruction, a defendant must show that a retest would have been possible and must challenge the state’s test results, either by attacking the manner in which the test was conducted or by other evidence. On the other hand, if the state has not tested an item of evidence before its loss or destruction, and no other facts indicate that test results might have proved unfavorable to the defendant, little more is required than a showing that the test could have been performed and results obtained which, in the context of the defendant’s version of the facts, would prove exculpatory.”

B. Due Process and Bad Faith

Unless the defendant can show bad faith on the part of the prosecution, the failure to preserve potentially exculpatory evidence does not deny defendant’s Fourteenth Amendment right to due process. Arizona v. Youngblood, 488 US 51, 58 (1988) (police failed to preserve a sex assault kit for testing); State ex rel. Juv. Dept. v. Huskey, 130 Or App 419, 423-24 (1995) (negligence by police in failing to preserve shoe print was not “bad faith” and thus did not violate defendant’s due process rights).

State v. Zinsli, 156 Or App 245, 252 (1998) (citations omitted): “To support a claim of denial of due process on the ground that constitutionally material evidence was lost, the defendant must make some showing that either the state acted in bad faith in failing to preserve the evidence or that the evidence sought to be discovered will be favorable. Where the state has not acted in bad faith, the defendant must show that the claim of favorableness is genuine, not speculation, and that comparable evidence cannot be obtained ‘by other reasonably available means.’” See State v.
Hendershott, 131 Or App 531, 535 (1994) (although police failed to preserve car as evidence, no due process violation occurred as defendant failed to show that forensic inspection of the car would have produced favorable evidence).

VII. DISCLOSURE BY THE DEFENSE

A. Mandatory Disclosure to the State

Except as otherwise provided in ORS 135.855 (exemptions) and ORS 135.873 (protective orders), ORS 135.835 requires the defense to disclose to the district attorney the following material and information within its possession or control:

1. Defense Witnesses

The defense must disclose names and addresses of persons, including the defendant, whom it intends to call as witnesses. ORS 135.835(1). See State v. Ben, 310 Or 309, 315 (1990) (defendant’s failure to disclose the names of two witnesses to the State until the morning of trial violated ORS 135.835 when the record revealed that defendant intended to call the witnesses much earlier).

a. Defendant’s Attorney Is Subject to Disclosure Duty


2. Pretrial Statements of Witnesses

The defense must also disclose relevant written or recorded statements or memoranda of any oral statements made by witnesses, other than the defendant, whom it intends to call at trial. ORS 135.835(1). See State v. Moss, 147 Or App 658, 663 (1997) (defendant violated discovery statute by failing to disclose notes concerning testimony of rebuttal witness).

3. Reports or Statements of Experts

The defense must disclose any reports or statements of experts made in connection with the case, including results of physical or mental examinations and scientific tests, experiments, or comparisons that the defense intends to offer in evidence at trial. ORS 135.835(2).
4. **Tangible Objects**
   The defense must disclose any books, papers, documents, photographs, or tangible objects that it intends to offer in evidence at trial. ORS 135.835(3).

   a. **Exhibits for Impeachment Purposes**
   If defense counsel can “reasonably predict” the use of certain exhibits to impeach an adverse witness, the defense must provide timely discovery of the exhibit to the prosecution. *State v. Young*, 94 Or App 683, 689 (1989) (tape and transcript of a telephone conversation between the victim and defendant’s son should have been disclosed).

**VIII. EXEMPTIONS FROM DISCOVERY**

A. **Statutory Exemptions**
   ORS 135.855(1) exempts the following material and information from discovery:

   1. Work product, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of attorneys, police or their agents concerning the case;

   2. Identity of confidential informers, unless the defendant’s constitutional rights require disclosure; and

   3. Transcripts, recordings, or memoranda of testimony of witnesses before the grand jury, except transcripts or recordings of the defendant’s statements.

B. **Protective Orders**
   Upon a showing of good cause, the court may at any time order that specified disclosures be denied, restricted, or deferred, or make such other order as is appropriate. ORS 135.873(2) as amended by 2005 Or Laws, ch. 531, § 1 (effective Jan. 1, 2006).

   1. **In Camera Showing of Good Cause**
   The court may permit a party to make an *in camera* showing of good cause for denial or regulation of disclosures provided it makes a record of the proceedings. ORS 135.873(3) as amended by 2005 Or Laws, ch. 531, § 1 (effective Jan. 1, 2006).

   2. **Sealing Exempt Material**
   If the *in camera* showing reveals an item that is not subject to disclosure, the court must seal the record of the showing and

See generally 2005 Or Laws, ch. 531, §§ 5 to 8 (effective Jan. 1, 2006) (providing protective orders to prohibit copying or disseminating sexually explicit information or a visual or audio recording of the victim describing the victim’s sexual victimization in criminal proceedings involving a sexual offense, an offense involving the visual or audio recording of sexual conduct by a child, or invasion of personal privacy).
preserve it in the event of appeal. ORS 135.873(4) as amended by 2005 Or Laws, ch. 531, § 1 (effective Jan. 1, 2006).

IX. SANCTIONS FOR DISCOVERY VIOLATIONS

A. Options to Remedy Discovery Violations
The court may impose any of the following sanctions for failure to comply with the discovery statutes:

1. Order the violating party to permit inspection of the material;
2. Grant a continuance;
3. Refuse to permit the witness to testify;
4. Refuse to receive in evidence the material not disclosed; or
5. Enter such other order as it considers appropriate.


1. Prejudice Is an Important Consideration
“A trial court must always consider the presence or absence of prejudice in deciding what sanction to impose under ORS 135.865 but is not precluded from imposing a sanction by the absence of prejudice.” *State v. Gray*, 101 Or App 421, 424 (1990). *See State v. Dyson*, 292 Or 26, 35 (1981) (holding that prejudice is an important but not a necessary factor “to impose the extreme sanction of refusing to receive in evidence material that has not been disclosed”).

2. Excluding the Testimony of a Witness
As a matter of law, to justify the exclusion of a witness, the court must find that:

a. The party requesting exclusion has suffered actual prejudice from the violation; and
b. No other sanction short of exclusion would remedy that prejudice.

lesser sanction would not avoid prejudice before excluding a witness’s testimony); *State v. Fain*, 132 Or App 488, 491-93 (1995) (remanded to determine whether discovery violation prejudiced the State and whether court’s refusal to permit a defense witness to testify was the least restrictive sanction).

**B. Court Has a Duty to Inquire**

When a party alleges a discovery violation, the court has a *duty* to determine whether a violation has occurred and its prejudicial effect prior to admitting the evidence. *State v. Addicks*, 28 Or App 663, 669 (1977); *State v. George*, 55 Or App 224, 229 (1981).

**C. Review of the Court’s Decision**

The court’s sanctions for discovery violations are reviewed for abuse of discretion. *State v. Moss*, 147 Or App 658, 663 (1997).
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CHAPTER 5: SELF-INFRINGEMENT—FIFTH AMENDMENT & COMPARABLE OREGON CONSTITUTIONAL PROVISIONS

Originally Prepared by Justice Paul J. De Muniz
Oregon Supreme Court

Updated by the Oregon Judicial Department

2005
Acknowledgements

The Oregon Judicial Department expresses sincere thanks to Justice Paul J. De Muniz, Oregon Supreme Court, for permission to include his work “Self-Incrimination—Fifth Amendment & Comparable Oregon ConstitutionalProvisions” as Chapter 5 of the Oregon Judges Criminal Benchbook.

Purpose

The Oregon Judges Criminal Benchbook is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 5: SELF-INCRIMINATION—FIFTH AMENDMENT & COMPARABLE OREGON CONSTITUTIONAL PROVISIONS
Originally Prepared by Justice Paul J. De Muniz, Oregon Supreme Court. Updated by the Oregon Judicial Department.

I. MEASURE 40 (OVERVIEW)

A. Measure 40 Held Unconstitutional
   Ballot Measure 40, requiring that Art. I, sec. 12 of the Oregon Constitution be construed no more broadly than the U.S. Constitution, was held unconstitutional in its entirety. *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998).
   
   • Legislative enactments incorporating Measure 40 into statutory scheme consistent with Oregon Constitution presumably are valid. *See State v. Fugate*, 332 Or 195, 209 (2001) (Concluding that SB 936, section 1 of which is now ORS 136.432, “did not depend on any power granted to the legislature by Measure 40, and there is nothing in SB 936 that is conditioned on the existence of Measure 40.”).
   
   • Measures dependent on Measure 40 constitutional amendments remain open to question.

II. SUPPRESSION OF STATEMENTS BY DEFENDANT

A. Voluntariness

  1. How Raised

     Issue can be raised either by request for pretrial omnibus hearing or by objection at trial. ORS 135.037(2)(c); ORS 133.673(1); *State v. Gable*, 127 Or App 320, 322-26, rev den 319 Or 274 (1994); *State v. Sherman*, 66 Or App 144, 150, 154 n. 2 (1983) (Gillette, J., specially concurring; Newman, J., dissenting). *See HJR 93 (Measure 73) regarding admissibility of compelled confessions; measure was submitted to voters in November 1999 election and was defeated.*

     a. Omnibus Hearing

        1. Hearing is matter of right on request of state or represented defendant. ORS 135.037(1),(5); *State v. Lewis*, 39 Or App 151, 154 (1979) (holding that
the language of ORS 135.037(1) is “mandatory”), *overruled on other grounds* 289 Or 315 (1980).

2. Court may order hearing on own motion. ORS 135.037(1).

3. Before trial, court must prepare and file order setting forth ruling. ORS 135.037(4).

b. Objection at Trial

Hearing should be in camera, unless defendant fails to object to hearing in jury’s presence. *State v. Brewton*, 238 Or 590, 603 (1964); *State v. Blackford*, 16 Or App 217, 220 (1974) (failure to object is sole exception).

2. Purpose of Hearing

Purpose of hearing is for trial court to determine whether confession/admission is voluntary. *Jackson v. Denno*, 378 US 368 (1964); *State v. Brewton*, 238 Or 590, 603 (1964). (Analysis is same under federal and state constitutions.)

a. Court should not decide whether confession was made or whether it was true; that is jury’s role. *State v. Dabney*, 24 Or App 181, 184, *rev den* (1976).


3. When Voluntary

Confession/admission is voluntary if, under the “totality of the circumstances,”

• the waiver of rights and the confession were the product of an essentially free, unconstrained, and informed choice, and

• the accused’s capacity for self-determination was not critically impaired.

4. When Involuntary


1) Threat of violence does not include questioning by officers with guns drawn but not pointed at defendant. State v. Pressel, 2 Or App 477, rev den (1970).

2) Threats of violence include police threats to release suspect into a community hostile to defendant. State v. Foster, 303 Or 518, 528 (1987).

b. Confession/admission is involuntary if result of psychological coercion, i.e., defendant’s will was overborne at time of confession. State v. Hadley, 105 Or App 467, 471 (1991).

1) Assuming defendant is in custody, failure to give Miranda warnings does not make confession/admission involuntary if subsequent confession/admission obtained after proper Miranda warning was knowing, intelligent, and voluntary, and circumstances show that prior confession/admission obtained without Miranda warnings was knowing, intelligent, and voluntary. Oregon v. Elstad, 470 US 298, 309 (1985); State ex rel. Juv. Dept. v. Charles, 98 Or App 436, 441-43 (1989), modified 100 Or App 430, rev den 310 Or 122 (1990).

2) Generally, if defendant is in custody and no Miranda warnings are given before confession, the court must suppress the statements. Oregon v. Elstad, 470 US 298, 309 (1985).

3) If a person is not in custody, incriminating statements are admissible unless coerced or involuntary. State v. Merrifield, 53 Or App 567, 572 (1981).


d. Confession/admission is involuntary if induced by express/implied promise of treatment instead of incarceration. State


1) Telling defendant a polygraph test is required to maintain defendant’s innocence is coercive and weighs against finding of voluntariness. State v. Maskell, 101 Or App 521, 524 (1990).

2) Failure of polygraph examiner to tell defendant that examiner is a trainee is not coercive: “Voluntariness does not turn on whether defendant would have made a different decision had he been provided with additional information, but only on whether the police coerced or misled him to make the choice that he did.” State v. Harberts, 109 Or App 533, 537 (1992), aff’d as modified 315 Or 408 (1993).


g. Confession/admission is not involuntary simply because given in exchange for favor to defendant (e.g., in exchange for promise by police to convey message to D.A.). State v. Morris, 248 Or 480, 482-83 (1967); State v. Williams, 64 Or App 448, 454-55, rev den 296 Or 120 (1983).

h. Confession/admission is not rendered involuntary by implicit threat that probationer would have his probation revoked if he failed to fully disclose his prior sexual history in accordance with a probationary condition. State v. Tenbusch, 131 Or App 634, 644-45 (1994), rev den 320 Or 587, cert den 516 US 991 (1995).

5. Voluntary Confessions Admissible for Impeachment

If state failed to give Miranda warnings when required, voluntary confession/admission is not admissible for state’s

6. **Involuntary Confession Not Admissible for Any Purpose**

If state fails to prove confession/admission is voluntary, the confession/admission is not admissible for any purposes, including impeachment. Due process would be violated “even though there is ample evidence aside from the confession to support the conviction.” Thus, harmless error analysis is not applicable. *Mincey v. Arizona*, 437 US 385, 397-98 (1978) (quoting *Jackson v. Denno*, 378 US 368 (1964)); ORS 136.425(1); *State v. Smith*, 242 Or 223, 226 (1965); *State v. Gable*, 127 Or App 320, 324 *rev den* 319 Or 274 (1994) (Possible Measure 40 concerns; see *Harris v. New York*, 401 US 222 (1971); *State v. Isom*, 306 Or 587 (1988)).

7. **Voluntary Confession: Jury Instruction**

If the court is satisfied that confession/admission is voluntary, the confession/admission is admissible. The court must then instruct the jury to determine:

a. whether confession/admission was made;

b. if so, whether it is voluntary; and

c. if so, whether it is true.


B. **Miranda**

Confession/admission is admissible if:

1. *Miranda* warnings not required; or

2. Warnings were required and given, but defendant waived rights.

   1. **How Raised**

   *Miranda* issue can be raised either by request for pretrial omnibus hearing or by objection at trial. ORS 135.037(2)(c); ORS 133.673(1); *State v. Gable*, 127 Or App 320, 322-26, *rev

a. Omnibus Hearing

1) No statute or case law provides for a hearing on a Miranda issue as a matter of right. See ORS 135.037(2); State v. Cheshier, 41 Or App 141, 145, rev den 288 Or 1 (1979).

2) Court may order hearing on own motion. ORS 135.037(1).

3) If the court holds a hearing, it must prepare and file order setting forth ruling before trial. ORS 135.037(4).

b. Objection at Trial

Because it is unclear whether the jury must or even should be present, the court should hold the hearing out of jury’s presence to avoid risk of reversible error.

2. Purpose of Hearing

The purpose of the hearing is for trial court to determine:

1. whether warnings were required;
2. if so, whether they were given;
3. if so, whether defendant knowingly and voluntarily waived his rights.


Miranda warnings are required when defendant is in “full custody” or similarly compelling circumstances, because of the air of compulsion associated with custody. Berkemer v. McCarty, 468 US 420, 434-35 (1984); State v. Carlson, 311 Or 201, 204-05 (1991); State v. Tobias, 131 Or App 591, 594 (1994).

3. “Custody”

Defendant is in “full custody” for Miranda purposes if taken into actual custody or otherwise deprived of freedom of action.

a. It may not be enough that a reasonable person would not feel free to leave; somewhat more compelling circumstances may be required. *State v. Nevel*, 126 Or App 270, 276 (1994).


c. Police were not required to give *Miranda* warning even though detainee was in police car for several minutes while police questioned his wife to determine whether detainee assaulted wife. *State v. Nevel*, 126 Or App 270, 276-77 (1994).


e. Field sobriety tests ordered in traffic stop are not “custody.” *State v. Miller*, 146 Or App 303, 308, 932 P2d 112, *rev den* 325 Or 247 (1997)


g. Fact that defendant is in familiar setting (*e.g.*, home, place of business) does not mean defendant is not “in custody” when also significantly deprived of movement. *Orozco v. Texas*, 394 US 324, 326-27 (1969) (home); see *State v. Brom*, 8 Or App 598, 605, *rev den* (1972) (place of business).

h. Relevant factors include whether defendant could have left the scene voluntarily, was questioned as suspect or witness, and voluntarily accompanied police to place of questioning. *State v. Sherman*, 66 Or App 144, 148 (1983).
4. “Interrogation”

For *Miranda* purposes, “interrogation” includes express questioning, as well as any words or actions that police should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 US 291, 300-02 (1980); *State v. Bradbury*, 80 Or App 613, 616, *rev den* 302 Or 342 (1986); *State v. Fitzgerald*, 60 Or App 466, 471 (1982).

5. **No Custodial Interrogation**


6. **If In Custody**

a. **Warning Given**

   • If defendant was in custody, next issue is whether he or she was given *Miranda* warnings.


b. **Knowing/Voluntary Waiver**

   If defendant was given *Miranda* warnings, next issue is whether defendant knowingly and voluntarily waived rights to counsel and against self-incrimination with full awareness of nature of those rights and consequences of waiver. *Moran v. Burbine*, 475 US 412, 421 (1986).


   • Factors include age, experience, and intelligence of defendant, manner in which questions are asked, responses made, and other circumstances. *State v. Edison*, 73 Or App 719, 729, *rev den* 299 Or 583 (1985).

4. Waiver is not presumed solely from silence or from fact that confession was made, but it is not necessary that defendant articulate waiver. *Miranda v. Arizona*, 384 US 436, 475 (1966); *State v. Davidson*, 252 Or 617, 620-21 (1969), *overruled on other grounds* 307 Or 125, 129 (1988).


c. Defendant Asserts Rights


3. If a suspect’s request for counsel is equivocal, subsequent interrogation must be limited to clarifying the suspect’s intent. However, a suspect remains free to waive the right to counsel and the right to remain silent. *State v. Gable*, 127 Or App 320, 329, *rev den*

4. Whether a suspect has invoked the right to counsel is a legal conclusion. However, what actually transpired during the interrogation is a question of fact for the trial court. State v. Gable, 127 Or App 320, 330, rev den 319 Or 274 (1994).


C. “Fruit of Poisonous Tree” Issues


Note: The Supreme Court held SB 936 (1997) constitutional, but it does not apply retroactively to crimes occurring before June 12, 1997, the effective date of the act. See State v. Fugate, 332 Or 195 (2001).


3. A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Taylor v. Alabama, 457 US 687, 690 (1982); State v. Quinn, 290 Or 383, 395-96 (1981).

4. If information in confession gets before jury in another permissible way, defendant may not assert impropriety of confession as ground for reversal. State ex rel. Juv. Dept. v. Cook, 325 Or 1, 4 (1997).

III. FORMER JEOPARDY

A. Overview

There are three prohibitions against former jeopardy: ORS 131.505-.535; Article I, section 12 of the Oregon Constitution; and the Fifth Amendment. The court should address statutory arguments before state constitutional arguments, and federal constitutional arguments last. Because, however, the constitutionality of ORS 131.525(2) has been questioned, the court should always analyze Article I, section 12 whenever an issue involves ORS 131.525(2). See State v. Farley, 301 Or 668, 671 (1986).


ORS 131.525(2) applies only to subsequent prosecutions for different offense based on the same criminal episode, not to subsequent prosecutions for the same offense. State v. Talbert, 153 Or App 594, 599 (1998); State v. Dane, 103 Or App 420, 424 (1990).

B. Procedure

Defendant must raise the issue by motion to dismiss at time of arraignment or within ten days thereafter, unless court allows
additional time. ORS 135.470(2); ORS 135.520; State v. Haycraft, 20 Or App 28, 33, rev den (1975).

C. Purpose of Hearing

Purpose of the hearing on motion to dismiss is to determine whether a former prosecution bars protection for the offense charges and, if so, whether defendant waived the right to assert former jeopardy.

D. Burden of Proof


E. Prior Prosecution

First issue is whether there is a prior prosecution that could bar the instant one.

1. Pretrial Dismissal

Pretrial dismissals do not bar, because jeopardy does not attach until the jury is empaneled and sworn, or, if the court is the trier of fact, until the first witness is sworn. ORS 131.505(5)(b),(c); U.S. v. Jorn, 400 US 470 (1971); State v. Ibkkeitan, 115 Or App 415, 419 (1992).

2. Guilty Plea

Generally, a guilty plea is a bar. ORS 131.505(5)(a). Under ORS 131.525(2), however, a guilty plea does not bar subsequent prosecution if the second accusatory instrument is filed within 30 days of the guilty plea and the two crimes are not the “same offense” under state constitutional analysis. See State v. Farley, 301 Or 668, 671 (1986).

3. Consent/Waiver

Prior prosecution is not a bar if defendant consented to termination of prosecution or waives right to object at termination. ORS 131.525(1)(a); U.S. v. Scott, 437 US 82, 93 (1978); see State v. Jones, 141 Or App 41, 47 (1996) (consent must be some kind of voluntary action intended to forego right to claim former jeopardy). Waiver includes:
a. motion for mistrial, except for prosecutorial misconduct as discussed below;


4. Prior Appeal

Federal constitution prohibits charging defendant with a greater offense after successful appeal of conviction of lesser-included offense. The state may charge greater offenses in the second prosecution if there was:

a. no appeal or appeal was unsuccessful, and

b. defendant pled to lesser-included offenses.


5. Statutory Exceptions to Bar

Statutes provide that further prosecution not barred when the trial court finds that termination other than by judgment of acquittal (e.g., mistrial) is necessary for one of the reasons listed below. ORS 131.525(1)(b); *State v. Embry*, 19 Or App 934 (1974).

Caveat

Be careful declaring mistrial without defendant’s consent (i.e., on state’s motion or sua sponte). Unless there is no reasonable alternative, the unauthorized dismissal of the jury will operate as a bar to future prosecutions under state constitution.


Reasons Necessitating Termination:


b. Legal defect in proceeding that would make any judgment entered reversible as matter of law (e.g., wrongful introduction of overwhelmingly prejudicial evidence).

c. Prejudicial conduct, in or out of the courtroom, that makes it impossible to proceed without injustice to state or defendant (e.g., when defense counsel, in presence of jury, says the prosecutor is hiding the facts). ORS 131.525(1)(b)(C); *State ex rel. Wark v. Freerksen*, 84 Or App 90, 95-97, *rev den* 303 Or 534 (1987).

1) Prosecutorial Misconduct/State Constitution

Under the state constitution, a mistrial for prosecutorial misconduct is a bar to retrial if:

- the misconduct is so prejudicial that it cannot be cured by declaring mistrial; and

- the official knows the conduct is improper and either intends or is indifferent to resulting mistrial or reversal.


2) Prosecutorial Misconduct/Federal Constitution


d. Hung jury, except where official misconduct (e.g., bailiff’s bad faith attempt to influence jury to convict causes jury’s inability to agree, in which case a second prosecution is barred). ORS 131.525(1)(b)(D); *Arizona v. Washington*, 434 US 497, 509 (1978); *State v. Rathbun*, 287 Or 421, 432-33 (1979); *State v. Bannister*, 118 Or App 252, 259 (1993).

e. False statements of juror on voir dire that prevent fair trial. ORS 131.525(1)(b)(E).

Other Exceptions:

a. Former proceeding not a bar if it took place in a court that lacked personal or subject matter jurisdiction or venue. ORS 131.525(1)(c); *State v. Garcia*, 74 Or App 649, 655, *rev den* 300 Or 180 (1985) (venue).
b. Former proceeding not a bar if the second offense was not consummated when former prosecution began. ORS 131.525(1)(d).

6. **Juvenile Proceedings**


7. **Probation Revocation**


8. **Nonsummary Punitive/Criminal Contempt**


9. **Tax and Civil Forfeiture**

A state may collect a tax on unlawful activity if the state has not previously punished the taxpayer for the same offense, or if the state assesses the tax in the same proceeding that results in the taxpayer’s conviction; however, a tax is not immune from double jeopardy simply because it is a tax—the court must determine whether the tax (or civil forfeiture) has punitive characteristics rather than a pure revenue-raising purpose, or, in the case of civil forfeiture, a remedial purpose. *Department of Revenue of Mont. v. Kurth Ranch*, 511 US 767 (1994); see *Hudson v. U.S.*, 522 US 93, 98-103 (1997) (overruling *U.S. v. Halper*, 490 US 435 (1989)); see *State v. Riggs*, 143 Or App 427, 433-34 (1996), rev den 325 Or 247 (1997) (impound fee for return of truck seized under civil forfeiture statute not considered punishment and not in violation of double jeopardy).

10. **Sexual Predator Statutes**

A sexual predator statute that authorizes additional incarceration of sex offender who has already served prison

F. Same Offense

If there is a prior prosecution, the next issue is whether it was for the “same offense” as the instant offense. It is important to distinguish between 1) multiple prosecutions for the same offense, and 2) separate prosecution for multiple offenses arising from the same criminal episode. *See e.g.*, *State v. Hunt*, 119 Or App 452, 456 (1993).

1. Multiple Offenses

   a. Multiple Victims

      When the same conduct or criminal episode violates only one statutory provision but involves two or more victims, there are as many offenses as there are victims. ORS 161.067(2) (note exceptions for certain offenses against two or more persons who jointly own property). *See State v. Spivak*, 130 Or App 153, 156 (1994), *rev den* 320 Or 508 (1995).

   b. Multiple Statutes

      When the same conduct or criminal episode violates two or more statutes, and each statute requires proof of an element that the other does not, there are as many offenses as there are statutory violations. ORS 161.067(1). *See U.S. v. Dixon*, 509 US 688, 700 (1993); *Brown v. Ohio*, 432 US 161, 168 (1977); *Tate v. Wright*, 150 Or App 159, 162 (1997), *rev den* 326 Or 390 (1998); *State v. Burnell*, 129 Or App 105, 109 (1994).

2. Collateral Estoppel

   a. General

      Collateral estoppel applies to criminal cases and is included in the former jeopardy prohibitions. Collateral estoppel bars relitigation of facts that were actually or necessarily adjudicated in the prior action. In deciding whether collateral estoppel applies, the question is whether a rational trier of fact could have grounded its verdict of acquittal on an issue other than the one defendant seeks to estop the state from litigating. *Dowling v. U.S.*, 493 US

b. Subsequent Civil Action


3. Separate Prosecution for Multiple Offenses Arising From a Single Criminal Episode

A person shall not be prosecuted twice for two or more offenses based on the same “criminal episode,” if the several offenses are “reasonably known” to the “appropriate prosecutor” at time the first prosecution begins and venue lies in a single court. ORS 131.515(2); State ex rel. Juv. Dept. v. Nelson, 124 Or App 562, 566 (1993), rev den 319 Or 81 (1994).

4. Prosecution for Offense Consisting of Different Degrees

If a person is prosecuted for an offense consisting of different degrees, the conviction or acquittal of that offense is a bar to later prosecution for the same offense, any inferior degree of the offense, and attempt to commit the offense, or an included offense. ORS 131.515(3).

5. Finding of Guilt of Lesser Included Offense

A finding of guilty of a lesser included offense on any count is an acquittal of the greater inclusive offense, but only as to that count. ORS 131.515(4).

6. “Criminal Episode”

This term means continuous and uninterrupted conduct so joined in time, place, and circumstances that such conduct is directed to accomplish a single criminal objective. ORS 131.505(4) “Criminal episode” is also synonymous with “same transaction” under ORS 132.560(2) (permissive joinder), i.e., so closely linked that account of one charge is not complete without details of other charge. State v. Boyd, 271 Or 558, 565-66 (1975); State v. Sparks, 150 Or App 293, 297 (1997), rev den 326 Or 390 (1998); State v. Gardner, 71 Or App 590, 594 (1985).
a. Relevant Factors


b. Discrete Events

“Criminal episode” does not include two discrete events. For example, although a person has the long-term objective of distributing a controlled substance, selling to different persons at different times of the same day are separate criminal objectives. *State v. Hunt*, 119 Or App 452, 457 (1993); *State v. Hathaway*, 82 Or App 509 (1986), *rev den* 302 Or 594 (1987); *State v. Gardner*, 71 Or App 590, 595 (1985); see *State v. Sparks*, 150 Or App 293 (1997), *rev den* 326 Or 390 (1998) (burglaries of three vacant motel rooms not single criminal episode).

c. Coincidental Events

“Criminal episode” does not include events only by coincidence (e.g., accidentally hitting elk shortly after stealing steer). *State v. Paquin*, 55 Or App 676, 680, *rev den* 292 Or 863 (1982); *State v. Oliver*, 26 Or app 331, 334 (1976).

d. Possession

“Criminal episode” includes simultaneous possession of two types of contraband (e.g., stolen goods and drugs), where the charges are for possession. *State v. Boyd*, 271 Or 558, 570 (1975); *State v. Gardner*, 71 Or App 590, 595 (1985).

e. Traffic Offenses

“Criminal episode” includes two charges stemming from a single act of driving (e.g., DUII and DWS, or DUII and “hit-and-run”). *State v. Farley*, 301 Or 668, 674 (1986); *State v. Goff*, 105 Or App 165, 166 (1991).
It does not include the charges of DWS and giving a false name, even from a single act of driving, where the driver had already been stopped before giving the false name. *State v. Ellison*, 301 Or 676, 679 (1986).

**Note:** A subsequent prosecution is not barred when one of the offenses is a traffic violation (*i.e.*, not a misdemeanor or a felony). ORS 153.108(1). *See State v. Oh My Darlin*, 122 Or App 172, 178 (1993) (so holding in regard to ORS 153.585(1), former version of ORS 153.108(1)).

7. **Burden**


G. **Prosecutorial Knowledge**

1. **Defendant’s Burden**

   Burden to show that prosecutor reasonably knew of the subsequent prosecution is on the defendant. *State v. Lowery*, 95 Or App 583, 585 (1989).

2. **“Reasonably Known”**


3. **Good Faith Effort**


4. **Knowledge as of First Trial/Plea**

   The court assesses prosecutor’s knowledge as of time first charge went to trial or guilty plea was entered. *State v. Leverich*, 14 Or App 222, 230 (1973) aff’d 269 Or 45 (1974).
If there is a factual dispute, court must hold an evidentiary hearing. Failure to grant a hearing is harmless error if appellate court finds that prosecutor lacked sufficient knowledge to prosecute the subsequent charge. \textit{State v. Lowery}, 95 Or App 583, 587 (1989); \textit{State v. Matischeck}, 20 Or App 332, 337, modified 21 Or App 300 (1975).

H. \textit{“Appropriate Prosecutor”}

This is the prosecuting attorney (not the arresting police officer) of the jurisdiction with venue. \textit{State v. Knowles}, 289 Or 813, 823 (1980); see \textit{State v. McGilchrist}, 294 Or 473, 476 (1983).

Prosecution by municipality and by state: Rule originally was that if both charges could have been tried in municipal court, fact that district attorney could not prevent an earlier municipal court prosecution does not permit prosecution on subsequent charge. \textit{State v. Anthony}, 68 Or App 718, 721-22 (1984), however, appears to say the D.A. can prosecute on subsequent charge so long as prosecutor did not know of it at the time of municipal prosecution.

I. \textit{Federal Rule for Multiple Prosecution: Blockburger Test}

This inquires whether each offense contains an element not contained in the other; if not, they are the same offense, and double jeopardy bars subsequent prosecution. However, unlike Oregon law, federal law does not consider whether the second offense was part of the “same criminal episode.” Thus, even if multiple crimes were from the same conduct, federal law permits subsequent prosecution of second offenses (subject to the “same element” test). \textit{U.S. v. Dixon}, 509 US 688, 696 (1993); \textit{Blockburger v. United States}, 284 US 299, 304 (1932); compare \textit{State v. Hunt}, 119 Or App 452 (1993); \textit{State v. Smith}, 95 Or App 683, 687, rev den 308 Or 158 (1989).

J. \textit{Waiver}

If the second prosecution is barred, next issue is whether defendant has waived right to assert former jeopardy.

1. \textit{Timing}

Waiver occurs if defendant fails to raise issue at arraignment or within ten days thereafter, unless court allows additional time. ORS 135.470(2); ORS 135.520; \textit{State v. Haycraft}, 20 Or App 28, 33, rev den (1975).
2. **Boyd Test**

In cases involving multiple charges (or the possibility of multiple charges) arising from the same criminal episode, prosecutor should bring charges together or move to join charges during proceedings for initial, not subsequent prosecution.

a. Defendant can oppose, acquiesce, join in motion for joinder, or move for severance.

b. If the court accepts defendant’s choice as to joinder/severance, which it should in most cases, defendant has waived right to assert former jeopardy.

c. No waiver if prosecution fails to join charges in proceeding for initial offense.


K. **Proceedings Not Constituting Acquittal**

The following proceedings do not constitute an acquittal of the same offense:

1. Former acquittal on the ground of variance between the accusatory instrument and the proof;

2. Dismissal of the accusatory instrument upon a demurrer to its form or substance;

3. Dismissal of the accusatory instrument upon any pretrial motion;

4. Discharge of the accusatory instrument for want of prosecution without a judgment of acquittal.

ORS 131.535.

1. **Variance Between the Pleadings and the Proof Annuls Jeopardy**

“We have always held that a criminal verdict on the merits will bar another prosecution for the same offense, and we have held that the discharge of a jury under circumstances in which jeopardy was not properly annulled by the trial court constitutes the equivalent of acquittal. But it is settled in this state that if jeopardy is properly annulled for any reason, including the reasons set forth in [ORS 131.535(1)], the proceedings stand upon the same footing as if the defendant had never been in jeopardy.” *State v. Jones, 240 Or 546, 548 (1965) (citation omitted).* See *State v. Ayers, 16 Or App 655,*
662 (1974) ("[W]hen a variance causes dismissal, this is not deemed an acquittal upon the merits. In that regard section 29 allows variance as a grounds for proper annulment of jeopardy.") (quoting the Commentary to Oregon Laws 1973 ch 836 § 29 now codified at ORS 131.535).

a. **ORS 131.535(1) Is Constitutional**

L. **Final Court Action**

If there is a statutory or constitutional former jeopardy violation and defendant has not waived right to object to it, then the court should:

1. Enter an order dismissing the accusatory instrument. The order will bar future prosecutions. ORS 135.470(1); ORS 135.560.
2. Order defendant discharged if in custody. ORS 135.530(1).
3. If defendant is not in custody, order the release agreement discharges and the security deposit refunded. ORS 135.530(1).
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CHAPTER 6: AN OREGON SEARCH AND SEIZURE LAW COMPENDIUM

Prepared by Justice Paul J. De Muniz
Oregon Supreme Court

2005

Oregon Judicial Department
Office of the State Court Administrator
Court Programs and Services Division
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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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I. THE MOTIONS—MOTION TO SUPPRESS OR CONTROVERT

A. General Considerations

1. Subject and Procedure

Evidence or information related to the commission of a crime is subject to search and seizure, including persons “for whose arrest there is probable cause.” ORS 133.535. A defendant may challenge the use of that evidence at trial in two ways, through:

a. a motion to suppress; or
b. a motion to controvert.

A motion to suppress challenges evidence seized with and without a warrant; a motion to controvert challenges evidence seized with a warrant by contesting the good faith, accuracy and truthfulness of the affiant upon which the warrant is based. See State v. Westfall, 178 Or App 343, 37 P3d 1030 (2001) (discussing motion to suppress, and motion to controvert).

2. Written Motion

Objections to the use of evidence seized in violation of the provisions of ORS 133.525 to ORS 133.703 shall be made by a motion to suppress, which shall be heard and determined by the trial court in advance of trial. ORS 133.673(1).

3. Trial Court Findings

The trial judge should make findings of historical fact. That means that the trial judge must evaluate the evidence, resolve conflicts, find what happened and set forth (preferably in writing) those findings. State v. Wise, 305 Or 78, 81, 749 P2d 1179 (1988). See also State v. Zinsli, 156 Or App 245, 255, 966 P2d 1200, rev den 328 Or 194 (1998) (remanding to trial court to make a credibility finding, which is a question of fact).
On appeal, if findings are not made on all facts, and there is evidence from which such facts could be decided more than one way, the appellate courts will presume that the facts were decided in a manner consistent with the trial court’s ultimate legal conclusion. *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968).

### B. Motion to Suppress

#### 1. Purpose

A written motion to suppress serves two functions:

- it frames the issues for the trial court; and
- it notifies the state of the contentions that it must be prepared to address at the hearing.


#### 2. Timeliness

A motion must be made sufficiently in advance of trial to meet those dual purposes. See *State v. Rodriguez*, 115 Or App 281, 840 P2d 711 (1992) (A motion made just before jury selection on day of trial was not timely made.).

##### a. Court Rules on Time Limits

- **i. Uniform Trial Court Rule 4.010**

  UTCR 4.010 requires that evidentiary motions must be made “21 days before trial or within 7 days after arraignment, whichever is later, unless a different time is permitted by the court for good cause shown.”

- **ii. Local Rules**

  Trial courts may enact their own rules concerning the time limits of filing motions to suppress. ORS 3.220.

##### b. Court Rules Are Not Necessarily Absolute

It may be an abuse of discretion for a trial court to deny a defendant a hearing on a motion to suppress on the ground that it violates the time limits set by a local rule. *State v. Peterson*, 66 Or App 477, 483-85, 675 P2d 1055 (1984). Considerations include when the motion was filed, whether
3. Motion Must Be Specific

It is the defendant’s burden to frame the issues. Where defendant’s motion failed to identify the evidence he sought to suppress, and the related intrusion, his motion was insufficient and, therefore, improperly granted. *State v. Sweet*, 122 Or App 525, 529-30, 858 P2d 477 (1993). See also Uniform Trial Court Rule 4.060 (requiring that motions to suppress be specific).

4. Burden of Proof

a. Warrantless Searches and Seizures

Warrantless searches of premises and persons are *per se* unreasonable unless they fall within one of the few specially established and well-delineated exceptions to the warrant requirement. The state has the burden of showing, by a preponderance of the evidence, that circumstances existing at the time of the entry fall within one of the exceptions. ORS 133.693(4); *State v. McDonald*, 168 Or App 452, 7 P3d 617, *rev den* 331 Or 193 (2000); *State v. Davis*, 295 Or 227, 237, 666 P2d 802 (1983).

b. Searches and Seizures With Warrants

The defendant has the burden of proving, by a preponderance of the evidence, that a search authorized by a warrant was unlawful. ORS 133.693(3); *State v. Ainsworth*, 310 Or 613, 622, 801 P2d 749 (1990); *State v. Coatney*, 44 Or App 13, 18, 604 P2d 1269, *rev den* 289 Or 107 (1980); *State v. Hall*, 166 Or App 348, 999 P2d 509 (2000) *rev allowed* 335 Or 195 (2003) (state does not have to prove existence of search warrant at suppression hearing where defendant challenges warrant’s scope).

5. Warrant Requirements

ORS 133.525 to ORS 133.621 contain the requirements for issuing and executing warrants.

a. Affidavit

An affidavit must “particularly set[] forth the facts and circumstances tending to show that the objects of the search...”
are in the places, or in the possession of the individuals, to be searched[.]
” and may be based on hearsay. ORS 133.545(4). See also ORS 133.545(5) (permits the trial court, in certain circumstances, to take an oral statement under oath as a substitute for an affidavit); ORS 133.545(6) (permits transmission of warrants and affidavits by facsimile or other electronic means). See State v. Martin, 170 Or App 366, 12 P3d 548 (2000) (duplicate original warrant obtained by telephone invalid if issuing court never signed, dated, or filed a written original warrant as required by ORS 133.555(3)).

b. Hearing

A trial court may conduct a hearing on the application, the record of which is admissible at any motion to suppress. ORS 133.555.

c. Contents

A search warrant must contain careful descriptions of the person (or the person’s name) and the places to be searched, and of the objects of the search. ORS 133.565(2).

d. Execution

The search must occur during time period as set out in the warrant, and the executing officer, before entering the premises, must give appropriate notice. ORS 133.575.

C. Motions to Controvert

1. Purpose

A defendant may challenge the basis of a search warrant by “contest[ing] the good faith, accuracy and truthfulness of the affiant[.].” The written motion must be supported by an affidavit. ORS 133.693(2).

2. Burden of Proof

The defendant has “the burden of proving by a preponderance of the evidence that the evidence presented before the issuing authority was not offered in good faith, was not accurate and was not truthful.” ORS 133.693(3).
II. THE ANALYSIS

A. Statutory Issues

Begin any analysis of a search and seizure issue by first determining whether there are any statutes applicable to the police conduct involved. Always analyze statutory issues applicable to the case before reaching constitutional ones. *State v. Davis*, 295 Or 227, 240, 666 P2d 802 (1983). Statutory issues may be substantive or procedural.

1. Community Caretaking Functions. ORS 133.033.
2. Civil Detoxification Statute. ORS 430.399.
3. Confidential Reliable Informant. ORS 133.545(4); OEC Rule 510.
4. DUII
   a. Breath test. ORS 813.100; ORS 813.130.
   b. Urine/Blood test. ORS 813.140.
   c. Field sobriety tests. ORS 813.135; ORS 813.136.
5. Intercepted Communications. ORS 133.721 to ORS 133.739
6. Knock and Announce. ORS 133.575.
7. Searches of Probationers by Probation Officers. ORS 137.540(1)(i).
8. Search Warrants. ORS 133.545 to ORS 133.621.
9. Stop and/or Frisk of Persons. ORS 131.605 to ORS 131.625.

B. Senate Bill (SB) 936: Oregon Laws 1997, Chapter 313

1. Key Holdings
   a. Applicability

      Section 1 of SB 936, presently codified as ORS 136.432, may not be applied to crimes committed before June 12, 1997.

   b. Does Not Violate the One Subject Rule of Article IV, § 20 of the Oregon Constitution
Because SB 936 has one unifying principle logically connecting all of its provisions—i.e., the prosecution and conviction of persons accused of crime—the act does not violate the one subject rule of Article IV, section 20, of the Oregon Constitution. *State v. Fugate*, 332 Or 195, 26 P3d 802 (2001). The reasoning in *Fugate*, rejecting defendant’s whole-body challenge to SB 936, also applies to challenges involving specific sections of that bill. *State v. Jaehnig*, 158 Or App 348, 978 P2d 1101 (1999).

c. Must Litigate and Answer the Constitutional Questions

The rulings on motions to suppress advancing nonconstitutional grounds and constitutional grounds now must include a determination whether a constitutional violation has occurred. *State v. Dolan*, 158 Or App 139, 143, 973 P2d 370 (1999).

2. Statutory Changes

The legislature has changed the statutory scheme governing search and seizure by expanding police authority, and limiting judicial authority.

a. Police Authority

ORS 131.615(1) expands police authority to stop persons; ORS 131.615(3)(c), and 810.410(3)(d) both expand police authority to ask about weapons; ORS 131.625(1) expands police authority to frisk stopped persons, and ORS 131.615(4), and 810.410(3)(e) both allow police to request consent to search.

b. Judicial Remedial Authority

ORS 136.432 forbids Oregon courts from suppressing evidence obtained in violation of a statute, unless suppression otherwise is required by the Oregon Constitution, or the United States Constitution.

3. Viability

SB 936 is constitutional, so far, though “Section 1 of SB 936, presently codified as ORS 136.432, may not be applied to crimes committed before June 12, 1997.” *See State v. Fugate*, 332 Or 195, 215, 26 P3d 802 (2001) (so holding).
“In conclusion, we hold that SB 936 embraces a single subject and matters properly connected therewith, and that none of the provisions of the act exceed the scope of the title. The act is valid under Article IV, section 20, of the Oregon Constitution.”


Ballot Measure 40, which contained many of the same provisions, was held unconstitutional as violative of the separate-vote requirement of Article XVII, section 1, of the Oregon Constitution. *Armatta v. Kitzhaber*, 327 Or 250, 959 P2d 49 (1998).

4. **Effect on Case Law**

In enacting SB 936, the relevant section of which is codified at ORS 136.432, the legislature removed the court’s authority to suppress evidence obtained in violation of a statute. In doing so, the legislature effectively nullified Oregon’s statutorily-based search and seizure case law. To understand the breadth of that nullification, it is important to understand the history of those non-constitutional cases. The rule in Oregon has never been to exclude evidence for any statutory violation related to the acquisition of evidence. *State v. Valdez*, 277 Or 621, 629, 561 P2d 1006 (1977); *State v. Davis*, 295 Or 227, 231-37, 666 P2d 802 (1983). Rather, the Oregon Supreme Court developed a rationale for distinguishing between statutory violations that required suppression, and those transgressions that did not. That principle related to the character, purpose and intent of the statute in question. *Id.* at 235-37.

In a series of cases concerning searches with warrants and subsequent violations of statutes governing the execution of warrants, suppression was not required because the interests protected by those statutes were “not * * * the privacy and the freedom of [citizens.]” *Davis*, 295 Or at 236. In contrast, statutes that defined the authority of police officers to search and to seize were designed to protect “interests of the kinds which are protected by the Fourth Amendment to the United States Constitution and by Art. I, [section] 9, of the Oregon Constitution.” *Valdez*, 277 Or at 629 (emphasis added); *Davis*, 295 Or at 237. Violations of those authority-limiting statutes required a suppression remedy because any sanction short of exclusion would have rendered those protections meaningless. *Id.* In *Davis*, the court explained:

“There is * * * no * * * logical difference between giving effect to a constitutional and statutory right. Such a
distinction would needlessly force every defense challenge to the seizure of evidence into a constitutional mold in disregard of adequate state statutes. This is contrary to normal principles of adjudication, and would practically make the statutes a dead letter.” *Id.* at 236-37 (emphasis added). *See also State v. Porter*, 312 Or 112, 121, 817 P2d 1306 (1991) (applying that rationale to ORS 810.410(3)).

In short, the character of authority-limiting statutes led to the application of a practical sanction—*i.e.* suppression.

Under ORS 136.432, the character of those statutes has not changed; however, the court’s remedial authority has. In limiting the court’s suppression power solely to constitutional violations, the legislature has taken away the only practical sanction for the government’s exercise of unlawful authority. In doing so, the legislature has made those statutes dead letters (except perhaps as the basis for a civil suit), nullified Oregon’s non-constitutional search and seizure law, and brought that aspect of Oregon’s law back to the time when no such authority-limiting statutes existed. Finally, an interesting irony closes this chapter in Oregon’s legal history because, although Ballot Measure 40 was declared unconstitutional, SB 936, which contains most of the same provisions, continues.

5. The Necessity of Litigating the Non-constitutional Violations

Although SB 936 removes the suppression power of courts for statutory violations, those questions should still be litigated for crimes committed prior to June 12, 1997, because of the *Fugate* holding. Furthermore, in *State v. Toevs*, 327 Or 525, 534, 964 P2d 1007 (1998), the Supreme Court noted that an analysis under ORS 131.605 to ORS 131.625 is substantially the same as an analysis of a defendant’s rights under the search and seizure provisions of the Oregon and federal constitutions, which in turn, suggests that such a statutory analysis at least relates to a constitutional one. Lastly, constitutional questions must be litigated and answered by the trial court, otherwise motions to suppress decided on non-constitutional grounds now must, as a general rule, be remanded to the trial court to determine whether a constitutional violation has occurred. *State v. Dolan*, 158 Or App 139, 143, 973 P2d 370 (1999).

C. Constitutional Issues

1. General Consideration
In conducting an inquiry under both the Oregon Constitution and the United States Constitution, the first step is to determine whether a search or a seizure has occurred; then it must be determined whether that search or seizure was reasonable. *State v. Nagel*, 320 Or 24, 28, 34, 880 P2d 451 (1994). A warrantless search or seizure is unreasonable unless it falls into one or another of the recognized exceptions to the warrant requirement. *Id.* at 31, 36.

2. **The Oregon Constitution—Article I, § 9**

Claims under the state constitution must be addressed before those under the federal constitution. *State v. Rodriguez*, 317 Or 27, 32, 854 P2d 399 (1993).

a. **The Government’s Conduct—a Search or a Seizure?**

An Article I, section 9, analysis begins with a determination of whether the police conduct at issue was a search or a seizure. *State v. Nagel*, 320 Or 24, 28, 880 P2d 451 (1994). Only if a search or seizure has occurred will the court consider whether that search was reasonable under the circumstances. *State v. Davis*, 313 Or 246, 834 P2d 1008 (1992). The protections of Article I, section 9, apply to the introduction of evidence in an Oregon criminal prosecution, regardless of the jurisdiction in which, or the government entity by which the search and seizure were carried out.

i. **Search**

Involves one basic question: Did the police invade a general right of privacy?

Whether the government’s conduct is a search for Article I, section 9, purposes, “is defined by the general privacy interest of ‘the people’ rather than by the privacy interests of particular individuals.” *State v. Tanner*, 304 Or 312, 320, 745 P2d 757 (1987).

The general right of privacy is one to which a person has a *right*, rather than, as is the case under the Fourth Amendment, one to which a person reasonably *expects*. *State v. Campbell*, 306 Or 157, 164, 759 P2d 1040 (1988).

A) **A General Right of Privacy Defined**
The general right of privacy is a person’s right to be free from particular forms of governmental scrutiny. *State v. Campbell*, 306 Or 157, 170-71, 759 P2d 1040 (1988).

**B) Physical Invasions of Private Space**

In cases in which the government physically invades private space (e.g. enters a house), it is relatively easy to conclude that a general right of privacy has been invaded.

Tax Court’s correct determination that discovery rule justified inspection of completed residence by Department of Revenue in connection with petition in which taxpayer challenged valuation of property during prior tax year, at time when residence was incomplete, satisfied requirements for entry of home established by state constitution’s prohibition of unreasonable searches and seizures. *Poddar v. Department of Revenue*, 328 Or 552, 983 P2d 527 (1999).


Given circumstances surrounding search and seizure, defendant had possessory and privacy interests in effects, even though defendant did not legally “own” the effects. *State v. Cook*, 332 Or 601, 609, 34 P3d 156 (2001).

**C) Non-Physical Invasions—Electronic, Technological, and the Like**

In such cases, the analysis must examine the nature of the act asserted to be a search, keeping in mind
the place where the object is kept or the conduct occurs, the government’s vantage point for the observation and the government’s technique used to obtain the information.

Where employer, the United States Forest Service, attached electronic transmitter to vehicle used by defendant, one of its employees, to determine defendant’s whereabouts, employer did not violate Article I, section 9, of the Oregon Constitution because employee did not have privacy interest in vehicle. State v. Meredith, 184 Or App 523, 56 P3d 943 (2002), aff’d 337 Or 299 (2004).

By statute, electronic surveillance used to listen and record a party’s statements during a telephone call requires consent of one or more parties. State v. Fleetwood, 331 Or 511, 16 P3d 503 (2000). See also State v. Lissy, 304 Or 455, 464, 747 P2d 345 (1987) (interception of telephone calls requires court order or consent of at least one participant). Similarly, electronic surveillance may not be used to listen and record a conversation unless a police officer or an informant participates in the conversation, or all parties give consent, even if the police have probable cause to believe that one of the persons is committing or planning to commit a drug felony. Finally, evidence obtained with electronic surveillance is not admissible unless the police first obtain an ex parte order.

A dog sniff was not a search because it was conducted in a public place and because the dog was not used to gather information from the interior of a private space. State v. Smith, 327 Or 366, 372-73, 963 P2d 642 (1998).

Where the defendant conducted his affairs in a car with its console or overhead light on, in a parking lot of a tavern that was open for business, no Article I, section 9, privacy interests of the defendant were invaded by police officers observing from 29 feet away. State v. Wacker, 317 Or 419, 426-27, 856 P2d 1029 (1993).
Observations from a helicopter above the defendant’s land was not a search because the observations occurred from a lawful vantage point. *State v. Ainsworth*, 310 Or 613, 616-21, 801 P2d 749 (1990).

A person who wishes to preserve a constitutionally protected privacy interest in land outside the curtilage must manifest an intention to exclude the public by erecting barriers to entry, such as fences, or by posting signs. However, the “No Hunting” sign did not present an objective reason for officers to believe that, in addition to the restriction on hunting, other uses such as hiking were forbidden. *State v. Dixson/Digby*, 307 Or 195, 211-12, 766 P2d 1015 (1988). See also *State v. Poppe*, 131 Or App 14, 883 P2d 905, rev den 320 Or 492 (1994); *State v. Erb*, 135 Or App 421, 899 P2d 716, rev den 322 Or 42 (1995); *State v. Glines*, 134 Or App 21, 894 P2d 516, rev den 321 Or 512 (1995); *State v. Gabbard*, 129 Or App 122, 877 P2d 1217, rev den 320 Or 131 (1994); *State v. Collier*, 124 Or App 100, 861 P2d 397 (1993), rev den 318 Or 326 (1994); *State v. Gorham*, 121 Or App 347, 854 P2d 971, adhered to as modified 123 Or App 582, 859 P2d 1201, rev den 318 Or 171 (1993).

Use of a flashlight to discern contents of film canister found in defendant’s purse during course of otherwise lawful search for weapons revealed evidence not otherwise exposed to public view, amounting to unlawful search in violation of defendant’s state constitutional privacy interest. *State v. Reed*, 169 Or App 456, 9 P3d 738 (2000). (Note: technological enhancement used to aid observation does not mean a search has occurred; the question is whether a privacy interest has been invaded.)

The trial court did not err when, after considering the totality of the circumstances, it granted the defendant’s motion to suppress evidence seized when officers obtained a warrant to search after illegally entering onto the defendant’s property in rural Douglas County and thereby obtaining probable cause. Signs on the driveway to defendant’s property read “No Hunting or
Trespassing,” “Guard Dog on Duty” and “Stop.” A gate or barrier was not required to further indicate that defendant wished to have his privacy respected. *State v. Poulos*, 149 Or App 351, 942 P2d 901 (1997).

The use of an electronic tracking device attached to a car was a search because the device allowed the government to locate the defendant within a 40-mile radius, day or night, and was difficult to detect, which amounted to a substantial limitation on freedom from scrutiny. *State v. Campbell*, 306 Or 157, 170, 759 P2d 1040 (1988).

There is no privacy interest in a transparent container that “announces” its contents. *State v. Owens*, 302 Or 196, 206, 729 P2d 524 (1986).

The “announce” rule of *Owens* requires that the container announce the contraband as its sole content. Without such a showing, the government’s act of opening the container would constitute a search because it would open to scrutiny contents that were not then known. *State v. Kruchek*, 156 Or App 617, 622, 969 P2d 386 (1998). *See State v. English*, 164 Or App 580, 994 P2d 165 (1999) (some opaque objects, such as balloons, small plastic vials, and tin foil or paperfold bindles can “announce their contents” to police officers with adequate training and experience).

When an officer sticks his head inside a car window, he conducts a search because he enables himself to observe things he would not otherwise be able to observe from a lawful vantage point. *State v. Hendricks*, 151 Or App 271, 948 P2d 740 (1997).

A police officer’s unaided observation, purposive or not, from a lawful vantage point is not a search. A police officer, standing on a sidewalk, does not violate a defendant’s privacy interests when he looks into the window of a vehicle, parked on a public street, and observes that which can be plainly seen. *State v. Orlovski*, 146 Or App 632, 933 P2d 976 (1997).
ii. Seizure

A seizure under Article I, section 9, can be of a person or property and is a fact-specific inquiry.

A) Person

A seizure occurs if a law enforcement officer intentionally and significantly restricts, interferes with, or otherwise deprives an individual of that individual’s liberty or freedom of movement, or whenever an individual believes that such a restriction has occurred and that belief is objectively reasonable in the circumstances. *State v. Juarez-Godinez*, 326 Or 1, 6, 942 P2d 772 (1997).

The defendant was “seized” within the meaning of Article I, section 9, while he was still in his house when the police ordered him to come out of his house with his hands up, and the defendant commenced to comply with that order. That is so because when that request was made, the defendant’s liberty or freedom of movement was significantly restricted. The seizure was unlawful because in making a routine felony arrest, an arrest warrant, based on probable cause, is required. Here, the officers had no warrant and the state could not otherwise justify the warrantless seizure on probable cause and exigent circumstances grounds. *State v. Dahl*, 323 Or 199, 207-08, 915 P2d 979 (1996).

ORS 811.705, which requires that drivers perform certain duties when they are involved in accidents resulting in injury or death, did not “seize” the defendant as statutes do not seize people. *State v. Larson*, 141 Or App 186, 917 P2d 519 rev den 324 Or 229 (1996).

B) Property

A seizure of property occurs when there is a significant interference, even a temporary one, with a person’s possessory or ownership interests in the property. In this case, the detention of the defendant’s car following an arrest on unrelated charges constituted a seizure that was not supported
by probable cause and, thus, was unlawful. The officer’s statements that another officer with a drug sniffing dog was coming to check the car curtailed the defendant’s rights to transfer possession of the car. *State v. Juarez-Godinez*, 326 Or 1, 6, 942 P2d 772 (1997).


Given circumstances surrounding search and seizure, defendant had possessory and privacy interests in effects, even though defendant did not legally “own” the effects. *State v. Cook*, 332 Or 601, 609, 34 P3d 156 (2001).

b. Can the Defendant Complain About the Invasion?

If a search has occurred, it does not necessarily follow that the defendant has a right to complain about the government’s conduct and obtain suppression of the evidence.

The determination of whether a general right of privacy has been invaded, *i.e.* whether section 9 has been violated, is “logically separate from the question” of whose privacy rights have been invaded. *State v. Tanner*, 304 Or 312, 320, 745 P2d 757 (1987).

The police stopped the defendant in a car that was owned by someone else, but that the defendant claimed he was buying. That evidence was uncontroverted. The defendant could complain about the search of the vehicle because, at the time of the search, the defendant had a right to control the vehicle, which sufficiently linked the defendant to the vehicle to support a privacy interest in the defendant. *State v. Herrin*, 323 Or 188, 192-93, 915 P2d 953 (1996).

Whether a defendant may complain is a fact-sensitive inquiry and concerns a defendant’s ability to assert a protected interest in the particular item of property searched at the time of the search. *State v. Creighton*, 142 Or App 378, 381-82, 921 P2d 1339 (1996).
The gun found by a tow truck driver, while searching defendant’s car at state trooper’s request, must be suppressed because of state’s failure to prove it did not violate a protected interest. When challenging warrantless searches, defendants are not required to assert a protected property or privacy interest on which state intruded. Rather the burden is on state to prove that the warrantless search did not violate a protected interest of the defendant. *State v. Tucker*, 330 Or. 85, 997 P.2d 182 (2000).

i. **Does not require legal ownership of item searched**

Defendant could complain about an unlawful search in someone else’s house where the defendant’s property was held there as collateral. *State v. Tanner*, 304 Or 312, 321-23, 745 P2d 757 (1987).

A defendant could complain about an unlawful search of bedroom being used temporarily by that defendant in a house not owned by the defendant. *State v. Wrenn*, 150 Or App 96, 102, 945 P2d 608 (1997).

Given circumstances surrounding search and seizure, defendant had possessory and privacy interests in effects, even though defendant did not legally “own” the effects. *State v. Cook*, 332 Or 601, 609, 34 P3d 156 (2001).

ii. **Does not necessarily turn on the defendant’s statements as to ownership or possession of that item**

During the arrest sequence, a container, of which the defendant claimed no knowledge, fell from her jacket moments before its seizure by the police. The defendant could complain about an unlawful search of that container because, under the circumstances, there was no question that she possessed it. *State v. Morton*, 326 Or 466, 469-70, 953 P2d 374 (1998).


The defendant validly moved to suppress an unlawfully seized pistol, despite disclaiming a protected interest in the pistol, because he had a protected interest in the
duffel bag in which the pistol was discovered. *State v. Jacobsen*, 142 Or App 341, 922 P2d 677 (1996).

Defendant had possessory and privacy interests in effects even though defendant did not legally “own” the effects, which he made clear to police. *State v. Cook*, 332 Or 601, 609, 34 P3d 156 (2001).

iii. **Might not be established, however, if the circumstances show that a defendant abandoned the item before the police seized it**

Even though defendant retained a possessory interest in a duffle bag seen in his possession just before police arrived at the scene of an automobile accident, the warrantless search of that bag was, nevertheless, valid because, in contrast to *Morton*, 326 Or 466, defendant’s decision to abandon the bag was not produced by unlawful police action. *State v. Kauffman*, 162 Or App 402, 986 P2d 696 (1999), rev den 329 Or 650 (2000).

The defendant could not complain where police officers observed a small bundle drop from a car that the defendant was driving and where, after being stopped, the defendant denied any possessory interest in the item. *State v. McDonald*, 105 Or App 102, 104-06, 803 P2d 1211 (1990), rev den 311 Or 433 (1991).

Defendant did not abandon effects when he “stepped out” away from the effects as the police instructed him to do. *State v. Cook*, 332 Or 601, 609, 34 P3d 156 (2001).


3. **The United States Constitution—The Fourth Amendment**


a. **Key Differences from Article I, § 9**
i. **Reasonable Expectation of Privacy vs. Privacy Right**

A search is defined by whether an individual has a “reasonable ‘expectation of privacy.’” *Terry v. Ohio*, 392 US 1, 9, 88 S Ct 1868, 20 L Ed 2d 889 (1968). Thus, in determining whether a search has occurred under the Fourth Amendment, it must be determined whether an individual may harbor a reasonable expectation of privacy such that the individual is entitled to be free from unreasonable governmental intrusion. *Id.*

Where the defendant conducted his affairs in a car with its console or overhead light on, in a parking lot of a tavern that was open for business, the police officers’ observations from 29 feet away did not violate the Fourth Amendment to the United States Constitution because whatever expectation of privacy defendant may have had, that expectation was not reasonable. *State v. Wacker*, 317 Or 419, 426-27, 856 P2d 1029 (1993).

ii. **Rationale for the Remedy**

The rationale for suppression under the Fourth Amendment is to deter unlawful police conduct. *Terry v. Ohio*, 392 US 1, 9, 88 S Ct 1868, 20 L Ed 2d 889 (1968).

**D. Suppression of Derivative Evidence**

Derivative evidence is evidence that is discovered as a consequence of prior police conduct. If the prior police conduct is unlawful and the subsequently discovered evidence is a direct result of that illegal police conduct, then that derivative evidence must be suppressed. Here, because the police officer’s entry into the defendant’s room was unlawful, the gun obtained as a result of that illegal entry, as well as products of a subsequent search incident to the defendant’s arrest, were also unlawful and suppression was required. *State v. Davis*, 295 Or 227, 243, 666 P2d 802 (1983).

Officer touching tires of parked car on defendant’s property to determine if the tires were “hot” in an effort to determine if defendant had just been racing while under the influence of intoxicants constitutes a search pursuant to Article I, section 9, of the Oregon Constitution. The trial court properly suppressed the direct evidence, namely the officer’s testimony that the tires
were “hot”, but incorrectly suppressed all subsequently obtained evidence because defendant failed at trial to satisfy his burden of proving that the police “traded” on the evidence that the tires were “hot,” the illegal evidence. *State v. Cardell*, 180 Or App 104, 41 P3d 1111 (2002).


The trial court erred in suppressing evidence of marijuana and cash. Although the defendant was unlawfully stopped, the evidence was not obtained through exploitation of that unlawful stop. The search of the defendant incident to his arrest was not the result of exploitation of the prior unlawful stop because the information leading to his arrest was not discovered as a result of the unlawful stop. *State v. Wenger*, 143 Or App 90, 922 P2d 1248 (1996).

**E. Inevitable Discovery**

If evidence seized during a search is subject to suppression, and that evidence leads to the discovery of other evidence, then the other evidence will also be suppressed, unless the state proves that evidence would inevitably have been discovered through lawful means. *Former ORS 133.683*. *See also State v. Miller*, 300 Or 203, 226, 709 P2d 225 (1985), *cert den* 475 US 1141 (1986) (recognizing doctrine in common law).

Where police seized the defendant’s clothes after an interview with the defendant at the police department, trial court properly suppressed evidence as having been obtained in violation of the defendant’s rights under Article I, section 9, of the Oregon Constitution because police did not have warrant, nor did the seizure fall within exceptions to warrant requirement. Court also ruled that upon later “reseizure” of the clothes using a warrant, state did not meet its burden of showing that the later seizure purged the taint of the prior unlawful seizure. *State v. Johnson*, 335 Or 511, 73 P3d 282 (2003).

ORS 133.683 codifies the inevitable discovery doctrine. The doctrine requires that the state show by a preponderance of the evidence that proper and predictable investigatory procedures would have been used and that those procedures would have resulted in lawful discovery of the derivative evidence. *State v.
Redmond, 114 Or App 197, 202, 834 P2d 516 (1992). Note: ORS 133.683 was repealed, 1997 c.313 § 37.

III. SEARCH WARRANTS

A. Warrant Requirement

ORS 133.545 to ORS 133.621 contain the requirements for issuing and executing warrants.

Juvenile adjudicated of rape in the first degree challenged former ORS 419.507(11)(a), which provides for the drawing of a blood sample from sex offenders, analysis of the sample, and storage of a DNA profile in a database pursuant to ORS 137.076. He argued that a warrant requirement applies to the extraction of blood for the database. However, the warrant requirement has never been applied to routine searches of convicted and adjudicated people in state custody. Therefore, blood samples, like fingerprints, can be seized to identify people in custody without a warrant. State ex rel. Juv. Dept. v. Orozco, 129 Or App 148, 878 P2d 432 (1994), rev den 326 Or 58 (1997).

B. Description of Person(s) to be Searched

If the person to be searched is named or described with particularity in the supporting affidavit, the warrant must contain a similar description to comply with ORS 133.565(2)(b) and Article I, section 9, of the Oregon Constitution.

A warrant may not authorize a search that is broader than the supporting affidavit. By authorizing police officers to search “persons present,” the warrant in this case failed to satisfy the requirements of ORS 133.565(2)(b), because the affidavit supporting the warrant did not demonstrate probable cause to believe that all “persons present” on the premises would be associated with criminal activity taking place there. State v. Reid, 319 Or 65, 872 P2d 416 (1994).

C. Description of Place(s) to be Searched

Warrant sufficiently particularized under Article I, section 9, because it contained the address of the house to be searched and named the defendants. The police were able to ascertain, through reasonable effort, the location of the defendants’ residence within the house that the warrant described. State v. Trax, 335 Or 597, 75 P3d 440 (2004).
A search warrant authorized the search of “all individuals and occupants found to be frequenting [a particular home]” and “all vehicles determined to be associated with the occupants of said premises.” State v. Ingram, 313 Or 139, 141, 831 P2d 674 (1992). The statutory requirement that a warrant “describe with particularity” the places to be searched, ORS 133.565(2)(b), was intended to be at least as restrictive as the constitutional prohibitions against general warrants. Id. at 143. The description contained in this warrant was “ambiguous and potentially so broad, officers executing it could invade privacy interests not intended by the magistrate to be invaded.” Id. at 145. Evidence found in the defendant’s car should have been suppressed.

When a warrant identifies one address and there appears to be more than one separately maintained residence at that address, the warrant authorizes only a search of the residence identified in the warrant. State v. Devine, 307 Or 341, 768 P2d 913 (1989).

A warrant with the incorrect address still satisfied the statutory and constitutional particularity requirements because it provided a precise description, including directions, of the residence to be searched. State v. Edwards, 149 Or App 702, 945 P2d 553, rev den 326 Or 234 (1997). See State v. Bush, 174 Or App 280, 287, 25 P3d 368 (2001) (not all address errors render a warrant invalid).

An officer’s training and experience are to be accorded some weight, but there still must be other facts establishing the required nexus. Here, a warrant established probable cause to believe that evidence of methamphetamine use may be found in a house and among its occupants. Commonly, the proximity of a building to the home of one suspected of possession of controlled substances establishes the requisite nexus to justify a search of the other building. State v. Showalter, 134 Or App 34, 37, 894 P2d 504 (1995) (warrant authorizing search of “premises” is not limited to dwellings but may extend to curtilage). However, when the building that was located in close proximity to the residence to be searched was known to be occupied lawfully by persons other than those suspected of criminal activity, and when there was no cause to believe that those persons were involved in criminal activity, proximity alone failed to establish probable cause that evidence of a crime might be found in that building. State v. Gloster, 145 Or App 555, 558-59, 932 P2d 68 (1997).

D. Description of the Object of the Search

See ORS 133.565(2)(c).
Where affidavit contained information pertaining only to methamphetamine, a sufficient nexus between the information in the affidavit, combined with officer’s prior experience, existed to permit a reasonable magistrate to authorize the search for “controlled substances.” State v. Beagles, 143 Or App 129, 923 P2d 1244, rev den 324 Or 487 (1996).

E. Motions to Controvert

See ORS 133.693.

In any proceeding on a motion to suppress evidence obtained by the authority of a search warrant, the moving party may “contest the good faith, accuracy and truthfulness of the affiant as to the evidence presented before the issuing authority[.]” ORS 133.693(2).

The word “untruthful” as used in ORS 133.693(5) means dishonest rather than inaccurate. When a trial court finds that an affidavit supporting a search warrant application contains an untruthful statement, the court is not required to assume the truth of the remainder of the affidavit. If the untruthfulness in the search warrant affidavit leads the court to conclude that it does not believe some or all of the affiant’s remaining statements, and, as a result, that the affidavit does not establish probable cause, the court may suppress the evidence seized pursuant to a warrant based on that affidavit. State v. Keeney, 323 Or 309, 918 P2d 419 (1996).

A defendant who alleges that a self-disclosed confidential informant would testify that she related hearsay information to the affiant but that the affiant reported it as the informant’s first hand information has set forth a substantial basis for questioning the affiant’s good faith, accuracy and truthfulness and should have been permitted to put on testimony to controvert the affidavit. State v. Modrell-Lydall, 128 Or App 372, 876 P2d 315 (1994).

The defendant successfully controverted evidence linking him and a grow operation to two other properties. He demonstrated that the affiant did not in good faith present evidence that the defendant resided at those properties. Moreover, the affidavits did not establish probable cause to believe that evidence of a grow operation would be found at the two residences or that there was a link between the operation in defendant’s barn and the other residences. State v. Stockton, 120 Or App 111, 852 P2d 227 (1993).
F. Review of Search Warrant Applications

1. General Considerations—Probable Cause

A search warrant affidavit must be viewed in a common sense and realistic fashion. Moreover, in determining whether facts and circumstances disclosed by the affidavit are sufficient to establish probable cause to search, facts derived from an officer’s training and experience are a permissible way to establish a nexus to a series of other verifiable facts, which, absent the officer’s explanation, could be viewed as innocent. Here, the defendant was recorded on videotape at a marijuana garden, which was located over eight-and-one-half miles away from his residence. Because no tools, harvested marijuana or records related to the processing or distribution of the crop existed at the garden site, the officer’s statements based on his training and experience that tools used to cultivate marijuana, the harvested crop, as well as pertinent records are customarily stored in a secure indoor location established the required nexus between the garden and the defendant’s home. *State v. Goodman*, 328 Or 318, 975 P2d 458 (1999).

An affidavit may support the issuance of a warrant if, after excising illegally obtained evidence from the affidavit, the affidavit establishes probable cause. *State v. Rein*, 324 Or 178, 923 P2d 639 (1996); *State v. Apolo*, 126 Or App 652, 657, 870 P2d 243, rev den 319 Or 81 (1994).


There is no requirement that an affidavit in support of a warrant to search a residence for controlled substances state the precise quantity of controlled substances observed at the place to be searched, the identity of the person with the controlled substances and the prior history of the location. *State v. Usher*, 135 Or App 143, 897 P2d 1185, rev den 321 Or 560 (1995).

Where an affidavit relates the declarations of an unnamed informant, it must set forth the informant’s basis of knowledge and facts showing the informant’s veracity. If it does not, the informant’s declarations must be disregarded. High power usage is an important factor to be considered but is not alone sufficient to establish probable cause. The additional information in this case, excluding information obtained by means of a Thermal Imaging Device (TID) was not sufficient
for a reasonable magistrate to conclude that there was probable cause. Nor did the information obtained by use of the TID contribute to the state’s probable cause where the affiant did not state what inferences or conclusions, if any, he drew from that information. *State v. Russell*, 122 Or App 261, 857 P2d 220 (1993).

Unsworn testimony may not be considered by a magistrate in deciding whether there is probable cause to support the issuance of a warrant. *State v. Burton/Cunningham*, 121 Or App 508, 511, 855 P2d 1124 (1993), *rev den* 318 Or 351 (1994).

An affidavit supporting a warrant is not stale if it contains facts that show that it is more probable than not that items sought are still at the location to be searched at the time the application for the warrant is made. Also, the reliability of information in an affidavit provided by an unnamed informant is established by setting forth facts that show the informant’s basis of knowledge and veracity. A person’s own conversations are a legitimate basis of knowledge; an affiant’s corroboration of an informant’s statements is probative of veracity. *State v. Wilson*, 120 Or App 382, 387, 852 P2d 910, *rev den* 317 Or 584 (1993). *See also State v. Chezem*, 125 Or App 341, 865 P2d 1307 (1993). *Compare State v. Cotter/Ray*, 125 Or App 210, 864 P2d 875 (1993).

2. Informants

ORS 133.545(4) provides that, “[i]f an affidavit is based in whole or in part on hearsay, the affiant shall set forth facts bearing on any unnamed informant’s reliability and shall disclose, as far as possible, the means by which the information was obtained.” *See also* OEC Rule 510 (relating to evidentiary privilege concerning informants).

a. Unnamed

Trial court did not err in suppressing evidence seized pursuant to warrant when affidavit did not show that information provided by unnamed concerned citizen (CC1) was reliable. A disinterested informant’s statement that he or she has seen drugs is not innately reliable. Many in our society cannot distinguish marijuana plants and “common knowledge” concerning the appearance of marijuana is not judicially noticeable. Information from other concerned citizens reported to affiant by other officers could not be
used to corroborate CC1’s information. When information is from a secondary source, each level of hearsay must be examined to determine if the basis of knowledge and reliability requirements are satisfied. Those requirements were not met. *State v. Kreutzer*, 138 Or App 306, 909 P2d 175 (1995). *Compare State v. Goff*, 134 Or App 92, 894 P2d 1207 (1995).

**b. Confidential Reliable Informant**

The analytical framework provided in ORS 133.545(4) is but one consideration in determining the reliability of the information from named informants and that the proper legal standard is the “totality of the circumstances” test. *State v. Pelster*, 172 Or App 596, 21 P3d 106, *rev den* 332 Or 632 (2001).

Under ORS 133.545(4), an informant’s veracity may be demonstrated by showing that the informant is “credible,” or that the information is “reliable.” Credibility refers to an informant’s reputation as a truth-speaker or his demonstrated history of truth-speaking. Reliability refers to circumstances assuring that the particular information is indeed trustworthy on a specific occasion. Once the informant’s veracity is established, the issue is whether there are enough facts to support probable cause. *State v. Grimes*, 135 Or App 497, 899 P2d 1201 (1995), *rev den* 322 Or 490 (1996).

The reliability aspect of an informant’s veracity may be shown by corroboration by another informant or by the police, by the informant exposing himself or herself to liability for filing a false report or by making statements against one’s penal interests. *State v. Wheelon*, 137 Or App 63, 70, 903 P2d 399 (1995), *rev den* 327 Or 123 (1998).

When an application for a warrant includes constitutionally tainted information, the correct action is for the magistrate and reviewing court to excise such information and determine whether the remaining information is sufficient to establish probable cause. When an affidavit relates the declarations of an unnamed informant, it must set forth the informant’s basis of knowledge and facts showing the informant’s veracity. Veracity may be established by facts showing that the information from the informant is reliable. Police corroboration of information supplied by an informant establishes the informant’s reliability and
permits an inference that other information supplied by that informant is also reliable. That some of the corroborated details concern nonincriminating facts does not adversely affect their worth in establishing the informant’s veracity. *State v. Binner*, 128 Or App 639, 877 P2d 642, *rev den* 320 Or 325 (1994).

c. Judge’s Role to Assess Facts Bearing on Credibility

It is the magistrate’s role, not the affiant’s, to assess the factual significance or weight of information that bears on the credibility of an unnamed informant, when deciding whether to believe that informant. *State v. Keeney*, 323 Or 309, 317, 918 P2d 419 (1996).

G. Execution of Warrants

ORS 133.545 to ORS 133.621 contain the requirements for issuing and executing warrants.

Notice of identity, authority, and purpose is appropriate under ORS 133.575(2), the “knock and announce” statute, if the notice makes it clear to an occupant of the premises that the officer who wanted to enter had a claim of right to do so. *State v. Bost*, 317 Or 538, 857 P2d 132 (1993). “[T]here is no magical period of time necessary to make an entry valid.” *Id.* at 544.

When executing an arrest warrant without a search warrant or some other legal authority at a dwelling shared by the wanted person and another person, the police must have probable cause to believe that the wanted person is within before entering over the other person’s objection. *State v. Jones*, 332 Or 284, 27 P3d 119 (2001).

The trial court did not err in denying the defendant’s motion to suppress evidence obtained after police officers searched an apartment. The fact that officers waited only four seconds between the time that they knocked on the apartment door and the time that they entered the apartment was not unreasonable under Article I, section 9. Under the Fourth Amendment, the wait of four seconds was reasonable in light of the fact that the evidence in question could be easily destroyed. *State v. Ordones-Villanueva*, 138 Or App 236, 908 P2d 333 (1995), *rev den* 322 Or 644 (1996). See also *State v. Fast*, 133 Or App 102, 889 P2d 1349 (1995); *State v. Barnett*, 132 Or App 520, 888 P2d 1064, *rev den* 321 Or 137 (1995).
H. Search Warrant Returns

Evidence seized in a search was properly suppressed when the officer did not return the original search warrant or a copy of it as required by ORS 133.615(2). A technical statutory violation does not necessarily require suppression of evidence. However, the state failed to cure the defect or offer evidence indicating that the copy eventually submitted to the trial court was the same as the one that was actually served on the defendant. Therefore, the state failed to prove that the search was conducted pursuant to a valid warrant. *State v. Drummond*, 137 Or App 168, 903 P2d 925 (1995).

IV. EXCEPTIONS TO THE WARRANT REQUIREMENT

A. Exigent Circumstances

Exigent circumstances may exist to preserve evidence or to provide emergency aid and, if present, would justify a warrantless search or seizure. However, police may not create, through unlawful conduct, exigent circumstances. *State v. Davis*, 295 Or 227, 237-43, 666 P2d 802 (1983). *See State v. Hansen*, 295 Or 78, 664 P2d 1095 (1983) (so holding).

1. To Preserve Evidence

A search incident to arrest constitutes an exception to the warrant requirement when it is conducted to preserve evidence. *State v. McCoy*, 155 Or App 610, 964 P2d 309 (1998).

An exigent circumstance is one that requires police to act swiftly to forestall the destruction of evidence. Where police officer had probable cause to believe that defendant was driving under the influence of intoxicants, there were exigent circumstances to justify a search under Article I, section 9, because the evidence of defendant’s intoxication may have dissipated in the time it would have taken to obtain a warrant. *State v. Nagel*, 320 Or 24, 880 P2d 451 (1994).

To justify warrantless extraction of the defendant’s blood, the state needed to prove that it could not have obtained a search warrant without sacrificing the evidence and that the blood sample that it obtained had been extracted promptly. Here, because the evidence showed that the officer could have obtained a warrant without sacrificing the evidence, the warrantless search was not justified. *State v. Moylett*, 313 Or 540, 836 P2d 1329 (1992).
Exigent circumstances existed when the officers were called to a beer party and, when they arrived, saw several people leaving, saw several people inside who appeared to be minors, and knew from experience that evidence of alcohol could be destroyed easily during the time it took to get a search warrant. *State v. Jangala*, 154 Or App 176, 961 P2d 246 (1998). *See State v. Gorham*, 121 Or App 347, 354, 854 P2d 971, *adhered to as modified* 123 Or App 582, 859 P2d 1201, *rev den* 318 Or 171 (1993) (exigent circumstances existed where crucial factual issue in case was time at which a deer was killed and that evidence would have been lost if officer waited to get a warrant).

2. Automobiles


Officer’s earlier observations of defendant’s interactions with the Cadillac established probable cause that defendant’s “stash” of drugs for distribution was in the car and that other evidence of distribution, including packaging material and proceeds, could be found in the car, satisfying “automobile exception.” *State v. Mosley*, 178 Or App 474, 38 P3d 278 (2001); *State v. Coleman*, 167 Or App 86, 2 P3d 399 (2000) (chronicling automobile exception case law in Oregon).

If a person’s automobile is mobile when stopped by police and probable cause exists for the search, the police may immediately search the vehicle instead of seizing it and holding it until a warrant is obtained. The test is whether a magistrate could issue a constitutionally sound search warrant based on the probable cause articulated by the officers. The scope of the warrantless search is defined by the object of the search and the places in which there is probable cause to believe that it may be found. *State v. Brown*, 301 Or 268, 276-79, 721 P2d 1357 (1986). *See also State v. Forrister*, 179 Or App 516, 40 P3d 571 (2002) (though police intend to tow car, for automobile exception to warrant requirement, car is still “mobile”).

Where passengers in front seat were in possession of drugs and drug paraphernalia, the police lacked probable cause to search gym bag in back seat. Assuming mobility of the vehicle, the automobile exception did not justify a warrantless search of the defendant’s gym bag because the officer did not have probable
cause to believe that the defendant had possession of illegal drugs. *State v. Herrin*, 323 Or 188, 193, 915 P2d 953 (1996). In *State v. Bingman*, 162 Or App 615, 986 P2d 676 (1999), the Court of Appeals specified that the strong odor of fresh marijuana emanating from defendant’s car, combined with actual possession of illegal drugs by a passenger in that car, provided probable cause to search defendant’s bags.

Where a car was parked, immobile, and unoccupied at the time the police first encountered it in connection with the investigation of a crime, the officers’ subsequent search of that vehicle needed to be authorized by a search warrant or by circumstances showing some exigency other than the exigency associated with a “mobile” vehicle. *State v. Kock*, 302 Or 29, 32-4, 725 P2d 1285 (1986).

Vehicle parked on public highway in isolated area was unoccupied when officers first encountered it. However, requirement of mobility was met because the defendants could have driven away at any minute. Inasmuch as the officers had probable cause because they smelled marijuana, the exigency of otherwise losing evidence of criminal conduct because of the delay inherent in procuring a search warrant justified an immediate search. *State v. Burr*, 136 Or App 140, 901 P2d 873, *rev den* 322 Or 360 (1995).

Because a police officer stopped the defendant’s car while it was moving, the car was “mobile”; also, because the defendant told the officers that a pistol was located underneath the glove box, the officer had probable cause to believe that a search of that area would uncover the pistol. *State v. Custer*, 126 Or App 431, 434, 868 P2d 1363 (1994).

3. **Emergency Aid Doctrine**

The “emergency aid doctrine” is one of the exceptions to the search warrant requirement, and for it to apply, the state must make a strong showing that exceptional emergency circumstances truly existed. *State v. McDonald*, 168 Or App 452, 7 P3d 617, *rev den* 331 Or 193 (2000).

The emergency aid doctrine provides an exception to the warrant requirement of Article I, section 9, when the following conditions are met:

1. the police must have reasonable grounds to believe that there is an emergency and an immediate need for their assistance for the protection of life;
2. the emergency must be a true emergency—the officer’s good faith belief alone is insufficient;

3. the search must not be motivated primarily by an intent to arrest or to seize evidence; and

4. the officer must reasonably suspect that the area or place to be searched is associated with the emergency and that, by making a warrantless entry, the officer will discover something that will alleviate the emergency.


An officer’s entry into a homicide suspect’s hotel room was lawful because the officer reasonably believed that he might be able to render lifesaving medical assistance to the victim. However, after lawful entry based on an emergency situation, the officers are limited to searching and seizing items in plain view. *State v. Miller*, 300 Or 203, 229, 709 P2d 225 (1985), cert den 475 US 1141 (1986). *See also State v. Will*, 131 Or App 498, 885 P2d 715 (1994) (there must be an emergency, an “urgent need to render aid and assistance,” before the emergency aid doctrine applies).

A “true” emergency exists if circumstances, as they were known at the time of the warrantless search, presented grounds for an officer to believe reasonably that immediate police action was necessary, even if after-acquired knowledge alters how the circumstances are viewed. *State v. Martofel*, 151 Or App 249, 252-54, 948 P2d 1253 (1997). *See also State v. McDonald*, 168 Or App 452, 7 P3d 617, rev den 331 Or 193 (2000) (search of adjacent room valid where officer objectively believed his immediate assistance in determining amount, variety, and combination of drugs taken by defendant was required to avert life threatening drug overdose).

Established exceptions to the warrant requirement may be used when a defendant is being held subject to civil authority. The emergency aid exception applied here because the defendant’s statements that she had taken 100 Ativan tablets gave the hospital staff member reasonable grounds to believe that an emergency existed that required assistance for the protection of the defendant’s life, and the staff member reasonably suspected that a search of the defendant’s fanny pack would lead to the discovery of something that would alleviate the emergency. *State v. DeAubre*, 147 Or App 412, 937 P2d 125 (1997). *See also State v. Martin*, 124 Or App 459, 463-64, 863 P2d 1276 (1993) (a police officer’s observation of the defendant slumped
over the wheel of a car with its lights on and engine running, which was facing the street in a public parking lot, created a true emergency).

B. To Protect Officer Safety or Prevent Escape

Patdown of defendant for officer-safety reasons lawful under Bates test when defendant’s shirt indicated his affiliation with a specific gang and based on officers’ training and experience with that gang, officers believed defendant possessed a gun and might pose threat to their safety. State v. Miglavs, 186 Or App 420, 63 P3d 1202, rev allowed 335 Or 479 (2003).

Under officer-safety exception to Article I, section 9, of the Oregon Constitution, it was not reasonable for officers to enter the private apartment of individual who was not arrestee and whose identity, connection to scene, or presence was unknown to officers as part of protective sweep of large house with multiple apartments. Court declined, however, to hold that under Article I, section 9, it is per se unreasonable for officers to search the residence of someone other than the arrestee to ensure officer safety. State v. Cocke, 334 Or 1, 45 P3d 109 (2002).

A search for officer safety incident to arrest must be based on “a reasonable suspicion, based on specific and articulable facts, that the person in custody poses serious threat of harm or escape.” State v. Hoskinson, 320 Or 83, 87, 879 P2d 180 (1994).

A search incident to arrest constitutes an exception to the warrant requirement when it is conducted to protect an officer. State v. McCoy, 155 Or App 610, 964 P2d 309 (1998).

Under Article I, section 9, of the Oregon Constitution, an officer may take reasonable steps to protect himself or others if, during the course of a lawful encounter with a citizen, the officer develops a reasonable suspicion, based on specific and articulable facts, that the citizen might pose an immediate threat of serious physical injury to the officer or to others then present. The inquiry focuses on whether the circumstances confronting the officer justified a reasonable suspicion that the defendant posed an immediate threat to the officer. State v. Bates, 304 Or 519, 524-25, 747 P2d 991 (1987).

Officer’s routine procedure of searching an item that felt heavy before handing it back to a subject did not authorize search of defendant’s bag because the Oregon Constitution requires more

The officer did not engage in an illegal search of a defendant when, after the officer had approached the defendant and said, “Let me see your hands,” the defendant volunteered that he was carrying a BB gun. The officer’s subsequent action of drawing his service revolver and ordering that the defendant lay on the ground and then frisking him was reasonable for officer safety purposes. The officer’s retrieval of marijuana and a pager from the defendant’s pocket, given that the defendant had been huddled with a group of about 10 others “where there had been a high level of street level dealing,” gave the officer probable cause to search defendant for evidence of other narcotics. *State v. Austin*, 145 Or App 217, 929 P2d 1022 (1996), *rev den* 325 Or 368 (1997).

After a traffic stop, the officer’s safety concerns were not reasonable under the circumstances. Here, the defendant appeared nervous but cooperative, did not make any movements as if to retrieve a weapon, and did not exhibit any hostile or aggressive behavior until after the officer’s subsequent inquiry commenced. Consequently, the officer did not have authority to detain the defendant after he had completed the investigation of the traffic infraction for which the defendant was stopped, nor to question the defendant about his criminal history or whether there were drugs and weapons in the car. *State v. Peterson*, 143 Or App 505, 510-11, 923 P2d 1340 (1996), *rev den* 327 Or 521 (1998).

An officer’s handcuffing of a defendant on officer safety grounds was not justified by the fact that the defendant had tattoos, was wearing a motorcycle jacket, and was present at a house that had been frequented by “biker-type” people and at which an informant had seen, at some point within the past two months, an unidentified person with a gun. *State v. Reinhardt*, 140 Or App 557, 916 P2d 313 (1996), *rev den* 327 Or 521 (1998).

C. Community Caretaking Function

The determination as to whether the community caretaking doctrine applies is a two-step analysis. First, it must be established that a police officer was authorized by statute to conduct the search. If such statutory authority exists, then it must be shown that the officer’s actions nonetheless complied with Article I, section 9, of the Oregon Constitution. In other words, though statutory authority is necessary, statutory compliance does not insure
constitutio nal compliance. Here, police officers responded to a missing person’s complaint concerning the defendant and entered the defendant’s home and shop in an effort to locate him. When the officers entered the shop, they saw through an open door to a separate part of the shop some growing marijuana plants. The court held that, because the officers’ entry was not authorized by any statute, their entry was unlawful, and the community caretaking exception did not apply. Consequently, the court did not reach the constitutional question. *State v. Bridewell*, 306 Or 231, 759 P2d 1054 (1988).

**Note on ORS 133.033:** After the publication of *Bridewell*, in 1991, the legislature enacted ORS 133.033, which authorizes the police to perform certain community caretaking functions. Those functions include, but are not limited to, the right to enter premises to prevent serious harm to person or property, and to locate missing persons.

Peace officers are authorized by ORS 133.033(1) “to perform community caretaking functions.” “‘[C]ommunity caretaking functions’ means any lawful acts that are inherent in the duty of the peace officer to serve and protect the public.” ORS 133.033(2). See *State v. Dahl*, 323 Or 199, 204, 915 P2d 979 (1996).

A search was not justified under the community caretaking function because even if, under that doctrine, the officer was justified in opening the trunk to retrieve a wheelchair, the search violated Article I, section 9, because the rifle was not in plain view as it was concealed in a pair of pants under the wheelchair. *State v. Cook*, 136 Or App 525, 531, 901 P2d 911 (1995), rev’d on other grounds 327 Or 316, 958 P2d 841 (1998).

**D. Search Incident to Arrest**

Because officer’s question to defendant—do you “have anything that would hurt me [the officer] or was sharp”—served a noncriminal, noninvestigatory purpose, it fell squarely within the class of questions that are normally attendant to arrest and custody, and defendant’s response that he had a loaded gun in the car should not be suppressed. *State v. Cunningham*, 179 Or App 498, 40 P3d 535 (2002).

A search incident to arrest constitutes an exception to the warrant requirement when it is related to the crime for which the arrest was made and is reasonable in time, scope and manner. *State v. McCoy*, 155 Or App 610, 964 P2d 309 (1998).
A search incident to arrest does not justify an exploratory seizure of everything in the arrestee’s immediate possession; rather, the search must be reasonable in relation to the objects sought and the intensity of the search. *State v. Crampton*, 176 Or App 62, 31 P3d 430 (2001).

Under the Oregon Constitution, a valid custodial arrest does not alone give rise to a unique right to search. Such a warrantless search must be justified by the circumstances surrounding the arrest. In this case, the court explained that, in addition to officer safety and destruction of evidence concerns, a search incident to arrest may be justified if the search is relevant to the crime for which the defendant is being arrested and so long as it is reasonable—time, space and intensity—in light of all the facts. The Oregon standard differs from the corresponding federal standard in that, under the Fourth Amendment, if the arrest is lawful, a warrantless search incident to the arrest requires no further justification; however that search is limited to items of personal property immediately associated with the person. *State v. Caraher*, 293 Or 741, 757-60, 653 P2d 942 (1982).

Where there was no evidence to suggest that the defendant posed an immediate threat of escape or harm, the officer’s decision to search the defendant’s wallet was unreasonable. Under Article I, section 9, there are three valid justifications for a search incident to arrest:

1. to protect the officer’s safety;

2. to prevent the destruction of evidence relevant to the crime for which the defendant was arrested; and

3. to discover evidence of that crime.

Whenever a person is taken into custody, a “pat-down” or limited search for weapons to protect the officer or to prevent escape would be justified. Beyond that limited search, a further search incident to arrest conducted on officer safety grounds or to prevent escape must be reasonable, taking into account all the facts surrounding the arrest. *State v. Hoskinson*, 320 Or 83, 879 P2d 180 (1994).

Police lawfully arrested the defendant for the unlawful possession of a firearm. Therefore, the officers were authorized to search him, incident to his arrest, for other weapons. *State v. Anfield*, 313 Or 554, 836 P2d 1337 (1992).

The trial court suppressed evidence, concluding that the search incident to arrest for controlled substances exceeded the scope
of a permissible search incident to an arrest for assault. The trial court erred because the proper analysis is whether, when the officer arrested the defendant for assault, she also had probable cause to arrest defendant for possession of a controlled substance. *State v. Plummer*, 134 Or App 438, 895 P2d 1384 (1995). Following remand, in *State v. Plummer*, 160 Or App 275, 980 P2d 676 (1999), the Court of Appeals held that, because the trial court found the officer’s testimony was not credible, the subjective element of probable cause was not satisfied. *See State v. Owens*, 302 Or 196, 729 P2d 524 (1986); *see also State v. Holliday*, 135 Or App 256, 898 P2d 812, *rev den* 322 Or 228 (1995) (fact that search precedes an arrest does not destroy its character as a search incident to arrest, so long as probable cause to arrest exists and search is not remote in time or space from site of arrest).

*See also State v. Lander*, 137 Or App 222, 903 P2d 903 (1995), *rev den* 323 Or 114 (1996) (where officer arrests an individual for one crime but also has probable cause to arrest for another, search for evidence of the other crime is permissible, provided it was otherwise reasonable under the circumstances); *State v. Lane*, 135 Or App 233, 898 P2d 1358, *rev den* 322 Or 360 (1995) (if in course of inventory process officer develops probable cause to believe that arrestee has committed crime other than one for which he or she was arrested, officer may conduct search incident to presumed arrest for that other crime); *State v. Mituniewicz*, 125 Or App 41, 864 P2d 1359 (1993) (circumstances here did not justify search incident to arrest).

**E. Consent**

Consent to a search is an exception to the warrant requirement. Under the consent exception, the state must prove by a preponderance of the evidence that someone having authority to do so voluntarily gave the police consent to search the defendant’s person or property and that any limitations on the scope of consent were met. *State v. Weaver*, 319 Or 212, 219, 874 P2d 1322 (1994).

**1. Test for Consent**

It is possible for consent to “relate back” to the beginning of a search that would otherwise be unlawful. For consent to conduct a search to retroactively validate earlier police activity, there must be evidence that the person giving the consent intended it to be retroactive. *State v. Weaver*, 319 Or 212, 221-22, 874 P2d 1322 (1994). *But see State v. Larson*, 159 Or App 34, 977 P2d 1175, *rev den* 329 Or 318 (1999) (retroactive consent to search by a third party does not constitute a waiver
as to defendant); State ex rel. Juv. Dept. of Coos County v. Reeves, 163 Or App 497, 988 P2d 433 (1999) (same).

The test for consent by a third party is the same as for “direct” consent: Whether, under the totality of the circumstances, the consent was given by an act of free will or was the result of coercion, express or implied. There was valid third-party consent where the totality of the circumstances indicated that the defendant’s business partner voluntarily consented to the police cutting a chain link fence to enter the business complex and allowed the police to use his key to enter the office building. State v. Parker, 317 Or 225, 855 P2d 636 (1993). See also State v. Ray, 164 Or App 145, 990 P2d 365 (1999) (consent by third party to search contents of automobile is valid as to passenger’s belongings when passenger disclaims ownership).

When question arises about whether a defendant’s consent to search an automobile was obtained voluntarily, court examines factors such as whether the officer’s patrol car blocked defendant’s path, whether the patrol car’s flashing lights were turned on before approaching defendant’s car, whether the officer drew a gun, whether the officer made overt threats to induce consent, or exerted leverage over defendant through retention of defendant’s driver’s license or otherwise. State v. Venturi, 166 Or App 46, 998 P2d 748, rev den 330 Or 375 (2000). Cf. State v. Glandon, 166 Or App 451, 998 P2d 785, rev den 328 Or 418 (2000) (Consent may be voluntary even where police officer unlawfully stops a motorist by retaining his or her driver’s license because license was not used to coerce consent); State v. Charlesworth/Parks, 151 Or App 100, 951 P2d 153 (1997), rev den 327 Or 82 (1998) (defendant voluntarily consented, when handcuffed and surrounded by several police officers with their guns drawn because defendant had significant experience with the criminal justice system).

The authority to conduct a home visit under the conditions of probation does not encompass the authority to conduct a search. State v. Guzman, 164 Or App 90, 990 P2d 370 (1999), rev den 331 Or 191 (2000); State v. Altman, 97 Or App 462, 777 P2d 969 (1989) (same).

Renter had actual authority to consent to search of locked shop in defendant’s basement. Renter had full access to shop and paid rent by tending to marijuana plants located in shop. Defendant assumed the risk that renter would provide access to

The defendant did not voluntarily consent to search of his residence where officers informed him that he would be taken to a holding cell or that an officer would remain in his home until a warrant could be obtained if the defendant did not consent. The officer’s statements, making it clear that the defendant would be detained if he declined to consent, affected the defendant’s state of mind so that his consent was not a voluntary act of his free will. *State v. Powelson*, 154 Or App 266, 275, 961 P2d 869 (1998).

The defendant was sitting in the passenger seat of a parked car when an officer approached and asked him to step out of the car and for consent to search. The consent was valid because, in seeking the defendant’s consent, the officers did not exploit any alleged illegality related to their stopping of the driver. *State v. Herrera-Sorrosa*, 154 Or App 28, 959 P2d 619, *on recons* 155 Or App 227, 963 P2d 728 (1998).

Where driver of car consented to a search of car, and the officer did not ask a defendant passenger for consent to search that defendant’s personal belongings, search of the defendant’s purse was not supported by valid consent. Oregon law requires that third-party consent be supported by actual authority, and the driver did not have actual authority over the belongings of her passenger. *State v. Edgell*, 153 Or App 108, 956 P2d 988 (1998).

If an officer obtains consent to search after completing a traffic infraction investigation, such consent does not cure the unlawfulness of the questioning or the search because consent would not have been obtained but for a violation of ORS 810.410(3); the presence of an outstanding warrant does not cleanse the taint of an unlawful search, if, at the time of the search, the officer had no knowledge of the outstanding warrant. *State v. Taylor*, 151 Or App 687, 950 P2d 930 (1997), *rev den* 327 Or 432 (1998).

Whether the defendant voluntarily consented to perform field sobriety tests when she agreed to do so before officer gave statutory warning, but actually performed them after receiving warning, is a question of fact. *State v. Cuneo*, 148 Or App 71, 939 P2d 84, *rev den* 326 Or 82 (1997).
When the state relies on the consent of a third party to justify a search under Article I, section 9, the third party must have actual authority to consent. *State v. Ready*, 148 Or App 149, 152-53, 939 P2d 177, *rev den* 326 Or 68 (1997).

2. **Scope of Consent**

The “objective reasonableness” standard articulated in *Florida v. Jimeno*, 500 US 248, 111 S Ct 1801, 114 L Ed 2d 297 (1991), best comports with the requirements of Article I, section 9. Under that standard, the court considers what a reasonable person would have understood by the interchange between the officer and the defendant. Where the defendant consented to search of his car, the scope of that consent did not include removing screws and prying the panel from the sidewall of the car door to look for narcotics, money and weapons. *State v. Arroyo-Sotelo*, 131 Or App 290, 884 P2d 901 (1994).


After consent to search a fanny pack was given, the police officer’s discovery of drug paraphernalia and a film canister, together with the officer’s knowledge and experience about drugs in film canisters, gave the officer grounds reasonably to believe that there were drugs in defendant’s truck and officer’s opening of that canister was reasonably within the scope of the search for contraband. *State v. Poulson*, 150 Or App 164, 945 P2d 1084 (1997).


3. **Burden of Proof**

ORS 133.693(4) provides: “Where the motion to suppress challenges evidence seized as the result of a warrantless search, the burden of proving by a preponderance of the evidence the validity of the search is on the prosecution.”

Article I, sections 9 and 12, require that the state prove voluntariness of consent by a preponderance of the evidence. That is the same standard that is required by the Fourth

Although the defendant’s and his wife’s consent to search their car was preceded by illegal police conduct, the state’s burden of proving voluntariness remained at the preponderance of the evidence standard. *State v. Meyer*, 120 Or App 319, 852 P2d 879 (1993).

4. **Following Lawful Stop/Arrest**

Police officers lawfully stopped and arrested the defendant. No weapons were displayed during the encounter, and there was no evidence that the police used force against him. Although the defendant was arrested and handcuffed, he voluntarily consented to the search, because nothing in the record indicated that the police obtained his consent through intimidation or coercion or that defendant’s capacity to make a knowing, voluntary and intelligent choice was impaired. *State v. Bea*, 318 Or 220, 230, 864 P2d 854 (1993). Accord *State v. Jacobus*, 318 Or 234, 864 P2d 861 (1993); *State v. Kennedy*, 290 Or 493, 624 P2d 99 (1981); *State ex rel. Juv. Dept. v. Doty*, 138 Or App 13, 906 P2d 299 (1995); *State v. White*, 130 Or App 289, 881 P2d 169 (1994).

Voluntary consent may be manifested by conduct. Here, the defendant voluntarily consented by placing her hand-carried item on an x-ray screening machine’s conveyor belt. She was not required to do so, as anyone who did not wish to have his or her hand-carried items subjected to the scrutiny of the x-ray machine was free to leave the courthouse without subjecting the personal items to the x-ray process. *State v. Brownlie*, 149 Or App 58, 941 P2d 1069 (1997).

5. **Following Illegal Police Conduct**

Voluntary consent to search can vitiate the effect of prior illegal police activity if the consent is not gained by exploiting the illegal activity. *State v. Peppard*, 172 Or App 311, 18 P3d 488, vacated and remanded on other grounds, 332 Or 630 (2001).

Unlawful police conduct occurring before a search made pursuant to a person’s consent may affect the admissibility of evidence seized during that search in two ways. First, the unlawful police conduct may bear on the issue of voluntariness of the person’s consent. Second, even if the person voluntarily consented, suppression of evidence obtained during a consent
search may be necessary to vindicate a defendant’s rights that were violated by the earlier unlawful activity. Evidence obtained after the illegal conduct is not suppressed unless the police exploited their prior unlawful conduct to obtain the consent. *State v. Rodriguez*, 317 Or 27, 38-42, 854 P2d 399 (1993). *See also State v. Wilkinson*, 132 Or App 531, 536, 889 P2d 351, *rev den* 321 Or 394 (1995) (evidence will be suppressed only when the defendant shows that there is a causal connection between the unlawful police conduct and the evidence discovered and that the police exploited their prior unlawful conduct by taking advantage of the circumstances to obtain consent); *State v. Jeffers*, 125 Or App 596, 866 P2d 486 (1994) (same).

A search is not legitimized by consent obtained under the pressure of police action that became available to police only by the prior unauthorized conduct. Here, the police officers found marijuana plants in closed boxes, after they unlawfully stopped the defendant’s vehicle at a roadblock and the defendant acquiesced in a search of the boxes rather than wait for one of the officers to obtain a search warrant. Because the stop was unlawful, the officers could not lawfully detain the defendant’s truck. Thus, the officers could not lawfully assert that they would do so if the defendant did not consent. That material misrepresentation of what the law permitted invalidated the defendant’s consent to search. *State v. Williamson*, 307 Or 621, 626, 772 P2d 404 (1989).

The constitutional prohibition against unreasonable searches and seizures does not apply to property that is abandoned by defendant following an illegal search when an event intervenes between the initial search and the later seizure of the abandoned property. *State v. Knox*, 160 Or App 668, 984 P2d 294, *rev den* 329 Or 527 (1999).

Trial court erred in denying the defendant’s motion to suppress methamphetamine and smell of methamphetamine discovered during consent search. The officer obtained the defendant’s consent to examine container discovered during an illegal frisk of the defendant. The officer “exploited” the unlawful frisk in obtaining that consent because the frisk revealed information that focused the officer’s attention on the defendant and prompted the officer to seek his consent. Unlike a “voluntariness” analysis, which focuses on the person giving consent, the “exploitation” analysis focuses on the prior illegality’s effect on the police. This is not the “but for” test rejected in *Rodriguez*, because the illegality must give
the police more than the *opportunity* to seek consent, it must also provide a *reason* for doing so. *State v. Stanley*, 139 Or App 526, 532-38, 912 P2d 948 (1996), *rev’d on other grounds* 325 Or 234, 935 P2d 1202 (1997). *See also State v. Herrera-Sorrosa*, 154 Or App 28, 35, 959 P2d 619, *on recons* 155 Or App 227, 963 P2d 728 (1998) (relying on *Stanley*).

Article I, section 11, of the Oregon Constitution does not entitle defendant to have his handcuffs removed before placing a call to his attorney. *State v. Dumford*, 149 Or App 1, 941 P2d 1042 (1997).

6. **Who May Consent**

Defendant’s parents cannot consent to a search to parents’ garage where parents had conceded control over the garage to defendant. *State v. Jenkins*, 179 Or App 92, 39 P3d 868 (2002).

Defendant left a duffel bag in a friend’s car or house, the friend, by virtue of that entrustment, had the authority to voluntarily produce the duffel bag in response to an officer’s inquiry, though did not have the authority to consent to a search of the contents of that bag. *State v. Lynch*, 94 Or App 168, 171, 764 P2d 957 (1988).

The affidavit supporting the warrant application was based, in part, on information that was gained during a previous consensual search of the house. The person who consented to that search had answered the door when an officer knocked, and told the officer that he was watching the house for the owner, who was in jail. He also told the officer that no one came inside the house without his permission. There was no contravening evidence; the state satisfied its burden of showing that the person who consented had actual authority to grant consent. *State v. Arnold*, 115 Or App 258, 838 P2d 74 (1992), *rev den* 315 Or 312 (1993). In *Illinois v. Rodriguez*, 497 US 177, 110 S Ct 2793, 111 L Ed 2d 148 (1990), the Supreme Court held that a person who grants consent to a search need only have *apparent authority* to consent. In contrast, Article I, section 9, requires that a person who grants consent to a search have *actual authority* to consent.

**Note:** This case reflects a primary difference between Oregon’s right to be free from unreasonable searches and seizures and the analogous federal right. Much of the federal law regarding exclusion of tainted evidence...
focuses on deterring future misconduct by police. Although deterring police misconduct may be a “desired consequence, [it] is not the constitutional basis for respecting the rights of a defendant against whom the state proposes to use evidence[.]” State v. McMurphy, 291 Or 782, 785, 635 P2d 372 (1981).

F. Plain View

This doctrine is not an exception to the warrant requirement; rather, it means that the government’s conduct is not a search because there is no privacy interest in conduct or contraband that is in plain view.

There was no unlawful search where evidence of a drug crime was in plain view during the officers’ execution of an arrest warrant. State v. Sargent, 323 Or 455, 918 P2d 819 (1996).

Officers in a helicopter saw marijuana growing on the defendant’s land. The officers’ unaided observation, purposive or not, was from a lawful vantage point and thus was not a search under Article I, section 9. State v. Ainsworth, 310 Or 613, 801 P2d 749 (1990).


The odor emanating through the car’s open windows announced its contents and, therefore, under the “plain smell” variant of the “plain view” doctrine, defendant had no cognizable privacy interest that was invaded. State v. Juarez-Godinez, 326 Or 1, 942 P2d 772 (1997).

The “plain view” doctrine applies to transparent containers, meaning that no cognizable privacy interest inheres in their contents. State v. Owens, 302 Or 196, 729 P2d 524 (1986).

G. Inventories

Inventory policy containing two different provisions, one concerning inventory of closed containers in vehicles to be impounded, and the other concerning “personal property in the possession of a person taken into police custody,” including closed containers, are mutually exclusive provisions. State v. Ray, 179 Or App 397, 40 P3d 528 (2002).
1. Automobiles

The authority of the police to conduct an inventory of an impounded car was implied from the authority granted by the city to the police to impound cars. Furthermore, because such authority was implied, a police agency may adopt its own valid inventory policy so long as that policy meets the other Atkinson requirements. State v. Boone, 327 Or 307, 314, 959 P2d 76 (1998).

The contents of a lawfully impounded vehicle may be inventoried to protect the owner’s property while it is in custody, to reduce the assertion of false claims for lost or stolen property, and to assuage articulable concerns for officer safety. An inventory must be conducted pursuant to a properly authorized administrative program that is designed and administered to eliminate any discretion on the part of the officer conducting or directing the inventory. State v. Atkinson, 298 Or 1, 688 P2d 832 (1984). See also State v. Herrin, 323 Or 188, 915 P2d 953 (1996) (inventory not valid where evidence did not show: (1) what politically accountable authority promulgated the inventory policy; and (2) that gym bag would have been opened as part of that inventory); State v. Corey, 123 Or App 207, 859 P2d 560 (1993), rev den 318 Or 351 (1994) (accord).

A city ordinance may not authorize opening a closed container as part of an inventory. The police are to list property by its outward appearance. State v. Maynard, 149 Or App 293, 942 P2d 851 (1997), rev den 327 Or 448 (1998).

The authority to conduct an inventory search at a jail and to adopt policies by which to conduct such an inventory can be implied from a politically accountable body’s decision to establish the jail. State v. Layman, 147 Or App 225, 935 P2d 1216 (1997), vacated and remanded 327 Or 447, 959 P2d 615 (1998), affirmed on remand 162 Or App 386, 986 P2d 624 (1999). See also State v. Ketelson, 163 Or App 70, 72, 986 P2d 1202 (1999) (applying the same principle to detoxification centers).

Automobile exception to warrant requirement did not apply to warrantless search of opaque bottle found by police between seats of defendant’s vehicle, where inventory search was conducted after defendant was removed from the automobile which was about to be towed following traffic stop. State v. Walker, 173 Or App 46, 20 P3d 834 (2001).
2. Persons in Custody

Police inventory of defendant’s key case attached to bicycle that was seized by police while taking defendant into custody, violated city’s inventory ordinance, and thus was unconstitutional, where key case was not within city code definition of a closed container designed to carry “valuables” of $50 in cash or personal property valued over $500. *State v. Kendall*, 173 Or App 487, 24 P3d 914 (2001).


Inventory search of person arrested for violating a city ordinance was invalid where state policy preempts city code by decriminalizing minor traffic offense. *State v. Tyler*, 168 Or App 600, 7 P3d 624 (2000).

Charge of supplying contraband was properly dismissed when marijuana was found during an inventory search following an arrest that was unsupported by probable cause. *State v. Williams*, 161 Or App 111, 984 P2d 312 (1999).


A briefcase is like a wallet or purse and thus can be searched pursuant to a valid inventory policy. *State v. Custer*, 126 Or App 431,435, 868 P2d 1363 (1994), is overruled in the respect that a reviewing court no longer needs to make a determination as to the authority under which the police conduct the inventory in the absence of a challenge to such authority by the defendant. *State v. Johnson*, 153 Or App 535, 958 P2d 887, rev den 327 Or 554 (1998).

An inventory search of closed containers used to store valuables may be proper if performed pursuant to a properly authorized administrative program. *State v. Bean*, 150 Or App 223, 946 P2d 292 (1997), rev den 327 Or 448 (1998).
An officer’s testimony that it was standard procedure to remove everything from the arrestee’s person before transporting the arrestee was insufficient to show that the purported inventory policy authorized the opening of any containers. *State v. Mituniewicz*, 125 Or App 41, 864 P2d 1359 (1993).

### H. Search of Probationers

Probation officer’s authority to conduct home visit did not extend to authority to conduct search. Further, probation officer had no “reasonable grounds” which would warrant a search, and defendant did not voluntarily consent to search, making probation officer’s search unlawful. *State v. Guzman*, 164 Or App 90, 990 P2d 370 (1999), rev den 331 Or 191 (2000).

Where statute authorizes courts to impose, as a condition of probation, a requirement that the probationer submit to searches by a probation officer who has “reasonable grounds” to believe such search will disclose evidence of a probation violation, the question of what quantum of information a probation officer must have to amount to “reasonable grounds” is a question of statutory construction. As provided in ORS 137.540(2)(m) (1991), “reasonable grounds” for a search by a probation officer of a probationer’s person or property refers to a quantum of information greater than that required to justify a stop of a person under ORS 131.615, but is less than is necessary to establish “probable cause.” Under the totality of circumstances, the probation officer had reasonable grounds to believe that a search of defendant’s home would produce evidence of a probation violation. *State v. Gulley*, 324 Or 57, 921 P2d 396 (1996). See ORS 137.540(1)(i) (current version of “reasonable grounds” search provision).

Under Article I, section 9, a probation condition that requires a probationer to submit to searches does not constitute a self-executing, prospective consent by the probationer to a general warrantless search. Rather, it represents an agreement by the probationer to submit to reasonable searches by the probation officer. If the probationer refuses to submit to such a search, then the officer has no authority, under the terms of the search condition, to conduct a warrantless search. The refusal may, however, violate the terms of the probation and could provide grounds for revocation of the probation. *State v. Davis*, 133 Or App 467, 473, 891 P2d 1373, rev den 321 Or 429 (1995).

### I. Search of Parolees
An officer acted on an order of the defendant’s parole officer to take the defendant into custody for failing to comply with a condition of his parole—i.e., his refusal to consent to a search. Such a condition is not a prospective consent, but merely an agreement to consent. Here, the officer’s authority to arrest stemmed from the parole officer’s order, which was based on the lower standard of “reasonable grounds,” and the officer did not subjectively believe he had probable cause to arrest the defendant for drug or weapons offense independent of the parole violation. Therefore, without probable cause, the search of the defendant’s automobile could not be justified as incidental to the defendant’s arrest. *State v. Meier*, 145 Or App 179, 185-87, 929 P2d 1052 (1996).

Parolees have the same rights on parole as any other citizen, including the right to be free of unreasonable searches and seizures. In this case, the only limitation on the defendant’s right to be free of unreasonable searches and seizure was the requirement that he would submit to a search if his parole officer had reasonable grounds to believe that the search would disclose evidence of a parole violation. Because the defendant’s parole officer had reasonable grounds to believe that evidence of a parole violation would be found only in the defendant’s home, the parole officer was not authorized to search the defendant’s car as well, and the defendant’s right to refuse consent to search of his car was as valid as a similar assertion by any other citizen. *State v. Brown*, 110 Or App 604, 608-12, 825 P2d 282 (1992).

V. WARRANTLESS SEIZURES OF PERSONS—ARREST, STOP OR MERE CONVERSATION

A. General Considerations

There are three kinds of “encounters” between the police and citizens:

1. an arrest, justified only by probable cause;

2. a stop, *i.e.*, a “temporary restraint of a person’s liberty,” justified by reasonable suspicion; and

3. “mere conversation” (questioning without restraint of liberty), which needs no justification.


A seizure of a person occurs under Article I, section 9, if a police officer intentionally and significantly restricts an individual’s
liberty or whenever that individual believes that such has occurred and the belief is objectively reasonable under the circumstances. *State v. Holmes*, 311 Or 400, 409, 813 P2d 28 (1991).

B. Arrest—Requires Probable Cause

A warrantless arrest must be based on probable cause, which is established if an officer subjectively believes that a crime has been committed and if that belief is objectively reasonable under the circumstances. *State v. Owens*, 302 Or 196, 204, 729 P2d 524 (1986).

A finding of subjective probable cause to make an arrest does not require specific testimony from the arresting officer but rather, can be inferred from the totality of the circumstances. *State v. Williams*, 178 Or App 52, 35 P3d 1088 (2001).

ORS 133.310(1)(a) provides:

“A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed [a crime].”

ORS 131.005(11) provides:

“‘Probable cause’ [to arrest] means that there is a substantial objective basis for believing that more likely than not an offense has been committed and a person to be arrested has committed it.”

A police officer had a “substantial objective basis for believing that more likely than not [a drug] offense has been committed and a person to be arrested has committed it[]” where the defendant was at a location late at night where drug transactions occurred, the defendant responded to the call of an occupant of a van that drove by and looked up and down the street before going to the van, the defendant’s interaction with the occupants of the van were consistent with a “hand-to-hand” drug transaction, and the defendant returned to that location that same evening. *State v. Martin*, 327 Or 17, 21-22, 956 P2d 956 (1998).

Officer’s earlier observations of defendant’s interactions with the Cadillac established probable cause that defendant’s “stash” of drugs for distribution was in the car and that other evidence of distribution, including packaging material and proceeds, could be found in the car, satisfying “automobile exception.” Thus, *Martin* controls here as well. When the officers returned to the area where
defendant had been engaged in continuous drug dealing activity an hour before, defendant was still in the area, and the Cadillac to which he had repeatedly returned during his earlier dealings was parked in the same spot. Those factors satisfy the Martin standard. *State v. Mosley*, 178 Or App 474, 38 P3d 278 (2001).


Officer’s failure to state the crime for which he was arresting the defendant did not defeat a finding of subjective probable cause to arrest because an inference of subjective probable cause could be drawn from the evidence, and no evidence suggested a contrary explanation of the officer’s conduct. *State v. Stanley*, 153 Or App 16, 955 P2d 764 (1998).

Discovery of a marijuana pipe alone does not support probable cause to believe that the defendant had more marijuana in her purse. *State v. Brownlie*, 149 Or App 58, 941 P2d 1069 (1997).

Article I, section 9, of the Oregon Constitution does not require an officer to articulate “magic words” to express the officer’s subjective belief that a crime has been committed by a defendant. In some cases, the officer’s subjective belief is evident from the surrounding circumstances, and there is more than one way to express that subjective belief. *State v. Wetzell*, 148 Or App 122, 939 P2d 106, *rev den* 325 Or 621 (1997).

Under a probable cause analysis, whether a police officer’s belief is objectively reasonable depends on the totality of the circumstances. *State v. Stroup*, 147 Or App 118, 935 P2d 438 (1997).

The trial court erred in denying a child’s motion to suppress evidence seized from his jacket by an assistant principal at the child’s school, who feared that the jacket contained a weapon. The child’s participation in a fist fight and the fact that his jacket
seemed “heavier than * * * what a jacket should have been,” would not, without more, support a reasonable inference that he possessed a weapon. In light of the fact that the assistant principal did not have reasonable suspicion to search the child’s jacket, the appellate court need not determine whether Article I, section 9, permits school searches on a showing of less than probable cause. *State ex rel. Juv. Dept. v. Finch*, 144 Or App 42, 925 P2d 913 (1996).

The trial court did not err in denying the defendant’s motion to suppress where police officer had probable cause to arrest the defendant for possession of a controlled substance, and the search was valid incident to that arrest. The officer had been called to investigate complaints about traffic in a remote forested area. He previously had made several drug-related arrests in remote areas of this type, he knew that such areas were used to “consummate illegal activities such as narcotics,” and there were many tire tracks in the area where the defendant had stopped his truck. He encountered the defendant alone and visibly under the influence of methamphetamine, a controlled substance. Probable cause was based on the totality of circumstances and, in light of the officer’s training and experience, not simply on the fact that the defendant appeared under the influence of methamphetamine. *State v. Blount*, 143 Or App 582, 924 P2d 860, *rev den* 324 Or 488 (1996).

The petitioner sought judicial review of a DMV hearing and argued that the arresting officer did not have probable cause to arrest him until after the officer had conducted an illegal search by administering field sobriety tests. Under Article I, section 9, of the Oregon Constitution, field sobriety tests constitute a search. Consequently, to conduct the tests, an officer must have probable cause to believe that an individual is driving under the influence of intoxicants before the officer administers field sobriety tests to the individual. The test for probable cause has both an objective and a subjective component. In this case, there was not substantial evidence to support the hearings officer’s finding about when the officer subjectively concluded that he had probable cause to arrest the petitioner. The facts of this case show unequivocally that the officer did not actually believe that he had probable cause to think that the petitioner was driving under the influence when he asked petitioner to perform the field sobriety tests. Because the search was conducted without probable cause, the evidence obtained as a result of the field sobriety tests should have been suppressed. *Winroth v. DMV*, 140 Or App 622, 915 P2d 991 (1996).

Under the collective knowledge doctrine, also known as the fellow-officer rule, “[a] peace officer who does not himself have probable cause to arrest a felony suspect nonetheless may arrest the suspect
if he reasonably believes that the officer or officers who have requested the arrest do have probable cause to make that arrest and if probable cause to arrest does, in fact, exist.” *State v. Pratt*, 309 Or 205, 216, 785 P2d 350 (1990). *See also State v. Soldahl*, 331 Or 420, 15 P3d 564 (2000) (applying doctrine to traffic stop).

C. Stop—Requires Reasonable Suspicion

ORS 131.605(6) provides:

“A ‘stop’ is a temporary restraint of a person’s liberty by a peace officer lawfully present in any place.”

*See also ORS 131.615.*

A stop occurs when a peace officer who is lawfully present temporarily restrains a person’s liberty. The court has established a two-step analysis to determine whether a challenged stop is lawful under ORS 131.615(1). First, it must be determined that a stop occurred. If so, the second inquiry is whether the facts known at the time of the stop, combined with the inferences that the police officer reasonably drew from those facts, were sufficient to give rise to “reasonable suspicion” by the officer that criminal activity was afoot. The police officer here testified that the defendant was not free to leave when he told the defendant that he was going to conduct a pat-down. That being so, defendant was stopped. The police officer in this case faced a nervous robbery suspect whose companion was acting aggressively toward another officer. The circumstances demonstrate particularized facts giving rise to a reasonable suspicion that the defendant posed an immediate threat to the officers. Accordingly, the frisk was lawful. *State v. Stanley*, 325 Or 239, 935 P2d 1202 (1997); ORS 131.615(1).

Experienced officer’s suspicion that defendant was engaged in prostitution procurement activities was objectively reasonable, and thus officer had reasonable suspicion to stop and question defendant. *State v. Williams*, 178 Or App 52, 35 P3d 1088 (2001).

Police officer’s question as to whether defendant had any guns in his car, asked within context of valid stop for driving without a license, did not transform the traffic stop into a warrantless seizure that required reasonable suspicion, but rather, was an inquiry to ensure the safety of the officer; officer knew that defendant had possessed controlled substances and firearms at time of an earlier arrest, and defendant failed to follow officer’s instructions to keep his hands on the steering wheel. *State v. Crampton*, 176 Or App 62, 31 P3d 430 (2001).
A peace officer who asks a person who is backing an automobile out of a parking space to repark the automobile and then to get out to answer questions has stopped the person. *State v. Belt*, 325 Or 6, 932 P2d 1177 (1997).

A two-step analysis is appropriate for determining whether a challenged stop was lawful under ORS 131.615.

- First, there must be a stop, or a “temporary restraint of a person’s liberty by a peace officer lawfully present in any place.” ORS 131.605(6).
- Second, if a stop occurred, the facts known at the time of the stop, combined with the inferences that the police officer reasonably drew from the facts, must have caused the officer reasonably to suspect that criminal activity was afoot.


Officers had reasonable suspicion to stop the defendants when the totality of the circumstances showed that the defendants had attempted to rob a liquor store. *State v. Langager*, 156 Or App 385, 965 P2d 1037 (1998).

Teachers in a high school stopped student when they removed him from class, took him to a vacant classroom, and asked him to empty his pockets. The stop required that they have reasonable suspicion that student committed an offense. *State ex rel. Juv. Dept. v. Rohlffs*, 147 Or App 565, 938 P2d 768 (1997).

The trial court erred in denying the defendant’s motion to suppress a forged immigration card on the ground that it constituted the fruit of an unlawful stop. The officer unlawfully stopped defendant by retaining his ID card and conducting a warrants check, as opposed to simply reviewing and returning the identification, without a reasonable suspicion that the defendant had committed a crime. *State v. Gonzalez-Galindo*, 146 Or App 291, 932 P2d 118 (1997).

The trial court erred in concluding that documentation of identification may only be requested in the context of a traffic stop. Such an inquiry may be made if it is “limited to the immediate circumstances that aroused the officer’s suspicion.” ORS 131.615. The officer reasonably suspected the defendant of the crime of illegal dumping because the defendant was driving a van that matched the description of the van seen at the sight of the dumping. Thus, the officer’s request to see the defendant’s driver license, registration and proof of insurance did not exceed the
proper scope of the officer’s investigation into that crime, and the inquiry was relevant to that investigation. *State v. Black*, 146 Or App 1, 932 P2d 554, *rev den* 325 Or 247 (1997).

The driver of a car was lawfully arrested, and the officer intended to tow the car at some point. The defendant, a passenger, was asked to step out of the car and crack cocaine was discovered in plain view. The trial court erred when it suppressed the cocaine on the grounds that it was the result of a pretext-stop. The defendant was not “stopped” when he was asked to get out of the car. A passenger must put up with some inconvenience following a traffic stop without having been “stopped” in the legal sense. Because at least one of the officer’s reasons for asking the defendant to stand up was to arrange for the tow of the driver’s car, the fact that the officer may have had other motivations does not make the action unlawful. *State v. Woods*, 134 Or App 53, 894 P2d 511, *rev den* 321 Or 340 (1995).

**Note:** An officer making a traffic stop may order passengers to get out of the car pending completion of the stop without violating the Fourth Amendment. After stopping a speeding car, a trooper noticed that the defendant, a passenger, was nervous and ordered him out of the car. Some cocaine fell to the ground, and the defendant was arrested. The defendant moved to suppress the cocaine on the grounds that the trooper’s ordering him out of the car constituted an unreasonable seizure. The Court found that the public interest in officer safety outweighs the individual’s interests and that the intrusion is minimal because a passenger, as a practical matter, is already stopped. *Maryland v. Wilson*, 519 US 408, 117 S Ct 882, 137 L Ed 2d 41 (1997).

*See also Jasper v. MVD*, 130 Or App 603, 608-610, 883 P2d 244 (1994) (transporting suspected intoxicated motorist three blocks to scene of single vehicle accident was improper stop and frisk given that detention went beyond vicinity of stop); *State v. Gilmore*, 123 Or App 594, 597-98, 860 P2d 882, *rev den* 318 Or 171 (1993) (police officer’s request for the defendant’s identification was not a “stop”); *State v. Fields*, 122 Or App 38, 41-42, 857 P2d 179 (1993) (the defendant was not “stopped” when a police officer pulled up behind the defendant, who was already parked on the shoulder of a public road, and asked the defendant to come out from beneath the car).

1. Reasonable Suspicion

ORS 131.615(1) provides:
“A peace officer who reasonably suspects that a person has committed or is about to commit a crime may stop the person and, after informing the person that the peace officer is a peace officer, make a reasonable inquiry.” (Emphasis added).

The 1997 legislature amended ORS 131.615 to include the phrase “is about to commit.” That change gives police officers that same stop authority as is permissible under the Fourth Amendment to the United States Constitution. The earlier formulation of ORS 131.615 limited stop authority to situations in which an officer reasonably suspected that the person “had committed a crime.” See ORS 131.615(1) (1995). That earlier version set forth “a different [more restrictive] rule than the decision in Terry v. Ohio, 392 US 1, 30, 88 S Ct 1868, 20 L Ed 2d 889 (1968)].” State v. Valdez, 277 Or 621, 625 n 4, 561 P2d 1006 (1977). The 1997 amendments conform to the Terry rule and thus grant officers more stop authority than previously existed. See State v. Tweed, 62 Or App 711, 716, 663 P2d 38 (1983) (the prior version was “more restrictive than the Fourth Amendment”).

ORS 131.605(5) provides:

“‘Reasonably suspects’ means that a peace officer holds a belief that is reasonable under the totality of the circumstances existing at the time and place the peace officer acts as authorized in ORS 131.605 to 131.625.”

ORS 131.605(4) provides:

“‘Is about to commit’ means unusual conduct that leads a peace officer reasonably to conclude in light of the officer’s training and experience that criminal activity may be afoot.”

The 1997 legislature also added a definition of the phrase “is about to commit,” as shown above. In that definition, the phrase “that criminal activity may be afoot” comes from Terry v. Ohio, 392 US 1, 30, 88 S Ct 1868, 20 L Ed 2d 889 (1968), and corresponds to the “is about to commit a crime” standard.

ORS 131.615(3)(c) and (4) provide:

“(3) The inquiry shall be considered reasonable if it is limited to:
“(c) Ensuring the safety of the officer, the person stopped or other persons present, including an inquiry regarding the presence of weapons.

“(4) The inquiry may include a request for consent to search in relation to the circumstance specified in subsection (3) of this section or to search for items of evidence otherwise subject to search or seizure under ORS 133.535.”

The 1997 legislature amended those sections to allow police officers to ask lawfully stopped persons about the presence of weapons and to ask for consent to search for “items of evidence otherwise subject to search and seizure under ORS 133.535.” Prior to that amendment, an officer needed reasonable suspicion to engage in such conduct. See, e.g., State v. Loud, 149 Or App 250, 942 P2d 814, rev den 326 Or 58 (1997) (under previous law, an officer needed reasonable suspicion to ask for consent to search); State v. Senn, 145 Or App 538, 930 P2d 874 (1996) (under previous law, officer needed reasonable suspicion to believe the person is armed and dangerous to ask about weapons). The new authority parallels the authority an officer has in any other lawful encounter with a citizen. See, e.g., State v. Mesa, 110 Or App 261, 265, 822 P2d 143 (1991), rev den 313 Or 211 (1992) (“Consent may be requested * * * of a citizen on the street.”).

The statutory standard for the stopping and questioning of a person concerning his or her possible criminal activity was intended to be less than the standard for probable cause to arrest. ORS 131.605(4) requires that the officer’s subjective belief that the person stopped has committed a crime be objectively reasonable under the totality of the circumstances. The “holds a belief” element of ORS 131.605(4) requires that the officer subjectively believe that the person stopped has committed a crime. Whether the suspicion is reasonable will depend on the inferences that may be drawn from the particular circumstances confronting the officer. State v. Belt, 325 Or 6, 932 P2d 1177 (1997). See ORS 131.605(5) (current version).

The statutory standard for stopping and questioning a person concerning his or her possible criminal activity is a reasonable suspicion, ORS 131.615, and it requires an objective test of observable facts. If a police officer can point to specific
and articulable facts that give rise to a reasonable inference that a person committed a crime, the officer has “reasonable suspicion” and may stop the person for investigation. *State v. Ehly*, 317 Or 66, 80, 854 P2d 421 (1993).

Police officer exceeded the scope of his authority when he questioned the defendant about prostitution without reasonable suspicion that the defendant had committed a crime. *State v. Meyers*, 153 Or App 551, 958 P2d 187 (1998).

“[C]onstitutional law provides that a stop can be no more intrusive than necessarily required by the objective reason giving rise to the stop.” *State v. Amaya*, 176 Or App 35, 40, 29 P3d 1177 (2001), citing to *State v. Evans*, 16 Or App 189, 517 P2d 1225, rev den (1974). Hence, ORS 131.615 appears to codify that constitutional limitation.

2. **Restraint**


For purposes of determining whether a “stop” has occurred, it suffices that a person’s liberty is restrained by either physical force or by a show of authority. *State v. Warner*, 284 Or 147, 162, 585 P2d 681 (1978).

D. **Mere Conversation—Requires No Justification**

Police-citizen encounter without any restraint of liberty, such as mere conversation, a noncoercive encounter, is not a “seizure” within meaning of the State Constitution and, thus, requires no justification. *State v. Dahl*, 323 Or 199, 915 P2d 979 (1996).

Not all encounters between citizens and police officers are seizures in the constitutional sense, and rather, some encounters constitute only “mere conversation” between citizens and police, involving no restraint of the citizen and thus requiring no police justification. *State v. Blair*, 171 Or App 162, 14 P3d 660 (2000).

Where nothing about police officers’ demeanor, their tone of voice, the nature of their language, or the time, place or manner of the encounter between the officers and the defendant would have
led a reasonable person in those circumstances to believe his or her liberty had been restrained, there was merely conversation, a noncoercive encounter, requiring no justification. *State v. Ehly*, 317 Or 66, 76, 854 P2d 421 (1993).


Reasonable suspicion is not needed for police officer to ask defendant for permission to search his vehicle after a traffic stop ends because defendant is no longer being “detained.” *State v. Cruz-Aguirre*, 158 Or App 15, 972 P2d 1276 (1999).

An officer who encountered the defendant on the street near a known drug house and asked him, “So Craig, did you buy any good crack in there?” did not stop the defendant because the officer did not announce that he had seen the defendant break the law. *State v. Baker*, 154 Or App 358, 961 P2d 913 (1998).


E. Frisk

ORS 131.605(3) provides:

“[A] ‘[f]risk’ is an external patting of a person’s outer clothing.”

ORS 131.625(1) provides:

“A peace officer may frisk a stopped person for dangerous or deadly weapons if the officer reasonably suspects that the person is armed and dangerous to the officer or other persons present.”

The 1997 legislature amended the frisk law by removing the requirement that the person frisked be “presently” dangerous. That change suggests that it will no longer be necessary that the defendant pose an “imminent” threat before a frisk is proper. See, e.g., *State v. Peterson*, 143 Or App 505, 923 P2d 1340 (1996), rev den 327 Or 521 (1998) (officer’s frisk search was improper
because officer’s belief that the defendant posed an imminent threat of serious physical injury was not reasonable).

An officer “may frisk a stopped person for dangerous or deadly weapons if the officer reasonably suspects that the person is armed and dangerous to the officer or other persons present.” ORS 131.625(1). However, “[t]here may be circumstances in which the interests of officer safety could justify handcuffing a dangerous person who refuses to submit to a frisk during a lawful stop. But when an officer fails to follow the procedure outlined in ORS 131.625, and there is no reason to believe that attempting to do so would be futile, then the use of handcuffs exceeds the restraint permitted by the statute.” State v. Greenwood, 175 Or App 69, 74-75, 27 P3d 151 (2001) (quoting State v. Johnson, 120 Or App 151, 158, 851 P2d 1160, rev den 318 Or. 26 (1993)).

Search of cigarette pack found in defendant’s pocket during officer safety frisk was unlawful and the evidence was properly suppressed even though the officer later discovered there was an outstanding warrant for defendant’s arrest. State v. Miears, 166 Or App 228, 999 P2d 493, rev den 331 Or 192 (2000).

The officers took the defendant into custody under ORS 430.399, the civil detoxification statute. However, that act was unlawful because the defendant was in his fenced-in yard, which was not a public place as required by the statute. Therefore, the officers’ pat-down of the defendant was also unlawful. State v. Premsingh, 154 Or App 682, 962 P2d 732 (1998).

A police officer’s warrantless pat-down of a child’s backpack incident to a child’s arrest on runaway warrant was not justifiable as part of limited pat-down that may always accompany custodial arrest, where that child was handcuffed and seated on bed, and backpack was across the motel room from the child. State ex rel. Juv. Dept. v. Singh, 151 Or App 223, 949 P2d 303 (1997).

The trial court erred by granting the defendant’s motion to suppress evidence found on his person. During the course of a lawful frisk for officer safety purposes, an officer is permitted to seize a container that the officer subjectively believes “might” contain a weapon so long as that belief is objectively reasonable under the circumstances. To have a reasonable suspicion that the object “might” contain a weapon requires:

1. that the container has the physical capacity to conceal a weapon; and
2. that under the totality of the circumstances, there was a reasonable suspicion that it did contain a weapon. That is what the officer testified to here; no more is required. *State v. Blevins*, 142 Or App 237, 244-45, 920 P2d 1131 (1996), rev den 324 Or 521 (1998).

Search of passenger’s lipstick case did not violate ORS 810.410 because the officer developed reasonable suspicion that vehicle occupants were armed based on their furtive movements and reluctance to follow instructions after leaving a “meth house.” *State v. Haney*, 158 Or App 53, 973 P2d 359 (1999).

Where the defendant possessed two stolen lottery tickets, was wearing a long coat, and questioning was to be conducted in a closed environment, the police lacked reasonable suspicion that the defendant was armed and dangerous. *State v. Dyer*, 141 Or App 6, 917 P2d 51 (1996).

**F. Traffic Infractions**

*See ORS 810.410(3).* The 1997 legislature amended this section to allow police officers to ask lawfully stopped motorists for consent to search with respect to the traffic infraction and to the presence of “items of evidence otherwise subject to search and seizure under ORS 133.535” and to inquire about the presence of weapons. Prior to that amendment, an officer needed reasonable suspicion to engage in such conduct. *See, e.g., State v. Loud*, 149 Or App 250, 942 P2d 814, rev den 326 Or 58 (1997) (under previous law, an officer needed reasonable suspicion to ask for consent to search); *State v. Senn*, 145 Or App 538, 930 P2d 874 (1996) (under previous law, officer needed reasonable suspicion to believe the person is armed and dangerous to ask about weapons). That expanded authority, however, was linked to a statutory requirement that police agencies develop and adopt policies to insure that traffic stops and subsequent searches are not based on race, color, sex or national origins. The Asset Forfeiture Oversight Advisory Committee also was required by statute to produce a report evaluating whether the law is being implemented in a fair and equal manner. In February 1999, that report—*Public Perceptions of Stop Decisions by Oregon Police Officers*—was presented to the 1999 Legislative Assembly and concluded that, although the new law has not triggered a “worsening trend, * * * minorities in Oregon are much more likely than non-minorities to consider Oregon police officers unfair[.]” A summary of the report is available for download at http://www.ocjc.state.or.us/Racial_Profiling/HB_2433_Survey.pdf (last visited January 10, 2005).
Defendant’s assertion that ORS 810.410 requires a police officer to have reasonable suspicion that a lawfully stopped person has committed a crime before making an inquiry regarding the presence of weapons was answered adversely to his position in *State v. Amaya*, 176 Or App 35, 29 P3d 1177 (2001). *Amaya* held that under ORS 810.410(3)(d), a police officer is not required to have reasonable suspicion in order to make that statutorily authorized inquiry. *State v. Hitt*, 177 Or App 168, 173, 33 P3d 715 (2001).

Under the authority of ORS 810.410(3) (1993), two police officers stopped the defendant for a traffic infraction. After investigating the traffic infraction, the officers decided not to issue the defendant a traffic citation; they turned off the overhead lights on their patrol car and told the defendant that he was “free to go.” At that time, the officers had no reason to believe that the defendant had engaged in criminal activity. Immediately after telling the defendant that he was free to go, the officers requested the defendant’s consent to search his person and his vehicle. After refusing several requests, the defendant consented to a search of his vehicle, in which drugs were found. The primary issue in this case involved whether the officers exceeded their authority under ORS 810.410(3). To answer that question, the court first examined the legislature’s intent when it provided in ORS 810.410(3) that an officer “[m]ay stop and detain a person for a traffic infraction.” The court analyzed related statutory provisions, concluding ultimately that the legislature intended for the words “stop” and “detain,” which are common both to the traffic and criminal codes, to carry the same meaning. Given that conclusion, the court then noted that the methodology for determining whether a stop had ended must be the same under the criminal and traffic codes, and, accordingly, to answer the primary question, the court turned to its methodology for determining whether an officer’s contact with a citizen rises to the level of a stop or a detention under the criminal code. In doing so, the court also noted that an analysis of a defendant’s rights under the criminal provisions governing an officer’s stop authority—ORS 131.605 to ORS 131.625—is substantially similar to an analysis of a defendant’s rights under the search and seizure provisions of the Oregon and federal constitutions. That analysis involves determining whether a person subjectively believes that an officer has significantly interfered with a person’s liberty and such a belief is objectively reasonable under the circumstances, and necessarily depends on the totality of the circumstances. Finally, the court noted that, because a detention is a continuation of a stop, that same analysis applies when determining whether an unlawful detention occurred following a lawful stop. In applying that analysis, the court held that the officers here unlawfully continued
to detain the defendant in violation of ORS 810.410(3), because the ensuing questioning was neither reasonably related to the traffic infraction nor based on some other reason separate from the traffic stop. The court granted the defendant’s motion to suppress. Also, although the 1997 legislature, prior to the publication of this case, had enacted SB 936, a portion of which limited the suppression of evidence in certain circumstances, neither party raised the issue whether that legislation applied here, and the court therefore did not consider the issue. *State v. Toevs*, 327 Or 525, 534-37, 964 P2d 1007 (1998).

An Oregon state trooper stopped the defendant after the trooper observed the defendant change lanes without signaling. The trooper tested the turn signals and warned the defendant to have them fixed in the next town. The trooper told the defendant that he was free to go, but the trooper continued to lean into the passenger side of the car. Within a couple of seconds, the trooper asked the defendant if he could ask some additional questions. He then asked the defendant and his passenger about drug trafficking and if he could search the automobile. The men consented, and the trooper found cocaine in the car. ORS 810.410 allows an officer to stop and detain a person for traffic infractions that he or she witnessed. However, an officer may investigate only that infraction unless the state can point to some other basis to broaden the scope of the investigation. After the investigation reasonably related to the traffic infraction is complete, an officer does not have authority to continue to detain the person stopped. *State v. Dominguez-Martinez*, 321 Or 206, 895 P2d 306 (1995).

**Note:** The Fourth Amendment does not require that a lawfully seized defendant be advised that he or she is “free to go” before the defendant’s consent to search would be recognized as voluntary. The test under the Fourth Amendment is reasonableness, which is measured in objective terms by examining the totality of circumstances. *Ohio v. Robinette*, 519 US 33, 117 S Ct 417, 136 L Ed 2d 347 (1996).

An officer who stops and detains a person for a traffic infraction must have probable cause to do so, *i.e.*, the officer must believe that the infraction occurred, and that belief must be objectively reasonable under the circumstances. *State v. Matthews*, 320 Or 398, 403, 884 P2d 1224 (1994).

A defendant was driving his car and came to an L-shaped intersection, where there was no stop sign, and turned left without signaling. Left was the only direction the defendant could have continued to travel on a public street unless he reversed directions.
The defendant committed a traffic infraction when he turned left without signaling, because the signaling provisions of the Oregon Vehicle Code, ORS 811.335 and ORS 811.400, apply to a change in direction of travel made from one street to another at the intersection of two or more streets. Because the defendant committed a traffic infraction, the police officer was authorized to stop the defendant under ORS 810.410(3). *State v. Bea*, 318 Or 220, 228-29, 864 P2d 854 (1993).

**Note:** The temporary detention of a motorist upon probable cause to believe he has violated the traffic laws does not violate the Fourth Amendment’s prohibition against unreasonable seizures, even if a reasonable officer would not have stopped the motorist absent some additional law enforcement objective. Ulterior motives will not invalidate a stop based on probable cause under the Fourth Amendment. *Whren v. United States*, 517 US 806, 116 S Ct 1769, 135 L Ed 2d 89 (1996).

The officers did not have reasonable suspicion to exceed the scope of their authority under ORS 810.410 where they discovered on the defendant a film canister, which is commonly used to store drugs, but had no reason to believe that that defendant was using the canister for that purpose. *State v. Lanig*, 154 Or App 665, 668-69, 963 P2d 58 (1998). **See also State v. Elverud**, 154 Or App 79, 961 P2d 224, rev den 327 Or 554 (1998) (traffic stop had ended before consent to search requested).

When the officer asked for consent to search, the traffic stop had ended, and the defendant had an objectively reasonable opportunity to leave because the officer told the defendant that she could leave three times and an intervening event occurred between the issuance of a citation and the officer’s request for consent. *State v. Hester*, 153 Or App 247, 956 P2d 1052, rev den 327 Or 432 (1998).

After a stop in which the defendant was a passenger, the officer told the defendant that he was “free to go.” The defendant took off his safety belt, opened the door of the car, got out and began walking away in a busy urban area before the officer asked if he could ask the defendant a question. The defendant, therefore, had a real time opportunity to leave, and the stop had concluded before the officer initiated further questioning. The trial court, thus, did not err in denying defendant’s motion to suppress. *State v. Bennett*, 153 Or App 60, 956 P2d 990, rev den 327 Or 305 (1998).

During the investigation of a traffic infraction, an officer may not ask a passenger’s name when not reasonably related to the traffic infraction without some independent basis to expand the scope of

The officers had authority to stop the defendant under ORS 810.410. Subsequent to the initiation of the stop, the defendant refused to stop for four blocks and made furtive gestures. Those actions and other actions the officers observed prior to stopping the defendant—stopping next to the left curb at 1:45 a.m. in a high vice area, honking his horn, and a visit with loitering pedestrian—constituted reasonable suspicion to expand the traffic stop. **State v. Loud**, 149 Or App 250, 942 P2d 814, *rev den* 326 Or 58 (1997).

An officer’s request that the defendant consent to a search was invalid because the request exceeded the scope of a traffic stop authorized under ORS 810.410(3)(b). Because ORS 810.410(3)(b) precludes police officers from seeking consent for a search beyond the scope of a traffic stop, the state must demonstrate that:

1. the request for consent was reasonably related to the basis of the traffic stop;
2. the request for consent pertained to some independently sufficient non-traffic justification for the stop or its continuation; or
3. the request for consent was made after the traffic stop had ended and a real temporal break had occurred between the termination of the stop and the subsequent request for consent.

Here, it was uncontroverted that neither the first nor the second alternative was met, so the state had to demonstrate that the third alternative was met. As there was a break of no more than a few seconds between when the officer told the defendant to “take care,” and when the officer “turned back” and began inquiring about controlled substances and weapons, culminating in the request for consent to search, the state failed to meet that burden, and the evidence derived from that search was properly suppressed. **State v. Hadley**, 146 Or App 166, 932 P2d 1194 (1997). **Compare State v. Toevs**, 327 Or 525, 534-37, 964 P2d 1007 (1998) (in the context of an investigation for a traffic infraction, the court applied a totality of the circumstances test to determine whether a stop had ended, focusing on the reasonableness of the defendant’s subjective belief that the stop had not ended).

After a lawful stop, despite officer’s statement that the defendant was free to go, his retention of the defendant’s gun extended the stop, and his subsequent request to search exceeded the scope of that stop. The trial court erred in determining that the search was a

The trial court erred in denying the defendant’s motion to suppress evidence found during a search pursuant to a traffic stop. Under *Dominguez-Martinez*, the officer must have some basis to believe the defendant had committed a drug-related crime to broaden the scope of the investigation. The proper standard for permitting an officer to broaden the investigation is a “reasonable suspicion” that the defendant committed an illegal act other than a traffic infraction. Here, the officer lacked reasonable suspicion to believe that defendant had engaged in a drug transaction. *State v. Aguilar*, 139 Or App 175, 912 P2d 379, rev den 323 Or 265 (1996).

### IV. DUII

#### A. Field Sobriety Tests Are a Search

The administration of field sobriety tests constitute a search under Article I, section 9, and, therefore, must be justified by one of the recognized exceptions to the warrant requirement. Here, probable cause existed, and there were exigent circumstances to justify a search under Article I, section 9, because the evidence of the defendant’s intoxication could have dissipated in the time it would have taken to obtain a warrant. *State v. Nagel*, 320 Or 24, 31-33, 880 P2d 451 (1994).

A police officer’s decision that an arrest is justified does not negate the exigency associated with a DUII investigation for a person’s blood-alcohol content. *State v. Skeans*, 149 Or App 570, 945 P2d 529 (1997).

Under the probable cause/exigent circumstances exception to the search warrant requirement, the officer must subjectively believe that the defendant was driving under the influence of intoxicants, and that belief must be objectively reasonable. Here, the officer’s belief that defendant “was possibly driving under the influence of intoxicants” was insufficient to demonstrate subjective probable cause. *State v. Demus*, 141 Or App 509, 919 P2d 1182 (1996). *See also State v. Smalley/Yaws*, 156 Or App 325, 965 P2d 419 (1998) (applying test to marijuana intoxication).

#### B. Stopping Drivers—Requires Reasonable Suspicion

In a boating under the influence case, an informant’s tip was sufficient to establish reasonable suspicion under the totality of

When an officer observes a vehicle cross the center line and weave within its own lane, the vehicle may be stopped on the basis of a reasonable suspicion that the driver is under the influence of intoxicants. There is no requirement that the observable actions themselves be unlawful in order to support a reasonable inference that a crime is being committed. *State v. Sulser*, 127 Or App 45, 871 P2d 126 (1994).

C. Self-Incrimination

Certain field sobriety tests are nontestimonial in nature, and thus, admission of results do not violate defendant’s right to be free from testifying against himself, in prosecution for driving under the influence of intoxicants (DUII). *State v. Forrest*, 174 Or App 129, 25 P3d 329 (2001).

A defendant’s refusal to take field sobriety tests is inadmissible as a violation of the defendant’s right against self-incrimination. *State v. Fish*, 321 Or 48, 893 P2d 1023 (1995).

Tests that produce purely physical results are not subject to suppression under *Fish*; divided attention tests contain verbal and physical aspects, the verbal components of which may be testimonial; however, the physical aspects of divided-attention tests are not testimonial and, thus, would not be subject to suppression under *Fish*. *State v. Riddle*, 149 Or App 141, 941 P2d 1079, *rev den* 326 Or 68 (1997). See also *State v. Anderson*, 148 Or App 325, 940 P2d 246, *rev den* 326 Or 43 (1997) (the non-testimonial aspects of certain FSTs are admissible); *State v. Gile*, 147 Or App 469, 936 P2d 1008 (1997) (only testimony and testimonial components of field sobriety tests are subject to suppression); *State v. Spicer*, 147 Or App 418, 936 P2d 1005, *rev den* 326 Or 68 (1997) (only the “verbal” aspects of field sobriety tests are testimonial and therefore subject to suppression under *Fish*).

During the course of a DUII stop and investigation, a police officer requested that the defendant perform “physical tests” and the defendant refused. Although the police officer requested the defendant’s performance of “physical tests,” the state failed to establish exactly what “physical tests” were to be administered and thus, failed to meet its burden under *Fish* to establish the admissibility of the defendant’s refusal. *State v. Rohrs*, 157 Or App 494, 499, 970 P2d 262 (1998).
Results from field sobriety tests that reveal an individual’s intoxicated state, without requiring the individual to reveal her thoughts, beliefs or state of mind, are not testimonial. Purely verbal answers to purely verbal questions are testimony, as are answers by conduct to the same questions. *State v. Nielsen*, 147 Or App 294, 936 P2d 374, rev den 326 Or 68 (1997).

D. Consent

**ORS 813.135** states that, “[A]ny person who operates a vehicle upon premises open to the public or the highways of the state shall be deemed to have given consent to submit to field sobriety tests upon the request of a police officer for the purpose of determining if the person is under the influence of intoxicants if the police officer reasonably suspects that the person has committed the offense of driving while under the influence of intoxicants * * *.

Before the tests are administered, the person requested to take the tests shall be informed of the consequences of refusing to take or failing to submit to the tests under ORS 813.136.”

**ORS 813.136** further establishes that, “[I]f a person refuses or fails to submit to field sobriety tests * * *, evidence of the person’s refusal or failure to submit is admissible in any criminal or civil action or proceeding arising out of allegations that the person was driving while under the influence of intoxicants.”

The defendant voluntarily consented where the defendant agreed to perform field sobriety tests because he thought that, “as a law-abiding citizen,” he had to consent, the officer did not threaten the defendant about refusing to consent, and there is no evidence that the defendant felt intimidated or threatened. An officer has no affirmative obligation to inform a defendant that he does not have to consent. *State v. Finney*, 154 Or App 166, 961 P2d 256 (1998).

Because the officer asked the defendant to take field sobriety tests, informed him of his *Miranda* rights, and because there is no evidence that the defendant felt coerced into consenting, the defendant’s consent was valid. *Walls v. DMV*, 154 Or App 101, 960 P2d 888 (1998).

An officer does not need probable cause to believe that the defendant was driving under the influence of intoxicants before the officer can ask the defendant for consent to perform FSTs. *State v. Barber*, 151 Or App 84, 949 P2d 1236 (1997).
Motion to suppress results of Intoxilyzer and of field sobriety tests was improperly allowed where the defendant voluntarily consented to perform the tests. *State v. Ramos*, 149 Or App 269, 942 P2d 841 (1997).

Field sobriety tests constitute a search within the meaning of Article I, section 9. However, a driver may consent in a constitutional sense to perform the tests. Even if the defendant did not know that he could refuse to take the tests and perceived the officer’s request as a command, the defendant’s lack of knowledge of his constitutional rights is only a factor that a court may consider in determining an effective consent. The officer was under no obligation to advise the defendant that he could decline the request to perform the tests. Because there was no coercion, express or implied, the defendant voluntarily consented, and performance of the tests did not violate either his state or federal constitutional rights. *State v. Maddux*, 144 Or App 34, 925 P2d 124 (1996).

When the officer asked whether he could check the defendant’s eyes, the defendant consented. At that time, the officer had not yet informed the defendant that any consequence would flow from the defendant’s refusal to permit the officer to do that. The defendant’s consent was voluntary. After checking the defendant’s eyes, the officer had probable cause to believe that the defendant was driving while under the influence of intoxicants. That probable cause, combined with exigent circumstances, allowed the officer to proceed with other field sobriety tests. *State v. Greenough*, 142 Or App 506, 923 P2d 646 (1996).

The defendant’s consent was voluntary where officer requested him to open his door even though the defendant was surrounded with police vehicles, he was concerned about the accident he had caused, and he was stuporous because he had been drinking. *State v. Larson*, 141 Or App 186, 917 P2d 519, *rev den* 324 Or 229 (1996).

### E. Right to Consult with Counsel

Under Article I, section 11, of the Oregon Constitution, drivers arrested for DUII must be afforded a reasonable opportunity to consult with counsel before deciding whether to submit to a breath test. *State v. Spencer*, 305 Or 59, 74-75, 750 P2d 147 (1988). The reasonable opportunity includes a right to a private consultation, which may be limited in some circumstances, such as maintaining security. *State v. Penrod*, 133 Or App 454, 892 P2d 729 (1995).
State committed serious infringement on the defendant’s right to a private consultation by tape recording the conversation between the defendant and her attorney. The state did not justify the extent of its limitation on that right, as required by *Penrod. State v. Riddle*, 149 Or App 141, 146, 941 P2d 1079, *rev den* 326 Or 68 (1997).

Constitutional right to counsel includes right to privately consult with counsel. Because evidence of blood alcohol content dissipates over time, however, the state is not required to provide an individual with an extended amount of time to contact a lawyer. *State v. Durbin*, 335 Or 183, 63 P3d 576 (2003).

F. Miranda Warnings

Administration of field sobriety tests does not, without more, create a “compelling” setting, thereby requiring that *Miranda*-like warnings always precede questioning after the completion of the tests. *State v. Prickett*, 324 Or 489, 930 P2d 221 (1997). *See also State v. Miller*, 146 Or App 303, 932 P2d 112, *rev den* 325 Or 247 (1997) (similar to *Prickett*).
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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 7: JURY PROCEDURES

I. RIGHT TO TRIAL BY IMPARTIAL JURY

A. Right to Jury Trial In Criminal Prosecutions

In all criminal prosecutions, the accused has the right to a public trial by an impartial jury. U.S. Const Amend VI; Or Const Art I, § 11; ORS 136.001(1).

1. Right to Jury Trial Where Imprisonment Exceeds 6 Months

In Baldwin v. New York, 399 US 66, 69 n.6 (1970), the Court distinguished “petty” offenses from “serious” offenses for purposes of the defendant’s right to a jury trial, concluding that a right to a jury trial attaches to serious offenses, and that “no offense can be deemed ‘petty’ for purposes of the right to trial by jury where imprisonment for more than six months is authorized.”

Lewis v. United States, 518 US 322, 326 (1996): “An offense carrying a maximum prison term of six months or less is presumed petty, unless the legislature has authorized additional statutory penalties so severe as to indicate that the legislature considered the offense serious.”

a. Aggregate Punishment of Multiple “Petty” Offenses

In Lewis v. United States, 518 US 322, 330 (1996), the Court held that an aggregate punishment of petty offenses that exceeds six months did not invoke the right to a jury trial: “[T]o determine whether an offense is serious for Sixth Amendment purposes, we look to the legislature’s judgment, as evidenced by the maximum penalty authorized. Where the offenses charged are petty, and the deprivation of liberty exceeds six months only as a result of the aggregation of charges, the jury trial right does not apply.”

2. Oregon’s Scheme

“In Oregon, the right to a jury trial extends to any prosecution that retains substantial penal characteristics, even though it may be labeled a ‘violation’ by the legislature. . . . Factors considered in determining whether a prosecution is essentially criminal in nature include the type of offense, the penalty, the collateral consequences associated with a conviction, the punitive significance of the conviction to the public, and the character of the pretrial practices including physical restraint and detention.” Wayne T. Westling, Oregon Criminal Practice

The abbreviation “UCrJI” is used throughout this chapter and refers to the instructions published in Oregon State Bar, Uniform Criminal Jury Instructions (Rev. 2002 & Supp. 2003).
§ 37.02, 402 (Michie 1996) (citing Brown v. Multnomah County Dist. Ct., 280 Or 95 (1977)).

a. Importance of the Prescribed Penalty
“The prescribed penalty is generally regarded as the single most important criterion, at least when it involves imprisonment.” Brown v. Multnomah County Dist. Ct., 280 Or 95, 103 (1977). However, “the absence of potential imprisonment does not conclusively prove a punishment non-criminal.” Id.

b. Right to Jury Trial Does Not Apply to Juvenile Delinquency Proceedings
“In determining that juvenile delinquency proceedings were not criminal proceedings under Article I, section 12, the court looked to the history of the juvenile code, its rehabilitative purpose, the various noncustodial dispositional alternatives provided within the juvenile code, and the focus on the child’s best interests rather than on punishment.” State v. James, 159 Or App 502, 515 (1999) (citing State ex rel. Juv. Dept. v. Reynolds, 317 Or 560, 568-73 (1993)).

II. WAIVER OF RIGHT TO JURY TRIAL

A. Generally
The defendant may waive trial by jury except in cases involving the death penalty. Or Const Art I, § 11; ORS 136.001(2); State v. Smith, 319 Or 37, 42 (1994) (“trial by a jury is compulsory in a capital case”).

Note: Following the passage of Measure 40 in 1996, the 1997 legislature amended ORS 136.001 to grant the State the right to a jury trial. However, the Supreme Court declared those provisions unconstitutional in State v. Baker, 328 Or 355 (1999) (finding the statute a violation of Or Const Art I, § 11). Measure 70, which attempted to revive the Measure 40 provisions was not approved by voters in the November 2, 1999 election. Hence, the provisions in ORS 136.001 granting the State the right to a jury trial and the opportunity to waive that right are invalid.

1. Waiver Must Be Written
a. **Written Waiver Requirement Must Be Strictly Enforced**

The written waiver requirement must be strictly enforced; if there is no written waiver, defendant may have the conviction set aside by either direct appeal or post-conviction relief. *State v. Cox*, 150 Or App 464, 466 (1997) (lack of a written waiver required reversal of bench trial); *State v. Huntley*, 112 Or App 22, 24 (1992) (even though defense counsel asserted on behalf of defendant that a waiver would be executed and defendant did not object to continuing the trial without a waiver, the court reversed because there was no written waiver in the record); *State v. Cassada*, 58 Or App 84, 87-88, modified on other grounds, 59 Or App 484 (1982) (waiver cannot be presumed from a silent record). *But see State v. Lopez-Loaiza*, 107 Or App 258, 260-61 (1991) (lack of written waiver held to be harmless error when defendant would neither execute a writing to reflect his oral waiver or accept a new trial by jury).

2. **Defendant’s Waiver Must Be Made Knowingly and Voluntarily**

“Although it is correct that a waiver of the right to a jury trial must be in writing and must be made knowingly and voluntarily, in the absence of an express statutory or constitutional requirement that a judge must make an inquiry on the record as to whether a represented defendant’s waiver is voluntary, we see no reason for imposing such a requirement.” *State v. Fry*, 180 Or App 237, 239 n.1 (2002) (citations omitted). *See State v. Wigglesworth*, 186 Or App 374, 378 (2003) (“[A] trial court that receives a written jury waiver from a represented defendant is not required to inquire whether the defendant’s waiver was voluntary.”).

a. **Waiver By a Pro Se Defendant**

There is no case law on the issue of whether a trial court is required to engage in a colloquy with a pro se defendant regarding the consequences of waiving trial by jury. *State v. Morrow*, 192 Or App 441, 446 (2004).

3. **Defendant May Not Waive Full Jury w/o Prosecution’s Consent**

The defendant may not waive a jury of 12 for a lesser number of jurors without the prosecution’s consent. ORS 136.210(1). In *State ex rel. Smith v. Sawyer*, 263 Or 136, 139 (1972), the court reasoned that because less than 12 jurors would require a unanimous verdict, allowing the defendant to be tried by less than 12 without the prosecution’s consent would “thwart the will of the people” who, in Article I, § 11 of the Oregon...
Constitution, expressed their desire to give the prosecution the advantage of a less than unanimous verdict. See State v. McFerron, 52 Or App 325, 331-33 (1981) (discussing Sawyer).

a. **Stipulating to a Lesser Number of Jurors**
   
   Both parties may stipulate to a lesser number of jurors, either before trial or during trial, e.g., when a juror becomes ill or is discharged. ORS 136.210(1). See State v. McFerron, 52 Or App 325, 331-33 (1981). However, a jury may not consist of less than 6 jurors. Or Const Art VII (amended), § 9.

b. **Defendant Must Affirmatively Consent to Less Than Full Jury**
   
   If both parties agree to a lesser number of jurors, defendant’s consent may be oral or in writing, State v. Lutz, 90 Or App 247, 250 (1988), modified 306 Or 499, 502 n.5 (1988) (stating that written consent is preferred), but in any case, the “defendant’s affirmative consent on the record is required before a trial can proceed with less than 12 persons on the jury.” State v. Fierro, 107 Or App 569, 570 (1991).

c. **Stipulating to the Number of Concurring Jurors**
   
   Unless the defendant stipulates to a less than unanimous verdict, when the parties agree to a jury of fewer than twelve in Circuit Court, the verdict must be unanimous. State v. Johnson, 13 Or App 79, 80-81 (1973). But see State v. Robinson, 22 Or App 340, 342 (1975) (finding that although the required number of concurring jurors was not discussed when the parties stipulated to less than twelve jurors, defendant waived the right to unanimous verdict when he did not object to the judge’s instruction that five out of six jurors could reach a verdict).

i. **Contents of the Stipulation**
   
   The stipulation should provide: (1) the number of jurors who will hear the case; and (2) the number of jurors required to agree on the verdict.

B. **Denial of Waiver**

   In an appropriate case (e.g., sex abuse trial), the trial judge may refuse to allow the defendant to waive a jury trial. Or Const Art I, § 11; ORS 136.001(2). See State v. Carr, 10 Or App 375, 377 (1972) (concluding that the trial judge’s decision to deny defendant’s waiver of trial by jury was not inconsistent with the federal constitution).
CHAPTER 7: JURY PROCEDURES

C. Withdrawal of Waiver
   When the defendant waives a jury in writing before the trial date, the defendant’s right to later withdraw that waiver is subject to the court’s discretion; the court may refuse to allow the defendant to withdraw the waiver. State v. Villareall, 57 Or App 292, 295 (1982).

D. Waiver on Guilt Automatically Waives Jury on Facts
   When a defendant waives the right to a jury trial on the issue of guilt, the waiver automatically constitutes a written waiver of the right to a jury trial on all enhancement facts. 2005 Or Laws, ch. 463, § 5 (effective July 7, 2005). See Chapter 16, VII.G.5. “Enhancement Facts & the Blakely Bill.”

III. JURY ORIENTATION

A. Court Program

   1. Orientation Issues
      The court should indoctrinate the jury panel on such matters as:
      1. Importance of jury duty;
      2. Types of cases to be tried;
      3. Burden of proof;
      4. Sequence of trial procedure; and
      5. Administrative matters.

   2. Juror Handbook
      The court may distribute to jurors the Handbook for Jurors, prepared by the Oregon State Bar, available for view at http://www.osbar.org/public/jurorhandbook.htm (last visited Oct. 7, 2005), which discusses topics such as juror qualifications, jury selection, challenges, and the trial process.

B. Consider Jurors’ Convenience
   Jury service causes a hardship for most jurors. Therefore, whenever reasonably possible, the court should consider the jurors’ convenience.

   1. Keep Jurors Advised of Trial Schedule
      Once a jury is selected for trial, advise the jurors as soon as possible about the trial schedule so that they may plan their schedules accordingly. Inform the jury how long the trial is

See ORCP 57B (how the jury panel is drawn) (made applicable to the criminal code by ORS 136.210(1)).
estimated to last and when the court will take recesses and begin and end each day.

2. **Establish a Contact Person**
   Whenever possible, the court should give the name of one court staff person who can deal with jurors’ concerns and scheduling issues.

IV. **VOIR DIRE**

A. **General Principles**

1. **Challenging the Jury Panel**
   Before voir dire examination of the jury, the district attorney or defendant may challenge the jury panel on the ground that there has been a material departure from the requirements of the law governing the selection of jurors by filing a motion with the court supported by an affidavit. ORS 136.005(1)-(2). If the court determines that there has been a material departure, it shall stay the proceedings until a jury panel is selected in conformity with the law, and grant other relief as appropriate. ORS 136.005(3).

2. **Court Has Broad Discretion In Conducting Voir Dire**
   “The scope of voir dire examination is in the trial court’s discretionary power to efficiently and expeditiously conduct the trial. In exercising that power, the trial court can consider, among other factors, whether counsel has had the opportunity to question sufficiently upon a certain subject or whether the question has any reasonable relevance to the venireman’s qualifications or possible prejudices. The trial court cannot, however, in the exercise of its discretion prohibit counsel from seeking information about prospective jurors which is obviously relevant.” *State v. Barnett*, 251 Or 234, 237-238 (1968). *But see State v. Williams*, 123 Or App 546, 551-52 (1993) (under facts of case, trial court abused its discretion in limiting defense counsel’s voir dire to 44 minutes).

*State v. Williams*, 123 Or App 546, 551 (1993): “In considering whether the trial court abused its discretion in limiting voir dire in this respect, we consider, among other factors, (1) the extent of the court’s initial examination of the venire panel; (2) whether defense counsel attempted to prolong the voir dire; (3) whether the questions defense counsel was not permitted to ask were proper voir dire questions; and (4) whether defense counsel was permitted to examine
prospective jurors who actually served on the jury. This list is not exclusive, nor does any single factor control the finding of whether the court abused its discretion. The determination is to be made on a case-by-case basis.”

3. **Legitimate Purposes of Voir Dire**
The purpose of voir dire is to determine whether grounds exist to challenge a juror for cause, and to determine whether a peremptory challenge should be exercised. *State v. Williams*, 123 Or App 546, 550 (1993).

4. **Each Party May Present a Short Statement of Facts**
Prior to voir dire, each party may, with the court’s consent, present a short, objective—*i.e.*, non-argumentative—statement of the facts to the entire jury panel. ORCP 58B(1) (made applicable to the criminal code by ORS 136.330(1).

5. **Sequence of Questioning Jurors**
When the jury pool has been called, the qualifications of the individual jurors are examined first by the court, then by the defendant, and last by the State. ORS 136.210(1).

   a. **Juror’s Oath before Jury Is Questioned**
   
   “*Do you and each of you solemnly swear or affirm that you will well and truly answer all questions pertaining to your qualifications to serve as a juror in this cause?*”

   b. **Juror’s Lie to a Question on Voir Dire Warrants New Trial**
   A juror’s failure to respond truthfully to a specific inquiry forecloses the defendant’s opportunity to ask questions that might reveal information that would prevent the juror from being impartial, and subverts the process that seeks to protect the defendant’s right to a fair trial. *State v. Holcomb*, 131 Or App 453, 457-58 (1994).

B. **Permissible Areas of Inquiry During Voir Dire**

1. **Questions That Are Usually Proper**
Questions regarding the following topics are usually permissible at voir dire:

   1. Acquaintance or relationship to parties and attorneys.
   2. Acquaintance or relationship to possible witnesses.
   3. Prior knowledge concerning case, including media exposure.
   4. Interest in case or its outcome.
5. Opinions about the case or charge.

6. Bias or prejudice toward parties or issues in the case.

7. Hardship suffered by a juror as result of being selected, taking into account anticipated length of trial.

8. Personal reasons as to why a juror prefers not to serve.

9. Attitudes and understanding of basic principles of law applying in a criminal case (e.g., presumption of innocence, burden of proof, right of defendant not to testify, etc.).

10. Attitudes toward certain defenses such as lack of mental responsibility. See State v. Wallace, 170 Or 60, 109 (1942) (where insanity is in issue, both parties have a clear right to examine juror’s attitudes regarding insanity defense).

11. Attitudes reflecting ethnic, cultural, gender, religious, or other prejudice against a group or class.

12. Previous experience as a party, witness, or juror. See State v. Miller, 10 Or App 636, 639 (1972) (a prospective juror’s prior experience is both important and subject to challenge).

13. Attitudes about defendant’s or witness’s prior convictions. See State v. Ziebert, 34 Or App 497, 501-02 (1978) (trial court erred in not allowing defendant to question prospective jurors about possible prejudice toward defendant’s prior conviction).

2. Questioning a Juror Regarding Religious Beliefs Is Permissible

Article I, § 6 of Oregon’s Constitution does not prohibit asking a prospective juror about the juror’s particular religious belief; thus, counsel is permitted to ask how prospective jurors’ religious beliefs would affect their ability to give defendant a fair trial. State v. Barnett, 251 Or 234, 235-37 (1968) (reversing the trial court for not allowing defendant to question prospective jurors about their religious beliefs in a criminal abortion case). “A party can make his own determination whether a venireman with a particular belief will be impartial or unprejudiced and exercise his peremptory challenge accordingly.” Id. at 237.

3. Questions That Are Always Improper

The following types of questions are not permissible at voir dire:

1. Misleading questions;
2. Confusing questions;
3. Badgering or harassing questions;
4. Questions designed to get jurors to commit to a disputed matter before hearing evidence;
5. Questions that are designed to ingratiate the attorney or party with the jury.

C. Suggestions on Selecting the Jury
The court has considerable latitude in the manner in which voir dire is conducted. There is no fixed or established procedure for selecting the jury. The important thing is that each side has a fair opportunity to question jurors. Some judges ask jurors a considerable number of questions; others let counsel ask all of the questions.

Provided below are suggestions for jury selection that may save voir dire time and engage or instruct the panel during an otherwise boring or intrusive process. Some suggestions are relevant to a particular type of case.

1. Discuss Jury Selection Procedures With Attorneys
Discuss the jury selection procedures that you intend to use with the attorneys before trial.

2. Questions For Jurors
The court may ask jurors a series of questions designed to determine whether a particular juror should or should not serve on the case. For example, if the charge was DUII, the court might ask the following questions:

1. “Have any of you or any member of your family or close circle of friends ever been in a motor vehicle collision where someone was under the influence of alcohol?”

2. “Have any of you or any member of your family or close circle of friends ever been arrested or convicted of DUII?”

3. [After telling the jury the legal definition of DUII]: “Do any of you personally disagree with the law and if so, does this disagreement mean that you could not apply that law in reaching a verdict?”

3. State the Elements of the Charge(s)
Tell the jurors at the outset the elements of the charge(s). Also, provide the definition of some important concept jurors may have to apply in the case, such as “attempt” or “accomplice liability.”
4. **Address Jurors on Objectivity**
   Tell the jurors that it is important for each individual juror to examine his or her own mind to determine if he or she can serve on this case as an objective juror. Use neutral terms; for example, it is easier for a juror to say that he or she cannot be objective than to say he or she is prejudiced or unfair.

5. **Inquire Into Each Juror’s Background**
   Ask each juror to give a brief thumbnail sketch of his or her background. Some judges place a chart in front of the jury that lists the areas to be covered. This process may duplicate some of the issues already addressed on a typical jury questionnaire, but it gives the attorneys and the court a chance to hear individual jurors talk about themselves.

6. **Select Extra Jurors**
   At the outset, select several “extra” jurors to replace any jurors on the original panel who are challenged. These extra jurors may sit in front of or near the jury box. Allowing the attorneys to question the extra jurors may take longer, but peremptory challenges should go more quickly.

7. **Setting a Time Limit for Voir Dire**
   Although the court in *State v. Williams*, 123 Or App 546, 551-52 (1993), did not hold that time limits cannot be imposed, under the facts of that case it found that the trial court abused its discretion in limiting defense counsel’s voir dire to 44 minutes.

8. **Question Jurors Individually**
   Question individual jurors out of the presence of other jurors. This procedure may be appropriate where the court anticipates that a juror may have special information about the case that other jurors should not hear, or where the questions involve sensitive issues and the answers may be embarrassing to the juror (e.g., in sex abuse cases). To save time, schedule individual questions of a juror for the beginning or end of a recess.

9. **Special Written Questionnaire For Jurors**
   In certain cases, it is advantageous to give jurors a special written questionnaire specific to the case. It avoids having to ask each juror the same questions, and it gives the jurors more time to respond to the questions in a calmer atmosphere and away from other jurors’ influence. If a party requests and prepares such a questionnaire, obtain the stipulation of counsel,
review the questionnaire, and include the questionnaire as part of the record.

10. General Voir Dire Introduction to Jurors In Major Cases

In major cases where voir dire may be lengthy, give a general introduction to all jurors. Then, keep just enough jurors to question for the rest of the court session and excuse the remainder to return later that day or the next day.

D. Excusing a Prospective Juror From Jury Duty

A prospective juror may be excused upon a showing of undue hardship or extreme inconvenience to the person, the person’s family, the person’s employer, or the public served by the person. In making this determination, the judge or clerk of court must carefully consider and weigh both the public need for juries which are representative of the full community and the individual circumstances offered as a justification for excuse from jury service. ORS 10.050(1). See ORS 10.050(4) (allowing the court to excuse from jury service, if so requested in writing, a woman who is breast-feeding a child; ORS 10.050(5) (allowing the court to excuse from jury service a person who is the sole care giver of a child or dependent person, who is unable to afford day care or make other arrangements for care of dependent, and who personally attends to dependent during court’s normal hours of operation).

V. CHALLENGES FOR CAUSE

A. Challenging Jurors for Cause

Challenges for cause may be taken on any one or more of the following grounds.

1. Lack of Juror Qualifications

A juror may be challenged for cause for lack of qualifications if the juror:

1. Is not a U.S. citizen;
2. Does not live in the county in which summoned for service;
3. Is less than 18 years of age;
4. Has had rights and privileges withdrawn and not restored under ORS 137.281 (withdrawal of rights during term of imprisonment);
5. Has been convicted of a felony or served a felony sentence within the prior 15 years;

A juror may be challenged for cause on the following grounds:

• Lack of qualifications;
• Mental or physical defect;
• Implied bias; and
• Actual bias.
6. Has been convicted of a misdemeanor involving violence or dishonesty or served a sentence for a misdemeanor involving violence or dishonesty within the prior 5 years; or

7. Is summoned to serve in circuit court and has been discharged from jury service in a federal or circuit court of the State within the past two years, unless the court has a need for additional jurors.

ORCP 57D(1)(a) (made applicable to the criminal code by ORS 136.210(1)); ORS 10.030 (eligibility for jury service); Or Const Art I, § 45(1) (prior felons and misdemeanants ineligible for jury service during prescribed time periods). See State v. Crocker, 160 Or App 445, 450-51 (1999) (excluding convicted felons from jury service does not violate the Sixth Amendment).

2. Existence of a Mental Or Physical Defect
A juror may be challenged for cause for the existence of a mental or physical defect which satisfies the court that the challenged person is incapable of performing juror duties in the particular action without prejudice to the substantial rights of the challenging party. ORCP 57D(1)(b) (made applicable to the criminal code by ORS 136.210(1)).

3. Challenge For Implied Bias
A juror may be challenged for implied bias for any of the following causes:

1. Related by blood or affinity within the fourth degree to the alleged victim, to the complainant, or to the defendant;

2. Standing in the relation of guardian and ward, attorney and client, physician and patient, master and servant, debtor and creditor, principal and agent, or landlord and tenant with the defendant, alleged victim, or complainant;

3. Being a member of the family, a partner in business with or in the employment of the defendant, alleged victim, or complainant, or a surety in the action or otherwise for the defendant;

4. Having served on the grand jury that found the indictment;

5. Having been a juror formerly sworn in the same action, and whose verdict was set aside or which was discharged without a verdict after the cause was submitted;

6. Having served as a juror in a civil action brought against the defendant for substantially the same act; or
7. Having served as a juror in a criminal action upon substantially the same facts, transaction or criminal episode.


4. **Challenge For Actual Bias**
   A juror may be challenged for actual bias. ORCP 57D(1)(g) (made applicable to the criminal code by ORS 136.210(1)).

   a. **Actual Bias Defined**
      “Actual bias” is the existence of a state of mind on the part of a juror that satisfies the court, in the exercise of sound discretion, that the juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging the juror. ORCP 57D(1)(g) (made applicable to the criminal code by ORS 136.210(1)).

      Actual bias may be in reference to:
      1. The action;
      2. Either party;
      3. The sex of the party, the party’s attorney, a victim, or a witness; or
      4. A racial or ethnic group that the party, the party’s attorney, a victim, or a witness is a member of, or is perceived to be a member of.

      ORCP 57D(1)(g) (made applicable to the criminal code by ORS 136.210(1)).

   b. **Discretion to Excuse For Actual Bias**
      The court’s discretion to excuse a juror for actual bias is very broad. State v. Nefstad, 309 Or 523, 528-29 (1990) (stating that the trial court’s finding of actual bias, if supported by the record of the voir dire taken as a whole, should not be disturbed on appeal). “Because the trial court has the advantage of observing the demeanor, apparent intelligence, and candor of a challenged prospective juror, a trial court’s discretionary decision on such a challenge is entitled to deference and will not be disturbed absent a manifest abuse of discretion.” State v. Fanus, 336 Or 63, 83 (2003).
**State v. Barone**, 328 Or 68, 74 (1998) (citations omitted): “In deciding whether a juror should be excluded for actual bias, the fact that he or she has preconceived ideas about a matter relevant to the case is not determinative. Rather, the test is whether the prospective juror’s ideas or opinions would impair substantially his or her performance of the duties of a juror to decide the case fairly and impartially on the evidence presented in court. The question whether a juror is biased is one of fact, to be determined by the trial court from all the circumstances, including the challenged juror’s demeanor, apparent intelligence, and candor. Trial court discretionary decisions on such challenges are entitled to deference and will not be disturbed except for abuse of discretion.”

i. **Court Must Be Convinced of the Absence of Actual Bias**

“It is not enough if a juror believes that he can be impartial and fair. The court in exercising discretion must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously. A mere statement by the juror that he will be fair and afford the parties a fair trial becomes less meaningful in light of other testimony and facts which at least suggest the probability of bias. The court in exercising discretion must be convinced that a probability of bias of the juror does not exist.” **Lambert v. Srs. of St. Joseph**, 277 Or 223, 230 (1977). **See State v. Nefstad**, 309 Or 523, 529-31 (1990) (discussing a prospective juror’s actual biases).

c. **Suggestions For How to Rule on the “Gray” Areas**

In considering a juror’s actual bias, there are often “gray” areas on which the court may be required to rule (e.g., where the juror has strong personal feelings against the use of alcohol).

The court must recognize two competing policies in ruling on a challenge for actual bias:

1. The need to ensure that the jury will be representative of the full community; and

2. The need to select jurors who can fairly and objectively judge the case on its facts.

If the court is uncertain whether to excuse a juror for bias, it usually is best to excuse the juror.
i. **When Court Should Be More Willing to Excuse a Juror**

The court should be *more willing* to excuse a juror if the grounds are that:

a. The juror has some *particular association* with the case, *(e.g., knows the prosecution witness)*;

b. The juror has some *particular attitude* toward this crime *(e.g., juror was sexually abused as a child or juror’s home was recently burglarized)*;

c. The juror has some *particular information* about the case *(e.g., juror talked to a fellow employee about the case)*; or

d. The juror will have *difficulty* disregarding this type of particular attitude, acquaintance, or information.

ii. **When Court Should Be Less Willing to Excuse a Juror**

The court should be *less willing* to excuse the juror if the grounds are that the juror has a general attitude toward some aspect of the case *(e.g., “I do not think people should drink,” or “I like police officers”), or simply holds a certain general community attitude.*

Keep the following in mind:

a. The jury should be representative of community attitudes;

b. Sometimes jurors who have such general attitudes think they cannot be fair because they do not fully understand the jury’s role to follow the law—not debate it—and determine if the State has proven the defendant’s guilt;

c. A party can use a peremptory challenge if it does not want jurors with a particular general community attitude;

d. Ultimately, the court must be satisfied that, despite having this general attitude, the juror will be objective in evaluating the evidence and will follow the law.

iii. **Assess Sincerity of Belief In Ability to Be Impartial**

If the juror believes that he or she can be objective and fair, the court should question the juror to determine the sincerity of that belief. “Early answers or reactions more truly indicate the juror’s frame of mind as opposed to later generalized statements that the juror
would be fair.”  

**A) Ask Investigative Questions**

Further questioning should determine whether the juror is able and likely to set aside the juror’s views. The court’s questions should not attempt to persuade the juror and should not just elicit *pro forma* answers to leading questions. See *Lane County v. Walker*, 30 Or App 715, 721-22 (1977) (finding an abuse of discretion not to dismiss juror who strongly disagreed with a legal principle relevant to the case, but after questioning said he would try to be impartial).

**iv. Special Knowledge Is Not Automatic Disqualification**

If a prospective juror has some special knowledge about the case (e.g., has read a newspaper article) this does not automatically disqualify the juror. *State v. Rogers*, 313 Or 356, 367 (1992) (five jurors’ knowledge of defendant’s prior murder conviction did not automatically disqualify them because evidence of the murder was introduced at trial and thereby obviated any prejudice these jurors had due to prior knowledge). The issue should be determined based on how much the juror knows, and whether that knowledge causes the juror to have already formed an opinion about the main issues or facts in the case.

**v. When Multiple Jurors Have Strong Feelings**

Sometimes a pattern seems to develop during voir dire with a number of jurors on the panel saying they feel so strongly about the charged crime (e.g., rape, robbery, possession of drugs) that they cannot be fair. In these situations, the court may wish to give the following instruction:

> “It is important that this jury be made up of persons who represent this community. We expect that different jurors will have different attitudes about certain aspects of this case. However, you are not here to decide whether the crime of _____ is a good law or a bad law or whether the crime of _____ is a serious charge. Your responsibility is to decide whether the State has proven that the defendant is guilty of committing the crime. If your feelings about the charged offense are so strong that they will affect your ability to evaluate
objectively the evidence in this case, then you should not serve. If your feelings about the charged offense are so strong that they will prevent you from following the law in deciding this case, then you should not serve. On the other hand, you are not disqualified just because you have certain attitudes or feelings about this type of charge.”

5. Denial of a Challenge For Cause
A party who uses a peremptory challenge to excuse a juror following the court’s denial of the party’s challenge for cause, lacks grounds for appeal unless the jury that finally hears the case is not impartial. *State v. Douglas*, 310 Or 438, 441-42 (1990).

VI. PEREMPTORY CHALLENGES

A. Generally
Peremptory challenges are exercised after challenges for cause. ORS 136.210(1).

1. Number of Peremptory Challenges
In any trial before more than six jurors, the defense and the prosecution each have *six* peremptory challenges. In any trial before six jurors, the defense and the prosecution each have *three* peremptory challenges. Where a crime is punishable by life imprisonment or death, the defense and the prosecution each have *twelve* peremptory challenges. ORS 136.230(1).

   a. Number of Challenges For Jointly Charged Defendants
   When two or more defendants are tried together, each defendant has the same number of peremptory challenges as if tried separately; the State has the same number as the combined defendants. ORS 136.250.

2. Procedure For Taking Peremptory Challenges
Unless the parties stipulate to take them orally, ORS 136.230(3), peremptory challenges are made in writing by secret ballot as follows: The defendant may challenge two jurors and then the prosecution may challenge two, and so alternating until the challenges are exhausted. ORS 136.230(2)(a).

After each challenge, the panel must be filled and the additional juror passed for cause before another peremptory challenge is used. Neither party can be required to exercise a peremptory
challenge if the full number of jurors is not in the jury box. ORS 136.230(2)(b).

3. **Timeliness For Taking Peremptory Challenges**
   If a party does not exercise a peremptory challenge during its alternating turn, that party has accepted the panel as currently constituted, and thereafter may challenge only jurors who are added to the panel. ORS 136.230(c). However, for good cause shown, the court has discretion to allow a party to exercise a remaining peremptory challenge, before the jury is completed and sworn, against a juror who was previously accepted. ORS 136.240. See *State v. Mulvihill*, 35 Or App 627, 629 (1978) (exercising a peremptory challenge against an accepted juror is subject to the court’s discretion); *State v. Miller*, 10 Or App 636, 639 (1972) (stating that the general rule is to prohibit challenges to the jury after it is sworn).

4. **The Number of Peremptory Challenges Cannot Be Increased**
   “In the face of the unambiguous limitation on peremptory challenges in ORS 136.230(1), the proper course for a defendant who has exhausted his peremptory challenges but who believes that there still are biased jurors on the panel is to challenge those jurors for cause, and appeal if his challenges are denied.” *State v. Barone*, 329 Or 210, 228 (1999).

5. **Peremptory Challenges Are Not of Constitutional Dimension**
   The defendant’s constitutional rights are not violated when the defendant must exercise a peremptory challenge to remove a potential juror whom the trial judge erroneously refused to dismiss for cause, provided that the resultant jury that heard the case was impartial. *U.S. v. Martinez-Salazar*, 528 US 304 (2000). *Accord State v. Douglas*, 210 Or 438, 441-42 (1990).

B. **Peremptory Challenges Based on Race, Ethnicity, or Gender**
   A party may not exercise a peremptory challenge on the basis of race, ethnicity, or sex. ORCP 57D(4) (made applicable to the criminal code by ORS 136.230(4)).

1. **Race**
   The prosecutor may not challenge a prospective juror solely on account of the juror’s race or on the assumption that because of race, the juror will be unable to impartially consider the State’s case against a minority defendant. *State v. Henderson*, 315 Or 1, 4 (1992).
a. The Batson Analysis
In Batson v. Kentucky, 476 US 79, 93-98 (1986), the Court articulated the following three-step analysis for determining whether a peremptory challenge of a prospective juror violates a defendant’s rights under the Equal Protection Clause:

1. The defendant first must establish a prime facie case of purposeful discrimination by the state in selection of the jury, e.g., defendant and the challenged juror are both of the same minority race;

2. If the defendant succeeds at the first step, the burden shifts to the state to articulate a race-neutral explanation for the peremptory challenge;

3. Finally, the court must decide whether the defendant has established that the challenge was based on purposeful discrimination.


b. Defendant and Juror Need Not Be of the Same Race
Under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors through peremptory challenges whether or not the defendant and the excluded juror are of the same race. Powers v. Ohio, 499 US 400, 404-16 (1991) (prosecutor prohibited from excluding black jurors in trial of white criminal defendant).

c. Criminal Defendants Also May Not Challenge Based on Race

2. Gender
As with race, the Equal Protection Clause prohibits a party from exercising a peremptory challenge based solely on “the assumption that an individual will be biased in a particular case for no reason other than the fact that the person happens to be a woman or happens to be a man.” J.E.B. v. Alabama ex
a. Apply the Batson Analysis to Gender Challenges
   “As with race-based Batson claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike.”

VII. ALTERNATE JURORS

A. Purpose of Alternate Jurors
   Alternate jurors are selected so the case can go to deliberation if an impaneled juror is unable to serve for the entire case. Alternate jurors are seated with or near the other jurors and must be in attendance at all times with the other jurors, and must be treated the same in all respects. ORS 136.270.

   1. Suggestion
      If the trial is expected to last a week, choose one alternate; if expected to last two weeks, choose two alternates, etc.

B. Selection of Alternate Jurors
   After the jury is impaneled and sworn, the court may, in its discretion, call one to six alternate jurors if the person is charged with a felony, and one to three alternate jurors if the person is charged with a misdemeanor. ORS 136.260(1)(a).

   1. Procedure For Calling Alternate Jurors
      Alternate jurors must be drawn from the same source in the same manner and have the same qualifications as the impaneled jurors, and are subject to the same examination and challenges as the impaneled jurors. ORS 136.260(1)(b).

   a. Excused Jurors Cannot Serve as Alternates
      Jurors previously challenged and excused cannot be included on the list from which alternate jurors are drawn. ORS 136.260(1)(c).

   2. Number of Peremptory Challenges to Alternate Jurors
      If one or two alternates are to be impaneled, each side has one peremptory challenge; if three or four alternates are to be impaneled, each side has two challenges; if five or six alternates are to be impaneled, each side has three challenges. ORS 136.260(2).
a. **Peremptory Challenges Do Not Carry Over**
   The additional peremptory challenges may be used only against alternate jurors; a party’s original peremptory challenges may not be used against alternate jurors. ORS 136.260(3).

3. **Substitution of a Juror Who Is Unable to Continue**
   If, before the final submission of the case, any juror is unable to continue serving because of death, illness, or other cause that the court deems sufficient, the juror must be dismissed from the case and an alternate selected. ORS 136.280. See ORCP 58D (made applicable to the criminal code by ORS 136.330(1)).

   a. **Make the Record**
      The court should include in the record the reason for the juror’s inability to continue serving.

4. **Excusing Alternate Jurors**
   Except as provided in 2005 Or Laws, ch. 463, § 18 (effective July 7, 2005), upon final submission of the case, any alternate juror who has not been selected to become a member of the jury must be excused. ORS 136.280. Instruct the excused jurors not to talk about the case until a verdict has been reached and the jury is excused.

**VIII. THE JURY IS SELECTED**

A. **Required Number of Jurors**
   The jury must consist of 12 persons unless the parties consent to a less number; except, in cases in circuit court in which the only charges to be tried are misdemeanors, the jury must consist of 6 persons. ORS 136.210. See Or Const Art VII (amended), § 9 (juries may consist of less than 12 but not less than 6 jurors).

B. **Oath of the Jury**
   Once the proper number of jurors is impaneled, the court must administer an oath to the jury that, in substance, requires the jurors to affirm that each of them will well and truly try the matter in issue, and a true verdict give according to the law and evidence as given them on the trial. ORCP 57E (made applicable to the criminal code by ORS 136.210(1)).
1. **Jeopardy Attaches When Jury Is Impaneled and Sworn**
   In a criminal case, swearing the jury has significant consequences: Jeopardy attaches at the point in time when the jury is impaneled and sworn. ORS 131.505(5)(b).

   a. **Suggestion**
      Because swearing the jury has significant consequences, do not swear the jury until just before opening statements. For example, if the jury is selected at 5:00 p.m., you may wish to wait until the next day to swear the jury because if something happens to a juror overnight, the difficulty is more easily resolved than if the jury had already been sworn.

2. **Failure to Administer the Oath Does Not Nullify the Verdict**
   “In the absence of a timely objection, the failure to administer an oath to the jury, without any other showing of juror misconduct or prejudice, will not serve as a ground for overturning an otherwise lawful verdict. A defendant may not obtain an automatic reversal of a conviction by raising an objection to the court’s failure to swear the jury only after an adverse judgment has been returned and the jury has been discharged. Instead, such an objection, like others that also seek to ensure defendant’s fair trial interests, must be raised timely, and prejudice must be shown, for a defendant to be entitled to relief.” *State v. Vogh*, 179 Or App 585, 598 (2002). See *State v. Barone*, 329 Or 210, 227 (1999) (an untimely administration of the oath in the absence of demonstrable prejudice does not compel a mistrial).

C. **Court’s Preliminary Instructions to the Jury**
   The court should give some preliminary remarks to the jury before the opening statement. The court and counsel tend to assume that jurors know, understand, and appreciate the basics of jury duty, yet jurors often indicate that they do not fully understand these concepts and appreciate having the court clearly explain them.

   After the jury is sworn, the court must instruct the jury concerning its duties, its conduct, the order of proceedings, the procedure for submitting written questions to witnesses if permitted, and the legal principles that will govern the proceedings. ORCP 58B(2) (made applicable to the criminal code by ORS 136.330(1)).

1. **Precautionary Instructions**
   UCrJl No. 1003 provides a precautionary instruction that may be given after the jury is impaneled and before opening statements.
2. **Remind the Jury Not to Discuss the Case**
Before the first recess, remind jurors not to discuss the case with anyone or amongst themselves. Also remind them not to do any independent investigation or research, including on the Internet, and not to read newspaper articles or listen to or watch media broadcasts.

D. **Communication With Jurors Prohibited**
Except as necessary during trial, parties, witnesses, or court employees must not initiate contact with any juror concerning any case which that juror was sworn to try. UTCR 3.120.

IX. **JURY VIEW AND HANDLING OF EXHIBITS**

A. **Purpose of a Jury View**
A jury view gives the jury an opportunity to view a location outside the courtroom. The view is not evidence, but it enables the jury to better understand the evidence introduced at trial. *State v. Mershon*, 1 Or App 314, 316-17 (1969) (trial court properly denied defendant’s motion for a jury view made while case was in progress, instead of at the beginning of trial, and that followed additional evidence on the issue for which the view was sought). See UCrJl No. 1026.

*State v. Layton*, 174 Or 217, 235 (1944) (photos of crime scene admissible despite jury view): “[T]he view taken by the jury does not constitute evidence, but is a means of enabling the jury to more easily and accurately understand the testimony.”

B. **Procedure for a Jury View**
Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the case, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of a proper officer, to the place, which must be shown to them by the judge or by a person appointed by the court for that purpose. While the jury are thus absent, no person, other than the judge or person so appointed, may speak to them on any subject connected with the trial. ORS 10.100 (made applicable to the criminal code by ORS 136.330(1)).

1. **Instructions**
The court must give any instructions to the jurors before they undertake the jury view. To avoid confusion, especially when the court appoints someone else to conduct the view, the court
should either have the parties submit a written statement as to what should be said or pointed out to the jury on the view, or give specific instructions to the person who will be in charge of the jury during the view. The court may conduct the jury view after opening statements so the attorneys can point out to the jurors during opening statements what they should watch for during the jury view.

2. Attendance at Jury View
   The defendant, the defendant’s attorney, and the prosecution have the right to attend the jury view.

C. Court Has Discretion to Grant a Jury View
   “The question of whether a jury in a given case should be permitted to view the premises at all, or, if permitted, at what stage of the proceedings the view should be taken, is wholly a matter within the sound judicial discretion of the trial court and will be reviewed only for an abuse of discretion.” *State v. Barnes*, 150 Or 375, 376 (1935).

D. Juror Handling of Exhibits
   The court should instruct the jury on how to handle certain exhibits depending on their characteristics. If the court does not give the exhibit to the jury, it must tell the jurors that they may view or examine the exhibit on request. If the jury so requests, the court can send the exhibit in with the bailiff or clerk who, if necessary, may stay while the jury examines it. **Caution:** Do not send the exhibit in with a witness or a police officer. The court may also choose to send in exhibits when the jury deliberates.

1. Weapons
   The court must ensure that firearms (including BB and pellet guns) are unloaded and rendered inoperable or have a trigger guard installed, guns and ammunition are kept separate, and knives are encased in a protective sheath or otherwise rendered harmless. UTCR 6.150(1).

2. Controlled, Hazardous, or Infectious Substances or Chemicals
   Jurors must be advised if any controlled, hazardous, or infectious substances or chemicals to be handled in the jury room present a danger and must be provided instructions on safe handling, including providing protective devices, if necessary. UTCR 6.170.

*See UTCR 6.140 (procedures for use of hazardous substances at evidentiary hearing or trial); UTCR 6.160 (controlled substances in the courtroom).*
3. Jury May View Exhibits During Recess
   If exhibits are lengthy or the court does not want to interrupt the trial, the court may allow the jury to view the received exhibits during a recess.

   a. Advice to Jury on Viewing Exhibits
      The court should advise the jurors that they are merely to view the evidence and not to attempt to decide the case while viewing the exhibits.

X. JUROR NOTE-TAKING AND QUESTIONS

A. Juror Note-Taking
   Jurors may take notes of the testimony or other trial proceedings and may take their notes into the jury room at the time of deliberations. ORCP 59C(4) (made applicable to the criminal code by ORS 136.330(1)). See UCrJI No. 1003.

B. Juror Questions During Trial
   With the court’s consent, jurors must be permitted to submit written questions directed to witnesses or to the court. The parties must be given an opportunity to object to such questions outside the jury’s presence. ORCP 58B(9) (made applicable to the criminal code by ORS 136.330(1)). See also ORCP 58B(2) (requiring the court to instruct the jury on the procedure for submitting written questions if permitted; made applicable to the criminal code by ORS 136.330(1)); UCrJI No. 1003.

1. Suggested Instruction on Procedure for Juror Questions
   The following is a suggested jury instruction for informing jurors on the procedure for asking questions:

   “During the trial you will be allowed to ask questions. This is a procedure designed to allow jurors to participate more directly in the trial process. In asking questions, you should proceed as follows:

   1. “Write your question down on a sheet from your note pad; fold the paper in half and pass it to the bailiff, who will place the question on the corner of the jury box.

   2. “After each witness’s testimony is concluded, I will have the bailiff hand me the questions you have submitted for that witness. I will review the questions with the attorneys before asking the questions to the witness. The attorneys will be allowed to ask follow up questions.
“Questions should be reserved for important points only. The sole purpose of juror questions is to clarify the testimony, not to comment on it or express any opinion about it. Jurors are not to argue with the witness through their questions. Jurors are not to reach any definite conclusions until the end of the case. There are some questions that the court will not ask, or will not ask in the form presented, because of the rules of evidence or other legal reasons. Jurors are to draw no inference if a question is not asked. In most cases, I can tell you why a question cannot be asked. Jurors are not to weigh the answers to their questions more heavily than other evidence in the case.”

XI. JUROR CONTAMINATION

A. Contamination Defined
   The term “contamination” refers to those situations where a juror, or the jury, acquires information that affects the ability to decide the case fairly and objectively.

B. Court Has Discretion to Handle Juror Contamination
   The court has considerable discretion to determine the appropriate procedure and remedies to deal with juror contamination. State v. Walton, 311 Or 223, 250 (1991) (jurors that observed defendant in handcuffs were not contaminated when court questioned and instructed the jurors following incident); State v. Kessler, 57 Or App 469, 473 (1982) (acknowledging trial judge’s discretion in whether to shackle defendant in light of possible prejudice to defendant in minds of jurors).

C. Jurors May Not Communicate Private Knowledge or Information
   A juror may not communicate any private knowledge or information that the juror has about the case to other jurors, nor use that information in reaching his or her verdict. ORCP 59C(7) (made applicable to the criminal code by ORS 136.330(1). See UCrJ1 No. 1003.

D. Common Ways Juror Contamination Occurs
   Juror contamination usually occurs in one of five ways:

1. Juror Has Private Knowledge About Case
   A juror discovers during trial that the juror has some private knowledge about the case (e.g., that the prosecution’s eyewitness is the juror’s neighbor).
2. **External Event Occurs During Trial**

Some external event may occur during trial that contaminates the jury or jurors; *e.g.*:

1. Juror sees defendant in handcuffs;
2. Clerk makes improper remarks;
3. Juror reads a newspaper article; or

3. **Occurrence During Jury Deliberations**

A prejudicial event occurs during deliberations.

4. **Prejudicial Remarks During Trial**

A witness or an attorney makes a prejudicial remark or does something prejudicial during trial.

5. **Contamination Discovered After Verdict**

The jury contamination is not discovered until after the verdict is received and the jurors are excused (*see infra, XVI. “Jury Problems Arising After Discharge”*).

E. **Avoiding Jury Contamination**

1. **Court Employees**

The court should ensure that all court employees, especially the bailiffs and court clerks, are carefully instructed regarding:

   1. Their responsibility in dealing with jurors, especially during recesses and deliberations, so jury contamination can be avoided;
   2. How they should respond and what they should do if they become aware that a juror has been contaminated; and
   3. The importance of not letting jurors see the defendant in handcuffs, shackles, or otherwise in custody.

*See State v. Rathbun, 287 Or 421, 433 n.7 (1979) (bailiff’s deliberate prejudicial remarks toward the defendant influenced jury).*

2. **Attorneys and Parties**

The court should ensure that attorneys and parties are aware of times and places where they cannot discuss the case because their discussion may be overheard by jurors.
a. Suggestion
Many courts now use juror identification buttons, or designate areas that are “off limits” for attorneys, parties, and witnesses during jury trials.

3. Exhibits
The court should have a procedure to ensure that only properly received exhibits go into the jury room during deliberations.

a. Suggestion
Have the attorneys review the exhibits with the bailiff or clerk before the jury goes to the jury room.

4. News Media
In cases likely to attract news coverage, the court should appropriately instruct the jury not to view or listen to the media.

F. Court Response When Jury Contamination Occurs

1. Assess the Degree of Contamination
Many matters are so trivial that no corrective action is required. If there is any reasonable possibility that the contamination could affect the jurors’ ability to decide the case impartially, the court should notify the attorneys.

2. Confer With Counsel on the Proper Course of Corrective Action
If the court determines that some corrective action may be needed, ask the attorneys on the record for suggestions on the proper course of action. In some circumstances, if the attorney does not request the court to take corrective action, this omission will waive any error on appeal. See State v. Valasco, 23 Or App 532, 534 (1975) (trial court did not abuse its discretion in refusing to grant mistrial when defendant did not request at trial inquiry into and corrective action for potentially contaminated juror).

a. Suggestion
Where the jury contamination is significant and defense counsel does not request any corrective action, consider having defense counsel place on the record the reasons for not requesting corrective action. This obviously should be done outside the jury’s presence and in the defendant’s presence.
G. Correcting Jury Contamination

Several alternatives to correct jury contamination are available to the court:

1. **Interview Affected Juror(s)**
   The court should interview the affected juror(s) on the record but out of the presence of other jurors to determine:
   
   1. The nature of the contamination;
   2. The degree to which the contamination affects the case; and
   3. Whether the juror(s) can disregard the contaminating information.

   *See State v. Walton*, 311 Or 223, 250 (1991) (jurors that observed defendant in handcuffs were not contaminated when court questioned and instructed the jurors following incident).

2. **Give Limiting Instruction**
   The court may give the juror(s) a limiting instruction, such as:

   "The information you have obtained is not evidence. Neither you nor the other jurors have any way of evaluating how reliable or unreliable that information may be. Therefore, you must totally disregard that information and not consider it in any way in deciding this case. You must not tell the other jurors about this information."

3. **Other Alternatives**
   If a limiting instruction is insufficient, there are other alternatives:

   1. If alternate jurors have been selected, excuse the contaminated juror and substitute an alternate (*see supra, VII. “Alternate Jurors”*); or
   2. Determine whether the attorneys will stipulate to excuse the contaminated juror and proceed with a lesser number (*see supra, II.A.3.a. “Stipulating to a Lesser Number of Jurors”*); or
   3. As appropriate, grant a mistrial (*see Chapter 14, “Mistrial”*).

H. Examples of Juror Contamination

The following examples illustrate how the Oregon appellate courts have responded to jury contamination issues.
1. **Observing Defendant In Handcuffs or Shackles**
   Depending on the circumstances, the fact that a juror saw the defendant in handcuffs or shackles does not necessarily constitute grounds for a mistrial. *State v. Walton*, 311 Or 223, 250 (1991) (jurors that observed defendant in handcuffs were not contaminated when court questioned and instructed the jurors following incident). *But see State v. Kessler*, 57 Or App 469, 474-75 (1982) (without a showing of substantial necessity, shackling the defendant in the courtroom was a violation of defendant’s due process right to a fair trial).

2. **Juror Hears an Unofficial Comment By a Spectator or Witness**
   *State v. Hatley*, 48 Or App 541, 548-49 (1980): An uninterested woman’s remark to a juror did not result in discernible prejudice when the facts were brought to the court’s attention, the woman testified that she had no interest in the case, the jurors denied that the incident would adversely affect their impartiality, and defense counsel did not object to the juror remaining on the case.

   *State v. Valasco*, 23 Or App 532, 533-34 (1975): Trial court did not abuse its discretion in denying defendant’s motion for a mistrial and failing to inquire into alleged instance of a juror overhearing a comment prejudicial to the defense during the selection of the jury because defense counsel did not request that the court inquire into the possibility that the juror was tainted.

3. **Witness Becomes Emotionally Distraught or Ill In Front of Jury**
   *State v. Gill*, 243 Or 621, 622 (1966): An emotional outburst by the defendant’s 15-year old daughter while testifying at trial of defendant’s attempted rape of daughter did not require a mistrial because the decision of whether an emotional outburst has a prejudicial effect is “within the province of the trial court,” and the court “carefully cautioned the jury to disregard the emotional conduct.”

   *State v. Hill*, 49 Or App 297, 300 (1980): The trial court was within its discretion to deny defendant’s motion for a mistrial on grounds that the epileptic seizure the victim suffered while testifying generated prejudicial sympathy for the victim when at the conclusion of the victim’s testimony the court gave the jury a cautionary instruction.
4. Bailiff Misconduct

a. Bailiff’s Improper Remarks Presumed to Prejudice Defendant

*State v. Kristich*, 226 Or 240, 251-53 (1961): Bailiff’s improper statement to the jury that it was necessary for them to reach a verdict required a mistrial because prejudice will be presumed when the bailiff improperly communicates with the jury—the court may not speculate on “whether the bailiff’s conduct actually influenced the mental process of any of the jurors.”

*State v. Rathbun*, 287 Or 421, 426 (1979): The court found a causal relationship between the bailiff’s deliberate prejudicial remarks toward the defendant and the subsequent mistrial for a hung jury, requiring a former jeopardy bar against retrial.

b. Bailiff’s Inadvertent Conduct Not Prejudicial

*State v. Williams*, 48 Or App 319, 324 (1980): Bailiff’s negligent mistake in allowing the jury to see the defendant pass by the jury room in handcuffs did not constitute judicial misconduct precluding a retrial because the bailiff’s conduct was inadvertent and not motivated by “bad faith” against the defendant.

*State v. Hatley*, 48 Or App 541, 548-49 (1980): Bailiff’s statement to a juror regarding the identity of a woman who made a remark to the juror did not result in discernible prejudice when the bailiff brought the facts to the court’s attention on his own accord, the woman testified that she had no interest in the case, the jurors denied that the incident would adversely affect their impartiality, and defense counsel did not object to the juror remaining on the case.

5. Juror Use of a Reference Book

The jury may be permitted to use a reference book, such as a *dictionary*, during deliberations if it is requested for a specific purpose and neither party’s counsel objects.

*State v. Cummings*, 33 Or App 265, 269-70 (1978): Trial court did not err in denying mistrial where bailiff gave a dictionary to the jury to look up the word “tumultuous” because the dictionary was used for the sole purpose of looking up the definition of that word, which was not a term of art, and
the court would have given the jury the same definition if requested.

*State v. Holmes*, 17 Or App 464, 475-76 (1974) (trial court erred in providing the jury with a dictionary, over the objections of both counsel, for use during deliberations): “Where counsel made a timely objection and pointed out the improper uses to which a dictionary could be put and the court furnished the dictionary for speculative reasons and without inquiry as to the jury’s need, we must assume that prejudice flowed from the injection of unauthorized informational and definitional material into the jury deliberations.”

*Creasey v. Hogan*, 292 Or 154, 168-171 (1981) (malpractice case): Trial court committed prejudicial error in instructing the jury, after they had retired to deliberate, on a medical dictionary definition of a technical word used in expert testimony because it presented evidence to the jury that neither party had an opportunity to meet, and it violated the normal procedures for taking judicial notice of such evidence.

6. **Juror Has Unauthorized View of Crime Scene During Trial**

If a juror has an unauthorized view of the crime scene and that view allows the juror to weigh the credibility of a witness or any other disputed fact in the case better than without the view, the verdict must be set aside unless the misconduct clearly did not influence the verdict. *State v. Sands*, 248 Or 213, 216 (1967).

*State v. Keaton*, 15 Or App 477, 485-86 (1973): A juror’s independent view of the crime scene and surrounding area could not have added anything new to the view taken prior to the trial by the entire jury, the judge, and both attorneys, and, therefore, could not prejudice the defendant or affect the trial’s outcome.

7. **Juror Obtains a Newspaper Account Regarding the Case**

*State v. Elkins*, 248 Or 322, 326-27 (1967): Trial court properly denied defendant’s several motions for mistrial based on published accounts of the case in the newspapers because the jurors were presumed to be truthful in their answers to the judge’s questions regarding their ability to be fair and impartial, and presumed to honor the judge’s cautionary instruction admonishing them not to obtain any outside information regarding the case. See *State v. Tucker*, 5 Or App 283, 286 (1971) (two jurors who brought newspapers into jury
room presumed to be truthful in satisfying court’s inquiry that the jurors did not receive any improper information and were not prejudiced).

8. Juror Gains Private Knowledge About the Case During Trial

*State v. Miller*, 167 Or App 72, 74-78 (2000): Juror’s statements during deliberations speculating that the defendant dressed in long-sleeve shirts in order to cover gang tattoos and symbols, based on her experience as a prison guard, were found to be statements regarding prisoners in general and not private knowledge about the defendant. Additionally, the fact that the juror pointed out certain actions by the defendant following his release that would have violated his release conditions, knowledge that the other jurors did not previously have, was not sufficient to order a new trial because the juror only used her experience and knowledge to describe the legal effect of facts that were all in evidence.

9. Juror Has Knowledge About the Case Not Disclosed on Voir Dire

A juror’s failure to disclose on voir dire any “familiarity with” or “preconceived distrust of defendant” qualifies as juror misconduct and requires a new trial. *State v. Salas*, 68 Or App 68, 71 (1984). “In order to preserve the integrity of the jury system a defendant should be tried by a jury that does not include anyone who, at the outset, harbors serious doubts about his credibility on the basis of undisclosed out-of-court familiarity with him.” *Id.* at 70-71. See ORS 131.525(1)(b)(E) (prosecution terminated due to juror’s false statements on voir dire does not bar a subsequent prosecution).

10. Juror Becomes Ill During Trial

The fact that a juror becomes ill during trial but nevertheless continues to serve until the jury reaches a verdict is not necessarily grounds for a new trial. *State v. Rutherford*, 1 Or App 599, 604 (1970) (diabetic juror became ill during deliberations).

11. Juror and Court Reporter Have Lunch Together

*State v. Dews*, 26 Or App 527, 529 (1976): A mistrial was not required where a juror and a court reporter had lunch together when the court’s inquiry and the reporter’s testimony under oath established that nothing prejudicial to the defendant transpired and that the case was not discussed, and defense counsel informed the court that he did not doubt the reporter’s veracity and did not request that the juror be questioned. See ORCP 58D (proceedings if juror becomes sick) (made applicable to the criminal code by ORS 136.330(1)).
12. Court Officials and Jurors Eat Dinner Together

*State v. Heintz*, 35 Or App 155, 157-58 (1978): Where the trial judge, the court reporter, and the bailiff dined with the jury after submission of the case but before a verdict, a new trial was not required because the record contained no evidence that the court officials communicated with the jurors.

13. Jurors Attend Drug Education Seminar During Recess of Trial

*State v. Mapel*, 54 Or App 795, 797 (1981) (delivery of marijuana charge): “We conclude that the attendance by the three jurors during the trial at a drug education seminar, at which the district attorney as well as one of the state’s witnesses in the case, a deputy sheriff, lectured operated to deny defendant a fair trial. This was tantamount to an impermissible *ex parte* contact between the prosecution and the jury. Additionally, the evidence was that a juror who attended the lecture brought to the jury room both a booklet and a book on marijuana she had been given at the seminar. The cumulative effect was impermissibly prejudicial by any reasonable standard.”

14. Jurors Serve on Another Similar Trial During Recess of First Trial

*State v. Miller*, 10 Or App 636, 640 (1972): A motion for mistrial should have been granted where several jurors served on another drug trial during a recess of the defendant’s trial.

15. Juror Discusses Case With Others

*State v. Baldeagle*, 154 Or App 234, 240-43 (1998): The trial court did not abuse its discretion in denying defendant’s motion for a new trial based on a juror’s discussion of the case with others on a commuter train where it took testimony from the jury foreperson and, on that basis, concluded that the juror did not communicate with any other juror about his contact with the individuals on train and that his contact did not prejudice the jury’s deliberations.

XII. JUROR EXCUSED DURING TRIAL

A. Generally

For various reasons, such as illness, contamination, or the receipt of improper information about the case, the court may
need to excuse a juror during trial. However, once the jury has been selected and sworn and begins to hear evidence, the court presumably cannot simply call a new juror.

B. Options
There are several things the court may do in lieu of granting a mistrial:

1. Replacement
Replace the juror with an already selected alternate. See supra, VII. “Alternate Jurors.”

2. Continuance
If the reason for excusing the juror is illness, death of a close family member, or some other reasonably temporary situation, the court might continue the trial until the juror is ready to serve. The court has discretion to decide whether the juror is unable to serve and whether to continue the case and, if so, for how long. If the attorneys will not stipulate to a continuance, the court should make a record, stating the nature of the juror’s problem and why the court is continuing the case.

3. Proceed With a Lesser Number of Jurors
If a juror has to be permanently excused and there are no alternates, ask whether the parties will stipulate to proceed with a lesser number of jurors. See supra, II.A.3.a. “Stipulating to a Lesser Number of Jurors.” See State v. Lutz, 306 Or 499, 501-503 (1988) (requiring defendant’s affirmative consent to proceed with a lesser number of jurors).

4. Order a Mistrial
If the above measures do not work, the court may need to order a mistrial. The court should state on the record why the juror is no longer available and why the court declared a mistrial.

XIII. JURY INSTRUCTIONS

A. Timing
The court may instruct the jury on the law before or after closing arguments. ORCP 58B(8) (made applicable to the criminal code by ORS 136.330(1)). See State v. Ness, 54 Or App 530, 535-36 (1981) (jury instructions given prior to closing argument did not prejudice defendant).
1. **Court Must Inform Parties of Instructions Before Argument**
   However, the court must inform the parties *before* argument of the instructions that it proposes to give to the jury. UTCR 6.060(5).

B. **Charging the Jury**
   In charging the jury, the court must state to them all matters of law necessary for their information in giving their verdict. ORCP 59B (made applicable to the criminal code by ORS 136.330(1)). The jury is bound to receive as law what is laid down as such by the court. ORS 136.320.

1. **Jury Instructions Must Be Written or Electronically Recorded**
   The court *must* reduce, or require a party to reduce, the charge to writing, unless the preparation of written instructions is not feasible, in which case the court may electronically record the instructions during the charging of the jury. ORCP 59B (made applicable to the criminal code by ORS 136.330(1)). See UCrJI No. 1058 (“Recorded or Written Instructions”).

   a. **Jury Instructions Are Kept While the Jury Deliberates**
      The jury *must* take the written or recorded instructions with it while deliberating upon the verdict and then return them to the clerk who must file the instructions in the file of the case. ORCP 59B (made applicable to the criminal code by ORS 136.330(1)).

2. **Jury Is Bound By Judicially Noticed Facts**
   The jury is bound to accept as conclusive facts of which the court takes judicial notice, *except* the court must instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed in favor of the prosecution. ORS 136.310; ORS 40.085(2). See UCrJI No. 1062 (“Judicial Notice”).

3. **Keep It Simple**
   A trial court is not required to define for the jury a statutory term intended to have its plain, common meaning, *State v. Nefstad*, 309 Or 523, 539-42 (1990), nor is it required to use a requested jury instruction simply because it is based on appellate court language. *Id.* at 551.

4. **Required Jury Instructions**
   a. **Statutory Provisos**
      The jury is to be instructed by the court on all *proper occasions* that:

1. Their power of judging of the effect of evidence is not arbitrary, but to be exercised with legal discretion, and in subordination to the rules of evidence;

2. They are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a lesser number, or against a presumption or other evidence satisfying their minds;

3. A witness false in one part of the testimony of the witness is to be distrusted in others;

4. The testimony of an accomplice ought to be viewed with distrust, and the oral admissions of a party viewed with caution;

5. Evidence is to be estimated, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

6. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

ORS 10.095(1)-(4) & (7)-(8).

b. Presumption of Innocence

The court must instruct the jury that in criminal cases a person is innocent of a crime or wrong until the prosecution proves otherwise, and guilt must be established beyond reasonable doubt. ORS 10.095(6). See State v. Castrejon, 317 Or 202, 206 (1993) (a particular definition of “reasonable doubt” is not required).

c. Necessity of Agreement on All Material Elements

In Oregon, it is clear “that a jury must be instructed concerning the necessity of agreement on all material elements of a charge in order to convict.” State v. Lotches, 331 Or 455, 472 (2000) (holding that the unanimity rule requires the jury to agree on the conduct that brought the defendant “within the purview of the particular subsection of the aggravated murder statute under which he was charged”).

i. Aggravated Murder Requires Unanimity on All Elements

In State v. Boots, 308 Or 371 (1989), the court “overturned the aggravated murder conviction of a
defendant who had been charged with that crime based on two separate aggravating factors, because the trial court had instructed the jury that it was not required to agree unanimously on any particular theory, so long as some combination of the 12 jurors agreed that one or the other or both of the alleged aggravating factors had been proved.” State v. Hale, 335 Or 612, 627 (2003) (concluding that unanimity was required on all material facts constituting the underlying crime of third-degree sexual abuse).

State v. Lotches, 331 Or 455, 472 (2000): “[B]ecause the aggravated murder instructions that were given did not either limit the jury’s consideration to a specified underlying felony or require jury unanimity concerning a choice among alternative felonies, each instruction carried the same danger that this court had condemned in [State v. Boots, 308 Or 371 (1989)].

State v. Hale, 335 Or 612, 627 (2003): “We agree with defendant that, because the instructions that the jury was given with respect to each of the aggravated murder counts based on the crimes of third-degree sexual abuse and murder did not either limit the jury’s consideration to a specific instance of third-degree sexual abuse or murder, committed by a particular perpetrator against a particular victim, or require jury unanimity concerning a choice among alternative scenarios, each instruction carried an impermissible danger of jury confusion as to the crime underlying each count.”

d. Defendant’s Theory of the Case
The defendant “is entitled to have his theory of the case presented to the jury, if there is any evidence from which jurors could infer that the required elements of the defense were present and if he has submitted an instruction that correctly states the law.” State v. Smith, 107 Or App 647, 651 (1991).

5. Recommended Jury Instructions
The following jury instructions are always recommended:

a. UCrJI No. 1004 (Functions of the Court and Jury).

b. UCrJI No. 1005 (Evaluating Witness Testimony).

c. UCrJI No. 1007 (Innocence of Defendant—Proof Beyond a Reasonable Doubt).
6. **Contentious Jury Instructions**

The following jury instructions are often the subject of disagreement or confusion:

   a. UCrJI No. 1022 (Defendant’s Statements).

   b. UCrJI No. 1028 (Witness False in Part).

      • Give this instruction only if a reasonable juror could conclude that a witness lied under oath in some part of his or her testimony. Do not give it, for example, if it is clear that the witness was just mistaken, confused, or had a hazy recollection. *State v. Long*, 106 Or App 389, 395 (1991), *overruled on other grounds*, *City of Portland v. Jackson*, 111 Or App 233 (1992). See ORS 10.095(3) (instruction regarding false testimony).

   c. UCrJI No. 1029 (Less Satisfactory Evidence).

      • Give this instruction only when a party’s failure to produce evidence could give rise to the inference that the party deliberately withheld the evidence to hide something. *See State v. McDonnell*, 313 Or 478, 497-503 (1992); ORS 10.095(7)-(8) (statutory instruction).

C. **Requesting Jury Instructions**

   Counsel must request jury instructions in writing and deliver copies to the court and opposing parties. UTCR 6.060(1).

1. **Failure to Give a Jury Instruction**

   The court’s failure to give an instruction is not reversible error if the defendant did not request the court to give the instruction or except to any of the instructions that were given. *State v. Cardwell*, 22 Or App 240, 241 (1975); *State v. Brown*, 310 Or 347, 355 (1990).

D. **Lesser Included Offense Instructions**

   1. **Defendant Must Request Instruction Before Closing Arguments**

      A defendant who desires a lesser included offense instruction must request the instruction prior to closing arguments, in order to ensure both parties “the opportunity to frame their closing arguments knowing whether a lesser included instruction will be given.” *State v. Radford*, 101 Or App 665, 668 (1990).
2. Defendant Entitled to Instruction If Evidence Supports It
   “A defendant is entitled to an instruction on a lesser included
toffense if the record contains ‘evidence, or an inference which
can be drawn from the evidence, which supports the requested
instruction so that the jury could rationally and consistently
find the defendant guilty of the lesser offense and innocent
of the greater.’” State v. Boyce, 120 Or App 299, 302 (1993)

3. Instructing the Jury on the Order of Deliberation
   1. The jury must first consider the charged offense.
      a. Only if the jury finds the defendant not guilty of the
         charged offense may the jury consider a lesser included
         offense.
      b. If there is more than one lesser included offense, the
         jury must consider the lesser included offenses in order
         of seriousness.
      c. The jury may consider a less serious lesser included
         offense only after finding the defendant not guilty of
         any more serious lesser included offenses.
   2. If the jury finds the defendant guilty of a lesser included
      offense, the court, if requested by the State or the
      defendant, must poll the jury on the original charge. If
      fewer than the required number of jurors vote to find the
      defendant not guilty on the original charge, the court:
      a. Must not receive the verdict; and
      b. Must instruct the jury to continue deliberations.
   3. If the jury is unable to reach a decision on the original
      charge, the State and defendant may stipulate that the jury
      may consider any lesser included offense.
      (2000) (holding that the “acquittal first” instruction mandated
      by ORS 136.460(2) does not violate the federal or state
      constitutions); UCrJl Nos. 1009-1012 (lesser included offense
      instructions).

E. Jury Instructions on Inferences
   In State v. Rainey, 298 Or 459 (1985) the court held that if
   an inference instruction has the potential to be construed as
   an improper comment on the evidence under ORCP 59E, the
   instruction should not be given. Wayne T. Westling, Oregon
   Criminal Practice § 42.04, 458 (Michie 1996). See State v.
Blanchard, 165 Or App 127, 131 (2000) (instruction permissible because it neither “directed the jury to draw a particular inference nor precluded it from drawing the inference” wanted by either party). See UCrJI No. 1006.

State v. Hayward, 327 Or 397, 410-11 (1998) (citations omitted): “A court impermissibly comments on the evidence when it gives a jury instruction that tells the jury how specific evidence relates to a particular legal issue. A court also impermissibly comments on the evidence if it instructs the jury to draw an inference against the defendant that shifts the burden of proof from the state to the defendant. An inference cannot relieve the state of its burden of proving each element of the crime beyond a reasonable doubt.”

F. Point of Exception to Instruction Must Be Timely Made
No instruction given to a jury may be subject to review upon appeal unless its error, if any, was pointed out to the judge who gave it and unless a notation of an exception is made immediately after the court instructs the jury. Any point of exception must be particularly stated and taken down by the reporter or delivered in writing to the judge. ORCP 59H (made applicable to the criminal code by 136.330(2)).

1. Failure to Give a Requested Instruction Is Automatic Exception
Failure to give a requested instruction or a requested statement of issues, creates an automatic exception in favor of the party against whom the ruling was made. ORCP 59H (made applicable to the criminal code by 136.330(2)).

XIV. JURY DELIBERATIONS

A. Custody of the Jury
After hearing the charge and submission of the cause to them, the jury must retire for deliberation to a convenient place, where they must be kept together under the charge of an officer until they agree upon a verdict, are allowed by the court to separate, or are discharged. ORCP 59C(5) (made applicable to the criminal code by ORS 136.330(1)).

1. No Communication with the Jury
The officer in charge of the jury must not allow any communication to be made to them, nor communicate personally with them, except to ask if they have agreed upon a verdict. Before the verdict is rendered, the officer must not communicate to any person the state of their deliberations, or
the verdict agreed upon. ORCP 59C(5) (made applicable to the criminal code by ORS 136.330(1)).

2. Officer's Oath
Before any officer takes charge of a jury, ORCP 59C(5) must be read to the officer who shall swear to follow its provisions. ORCP 59C(5) (made applicable to the criminal code by ORS 136.330(1)).

a. Suggested Oath Before Officer Takes Charge of the Jury
"Do you solemnly swear that you will take charge of this jury and keep them together until they have reached their verdict; that you will not, unless by order of the court, allow any communication to be made to the jury except to ask them if they have agreed on a verdict; that you will not communicate to anyone the state of their deliberations or the verdict agreed on; that you will perform these duties in accordance with all applicable ORCPs to the utmost of your ability?"

3. Separation During Deliberation
The court in its discretion may allow the jury to separate during its deliberation when the court is of the opinion that the deliberation process will not be adversely affected. ORCP 59C(5) (made applicable to the criminal code by ORS 136.330(1)).

B. Time Frame for Deliberations
The court has considerable discretion to determine the time frame during which the jury deliberates. The court may send the jury home and allow deliberations to begin later, e.g., the next morning. Or, the court may have the jury begin deliberating then send the jurors home, and resume deliberations at a later time. Alternatively, the court may allow the jury to decide the schedule for deliberations, including into the evening.

1. Cautionary Instruction
If the court sends the jury home during deliberations, instruct the jurors not to discuss the case with anyone and not to read, listen to, or watch news media.

C. Appropriate Materials During Deliberations

1. All Exhibits Received In Evidence
The jury may take with them into deliberation all exhibits received in evidence, except depositions. ORCP 59C(1) (made applicable to the criminal code by ORS 136.330(1)).
a. Suggestions
   1. The court clerk or bailiff must make sure exhibits that have not been received do not accidentally go to the jury. *See State v. Bates*, 22 Or App 69 (1975) (new trial required where two letters written to the defendant not received in evidence went to the jury room).
   2. Invite counsel to review the exhibits before they are given to the jury.
   3. Have a second court staff person review the exhibits before they are given to the jury if time permits.

2. Verdict Form
   Use a one-page jury form that clearly identifies the charge(s). *See UCrJI Nos. 1015-1018* (sample criminal jury verdict forms).

3. Jurors’ Notes
   Jurors may take notes of the testimony or other proceeding on the trial into the jury room. ORCP 59C(4) (made applicable to the criminal code by ORS 136.330(1)).

4. Written or Electronically Recorded Instructions
   The jury must take the written or recorded instructions with it while deliberating upon the verdict. ORCP 59B (made applicable to the criminal code by ORS 136.330(1)).

5. Equipment
   The jury may use equipment to review recorded evidence, or other devices such as chart paper and blackboards. *See State v. Reyes*, 209 Or 595, 636 (1957) (court did not err in allowing a “machine” to go to the jury room which could play a record of defendant’s statement).

D. Inappropriate Materials During Deliberations

1. Accusatory Instrument
   The indictment or other charging instrument may not go with the jury. ORCP 59C(2) (pleadings may not go to the jury room) (made applicable to the criminal code by ORS 136.330(1)).

a. Suggestion
   During trial, do not refer to an “indictment” or to a “charge returned by the grand jury.” Simply refer to the charge as a “charge.” The jury has no need to know or infer
that another group of jurors (i.e., grand jurors) already considered the charge.

2. **Depositions**
   Depositions may not go to the jury room. ORCP 59C(1) (made applicable to the criminal code by ORS 136.330(1)).

3. **Reference Materials**
   Dictionaries, encyclopedias, or other research materials may not be used by the jury during deliberations. However, the jury may be permitted to use a dictionary if it is requested for a specific purpose and neither party’s counsel objects. See supra, XI.H.5 “Juror Use of a Reference Book.”

**E. Reading Portions of Testimony to Jurors During Deliberations**

Although the practice is not encouraged, the court has the discretion to allow testimony to be read/played back, in whole or in part, to the jury while it is deliberating. State v. Miller, 2 Or App 353, 355 (1970); State v. Vaughn, 200 Or 275, 278 (1954) (conforming to the rule that “whether in a particular case certain portions of the testimony should be read to a jury rests in the discretion of the trial court”).

1. **Potential Problems In Allowing a Read Back of Testimony**
   Most courts in Oregon do not allow testimony to be read or played back to the jury because of:
   
   a. Practical difficulties;
   
   b. Risk of confusion; and
   
   c. Risk that jurors will give undue emphasis to the testimony that is read back to them.

   a. **Read Back May Invade Province Of The Jury**
      The practice of reading back testimony may run afool of ORCP 59E: “The judge shall not instruct with respect to matters of fact, nor comment thereon.” ORCP 59E (made applicable to the criminal code by ORS 136.330(1)).

**F. Discretion to Reinstruct**

“When the trial court has given to the jury an adequate instruction upon a specific issue in the case and thereafter the jury requests the court to ‘reinstruct’ upon that issue, the giving of such further instruction rests in the sound discretion of the trial court.” State v. Vaughn, 200 Or 275, 277 (1954).
G. Written Statement of Issues

The court may, in its discretion, submit to the jury an impartial written statement summarizing the issues to be decided by the jury. ORCP 59C(2) (made applicable to the criminal code by ORS 136.330(1)).

H. Answering Questions During Jury Deliberations

The court has considerable discretion to decide how to answer a jury question during deliberations.

1. Court Has Discretion to Answer Questions of Law

After retiring for deliberation, if the jury requests information on any point of law, the judge has discretion to provide the information requested, which must be given either orally or in writing in the presence of, or after notice to, the parties or their counsel. ORCP 59D (made applicable to the criminal code by ORS 136.330(1)).

a. To Answer, or Not to Answer the Question

Although a judge may be reluctant to answer a question from the jury during deliberations, the question may indicate that the jury is confused about the law, and, therefore, the court should try to answer it as thoroughly and meaningfully as possible. Trial courts are rarely reversed for answering a jury question—provided they answer it correctly.

i. Suggestion: Make the Record

Make the jury’s question and the court’s response a matter of record in the presence of counsel. Compare State v. Barmon, 67 Or App 369, 381-82 (1984) (Van Hoomissen, J., specially concurring in part; dissenting in part) (arguing that judge’s answering of three jury questions without first advising defense counsel warranted new trial) with State v. White, 55 Or App 729, 732 (1982) (concluding that it was not prejudicial error for the court in the absence of counsel to give a written response to a written jury question both of which were made part of the record). See Iron Horse Engr. Co., Inc. v. N.W. Rubber Extruders, Inc., 193 Or App 402, 418-419 (2004) (concluding that although it may have been “technical error” to answer jury question in absence of counsel, it was not prejudicial error, especially when the answer was legally correct). See generally Hastings v. Top Cut Feedlots, Inc., 285 Or 261, 264-65 (1979); Huntley v. Reed, 276 Or 591, 593-95 (1976).
2. **Procedure**

The following is a suggested procedure for receiving a jury question during deliberations:

1. Instruct the bailiff to tell the presiding juror to write the question out and to be careful to state the question as clearly and simply as possible;

2. Show the attorneys the question, make it a part of the record, and ask them, on the record, for suggestions on answering the question;

3. Once the court decides how to respond to the question, let the attorneys put any objections on the record.

I. **Handling Lengthy Deliberations**

The court may allow the jury to interrupt its deliberations, send the jurors home, and resume deliberations at a later time. ORCP 59C(5)-(6) (made applicable to the criminal code by ORS 136.330(1)).

J. **Deadlocked Jury**

If the jury reports that it is deadlocked, the court has a number of options, including:

1. Direct the jury, by note or a statement in court, to continue deliberations;

2. Direct the jury to interrupt its deliberations and return the next day or some date later in the week to resume deliberations;

3. Direct the presiding juror to indicate the number of jurors voting for guilty or not guilty in their latest vote;

4. Reinstruct the jury;

5. After careful consideration, give the deadlocked jury instruction, UCrJI No. 1027, putting on record the reasons for giving the instruction rather than declaring a mistrial; or

6. Declare a mistrial.

1. **Discretion to Instruct Deadlocked Jury**

A trial court has discretion to give a deadlocked jury instruction, provided the instruction does not result in jury coercion. *State v. Hutchison*, 142 Or App 56, 59-61 (1996) (based on factual setting of the case, the deadlocked jury instruction was improperly given). See *State v. Marsh*, 260 Or 416, 423 et seq. (1971) (discussing the deadlocked jury instruction also known as the “Allen charge”).
2. Considerations Before Declaring a Mistrial
Before declaring a mistrial, the court should consider:

a. The time the jury has been deliberating;
b. The complexity of the evidence and instructions; and
c. The firmness of the jurors’ position.

a. Policy Considerations
The competing policy considerations are:

1. Getting the jury to reach a verdict so the case will not have to be retried; and
2. Keeping a juror from changing the juror’s vote solely because of court pressure to reach a verdict.

K. Discharging the Jury Without a Verdict
The court may discharge the jury before it has reached a verdict if, at the expiration of such period as the court deems proper, it satisfactorily appears that there is no probability of an agreement. ORCP 59F(1)(a) (made applicable to the criminal code by ORS 136.330(1)).

1. Make the Record When Discharging a Deadlocked Jury
The following items suggest a procedure for making the record when it is clear that the jury is deadlocked and must be discharged:

a. Inform the jury of the length of its deliberations;
b. Ask the presiding juror to indicate, without revealing how the votes stand with respect to guilty or not guilty, the numerical status of the jury’s vote (e.g., 8-4);
c. Ask the presiding juror to indicate whether he or she believes further deliberations will result in a verdict;
d. Ask the jury if they agree with the presiding juror’s response;
e. If the jurors agree with the presiding juror that further deliberations will not result in a verdict, state for the record that all jurors have agreed and state the following:

“I find that the jury has deliberated in this matter and that further deliberations would not produce a verdict, therefore, I declare a mistrial. Jurors, with the court’s thanks, you are discharged.”
2. New Trial

If the jury is discharged without giving a verdict, either during the progress of the trial or after the cause is submitted to them, the action may be tried again immediately, or at a future time. ORCP 59F(2) (made applicable to the criminal code by ORS 136.330(1)).

a. Former Jeopardy No Bar to Retrial if Jury Unable to Agree

A previous prosecution is not a bar to a subsequent prosecution when the trial court terminates the previous prosecution because the jury is unable to agree upon a verdict. ORS 131.525(1)(b)(D). “[I]f the jury’s inability to reach a verdict is not the result of prosecutorial or judicial misconduct, ORS 131.525(1)(b)(D) can be constitutionally applied to annul the attachment of jeopardy arising from the original trial.” State v. Bannister, 118 Or App 252, 258 (1993) (holding that neither the double jeopardy clause of Article I, § 12 of the Oregon Constitution nor that of the Fifth Amendment to the U.S. Constitution bar reprosecution where the jury is unable to reach a verdict).

State v. O’Donnell, 192 Or App 234, 252 (2004): “We thus conclude that ORS 131.525(1)(b)(D) is satisfied, even in the absence of an explicit finding, where, as here, (1) the record demonstrates that the jury was unable to reach a verdict and further deliberations would have been unavailing; (2) the trial court discharged the jury after confirming that inability to reach a verdict; and (3) the record does not disclose any other plausible reason for the court to have discharged the jury at that time.”

i. The Record Must Show No Probability of Agreement

“[W]e conclude that compliance with the procedural rule set forth in ORCP 59 F(1)(a) is a prerequisite to the triggering of the exception to former jeopardy contained in ORS 131.525(1)(b)(D). In other words, only when it satisfactorily appears that there is no probability of an agreement, under ORCP 59 F(1)(a), does a trial judge have a basis to find that the jury is unable to agree upon a verdict for the purposes of ORS 131.525(1)(b)(D).” State ex rel. Turner v. Frankel, 322 Or 363, 375-76 (1995) (concluding that because the record did not indicate the jury had “no probability” of reaching agreement on certain counts, retrial as to those counts was barred by former jeopardy).
XV. JURY VERDICT AND POLLING

A. Reaction to Verdict
Instruct all persons present in the courtroom that after the jury returns a verdict they must remain seated until the jury has left the room and must refrain from visibly or audibly reacting to the verdict in a manner which disrupts the dignity of the courtroom. UTCR 3.150.

B. Number of Jurors Required for Verdict

1. Concurrence of 10 Out of 12 Jurors Generally Required
In general, a jury verdict must be by concurrence of at least 10 of 12 jurors. ORS 136.450(1); Or Const Art I, § 11 (in circuit court 10 members of the jury may render a verdict of guilty or not guilty, except guilty verdict of first degree murder must be unanimous). If the parties consented to less than 12 jurors, the verdict must be unanimous, unless the parties also stipulated to a less than unanimous verdict. State v. Johnson, 13 Or App 79, 80-81 (1973); ORS 136.210(1) (allowing the parties to consent to a less number of jurors).

2. Guilty Verdict of Murder Must Be Unanimous
Article I, § 11 of the Oregon Constitution requires that a guilty verdict for “first degree murder” be unanimous. ORS 136.450(2), providing an 11-1 guilty verdict for murder or aggravated murder, should be disregarded because it was generated from Ballot Measure 40(1)(h), a constitutional amendment which the court in Armatta v. Kitzhaber, 327 Or 250 (1998), subsequently declared unconstitutional. Wayne T. Westling, Oregon Criminal Practice § 43.05, 156 (Michie Supp. 2000). “Without that constitutional amendment, Article I, section 11, of the state constitution, which requires a unanimous verdict in cases of ‘first degree murder,’ prevails.” Id. Ballot Measure 72, which attempted to revive the amendment, was not passed by voters in the November 2, 1999 election.

a. Not Guilty of Murder Requires a 10-2 Verdict
A 10-2 verdict is acceptable for a not guilty verdict for murder, or for a guilty or not guilty finding on any lesser included offenses.

b. Verdict of Guilty of Murder Except For Insanity
When insanity is raised as an affirmative defense to murder, a guilty verdict of murder except for insanity is not an acquittal, but is a guilty verdict and therefore must be
See UCrJI No. 1122.

3. Misdemeanor Charges
Where the only charge is a misdemeanor, unless the defendant stipulates to a less than unanimous verdict, a 6-person jury must return a *unanimous* verdict. *State v. Johnson*, 13 Or App 79, 80-81 (1973).

C. General Verdict Required

1. Special Verdicts Have Been Repealed
Although some early cases refer to special verdicts in criminal cases, ORS 136.630 and other statutes that authorized special verdicts have been repealed. Therefore, the only verdict in Oregon criminal cases is a general verdict. See ORS 136.485 (reconsideration of verdict which is not general verdict).

2. General Verdict Defined
A general verdict upon a plea of not guilty is either “guilty” or “not guilty.” ORS 136.455.

D. Verdicts in Cases with Lesser or Necessarily Included Offenses

1. Lesser Included Offenses
Upon a charge for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged, but guilty of any inferior degree or of an attempt to commit the crime or any such inferior degree thereof. ORS 136.460(1). See supra XIII.D. “Lesser Included Offense Instructions.”

2. Necessarily Included Offenses
In all cases, the defendant may be found guilty of any crime the commission of which is necessarily included in the crime charged or of an attempt to commit such crime. ORS 136.465.

3. Verdict Form
List all possible verdicts for one charge on the same verdict form. See UCrJI No. 1018.

E. Verdict on Several Defendants

1. Conviction or Acquittal of Some Defendants
Where an accusatory instrument charges several defendants, any one or more may be convicted or acquitted. ORS 136.470.
2. **Retrial of Other Defendants**

Where an accusatory instrument charges several defendants, if the jury cannot agree upon a verdict as to all, it may give a verdict regarding those whom it does agree and the rest of the defendants may be tried by another jury. ORS 136.475.

F. **Improper Verdicts**

If the court uses the Uniform Criminal Jury Instruction verdict form, the jury should return a properly completed verdict. However, even with form verdicts, juries sometimes return an improper verdict, as in the following examples:

1. Jury returns a verdict of guilty on both the major charge and a lesser included offense.

2. Jury returns a verdict of guilty on each of two inconsistent charges. *See State v. Grabill*, 34 Or App 639, 643 (1978) (recognizing that the majority rule “appears to be that courts will not overturn criminal convictions on the ground of inconsistency of general verdicts,” however, whether or not Oregon appellate courts have “such authority has never been clearly established”); *State v. Owens*, 58 Or App 739, 745 (1982) (stating that Oregon has not decided this issue), overruled on other grounds, *State v. Thiesies*, 63 Or App 200 (1983); *State v. Peaslee*, 59 Or App 519 (1982) (defendant did not object when jury returned unanimous verdict on felony murder charge and 10-2 verdict on robbery charge thereby waiving any objection to the verdicts on appeal).

3. Jury returns a verdict with an additional written comment, such as a comment about sentencing.

1. **Directing the Jury to Reconsider An Improper Verdict**

If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be required to deliberate further. ORCP 59G(4) (made applicable to the criminal code by ORS 136.330(1)).

a. **Mistake of Law**

If the court finds that the jury’s verdict has mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider its verdict; but if after such reconsideration the jury finds the same verdict, it must be received. ORS 136.480.

b. **When Verdict Is Not a General Verdict**

If the jury finds a verdict that is not a general verdict, the court may instruct the jury as to the law and direct it to
reconsider its verdict; the verdict cannot be received until it is clear that the jury intends to return a general verdict. ORS 136.485.

2. Suggestion
   Once the irregularity is discovered, allow counsel to suggest a solution to the problem outside the presence of the jury.

G. Polling the Jury
   When the verdict is given, and before it is filed, the jury may be polled on the request of a party, for which purpose each juror must be asked whether the verdict is the juror’s verdict. If fewer jurors answer in the affirmative than the number required to render a verdict, the jury must be sent out for further deliberations. ORCP 59G(3) (made applicable to the criminal code by ORS 136.330(1)).

1. Defendant Has the Right to Poll the Jury
   A criminal defendant has an absolute right to have the jury polled upon request. Brooks v. Gladden, 226 Or 191, 193 (1961) (denial of defendant’s request to poll the jury did not violate due process but did constitute grounds for appeal).

2. Form of the Poll
   The court has discretion to poll the jury orally or in writing, with the written results sealed and placed in the court record. ORS 136.330(1). See State v. Mendez, 308 Or 9, 14-15 (1989) (trial court complied with ORCP 59G(3) and ORS 136.330(1) by numerically polling jury; in camera questioning of each juror not required); State v. Lehnherr, 30 Or App 1033, 1037-39 (1977) (defendant’s right to a public trial does not require a public polling of the jury).

   a. Suggestion
      It is often possible to avoid a formal poll if the court asks the presiding juror in the presence of the other jurors and parties the following:

      "Without revealing the vote of any individual juror, did at least 10 jurors vote guilty on the charge?"

      If the jurors nod in approval, counsel may be satisfied and not request a formal poll. The judge might caution the presiding juror not to reveal whether the verdict was unanimous because this, in effect, tells publicly how each juror voted.
H. Return of the Verdict  
When the jurors have agreed upon their verdict, they must be conducted into court by the officer having them in charge. The court must inquire whether they have agreed upon their verdict. If the presiding juror answers in the affirmative, it must be read. ORCP 59G(1) (made applicable to the criminal code by ORS 136.330(1)).

1. Defendant Discharged on Acquittal  
If a judgment of acquittal is given and the defendant is not detained for any other legal cause, the defendant must be immediately discharged, unless the court allows the case to be resubmitted, in which case the court may retain the defendant. ORS 136.490.

2. Jury Discharged Upon Completion of the Verdict  
When a proper verdict is given, the clerk must file the verdict and the jury must be discharged from the case. ORCP 59G(5) (made applicable to the criminal code by ORS 136.330(1)).

3. Discharge of the Jury Forecloses Challenge to Verdict  
In State v. Vann, 158 Or App 65, 73-74 (1998), the court adopted the rule that “[o]nce a verdict has been received, and the jury dispersed, the court is foreclosed from any action regarding the verdict, except mistrial or some other post-trial motion.” See id. at 74 (discussion rationale for the rule).

XVI. JURY PROBLEMS ARISING AFTER DISCHARGE

A. Policy Is to Protect Jury Verdicts  
“[C]ourts are hesitant to allow interrogation of jurors in order to probe for potential misconduct after they have reached a verdict. The rationale for this policy is the need for freedom of deliberation, stability and finality of verdicts, and protection of jurors from annoyance and embarrassment after they have performed their civic duty and rendered a verdict.” State v. Jones, 126 Or App 224, 228 (1994).

B. Jury Mistake, Fraud, or Misconduct  
On sufficient showing, the court may enter an order allowing a party to have contact with a juror in the presence of the court and opposing parties when there is a reasonable ground to believe that:

1. There has been a mistake in the announcing or recording of a verdict; or
2. A juror or the jury has been guilty of fraud or misconduct sufficient to justify setting aside or modifying the verdict or judgment.

UTCR 3.120(2).

1. **Misconduct Must Materially Affect a Substantial Right**
   Even where the grounds alleged are juror misconduct, the court should not set aside a jury verdict unless the misconduct materially affected the substantial rights of a party. ORCP 64B(2) (made applicable to the criminal code by ORS 136.535). *See State v. Miller,* 167 Or App 72, 74-78 (2000) (“Whether to grant a new trial because of juror misconduct is a discretionary decision for the trial court. . . . The evidence must, however, meet a threshold level before the court has any discretion to exercise.”); *Ertsgaard v. Beard,* 310 Or. 486 (1990).

*State v. Gardner,* 230 Or 569, 575 (1962): “[A]lthough we recognize that evidence of a juror’s misconduct may be used, the verdict will stand unless the evidence clearly establishes that the misconduct constitutes a serious violation of the juror’s duty and deprives complainant of a fair trial.”

*State v. Vogh,* 179 Or App 585, 596 (2002): “Whether the misconduct rises to [a serious violation of the juror’s duty and deprives complainant of a fair trial] depends on the nature of the conduct considered in the context of the trial proceedings as a whole, including the instructions given to the jury to channel its deliberations. . . . The same is true of related claims, such as those involving a juror’s actual eligibility and qualifications to serve as a juror. A defendant must raise an objection to the juror’s competency or eligibility in a timely way and cannot, instead, do so only after gambling on a favorable jury verdict.”

*State v. Miller,* 167 Or App 72, 74-78 (2000): Juror’s statements during deliberations speculating that the defendant dressed in long-sleeve shirts in order to cover gang tattoos and symbols, based on her experience as a prison guard, were found to be statements regarding prisoners in general and not private knowledge about the defendant. Additionally, the fact that the juror pointed out certain actions by the defendant following his release that would have violated his release conditions, knowledge that the other jurors did not previously have, was not sufficient to order a new trial because the juror only used her experience and knowledge to describe the legal effect of facts that were all in evidence.
C. Jury Contamination Discovered After Discharge

Often a problem relating to jury contamination does not surface until after the jury is discharged. *See supra, XI. “Juror Contamination.”*

D. Inquiry Into Misconduct Must Be Extrinsic to Jury Deliberations

Because of the sanctity of the jury deliberations and the principle of finality of jury verdicts, the court may not overturn a jury verdict on grounds relating to the juror’s mental processes during deliberation. *D.C. Thompson and Co. v. Hauge*, 300 Or 651, 660 (1986). It is equally established that there are few exceptions to the rule that affidavits of jurors will not be used to impeach their verdict. *Blanton v. Union Pacific Railroad*, 289 Or 617, 630 (1980).

*State v. Jones*, 126 Or App 224, 227 (1994): “There is a strong policy in Oregon to protect jury verdicts from attack. Only limited kinds of juror misconduct justify a new trial. The kind of misconduct that will be considered in an attack on a verdict is misconduct that is extrinsic to the communications between jurors during the deliberative process or that amounts to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to contempt of court or criminal prosecution.”

E. Use of Juror Affidavits to Impeach Verdict

The use of juror affidavits alleging misconduct are sufficient to warrant a mistrial only if they establish misconduct that amounts to a criminal obstruction of justice such as fraud, bribery, or forcible coercion. *State v. Woodman*, 195 Or App 385, 392 (2004) (affidavits and testimony alleging irregularity and a verdict “against law” did not disclose a criminal obstruction of justice such as fraud, bribery, or forcible coercion, as required to impeach verdict). *See also Pinnell v. Palmateer*, 200 Or App 303, 317 (2005).

F. Raise it or Waive it

The defendant’s failure to raise a timely claim that his or her right to a fair trial by an impartial jury was violated due to alleged juror misconduct or contamination, will operate as a waiver of that claim. Otherwise, the defendant would be permitted to gamble on a favorable verdict. *State v. Vogh*, 179 Or App 585, 595-96 (2002).
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CHAPTER 8: ORDER OF PROOF

I. STATUTORY ORDER

A. Statutory Order of Proof
   The statutory order of proof is as follows:
   - Opening statement of the parties;
   - State’s case in chief;
   - Defendant’s case in chief;
   - Rebuttal;
   - Closing argument.

   ORCP 58B (made applicable to the criminal code by ORS 136.330(1)).

II. JUDICIAL DISCRETION AFFECTING ORDER

A. Discretion to Vary Order
   The court may vary the order of proof for good cause. ORCP 58B (made applicable to the criminal code by ORS 136.330(1)). See State v. Stevens, 311 Or 119, 145 (1991); State v. Ness, 54 Or App 530, 535 (1981). The court may also, in the “furtherance of justice,” allow a party to introduce evidence on the original cause of action, defense, or counter-claim after conclusion of the case in chief. ORCP 58B(5) (made applicable to the criminal code by ORS 136.330(1)).

B. Discretion to Determine Scope of Rebuttal and Surrebuttal

1. Scope
   Determination of the proper scope of rebuttal is within the discretion of the trial court. State v. Truxall, 2 Or App 214, 218 (1970).

   The admissibility of surrebuttal (a rebuttal to a rebuttal) is governed by the same rules as rebuttal. State v. Dilley, 15 Or 70, 75-76 (1887).

2. Definition of Rebuttal Evidence
   Rebuttal evidence is evidence made necessary by the opponent’s evidence. State v. Fischer, 232 Or 558, 563 (1962).
3. **Test For Proper Rebuttal**
   When defendant produces evidence that identifies a particular point of inquiry, the State may offer contradictory evidence in rebuttal on that point, even though evidence would have been properly admissible as part of case in chief but was not offered then. *State v. Fischer*, 232 Or 558, 563 (1962). However, the court may not arbitrarily allow the State to separate its case into parts and present a portion in chief and another in rebuttal. *State v. Evans*, 98 Or 214, 235 (1920); *State v. Birchfield*, 26 Or App 749 (1976).

4. **Timing Is Key Inquiry**
   The appellate court reviews whether the timing of the testimony and not the testimony itself adversely affected the case. *State v. Harris*, 37 Or App 715, 719 (1978) (trial court did not abuse its discretion in allowing testimony as rebuttal where defendant could not show late production of evidence was prejudicial), *aff’d in part, rev’d in part*, 287 Or 335 (1979).

5. **Examples of Proper Rebuttal**
   *State v. Truxall*, 2 Or App 214, 218 (1970): The State was properly allowed to present rebuttal evidence that a person, whom the defendant testified being with on the night of the crime, was at the scene of crime in order to contradict defendant’s alibi.

   *State v. Gardner*, 16 Or App 464, 470 (1974): When defendant opened door, impeachment evidence on collateral matters was admissible on rebuttal.

   *State v. Jackson*, 30 Or App 681 (1977): When defendant in hit-and-run case testified that he fled police officers because he feared they were cohorts of a person against whom defendant was going to testify, he opened the door on the issue of motive and the State was properly allowed to show in rebuttal that, before fleeing, defendant had been observed making contact with a woman whom narcotics investigators had under surveillance.

   *State v. Wood*, 71 Or App 126, 131-32 (1984): When the defendant opened the door by denying prior illegal acts, the State was allowed to introduce contradicting evidence on rebuttal.
C. **Discretion to Allow a Party to Reopen Its Case In Chief**


1. **Technical Deficiencies**
   The court may reopen the case to permit correction of mere technical deficiencies. Examples include:
   
   a. Venue, where some evidence as to location of incident has been received. *State v. Cervantes*, 319 Or 121, 124 n.3 (1994); *State v. Eppers*, 138 Or 340, 346 (1931).
   
   b. In a statutory rape case, direct evidence as to nonmarriage of defendant and victim where indirect evidence already was received. *State v. Drake*, 127 Or 585 (1928).

2. **Surprise**
   The court should consider whether reopening the case will surprise the opposing party. *See State v. Isenhart*, 32 Or 170, 173 (1898).

3. **Examples of Timing**
   The following examples illustrate when the court properly permitted a party to reopen its case.
   
   a. Following the court’s denial of defendant’s motion to acquit, the court properly allowed the State to reopen its case to admit additional evidence regarding venue. *State v. Eppers*, 138 Or 340, 346 (1931).
   
   b. After closing arguments, the court properly allowed the State to reopen its case to introduce evidence it carelessly forgot to offer in evidence at trial in order to prevent a miscarriage of justice. *State v. Farr*, 8 Or App 78, 82-84 (1972).
   
   c. After the defendant testified, the court did not abuse its discretion in allowing the State to reopen the issue of the voluntariness of statements made by the defendant to police, even though the defendant took the stand in reliance on the court’s pretrial ruling that the statements were inadmissible. *State v. Sage*, 20 Or App 368 (1975).

4. **Standard of Review**
   “The order of proof and leave to reopen is within the sound discretion of the trial court and will not be disturbed on appeal except for abuse.” *State v. Cole*, 252 Or 146, 159 (1968).
5. **Form of Request**
   A party must make a motion to reopen its case. *State v. Evans*, 98 Or 214, 235 (1920).
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CHAPTER 9: OPENING STATEMENTS AND CLOSING ARGUMENTS

I. OPENING STATEMENTS

A. Purpose of the Opening Statement
Opening statements are an administrative aid to the jury and are subject to the discretion of the trial judge who may “supervise the opening statement so that it will serve the purpose which the law intended.” State v. Ragan, et al., 123 Or 521, 524 (1928).

State v. Reynolds, 164 Or 446, 454 (1940): “The purpose served by an opening statement is to acquaint the jurors with the issues, the contemplated testimony and the relationship of the latter to the issues. The making of one is subject to the discretion of the trial judge. In exercising this discretion the trial judge must of necessity rely to a large extent upon the good faith of the attorney.”

B. Order of Opening Statements
When the jury has been selected and sworn, unless the court for good cause directs otherwise, the trial must proceed with the State presenting its opening statement first, followed by the defendant’s opening statement. ORCP 58B(1) (made applicable to the criminal code by ORS 136.330(1)).

1. Defendant May Waive or Reserve Opening Statement
The court may permit the defendant to waive opening statement or reserve it until the State completes its case. 2 CRIMINAL LAW §§ 20.45, 20.46 (Oregon CLE 2005). See State v. Ragan, et al., 123 Or 521, 524 (1928) (recognizing the trial judge’s discretion to supervise opening statements); State v. Seeger, 4 Or App 336, 337 (1971).

C. Control of Opening Statement
The court may change the order of opening statements or regulate or curtail opening statements. ORCP 58B (allowing the court to alter the manner of proceedings for good cause) (made applicable to the criminal code by ORS 136.330(1)).

II. SCOPE AND CONTENT OF OPENING STATEMENT

A. Scope of Opening Statement
Although each party is entitled to present its theory of the case, a party’s opening statement may include only those matters that are practical note: The prosecution also may waive opening argument, however, generally, this is done only in bench trials.

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admissible and that can be proven at trial. *State v. Patterson*, 117 Or 153, 154-55 (1925). See 1 ABA Standards for Criminal Justice § 3-5.6 (3d ed. 1993) (a prosecutor’s opening statement may not include “inadmissible evidence,” “legally objectionable questions,” or “impermissible comments or arugments”); 1 ABA Standards for Criminal Justice § 4-7.4 (3d ed. 1993) (defense counsel should confine opening statement to the issues of the case and evidence it in good faith believes will be available and admissible).

1. **Discretion Over Content of Opening Statement**

2. **Prejudicial Evidence**
   An opening statement may mention prejudicial evidence if it “has probative value concerning a material issue in the case.” *State v. Herrera*, 236 Or 1, 6 (1963) (no actual prejudice resulted from prosecutor’s inflammatory remark).

3. **Elements of Crime**
   The State need not include in the opening statement every element of a crime charged. See *State v. Keaton*, 15 Or App 477, 482 (1973) (opening statement not intended to replace complaint or other pleading).

4. **Objections Must Be Timely**
   A party must timely object to an improper opening statement in order to preserve a motion for mistrial. See *Carlson v. Lyman Slack Motors*, 49 Or App 63, 66 (1980) (concluding that defendant’s wait until plaintiff completed opening statement before moving for mistrial was not timely).

B. **Errors in Opening Statement**

1. **Evidence Not Produced During Trial**
   Without more, a party’s failure to produce evidence covered in its opening statement does not justify a mistrial.

   *Gladden v. Frazier*, 388 F2d 777, 779 (9th Cir 1968): “[A] rule that a mistrial must be declared because the expected testimony outlined in the opening statement is never given from the witness stand, and consequently the adversary never has a chance to test its truth by cross-examination, would be a wasteful and mischievous rule. The controlling question should be the good faith or lack of good faith of counsel in saying what he said in his opening statement and the likelihood
that the opening statement was unfairly prejudicial to the defendant.”

a. Good Faith Standard
   The court must determine whether the attorney in good faith expected to produce at trial the evidence referred to in the opening statement. State v. Broadhurst, 184 Or 178, 221 (1948).

b. Prejudice Required For a Mistrial

2. Admissions
   Although “[i]t is error, in a criminal case, to take any element of the crime from the jury, ‘no matter how overwhelming the evidence of guilt might be,’” State v. Cassada, 58 Or App 84, 87 (quoting State v. Gibson, 252 Or 241, 244 (1969)), modified on other grounds, 59 Or App 484 (1982), a statement in opening may constitute a judicial admission if circumstances indicate that counsel intended the statement to be an admission, and any alleged error proves harmless beyond a reasonable doubt. Id. (counsel admitted in opening statement that defendant was intoxicated, and defendant testified he was drunk); see State v. Adams, 29 Or App 827, 831 (1977) (counsel admitted that there was no dispute as to facts in opening statement).

3. Inadmissible Evidence
   Mistrial is warranted in some cases where the court later rules the evidence covered in the opening statement to be inadmissible.

a. Good Faith Standard
   If the attorney has a good faith belief that the evidence was admissible, the error is not grounds for mistrial. State v. MacLaren, et al., 115 Or 505, 507 (1925) (mere fact attorney was mistaken regarding the competency of anticipated evidence does not constitute reversible error, if statement was made in good faith). Absent evidence of bad faith, the court will presume the statement was offered in good faith. Id.
CHAPTER 9: OPENING STATEMENTS AND CLOSING ARGUMENTS

4. Prejudicial Statement

C. Remedy
The court should instruct the jury to disregard an opening statement as soon as it becomes clear that the statement was improper and it is “early enough in the case to prevent irreparable damage to the defense.” State v. Thompson, 2 Or App 72, 75 (1970) (court should have granted mistrial for improper remark in opening statement). The court should grant a motion for mistrial only when cautionary instructions cannot fully counteract the improper statement. Id. See State v. Alvord, 118 Or App 111 (1993) (mistrial proper where error was not harmless); State v. Mullenburg, 112 Or App 518, 521 (1992) (curative instruction did not “unring the bell” where prosecutor improperly commented on the defendant’s right to remain silent); State v. White, 303 Or 333, 342-44 (1987) (mistrial proper for improper statement regarding defendant’s right to remain silent).

III. CLOSING ARGUMENTS

A. Defendant’s Right to Closing Argument

1. Sixth Amendment Right to Make Closing Argument
The “adversary factfinding process” guaranteed to a defendant under the Sixth Amendment includes the right to an opportunity for closing argument, even in a nonjury trial. Herring v. New York, 422 US 853, 857-59 (1975) (closing argument for defense is “a basic element of the adversary factfinding process in a criminal trial”).

2. Waiver By the Defendant
If the court does not invite closing argument, the defense may have a responsibility to request it; otherwise defendant may waive the right. See State v. Green, 49 Or App 949, 951 (1980) (defendant who did specifically request closing argument nor object to the proceeding failed to preserve error on appeal).

3. Waiver By the State
If the State waives closing argument and the defendant argues, the State has the right to reply only to the defendant’s argument. ORCP 58 B(6) (made applicable to the criminal code by ORS 136.330(1)).
B. Order of Closing Arguments
When the evidence is concluded, unless the case is submitted by both sides to the jury without argument, or the court for good cause directs otherwise, closing arguments proceed as follows:

1. State makes its closing argument to the jury; then
2. Defendant may make his or her argument to the jury; then
3. State may make a rebuttal argument to the jury.

ORCP 58 B(6) (made applicable to the criminal code by ORS 136.330(1)). See State v. Stevens, 311 Or 119, 145 (1991) (“trial court has discretion to alter the customary order of events at trial”); State v. Radford, 101 Or App 665, 668 (1990) (whether to allow both sides to present additional closing arguments is within court’s discretion).

1. State May Not Make a Rebuttal If Defendant Waives Argument
However, if the State waives its opening argument and the defendant also waives argument, then the State has no right to present a rebuttal argument. ORCP 58 B(6) (made applicable to the criminal code by ORS 136.330(1)).

2. Closing Argument Cannot Be Limited to Less Than 2 Hours
No more than two counsel may argue to the jury on behalf of either party; and the time allotted for argument cannot be limited to less than two hours. ORCP 58 B(7) (made applicable to the criminal code by ORS 136.330(1)). ORCP 58 B(7) “deals solely and exclusively with closing jury arguments and with the time constraints that trial judges may place on them.” State v. Doern, 156 Or App 566, 572 (1998) (finding reversible error in trial court’s ruling that limited defendant’s closing argument to 20 minutes).

IV. SCOPE AND CONTENT OF CLOSING ARGUMENT
A. Scope of Closing Argument
A closing argument:


d. May address arguments of opposing counsel, including some statements that would otherwise be improper. *State v. Guritz*, 134 Or App 262, 270 (1995); *State v. Bolger*, 31 Or App 565, 568 (1977) (prosecutor’s comment regarding motive was in response to defendant’s argument that no motive had been shown).

e. May not comment on the law or jury instructions. *Mason v. Allen, et al.*, 183 Or 638, 644-45 (1948) (concluding that aside from elementary legal rules about which there is no debate, statements by counsel concerning their view of the law or the instructions given by the court are inappropriate in closing argument).


1. **State’s Rebuttal Argument Must Reply to Defendant’s Argument**
   The State’s rebuttal argument is limited to matters raised by the defendant’s argument. ORCP 58 B(6) (made applicable to the criminal code by ORS 136.330(1)).

2. **Court’s Discretion to Control Closing Arguments**
   Control over closing arguments is “largely entrusted to the discretion of the trial court.” *State v. Gill*, 3 Or App 488, 497 (1970).

   *State v. Bockorny*, 124 Or App 585, 594 (1993): “A trial court has broad discretion in the control of the arguments of counsel in the penalty phase, as well as the guilt phase, of a capital case. Even if a prosecutor’s statements are improper, tasteless or inappropriate, there is no abuse of discretion unless the effect is to deny a defendant a fair trial.”

B. **Content of Closing Argument**

1. **Proper Argument**
   A proper closing argument may:
   

   b. Make an unfavorable inference from the opposing party’s failure to produce evidence or available witnesses. *State v. Dennis*, 177 Or 73, 107 (1945); *State v. Goodin*, 8 Or App

c. Use exhibits admitted into evidence.

2. Improper Argument

A closing argument may not:

a. Advance personal opinions. State v. Rutherford, 1 Or App 599, 605 (1970) (prosecutor’s use of “I think” and “I firmly believe” regarding a witness’s testimony was improper). See State v. Pirouzkar, 98 Or App 741, 745 (1989) (prosecutor’s comparison of the defendant and her attorney to the novel Anatomy of a Murder was an unwarranted personal attack on defendant’s attorney); State v. Miller, 1 Or App 460, 463-65 (1969) (counsel’s interjection of personal opinions into argument was unethical but not reversible error).

b. Exploit familiarity with jurors. 1 ABA Standards for Criminal Justice § 4-7.3 (3d ed. 1993).

c. Attempt to incite the jury. State v. Wilson, 221 Or 602, 608 (1960) (“[A]rguments which tend to inflame, threaten the community with mob violence, or to coerce a jury into a conviction are improper and constitute reversible error when properly preserved in the record.”).

d. Refer to defendant’s failure to testify. State v. Dennis, 177 Or 73, 106 (1945); State v. Halford, 101 Or App 660, 662 (1990) (“Informing a jury that the defendant has exercised the right to remain silent is likely to prejudice the defendant’s right to a fair trial.”).


g. Rely on facts not in the record. State v. Bolt, 108 Or App 746, 749-51 (1991) (finding prosecutor’s comments about specific facts of other unrelated, particularly heinous crimes were highly likely to improperly influence the jury); State v. Proctor, 94 Or App 720, 724 (1989) (improper to introduce material in closing that was not “within the common
knowledge or experience of the jury” because defendant had no opportunity to challenge it). See also 1 ABA Standards for Criminal Justice § 3-5.9 (3d ed. 1993); 1 ABA Standards for Criminal Justice § 4-7.8 (3d ed. 1993).

h. Argue about the sentence. See State v. Wampler, 30 Or App 931, 935 (1977) (concluding that statements made by both parties regarding defendant’s possible life sentence were improper).

3. Remedies For Improper Argument

If a party timely objects to an improper closing argument, see State v. Sims, 105 Or App 318, 323 (1991) (a timely objection allows the trial court to take action in correcting the harm), the court may:

1. Instruct the jury to disregard the statement. State v. Smith, 310 Or 1, 25-26 (1990).


3. Grant a mistrial if the error is so prejudicial as to deny a fair trial. State v. Pirouzkar, 98 Or App 741, 745 (1989); State v. Gairson, 5 Or App 464, 469 (1971); State v. Seeger, 4 Or App 336, 340 (1971); State v. Montez, 324 Or 343, 356-57 (1996) (trial court’s failure to grant mistrial sua sponte based on prosecutor’s closing argument amounts to “plain error” on appeal only if it is beyond dispute that the comments were so prejudicial as to deny defendant a fair trial).

a. Failure to Object Is to Accept the Tone Set For Argument

If a party did not object to initial improper statements in a closing argument and elects to comment on the issue in its closing, the party has accepted the tone set for argument and cannot successfully argue that the jury drew an improper inference from opposing counsel’s remarks. State v. Pirouzkar, 98 Or App 741, 746 (1989).
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CHAPTER 10: MOTIONS DURING TRIAL

I. MOTION TO EXCLUDE WITNESSES

A. Procedure

The motion to exclude witnesses may be made by a party or the court on its own motion. OEC Rule 615.

B. Purpose

“The policy served by excluding witnesses is to prevent a witness’s testimony from being tainted or influenced by hearing the testimony of a prior witness.” State v. Ott, 61 Or App 576, 583 (1983), rev’d on other grounds, 297 Or 375 (1984). Additionally, exclusion prevents witnesses from observing what types of questions are likely to be posed on cross examination. State v. Larson, 325 Or 15, 26 (1997). See State v. Bishop, 7 Or App 558, 562 (1972) (discussing exclusion of witnesses).

1. Expert Witnesses

The policy behind excluding witnesses “is not necessarily applicable when the witness excluded is an expert who offers his opinion based on evidence introduced during trial.” State v. Ott, 61 Or App 576, 583 (1983), rev’d on other grounds, 297 Or 375 (1984).

C. Court May Deny Motion for Good Cause

The court must grant the motion unless the opponent’s showing of good cause to not exclude witnesses outweighs the policy favoring exclusion. State v. Bishop, 7 Or App 558, 562-63 (1972), overruled on other grounds, State v. Larson, 139 Or App 294, (1996).

D. Limitations on Exclusion of Witnesses

The following witnesses cannot be excluded:

1. A party who is a natural person;
2. An officer or employee of a party which is not a natural person designated as its representative by its attorney;
3. A person whose presence is shown by a party to be essential to the presentation of the party’s cause; or
4. The victim in a criminal case.

OEC Rule 615.
1. Note on Crime Victims

A victim is defined as a person who has suffered financial, social, psychological or physical harm as a result of a crime and includes in the case of homicide a member of the immediate family of the decedent, and in the case of a minor victim, the legal guardian of the minor. ORS 131.007. See State v. Stookey, 119 Or App 487, 490 (1993) (murder victim’s fiance did not meet definition of victim in ORS 131.007).

E. Violation of an Exclusion Order Does Not Warrant Disqualification

“[A] violation of an exclusion order is not, of itself, sufficient to disqualify a defense witness in a criminal case, and . . . the trial court cannot exclude the testimony based upon this ground alone. We . . . hold that exclusion of a witness in a criminal case is too grave a sanction where the violation of the order was not intentional and not procured by a connivance of counsel or for some improper motive. We think this represents a practical and sensitive accommodation between a criminal defendant’s right to present witnesses in his behalf and the court’s need to control the trial proceedings.” State v. Burdge, 295 Or 1, 14 (1983) (citations omitted).

F. Mistrial May be Appropriate for Violation of Exclusion Order

The allowance or denial of a motion for mistrial based on the violation of an exclusion order is within the discretion of the trial court and won’t be disturbed except for an obvious abuse of discretion. State v. Kendrick, 239 Or 512, 518 (1965) (court’s denial of motion for mistrial on grounds that defendant was not prejudiced by the prosecution’s first witness inadvertently hearing State’s opening statement was not an abuse of discretion).

II. OFFER OF PROOF

A. Purpose

An offer of proof makes the record regarding evidence ruled inadmissible during the course of the trial to preserve the issue in the event of appeal. A party may not claim error based upon a trial court’s ruling to exclude evidence unless a substantial right of the party was affected, and the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked. OEC Rule 103(1)(b).

“Under OEC 103(1)(b), when a trial court excludes testimony or other evidence, an offer of proof by the proponent of the evidence is required to preserve any claim of error related to what the evidence would have shown. . . . Adequate offers of proof are
required to ensure that appellate courts are able to determine (1) whether it was error to exclude the evidence, and (2) whether any error was likely to have affected the result of the case.” State v. Busby, 315 Or 292, 298 (1993). “Other purposes are to permit the trial judge to reconsider his or her ruling in view of the actual evidence to be offered, and to enable opposing counsel to take appropriate action.” State v. Smith, 319 Or 37, 44 (1994) (citations omitted). See State v. Olmstead, 310 Or 455, 461 (1990) (discussing the purpose of offer of proof).

1. **Offer of Proof Required**

“The only situations in which an offer of proof is not required are those situations in which an offer of proof is impossible because of a trial court’s refusal to allow the offer of proof to be made.” State v. Affeld, 307 Or 125, 129 (1988).

**B. Procedure**

1. **Offers of Proof Should Be Made Outside the Jury’s Presence**

To prevent exposing the jury to inadmissible evidence, to the extent practicable, the offer of proof should be made outside the presence of the jury. OEC Rule 103(3).

2. **Ways to Make Offer**

“One method of making an offer of proof is by question and answer. It also is acceptable, however, for a party’s counsel to state what the proposed evidence is expected to be.” State v. Phillips, 314 Or 460, 466 (1992). See OEC Rule 103(1)(b).

   a. **Court May Require Proof to Be In Question and Answer Form**

   The court may direct that the offer of proof be made in question and answer form. OEC Rule 103(2).

3. **Court May Supplement the Record For Appeal**

The trial court may add further statements which show the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon to assist in making a full record for purposes of appeal. OEC Rule 103(2).

**III. MOTION TO STRIKE ANSWER OF WITNESS**

**A. Purpose**

A party may not claim error based upon a trial court’s ruling to admit evidence unless a **substantial right** of the party was affected, and a timely objection or motion to strike was made on the record,
stating the specific ground of objection, if the specific ground was not apparent from the context. OEC Rule 103(1)(a).

B. Use

1. The motion is used when a witness answers a question before counsel can object.

2. The motion is offered by the questioning counsel when a witness is not responsive to the question.

3. The motion is offered by opposing counsel when there is:
   a. Improper foundation;
   b. Cumulative evidence; or
   c. Other evidentiary objections.

C. Procedure

If the motion is granted, the jury should be instructed to disregard the witness’s answer.

IV. MOTION TO COMPEL ELECTION

A. Generally

A motion to compel election is made by the defendant to require the State to:

1. Make a general allegation in the indictment precise;

2. Select a theory when the crime charged has been alleged as committed by alternative means; or

3. Elect on which of the improperly joined charges the prosecution is going to proceed.

“We draw . . . the general rule that juries must agree on the factual occurrences that constitute the statutorily defined elements of the crime at issue, even though they need not agree on the evidentiary bases for their decisions as to those elements. The rule only makes sense. To hold otherwise would permit juries to declare a defendant guilty without the requisite agreement that the defendant actually committed the acts that constitute the crime charged. We also draw . . . that the trial court generally has the discretion to address the problem either by requiring the state to elect at the close of its case-in-chief or by giving appropriate jury instructions. There may be circumstances in which one approach may be more appropriate than the other. For example, when time is an element essential to the defense, that is, when the defense is an alibi or a
statute of limitations, an election by the state at the close of its
case-in-chief may be more appropriate.” State v. Houston, 147 Or
App 285, 292 (1997) (reversing conviction because the “trial court
neither required the state to elect which of the separate occasions
it had established at trial was to be the basis for the jury’s decision
nor delivered instructions properly instructing the jury as to its
obligation to base its decision on a single criminal act”).

to compel election was not error where the court’s “instruction
sufficiently ensured that the jury could convict only upon a
determination that the same act had occurred on one occasion”),

B. Timing
The motion is generally made pretrial, but is permitted at any point
during the trial.

State v. Lee, 202 Or 592, 607 (1954): “We are aware of no reason
which demands a holding that the election in all cases must be
made at this or that stage of the case. It appears to us that the
administration of justice will be better served if the rule governing
election is flexible so that the state will not be forced to make a
choice when it cannot intelligently do so, but which will afford the
defendant sufficient time, after the choice has been made, to defend
himself properly.”

1. Court Has Discretion to Grant Motion
   The discretion to grant a motion to compel election remains

C. Considerations
In determining whether the State must elect a specific date on
which the charged crime occurred prior to the conclusion of its
case in chief, the court should consider:

1. The nature of the charged crime;
2. The defense sought to be asserted;
3. The kind of evidence necessary to establish the material
elements of the charge; and
4. The degree of reliance the State places on circumstantial
evidence.

D. Specific Examples
Where the crime may be committed by the use of different means, the prosecution is permitted to plead and prove alternative theories. ORS 132.560(1)(a). Thus, the prosecution need not elect.

*State v. Cook*, 242 Or 509, 520-21 (1966): The prosecution is not required to elect whether the defendant is to be charged as an aider and abettor or as a principal.

*State v. Pace*, 187 Or 498, 506 (1949): “Where the evidence discloses only one offense within the statutory period, the time of commitment thereof is not material. If, however, the evidence tends to show more than one similar act, the State is required to make an election and time becomes material.” *See State v. Deptuch*, 96 Or App 228, 231 (1989) (where State elected to prosecute defendant on date alleged court erred in instructing jury to the contrary).

*State v. Lee*, 202 Or 592, 607 (1954): “When a defendant moves for an election and announces a purpose to rely upon an alibi, the trial judge should ask the attorneys for information relevant to the motion, so that he will be able to rule advisedly upon the motion. The latter is addressed to a discretionary power, and the judge should always seek to obtain from counsel sufficient light so that he will exercise his discretion prudently.”

*State v. Shields*, 280 Or 471, 474 (1977): “[T]he trial court should, on defendant’s motion, require the state to elect upon which charge it wishes to proceed when it becomes apparent that the two offenses were not in fact part of the same transaction.” *See State v. Fitzgerald*, 267 Or 266, 273 (1973) (concluding that the trial court erred “in not requiring the state to elect when it became apparent that the two offenses were not part of the same transaction”).

E. Joinder
If the State or defendant is substantially prejudiced by a joinder of offenses, the court may order an election or separate trials. ORS 132.560(3).

V. MOTION FOR JUDGMENT OF ACQUITTAL

A. Appropriate When Evidence Will Not Support Conviction
After the close of the State’s evidence or of all the evidence, the defendant may move the court for a judgment of acquittal, which the court must grant if the evidence introduced would not support a verdict against the defendant. ORS 136.445.
1. Acquittal Defined
An “acquittal” occurs when the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction. ORS 131.505(6); State v. Sperry, 149 Or App 690, 697 (1997) (concluding that “acquittal” as used in ORS 136.445 should be construed as defined in ORS 131.505(6)).

2. Evidence Must Be Sufficient Beyond a Reasonable Doubt
“Under [ORS 136.445], a trial judge must grant a motion for judgment of acquittal if the evidence presented by the state is insufficient to allow a rational trier of fact to conclude that the defendant committed each element of the crime or crimes charged.” State v. Davis, 194 Or App 382, 390 (2004) (holding that the trial court properly denied defendant’s motions for judgment of acquittal once State presented legally sufficient evidence on each count). See ORS 136.445 (requiring court to grant motion if evidence introduced would not support a verdict against the defendant); State v. Vaughn, 175 Or App 192 (2001).

State v. Cunningham, 320 Or 47, 63 (1994): “This court reviews questions of the sufficiency of the evidence in a criminal case following a conviction by examining the evidence in the light most favorable to the state to determine whether a rational trier of fact, accepting reasonable inferences and reasonable credibility choices, could have found the essential element of the crime beyond a reasonable doubt.”

B. Motion Cannot Be Made Post Verdict
ORS 136.445 “permits, but does not require, a defendant in a criminal proceeding to make a motion at two points in the proceeding, namely, after close of the state’s evidence or after all the evidence;” it does not “allow a criminal defendant to move for a judgment of acquittal after a jury returned its verdict if, in hindsight, the evidence did not support the verdict.” State v. Metcalfe, 328 Or 309, 313 (1999) (concluding that ORS 136.445 “does not authorize a trial court to grant a motion for judgment of acquittal after a jury verdict”). “[T]he only post-verdict motions authorized by statute in criminal cases are motions for a new trial and motions in arrest of judgment.” State ex rel. Haas v. Schwabe, 276 Or 853, 856 (1976) (finding that judge lacked statutory authority to enter a post-verdict judgment of acquittal). See also State v. Cartwright, 246 Or 120, 133-34 (1966) (noting its disapproval of the practice of moving for judgment of acquittal after the court has charged the jury).
C. **Procedure**  
A motion for judgment of acquittal “always should be made outside the presence of the jury.” 2 CRIMINAL LAW § 20.56 (Oregon CLE 2005).

D. **Variance Between Allegations and Proof Supports Motion**  
A variance between the facts alleged in the indictment and facts proved which is material, prejudicial, misleading, or exposes defendant to the possibility of being put in double jeopardy, supports the acquittal motion. *State v. Roper*, 34 Or App 273, 277 (1978), *rev’d on other grounds*, 286 Or 621 (1979).

E. **Venue May be Challenged by Motion**  
“[B]ecause the state must prove venue, a defendant may challenge venue in the same manner as he could the sufficiency of proof of any other required fact. Defendant’s challenge was properly preserved by his motion for judgment of acquittal.” *State v. O’Neall*, 115 Or App 62, 65 (1992); *see State v. McCown*, 113 Or App 627, 630 (1992) (motions for judgment of acquittal on grounds of improper venue denied).

F. **Acquittal Bars Subsequent Prosecution**  
An acquittal bars another prosecution for the same offense. ORS 136.445.

VI. **MOTION IN ARREST OF JUDGMENT**

A. **Purpose**  
A motion in arrest of judgment is a request by the defendant that no judgment be rendered on a plea or verdict of guilty. ORS 136.500.

1. **Grounds**  
The motion may be founded only on either or both of the grounds specified in ORS 135.630(1) (court lacks jurisdiction over the subject of the accusatory instrument because the crime is not triable within the county) and ORS 135.630(4) (facts stated do not constitute an offense). ORS 136.500; *see ORS 135.640.*

   a. **Vagueness Challenge Is Proper Subject of Motion**  
   “If a statute is constitutionally too vague, then the facts alleged in an indictment under such a statute do not and cannot constitute an offense. Thus, a vagueness challenge falls squarely under ORS 135.630(4) and the challenge

B. When the Motion May Be Taken

1. At Trial
   The proper procedure for treating the demurrer-type objection provided in ORS 135.630(4) when it is raised at trial is the motion in arrest of judgment, and not a motion for judgment of acquittal. ORS 135.640; see State v. Wigglesworth, 186 Or App 374, 378 n.3 (2003); State v. McKenzie, 307 Or 554, 561 (1989).

2. Post Judgment
   A motion in arrest of judgment raised after a judgment has been entered must be made within the time allowed to file a motion for a new trial, and may be made and heard as the court directs. ORS 136.500.

   a. Timing
      A motion in arrest of judgment must be filed within 10 days after entry of the judgment, and the opposing motion must be filed within 10 days following the filing of the motion, unless the court allows further time. The court must hear and determine the motion no later than 55 days following entry of the judgment. ORCP 64F (made applicable to the criminal code by ORS 136.535).
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CHAPTER 11: EVIDENCE—WITNESSES

I. COMPETENCY

A. General Rule of Competency

Rule 601 of the Oregon Evidence Code (OEC) provides that any person who has sensory perception and can make known that perception to others, may testify as a witness. OEC Rule 601.

1. Elements of Competency

Rule 601 effectively removes “all the old common law disqualifications” to testifying, such that any person who meets the following criteria may be competent to testify:

1. Recognize the necessity of telling the truth;
2. Have knowledge of the matter from personal observation;
3. Have some recollection of that knowledge at the time of testimony;
4. Be able to communicate that knowledge; and
5. Be free of any disqualification that would render the person’s testimony presumably inaccurate or prejudicial.

1981 Conference Committee Commentary to OEC Rule 601.

B. Competency Decisions Are Within Discretion of the Trial Court

Whether a person has sufficient ability to perceive, recollect, and communicate in order to testify as a witness is for the court to decide in the exercise of sound discretion. 1981 Conference Committee Commentary to OEC Rule 601.

2. Witness’s Personal Knowledge of the Matter Required

Except as provided in OEC Rule 703 covering expert testimony, a witness may not testify to a matter unless evidence is introduced that establishes the witness’s personal knowledge of the matter. OEC Rule 602. The witnesses’ testimony “may be sufficient to lay this foundation.” 1981 Conference Committee Commentary to OEC Rule 602.

3. Right to Call Competent Witnesses

A party has the right to call and elicit testimony from competent witnesses. It is error for the court to refuse that right, unless testimony is otherwise objectionable or cumulative.

ORS 40.010 to 40.585 and 41.415 comprise the Oregon Evidence Code. ORS 40.010. When a Rule is cited in this chapter, parallel citations to the corresponding ORS are omitted.

□ Be able to perceive;
□ Be able to communicate the perception to others, alone or with the assistance of an interpreter;
□ Have personal knowledge of the matter; and
□ Have taken an oath or affirmation to testify truthfully.

B. Witness Must Swear to Testify Truthfully
Before testifying, every witness must declare, by oath or affirmation, that he or she will testify truthfully. OEC Rule 603(1). See State v. Milbradt, 305 Or 621, 624 (1988). The swearing of the witness must be conducted as a serious ceremony and not as a mere formality. UTCR 3.080.

1. Flexibility In Swearing the Witness
The court has flexibility in administering either an oath or an affirmation, depending upon the witness’s personal beliefs: “Any mode of administering the oath or affirmation which is binding upon the conscience of the person to whom the oath or affirmation is administered is allowable.” 1981 Conference Committee Commentary to OEC Rule 603. See Or Const Art I, § 7; OEC Rule 603(2)-(3) (examples of oath and affirmation).

a. No Religious Test For Witnesses
No person can be rendered incompetent as a witness based on his or her opinions on religious matters. Or Const Art I, § 6.

b. Discussion on Form of Oath or Affirmation
Discussions between the judge and the witness regarding the form of the oath or affirmation should be conducted outside the presence of the jury to avoid possible prejudice based on the witness’s personal beliefs. Laird C. Kirkpatrick, Oregon Evidence § 603.03 (4th ed., Lexis 2002). See OEC Rule 104(3).

2. Children
In the case of a child witness under the age of 10, the child’s promise to tell the truth qualifies as an affirmation, provided that the court is satisfied that the child understands the nature and obligation of that promise. 1981 Conference Committee Commentary to OEC Rule 603.

3. Refusal to Be Sworn
A witness’s refusal to swear that he or she will testify truthfully may result in barring the witness from testifying. See U.S. v. Fowler, 605 F2d 181, 185 (5th Cir. 1979). Refusal to be sworn or answer as a witness may be punishable as contempt. ORCP 55G (made applicable to the criminal code by ORS 136.600).

4. Failure to Object to Unsworn Testimony Waives Defect
A party’s failure to object to receipt of testimony by an unsworn witness waives the defect. State v. Cox, 43 Or

C. Challenges to Competency

1. Competency Is Decided By the Court
   Preliminary questions concerning the qualification of a person to be a witness are decided by the court. OEC Rule 104(1). The burden is on the party objecting to the witness.

2. Procedure
   When the interests of justice require, the court must determine the competency of the witness outside the presence of the jury. OEC Rule 104(3).

3. Timing of Challenge
   If a party is aware of a competency issue, the party must timely request a voir dire examination of the witness. State v. Quick, 24 Or App 437, 440 (1976); State v. Pace, 187 Or 498, 507 (1949) (requiring a timely request to examine witness’s mental capacity); State v. Jorgensen, 8 Or App 1, 10 (1972) (lack of objection in the record to witness testimony precluded review).

D. Special Issues

1. Judge as Witness

   a. Judge May Testify When Disqualified
      “[Rule 605] does not prevent a judge from testifying as a witness when the judge has taken a disqualification from presiding.” 1981 Conference Committee Commentary to OEC Rule 605.

2. Juror as Witness
   A juror may not testify as a witness in the trial of the case in which the person has been sworn to sit as a juror. OEC Rule 606.

3. Lawyer as Witness on Behalf of the Client
   Rule 3.7(a) prohibits a lawyer from acting as advocate at a trial in which the lawyer is likely to be a witness on behalf of the lawyer’s client, unless:
The testimony relates to an uncontested issue;

b. The testimony relates to the nature and value of legal services rendered in the case;

c. Disqualification of the lawyer would work a substantial hardship on the client; or

d. The lawyer is appearing pro se.

Or. R. Prof. Conduct 3.7(a) (2005). However, a lawyer may continue representation even though a member of the lawyer’s firm is likely to be called as a witness on the client’s behalf. Or. R. Prof. Conduct 3.7(b) (2005).

4. **Lawyer as Witness Other Than on Behalf of Client**

If, after accepting the case, the lawyer learns or it is obvious that the lawyer or a member of the lawyer’s firm may be called as a witness other than on behalf of the client, the lawyer may continue representation until it is apparent that the testimony is or may be prejudicial to the client. Or. R. Prof. Conduct 3.7(c) (2005).

4. **Child Witnesses**

The court determines whether children are competent to testify under OEC Rule 601. Laird C. Kirkpatrick, *Oregon Evidence § 601.03[6]* (4th ed., Lexis 2002). “Courts have continuing discretion to conduct competency examinations of children, and when competency of a child witness is challenged such an examination will usually be required. The ruling of the trial court regarding competency will normally be upheld on appeal, provided an adequate record is made supporting the ruling. See *State v. Bauman*, 98 Or App 316, 318 (1989) (affirming finding that four-year-old child sex abuse victim was a competent witness); *State v. Stevens*, 311 Or 119, 138-42 (1991) (an eight-year-old victim and her four-year-old sister were incompetent to be witnesses because they were traumatized by the presence of the defendant and were unable to communicate their perceptions).” *Id.* (citations to regional reporter omitted).

4. **Expediting the Proceedings**

Except in juvenile proceedings other than the termination of parental rights, or except for good cause shown by either party, in any case where a child under 18 years of age is called to give testimony and the child or a member of the child’s family is the victim of a crime, the court must expedite the action and insure that it takes precedence over any other. ORS 44.545(1).
b. **Granting a Continuance**

When determining whether or not to grant a continuance, the judge must consider the age of the child and the potential adverse impact the delay may have on the well-being of the child. The court must make written findings of fact and conclusions of law when granting a continuance. ORS 44.545(1).

c. **Accommodating the Child witness**

If a child *under 12 years of age* will be called to testify, the attorney or party who plans to call the witness must notify the court at least seven days before the trial or proceeding of any special accommodations needed by the witness. Upon receiving the notice, the court must order such accommodations as are appropriate under the circumstances. ORS 44.547(1).

5. **Person With Developmental Disability as Witness**

If a person with a developmental disability will be called to testify, the attorney or party who plans to call the witness must notify the court at least seven days before the trial or proceeding of any special accommodations needed by the witness. Upon receiving the notice, the court must order such accommodations as are appropriate under the circumstances. ORS 44.547(1). See ORS 44.547(2) (defining developmental disability).

6. **Alcohol or Drug Use**

A substance abusing witness is competent to testify, unless it can be shown that the witness was under the influence of alcohol or drugs at the time of the event as to which the witness testifies, in which case it becomes an issue of impeachment. Laird C. Kirkpatrick, *Oregon Evidence* § 601.03[6] (4th ed., Lexis 2002); *State v. Batchelor*, 34 Or App 47, 50 (1978) (trial court properly limited defendant’s cross-examination of witness’s drug use in general when defendant failed to produce evidence of witness’s drug use on night in question).

7. **Mental Capacity**

“Mental defect is not of itself a disqualification of the witness.” *State v. Longoria*, 17 Or App 1, 13-14 (1974) (stating that “it is only those mental defects which interfere with the ability to perceive and relate” that disqualify a person as a competent witness). *See State v. Milbradt*, 305 Or 621, 624-25 (1988) (mentally retarded sex abuse victims competent to testify).
a. **Discretion to Decide Mental Capacity**

In the case of mental capacity, the court’s discretion in determining whether a person is competent to testify is clearly recognized. 1981 Conference Committee Commentary to OEC Rule 601. See OEC Rule 104(1); *State v. Quick*, 24 Or App 437, 440-41 (1976) (the court determines the issue of competency, but the jury is to decide the quality and credibility of testimony by a witness with a mental defect).

b. **Voir Dire Examination**

The court may order a voir dire examination of a witness whose mental capacity is at issue. See *State v. Pace*, 187 Or 498, 506-07 (1949). See generally *U.S. v. Gutman*, 725 F2d 417, 420 (7th Cir. 1984).

8. **Habitual Liar**

“The demonstrated fact that a person has lied on a number of occasions or given conflicting accounts of a particular event is not a basis of disqualification. The quality of the testimony is a determination left to the trier of fact. Whether a person, who has the ability to perceive an event, recall it and relate the recollection will tell the truth is to be tested by cross-examination and not by a motion to disqualify the witness as incompetent. The competency inquiry should be made with a view to the preference toward allowing the trier of fact to be the ultimate judge of the quality of the evidence.” *State v. Lantz*, 44 Or App 695, 700 (1980).

9. **Defendant as Witness**

The defendant may be deemed a competent witness, but only at his or her own request; the credibility of the defendant’s testimony is left solely to the jury. ORS 136.643.

a. **Defendant’s Constitutional Right to Testify**

A defendant is guaranteed the right to testify by both the federal and state constitutions. *State v. Lotches*, 331 Or 455, 483 n.10 (2000); *Rock v. Arkansas*, 483 US 44, 51 (1987). “[H]owever, a criminal defendant’s right to testify is subject to the state’s right to cross-examine him or her.” *State v. Cox*, 337 Or 477, 492 (2004); see *Rock*, 483 US at 52 (stating that the defendant’s veracity “can be tested adequately by cross-examination”).

b. **Limitation on Cross-examination of the Defendant**

If the defendant testifies, the State’s right to cross-examination must be limited to facts upon which the
defendant testified and which tend toward conviction or acquittal. ORS 136.643. See State v. Tippie, 15 Or App 660, 668 (1973) (concluding that cross-examination of defendant that “in no way related to defendant’s testimony on direct examination” was improper under former ORS 136.643), rev’d on other grounds, 269 Or 661 (1974).

10. Witness Who Has Appealed From Criminal Convictions
A person who pled not guilty and has an appeal pending from convictions for crimes resulting from the same events about which that person would be asked to testify may assert the privilege against self-incrimination because of the possibility of being granted a new trial. State v. Sutterfield, 45 Or App 145, 147 (1980).

11. Codefendant as Witness
A codefendant is a competent witness at the trial of another defendant. ORS 136.645.

12. Codefendant Asserting Privilege Against Self-incrimination

a. The Johnson Rule
It is reversible error “... for the state to call a witness, who it appears from prior testimony, already in the record, may have been closely associated with the defendant in the [charged crime], and the witness has been indicted for but not convicted of his purported participation in that [crime], when the state knows that the witness will invoke his constitutional right, and, with this knowledge, asks questions from which the jurors themselves could infer that if the questions were answered truthfully the answers would tend to establish the guilt of the defendant.” State v. Johnson, 243 Or 532, 538 (1966).

i. Make the Record Out of the Jury’s Presence
Before the Johnson rule can be applied, an actual determination of whether the witness will refuse to testify must be made on the record and out of the presence of the jury. State v. Froats, 47 Or App 819, 822 (1980).

ii. Exception to the Johnson Rule
If a codefendant has been convicted and is not eligible for appeal, the prosecutor may call the codefendant as a witness because the privilege against self-incrimination no longer exists, even though the prosecutor knows that the witness will nevertheless claim the privilege.

13. Witness Asserting Privilege Against Self-incrimination
   If a witness, who is not charged with a crime, asserts the privilege against self-incrimination, the court may have to make a preliminary determination as to whether the witness’s answers would be self-incriminating. See Hoffman v. U.S., 341 US 479, 486-90 (1951); Blau v. U.S., 340 US 159 (1950).

14. Hypnotized Witnesses
   “[T]he testimony of a witness who has been hypnotized is admissible; the issue is the weight to be given the testimony, not its admissibility.” State v. King, 84 Or App 165, 176 (1987). See State v. Jorgensen, 8 Or App 1, 7-10 (1972).

   a. Procedure
   If a party intends to offer the testimony of a person who has been subjected to hypnosis or a similar procedure, the use of such testimony must be conditioned upon recordation of the entire procedure and availability of that recordation to the other party. ORS 136.675.

II. INTERPRETERS

   See Chapter 19, “Interpreters.”

A. Appointment For Non-English-Speaking Party or Witness
   The court must appoint a qualified interpreter whenever it is necessary to:

   1. Interpret the proceedings to a non-English-speaking party;
   2. Interpret the testimony of a non-English-speaking party or witness; or
   3. Assist the court in performing its duties and responsibilities.

   ORS 45.275(1).

1. Non-english-Speaking Person Defined
   A non-English-speaking person is a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate effectively in the proceedings. ORS 45.275(9)(b) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).
2. **Qualified Interpreter to a Non-English-Speaking Person Defined**
   A qualified interpreter to a non-English-speaking person must be readily able to:
   
   a. Communicate with the non-English-speaking person;
   
   b. Orally transfer the meaning of statements to and from English and the non-English-speaking person’s language; and
   
   c. Interpret in a manner that conserves the meaning, tone, level, style, and register of the original statement, without additions or omissions.

   ORS 45.275(9)(c) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

   a. **Dialect, Slang, or Specialized Vocabulary**
   A qualified interpreter must be able to interpret the dialect, slang, or specialized vocabulary used by the non-English-speaking party or witness. ORS 45.275(9)(c) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

B. **Appointment For Disabled Party or Witness**
If no other person is responsible for providing an interpreter in a proceeding in which a disabled person is a party or witness, the court must appoint a qualified interpreter and make appropriate assistive communication devices available whenever it is necessary to interpret the proceedings to the disabled person, or to interpret the testimony of the disabled person. ORS 45.285(1).

1. **Disabled Person Defined**
   A “disabled person” is a person who cannot readily understand the proceedings because of deafness or a physical hearing impairment, or cannot communicate in the proceedings because of a physical speaking impairment. ORS 45.285(4)(b).

2. **Qualified Interpreter to a Disabled Person Defined**
   A qualified interpreter to a disabled person must be readily able to:
   
   1. Communicate with the disabled person;
   
   2. Interpret the proceedings, and
   
   3. Accurately repeat and interpret the statements of the disabled person to the court.

   ORS 45.285(4)(d).
C. Appointment of a Certified Interpreter Required
Whenever the court is required to appoint an interpreter for any person, the court must appoint a qualified interpreter who has been certified under ORS 45.291, unless a certified interpreter is not available, able or willing to serve, in which case the court must appoint a qualified interpreter. ORS 45.288(1).

1. Party May Request a Qualified Interpreter
Upon the request of a party, the court has discretion to appoint a qualified interpreter to act in lieu of a certified interpreter. ORS 45.288(1).

D. Interpreter Must be Qualified as an Expert
An interpreter is subject to the Oregon Evidence Code’s provisions relating to qualification as an expert and must take an oath or affirmation to make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter’s best skills and judgment in accordance with the standards and ethics of the interpreter profession. OEC Rule 604. The interpreter must state the interpreter’s name on the record and indicate whether the interpreter is certified under ORS 45.291. ORS 45.275(8) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

1. Exception
An interpreter who is certified under ORS 45.291 is not required to take the oath or affirmation or submit his or her qualifications on the record. ORS 45.275(8) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

III. SECURING THE WITNESS’S ATTENDANCE

A. Person Before The Court
If a person is present in court, or before the judge, the judge may require a person to testify, even though the person is not under subpoena.

B. Subpoena
The process by which a witness’s attendance is secured before the court is a subpoena. ORS 136.555.

1. Subpoena Duces Tecum
If a witness is required to bring books, papers, or documents, the subpoena must include a direction to the following effect: “And you are required, also, to bring with you the following:
(describing intelligibly the books, papers or documents required).” ORS 136.580(1).

a. Inspecting and Copying the Materials
   Either party may move the court to direct that the books, papers, or documents described in the subpoena be produced before the court prior to trial or prior to when they are to be offered in evidence, and the court may permit either party to inspect or copy the materials. ORS 136.580(2).

b. Medical Records
   Medical records may be obtained by subpoena as provided in ORCP 55H and must be sent only to the court before which the matter is pending (or its clerk) or the grand jury; in the case of a grand jury proceeding, notice to the individual is not required. ORS 136.447.

i. Restricted or Limited Disclosure
   If disclosure of any requested records is restricted or otherwise limited by state or federal law, such records cannot be disclosed unless the requesting party has complied with the applicable law. ORCP 55H(2) (made applicable to the criminal code by ORS 136.447).

ii. Attendance By the Custodian of Records
   Unless the personal attendance of the custodian of records is requested as provided in ORCP 55H(4), when a subpoena requesting individually identifiable health information is served upon a custodian who is not a party to the action, the custodian sufficiently complies with the subpoena by delivering by mail or otherwise a true and correct copy of the records within five days after receiving the subpoena. ORCP 55H(2)(b).

2. Issuance of Subpoenas
   See ORCP 55H(1)(a) for a definition of “individually identifiable health information.”

   a. By Magistrate at Preliminary Examination
      A magistrate examining an information or complaint may subscribe and issue subpoenas for witnesses within the state, either on behalf of the State or of the defendant. ORS 136.557.

   b. By District Attorney Before Grand Jury
      The district attorney may subscribe and issue subpoenas for witnesses within the state in support of the prosecution or
as the grand jury directs to appear before it upon a pending investigation. ORS 136.563.

c. **By District Attorney For Trial Witnesses**
   In support of an indictment, the district attorney may subscribe and issue subpoenas for up to **10 witnesses** within the state to appear before the trial court. ORS 136.565.

d. **By Defendant**
   The defendant is entitled to issue **10 subpoenas** for witnesses within the state at the expense of the State. At the defendant’s own expense, the defendant is entitled to issue subpoenas for any number of additional witnesses without court order. ORS 136.567(1).

i. **Expenses For Additional Witnesses**
   The defendant must pay the costs of serving the subpoenas, the per diem and mileage fees provided by ORS 136.602, and expenses allowed under ORS 136.603 for additional witnesses subpoenaed at the defendant’s expense. ORS 136.567(1).

ii. **Issuance of Defendant's Subpoenas**
   The defendant’s subpoenas must be subscribed and issued either by the defendant’s attorney of record, or, if requested by the defendant, by the clerk of the court in which the trial is pending, and in blank under the court’s seal. ORS 136.567(2).

e. **Additional Witnesses at State Expense Must Be Approved**
   If either party desires more than 10 witnesses at state expense, the party must move for an order allowing the issuance of subpoenas for the additional witnesses, supported by a written statement by the district attorney or an affidavit by the defendant providing the names and residences of such witnesses and the facts expected to be proved by them. The court must order the issuance of subpoenas for all such witnesses that appear to be necessary and material to a fair, full, and impartial trial. ORS 136.570.

3. **Service of Subpoenas**

a. **By Whom Subpoena Is Served**
   A subpoena may be served by (1) the defendant or (2) any person over 18 years of age, and must be served by any sheriff or constable within the county or district, either
b. **Personal Service**
   Except in regard to medical records and service upon a law enforcement agency, a subpoena is served by delivering a copy to the witness personally. ORS 136.595(1).

c. **Service Upon Peace Officers and Law Enforcement Agencies**
   A subpoena may be personally served to a peace officer whose attendance at trial is required not later than **10 days** prior to the date attendance is sought, only if the officer is currently employed as a peace officer and is present in the state. ORS 136.595(2)(b). Service may also be made to a person designated to receive service of subpoena by the law enforcement agency that employs the officer; if such person is absent, service may be made upon the officer in charge of the agency. ORS 136.595(2)(a). The agency must make a good faith effort to actually notify the officer of the date, time, and location of the court appearance; if the officer cannot be notified, the agency must contact the court and request a continuance to allow the officer to be personally served. ORS 136.595(2)(c).

d. **Service on Incarcerated Witness**
   A subpoena may be served on a witness incarcerated in a state prison or jail only upon leave of court, and attendance of the witness may be compelled only upon such terms as the court prescribes. The court may order (1) temporary removal and production of the prisoner for testimony; or (2) testimony taken by deposition at the place of confinement. The subpoena and court order must be served upon the prisoner’s custodian. ORCP 55E (made applicable to the criminal code by ORS 136.600).

4. **Proof of Service**
   Proof of service of the subpoena is made in the same manner as in the service of a summons. ORS 136.595(1). See ORCP 7F(2); ORCP 55D(5).

5. **Forced Entry**
   If a witness is concealed to prevent the service of a subpoena, a sheriff, deputy, or a special appointee of the sheriff is authorized and required to break into the building or vessel and serve the subpoena. ORS 44.150 (made applicable to the criminal code by ORS 136.600).
6. **Disobedience to Subpoena**
A witness’s disobedience to a subpoena or a refusal to be sworn or answer may be punished as contempt. ORCP 55G (made applicable to the criminal code by ORS 136.600). See ORS 33.015(2)(c) (defining contempt to include refusal to appear as a witness, be sworn, or answer a question contrary to the court’s order).

C. **Payment of Witness Fees**

1. **Prosecution Witnesses**
The per diem fees, mileage, and any expenses allowed under ORS 136.603 due to any witness in a grand jury proceeding or any prosecution witness in a criminal action must be paid by the county in which the proceeding is held. Payment is made upon a verified claim of the witness showing the number of days attended and the miles traveled; and a certified statement received from the district attorney, justice of the peace, or committing magistrate showing the amounts due the witness. ORS 136.602(1).

2. **Defense Witnesses**
The per diem fees, mileage, and any expenses allowed under ORS 136.603 due to any defense witness in a criminal action must be paid by the defendant. ORS 136.602(2).

   a. **Exception: Financially Eligible Defendants**
   If the defendant is determined to be financially eligible for appointed counsel at state expense, witness fees may be paid by the State pursuant to ORS 135.055. ORS 136.602(2).

3. **Out-of-State or Indigent Witnesses**
If a witness has come from outside the state, or it appears that the witness is indigent, the court may order direct payment to the witness of a reasonable sum for expenses. ORS 136.603(1). See ORS 136.603(1)(b) (providing who must pay expenses).

D. **Uniform Act to Secure the Attendance of Witnesses**
The Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings (Uniform Act) is applicable in Oregon according to ORS 136.623 to 136.637.
1. Where Witness Material to Proceeding In Another State Is In Oregon

a. Certificate From Requesting Jurisdiction
If a judge in any state certifies under seal that (1) a person residing in Oregon is a material witness to a grand jury investigation or a criminal prosecution in that state, and (2) the person’s presence is required for a specified number of days, upon presentation of such certificate, any judge in the county in which the person resides must fix a time and place for a hearing and direct the person to appear. ORS 136.625(1).

b. Findings Required at Hearing
At the hearing on the certificate, the judge must issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court of the requesting jurisdiction if the judge finds that:

1. The witness is material and necessary;
2. Compelling the witness to attend and testify will not cause undue hardship to the witness; and
3. The laws of the requesting state (and any other state through which the witness must travel) will give the witness protection from arrest and service of civil and criminal process.

ORS 136.625(2).

c. Immediate Appearance In Lieu of Hearing Notification
If the certificate recommends that the person be taken into immediate custody and delivered to an officer of the requesting jurisdiction to assure the person’s attendance, the judge may direct the person to be brought before the court immediately for a hearing. ORS 136.625(3).

i. Immediate Custody In Lieu of Summons
Based on the certificate as prima facie evidence of the desirability of the person’s immediate custody and delivery, if the judge is satisfied thereby, the judge may order that the person be taken into immediate custody and delivered to an officer of the requesting jurisdiction (only after the person is paid the mileage and per diem expenses provided in ORS 136.625(4)). ORS 136.625(3).
Where Witness Material to Proceeding In Oregon Is In Another State

If a person in another state is a material witness to a grand jury investigation or a criminal prosecution in Oregon, a judge of the respective court may issue a certificate under seal stating:

a. The materiality of the witness;

b. The number of days the witness’s presence is required; and

c. If desired, a recommendation of whether the person should be taken into immediate custody and delivered to an officer of Oregon.

ORS 136.627(1).

Requisite Showing of Witness’s Materiality

“It is uniformly held that statutes which require a proper and timely showing of materiality of the testimony of witnesses subpoenaed at public expense are reasonable and harmonious to the terms of the constitutional guaranty of compulsory process, and that without compliance with such provisions the defendant cannot demand as a matter of right that the witnesses be subpoenaed. The requisite finding of materiality can only be made on the basis of an affidavit or other competent evidence setting forth the facts to which the proposed witness would testify.” *State v. Blount*, 200 Or 35, 54 (1953) (citations omitted); see also *State v. Harris*, 47 Or App 665, 669 (1980) (quoting *Blount*).

Witness Cannot Be Held Over Except By Court Order

A witness who has appeared according to the summons cannot be required to remain within the state for longer than specified in the certificate, unless ordered by the court. ORS 136.627(2).

Misdemeanor Charges


Immunity of Out-of-State Witness

A person summoned to this state under the Uniform Act is immune to arrest and service of civil or criminal process in connection with matters arising before the person entered the state pursuant to the summons. ORS 136.633(1). The same immunity also extends to a person passing through Oregon while going to or returning from another state in...
obedience to a summons under the Uniform Act. ORS 136.633(2).

3. Noncompliance With Summons Punishable as Contempt
If a witness subject to the Uniform Act fails to attend and testify without good cause, the witness can be punished in the same manner as a witness who disobeys a subpoena from a court in this state. ORS 136.625(4); ORS 136.627(2).

E. Material Witness Order

1. Definition
A material witness order is an order that:

1. Finds a person to be a material witness in a pending criminal action; and

2. Fixes a security amount to be posted to secure future attendance of the witness.

ORS 136.608(4).

2. Application Procedure
The District Attorney or the defendant may apply for a material witness order when: (1) an indictment is pending; (2) a grand jury proceeding has been commenced; or (3) an information charging a felony is pending. ORS 136.608(1).

a. Requirements
The application must be in writing and sworn to by the applicant, and must state facts establishing a reasonable belief that the person being called as a witness:

1. Possesses material information; and

2. Will not appear at the time required.

ORS 136.608(2).

b. Court Action Upon Receipt of Application
If the court determines that the application is well founded, the court must:

1. Enter an order requiring the witness to appear before the court at a designated time; or

2. Issue an arrest warrant, if the application includes facts establishing a reasonable belief that the witness will not appear.

ORS 136.611(1).
i. **Informing Prospective Witness of the Hearing’s Purpose**  
The order must inform the prospective witness of the purpose of the hearing and be served in accordance with ORCP 7 (service of summons). ORS 136.611(2).

ii. **Informing Prospective Witness of Rights Retained**  
When the prospective witness appears, the court must inform the person:

a. Of the nature and purpose of the hearing; and

b. That the person retains all rights guaranteed to a person in a criminal proceeding, including the right to:
   1. Have counsel present;
   2. Be appointed counsel at state expense if financially eligible;
   3. Call witnesses; and
   4. Issue subpoenas.

ORS 136.611(3).

iii. **Postponement of the Hearing**  
The court may postpone the hearing to allow the prospective witness to obtain counsel. The court must order the witness to appear at a future time and may require a security amount to ensure appearance. If the person refuses to comply with the order, the court must detain the person at the county jail or other appropriate facility. ORS 136.611(4).

3. **Hearing on the Material Witness Order**  
At the hearing to determine whether a material witness order should be entered:

a. The applicant must prove by a *preponderance of the evidence* all essential facts;

b. The prospective witness may testify and call witnesses;

c. All testimony is under oath; and

d. The *Oregon Evidence Code* applies, except that *hearsay* may be admitted if:

   1. It would impose an unreasonable hardship on the party to produce the primary source of evidence; and
2. The witness establishes the reliability of both the informant and how the information was obtained.

ORS 136.612(1).

a. **Evidentiary Standard to Enter Order**
   If the court finds by a *preponderance of the evidence* that the prospective witness: (1) possesses material information; and (2) will not appear at the time required, the court must establish a *security amount* sufficient to secure the witness’s attendance and enter the order. ORS 136.612(2).

b. **Releasing the Witness Upon Payment of Security Amount**
   The witness must be released upon payment of the security amount; if a third party pays the amount, the witness must consent in writing. ORS 136.612(3)(a). If the security amount is not paid, the court must commit the witness to the county jail or other appropriate detention facility until the witness pays the security amount or is no longer needed. ORS 136.612(3)(b).

c. **Duration of the Order**
   Unless vacated, a material witness order issued by a circuit court remains in effect during the pendency of the action. ORS 136.612(4).

d. **Vacating or Modifying the Order**
   Upon application by either party, the court may *vacate or modify* the order, in whole or in part, in consideration of new or changed facts or circumstances. ORS 136.612(5).

e. **Payment to a Detained Witness**
   The county must pay a witness detained as a result of a material witness order $7.50 for each day of confinement. ORS 136.614.

**IV. EXAMINATION OF WITNESSES**

A. **Control by the Court**
   The court must exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence in order to ascertain the truth, avoid wasting time, and protect witnesses from harassment or undue embarrassment. OEC Rule 611(1).
1. **Protection of the Witness**
   The court must protect the witness from irrelevant, insulting, or improper questions, and harsh or insulting demeanor. The witness may be detained only as long as the interests of justice require. ORS 44.080.

2. **Trial Court Discretion**
   Under OEC Rule 611(1), the following issues are subject to the “broad discretion” of the trial court:
   - The order of witnesses;
   - The number of witnesses a party may call;
   - The manner of inquiry, including whether narrative testimony will be allowed;
   - The form of questions;
   - The length of witness examination;
   - Whether to allow a party to ask questions of a witness in aid of an objection;
   - Whether to allow recross or redirect examination; and
   - Whether a witness may be recalled.


B. **Direct Examination**

1. **Leading Questions Generally Discouraged**
   Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness’s testimony. OEC Rule 611(3). See 1981 Conference Committee Commentary to OEC Rule 611 (stating that “the suggestive powers of the leading question are undesirable” on direct examination).

a. **Leading Question Defined**
   A leading question is one that relates to a material matter and suggests the answer desired by the examining party. *State v. Sing*, 114 Or 267, 288 (1925); 1981 Conference Committee Commentary to OEC Rule 611.

b. **Discretion to Allow Leading Questions**
   “Whether or not a leading question may be asked in direct examination is strictly within the discretion of the judge.” *State v. Joseph*, 230 Or 585, 589 (1962); accord *State v.*
c. Questions Calling For a “Yes” or “No” Answer
Questions requesting a “yes” or “no” answer are not necessarily leading if the question does not suggest one more than the other, “even though it calls attention to a subject about which testimony is desired.” Coates v. Slusher, 109 Or 612, 621 (1924).

2. When Leading Questions Are Necessary to Develop Testimony
Leading questions on direct examination are likely permissible “when the testimony relates only to undisputed preliminary or background matters; when the witness is reluctant, reticent, confused, forgetful, hostile, biased, infirm, unresponsive, ignorant, frightened, timid, embarrassed, or young; when the witness is called to dispute the testimony of an earlier party; or when the witness is being impeached.” Laird C. Kirkpatrick, Oregon Evidence § 611.05 (4th ed., Lexis 2002); see also 1981 Conference Committee Commentary to OEC Rule 611 (recognizing exceptions to the rule against leading questions for witnesses who are “hostile, unwilling, or biased; the witness with communication problems; the child witness; the witness whose recollection is exhausted; and undisputed preliminary matters”).

3. Hostile Witnesses
Under OEC Rule 611(3), a party may ask leading questions to a hostile witness, an adverse party, or a witness identified with an adverse party. See State v. Williams, 313 Or 19, 32 (1992) (allowing leading questions to witness who “was showing some hostility and being evasive”).

Note: In Sinclair v. Barker, 236 Or 599, 607 (1964), the court stated, “[l]ead ing questions may be allowed upon the direct examination of an adverse party if he appears to be hostile to the examiner,” indicating that a witness must be both adverse and hostile before leading questions can be used. However, the 1981 Conference Committee Commentary to OEC Rule 611 overrules this statement by providing that leading questions may be put “to any adverse party or witness identified with an adverse party, regardless of hostility.”
a. **Hostile Witness Defined**
A hostile witness is one who demonstrates hostility by his or her demeanor. *Schrock v. Goodell*, 270 Or 504, 512 (1974).

b. **Discretion to Declare Witness Hostile**
The trial court has discretion to declare witnesses hostile, and the determination “will not be set aside unless it amounted to or contributed to the denial of a fair trial.” *State v. Tidyman*, 30 Or App 537, 553 (1977).

C. **Cross-Examination**

1. **Scope of Cross-Examination**
The court must limit the scope of cross-examination to:

   a. The subject matter of the direct examination; and

   b. Matters affecting the credibility of the witness.

OEC Rule 611(2). *See State v. Moore*, 103 Or App 440, 445 (1990) (error to allow cross-examination when the inquiry “was not relevant and was outside the scope of direct examination”); *see also* OEC Rule 106 (providing that when one party gives evidence on part of an act, declaration, conversation, or writing, the opposing party may inquire into the whole).

a. **Inquiry Into Additional Matters**
The court has the discretion to permit a party on cross-examination to inquire into additional matters “as if on direct examination.” OEC Rule 611(2). Note that this qualification prevents the use of leading questions during such inquiry. *See* 1981 Conference Committee Commentary to OEC Rule 611.

b. **Matters That Tend to Explain or Qualify Direct Examination**
“[G]reat latitude should be allowed in conducting the [cross-]examination. It should not be limited to the exact facts stated on the direct examination, but may extend to other matters which tend to limit, explain, or qualify them, or to rebut or modify any inference resulting therefrom, provided they are directly connected with the matter stated in the direct examination.” *Hayes v. Ogle*, 143 Or 1, 5 (1933) (quoting *Goltra v. Penland*, 45 Or 254, 259 (1904)). *Cf. Blue v. Port. Ry., Light & Power Co.*, 60 Or 122, 126 (1911) (“if from the direct examination of a witness the jury could draw an inference, such deduction of fact thereby
becomes connected with the testimony in chief, rendering it a legitimate matter of cross-examination”).

c. Matters Affecting the Credibility of the Witness

“The discretionary power of the trial judge is to confine the cross-examination within reasonable limits. It does not include the authority to exclude altogether questions, and the answers thereto, which directly challenge the disinterestedness or credibility of the witness’s testimony.” State v. Bailey, 208 Or 321, 342 (1956) (quoting State v. Roberson, 215 NC 784, 787 (1939)). A trial judge’s discretion is limited to:

“additional matters,” not including evidence which is relevant to bias or interest, until sufficient opportunity has been given to the cross-examiner to establish the witness’s lack of credibility. Impeachment for bias or interest relates to “matters affecting the credibility of the witness” and, for that reason, decisions on the admissibility of evidence relevant to bias or interest are not within the trial judge’s discretionary authority under OEC Rule 611(2) to control the scope of cross-examination.

Evidence relevant to the bias or interest of a witness need not always be admitted. The trial judge, in his or her discretion, may limit the extent of such evidence pursuant to OEC 403. However, the cross-examiner must be given the opportunity to establish sufficient facts from which the bias or interest may be inferred, because it is always permissible to show bias or interest. Where bias or interest is shown, but further questioning is objected to, the decision is within the discretion of the trial judge. However, where the questioning is curtailed before bias or interest is shown, the decision is an error of law.


d. Collateral Matters

“A witness cannot be cross-examined on a collateral matter if the purpose of that cross-examination merely is to discredit the witness by subsequently admitting evidence to contradict the witness’s testimony.” State v. Titus, 328 Or 475, 480 (1999). See State v. Moore, 72 Or App 454, 459 (1985) (approving trial court’s limitation of defendant’s
cross-examination based on concern that it would “raise collateral matters not appropriate for impeachment” and result in a trial within a trial). However, “[w]hen the cross-examination is in respect to a collateral matter incidental to the main issue, the court need not permit it to be unduly extended and [its] action thereon will not be reviewed except for an abuse of discretion.” Bowles v. Creason, 156 Or 278, 290 (1937).

2. **Leading Questions “Ordinarily” Permitted**
   Ordinarily, leading questions should be permitted on cross-examination. OEC Rule 611(3). “The purpose of the qualification ‘ordinarily’ is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as, for example, the ‘cross-examination’ of a party by the party’s own counsel after being called by the opponent (savoring more of re-direct) . . . .” 1981 Conference Committee Commentary to OEC Rule 611.

3. **Cross-Examination By the Defendant**
   “Defendant in a criminal action particularly is entitled to great latitude in cross-examination.” State v. Williams, 6 Or App 189, 193 (1971). However, “the judge may properly exclude that which is of little or no probative value.” State v. Davis, 65 Or App 83, 86 (1983).

   a. **Defendant’s Constitutional Right to Cross-Examine**
      “A defendant in a state criminal proceeding is entitled, as a matter of federal constitutional right, to cross-examine prosecution witnesses.” State v. Hubbard, 61 Or App 350, 355 (1983) (citing U.S. Const Amend VI & XIV). “Free and vigorous cross-examination is particularly important when prosecution and defense witnesses give sharply conflicting accounts of the facts and the jury must assess the credibility of the witnesses.” Id. at 355-56 (citing Alford v. United States, 282 US 687 (1931)).

   b. **Confrontation Clause Concerns**
      Limiting the right to cross-examine may transgress a criminal defendant’s right to confront his or her witnesses, provided in the Sixth Amendment to the U.S. Constitution and Article I, § 11 of the Oregon Constitution. See Davis v. Alaska, 415 US 308, 319-20 (1974) (concluding that the defendant’s right of confrontation was paramount to the state’s policy interest in protecting a juvenile offender’s confidentiality when the offender was a crucial identification witness).
4. **Cross-Examination of the Defendant**
The State’s right to cross-examine must be limited to facts upon which the defendant testified and which tend toward conviction or acquittal, ORS 136.643; the State cannot compel the defendant’s self-incrimination. *See State v. Lurch*, 12 Or. 99, 103 (1885) (stating that the right against self-incrimination provides an immunity that is “effectually violated when the cross-examination of the accused is extended beyond the facts to which he has testified”); *State v. Tippie*, 15 Or App 660, 667-68 (1973), rev’d on other grounds, 269 Or 661 (1974).

5. **Witness’s Refusal to Submit to Cross-Examination**
“[W]hen a witness refuses to submit to any cross-examination or to answer cross-examination questions necessary to test the witness’s direct testimony, that refusal undermines the trier of fact’s ability to rely on the witness’s direct testimony. In those circumstances, the courts generally have recognized that a trial court may strike the witness’s testimony.” *State v. Cox*, 337 Or 477, 493 (2004). However, if the questions are solely related to the witness’s credibility and lack a logical relation to the subject matter of the witness’s direct testimony, the court should not strike the testimony. *Id.*

a. **When Striking the Defendant’s Testimony Is Appropriate**
When the defendant refuses to provide answers on cross-examination that might establish truthfulness with respect to specific events of the crime, the State’s ability to test the details of the defendant’s direct testimony is prejudiced, and a trial court acts within its discretion in striking the defendant’s testimony. *State v. Cox*, 337 Or 477, 495 (2004). *See State v. Lea*, 146 Or App 473, 482-86 (1997) (concluding that the court appropriately struck defendant’s testimony after he refused to be cross-examined on matters addressed in his direct testimony).

i. **Note on Striking Testimony & Defendant’s Right to Testify**
The court in *State v. Cox*, 337 Or 477 (2004), declined to address any constitutional issues that may arise from striking the defendant’s testimony vis-à-vis the guaranteed right to testify. *See State v. Lotches*, 331 Or 455, 483 n.10 (2000).

D. **Redirect Examination**
Redirect examination can be characterized as a “rule of completeness,” which permits “proof of the remainder of a transaction, conversation, or writing when a part has been proven
by the adversary so far as the remainder relates to the same subject-matter.” 1 MCORMICK ON EVIDENCE § 32, 120 (John W. Strong ed., 5th ed., West 1999).

1. **Court’s Discretion**

2. **Appropriate Use of Redirect Examination**
   Redirect examination is appropriate to:

   - Rebut a possible inference brought out in cross-examination. *See State v. Kessler*, 254 Or 124, 127 (1969) (State was allowed to overcome inference that the victim was unable to identify the defendant from any photographs previously shown to the victim by demonstrating that the witness had in fact identified the defendant in one of the photographs).


   - Correct a witness’s erroneous impression of the facts. *See Pacific Export Lumber Co. v. North Pacific Lumber Co.*, 46 Or 194, 206 (1905) (witness allowed to explain the meaning of his statement).

E. **Recross-Examination of Witnesses**
   Even if the testimony is relevant, the court has the discretion to control the progress of the trial and limit the scope of recross-examination to the specific matters brought out on redirect. *See Marsh v. Davidson*, 265 Or 532, 541 (1973); *Still v. Benton*, 251 Or 463, 473-74 (1968).

F. **Judicial Questioning of Witnesses Permissible**
   Although the Legislative Assembly did not adopt Federal Rule of Evidence 614, which allows federal trial courts to call and question witnesses, it did “not intend to deny or limit the inherent power of a trial court to call and examine witnesses.” 1981 Conference Committee Commentary to OEC Rule 615. The trial court “may, when necessary in the furtherance of impartial justice, examine a witness, though he should not by the form, manner or extent of his
questions indicate to the jury his opinion on the merits.” *Frangos v. Edmunds*, 179 Or 577, 610 (1946).

V. PRIVILEGES

A. Lawyer-Client Privilege

The client has a privilege to refuse to disclose and to prevent any other person from disclosing *confidential communications made specifically for the purpose of obtaining professional legal services for the client*. OEC Rule 503(2); 1981 Conference Committee Commentary to OEC Rule 503. The privilege includes confidential communications made:

- Between the client or the client’s representative and the client’s lawyer or a representative of the lawyer;
- Between the client’s lawyer and the lawyer’s representative;
- By the client or the client’s lawyer to a lawyer representing another in a matter of common interest;
- Between representatives of the client or between the client and a representative of the client; or
- Between lawyers representing the client.

OEC Rule 503(2)(a)-(e).

1. **Note on Communications Between Lawyer’s Representatives**

   OEC Rule 503(2) does not protect confidential communications made between the lawyer’s representatives.

2. **Lawyer Defined**

   The definition of lawyer includes a person *reasonably believed by the client* to be authorized to practice law anywhere. OEC Rule 503(1)(c).

3. **Client Defined**

   A client may be a person, public officer, or public or private entity who:

   - Is rendered professional legal services by a lawyer; or
   - Consults a lawyer with a view to obtaining professional legal services from the lawyer.

   OEC Rule 503(1)(a). The definition applies even though the lawyer is never hired and the person is not involved in litigation—the rendition of professional legal services under any circumstances, except those concerning purely business
or personal matters, creates a lawyer-client relationship. 1981 Conference Committee Commentary to OEC Rule 503.

4. **Client’s Representative Defined**
A representative of the client is a principal, employee, officer, or director of the client who:

- Provides the client’s lawyer with information acquired via such relationship for the purpose of obtaining for the client the legal advice or other legal services of the lawyer; or
- Seeks, receives, or applies legal advice from the client’s lawyer as a part of such relationship.

OEC Rule 503(1)(d). *See State ex rel. OHSU v. Haas*, 325 Or 492, 509 (1997) (concluding that “any employee of a client may be a representative of the client” and “interaction with the client’s lawyer need not be a regular part of the employee’s job for the employee to qualify as a representative of the client”).

5. **Lawyer’s Representative Defined**
A representative of the lawyer is one employed to assist the lawyer in the rendition of professional legal services, *not* including a physician making a physical or mental examination under ORCP 44. OEC Rule 503(1)(e).

a. **Underlying Substance of the Representative’s Communications Are Not Privileged**
“We conclude that the meaning of OEC 503(2) is clear . . . . If an expert originally worked for a party and can be deemed to be a representative of that party’s lawyer, then OEC 503(2) extends a privilege to any confidential information or statements that the lawyer communicated to the expert, as well as to the fact of and content of the expert’s confidential communications (i.e., written or oral reports) to either the client or the lawyer. However, OEC 503(2) does not render the expert *per se* incompetent to testify on behalf of another party about segregated information or opinions that the expert has formed without regard to any confidential communication.” *State v. Riddle*, 330 Or 471, 482 (2000).

6. **Confidential Communication Defined**
A confidential communication is one *not intended to be disclosed to third persons*, except those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. OEC Rule 503(1)(b). *See State v. Howell*, 56 Or App 6, 10 (1982) (“The attorney-client privilege cannot
be invoked where the communication to the attorney is not intended to be confidential.”).

7. **Burden of Establishing Privilege**

8. **Who May Claim Privilege**
   The lawyer-client privilege belongs to the client and may be claimed only by:
   - The client;
   - The client’s guardian or conservator;
   - A deceased client’s personal representative;
   - The successor, trustee, or similar representative of a corporation, association, or other organization, even if dissolved; or
   - The client’s lawyer or the lawyer’s representative on behalf of the client.
   OEC Rule 503(3).

   a. **Lawyer’s Ethical Duty of Confidence to the Client**
      “An Oregon attorney is prohibited by the ethics of the profession from divulging a client’s secrets or confidences. The attorney would therefore be bound to claim the privilege on behalf of the attorney’s client if called to testify.” 1981 Conference Committee Commentary to OEC Rule 503. *See* Or. R. Prof. Conduct 1.6 (2005) (confidentiality of information).

9. **Limitations on the Lawyer-Client Privilege**
   There is no lawyer-client privilege if in the professional judgment of the person receiving the communications:
   1. The communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse, or death;
   2. The declarant poses a danger of committing the crime; and
3. The person receiving the communications makes a report to another person based on the communications.

OEC Rule 504-5.

10. Exceptions to the Lawyer-Client Privilege

a. Future Crime-Fraud Exception
The lawyer-client privilege is unavailable if the client sought the lawyer’s services to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud. OEC Rule 503(4)(a). See State v. Jenkins, 190 Or App 542, 549 (2003) (concluding that exception erroneously applied where the record did not indicate that defendant’s confidential disclosure of his plan to commit murder to a psychiatrist hired by defense counsel was a request for services to aid or enable defendant to commit aggravated murder). The privilege is also “not meant to protect discussion of future crime or fraud designed to conceal past wrongdoing.” State v. Phelps, 24 Or App 329, 333 (1976) (crime of perjury at issue).

i. Party Seeking Exception Must Prove Requisite Knowledge
“A party who seeks to rely on the crime-fraud exception to the attorney-client privilege to obtain or introduce evidence must establish that ‘the client, when consulting the attorney, knew or should have known that the intended conduct was unlawful.’” State v. Charlesworth/Parks, 151 Or App 100, 119 (1997) (quoting State ex rel. N. Pacific Lbr v. Unis, 282 Or 457, 464 (1978) (“Good-faith consultations with attorneys by clients who are uncertain about the legal implications of a proposed course of action are entitled to the protection of the privilege, even if that action should later be held improper.”)).

b. Will Contest Exception
A communication relevant to an issue between parties who claim through the same deceased client is not protected by the lawyer-client privilege, regardless of whether the claims are by testate or intestate succession or by an inter vivos transaction. OEC Rule 503(4)(b). See Tanner v. Farmer, 243 Or 431, 435 (1966) (permitting attorney to testify regarding client’s execution of a will under which both parties to the litigation made claims).
c. **Breach of Duty Exception**
Any communication relevant to an issue of breach of duty, either by the lawyer or the client, is not covered by the lawyer-client privilege. OEC Rule 503(4)(c). This exception “will generally arise when there is a controversy over the attorney’s fees, a claim of inadequate representation, or charges of professional misconduct.” 1981 Conference Committee Commentary to OEC Rule 503. However, notwithstanding OEC Rule 503(4)(c), a privilege is maintained for communications made on or after January 1, 2006 to the office of public defense services for the purpose of making, or providing information regarding, a complaint against a lawyer providing public defense services. 2005 Or Laws, ch. 358, § 1(5), 2 (effective Jan. 1, 2006).

d. **Attested Document Exception**
The lawyer-client privilege does not cover a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness. OEC Rule 503(4)(d). “When a lawyer acts as an attesting witness, the approval of the client to the lawyer’s doing so may safely be assumed, and waiver of the privilege as to any relevant lawyer-client communication is a proper result.” 1981 Conference Committee Commentary to OEC Rule 503.

e. **Mutual Information Exception Between Adverse Clients**
Any communication relevant to a matter of common interest between joint clients is not protected by the lawyer-client privilege when offered in a subsequent action between the clients. OEC Rule 503(4)(e). “[T]he rule is as well settled that in a dispute between parties themselves the attorney is not inhibited from making such disclosures where the communication was made in the presence and hearing of all concerned, or was intended for the mutual information of all.” Minard v. Stillman, 31 Or 164, 167 (1897).

i. **Distinguish Clients With a Common Interest**
OEC Rule 503(4)(e) does not exclude the lawyer-client privilege where the clients have a common interest but retain different lawyers. 1981 Conference Committee Commentary to OEC Rule 503; see OEC Rule 503(2)(c).
f. **Client’s Identity Exception**

Oregon case law recognizes an exception to the lawyer-client privilege regarding the fact of employment of an attorney and the name and address of the client. 1981 Conference Committee Commentary to OEC Rule 503; see *In re Illidge*, 162 Or 393, 401-406 (1939) (discussing exception). However, “[i]n narrow circumstances, where disclosure of the client’s identity would impair the attorney-client relationship, courts have allowed the claim of privilege . . . [especially] where disclosure of the client’s identity would be tantamount to disclosing an otherwise protected confidential communication.” Laird C. Kirkpatrick, *Oregon Evidence* § 503.12[6] (4th ed., Lexis 2002). See *Little v. Dep’t of Justice*, 130 Or App 668, 674 (1994) (implying that a showing of “peculiar circumstances” may bring the client’s identity within the lawyer-client privilege).

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h. **Exception For Notification of Court Proceedings**

“When an attorney notifies a client of a court date set for the client, it is not ‘for the purpose of facilitating the rendition of professional legal services.’ OEC 503(2). The lawyer is acting merely as an agent for the court in communicating the court date to the client. The attorney’s later disclosure of the fact that he or she performed this function is not privileged.” *State v. Ogle*, 297 Or 84, 89 (1984); see id. at 87-91 (discussing the exception at length).

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11. **When Privilege Attaches**

To successfully invoke the lawyer-client privilege, the person seeking to exclude the evidence must show:

1. A confidential communication;

2. Between the persons described in OEC Rule 503(2)(a)-(e);

3. Made for the purpose of facilitating the rendition of professional legal services to the client.

*State v. Jancsek*, 302 Or 270, 275 (1986). If these three requirements are not met, the privilege does not attach. 1981 Conference Committee Commentary to OEC Rule 503.
12. Waiver of Lawyer-Client Privilege

The client waives the lawyer-client privilege by voluntarily disclosing or consenting to the disclosure of any significant part of the matter or communication. OEC Rule 511. See Boon and Boon, 100 Or App 354, 357-58 (1990) (privilege waived by furnishing psychological report to expert and then calling expert to testify); Stark Street Properties, Inc. v. Teufel, 277 Or 649, 657 (1977) (“Where communications between attorney and client are not regarded by the client as confidential, the policy reasons for shielding inquiry into their contents disappear.”). But see State ex rel. OHSU v. Haas, 325 Or 492 (1997) (construing OEC Rule 503(1)(d) to conclude that head of university department and faculty members were representatives of the client and therefore disclosure of a report at faculty meeting did not constitute waiver of the lawyer-client privilege).

a. Waiver Is a Preliminary Question of Fact

Whether the client has waived the lawyer-client privilege is a preliminary question of fact to be determined by the trial court under OEC Rule 104(1), using a preponderance of the evidence standard. State ex rel. OHSU v. Haas, 325 Or 492, 497-98 (1997).

b. Waiver By Attorney Must Be Authorized

The attorney’s disclosure of privileged communication does not waive the lawyer-client privilege unless the client consents to or authorizes the disclosure. State v. McGrew, 46 Or App 123, 127 (1980) (fact that defendant’s attorney turned reports over to a third person without defendant’s knowledge or consent did not constitute waiver of lawyer-client privilege); OEC Rule 512(2) (providing the holder of the privilege an opportunity to claim the privilege before evidence of a statement or other disclosure of privileged matter is admissible).

i. Exception: Lawyer’s Authorization to Disclose During Discovery Presumed

“It is common practice for clients to authorize their lawyers to respond to discovery requests. In the absence of evidence to the contrary, an inference may be drawn that a lawyer who voluntarily turns over privileged material during discovery acts within the scope of the lawyer’s authority from the client and with the client’s consent. The lawyer’s action in voluntarily giving privileged material in response to a demand for discovery is at least an implicit representation by
the lawyer that the lawyer has the client’s consent to do so, *i.e.*, that the client has waived the privilege.” *Goldsborough v. Eagle Crest Partners, Ltd.*, 314 Or 336, 342-43 (1992).

A) Rebutting the Presumption

In rebutting the presumed authorization of disclosure for discovery purposes, the court may consider the following factors:

- Whether the disclosure was inadvertent;
- Whether any attempt was made to promptly remedy a disclosure error; and
- Whether preservation of the privilege will prove unfair to the opponent.


c. Disclosure for Approval of Nonroutine Expenses

Notwithstanding OEC Rule 511, a privilege is maintained for communications made on or after January 1, 2006 to the *office of public defense services* for the purpose of seeking preauthorization for or payment of nonroutine fees or expenses under ORS 135.055. 2005 Or Laws, ch. 356, §1(5), 2 (effective Jan. 1, 2006).

13. Work Product Protection

The work product doctrine applies to criminal cases. Laird C. Kirkpatrick, *Oregon Evidence* § 503.14[1] (4th ed., Lexis 2002); see ORS 135.855(1) (providing discovery exemptions for certain material and information, including work product). See also Chapter 4, VIII. “Exemptions From Discovery.”

B. Psychotherapist-Patient Privilege

A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications *made for the purposes of diagnosis or treatment* of the patient’s mental or emotional condition. OEC Rule 504(2). The privilege applies to confidential communications made among the patient, the patient’s psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist, including members of the patient’s family. *Id.*
1. **Psychotherapist Defined**
Psychotherapist is defined to include any person licensed, registered, certified, or otherwise authorized under the laws of any state to diagnose or treat mental or emotional conditions—or any person reasonably believed to be so by the patient. OEC Rule 504(1)(c). In addition to psychiatrists and psychologists, the definition is broad enough to include, in appropriate circumstances, medical doctors, nurses, or clinical social workers. 1981 Conference Committee Commentary to OEC Rule 504. *See Moore and Moore, 146 Or App 661, 670 (1997)* (stating that the definition of psychotherapist in OEC Rule 504(1)(c) is broad enough “to include medical doctors engaged in mental health treatment”).

a. **Substance Abuse Counselor Excluded From Definition**
A person “who is specifically consulted for a problem of drug or alcohol dependency” was intentionally excluded from the protection of the privilege. 1981 Conference Committee Commentary to OEC Rule 504. “[T]he psychotherapist-patient privilege does not apply to communications made during the diagnosis or treatment of drug dependency when that is the specific purpose of the diagnosis or treatment.” *State ex rel. Juv. Dept. v. Ashley, 312 Or 169, 180 (1992)* (concluding that the Legislature intended to exclude substance dependency from “mental or emotional condition” under both OEC Rule 504(1)(c) and 504(2)).

2. **Patient Defined**
A patient is any person who consults or is examined or interviewed by a psychotherapist. OEC Rule 504(1)(b).

3. **Who May Claim Privilege**
The psychotherapist-patient privilege may be claimed by:

   a. The patient;

   b. The patient’s guardian or conservator;

   c. A deceased patient’s personal representative; or

   d. The psychotherapist, but only on behalf of the patient.

   OEC Rule 504(3).

4. **Burden of Proof**
“The burden rests on the person seeking to assert the privilege to show that both that person and the nature of the testimony
offered are within the ambit of the privilege.” *State v. Miller*, 300 Or 203, 209 (1985).

5. **Exceptions to the Psychotherapist-patient Privilege**

The psychotherapist-patient privilege is not available under the following circumstances.

a. **Court Ordered Examination**

   Unless the court orders otherwise, where an examination of the patient’s mental, physical, or emotional condition is ordered by the court, communications made with respect to the particular purpose for which the exam was ordered are not privileged. OEC Rule 504(4)(a).

i. **State’s Examiner Must Warn Defendant**

   “When a defendant already is represented by counsel, obviously there is no need to explain that the defendant is entitled to counsel. If counsel is present at the examination, a court thereafter may presume that counsel has advised or will advise defendant as to his rights as the occasion may arise. If counsel is not present at the examination, however, the defendant should be asked by the examiner whether he understands that counsel is entitled to be present and has consented to be examined in the absence of counsel. The defendant should further be informed that the examination is conducted on behalf of the prosecution and its results will be available for use against the defendant without the confidentiality of a doctor-patient relationship.” *State v. Mains*, 295 Or 640, 645 (1983).

ii. **Defendant Cannot Be Compelled to Self-incriminate**

   “At a court-ordered examination a criminal defendant can be required to answer questions asked by the state psychiatrist, except questions concerning his conduct at or immediately near the time of the commission of the offense. He cannot be required to incriminate himself.” Laird C. Kirkpatrick, *Oregon Evidence* § 504.04 (4th ed., Lexis 2002); *see Shepard v. Bowe*, 250 Or 288 (1968).

b. **When Patient’s Mental or Emotional Condition Is at Issue**

   In any proceeding in which the patient, or another party after the patient’s death, relies upon the patient’s mental or emotional condition as an element of a claim or defense, communications relevant to the condition are not privileged. OEC Rule 504(4)(b). “In a criminal proceeding
this means that there is no privilege if a defendant raises the defense of not responsible by reason of mental disease or defect, or the mitigating defense of extreme emotional disturbance.” 1981 Conference Committee Commentary to OEC Rule 504.

c. **Commitment Procedures and Competency Hearings**
The psychotherapist-patient privilege does not protect any confidential communication or record allowed specifically for a commitment procedure under ORS 426.070, 426.074, 426.075, 426.095, or 426.120, or a competency hearing under ORS 426.307. OEC Rule 504(d).

d. **Court Proceedings on Child Abuse**
The psychotherapist-patient privilege cannot be grounds for excluding evidence regarding child abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 to 419B.050. ORS 419B.040(1). See generally State ex rel. Juv. Dept. v. Spencer, 198 Or App 599 (2005) (concluding that the application of ORS 419B.040(1) is not limited to privileged communications between a child abuse victim and a psychotherapist, but also abrogates the psychotherapist-patient privilege when the person who otherwise would hold the privilege is the person accused of the abuse, rather than the victim of the abuse); State v. Hansen, 304 Or 169 (1987) (applying the exception to both inculpatory and exculpatory communications); State v. Reed, 173 Or App 185 (2001) (limiting Hansen).

6. **Marriage Conciliation Proceedings Absolutely Privileged**
ORS 107.600(2) makes confidential all verbal or written communications between spouses and from spouses to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings and other proceedings; and prohibits the examination of a spouse or any other individual engaged in a conciliation proceeding as to such communications. The exceptions to the privilege otherwise applicable do not apply to communications made confidential under ORS 107.600(2).

7. **Limitations on the Psychotherapist-Patient Privilege**
There is no psychotherapist-patient privilege if in the professional judgment of the person receiving the communications:

a. The communications reveal that the declarant has a clear and serious intent at the time the communications are made
to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse, or death;

b. The declarant poses a danger of committing the crime; and
c. The person receiving the communications makes a report to another person based on the communications.

OEC Rule 504-5.

C. Physician-Patient Privilege

D. Nurse-Patient Privilege
The nurse-patient privilege applies only in civil actions. OEC Rule 504-2.

E. School Employee-Student Privilege
The school employee-student privilege provides two evidentiary rules. The privilege encompassing a certificated staff member of an elementary or secondary school applies only in civil actions or proceedings. OEC Rule 504-3(1). The privilege regarding a certificated school counselor also applies in criminal actions or proceedings in which the student is a party. OEC Rule 504-3(2).

1. Certificated School Counselor-Student Privilege
A certificated school counselor cannot be examined, without the student’s consent, as to any communication made by the student to the counselor in the counselor’s official capacity in any action or proceeding in which the student is a party concerning the past use, abuse, or sale of drugs, controlled substances, or alcoholic liquor. OEC Rule 504-3(2).

2. Certificated School Counselor Requirements
To qualify under the privilege, a certificated school counselor must be regularly employed and designated in such capacity by a public school. OEC Rule 504-3(2).

3. Penalty For Violating Privilege
The counselor’s professional certification may be suspended as provided in ORS 342.175, 342.177, and 342.180 for any violation of the privilege. OEC Rule 504-3(2).
a. Exception: Clear And Imminent Danger
   If the student’s condition presents a clear and imminent danger to the student or others, the counselor must report this fact to the appropriate authority or take other necessary emergency measures. OEC Rule 504-3(2).

4. Waiver of the Certificated School Counselor-Student Privilege
   As holder of the privilege, the student may waive it. 1981 Conference Committee Commentary to OEC Rule 504-3.

a. Counselor's Disclosure Should Not Constitute Waiver
   If the counselor is required to disclose any confidential communications in the emergency situations contemplated, this should not necessarily be viewed as a waiver by the student that precludes assertion of the privilege at a judicial proceeding in which it is applicable. Laird C. Kirkpatrick, Oregon Evidence § 504-3.04 (4th ed., Lexis 2002).

5. Exceptions to the Certificated School Counselor-Student Privilege

   a. Duty to Report Child Abuse
      A certificated school counselor having reasonable cause to believe that any child with whom the counselor comes in contact has suffered abuse or that any person with whom the counselor comes in contact has abused a child must immediately report it as required in ORS 419B.015. ORS 419B.010(1); 419B.005(3) (defining “public or private official” to include a school employee).

   b. Court Proceedings on Child Abuse
      The certificated school counselor-student privilege cannot be grounds for excluding evidence regarding child abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 to 419B.050. ORS 419B.040(1).

F. Clinical Social Worker-Client Privilege

1. Conditions Precedent
   A clinical social worker must have:

   1. A license from the State Board of Clinical Social Workers;
   2. Received communications in non-investigatory professional activity; and
3. Received communications to enable the worker to aid the client.

OEC Rule 504-4.

2. Exceptions to the Social Worker-Client Privilege

a. Consent. OEC Rule 504-4(1).

b. When the client initiates legal action or complaint to the State Board. OEC Rule 504-4(2).

c. Communication reveals intent to commit a crime which reasonably is expected to result in physical injury to a person. OEC Rule 504-4(3).

d. Information reveals minor was victim of crime, neglect, or abuse. OEC Rule 504-4(4).

e. When licensed clinical social worker is a public employee and the public employer finds examination in civil or criminal proceeding is necessary in the performance of duty of worker as public employee. OEC Rule 504-4(5).

f. When disclosure of the communication is necessary to obtain further professional assistance for the client. ORS 675.580(1)(e).

g. When otherwise required by statutes for reporting elderly adult abuse (ORS 124.060), child abuse (ORS 419B.010), or adult abuse (ORS 430.765). ORS 675.580(1)(f).

a. Duty to Report Child Abuse

A clinical social worker having reasonable cause to believe that any child with whom the social worker comes in contact has suffered abuse or that any person with whom the social worker comes in contact has abused a child must immediately report it as required in ORS 419B.015. ORS 419B.010(1); 419B.005(3) (defining “public or private official” to include licensed clinical social worker).

b. Court Proceedings on Child Abuse

The clinical social worker-client privilege cannot be grounds for excluding evidence regarding child abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 to 419B.050. ORS 419B.040(1).
3. Limitations on the Clinical Social Worker-Client Privilege
   There is no clinical social worker-client privilege if in the professional judgment of the person receiving the communications:
   a. The communications reveal that the declarant has a clear and serious intent at the time the communications are made to subsequently commit a crime involving physical injury, a threat to the physical safety of any person, sexual abuse, or death;
   b. The declarant poses a danger of committing the crime; and
   c. The person receiving the communications makes a report to another person based on the communications.
   OEC Rule 504-5.

G. Husband-Wife Privilege
   In all criminal actions in which the husband is the party accused, the wife is a competent witness and when the wife is the party accused, the husband is a competent witness; but neither husband nor wife in such cases may be compelled or allowed to testify in such cases, except as provided in OEC Rule 505. ORS 136.655(1). OEC Rule 505 establishes two privileges: a privilege against adverse spousal testimony and a privilege as to confidential communications. 1981 Conference Committee Commentary to OEC Rule 505.

1. Marriage Defined
   Marriage is a marital relationship between husband and wife, legally recognized under state law. OEC Rule 505(1)(b).

2. Privilege Against Adverse Spousal Testimony
   The privilege against adverse spousal testimony consists of the following:
   a. Exists in criminal proceedings only;
   b. Parties must be married;
   c. Neither spouse may be examined adversely against the other as to any matter occurring during the marriage, unless the spouse called to testify consents;
   d. Privilege applies to nonconfidential observations and communications with the other spouse; and
   e. One spouse may not prevent the other spouse from testifying; i.e., the privilege rests with the testifying spouse.
Privilege as to Confidential Communications

In any civil or criminal action, either spouse may claim a privilege to refuse to disclose and to prevent the other spouse from disclosing any confidential communication made by one spouse to the other during the marriage. OEC Rule 505(2). The authority of the spouse to claim the privilege and the claiming of the privilege is presumed in the absence of evidence to the contrary. *Id.* Note: the parties need not be married, but the communication must have been made during the marriage.

a. Confidential Communication Defined

A confidential communication is a communication by a spouse to the other spouse and not intended to be disclosed to any other person. OEC Rule 505(1)(a).

4. Exceptions to the Husband-Wife Privilege

There is no husband-wife privilege:

a. In all criminal actions in which one spouse is charged with:

1. Bigamy;

2. An offense or attempted offense against the person or property of the other spouse;

3. An offense or attempted offense against the child of either spouse (see *State v. Suttles*, 287 Or 15, 20 (1979));

4. An offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse;

b. As to matters occurring prior to the marriage; or

c. In any civil action where the spouses are adverse parties.

OEC Rule 505(4). See also ORS 136.655(2).

a. Court Proceedings on Child Abuse

The husband-wife privilege cannot be grounds for excluding evidence regarding child abuse, or the cause thereof, in any judicial proceeding resulting from a report made pursuant to ORS 419B.010 to 419B.050. ORS 419B.040(1).
i. **Spouses May Be Compelled to Testify**

In any judicial proceedings resulting from a report made pursuant to ORS 419B.010 to 419B.050, either spouse shall be a competent and compellable witness against the other. ORS 419B.040(2).

H. **Member of Clergy-Penitent Privilege**

A member of the clergy may not be examined as to any confidential communication made to the member in the member’s professional character unless the penitent consents to disclosure. OEC Rule 506(2). However, even if the penitent consents to disclosure, a member of the clergy may refuse to disclose the communication if, under the discipline or tenets of the member’s church, denomination, or organization, the member has an absolute duty to keep the communication confidential. OEC Rule 506(3).

1. **Member of the Clergy Defined**

A member of the clergy is a minister of any church, religious denomination or organization, or accredited Christian Science practitioner who in the course of his or her discipline or practice is authorized or accustomed to hearing confidential communications and, under the discipline or tenets of the organization has a duty to keep such communications secret. OEC Rule 506(1)(b).

2. **Confidential Communication Defined**

The definition of confidential communication requires the communication to be made privately and not intended for further disclosure, and allows third persons to be present in furtherance of the communication’s purpose. OEC Rule 506(1)(a).

3. **Exceptions to the Member of Clergy-Penitent Privilege**

Apparently, there are no exceptions to the member of the clergy-penitent privilege.

I. **Counselor-Client Privilege**

A professional counselor or a marriage and family therapist licensed by the Oregon Board of Licensed Professional Counselors and Therapists under ORS 675.715 may not be examined in a civil or criminal court proceeding as to any communication given the counselor or therapist by a client in the course of a noninvestigatory professional activity when such communication was given to enable the counselor or the therapist to aid the client. OEC Rule 507.
1. **Exceptions to the Counselor-Client Privilege**
   The counselor-client privilege does not apply when:
   
a. The client or those persons legally responsible for the affairs of the client consent to disclosure;

b. The client initiates legal action or makes a complaint against the counselor or therapist to the board;

c. The communication reveals the intent to commit a crime or harmful act; or

d. The communication reveals that a minor is or is suspected to be a victim of crime, abuse, or neglect.

OEC Rule 507(1)-(4).

a. **Duty to Report Child Abuse**
   A counselor or therapist having reasonable cause to believe that any child with whom the counselor or therapist comes in contact has suffered abuse or that any person with whom the counselor or therapist comes in contact has abused a child must immediately report it as required in ORS 419B.015. ORS 419B.010(1); 419B.005(3) (defining “public or private official” to include a licensed professional counselor and a licensed marriage and family therapist).

2. **Counselors Engaged In Conciliation Services of a Circuit Court**
   All communications, verbal or written, between spouses and from spouses to counselors, the court, attorneys, doctors or others engaged in the conciliation proceedings, made in conciliation conferences, hearings and other proceedings had pursuant to the exercise of the court’s conciliation jurisdiction must be confidential. A spouse or any other individual engaged in conciliation proceedings may not be examined in any civil or criminal action as to such communications. Exceptions to testimonial privilege otherwise applicable under ORS 40.225 to 40.295 do not apply to communications made confidential under this subsection. ORS 107.600(2).

J. **Stenographer-Employer Privilege**
   A party may not examine a stenographer without the consent of stenographer’s employer as to any communication or dictation made by the employer to the stenographer in the course of professional employment. OEC Rule 508a.
1. **Scope of the Stenographer-Employer Privilege**
The stenographer-employer privilege applies only to stenographic duties and not other professional duties performed by the person. *State v. Bengtson*, 230 Or 19, 29 (1961). Additionally, the privilege applies only to communications received from the employer, as opposed to those received in the course of the employer’s business from persons with whom the employer deals. 1981 Conference Committee Commentary to OEC Rule 508a.

K. **Public Officer Privilege**

1. **In Camera Examination When Privilege Invoked**

2. **Records Exempt From Disclosure**
ORS 192.501 provides a list of public records that are exempt from disclosure unless the public interest requires disclosure in the particular instance. ORS 192.502 provides a list of public records that are exempt from disclosure in every instance.

3. **Administrative Disclosure**
ORS 192.450 to 192.490 provide the procedure by which a citizen can seek administrative disclosure of public records.

4. **Waiver of the Public Officer Privilege**
“It is unclear whether the privilege set forth in Rule 509 can be waived, and, if so, by whom and under what circumstances.” Laird C. Kirkpatrick, *Oregon Evidence* § 509.03 (4th ed., Lexis 2002).
L. Disabled Person-Sign Language Interpreter Privilege
A disabled person has a privilege to refuse to disclose and to prevent a sign language interpreter from disclosing any communications to which the disabled person was a party that were made while the interpreter was providing interpretation services for the disabled person. OEC Rule 509-1(2).

1. Disabled Person Defined
A “disabled person” is a person who cannot readily understand or communicate spoken English, or cannot understand proceedings in which the person is involved because of deafness or a physical hearing impairment, or cannot communicate in the proceedings because of a physical speaking impairment. OEC Rule 509-1(1)(a).

2. Sign Language Interpreter Defined
A “sign language interpreter” is a person who translates either conversations or other communications for a disabled person, or the disabled person’s statements. OEC Rule 509-1(1)(b).

3. Scope of Disabled Person-Sign Language Interpreter Privilege
The privilege extends only to communications between a disabled person and another, and translated by the interpreter, that would otherwise be privileged under Rules 503 to 514. OEC Rule 509-1(2).

M. Non-English-Speaking Person-Interpreter Privilege
A non-English-speaking person has a privilege to refuse to disclose and to prevent an interpreter from disclosing any communications to which the non-English-speaking person was a party that were made while the interpreter was providing interpretation services for the non-English-speaking person. OEC Rule 509-2(2).

1. Non-English-Speaking Person Defined
A “non-English-speaking person” is a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate in the proceedings. OEC Rule 509-2(1)(b).

2. Scope of Non-English-Speaking Person-Interpreter Privilege
The privilege extends only to communications between a non-English-speaking person and another, and translated by the interpreter, that would otherwise be privileged under Rules 503 to 514. OEC Rule 509-2(2).
N. Informer Privilege

A unit of government has a privilege to refuse to disclose the identity of a person who has furnished information, relating to or assisting in an investigation of a possible violation of law, to a law enforcement officer or member of a legislative committee or its staff conducting an investigation. OEC Rule 510(2). Only the informer’s identity is privileged; communications are not included except to the extent that disclosure would disclose informer’s identity. 8 Wigmore on Evidence § 2374, 765 (McNaughton rev. 1961).

1. Unit of Government Defined

A “unit of government” includes the Federal Government or any state or political subdivision thereof. OEC Rule 510(1).

2. Privilege is Not Absolute

“The problem is one which calls for a balancing of the public’s interest in protecting the flow of information against the individual’s right to make his defense. Whether a proper balance renders as error the failure to require production depends upon the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informant’s testimony, and other relevant factors. Where production of the informant has been shown to be essential to a fair determination of a defendant’s guilt or innocence, the privilege must give way.” State v. Elliot, 276 Or 99, 102 (1976). See State v. Wood, 114 Or App 601, 607 (1992); State v. Waterbury, 50 Or App 115, 118 (1981) (“The state is authorized to withhold the identity of a confidential informant where failure to disclose will not infringe the constitutional rights of the defendant.”); Rovario v. U.S., 353 US 53 (1957).

3. Privilege Lost If Informer’s Identity Is Disclosed

No privilege exists if informer’s identity is disclosed by informer’s appearance as a witness, or by an action of the governmental unit or the informer. OEC Rule 510(4)(a). The court may require disclosure of identity when informer’s involvement goes beyond preliminary stage of providing facts constituting probable cause, such as where informer is a witness to alleged transaction or a participant in it. State v. Jessie, 17 Or App 368 (1974).

4. Disclosure Required When Informer May Be Able to Give Testimony

Disclosure is required if the informer’s testimony is:

a. Necessary to a fair determination of guilt or innocence;

The informer privilege provided in OEC Rule 510 “should be considered in conjunction with ORS 135.855, which makes the identity of an informer generally immune from discovery.” Laird C. Kirkpatrick, Oregon Evidence § 510.03[3] (4th ed., Lexis 2002).
b. Relevant and helpful to the defendant’s defense; or

c. Relates to a material issue on the merits in a civil case.

OEC Rule 510(4)(b); State v. Vatland, 123 Or App 577, 581 (1993) (disclosure of informant’s name would produce evidence “useful to defense”). See also State v. Jessie, 17 Or App 368, 372 (1974) (defendant has burden of proof to demonstrate relevance of informer’s testimony to the issue of guilt or innocence).

a. Procedure

The court must give the unit of government the opportunity to make an in camera showing of facts relevant to determining whether informer can, in fact, supply testimony necessary to a fair determination of guilt or innocence. The showing is ordinarily made by affidavits, but the court may take testimony. The court may not allow the parties or counsel to be present at the in camera review. OEC Rule 510(4)(b).

If the court finds “a reasonable probability” that the informer can give the testimony, and the unit of government elects not to disclose the informer’s identity, the court, on the defendant’s motion or on its own motion, must dismiss the charges relevant to that testimony. The court must seal and preserve for appeal evidence submitted in camera and may not reveal the contents of the records without the unit of government’s consent. OEC Rule 510(4)(b).

5. Disclosure Required When Informer Believed to Be Unreliable

The court may require disclosure of the informer’s identity when the information is relied upon to establish the legality of the means by which evidence was obtained and the judge is not satisfied that the information was received from an informer reasonably believed to be reliable or credible. OEC Rule 510(4)(c). But see State v. Cortman, 251 Or 566, 572 (1969) (“[W]here the identity of the informer can be relevant only on the issue of probable cause and the record reveals adequate proof of probable cause without the informer’s identity, the defendant has no right to insist upon disclosure.”). See generally State v. Young, 108 Or App 196 (1991).

a. Procedure

On the unit of government’s request, the court must require an in camera disclosure. The court may not allow the parties or counsel to be present at the in camera review. The court must seal and preserve for appeal evidence
submitted in camera and may not reveal the contents of the records without the unit of government’s consent. OEC Rule 510(4)(c).

6. **Representative of the Governmental Unit May Claim Privilege**
The informer privilege may be claimed by an appropriate representative of the unit of government if the information was furnished to an officer thereof. OEC Rule 510(3).

**O. Media Person Privilege**
The court cannot compel a media person to disclose:

1. The source of any published or unpublished information obtained in the course of gathering, receiving or processing information for any medium of communication to the public; or

2. Any unpublished information obtained or prepared in the course of gathering, receiving or processing information for any medium of communication to the public.


**Search** of papers, effects or work premises of a media person is prohibited, except where probable cause exists to believe that the person has committed, is committing or is about to commit a crime. ORS 44.520(2).

1. **Continuance of the Privilege**
The media person privilege continues even if the media person has disclosed information or source elsewhere. ORS 44.530(1).

The privilege also continues despite termination of the media person’s connection with, employment by, or engagement in any medium of communication to the public. ORS 44.530(2).

2. **Definitions**
A “media person” is a person connected with, employed by, or engaged in any medium of communication to the public. ORS 44.520(1).

“Information” has its ordinary meaning and includes, but is not limited to, any written, oral, pictorial, or electronically recorded news or other data. ORS 44.510(1).

“Medium of communication” has its ordinary meaning and includes, but is not limited to, the following media:

a. Newspaper;
b. Magazine or other periodical;

c. Book;

d. Pamphlet;

e. News and wire services;

f. News or feature syndicate;

g. Broadcast station or network; or

h. Cable television system.

ORS 44.510(2).

“Published information” is any information disseminated to the public. ORS 44.510(4).

“Unpublished information” is any information, including, but not limited to, notes, outtakes, photographs, tapes, or other data of whatever sort, not disseminated to the public through a medium of communication, whether or not published information based upon or related to such material has been disseminated. ORS 44.510(5).

“Processing” has its ordinary meaning and includes, but is not limited to, the compiling, storing, and editing of information. ORS 44.510(3).

3. **Exceptions to Media Person Privilege**

   a. **Governmental Utterances and Political Publications**

      The definition for “medium of communication” expressly precludes any information which is a portion of a governmental utterance made by an official or employee of government within the scope of the official’s or employee’s governmental function, or any political publication subject to ORS 260.532 and 260.605 (campaign finance regulations). ORS 44.510(2).

   b. **Source Offers to Testify**

      An offer to testify as a witness by the source of the information is deemed a consent to the examination also of the media person. ORS 44.540.

   c. **Media Person as Defamation Defendant**

      ORS 44.520(1) does not apply with respect to the content or source of allegedly defamatory information, in a civil action for defamation wherein a media person asserts a
defense based on the content or source of the information in question. ORS 44.530(3). See McNabb v. Oregonian Publishing Co., 69 Or App 136, 144 (1984) (plaintiff not entitled to reporter’s notes when defense not based on their content or source, even though notes might show actual malice).

d. Criminal Defendant’s Right to a Fair Trial
The court must balance defendant’s rights with the need for confidentiality. See State v. Rinaldo, 102 Wash 2d 749, 754 (1984).

P. Comment Upon or Inference From Claim of Privilege
The claim of privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from a claim of privilege. OEC Rule 513(1). See Griffin v. California, 380 US 609 (1965) (prosecutor’s comment to the jury upon the defendant’s failure to testify as to matters which he could reasonably be expected to deny or explain because of facts within his knowledge or by the court that the defendant’s silence under those circumstances evidenced guilt violated the Fifth Amendment’s Self-Incrimination Clause).

1. Claiming a Privilege in Jury Cases
In jury cases, the court must conduct the proceedings, to the extent practicable, so as to facilitate the making claims of privilege without the jury’s knowledge. OEC Rule 513(2).

2. Instructing the Jury
Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom. OEC Rule 513(3). Whether an instruction should be given is left to counsel’s discretion; it is a matter of right, if requested, that is not impaired by the fact that the claim of privilege is by a witness, provided an adverse inference against the party may result. 1981 Conference Committee Commentary to OEC Rule 513.

Q. Improperly Compelled Privileged Testimony
Evidence of statement or other disclosure of privileged matter is not admissible against the holder of the privilege if the disclosure was:

1. Compelled erroneously; or

2. Made without opportunity to claim the privilege.

OEC Rule 512.
R. Waiver of Privilege by Voluntary Disclosure or Consent

A privilege against disclosure of confidential information is waived if the person (or the person’s predecessor while holder of the privilege) voluntarily discloses or consents to disclosure of any significant part of the matter or communication, unless the disclosure itself is a privileged communication. OEC Rule 511.

1. Scope of Disclosure Constituting Waiver

a. Disclosure of Significant Part Waives Entire Communication

If the holder of a privileged communication voluntarily or consensually discloses any significant part of the communication, the entire communication may be inquired into. Furthermore, the privilege is waived as to other communications on the same subject with the same person, and communications on the same subject with other persons. 1981 Conference Committee Commentary to OEC Rule 511.

b. Commencement of Litigation Does Not Waive Privilege

Voluntary disclosure does not occur with the mere commencement of litigation. OEC Rule 511. However, thereafter, waiver can occur during discovery and at trial on both direct and cross-examination. 1981 Conference Committee Commentary to OEC Rule 511.

c. Attendance of News Media at Executive Sessions

Voluntary disclosure does not occur when representatives of the news media are allowed to attend executive sessions of the governing body of a public body as provided in ORS 192.660(3) (concerning labor negotiations) or when representatives of the news media disclose information after the governing body has prohibited disclosure of the information under ORS 192.660(3). OEC Rule 511.

d. Testimony of Mental, Emotional, or Physical Condition

Voluntary disclosure occurs as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition upon the holder’s offering of any person as a witness who testifies as to the condition. OEC Rule 511. See State v. Corgain, 63 Or App 26, 30-32 (1983) (concluding that defendant’s calling of witnesses to testify regarding his alcoholism in order to assert alcohol amnesia as a partial defense offered witnesses who “testifie[d] as to the condition” within the meaning of
OEC Rule 511 and thereby voluntarily waived defendant’s communications to psychiatrist).

2. **Distinguish Subject Matter From the Communication Itself**
   “A distinction must be drawn between disclosure of information pertaining to the subject of the privileged communication and disclosure of the communication itself. Only the communication is privileged, not the holder’s knowledge of the facts. Therefore, the holder may disclose the facts to third persons without waiving the privilege.” Laird C. Kirkpatrick, *Oregon Evidence* § 511.03[1] (4th ed., Lexis 2002).

3. **Refreshing Recollection With a Privileged Communication**
   “It is unclear whether the right of an adverse party to production of a writing used to refresh the recollection of a witness can override the privileges set forth in Article V [of the OEC] or the work product doctrine.” Laird C. Kirkpatrick, *Oregon Evidence* § 612.03[6] (4th ed., Lexis 2002) (discussing applicability of OEC Rule 612 to privileged writings).

VI. **REFRESHING MEMORY**

A. **Writing Used to Refresh Memory**

1. **Writing Used for the Purpose of Testifying**
   The witness must use a writing to refresh memory for the purpose of testifying; the witness may use the writing before or while testifying. OEC Rule 612.

2. **Use of Writing By Adverse Party**
   If in the court’s discretion it is necessary in the interests of justice, the adverse party may:
   a. Request production of the writing;
   b. Cross-examine the witness on the writing; or
   c. Introduce into evidence those portions relating to the witness’s testimony.

OEC Rule 612. See 1981 Conference Committee Commentary to OEC Rule 612 (“[T]he Legislative Assembly intends that [the Rule’s] policies of permitted use and required disclosure apply to any material that refreshes the memory of a witness.”); *Elam v. Soares*, 282 Or 93 (1978); *Waterway Terminals Co. v. P.S. Lord*, 242 Or 1, 55-61 (1965); *State v. Duggan*, 215 Or 151, 163-64 (1958); *State v. Liston*, 18 Or App 26, 34 (1974);
Doe v. Denny’s, Inc., 327 Or 354, 364 (1998) (court did not err in refusing to order production of report prepared by defendant’s agent, which defendant reviewed before deposition, where document did not in fact refresh his memory).

3. **Scope of Production**
   If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court must examine the writing *in camera*, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. OEC Rule 612. See U.S. v. Costner, 684 F2d 370, 373 (6th Cir. 1982).

   a. **Preserving Writing for Appellate Review**
      Any portion of the writing the court withholds over objections must be preserved and made available to the appellate court in the event of an appeal. OEC Rule 612.

4. **Sanctions For Nonproduction**
   If a writing is not produced or delivered pursuant to the court’s order, the court may make any order justice requires. OEC Rule 612.

   a. **Criminal Cases**
      If the prosecution does not to comply with an order requiring production or delivery of a writing, the court may:
      1. Strike the testimony; or
      2. Declare a mistrial if the interests of justice require.

      OEC Rule 612.

5. **Foundation For Memory Loss Not Required**
   Rule 612 does not address whether the witness’s memory loss must be demonstrated before it may be refreshed, however, no such foundation should be required. Laird C. Kirkpatrick, Oregon Evidence § 612.03[4] (4th ed., Lexis 2002).

6. **Memory Must Be Refreshed Before Testifying**
   The witness’s memory must be refreshed before the witness testifies; the witness may not just read from the writing—the court may require the witness to surrender it in order to determine whether the witness is testifying from independent recollection. Laird C. Kirkpatrick, Oregon Evidence § 612.03[4] (4th ed., Lexis 2002).
7. **Transcript Read to Witness**
   “[W]hen a transcript of a statement given by a witness is read by counsel for the purpose of refreshing the witness’s recollection, opposing counsel, on request, has the right to inspect the transcript whether or not it is shown to the witness.” *Waterway Terminals Co. v. P.S. Lord*, 242 Or 1, 60 (1965).

8. **Admissibility of Writing Used to Refresh Memory**
   Using a writing to refresh a witness’s memory does not make it admissible as evidence. The court must determine that the writing is otherwise admissible before receiving it in evidence. See Laird C. Kirkpatrick, *Oregon Evidence* § 612.03[2] (4th ed., Lexis 2002).

   **B. Past Recollection Recorded**
   “If the witness’s memory is not refreshed, a foundation may then be laid for introduction of the writing under the past recollection recorded exception to the hearsay rule.” Laird C. Kirkpatrick, *Oregon Evidence* § 612.03[4] (4th ed., Lexis 2002). See OEC Rule 803(5) (excepting past recollections recorded from the hearsay rule even though the declarant is available as a witness).

1. **Foundation for Admission**
   The writing must be a memo or record:
   1. Concerning a matter about which the witness once had knowledge but now has insufficient recollection to testify fully and accurately;
   2. Shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory; and
   3. Reflecting that knowledge correctly.

   OEC Rule 803(5).

   **a. Admitted Memo or Record May Be Read Into Evidence**
   If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party. OEC Rule 803(5).

**VII. EXPERT WITNESSES**

A. **Testimony by Experts**
   If *scientific, technical or other specialized knowledge* will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill,
experience, training or education may testify thereto in the form of an opinion or otherwise. OEC Rule 702.

1. **Key Inquiry**
   If the expert testimony will assist the trier of fact, the court should admit the evidence; otherwise the court may commit error by refusing to admit it. *State v. Stringer*, 292 Or 388, 392 (1982). See *Wulff v. Sprouse-Reitz Co., Inc.*, 262 Or 293, 304 (1972) (expert need not have best qualifications); see also *Marshall v. Martinson*, 264 Or 470, 475 (1973) (jury is free to disbelieve expert opinions); *State v. Schutte*, 146 Or App 97, 103-04 (1997) (expert testimony would not be helpful to jury).

B. **Qualification as an Expert**

1. **Preliminary Question of Fact**
   Qualification as an expert is a preliminary question of fact over which the court has discretion. OEC Rule 104(1). See *Yundt v. D & D Bowl, Inc.*, 259 Or 247 (1971); *State v. Caulder*, 75 Or App 457 (1985) (court’s finding will not be overturned except for abuse of discretion); *State v. Smith*, 66 Or App 703 (1984).

2. **Basis For Qualifications**
   Formal training is not a required—knowledge, skill, experience, or training may qualify expert. *State v. Smith*, 228 Or 340, 345-46 (1961); OEC Rule 702.

3. **Challenging Expert Testimony**
   In “aid of an objection,” the court may permit questions to be asked by opposing counsel relating to the qualifications of a witness or the foundation of the witness’s testimony and may insist that all such questions be postponed until cross-examination. *Krause v. Eugene Dodge, Inc.*, 265 Or 486, 510 (1973).

C. **Scientific Evidence**

1. **Admissibility Standard For Scientific Evidence: State V. Brown**
   In *State v. Brown*, 297 Or 404, 409 (1984), the court held that the admissibility of scientific evidence should be determined by application of:
   - OEC Rule 401 (relevancy);
   - OEC Rule 702 (expert testimony); and
   - OEC Rule 403 (exclusion for unfair prejudice, confusion of issues, or misleading the jury).
Applying OEC Rules 401, 702, and 403

In applying OEC Rules 401, 702, and 403, the court must:

1. Identify and evaluate the probative value of the evidence;
2. Consider how it might impair rather than help the fact finder; and
3. Decide whether truth-finding is better served by exclusion or admission.


Factors to Consider

The “existence or nonexistence” of the following factors may enter into the court’s ruling on the admissibility of scientific evidence:

1. General acceptance of technique in field;
2. Expert’s qualifications and stature;
3. Use which has been made of technique;
4. Potential rate of error;
5. Existence of specialized literature;
6. Novelty of the invention; and
7. Extent to which technique relies on subjective interpretation of expert.


i. *Frye Standard Rejected*

“The salutary aspect of the Frye ‘general acceptance’ test is retained, not as a prerequisite to admissibility, but as one of seven steps in the screening process.”

c. **Brown Standard Reaffirmed**

d. **Daubert’s Two-Prong Test**
   The court must determine whether scientific evidence is admissible using *Daubert’s* two-prong test:
   
   1. Evidence must have scientific validity, *i.e.*, it must be reliable; and
   2. Proffered evidence must “fit”—*i.e.*, be pertinent to an issue in the case.


i. **Determining Reliability**

ii. **Factors in the Reliability Analysis**
   The court in *State v. O’Key*, 321 Or 285, 306 (1995), adopted the following factors from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (1993), for trial courts to consider in their “vital role” as gatekeeper in determining the *reliability* of scientific evidence:

   a. Whether theory or technique in question can be (and has been) tested;

   b. Whether theory/technique has been subject to peer review and publication;

   c. Known or potential rate of error and existence of operational standards controlling technique’s operation; and
d. The degree of acceptance in the relevant scientific community.

_O'Key_, 321 Or at 304-05; _see id._ at 306 n.28 (concluding that additional factors “such as the nonjudicial uses and experience with the process or technique and the extent to which other courts have permitted expert testimony based on the process or technique” may also be considered in determining admissibility). *See Kumbo Tire Co. v. Carmichael*, 526 US 137 (1999) (products liability action; *Daubert*’s “gatekeeping” function, requiring inquiry into relevance and reliability of expert witness’s principle or technique, applies not only to “scientific” evidence, but to all expert testimony).

iii. **When Reliability Determination Is Unnecessary**

The court’s determination of reliability is unnecessary in cases where:

a. Appellate precedent has approved the admissibility of the particular type of scientific evidence;

b. The scientific evidence’s validity is so clear that it is subject to judicial notice; and

c. Possibly where scientific evidence is admissible pursuant to statute.


e. **Proponent of Evidence Has Burden to Show Admissibility**

The proponent of scientific evidence has the burden to show that it meets the admissibility standards provided in *State v. Brown*, 297 Or 404 (1984), unless the evidence is approved by statute or a prior appellate decision. Laird C. Kirkpatrick, *Oregon Evidence* § 702.04[1][h] (4th ed., Lexis 2002).

2. **Definition of Scientific Evidence**

The “term ‘scientific’ as we use it in this opinion refers to evidence that draws its convincing force from some principle of science, mathematics and the like. Typically, but not necessarily, scientific evidence is presented by an expert witness who can explain data or test results and, if necessary, explain the scientific principles which are said to give the evidence its reliability or accuracy.” *State v. Brown*, 297 Or
Focus on Jurors’ Perspective of the Evidence

“An important aspect of the O’Key opinion is that it extends the definition of scientific evidence to ‘proffered expert scientific testimony that a court finds possesses significantly increased potential to influence the trier of fact as ‘scientific’ assertions.’ 321 Or at 293. In other words, the Court apparently intends the standard to be not whether scientists would categorize the evidence as ‘scientific,’ but whether jurors would perceive it as such. Evidence that is likely to influence (and hence possibly mislead) jurors as conveying the imprimatur of science must satisfy the Brown/O’Key foundational requirements.” Laird C. Kirkpatrick, Oregon Evidence § 702.04[1][e] (4th ed., Lexis 2002).

Bases of Opinion Testimony By Experts

An expert may base an opinion or inference on facts or data perceived by or made known to the expert at or before the hearing. OEC Rule 703.

1. Opinion May Be Based on Data From Three Sources

An expert may base an opinion on facts or data from the following three sources:

a. Personal observation;

b. Testimony of other witnesses at trial; and

c. Sources of data made known to the expert outside of court and other than by the expert’s own perception.

1981 Conference Committee Commentary to OEC Rule 703. 
See also Myers v. Cessna Aircraft, 275 Or 501, 512 (1976) (holding that “it was not error to allow the expert accident reconstruction analyst in this case to base his opinion, at least in part, on the previously admitted opinions of other experts”).

2. Facts Reasonably Relied Upon By Experts Need Not Be Admissible

If the facts or data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences on the subject, they need not be admissible in evidence. OEC Rule 703. See Stevens v. Horton, 161 Or App 454, 465 (1999) (“Nothing in OEC 703 suggests that otherwise inadmissible evidence is admissible simply because it was the basis for
E. Disclosure of Fact or Data Underlying Expert Opinion

An expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. OEC Rule 705. See Wulff v. Sprouse-Reitz Co., Inc., 262 Or 293, 307-08 (1972).

1. When Disclosure of Facts May Be Required

OEC Rule 705 indicates that in appropriate circumstances the court can require advance disclosure of the underlying facts by hypothetical question or otherwise. See 1981 Conference Committee Commentary to OEC Rule 705. Additionally, the expert may in any event be required to disclose the underlying facts on cross-examination. OEC Rule 705.

2. Conjectural Opinion Impermissible

If it is found on cross-examination that the opinion is not based upon a permissible basis, then the court may strike the opinion or, in extreme cases, declare a mistrial. Laird C. Kirkpatrick, Oregon Evidence § 705.03 (4th ed., Lexis 2002).

F. Opinion on Ultimate Issue

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue that the trier of fact must decide. OEC Rule 704. See Madrid v. Robinson, 324 Or 561, 567 (1997); State v. Middleton, 294 Or 427, 435 (1983). However, the opinion still must comply with Rules 701 and 702 (requiring opinions to be helpful to the trier of fact) that protect against the admission of opinions that would merely instruct the jury on what conclusion to reach. 1981 Conference Committee Commentary to OEC Rule 704. See State v. Parks, 71 Or App 630, 635 (1985) (agreeing with trial court’s striking of defendant’s wife’s testimony that shooting was “an accident” because the witness was no better able than the jury to reach a conclusion on that issue).
1. Prejudicial Versus Probative Considerations
   Even if the opinion embraces an ultimate issue, or the basis of
   the opinion tends to confuse the jury on other principal issues
   in the case, the court may exclude it on prejudicial grounds.

G. Impeachment of Experts
   An expert, like any other witness, may be impeached by any
   method applicable. See OEC Rule 607 (allowing the credibility of
   a witness to be attacked by any party, including the party calling
   the witness); OEC Rule 609-1 (impeachment for bias or interest).

1. Examining Experts on Fees and Prior Relationships
   The parties may examine an expert on fees received,
   compensation, prior relationships with the parties or attorneys,
   and the frequency of testimony on behalf of a party. 1981
   Conference Committee Commentary to OEC Rule 609-1. See
   State v. Sack, 210 Or 552, 583 (1957); Hahn v. Dewey, 157 Or
   433, 455 (1937). Prior to OEC Rule 609-1, a party could not
   question an expert on the amount of fees received for testimony
   Or 393 (1955). However, the Legislative Assembly intended
   that Rule 609-1 overrule case law prohibiting this line of
   inquiry. 1981 Conference Committee Commentary to OEC
   Rule 609-1.

2. Impeachment of Expert Witness By Learned Treatise
   Upon cross-examination, an expert witness may be questioned
   concerning statements contained in a published treatise,
   periodical, or pamphlet on a subject of history, medicine or
   other science or art if the treatise, periodical, or pamphlet is
   established as a reliable authority. OEC Rule 706. See
   Kern v. Pullen, 138 Or 222, 231-32 (1931), overruled on other
   grounds 167 Or 439 (1941) (“[I]t would create an anomalous situation
   to permit the witness, by his own oath, to qualify himself
   as an expert on the matter upon which he testifies and then
   refuse to allow opposing counsel to test his qualifications and
   truthfulness by the use of authorities that the witness himself
   says he is familiar with, are standard and so recognized by the
   members of his profession.”).

   a. Establishing a Reliable Authority
      A treatise, periodical, or pamphlet may be established as
      a reliable authority by the testimony or admission of the
      witness, by other expert testimony, or by judicial notice.
      OEC Rule 706.
b. **Statements May Not Be Introduced as Substantive Evidence**

Statements contained in a treatise, periodical or pamphlet established as a reliable authority may be used for purposes of impeachment but may not be introduced as substantive evidence. OEC Rule 706. *See Eckleberry v. Kaiser Foundation, et al.*, 226 Or 616, 620-21 (1961); OEC Rule 105 (allowing court to limit admissibility of evidence for one purpose (e.g., impeachment) and not for another (e.g., substantive evidence)).

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**VIII. LAY WITNESS OPINIONS**

**A. Lay Witness Opinion Testimony**

Lay witness opinions are limited to those opinions or inferences which are:

1. Rationally based on the perception of the witness, and

2. Helpful to a clear understanding of the witness’s testimony or to the determination of a fact in issue.

OEC Rule 701. *See State v. Ross*, 147 Or App 634, 641 (1997) (DUII case; disapproved use of arresting officer’s testimony that defendant’s behavior was consistent with his BAC).

**1. Examples of Opinion Testimony By Lay Witnesses**

Examples of lay witness opinion testimony include:


- “[T]hings that are of common occurrence and observation, such as size, heights, odors, flavors, color, heat.” *State v. Lerch*, 63 Or App 707, 717 (1983) (quoting *U.S. v. Skeet*, 665 F2d 983, 985 (9th Cir. 1982)).

• Identity of persons. *State v. Welch*, 33 Or 33, 35 (1898).
• Intoxication. *Brown v. Bryant*, 244 Or 321 (1966); see *State v. Wright*, 315 Or 124, 132 (1992) (lay witness is capable of offering opinion as to whether person is intoxicated); *State v. Bybee*, 131 Or App 492, 496 (1994).
• Approximate age. 1981 Conference Committee Commentary to OEC Rule 701.
• Speed, generally and not specifically, when based upon the sound of a motor vehicle. *Marshall v. Mullin*, 212 Or 421, 426 (1958).
• Sanity of defendant (the witness must have sufficiently intimate acquaintance with defendant—the court has discretion whether to allow). *State v. Fowler*, 37 Or App 299 (1978); *State v. Baucom*, 28 Or App 757 (1977); *State v. Dyer*, 16 Or App 247 (1974).

IX. IMPEACHMENT

A. Who May Impeach

Any party, including the party calling the witness, may attack the witness’s credibility. OEC Rule 607.
1. **Contradictory Evidence**


2. **Improper Impeachment**

   Improper impeachment occurs:

   a. If the testimony amounted to an expert giving an opinion on whether the expert believed a witness. *State v. Munro*, 68 Or App 63 (1984); see *State v. Gherasim*, 153 Or App 313, 320 (1998) (expert did not give opinion on whether he believed the witness was telling truth). Or


B. **Evidence of Witness’s Character and Conduct**

   Evidence of a witness’s character is admissible for the purpose of proving that the witness acted in conformity therewith on a particular occasion. OEC Rule 404(2)(c). Rules 608 and 609 determine the method of proof. 1981 Conference Committee Commentary to OEC Rule 404.

   1. **Reputation or Opinion Evidence**

   A party may attack or support a witness’s credibility by opinion or reputation evidence, but:

   a. The evidence may refer only to character for truthfulness or untruthfulness; and

   b. Evidence of truthful character is admissible only after the witness’s character for truthfulness has been attacked by opinion or reputation evidence or otherwise.

a. **Evidence of Witness’s Religious Beliefs or Opinions**

   Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the credibility of the witness is impaired or enhanced. OEC Rule 610. *See State v. Duncan*, 131 Or App 1, 5 (1994) (citing Rule 610; evidence of religious belief inadmissible regarding witness credibility).

2. **Specific Instances of Conduct**

   Extrinsic evidence may not be used to prove specific instances of a witnesses’ conduct (other than conviction of crime) for the purpose of attacking or supporting the witness’s credibility. Such specific instances of conduct may not be inquired into on cross-examination of the witness, even if probative of truthfulness or untruthfulness. OEC Rule 608(2). *See State v. Brown*, 297 Or 404, 443 (1984); *State v. Thompson*, 131 Or App 230, 238 (1994); *Addicks v. Cupp*, 54 Or App 830, 834 (1981); *State v. White*, 48 Or 416, 426 (1907); *State v. Schober*, 67 Or App 385 (1984) (distinguishing impeachment by contradiction and impeachment by prior bad acts).

C. **Admissibility of Character Evidence**

1. **Admissible When It Is An Essential Element**

   Evidence of a person’s character or trait of character is admissible when it is an *essential element* of a charge, claim, or defense. OEC Rule 404(1). *See State v. Whitney-Biggs*, 147 Or App 509, 526-28 (1997).

2. **Generally Inadmissible to Prove Action In Conformity Therewith**

   Evidence that a person acted in conformity with character on a particular occasion is inadmissible, except:

   a. Evidence of a pertinent character trait offered by the accused, or the prosecution to rebut the same;

   b. Evidence of a pertinent character trait of the victim offered by the accused, or the prosecution to rebut the same (e.g., to show victim’s reputation for aggressiveness in support of a claim of self-defense when charged with assault or homicide);

   c. Evidence to show the victim’s character for peacefulness offered by the prosecution to rebut evidence that the victim was the first aggressor;

   d. Evidence of a witness’s character as provided in Rules 607, 608, and 609.

3. **Distinguish Reputation Evidence From Character Evidence**
Under OEC Rule 608(1), the prosecutor may offer reputation or opinion evidence only concerning the defendant’s character for untruthfulness if the defendant testifies; under OEC Rule 404(2)(a), the prosecutor can offer pertinent character evidence of the defendant to rebut that offered by the defendant, whether or not the defendant testifies. Laird C. Kirkpatrick, *Oregon Evidence* § 608.03[1] (4th ed., Lexis 2002).

4. **Evidence of Other Crimes, Wrongs, or Acts Inadmissible**
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. OEC Rule 404(3).

a. **Admissibility For Other Purposes**
Evidence of other crimes, wrongs, or acts may be admissible for other purposes, such as proof of:
   - Motive;
   - Opportunity;
   - Intent;
   - Preparation;
   - Plan;
   - Knowledge;
   - Identity; or
   - Absence of mistake or accident.

OEC Rule 404(3).

b. **Admissibility of Defendant’s Other Crimes, Wrongs, or Acts**
Evidence of other crimes, wrongs, or acts by the defendant is admissible if relevant, except as otherwise provided by:

1. ORS 40.180, 40.185, 40.190, 40.195, 40.200, 40.205, 40.210 and, to the extent required by the U.S. or Oregon Constitutions, ORS 40.160;
2. Rules of evidence relating to hearsay and privileges;
3. Oregon Constitution; and

OEC Rule 404(4). See generally State v. Johns, 301 Or 535, 557-59 (1986) (providing five factors that a trial judge should consider in determining whether the probative value of evidence of other crimes exceeds its prejudicial nature); State v. Dibala, 161 Or App 99, 106-07 (1999) (denying admission of defendant’s prior bad acts under Rule 404(4) because they were not logically relevant to the charged offenses); State v. Pyle, 155 Or App 74, 82 (1998) (“The trial court’s application of the five Johns’ criteria and its order to exclude the prior acts for failing to meet that criteria is a determination of relevancy.”); Wayne T. Westling, Oregon Criminal Practice § 39.02, 143 (Michie Supp. 2000) (stating that Rule 403 balancing is not permitted under Rule 404(4) unless required by the Federal or Oregon Constitution); Laird C. Kirkpatrick, Oregon Evidence § 404.07[1] (4th ed., Lexis 2002) (“In allowing propensity evidence, OEC 404(4) overrides the policy of OEC 402(2) and (3), both of which prohibit evidence of a person’s character to show ‘that the person acted in conformity therewith’ on a particular occasion.”).

5. Evidence Establishing a Pattern, Practice, or History of Abuse

Any party may introduce evidence establishing a pattern, practice, or history of abuse of a person and may introduce expert testimony to assist the fact finder in understanding the significance of such evidence, if the evidence:

a. Is relevant to any material issue; and

b. Is not inadmissible under any other provision of law.

OEC Rule 404-1(1).

D. Impeachment by Evidence of Conviction of Crime

1. Admissible to Impeach Witness’s Credibility

Evidence of a former conviction is admissible to impeach the credibility of a witness, including the defendant, if the crime was punishable by death or imprisonment for more than one year (i.e., a felony conviction), or involved false statement or dishonesty. OEC Rule 609(1). See State v. Archer, 150 Or App 505, 507-10 (1997) (concluding that under Rule 609 the State was entitled to inform the jury that defendant’s conviction for driving while suspended was a felony; trial court erred in excluding that fact under Rule 403 on prejudicial and cumulative grounds); State v. Busby, 315 Or 292, 297 (1993) (approving the continued practice of ruling on the admissibility
of prior crime impeachment evidence as soon as possible after the issue is raised).

a. **Witness Allowed to Give a Brief Explanation**
   When the witness’s credibility has been attacked by evidence of a former conviction, the witness must be allowed to briefly explain the circumstances of the crime or former conviction; the opposing party must have the opportunity to rebut the explanation. OEC Rule 609(4).

2. **Prior Convictions For Domestic Violence Admissible**
   Evidence that the defendant has been previously convicted of fourth-degree assault, attempted fourth-degree assault, menacing, or harassment against a family or household member may be elicited from the defendant, or established by public record, and admitted for the purpose of attacking the defendant’s credibility, if the defendant testifies and is charged with committing one or more of the crimes enumerated in OEC Rule 609(2)(b). OEC Rule 609(2)(a); OEC Rule 609(2)(b) (including murder, manslaughter, assault, rape, sodomy, kidnapping, harassment, etc.).

3. **When Evidence of Former Conviction Inadmissible**
   Evidence of a former conviction is *not* admissible if:
   
a. More than 15 years has elapsed from the date of the conviction, or release of the witness from confinement for that conviction, whichever is later; or

b. The conviction has been expunged by pardon, reversed, set aside, or otherwise rendered nugatory.

OEC Rule 609(3). *See U.S. v. Mullins*, 562 F2d 999 (5th Cir. 1977) (period measured back from time of indictment or complaint).

4. **Conviction Pending Appeal Admissible**
   The pendency of appeal from a former conviction does not render evidence of the conviction inadmissible; and evidence of the pending appeal is admissible. OEC Rule 609(5).

5. **Juvenile Adjudication Is Not a Conviction**
   An adjudication by a juvenile court that a child is within its jurisdiction is not a conviction of a crime. OEC Rule 609(6).

6. **Violations May Not Be Used to Impeach**
   A conviction of any of the statutory counterparts of offenses designated as violations as described in ORS 153.008 may not be used to impeach the witness’s character. OEC Rule 609(7).
CHAPTER 11: EVIDENCE—WITNESSES

E. Impeachment For Bias or Interest
The credibility of a witness may be attacked by evidence that the witness engaged in conduct or made statements showing bias or interest. OEC Rule 609-1(1). See State v. Sheeler, 15 Or App 96, 100 (1973) (error to refuse to admit evidence of possible bias). The evidence offered need only have a tendency to prove bias or interest and may otherwise be irrelevant. State v. Mellinger, 52 Or App 21, 28 (1981).

1. Disclosure of Statement to Witness Not Required
A party need not show or disclose to the witness on examination a prior statement made by a witness that reveals the witness’s bias or interest; however, a party must disclose the statement to the opposing party on request. OEC Rule 609-1(1).

2. Witness Admits Bias or Interest
If the witness admits the facts claimed to show the bias or interest, then the court may not admit additional evidence of that bias or interest. OEC Rule 609-1(2).

3. Witness Denies Bias or Interest
If the witness denies or does not fully admit the facts claimed to show the bias or interest, then the attacking party may offer evidence to prove those facts. OEC Rule 609-1(2).

4. Rehabilitation
Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest must be limited to evidence showing a lack of bias or interest. OEC Rule 609-1(3). See State v. Estlick, 269 Or 75 (1974); State v. Neal, 143 Or App 188, 192 (1996); State v. Van Hooser, 11 Or App 146, 151-52 (1972).

F. Impeachment For Lack of Perception
Impeachment based on lack of perception issues involve:

- Alcohol or drug use at time to which the testimony relates; or
- A defect of memory.


G. Prior Statements of Witness
1. **Prior Statements**
   In examining a witness concerning a prior statement, a party need not show the statement or disclose its contents to the witness at that time; however, the statement must be shown or disclosed to the opposing counsel on request. OEC Rule 613(1). See *State v. Van Gorder*, 56 Or App 83, 89 (1982) (“[I]f a proper foundation has been laid, when a witness testifies that he is unsure of or does not remember having made a particular statement, the witness may be impeached by evidence that he made the alleged statements.”); *State v. Middleton*, 58 Or App 447, 450-51 (1982).

2. **Prior Inconsistent Statements**
   Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. OEC Rule 613(2). This rule does not apply to admissions by a party opponent as defined in OEC Rule 801. OEC Rule 613(2). See OEC Rule 801(4)(a) (providing that inconsistent statement given under oath is not hearsay where declarant testifies and is subject to cross-examination).

3. **State May Use Admissions From Omnibus Hearing to Impeach**
   Admissions made by the defendant or the attorney of the defendant at an omnibus hearing may be used to impeach the defendant or in a prosecution of the defendant for perjury or false swearing. ORS 135.037(4).

4. **Court Discretion**
   The degree of compliance with the foundation requirement for admission of the evidence is within the trial court’s discretion. *State v. Joseph*, 230 Or 585, 589 (1962); *State v. Nortin*, 170 Or 296, 321 (1943).

H. **Impeachment of Experts**
   See supra VII.G. “Impeachment of Experts.”

I. **Illegally Obtained Evidence**
   “[A] defendant [is permitted] to keep illegally obtained evidence from a jury unless he takes the stand—something he cannot be compelled to do—and, by his testimony, makes that evidence pertinent to determining whether he is telling the truth. This is a very limited rule: The evidence against defendant is not made generally admissible if he testifies; it is admissible only and to the extent it impeaches a statement he had made under oath at trial.”
State v. Mills, 76 Or App 301, 310 (1985). Cf. State v. Iseli, 80 Or App 208, 212 (1986) (concluding that suppressed evidence should not have been admitted to impeach defendant where she did not deny her possession of drugs but asserted her right to refuse to answer under the Fifth Amendment).

X. REHABILITATION

A. Criminal Records

1. Evidence of Conviction
   When a witness is impeached by evidence of conviction of a crime, the witness may briefly explain the circumstances of the crime or former conviction. OEC Rule 609(4). See State v. Gilbert, 282 Or 309 (1978); State v. Washington, 36 Or App 547, 553 (1978).

2. Misleading or False Statements
   When a witness misleads or makes false statements regarding circumstances, it may entitle the State to bring out additional details to correct the record. State v. Poole, 11 Or App 55, 61 (1972). For example, when the defense attempts to minimize a prior conviction by showing that defendant pleaded guilty, the State then may demonstrate factors other than the defendant’s sense of guilt that entered into the ultimate decision to plead guilty.

3. Evidence of Acquittal
   If the State introduces evidence of other alleged criminal acts to prove the defendant’s guilt (modus operandi), defendant may offer evidence of acquittal. State v. Smith, 271 Or 294, 298-99 (1975).

B. Bolstering a Witness’s Credibility

1. Showing Lack of Bias or Interest
   Evidence to support or rehabilitate a witness whose credibility has been attacked by evidence of bias or interest must be limited to evidence showing a lack of bias or interest. OEC Rule 609-1(3). See State v. Van Hooser, 11 Or App 146, 151 (1972); State v. Eby, 296 Or 63, 75 (1983).

2. Mere Contradiction
   “[T]he mere contradiction of one witness by another is an insufficient impeachment of character to justify the admission of evidence of general reputation for truth and veracity.” State
Good Character
Evidence of a witness’s good character generally is inadmissible; however, reputation or opinion evidence referring to character for truthfulness or untruthfulness is admissible, but only after the witness’s character has been attacked. OEC Rule 608(1). See State v. Reynolds, 324 Or 550, 556-57 (1997); State v. Neal, 73 Or App 816, 818 (1985); State v. Adonri, 143 Or App 298, 300-07 (1996) (evidence of child rape victim’s character for truthfulness was not admissible under OEC Rule 608 because her character had not been attacked; admitted under “curative admissibility” doctrine).

Prior Consistent Statements
Prior consistent statements are generally inadmissible. However, the definition of hearsay excludes a prior statement made by a declarant who testifies at the trial or hearing and is subject to cross-examination concerning the statement. The statement must be consistent with the witness’s testimony and must be offered to rebut an inconsistent statement or an express or implied charge against the witness of recent fabrication or improper influence or motive. OEC Rule 801(4)(a)(b). See Keys v. Nadel, 325 Or 324 (1997); State v. Middleton, 294 Or 427, 431 (1983); Livestock Transportation v. Ashbaugh, 64 Or App 7, 10 (1983).

1. Exception
When a witness’s testimony is attacked as false, the court may admit proof of a prior statement made shortly after the incident, consistent with sworn testimony, as proper rehabilitation. See State v. Knoke, 14 Or App 187, 191 (1973); State v. Drew, 8 Or App 471, 476 (1972).

Use of Polygraph
XI. HEARSAY

“The lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is reported is today accepted as the main justification for the exclusion of hearsay.” 2 MCORMICK ON EVIDENCE § 245, 94 (John W. Strong ed., 5th ed., West 1999).

A. Hearsay Rule
Hearsay is not admissible unless it qualifies under an exception as provided in OEC Rules 801 to 806 or other applicable law. OEC Rule 802. The hearsay rule “is only effective when invoked: hearsay which is offered, and not objected to, will be received into evidence.” 1981 Conference Committee Commentary to OEC Rule 802.

B. Hearsay Defined
Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. OEC Rule 801(3).

1. An Assertion Must Be Intended
An assertion can be oral, written, or nonverbal, however, “nothing is an assertion unless intended to be one;” thus, all evidence of verbal or nonverbal conduct not intended by the declarant to be an assertion is not within the operation of the hearsay rule. 1981 Conference Committee Commentary to OEC Rule 801; OEC Rule 801(1).

a. Opponent of the Evidence Has Burden of Proving Assertion
When evidence is offered on the theory that it is not an assertion, the party opposing its admission has the burden of proving that an assertion was intended. 1981 Conference Committee Commentary to OEC Rule 801.

2. Statements Not Offered as Truth of the Matter Are Admissible
An out-of-court statement that would otherwise qualify as hearsay if offered for its truth may nevertheless be admissible under one of the following theories:

a. Impeachment of a witness whose prior inconsistent statements are offered as evidence that the witness is not testifying consistently;

b. Proof of an operative fact or verbal act by a statement that has independent legal significance apart from its truth;

c. Circumstantial evidence of the declarant’s state of mind, such as motive or knowledge;

d. Proof of the effect of the statement on a listener’s motive, knowledge, or attitude; and

e. Proof of facts or data relied upon in expert testimony.

3. **Statements That Are Not Hearsay**
The following types of statements are excluded from the definition of hearsay and thus not subject to OEC Rule 802.

a. **Prior Statements By a Witness**
The definition of hearsay excludes a prior statement made by a declarant who testifies at the trial or hearing and is subject to cross-examination concerning the statement, when the statement is:

- Inconsistent with the witness’s testimony and was given under oath subject to the penalty of perjury;
- Consistent with the witness’s testimony and is offered to rebut an inconsistent statement or an express or implied charge against the witness of recent fabrication or improper influence or motive; or
- One that identifies a person made after perceiving the person.

OEC Rule 801(4)(a).

i. **Cross-Examination at Prior Proceeding Not Required**
Because OEC Rule 801(4)(a) does not require the witness’s prior statement to have been subject to cross-examination, a witness’s inconsistent testimony before a grand jury is admissible as substantive evidence. Laird C. Kirkpatrick, *Oregon Evidence* § 801.02[b][iii] (4th ed., Lexis 2002).

b. **Party Admissions**
The definition of hearsay excludes a statement offered against a party when the statement is:

- The party’s own statement;
- One that the party has manifested an adoption of or a belief in its truth;
- Made by another person under the party’s authorization;
- Made by the party’s agent or servant concerning a matter within the scope of the agency or employment and during the existence of such relationship; or
• Made by the party’s coconspirator during the course and in furtherance of the conspiracy.

OEC Rule 801(4)(b).

i. Admissions Made By Codefendants

“Admissions made by codefendants are generally admissible against a party only if they qualify under a subsequent subsection of Rule 801(4)(b), such as the exceptions for authorized admissions or coconspirator admissions.” Laird C. Kirkpatrick, Oregon Evidence § 801.03[4][f] (4th ed., Lexis 2002). Evidence of a codefendant’s guilty plea may not be received against a defendant. Id.

ii. Silence Construed as an Adoption or Belief

The party admission exclusion in OEC Rule 801(4)(b)(B) concerning a statement that the party has manifested an adoption of or a belief in its truth “should not be construed to allow the admission, for any purpose in a criminal case, of evidence of silence during police interrogation after the defendant has been informed of the right to remain silent as provided in Miranda v. Arizona . . . .” 1981 Conference Committee Commentary to OEC Rule 801. However, evidence of the defendant’s silence following accusations made by persons other than law enforcement may be admissible. Laird C. Kirkpatrick, Oregon Evidence § 801.03[5][d] (4th ed., Lexis 2002).

C. Hearsay Exceptions


In Crawford v. Washington, 541 US 36 (2004), the U.S. Supreme Court abrogated the “indicia of reliability” rule announced in Ohio v. Roberts, 448 US 56, 65-66 (1980), for determining when an unavailable declarant’s hearsay statement is admissible against a criminal defendant. The Crawford Court held that where “testimonial” statements are at issue, the Confrontation Clause of the Sixth Amendment requires “unavailability and a prior opportunity for cross-examination.” Crawford, 541 US at 68. As a result of this opinion, “several existing state hearsay exceptions are likely unconstitutional to the extent that they allow ‘testimonial’ hearsay to be admitted against criminal defendants without requiring cross-examination of the declarant.” Laird C. Kirkpatrick, Oregon Evidence § 802.03[2][a] (4th ed., Lexis Supp. 2004). Specifically, OEC Rule 803(18a) (providing
exception for admissibility of a reliable statement describing sexual misconduct or abuse) and OEC Rule 803(26) (providing exception for admissibility of a reliable statement describing an incident of domestic violence) are likely unconstitutional under Crawford because introduction of a statement under both rules is based on the “indicia of reliability” rule provided in Roberts. See id. Additionally, a hearsay statement offered under any exception will be subject to exclusion under Crawford to the extent that is found to be testimonial. See id. at §§ 803.02[3][a], 803.04[3][g], 803.29[3][f], 804.04[4], and 804.07[3][a].

a. Defining “Testimonial” Statements
   The Crawford Court stated, “[w]e leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’ Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” Crawford v. Washington, 541 US 36, 68 (2004).

b. Exceptions to the Confrontation Clause Accepted in Crawford

i. Dying Declarations
   The Crawford Court acknowledged historical authority for dying declarations as an exception to the Confrontation Clause that may be “invoked to admit testimonial statements against the accused in a criminal case.” Crawford v. Washington, 541 US 36, 56 n.6 (2004) (emphasis in original).

ii. Forfeiture By Wrongdoing
   The Court in Crawford also accepted that “the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.” Crawford v. Washington, 541 US 36, 62 (2004). See Reynolds v. United States, 98 US 145, 158-59 (1878) (acknowledging the exception as a principle of equity); FRE 804(b)(6) (providing an exception to the hearsay rule for a statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness).
In sum, *Crawford* prohibits the admission of testimonial hearsay by an unavailable witness against a criminal defendant unless the defendant has had the opportunity to cross-examine the hearsay declarant." *State v. Page*, 197 Or App 72, 84 (2005) (concluding that an accomplice’s statements to a police detective during a custodial interview were testimonial and therefore inadmissible because the defendant lacked the opportunity either before or at trial to cross-examine the accomplice, who was rendered unavailable by his refusal to testify).

### c. Oregon Cases Interpreting *Crawford*

In *State v. Mack*, 337 Or 586 (2004), the trial court ruled that statements made by a three-year-old to a Department of Human Services caseworker were inadmissible “testimonial” statements under *Crawford* because the caseworker was a government officer acting as an agent for the police, who structured her questions in order to obtain information to assist the State in its prosecution of the defendant. The Supreme Court of Oregon affirmed that the statements were testimonial on grounds that the caseworker “was serving as a proxy for the police,” who directed and videotaped the interview and requested that the caseworker elicit information relevant to its investigation. *Id.* at 593. Thus, the statements were inadmissible under the Sixth Amendment’s Confrontation Clause because the defendant did not have an opportunity to cross-examine the three-year-old declarant.

In *State v. Saechao*, 195 Or App 581, 586 (2004), the court held that a codefendant’s statements made to a third party over a telephone call from jail were not testimonial because they were “closely akin to the ‘off-hand, overheard remark’ specifically identified by the Court in *Crawford* as not implicating the Sixth Amendment’s ‘core concerns.’” Admission of the statements to rebut the defendant’s alibi defense therefore was not erroneous.

In *State v. Thackaberry*, 194 Or App 511, 515-16 (2004), the court concluded under the plain error doctrine that there was a reasonable dispute as to whether a laboratory report of the results of a toxicology test performed on a urine sample following the defendant’s arrest for DUII was testimonial hearsay. Although the court was not required to decide whether the report was testimonial given the procedural posture of the case, it did state the following:

“A laboratory report of a toxicology test performed on a urine sample neither qualifies as, nor seems analogous to, testimony at a preliminary hearing, before a grand jury, or at a former trial. Nor, at least in any obvious way, is it a statement made during a ‘police interrogation’ or closely analogous to one. On the other hand, a laboratory report may be analogous to—or arguably even the same as—a business or official record, which the Court in *Crawford* suggested in *dictum* would not be subject to its holding.”

*Id.* at 516.
2. **Declarant’s Availability Immaterial—Rule 803 Exceptions**  
The exceptions to the hearsay rule provided in OEC Rule 803 are justified on the theory that they possess “circumstantial guarantees of trustworthiness;” therefore, they “apply whether or not the declarant is available as a witness.” 1981 Conference Committee Commentary to OEC Rule 803.

Under OEC Rule 803, the following are not excluded by the hearsay rule **even though the declarant is available** as a witness:

- **Excited utterance.** OEC 803(2). *See also State v. Cunningham,* 337 Or 528, 535-46 (2004); *State v. Carlson,* 311 Or 201, 215-219 (1991); *State v. Crain,* 182 Or App 446 (2002) (victim’s statements during 911 call admissible under excited utterance exception); *State v. Moore,* 334 Or 328 (2002).

- **Then existing mental, emotional, or physical condition.** OEC 803(3). *See also State v. Voits,* 186 Or App 643, 658 (2003).

- **Statements for purposes of medical diagnosis or treatment.** OEC 803(4). *See also State v. Moen,* 309 Or 45, 54 (1990).

- **Recorded recollections.** OEC 803(5).

- **Records of a regularly conducted business activity.** OEC 803(6).

- **Absence of entry in business records.** OEC 803(7).

- **Public records and reports.** OEC 803(8). *See also State v. William,* 199 Or App 191 (2005).

- **Records of vital statistics.** OEC 803(9).

- **Absence of public record or entry.** OEC 803(10).

- **Records of religious organizations.** OEC 803(11).

- **Marriage, baptismal, and similar certificates,** 803(12);

- **Family records.** OEC 803(13).

- **Records of documents affecting an interest in property.** OEC 803(14).

- **Statements in documents affecting an interest in property.** OEC 803(15).

- **Statements in ancient documents.** OEC 803(16).

**Reminder:** *Crawford v. Washington,* 541 US 36 (2004), prohibits the admission of **testimonial** hearsay unless the accused has had the opportunity to confront—*i.e.*, cross-examine—the declarant.
• Market reports and commercial publications. OEC 803(17).

• Complaint of sexual misconduct. OEC 803(18a)(a).


• Reputation concerning personal or family history. OEC 803(19).

• Reputation concerning boundaries or general history. OEC 803(20).

• Reputation as to character. OEC 803(21).

• Judgment of a previous conviction. OEC 803(22).

• Judgment as to personal, family, or general history, or boundaries. OEC 803(23).

• Televised testimony. OEC 803(24).

• State police data retrieval. OEC 803(25).

• Statements relating to domestic violence. OEC 803(26).

• Forensic report containing results of presumptive test. OEC 803(27).

a. Residual Exception Under Rule 803
A statement not specifically covered by any of the 803 exceptions, but one that has equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule even though the declarant is available as a witness if the court determines that:

1. The statement is relevant;

2. The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and

3. The general purposes of the OEC and the interests of justice will best be served by admission of the statement into evidence.

i. **Notice Required Under the Residual Exception**

A statement may not be admitted under 803’s residual exception unless its proponent provides the adverse party with notice of its intention to offer the statement, and the particulars thereof, sufficiently in advance of the proceeding to allow the adverse party a fair opportunity to prepare to meet it. OEC Rule 803(28)(b).

b. **Admissibility Is Not Guaranteed**

The admissibility of evidence that meets an exception under OEC Rule 803 is not guaranteed; it may be excluded on other grounds—for example, under OEC Rule 403, if the danger of unfair prejudice, confusion of the issues, or misleading the jury, or considerations of undue delay or needless presentation of cumulative evidence substantially outweigh its probative value. Laird C. Kirkpatrick, *Oregon Evidence* § 803.01[3] (4th ed., Lexis 2002).

3. **Declarant Is Unavailable—Rule 804 Exceptions**

OEC Rule 804 is based on the theory “that hearsay which is admittedly not equal in quality to testimony of the declarant on the stand may nevertheless be admitted, if the declarant is unavailable and if the statement meets a specified standard.” 1981 Conference Committee Commentary to OEC Rule 804.

Under OEC Rule 804, the following are not excluded by the hearsay rule *if the declarant is unavailable* as a witness:

- Former testimony. OEC 804(3)(a).
- Statement under belief of impending death. OEC 804(3)(b).
- Statement of personal or family history. OEC 804(3)(d).
- Statement made in professional capacity. OEC 804(3)(e).

- A statement offered against a party who intentionally or knowingly engaged in criminal conduct that directly caused the death of the declarant, or directly caused the declarant to become unavailable as a witness because of incapacity or incompetence. 2005 Or Laws, ch. 458, § 1(3)(f) (effective Jan. 1, 2006).
• A statement offered against a party who engaged in, directed or otherwise participated in wrongful conduct that was intended to cause the declarant to be unavailable as a witness, and did cause the declarant to be unavailable. 2005 Or Laws, ch. 458, § 1(3)(g) (effective Jan. 1, 2006).

a. Residual Exception Under Rule 804
A statement not specifically covered by any of the 804 exceptions, but one that has equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as a witness and the court determines that:

1. The statement is offered as evidence of a material fact;
2. The statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts; and
3. The general purposes of the OEC and the interests of justice will best be served by admission of the statement into evidence.


i. Notice Required Under the Residual Exception
A statement may not be admitted under 804’s residual exception unless its proponent provides the adverse party with notice of its intention to offer the statement, and the particulars thereof, sufficiently in advance of the proceeding to allow the adverse party a fair opportunity to prepare to meet it. OEC Rule 804(3)(f).

b. Definition of “Unavailability as a Witness”
“Unavailability as a witness” includes situations in which the declarant:

1. Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the statement;
2. Persists in refusing to testify despite a court order to do so;
3. Testifies to a lack of memory of the subject matter of a statement;
4. Is unable to be present or testify because of death or then existing physical or mental illness or infirmity; or
5. Is absent from the hearing and the statement’s proponent has been unable to procure the declarant’s attendance (or in the case of an exception under 804(3)(b), (c), or (d), the declarant’s attendance or testimony) by process or other reasonable means.

OEC Rule 804(1).

c. Unavailability Due to Proponent’s Wrongdoing
   The unavailability requirement is not satisfied if the declarant’s exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the statement’s proponent for the purpose of preventing the witness from attending or testifying. OEC Rule 804(2).

d. Determining Unavailability
   The court determines whether the unavailability requirement has been satisfied under OEC Rule 104(1) (preliminary questions of admissibility); failure to satisfy the requirement is grounds for excluding evidence that otherwise would fit an 804 exception. Laird C. Kirkpatrick, Oregon Evidence § 804.01[4][a] (4th ed., Lexis 2002).

D. Hearsay Within Hearsay
   Hearsay included within hearsay is not excluded by the hearsay rule if each part of the combined statements conforms with an exception provided in OEC Rule 803 or 804. OEC Rule 805. If “a proponent offers testimony in which the witness quotes one out-of-court declarant who in turn quotes another out-of-court declarant, each of the multilevel statements must satisfy a hearsay exception or be categorized as not hearsay.” State v. Smith, 194 Or App 697, 703 (2004) (defendant’s testimony that his father told him that a detective had told defendant’s father that he would lose his house if defendant did not confess was not double hearsay but was offered to show its effect on defendant, who believed the threat originated from a credible source and was therefore motivated to falsely confess).

E. Attacking and Supporting the Declarant’s Credibility
   When a hearsay statement has been admitted, the declarant’s credibility may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. OEC Rule 806. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to cross-examine the declarant on the statement. Id.
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Chapter 12: Defenses
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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 12: DEFENSES

I. DEFENSES GENERALLY

A. Standard
When the defendant raises a defense at trial other than an affirmative defense, the State must disprove the defense beyond a reasonable doubt. ORS 161.055; State v. McCoy, 17 Or App 155, 163, aff’d 270 Or 340 (1974); State v. Siens, 12 Or App 97, 101, rev den (1973).

1. Raised by Defendant
A defense is raised either by notice in writing to the State before trial or by some affirmative evidence produced at trial. The defendant has the burden of production, of “raising the defense.” If the defendant raises it, the State must disprove it beyond a reasonable doubt. ORS 161.055(1),(3); State v. Olson, 79 Or App 302, 305 (1986). See State v. McMullen, 34 Or App 749, 752 (1978); State v. Williams, 12 Or App 21 (1972), rev den (1973).

2. Some Evidence Necessary
   a. Written notice of a defense, absent “some” evidence to support it, does not obligate court to instruct the jury on the defense. State v. Williams, 12 Or App 21, 22-23 (1972), rev den (1973); State v. Gunn, 15 Or App 174, 176, rev den (1973) (some evidence must be presented to warrant a jury instruction on defense).

   b. The court submits the defense to the jury when either:
      1. The defendant produces evidence of the defense, or
      2. The State has offered evidence in its case-in-chief that supports the defense.


3. Absent Notice
   a. Case-in-Chief
      Absent written pretrial notice, defendant can raise defense only by affirmative evidence in defendant’s case-in-chief. State v. Keaton, 15 Or App 477, 483 (1973).
1. Pretrial notice of defense does not alter defense duties under pretrial discovery statutes.

2. Defense may be subject to challenge under ORS 135.805 et seq. if not disclosed before trial.


b. Raised by State

1. Defense may be raised by the State’s evidence.

2. Notice and discovery requirements remain unaffected.


4. Overwhelming Evidence

If the evidence is overwhelming, the court may rule that the State has failed to disprove the defense as a matter of law. State v. Gunn, 15 Or App 174, 176, rev den (1973); State v. Folsom, 1 Or App 404, 407 (1970).

B. “Affirmative Defenses” Defined

An affirmative defense raises issues that defendant must prove by a preponderance of the evidence. An affirmative defense is one where the proof is particularly within a defendant’s knowledge. Affirmative defenses must be designated “affirmative” by statute. ORS 161.055(2).

1. Raised by Defendant

a. Written Notice Required

Defendant may raise the following affirmative defenses only by providing written notice before trial:

1. Alibi. ORS 135.455(1).

2. Insanity/lack of responsibility. ORS 161.309(1).

3. Extreme emotional disturbance. ORS 163.135(2), (3).

b. Written Notice Not Required

All other affirmative defenses must be raised by evidence in defendant’s case-in-chief. ORS 161.055(3); but see State v. McBride, 287 Or 315, 321 (1979) (use of State’s evidence.

2. **Defendant Has Burden of Proof**

   a. Standard is by a preponderance of the evidence.

   b. It is constitutionally permissible to place burden on defendant.


3. **Failure to Produce Evidence**

   If defendant files written pretrial notice but presents no evidence, the court is under no obligation to instruct jury. *State v. Williams*, 12 Or App 21, 22-23 (1972), rev den (1973).

4. **If Evidence Presented**


C. **Mutually Exclusive Defenses**

   Generally, the court should not instruct on mutually exclusive defenses, such as alibi and self-defense. But where there is “some” evidence to support both defenses, “it is better to give the instruction and allow the jury to determine the truth among conflicting available inferences.” *State v. Burns*, 15 Or App 552, 556 (1973) rev den (1974); cf. *State v. Anderson*, 207 Or 675, 694 (1956) (defendant entitled to self-defense instruction if evidence in record supports it); *State v. Counts*, 311 Or 616 (1991) (insanity and EED not mutually exclusive).

II. **AFFIRMATIVE DEFENSES**

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A. Alibi

1. Defined
It is an affirmative defense if at the time of the alleged offense, defendant was at a place other than where the offense was committed. ORS 135.455(2); State v. Gordon, 208 Or 455, 463 (1956) (alibi “involves impossibility of the accused’s presence at the scene of the offense at the time of its commission”); State v. Poole, 161 Or 481, 495 (1939); State v. Redwine, 79 Or App 25, 28, rev dismissed 302 Or 193 (1986).

Note: Defense may not be relevant if defendant’s presence at scene is not required to obtain conviction; therefore, it is important for the court to distinguish testimony that defendant was not at the scene from testimony that defendant did not commit the crime.

2. Notice Requirement

a. Written Notice Required
If the defendant wants to rely on alibi evidence, the defendant must file and serve written notice on the district attorney not less than five days before trial. ORS 135.455(1). But see State v. Edgmand, 306 Or 535 (1988) (statute requiring notice of alibi evidence does not apply to alibi offered by defendant’s own testimony); State v. Douglas, 292 Or 516, 519-20 (1982) (error for trial court to preclude defendant from giving alibi testimony where defendant tried to give proper notice).

b. Failure to Provide Notice

3. Application of Discovery Statutes


b. When defendant asserts an alibi defense, discovery is reciprocal—State must provide names and addresses of rebuttal witnesses. State v. Frye, 34 Or App 871, 874 (1978).
c. Court may exclude defendant’s alibi evidence for discovery violation only when no lesser sanction is available and State is prejudiced (constitutional issue). *State v. Mai*, 294 Or 269, 276-77 (1982); *State v. Perez*, 135 Or App 433, 436 (1995).

4. Effect of Production/Failure of Production

a. Before an alibi instruction “need be given,” there must be “some proof” in the record that would tend to show defendant was not at the scene of the crime. *State v. Yielding*, 238 Or 419, 422 (1964). See *State v. Dudley*, 29 Or App 471, 475, *rev den* 280 Or 521 (1977) (failure to give requested alibi instruction was not reversible error).


5. Time/Date as Element of Crime

Prosecution is not generally required to prove specific date of commission of crime. If precise date/time of crime is not otherwise a material element, defendant cannot make it a material element simply by assertion of alibi. *State v. Yielding*, 238 Or 419, 423-24 (1964).

B. Extreme Emotional Disturbance (EED)

1. Defined

A homicide that would otherwise be murder is manslaughter in the first degree if committed under the influence of extreme emotional disturbance. ORS 163.118(1)(b); ORS 163.135(1); ORS 163.115(1)(a). See *State v. Gaynor*, 130 Or App 99, 105 (1994), *rev den* 320 Or 508 (1995).

a. EED is not a defense to a prosecution for, nor does it preclude conviction of, manslaughter in the first degree or any other crime. ORS 163.135(1). See *State v. Moore*, 324 Or 396, 413 (1996); *Kibble v. Baldwin*, 135 Or App 540, 541 (1995).

b. EED is not a defense to aggravated murder. *State v. Moore*, 324 Or 396, 413 (1996); ORS 163.135(1). See ORS 163.095 (defining aggravated murder).
c. Application of this defense is limited to cases charging intentional murder under ORS 163.115(1)(a). ORS 163.135(1). See State v. Wille, 317 Or 487, 492 (1993) (stating that “EED is a defense to the crime of intentional murder, and to no other crime.”).

d. EED means defendant was under the influence of an emotional disturbance to the extent that defendant lost self-control that would otherwise have prevented commission of the homicide. State v. Ott, 297 Or 375, 391-93 (1984) (jury should be instructed on meaning of the whole term rather than singling out “extreme;” specifically disapproving instruction used in State v. Akridge, 23 Or App 633 (1975), rev’d on other grounds).

2. Notice Requirement

Written pretrial notice is required to introduce expert testimony regarding extreme emotional disturbance. ORS 163.135(2).

Written notice of intent to rely upon defense must be given at time of plea; notice may be filed after plea if just cause shown to satisfaction of court. ORS 163.135(3).

If notice not filed, defendant may not introduce evidence to establish this defense unless the court, for just cause shown, permits introduction. ORS 163.135(4).

a. Pretrial Examination by State

Exam is allowed as matter of right after defendant files notice; scope of exam is governed by same principles as set forth in defense of mental disease or defect. ORS 163.135(5); ORS 161.315; State v. Phillips, 245 Or 466, 475 (1967); see State v. Moore, 324 Or 396, 404 (1996) (ORS 161.315 and ORS 163.135(5) construed). See infra II.F.4. “Right to Pretrial Examination.”

3. Examination During Trial by State


4. Limitations

a. Objective Aspect

The emotional disturbance cannot result from person’s own intentional, knowing, reckless, or criminally negligent act,
and for which disturbance there is a reasonable explanation. ORS 163.135(1); State v. McCoy, 17 Or App 155, 173, aff’d 270 Or 340 (1974) (Tanzer, J., specially concurring).

b. Subjective Aspect
The reasonableness of the explanation for the disturbance is determined from the standpoint of an ordinary person in the actor’s situation under the circumstances as the actor reasonably believes them to be. ORS 163.135(1).

1. “The test of the statute however, by its own terms, is not completely subjective, but retains aspects of an objective standard . . . .” Smith v. Cupp, 55 Or App 970, 975 rev den 293 Or 103 (1982).

2. “Actor’s situation” includes actor’s personal characteristics (such as age, sex, nationality, physical stature, mental/physical handicaps), but not personality characteristics. State v. Ott, 297 Or 375, 396 n.20 (1984).

c. EED Not a Defense to Felony Murder
Extreme emotional disturbance is not a defense to a felony murder charge based on underlying felony. State v. Reams, 47 Or App 907, 913-14 (1980) aff’d and remanded 292 Or 1 (1981). When defendant is charged with murder and felony murder, the court may instruct jury that extreme emotional disturbance is not a defense to felony murder.

d. EED Not a Defense to Aggravated Felony Murder

C. Felony Murder
It is an affirmative defense to felony murder if defendant proves the following five elements:

1. Defendant was not the only participant in the underlying crime;

2. Defendant did not commit the homicidal act or in any way solicit, request, command, importune, cause, or aid in the commission of it;

3. Defendant was not armed with a dangerous or deadly weapon;

4. Defendant had no reasonable ground to believe that any other participant was armed with a dangerous or deadly weapon; and
5. Defendant had no reasonable ground to believe that any other participant intended to engage in conduct likely to result in death.

ORS 163.115(3).

D. Inability to Comply With Order of Court

It is an **affirmative defense** to contempt if defendant proves inability to comply with an order of the court. ORS 33.055(10); ORS 33.065(7). See State ex rel. Mikkelsen v. Hill, 315 Or 452, 458 (1993); State ex rel. Robertson v. Robertson, 123 Or App 157, 160 (1993), rev den 318 Or 350 (1994) (inability to pay support is an affirmative defense); see also Hicks v. Feiock, 485 US 624, 629 (1988) (whether ability to comply is an element of contempt or a defense is question of state law).

1. Notice Requirement

Written notice of intent to offer evidence of inability to comply with a court order must be filed and served on the prosecuting authority at least five days before trial. If written notice is not served and filed, court must not allow defendant to introduce such evidence unless defendant shows just cause for failure to file the notice or to file within the time allowed. ORS 33.065(7).

2. Proof Required

Defendant has burden of proof by a **preponderance of the evidence**. State ex rel. Mikkelsen v. Hill, 315 Or 452, 459 n.6 (1993).

E. Lack of Notice—Driving While Suspended or Revoked

It is an **affirmative defense** if defendant has not received notice of a suspension or revocation or has not been informed of it by a trial judge who ordered it. ORS 811.180(1)(b). See State v. Click, 305 Or 611 (1988) (showing that post office failed to deliver notice of driver’s license suspension by certified letter is part of defendant’s burden).

However, the affirmative defense is not available if the State proves that:

1. Defendant refused to sign a receipt for certified mail containing the notice;

2. Notice could not be delivered to defendant because defendant failed to comply with ORS 807.560 by not properly notifying the DOT of a change of address; see State v. Hayes, 99 Or App 387, 390 (1989), rev den 309 Or 441 (1990);
3. At a previous court appearance, defendant was informed by judge that judge was ordering a suspension or revocation;

4. Defendant had actual knowledge by any means prior to the time defendant was stopped on the current charge; or

5. Defendant was provided with written notice by a police officer pursuant to ORS 813.100.

ORS 811.180(2).

F. Mental Disease or Defect—Guilty Except for Insanity

1. Defined
A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law. ORS 161.295(1). See State v. Counts, 311 Or 616, 618 (1991) (extreme emotional disturbance and insanity not mutually exclusive defenses); State v. Olmstead, 310 Or 455, 466 (1990) (insanity defense available in DUII and DWS cases). The defense cannot be forced on a defendant who chooses not to assert it. State v. Bozman, 145 Or App 66, 71-72 (1996); State v. Peterson, 70 Or App 333, 345 (1984).

a. “As a Result Of”—Causation Required
“The rule contains a requirement of causality, as is clear from the term ‘result’. Exculpation is established not by mental disease alone but only if ‘as a result’ defendant lacks the substantial capacity required for responsibility.” U.S. v. Brawner, 471 F2d 969, 991 (DC Cir. 1972).

b. “Mental Disease or Defect”
The phrase is undefined by statute, except that the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor do they include an abnormality constituting solely a personality disorder. ORS 161.295(2). See also Hanson v. PSRB, 331 Or 626, 630 (2001); Osborn v. PSRB, 325 Or 135, 137 n.1 (1997).

i. Substance and Alcohol Dependency
Alcohol dependency is a personality disorder as that term is used in ORS 161.295(2), not a mental disease or defect. Ashcroft v. PSRB, 338 Or 448, 450 (2005). Likewise, substance dependency is not a mental disease or defect. Tharp v. PSRB, 338 Or 413, 420-430 (2005) (discussing legislative history to conclude that “the
legislature intended to exclude personality disorders such as drug and alcohol dependency from the terms ‘mental disease’ and ‘mental defect’ as it used those terms in ORS 161.295”.

c. “Lacks Substantial Capacity”
The phrase eliminates the occasional reference in some older cases to “complete” or “total” destruction of normal cognitive capacity. See Commentary, Or Crim Code of 1971, p. 33.

d. “Appreciate the Criminality of the Conduct”
The phrase indicat[es] a preference for the view that an offender must be emotionally as well as intellectually aware of the significance of his conduct.” See Commentary, Or Crim Code of 1971, p.33.

e. “Conform Conduct to the Requirements of Law”
“The section uses the word ‘conform’ instead of the phrase ‘loss of power to choose between right and wrong’ while studiously avoiding any reference to the misleading words ‘irresistible impulse.’ This phrase is an alternative to ‘appreciate the criminality of conduct.’” See Commentary, Or Crim Code of 1971, p. 33.

2. Mental Disease or Defect is an Affirmative Defense
Mental disease or defect constituting insanity under ORS 161.295 is an affirmative defense. ORS 161.305.

3. Notice Requirement
Written notice of intent to rely upon affirmative defense of insanity must be given at time of plea. ORS 161.309(1), (3).

a. Defendant may file notice after plea, but before trial, if defendant shows just cause to the court’s satisfaction.

b. If notice is not filed, defendant may not introduce evidence to establish defense unless the court permits for good cause shown. State v. Bozman, 145 Or App 66, 72 n.6 (1996).


4. Right to Pretrial Examination
Once defendant files notice, the State has a right to have defendant examined by at least one psychiatrist or licensed psychologist. ORS 161.315. See State v. Moore, 324 Or 396,
405 (1996) (statute does not limit state to one nonconsensual mental exam; no showing of necessity required to order second exam). Court may commit defendant to state institution or other facility, for period not exceeding **30 days**. Defendant may object to examiner chosen by state. If good cause shown, court may direct State to select different examiner. **ORS 161.315.** See *State v. Phillips*, 245 Or 466, 475 (1967); *State v. Corbin*, 15 Or App 536, 544-47 (1973), *rev den* (1974).

5. **Scope of Pretrial Examination**

   a. **Right Against Self-Incrimination**

   b. **Advice of Rights**
      The examiner must advise defendant of the right to counsel. If defendant has counsel, but counsel is not present at the examination, the examiner must ask whether defendant understands that counsel is entitled to be present and whether defendant has consented to be examined in the absence of counsel. *State v. Mains*, 295 Or 640, 645 (1983); *State v. Metz*, 131 Or App 706, 710-11 (1994), *rev den* 323 Or 483 (1996).

      The examiner must further inform defendant that the examination is being conducted on behalf of the prosecution and the results will be available for use against the defendant without the confidentiality of a doctor-patient relationship. See *State v. Loyer*, 55 Or App 854 (1982) (defendant represented by counsel given truncated version of full *Miranda* rights prior to interview); *State v. Corbin*, 15 Or App 536, 544-47 (1973), *rev den* (1974) (examining psychiatrist is, for all purposes, an officer of the State).

   c. **Presence of Counsel**
d. Failure to Answer Legally Permissible Questions
   Court may not limit counsel’s ability to advise defendant to refuse to answer certain questions asked at the exam. However, defendant’s improper refusal to answer a proper question requires forfeiture of mental defense. State ex rel. Ott v. Cushing, 289 Or 705, 713 (1980); State ex rel. Johnson v. Woodrich, 279 Or 31 (1977) ( confines of questioning); State ex rel. Johnson v. Richardson, 276 Or 325, 329 (1976).

e. Multiple Examinations
   1. Pretrial exam by one psychiatrist is allowed as matter of right. ORS 161.315; State v. Phillips, 245 Or 466, 475 (1967).
   2. Indigent defendant is entitled to access to psychiatrist to determine responsibility at time crime committed or to consult with defense. Ake v. Oklahoma, 470 US 68, 76-85 (1985).
   3. Due process may require court to appoint more than one expert (court has discretion to determine). State v. Ott, 61 Or App 576, 584 (1983), rev’d on other grounds, 297 Or 375 (1984); State v. Glover, 33 Or App 553 (1978) (one exam held sufficient).

6. Examination During Trial
   Allowance of exam is discretionary; court’s authorization for State to examine is reviewable only for abuse of discretion. State v. Ott, 61 Or App 576, 583-84 (1983), rev’d on other grounds, 297 Or 375 (1984).

7. Burden of Proof
   Because mental disease or defect is an affirmative defense, defendant has burden of proving by a preponderance of the evidence. ORS 161.055(2). See Patterson v. New York, 432 US 197, 210 (1977); State v. Burrow, 293 Or 691, 700 (1982) (legislature authorized to place burden on defendant).

8. Evidence
   a. Expert Testimony
      If scientific, technical, or other specialized knowledge will assist trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in form of opinion or otherwise. OEC Rule 702.

2. Expert may not testify for defendant regarding defendant’s partial responsibility under ORS 161.300 unless defendant gives pretrial notice. ORS 161.309(2), (3).

b. Lay Testimony
Testimony is limited to those opinions or inferences that are:

1. Rationally based on witness’s perception; and
2. Helpful to a clear understanding of witness’s testimony or determination of fact in issue.


c. Defendant’s History—Prior Bad Acts

1. Evidence of prior bad acts may be used by State’s psychiatrist in forming diagnosis in order to present more complete picture; may be presented at trial as basis of opinion. State v. Wall, 78 Or App 81, 86, rev den 301 Or 241 (1986); State v. Larsen, 44 Or App 643, 649, rev den 289 Or 373 (1980).

2. Any and all actions of defendant, including life and conduct, are permissible evidence on issue of defendant’s sanity. OEC Rule 703. See State v. Garver, 190 Or 291, 313 (1950).

3. Where such acts are offered as basis for expert’s opinion, court should instruct (caution) jury as to use. State v. Larsen, 44 Or App 643, 650 n.2, rev den 289 Or 373 (1980).

G. Mistake

1. Mistake of Fact
Defendant’s mistake of fact is a defense when mistaken belief negates an element of the crime. See State v. Ross, 123 Or App 264 (1993) (evidence of defendant’s mistaken belief that he was not required to appear is relevant when state law requires that he “intentionally fails to appear as required”).
a. Ignorance or Mistake as Defense to Sexual Offenses

i. Mentally Defective, Mentally Incapacitated, Physically Helpless Victim

It is an **affirmative defense** if the defendant proves that at the time of the sexual offense the defendant did not know the facts or conditions responsible for the victim’s incapacity to consent when the victim was mentally defective, mentally incapacitated, or physically helpless. ORS 163.325(3). *See State v. Phelps*, 141 Or App 555, 558-59, *rev den* 324 Or 306 (1996).

ii. Element of Sex Offense That Child Was Under Age of 16

When criminality depends on the child’s being under the age of 16, it is not a defense that defendant did not know the child’s age or that defendant reasonably believed the child to be older than the age of 16. ORS 163.325(1); *State v. Hoehne*, 78 Or App 479, 482 (1986).

iii. Element Of Sex Offense That Child Was Under A Specified Age Other Than 16

When criminality depends on the child’s being under a specified age other than 16, it is an **affirmative defense** if defendant proves that defendant reasonably believed the child to be above the specified age at the time of the sexual offense. ORS 163.325(2).

iv. Age of Defendant Less Than 3 Years Older Than Victim

It is a defense if the defendant was less than three years older than the victim at the time of the sexual offense. ORS 163.345(1) (defense only applies to rape in second and third degrees, sodomy in second and third degrees, and sexual abuse in first, second, and third degrees). *See also* ORS 163.345(2) (defense also applies in prosecutions for unlawful penetration in the second degree, ORS 163.408, if the object used for penetration was the hand or other part of the defendant). *But see State ex rel. Juv. Dept. v. Kitt*, 129 Or App 591 (1994) (age difference of less than three years is not defense where victim does not give actual consent).

2. Mistake of Law

It is not a defense when a defendant who engages in unlawful conduct mistakenly believes that the conduct was not unlawful. *See State v. Baker*, 48 Or App 999, 1003-04 (1980) (not error
to give “knowingly” instruction, even if defendant believed conduct to be lawful).

H. Necessity to Operate Motor Vehicle
In prosecutions for driving while suspended or revoked in violation of ORS 811.175 or 811.182, it is an affirmative defense if defendant proves that defendant reasonably believed that there was an injury or an immediate threat of injury to a human being or an animal; and the urgency of the circumstances made it necessary for defendant to operate a motor vehicle at the time and place in question. ORS 811.180(1). See State v. Brown, 306 Or 599, 605-06 (1988) (defendant does not have to prove the injury “actually” existed); State v. Costanzo, 94 Or App 516, 520 (1988); State v. Haley, 64 Or App 209, 212-13 (1983).

I. Religious Beliefs and Practices
It is an affirmative defense to murder by abuse caused by neglect or maltreatment, and manslaughter in the first degree if the child or dependent person was under care or treatment solely by spiritual means pursuant to the religious beliefs and practices of the child or dependent person, or of the parent or guardian of the child or person. ORS 163.115(4); ORS 163.118(3).

J. Renunciation
Renunciation is an affirmative defense to charges of attempt, solicitation, and conspiracy. ORS 161.430; ORS 161.440; ORS 161.460.

1. Attempt
Defendant is not liable for an attempted crime if:

- Under circumstances manifesting a voluntary and complete renunciation of the criminal intent, the person avoids the commission of the crime by abandoning the effort; or
- If mere abandonment is insufficient to avoid the crime, the person does everything necessary to prevent the crime.

ORS 161.430(1).

2. Solicitation
Renunciation is an affirmative defense to a charge of solicitation when defendant soliciting the crime persuaded the person solicited not to commit the crime or otherwise prevented commission of the crime, under the circumstances manifesting a complete and voluntary renunciation of the criminal intent. ORS 161.440.
3. **Conspiracy**

Renunciation is an *affirmative defense* to a charge of conspiracy when defendant thwarted the commission of the crime that was the object of the conspiracy under the circumstances manifesting a complete and voluntary renunciation of defendant’s criminal purpose. However, renunciation by one conspirator does not affect the liability of other conspirators who do not join in the renunciation. ORS 161.460.

K. **Vindictive or Selective Prosecution**

1. **Vindictive Prosecution**

   a. **Defined**
      
      Charges motivated by prosecutorial vindictiveness, designed to punish a person for doing what the law allows, will be dismissed for violating the person’s due process rights. *State v. Hilling*, 66 Or App 180, 183 (1983).

   b. **Proof Required**
      

2. **Selective Prosecution**

   a. **Defined**
      
      It is an *affirmative defense* that enforcement of a law violates equal protection where prosecutor’s decision whether, or how, to apply the law is based on a *de facto* improper classification such as race, religion, or other arbitrary classification. *City of Eugene v. Crooks*, 55 Or App 351, 353-54 (1981), *rev den* 292 Or 722 (1982).

   b. **Proof Required**
      
      Defendant must show that enforcement is based on a suspect class or that there is no rational basis for selective enforcement. *City of Eugene v. Crooks*, 55 Or App 351, 354 (1981), *rev den* 292 Or 722 (1982).

   c. **Elements Required**
      
      Defendant must establish:

      1. Prosecutor has not punished other similarly situated for similar conduct; and
2. Decision to prosecute was based on impermissible grounds, such as, for example, race, religion, or defendant’s exercise of constitutional rights.


**L. Concealed Handgun License**

Having a concealed handgun license is an *affirmative defense* in a prosecution for unlawful possession of a firearm under ORS 166.250. ORS 166.260(1)(h), (3). *See also* ORS 166.370(4) (providing affirmative defenses to possession of firearm in public building). Federal registration of machine gun, short-barreled rifle or shotgun, or firearms silencer is an affirmative defense to unlawful possession of those items. ORS 166.272(4).

**M. Fleeing to Elude**

It is an *affirmative defense* to a prosecution that after a police officer in an unmarked vehicle signaled that person’s vehicle to stop, the person proceeded lawfully to an area that the person reasonable believed was necessary to reach before stopping. ORS 811.540(2).

**N. Medical Marijuana Defense**

It is an *affirmative defense* to a criminal charge of possession or production of marijuana, or any other criminal offense in which possession or production of marijuana is an element, that the person charged with the offense is a person who:

1. Has been diagnosed with a debilitating medical condition within 12 months prior to arrest and been advised by the person’s attending physician that the medical use of marijuana may mitigate the symptoms or effects of that debilitating medical condition;

2. Is engaged in the medical use of marijuana; and

3. Possesses or produces marijuana only in the amounts specified by statute.

ORS 475.319(1) as amended by 2005 Or Laws, ch. 22, § 347 (effective Jan. 1, 2006). *See State v. Root*, 202 Or App 491 (2005) (concluding that the trial court did not err in barring defendant from raising the “medical marijuana” defense because he had not been advised by his attending physician before his arrest that medical use of marijuana might mitigate the symptoms or effects of a debilitating medical condition).

Not less than **five days** before trial, the defendant must file and serve upon the district attorney a written notice of the intention
to offer the defense that specifically states the reasons why the defendant is entitled to assert and the factual basis for the defense. ORS 475.319(4). It is not necessary for a person to have received a registry identification card in order to assert this defense. ORS 475.319(2).

III. OTHER DEFENSES

A. Choice of Evils

1. Defined
   Conduct that would otherwise constitute an offense is justifiable and not criminal when:
   
   a. The conduct is necessary as an emergency measure to avoid a public or private injury;
   
   b. The threatened injury is imminent; and
   
   c. It is reasonable for defendant to believe that the need to avoid the threatened injury is greater than the need to avoid the injury that the statute defendant is charged with violating seeks to prevent.

   ORS 161.200(1); State v. Boldt, 116 Or App 480, 483 (1992). See State v. Olson, 79 Or App 302, 305 (1986) (defense applied to threatened injury to property as well as people); State v. Matthews, 30 Or App 1133, 1136 (1977) (discussing that ORS 161.200(1) allows for the balancing of the injury which the actor sought to prevent against the injury that the actor caused).

2. Circumstances Regarding Use of Choice of Evils Defense
   The choice of evils defense is not available if inconsistent with other provisions of the Oregon Criminal Code of 1971, defining justifiable use of physical force, or with some other provision of law. ORS 161.200(1). Examples:

   a. Driving While Suspended
      Choice of evils defense is available in DWS cases. ORS 811.180(1).

   b. DUll
      Generally, choice of evils is not viable defense to DUII charge. Teague v. MVD, 124 Or App 25, 28 (1993).
c. **Resisting Arrest**
   Defendant’s use of force in resisting arrest is *not* allowed as choice of evils defense. ORS 161.260 (prohibiting use of physical force in resisting arrest).

d. **Hit and Run**
   Driver’s failure to remain at scene may be excused by reasonableness of driver’s apprehension of danger or harm. *State v. Burris*, 10 Or App 297 (1972).

e. **Felon In Possession of Firearm**

f. **Escape**

g. **Abortion Protesters**
   Defense is *not* available because it is inconsistent with the provision of law allowing abortion and is also not preventive of a “public or private injury.” *State v. Clowes*, 310 Or 686 (1990); *Downtown Women’s Center v. Advocates for Life, Inc.*, 111 Or App 317, 321-23 (1992).

h. **Animal Activist**

i. **Sexually Explicit Materials**
   Defense is *not* available even if child pornography materials were acquired before effective date of statute prohibiting possession. *State v. Ready*, 148 Or App 149, 159-60, *rev den* 326 Or 68 (1997).

j. **Custodial Interference**
   Defense is available. *State v. Bayse*, 122 Or App 608, 614 (1993) (evidence of alleged child abuse by father or his girlfriend was relevant to custodial interference charge).

k. **Medical Marijuana**
   No person engaged in the medical use of marijuana who claims that marijuana provides medically necessary benefits...
and who is charged with a crime pertaining to such use of marijuana may be precluded from presenting a choice of evils defense or from presenting evidence supporting the necessity of marijuana for treatment of a specific disease or medical condition, provided that the amount of marijuana at issue is no greater than permitted under ORS 475.306 and the patient has taken a substantial step to comply with the provisions of ORS 475.300 to 475.346. ORS 475.319(3).

3. **Imminency Requirement**

   Threat of future injury is insufficient; must be present, imminent, and impending. *State v. Taylor*, 123 Or App 343, 348 (1993) (prison inmate’s use of unlawful force was imminent and defendant acted to avoid imminent injury; court erred in refusing to instruct on choice of evils defense); *State v. Boldt*, 116 Or App 480, 483-84 (1992) (threat must exist at time of commission of the charged offense); *State v. Hund*, 76 Or App 89, 92 (1985), rev den 300 Or 477 (1986) (no emergency when defendants had legal recourse); *State v. Whisman*, 33 Or App 147, 152 (1978).

   In jury instructions, “‘imminent’ is to be given its ordinary meaning, that is, “immediate, ready to take place, near at hand.” *State v. Jackson*, 33 Or App 139, 144-45, rev den 283 Or 99 (1978), cert den 440 US 971 (1979).

4. **Balancing Requirement**

   If the court instructs the jury on choice of evils, the court must instruct the jury that defendant must have *reasonably believed* that the need to avoid the threatened injury was greater than the need to avoid the injury covered by the violated statute. The court may refuse to give defendant’s requested instruction if it is incomplete. *State v. Wilhelm*, 55 Or App 168, 172 (1981).

5. **Wisdom of Statute Violated**

   The choice of evils defense itself does not challenge the violated statute’s morality or advisability, either in its general application or its application to a particular class of cases arising under the statute. ORS 161.200(2).

B. **Collateral Estoppel**

1. **Defined**

   Collateral estoppel bars relitigation of particular facts or questions that were *actually or necessarily determined* in prior litigation, regardless of whether the second claim or cause of action is the same as the first. *State v. George*, 253 Or 458, 462...
Collateral estoppel “means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.” *Timms v. Cupp*, 38 Or App 339, 342, rev den 286 Or 637 (1979) (quoting *Ashe v. Swenson*, 397 US 436 (1970) (holding that collateral estoppel applies to criminal prosecutions as an aspect of the constitutional protection against double jeopardy)).

2. **Requirements**


   b. Determinative facts must have been actually or necessarily adjudicated in prior action. *State v. Hollandsworth*, 64 Or App 44, 46 n.3 (1983).

   c. **Test:** Could a rational fact finder have grounded decision on an issue other than the issue that the defendant seeks to foreclose from consideration? If so, collateral estoppel does not apply. *State v. Mozorosky*, 277 Or 493, 499 (1977); *State v. Bannister*, 118 Or App 252, 259 (1993); see also *State v. Guyton*, 286 Or 815 (1979).

3. **Res Judicata Distinguished**

   Res judicata bars relitigation of claims or causes of action that were *previously litigated*, regardless of whether particular facts or questions were actually litigated. *State v. Hollandsworth*, 64 Or App 44, 46 n.3 (1983).

4. **Former Jeopardy Compared**

   Former jeopardy is analogous in part to res judicata—it bars relitigation of claims or causes of action previously litigated, plus bars prosecution of two or more offenses based on same criminal episode that were not litigated but were known to the appropriate prosecutor at time first prosecution was commenced. See ORS 131.505 to ORS 131.535; *State v. Mozorosky*, 277 Or 493, 497-99 (1977).
5. Other Key Distinguishing Features Between Collateral Estoppel and Former Jeopardy

a. Former jeopardy is available even in the absence of a judgment, but the effect of collateral estoppel ordinarily attaches only to a judgment.

b. Former jeopardy requires identity of offenses, but collateral estoppel does not.

c. Former jeopardy operates as a complete bar to another prosecution, while collateral estoppel does not and may merely preclude relitigation of certain issues.

d. Former jeopardy arises from state and federal constitutional protections; collateral estoppel is a product of common law.


C. Duress

1. Defined

Conduct which would otherwise constitute an offense, other than murder, is not criminal if person who engaged in the conduct “was coerced to do so by the use or threatened use of unlawful physical force upon the actor or a third person.” ORS 161.270(1). See also ORS 162.035 (defense to bribery); ORS 163.285 (defense to coercion).

2. Test

The test concerns the scope of compulsion or coercion: Compulsion that will excuse a criminal act must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. State v. Ellis, 232 Or 70, 85-86 (1962); State v. Patterson, 117 Or 153, 155-56 (1925); State v. Boldt, 116 Or App 480, 484 (1992) (continuing threat considered “imminent”).

3. Statutory Test

The force or threatened force must be of such nature or degree as to overcome earnest resistance. ORS 161.270(1). See State v. Van Natta, 149 or App 587, 591, rev den 326 Or 234 (1997) (whether defendant is easily coerced is not relevant to whether,
at time of criminal act, defendant was subjected to physical force of such degree as to overcome earnest resistance).

4. Limitations on Availability of Defense

a. Murder
Duress is not a defense to murder. ORS 161.270(1). See State v. Weston, 109 Or 19, 35 (1923) (“As a general rule one cannot excuse or justify himself under the plea of compulsion or necessity, for taking the life of an innocent person.”) (quoting 1 Michie, Homicide p.451).

b. Danger Must Be Present, Imminent, and Impending
The threat of future injury is insufficient to raise defense. State v. Whisman, 33 Or App 147, 151 (1978); State v. Fitzgerald, 14 Or App 361, 371 (1973) (rationale similar to choice of evils defense).

c. Defendant Must Not Have Placed Self In Duress Situation
Duress is not a defense if defendant intentionally or recklessly placed him or herself in a situation in which it is probable that one will be subjected to duress. ORS 161.270(2). See State v. Fowler, 37 Or App 299, 301-302 (1978) (defendant failed to avail himself of clear avenues of escape).

d. Evidence of Surrender or Return in Escape Case

e. Husbands and Wives
It is not a defense that a person acted on command of the person’s spouse, unless the person acted under such coercion as would establish defense under ORS 161.270(1). ORS 161.270(3) (abolishing common-law presumption of coercion).

5. Notice Requirement
Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

D. Entrapment
1. Defined
An act that is normally a crime is not criminal if defendant engaged in the proscribed conduct because defendant was induced to do so by a law enforcement official, for the purpose of obtaining evidence to be used against the defendant in a criminal prosecution. ORS 161.275(1). “Induced” means that the defendant did not contemplate and would not otherwise have engaged in the proscribed conduct. ORS 161.275(2). Statute codifies former case law. State v. Gunn, 15 Or App 174, 175-76, rev den (1973).

Entrapment may be raised in situations where the intent to commit a crime originates not with the accused, but is in the minds of law enforcement officials or their agents. State v. LeBrun, 245 Or 265, 266-67 (1966), cert den 386 US 1011 (1967).

a. Inducement Versus Providing Opportunity

b. Defendant’s “Predisposition to Commit Offense”

c. No Requirement of Reasonable Suspicion
There is no requirement that officers have reasonable suspicion that defendant is engaged in unlawful activity before providing opportunity to commit crime. State v. DeAngelo, 113 Or App 192, 196 rev den 314 Or 391 (1992) (lack of any reasonable suspicion that defendant was engaged in criminal activities does not mean that there was entrapment as a matter of law).
2. **Notice Requirement**
   Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

3. **Limitations on Defense of Entrapment**

   Evidence of entrapment can be so overwhelming that judge must rule that State has failed to disprove entrapment as matter of law. *State v. Gunn*, 15 Or App 174, 176, rev den (1973).

4. **Application of Discovery Statutes**
   Evidence that defendant already engaged in existing course of similar crimes before meeting undercover agent is admissible to rebut entrapment defense. *State v. Kraemer*, 9 Or App 220, 223, rev den (1972).

   If defendant files written pretrial notice, it is unclear whether the State should be required to provide discovery of rebuttal evidence by the same reasoning as in alibi defenses. See *State v. Frye*, 34 Or App 871, 874 (1978); *Wardius v. Oregon*, 412 US 470, 477-78 (1973).

5. **When Instruction Necessary**

   a. **General Rule**

   b. **When Error to Refuse to Give Instruction**

   c. **When Not Error to Refuse to Give Instruction**
      Where evidence could not reasonably support conclusion that police induced defendant to commit crime but rather amply revealed defendant’s predisposition, the court need

E. Impossibility Not A Defense

1. Defined
   In prosecution for attempt, defendant cannot assert that it was impossible to commit the crime that was the object of the attempt where the conduct defendant engaged in would have been a crime if the circumstances were as defendant believed them to be. ORS 161.425.

   ORS 161.425 makes an actor liable in all “impossibility” situations, e.g., where theft could not be committed because property subject to theft ceased to be stolen when recovered by police, actor is liable. Commentary, Or Crim Code of 1971 pp. 50-51; *State v. Mack*, 31 Or App 59, 62 (1977); *State v. Niehuser*, 21 Or App 33, 36-37 (1975).

2. Necessary That Result Intended Be a Crime
   Where desired result is not a crime, even though defendant firmly believes it is criminal, impossibility would be a valid defense. Commentary, Or Crim Code of 1971, p. 51 (citing Model Penal Code, comment to § 5.01, tent. Draft No. 10, at 31-2 (1960)).

3. Legal Versus Factual Impossibility
   Neither legal nor factual impossibility is a defense to an attempted crime. *State v. Korelis*, 21 Or App 813, 819, aff’d 273 Or 427 (1975).

4. Solicitation and Conspiracy
   It is a valid defense to *solicitation* or *conspiracy* to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice. ORS 161.475(2). See ORS 161.150 - ORS 161.165 (accomplice liability); *State v. Mathie*, 54 Or App 232, 239 (1981) (Richardson, J., dissenting), rev den 292 Or 568 (1982).

   a. It is not a defense that, unknown to the solicitor, the person solicited could not commit the crime, or has immunity to prosecution or conviction for the crime. ORS 161.475(1)(a)-(b).

   b. It is not a defense that person with whom defendant conspired was not prosecuted or was acquitted. ORS 161.475(1)(c).
F. Incapacity Due to Immaturity
   A person tried as an adult in criminal court is not criminally responsible for any conduct which occurred when the person was under 12 years of age. ORS 161.290. Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

G. Intoxication

1. Defined
   The use of or dependence on drugs or controlled substances or voluntary intoxication is not a defense to a criminal charge. However, intoxication may be offered by the defendant to negate an element of a criminal charge. ORS 161.125(1). See State v. Smith, 260 Or 349 (1971) (voluntary intoxication not complete defense but may negate element of intent). See infra III.G.2.a. “Relevant to Negate Element.”

   a. Drug Use or Dependence on Drugs
      Evidence of drug dependence alone is not a defense. However, because drug dependence can have either physical or mental aspects, evidence that drug dependence has resulted in a mental disease or defect may justify giving instruction on insanity defense. State v. Herrera, 286 Or 349, 362 (1979).

   b. Alcoholism
      Mental incapacity produced by voluntary, immediate and temporary intoxication is not a defense, but if excessive and long-term use of intoxicants produces a mental condition of insanity, permanent or temporary, such mental condition may be a defense to a criminal act. State v. Wallace, 170 Or 60, 81 (1942).

   c. Other Toxic Substances
      Voluntary intoxication is not restricted to intoxication from alcohol, but includes alcohol, drugs, or any other toxic substance. State v. Roisland, 1 Or App 68, 76 (1969) (use of LSD).

2. Not a True Defense

   a. Relevant to Negate Element
      Evidence that defendant used drugs or controlled substances or was intoxicated may be offered by defendant

b. Burden of Proof
State has burden of proving intent element beyond a reasonable doubt. Putting on evidence of intoxication is a method of negating the State’s proof on intent. Defendant has no burden to prove it as a “defense.” State v. Nulph, 31 Or App 1155, 1160 (1977), rev den 282 Or 189 (1978).

1. When intoxication negates an element of the crime, the State fails to meet its burden, resulting in either acquittal or conviction of lesser crime. State v. Atkins, 269 Or 481 (1974).

2. Fact that vehicle code makes particular blood alcohol level presumptive of intoxication has no bearing on issue of specific criminal intent. State v. Fish, 29 Or App 15, 18-19 (1977), aff’d in part, vacated in party by 282 Or 53 (1978).

3. Notice Requirement
Pretrial notice is not required. “Defense” (via jury instruction) is “raised” by evidence in the case.

4. Jury Instruction
a. Defendant is entitled to present a theory of the case, and if that theory is supported by the evidence, the defendant is entitled to a jury instruction. State v. McBride, 287 Or 315, 319 (1979).

b. If there is evidence from which a jury could find a lesser-included offense, it is error for the court to fail to give requested lesser-included offense instructions. State v. Atkins, 269 Or 481, 484 (1974); State v. Wilson, 182 Or 681 (1948).

c. Court is obligated to give instruction on voluntary intoxication in addition to lesser-included offenses, if evidence supports it. State v. Atkins, 269 Or 481, 484 (1974); State v. Noble, 26 Or App 921, 925 (1976), rev den 277 Or 99 (1977) (not error to refuse instruction because of insufficient showing of intoxication).
5. **Recklessness as Element of Offense**

When recklessness is an element of the offense, and defendant is unaware of risk because of drug use, dependence, or intoxication, defendant’s unawareness is immaterial. ORS 161.125(2). See *State v. Hodgdon*, 244 Or 219 (1966); *State v. Belcher*, 124 Or App 30, 32-33 (1993), rev den, 318 Or 351 (1994); *State v. Rabago*, 24 Or App 95, rev den (1976).

An instruction indicating the immateriality of voluntary intoxication is appropriate if the evidence would be likely to lead the jury to erroneous conclusion. *State v. Corpuz*, 49 Or App 811, 817 (1980) (stating “[i]n the absence of such an instruction the jurors might well have inferred from the evidence of defendant’s voluntary intoxication that defendant was incapable of having a reckless state of mind”).

6. **Opinion Evidence**

   a. **Lay Witnesses**

   Lay witnesses who had opportunity to observe conduct and condition of defendant may testify as to intoxication. *State v. Rand*, 166 Or 396, 401 (1941).

   b. **Helpful Versus Necessary**

   Older cases allowed opinion testimony by lay witnesses only if necessary. *Everart v. Fischer*, 75 Or 316 (1915).

   Newer standard permits lay witness to speak freely, using ordinary language; standard is whether the testimony is “helpful” rather than necessary. OEC Rule 701; *State v. Garver*, 190 Or 291, 316 (1950).

H. **Kidnapping In Second Degree—Defense**

   It is a defense to a prosecution of kidnapping in the second degree if:

   1. The person taken or confined is under 16 years of age;
   2. The defendant is a relative of that person; and
   3. The sole purpose of the defendant is to assume control of that person.

   ORS 163.225(2).

I. **Partial Responsibility—Diminished Capacity**
1. **Defined**
   Evidence that defendant suffered from mental disease or defect is admissible whenever relevant to issue of whether defendant did or did not have intent that is an element of the crime. ORS 161.300. *See State v. Smith*, 154 Or App 37, 40 (1998). Defense is available whether or not crime charged includes lesser offense. *State v. Booth*, 284 Or 615, 618 (1978).

   a. **Jury Instruction**
   There is no duty to instruct the jury; ORS 161.300 is an evidentiary statute and does not speak to the issue of jury instructions. *State v. Francis*, 284 Or 621, 626 (1978). Partial responsibility evidence is one method of disproving the “intent” element of the State’s case. Instruction that State must prove “intent” beyond reasonable doubt are sufficient to direct jury’s attention to partial responsibility evidence. However, the court may also instruct on partial responsibility. *State v. Booth*, 284 Or 615, 620 (1978) (partial responsibility instructions are proper, but refusal to give instruction is not reversible error).

2. **Notice Requirement**
   Written notice required *at time of plea*; the court may allow after plea if just cause shown. ORS 161.309(3). *See State v. Bozman*, 145 Or App 66, 70-72 (1996); *see State v. Peterson*, 70 Or App 333, 339 (1984) (court may not impose a defense over defendant’s objections; nor does notice of nonresponsibility serve as adequate notice of partial responsibility).


3. **Pretrial Examination By State**
   The State’s right is triggered by defendant’s filing of notice of intent. ORS 161.315. The State’s right to exam and the scope of the exam are governed by the same principles as in defense of mental disease or defect. *See supra II.F.4. “Right to Pretrial Examination.”*

4. **Burden of Proof**
   The State has burden to prove intent element *beyond a reasonable doubt*. Putting on evidence of the partial responsibility is a method of rebutting the State’s allegation of intent. The defendant has no burden to prove it as a “defense.” *See ORS 161.300; State v. Booth*, 284 Or 615, 619-20 (1978).
5. **Nature and Effect of “Evidence”**

   a. Statute allows jury to consider evidence of defendant’s mental disease or defect in determining whether defendant did or did not have intent that is element of the crime. ORS 161.300.


   d. Same principles of evidence apply as set forth in discussion of affirmative defense of guilty except for insanity. See supra II.F.8. “Evidence.”

J. **Retraction**

   It is a defense to perjury or false swearing committed in an official proceeding if the defendant retracted the false statement:

   1. In a manner showing a complete and voluntary retraction of the prior false statement;

   2. During the course of the same official proceeding in which it was made; and

   3. Before the subject matter of the proceeding was submitted to the ultimate trier of fact.

   ORS 162.105(1). See ORS 162.105(2) (defining “official proceeding”).

K. **Use of Physical Force**

   1. **Self-Defense or Defense of Another Person**

      a. **Defined**

         Generally, defense of self or another is a defense to a crime involving the use of physical force when defendant reasonably believed that the force used was necessary to defend self or a third person from the use or imminent use of unlawful physical force. ORS 161.209.

Defense applies to any relevant criminal charge involving the use of force. *State v. DeLaura*, 75 Or App 655 (1985) (defendant should have been acquitted of disorderly conduct as well as assault, based on self-defense).

b. **Notice Requirement**

Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

If defense is “raised” by testimony of defendant alone, it is error to refuse self-defense instruction. *State v. Davis*, 65 Or App 83, 87 (1983).

When defense is “raised,” defendant also is entitled to instruction on State’s burden to disprove the defense beyond a reasonable doubt. *State v. Freeman*, 109 Or App 472, 476 (1991) (State must request instruction for statutory limitations, if applicable); *State v. McMullen*, 34 Or App 749, 752 (1978).

c. **Nondeadly Physical Force—Limitations**

i. **Reasonable Belief**

Defendant may use a degree of force that the defendant reasonably believes to be necessary for the purpose. ORS 161.209.

ii. **Imminency Requirement**


iii. **When Use of Nondeadly Physical Force Is Not a Defense**

The use of physical force upon another person is not justified if:

a. Defendant provokes use of unlawful physical force by the other person with intent to cause injury or death. ORS 161.215(1).

b. Defendant is initial aggressor, unless defendant withdraws from the encounter and effectively communicates to the other person the intent to do so, but the other person continues or threatens to

c. Physical force involved is the product of illegal combat by mutual agreement. ORS 161.215(3).

iv. No Duty to Retreat
In contrast to the use of deadly force, defendant has no duty to retreat before using nondeadly physical force. See Commentary, Or Crim Code of 1971, pp. 22-24.

d. Use of Deadly Physical Force
Defendant may not use deadly physical force unless defendant reasonable believes that other person is:

1. Committing or attempting to commit a felony involving use or threatened imminent use of physical force against a person. ORS 161.219(1); see State v. Nodine, 198 Or 679, 714 (1953).

2. Committing or attempting to commit burglary in a dwelling. ORS 161.219(2).

3. Using or about to use unlawful deadly physical force against a person. ORS 161.219(3); see State v. Wright, 31 Or App 1345 (1977).


i. Deadly Force Must Be Reasonably Necessary
ORS 161.209 and ORS 161.219 must be read together: Even when one of the threatening circumstances in ORS 161.219 is present, the use of deadly force is justified only if it does not exceed the degree of force that the person reasonably believes to be necessary under the circumstances. State v. Haro, 117 Or App 147, 150-51 (1992), rev den 315 Or 443 (1993).

ii. Duty to Retreat
A person has the duty to retreat to avoid the threatened danger where it is possible to do so without sacrificing the person’s own safety, except as noted below. State v. Charles, 293 Or 273, 284 (1982) (stating that the exception to the general retreat-type “necessity” rule requires that “the danger justifying self-defense be ‘absolute, imminent, and unavoidable,’” that ‘the
necessity of taking human life is actual, present, urgent,’
that ‘the killing is absolutely or apparently absolutely
necessary,’ that there was no ‘reasonable opportunity to
escape and to avoid the affray,’ and that ‘there was no
other means of avoiding or declining the combat’

A) “Castle” Exception to Duty to Retreat
A person has no duty to retreat when in the person’s
own “castle” or a similarly legally recognized place.  
*State v. Charles*, 293 Or 273, 283-84 (1982).

e. “Deadly Physical Force” Defined
“Deadly physical force” is physical force that, under the
circumstances in which it is used, is readily capable of
causing death or serious physical injury.  ORS 161.015(3).

i. “Serious Physical Injury” Defined
“Serious physical injury” is physical injury, defined
as “impairment of physical condition or substantial
pain,” ORS 161.015(7), that creates a substantial risk
of death or causes serious and protracted disfigurement,
protracted impairment of health, or protracted loss or
impairment of the function of any bodily organ.  ORS
161.015(8).  *See State v. Byers*, 95 Or App 139, 143
(1989);  *State v. Mayo*, 13 Or App 582, 585, *rev den*
(1973).

ii. “Great Bodily Harm”
“Great bodily harm” is equated with serious physical

f. Defense of Another Person
Test: Defendant is not justified in doing more for the
defense of another than defendant could do for himself or
herself.  Commentary, Or Crim Code of 1971, p. 24;  *see
Linkhart v. Savely*, 190 Or 484, 501-02 (1951);  *State v. Yee
Guck*, 99 Or 231, 244 (1921);  *State v. Gibson*, 36 Or App
relationship is required between defendant and third person.

g. Evidence of Victim’s Violent Character
Evidence of victim’s character for violence is admissible
when it is an essential element of a defense.  OEC Rule
404(1).  *See State v. Lunow*, 131 Or App 429, 434-36
(1994) (“The plain language of OEC 404(1) permits
evidence of a person’s character when it is an essential element of a defense. ‘Reasonable belief’ is an element of the defense of self-defense.”).

Evidence of victim’s character for peacefulness is admissible in prosecution’s case in chief or to rebut. See OEC Rule 405 (providing methods of proving character).

2. Defense of Premises

a. Defined
A person who is in lawful possession or control of premises may use physical force on another person when and to the extent that the person reasonably believes it is necessary to prevent the other’s commission or attempted commission of criminal trespass on premises. ORS 161.225(1). See State v. Delucia, 40 Or App 711, 713-14 (1979) (concluding that an instruction on the use of physical force in defense of premises is incomplete without defining for the jury what constitutes criminal trespass).

b. Premises Defined
“Premises” means any building as defined in ORS 164.205 and any real property. ORS 161.225(3).

c. Notice Requirement
Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

d. Limitation on Use of Force in Defense of Premises

i. Deadly Physical Force
A person may use deadly physical force in defense of premises only:

a. In defense of a person as provided in ORS 161.219; or

b. When the person reasonably believes deadly physical force is necessary to prevent the commission of arson or a felony by force and violence.


Elements Necessary for Use of Deadly Physical Force in Defense of Premises:

- There must be actual or attempted criminal trespass; and
- Defendant must have acted in defense of a person; or
- Defendant must have reasonably believed deadly physical force was necessary to prevent commission of arson or felony by force and violence.
A person may not use a deadly weapon to eject a trespasser. See Scheufele v. Newman, 187 Or 263 (1949) (heavy gun used as club).

ii. Nondeadly Physical Force

3. Defense of Property

a. Defined
A person may use physical force, other than deadly physical force, on another when there is a reasonable belief such force is necessary to prevent or stop commission or attempted commission of theft or criminal mischief of property. ORS 161.229. See State v. Weber, 246 Or 312, cert den 389 US 863 (1967); State v. Lockwood, 43 Or App 639, 644 (1979).

b. Notice Requirement
Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

c. Limitations on Defense of Property
In absence of statutory authority, use of force intended or likely to cause death or great bodily injury is never authorized for defense of property. State v. Weber, 246 Or 312, cert den 389 US 863 (1967) (citing Perkins, Criminal Law 917 (1957)). By statute, only nondeadly force is authorized, unless there is threat to person or premises. See ORS 161.229; ORS 161.225. See supra III.K.2.d. “Limitation on Use of Force in Defense of Premises.”

4. Use of Physical Force Generally

a. Parent, Guardian, or Other Entrusted With Care of Minor or Incompetent Person
Reasonable physical force may be used, to extent reasonably believed necessary, to maintain discipline or to promote welfare of minor or incompetent person. ORS 161.205(1). See State v. Waller, 22 Or App 299, 301-02 (1975).
Teacher may use reasonable physical force on student when and to extent reasonably believed necessary to maintain order in school classroom, or school event, whether or not event is held on school property. ORS 161.205(1); ORS 339.250(2). See Simms v. School Dist. No. 1, 13 Or App 119, 129, rev den (1973).

b. **Jail Official**
Jail officials may use such force as reasonably believed necessary to maintain discipline and order. ORS 161.205(2). See also ORS 137.380; ORS 421.105.

c. **Common Carrier Official**
A person responsible for the maintenance of order in a common carrier of passengers may use physical force as reasonably believed necessary to maintain order, but the person may use deadly physical force only when the person reasonably believes it necessary to prevent death or serious physical injury. ORS 161.205(3).

d. **Thwarting Suicide or Self-Injury**
A person who reasonably believes that another person is about to commit suicide or inflict serious physical self-injury may use physical force upon that person to the extent necessary to thwart the result. ORS 161.205(4).

e. **Preventing Escape or Making Arrest**
A person may use physical force reasonably believed necessary to make an arrest or prevent escape. ORS 161.205(5). See Commentary, Or Crim Code of 1971, p. 21; see also ORS 161.255 (citizen’s arrest)

f. **Notice Requirement**
Defense is standard; no notice required. Defense may be raised by either written notice or by affirmative evidence by a defense witness in the defendant’s case in chief. ORS 161.055(3).

5. **Making Arrest or Preventing Escape By a Private Person**
Acting on one’s own account, a private person may use physical force on another person when and to the extent reasonably believed necessary to make arrest or prevent escape from custody of an arrested person whom the person has arrested under ORS 133.225 (arrest by a private person). ORS 161.255(1). See also ORS 161.205(5); ORS 161.249(1) (use of physical force by private person assisting officer with arrest).
a. Limitations
Use of *deadly physical force* in making a citizen’s arrest is justified only when the person reasonably believes it necessary to defend oneself or a third person from the use or imminent use of deadly physical force. ORS 161.255(2). *See Lander v. Miles and Collins*, 3 Or 35 (1868) (firing gun not justifiable where arrest can be secured by less dangerous means).

6. Resisting Arrest

a. **Use of Physical Force in Resisting Arrest Prohibited**
A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful. ORS 161.260. However, a person may defend against the officer’s use of excessive force. *State v. Wright*, 310 Or 430, 435 (1990) (“If a peace officer uses excessive force in making an arrest, the arrestee has a right to use physical force in self-defense against the excessive force being used by the officer. In that circumstance, the arrestee is not ‘resisting arrest,’ but, rather, is defending against the excessive force being used by the arresting officer.”) (citations omitted).


b. **Other Limitations on Defendant**

1. A person is not entitled to resist arrest by police, even when the person is innocent. *State v. Castle*, 48 Or App 15, 19 (1980).

2. It is no defense that peace officer lacked legal authority to make the arrest, provided the officer was acting under color of authority. ORS 162.315(3).

3. If officer uses excessive force in making an arrest, the arrestee may use only such physical force as is reasonably necessary for self-defense against the excessive force. *State v. Wright*, 310 Or 430, 435 (1990).
c. **Limitation on Arresting Officer**

An officer is justified in using force only when and to extent reasonably believed necessary:

1. To make arrest or prevent escape, unless officer knows arrest is unlawful; or
2. For self-defense or to defend a third person.


Officer is justified in using **deadly physical force** only when the officer reasonably believes that:

1. The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person;
2. The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime;
3. Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force;
4. The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or
5. The officer’s life or personal safety is endangered in the particular circumstances involved.

ORS 161.239(1). *See Tennessee v. Garner*, 471 US 1 (1985) (unconstitutional to use deadly force unless officer has probable cause to believe suspect poses threat of serious physical harm to officer or others).

ORS 161.239(1) does not justify an officer’s reckless or criminally negligent conduct amounting to an offense against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody. ORS 161.239(2).
7. **Use of Physical Force By DOC Official to Prevent Escape**

A corrections officer or other official employed by the Department of Corrections (DOC) is justified in using physical force, *including deadly physical force*, when and to the extent that the officer or official reasonably believes it necessary to:

a. Prevent the escape of an inmate from a DOC institution;

b. Maintain or restore order and discipline in a DOC institution, in the event of a riot, disturbance or other occurrence that threatens the safety of inmates, department employees, or other persons; or

c. Prevent serious physical injury to or the death of the officer, official or another person.

2005 Or Laws, ch. 431, § 2(2) (effective July 1, 2005).

However, a corrections officer or other official employed by the department may *not* use deadly physical force to prevent the escape of an inmate from:

a. A stand-alone minimum security facility;

b. A colocated minimum security facility, if the corrections officer or other official knows that the inmate has been classified by the department as minimum custody; or

c. Custody outside of a Department of Corrections institution:
   - While the inmate is assigned to a work crew; or
   - During transport or other supervised activity, if the inmate is classified by the department as minimum custody and the inmate is not being transported or supervised with an inmate who has been classified by the department as medium or higher custody.

2005 Or Laws, ch. 431, § 2(3) (effective July 1, 2005).

8. **Use of Physical Force By Correctional Officer to Prevent Escape**

A guard or other peace officer employed in a correctional facility, as that term is defined in ORS 162.135, is justified in using physical force, including deadly physical force, when and to the extent that the guard or peace officer reasonably believes it necessary to prevent the escape of a prisoner from a correctional facility. ORS 161.265. However, a guard or other peace officer employed by the Department of Corrections may not use deadly physical force in the circumstances described in 2005 Or Laws, ch. 431, § 2(3). 2005 Or Laws, ch. 431, § 3(2) (effective July 1, 2005).
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2005
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Purpose

The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.
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CHAPTER 13: CONTEMPT POWER

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I. CONTEMPT GENERALLY

A. Inherent Judicial Power
   The courts’ contempt power is an inherent judicial power. ORS 33.025(1). See ORS 1.240 (providing judicial officers with the power to preserve and enforce order in their immediate presence and in proceedings before them and to compel obedience to those orders); ORS 1.250 (empowering judicial officer to punish contempt in order to effectually exercise the powers provided in ORS 1.240). See also Rust v. Pratt, 157 Or 505, 511 (1937), appeal dismissed 303 US 621 (1938) (contempt power not derived from statute but is inherent in courts and arises from necessity); Taylor v. Gladden, 232 Or 599, 602 (1962) (judge who erred in other respects “was not on that account deprived of jurisdiction to maintain order and decorum in his court or to vindicate the authority of the court by punishment for contempt”); Pounders v. Watson, 521 US 982, 991 (1997) (“While the Due Process Clause no doubt imposes limits on the authority to issue a summary contempt order, the States must have latitude in determining what conduct so infects orderly judicial proceedings that contempt is permitted.”).

B. Statutory Authority
   ORS 33.015 to ORS 33.145 govern contempt proceedings and apply to every court and judicial officer, including municipal, county, and justice courts. ORS 33.155; ORS 52.040.

1. Supreme Court Rules
   The Supreme Court may adopt rules to carry out the purposes of ORS 33.015 to ORS 33.155. ORS 33.145; UTCR 19.010(1). The current rules now appear in UTCR Chapter 19.

2. Inherent Authority Absent Rule or Statute
   Courts also have the power to exercise their inherent authority in contempt proceedings over matters not covered by rule or statute, provided that exercise fosters efficient and fair resolution of the matter. UTCR 19.010(2).

3. Contempt Statutes Apply to Justice Courts
   ORS 33.015 to 33.155, defining acts that constitute contempt and the proceedings for imposing sanctions for contempt, apply to justice courts. ORS 52.040.
C. What Constitutes Contempt

1. Definitions

“Contempt of court” includes the following acts done willfully:


c. Refusal as a witness to appear, be sworn, or answer a question contrary to an order of the court. ORS 33.015(2)(c).

d. Refusal to produce a record, document, or other object contrary to an order of the court. ORS 33.015(2)(d).

e. Violation of a statutory provision that specifically subjects the person to the contempt power of the court. ORS 33.015(2)(e). See, e.g., ORS 20.160 (liability of attorney of nonresident or foreign corporation plaintiff); ORS 136.619 (refusal of immune witness to comply with order compelling testimony); ORS 161.685 (nonpayment of fines, restitution, or costs); ORS 243.726(4)(b) (disobeying court order concerning strike of public employees); ORCP 47G (affidavits or declarations made in bad faith); ORCP 46B(2)(d) (failure to comply with order).

2. Willful Misconduct

The misconduct must be willful to constitute contempt. ORS 33.015(2).
a. **Bad Intent**

“Bad intent” is same element as willfulness. ORS 33.015(2). *See Couey and Couey, 312 Or 302, 305-06 (1991)* (overruling a line of prior cases that viewed willfulness and bad intent as separate elements of contempt); *Patchett and Patchett, 156 Or App 69, 72 (1998)* (willful act is one undertaken with bad intent).

b. **Presumption**

Because willfulness or “bad intent” is part of the case in chief, the contemnor is entitled to a presumption of “good faith.” *See, e.g., State ex rel. Oregon State Bar v. Wright, 280 Or 713, 720 (1977); Barrell v. Holmes, 107 Or App 187, 192 (1991).*

3. **Prima Facie Case**

Proof of three elements establishes a *prima facie* case of contempt:

a. Existence of a valid court order;

b. Contemnor’s knowledge of that order; and

c. Contemnor’s voluntary noncompliance with the order.

*Couey and Couey, 312 Or 302, 306 (1991).*

4. **Corporate Liability**

a. **When Liable**

A corporation may be held liable for contempt if:

1. The conduct constituting contempt is engaged in by an “agent” of the corporation while acting within the scope of employment and on behalf of the corporation. ORS 33.025(2)(a); *see ORS 33.025(4); ORS 161.170(2)(a)* (defining “agent” as any director, officer, or employee of a corporation, or any other person who is authorized to act on behalf of the corporation).

2. The conduct constituting contempt consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by a court. ORS 33.025(2)(b).

3. The conduct constituting contempt is engaged in, authorized, solicited, requested, commanded, or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of

**Note:** In all categories of contempt, the alleged contemnor’s misconduct must be “willful.” “Bad intent” is the same as willfulness.
employment and on behalf of the corporation. ORS 33.025(2)(c).

b. High Managerial Agent
“High managerial agent” means an officer of a corporation who exercises authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees, or any other agent in a position of comparable authority. ORS 161.170(2)(b); ORS 33.025(4).

c. Individual Liability
If a corporation is liable for contempt, the board of directors and high managerial agents of the corporation are individually subject to contempt sanctions if they engaged in, authorized, solicited, requested, commanded, or knowingly tolerated the conduct constituting contempt. ORS 33.025(3).


d. Duty to Pay Fines or Restitution
When the court imposes a fine or restitution on a corporation or unincorporated association, the person authorized to make disbursements for the entity must pay the fine or restitution or risk being held in contempt. ORS 161.685(3).

D. Summary Versus Nonsummary Proceedings

1. Summary Proceedings
The court may summarily sanction a person who commits a contempt of court in the immediate view and presence of the court. ORS 33.096. See, e.g., Pearson and Pearson, 136 Or App 20 (1995) (affirming summary contempt for party shouting obscenity in courtroom); see also State v. Ferguson, 173 Or App 118, 120 (2001) (construing phrase “presence of the court” in ORS 33.096). (See Appendix A: Summary Contempt Trial Guide)

The court may summarily impose sanctions only for contempt that occurs while the court is “sitting judicially.” State v. Baker, 126 Or App 508, 511-14 (1994) (reversing summary sanctions imposed for conduct occurring in chambers while judge was signing orders).
a. Immediate View and Presence
The contempt must occur “in the immediate view and presence of the court.” ORS 33.096; State v. Errichetto, 160 Or App 73, 75 (1999).


2. Filing a motion by mail is not conduct “in the immediate view and presence of the court.” Barton v. Maxwell, 325 Or 72, 79 (1997).

b. No Right to Counsel or Jury
The contemnor has no right to counsel or to a jury in a summary contempt proceeding. See, e.g., Pearson and Pearson, 136 Or App 20, 24-25 (1995) (no right to counsel in summary contempt). The proceeding need not be initiated by an accusatory instrument. However, if the court postpones imposition of sanction, the proceeding may lose its summary nature, and the contemnor may then have the right to counsel. See ORS 33.096 (ORS 33.055 and ORS 33.065, which pertain respectively to remedial and punitive contempt proceedings, do not apply to summary contempt proceedings). See infra II.B.1. “Contempt Must Occur in the Presence of the Court.”

See infra Appendix B: Script—Suggested Procedure For Making The Record In A Summary Contempt Proceeding.

c. OEC Does Not Apply to Summary Proceedings
The Oregon Evidence Code does not apply to summary contempt proceedings. OEC Rule 101(2).

2. Nonsummary Proceedings
Proceedings for contumacious conduct that occurred outside the court’s immediate view and presence are not summary proceedings. The plaintiff in nonsummary proceedings may seek remedial or punitive sanctions or both, and the contemnor has various due process rights not afforded in summary proceedings. See, e.g., ORS 33.015(2) (defining instances of contempt, which may occur outside the court’s immediate view and presence); ORS 161.685(1), (2) (providing that failure to pay fines or restitution, but not costs, may be contempt). See infra III. “Remedial Versus Punitive Contempt—Nonsummary Proceedings.”

Caution: Postponing finding of contempt and/or sanctioning, may cause additional rights to accrue to offenders and loss of the summary nature of the proceedings. See infra II.C.6. “Postponing Finding of Contempt and Imposition of Sanction.”
II. SUMMARY CONTEMPT

A. Introduction
“[F]or direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion, be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them.” Taylor v. Gladden, 232 Or 599, 605-06 (1962) (quoting Ex parte Terry, 128 US 289, 313 (1888)).

B. Summary Imposition of Sanction for Contempt

1. Contempt Must Occur in the Presence of the Court
Summary sanction power has not been extended to contempt that occurs outside of judicial proceedings. For example, “[d]efendant was not adjudged in contempt merely for making a representation to the court but, rather, because she made the representation and the court believed that it was false. The court’s professed knowledge that the representation was false did not authorize it to hold defendant in contempt summarily, because the court did not acquire that knowledge while in session during a judicial proceeding. Instead, the court acquired its asserted knowledge by personally observing the hallway outside the courtroom, off the record, while in recess. In that capacity, although clothed with a judicial purpose, the judge was not acting as a court while sitting judicially. Because the observation required to establish that defendant’s representation was false did not occur in the presence of the court, the court erred in summarily holding defendant in contempt.” State v. Ferguson, 173 Or App 118, 125 (2001) (citations omitted) (construing phrase “presence of the court”). See Barton v. Maxwell, 325 Or 72, 79 (1997) (court’s
authority to impose contempt sanction summarily is confined to misconduct that occurs in court’s immediate presence when court is in session during judicial proceeding; State v. Baker, 126 Or App 508, 511 (1994) (contempt committed while judge was in chambers signing orders and not in session is not subject to summary proceeding); see also Rust v. Pratt, 157 Or 505, 510 (1937), appeal dismissed 303 US 621 (1938) (traditionally, a “direct contempt” was the commission of an improper act in presence of court while in session); State v. Driscoll, 151 Or 363, 367 (1935) (contempt committed in judge’s chambers was not subject to summary proceeding, because court was not in session).

2. Imposition of Summary Sanction
A summary sanction may be imposed where instant action is necessary to preserve order in the court or protect the authority and dignity of the court. ORS 33.096.

C. Procedures for Summary Imposition of Sanction
“Summary punishment always, and rightly, is regarded with disfavor . . . .” Sacher v. United States, 343 US 1, 8 (1952).

1. Warning a Potential Contemnor
Warning that a potential contemnor’s actions may result in a finding of contempt is not required, but highly recommended. It can be an effective deterrent to continued misbehavior. State v. Middleton, 46 Or App 381, 385, rev den 289 Or 588 (1980) (trial court’s warning foreshadowed contemnor being held in contempt); State ex rel. Beckett v. Stockett, 26 Or App 167, 170 (1976) (failure to forewarn contemnor that behavior would result in contempt did not prevent court from holding contemnor in contempt). See Appendix A: Summary Contempt Trial Guide.

2. Immediate Imposition
Summary imposition of a sanction means holding the person in contempt and sentencing the person immediately without adhering to the procedures outlined in ORS 33.055 and ORS 33.065. See ORS 33.096; Taylor v. Gladden, 232 Or 599, 604-06 (1962) (finding of contempt and imposition of sentence without further hearing within authority of court).

3. Notice or Trial Not Required
Court may punish for such contempts summarily without notice or trial, if timely done, and without other proof than its actual knowledge of what occurred. State v. Ramsey, 156 Or App 529, 535 (1998), rev den 328 Or 365 (1999); City of

Caution—False Statements Made in Court: If the court believes or knows the statements are false because of something the court learned outside the session, then summary sanction is not authorized.

Practice Tip: A warning is not required, but is highly recommended as a deterrent.
Caution: When a refusal to testify is based on possible self-incrimination, the right to counsel attaches.


4. Holding Person in Contempt During Trial or Hearing

When feasible, the court should hold a person in contempt outside the presence of the jury to avoid prejudicing the jury. State v. Middleton, 46 Or App 381, 384-86, rev den 289 Or 588 (1980) (court did not err in holding defendant in contempt in front of jury when defendant had repeatedly refused to answer and judge allowed defendant to explain his reluctance to answer, did not berate the defendant and gave a curative instruction to jury stressing the contempt matter was not evidence which it could consider); see also State v. Howell, 237 Or 382, 385-89 (1964) (court did not err in denying defendant’s motion for new trial after it held codefendant in contempt in front of jury).

5. Postponing Imposition of Sanction for Contempt

a. Until Court Recesses or at End of Day

After holding a person in contempt during court proceedings, the court may delay imposition of a sanction until the jury is removed, until the court can recess, or until the end of the day. Even when delaying imposition of sanction for a short period, the better practice is to afford the person an opportunity to be heard on the charge. See infra II.C.6. “Postponing Finding of Contempt and Imposition of Sanction.” For longer delays, the better
6. Postponing Finding of Contempt and Imposition of Sanction

Where the court postpones punishment for contempt committed in the court’s presence until after trial or hearing, and there is no need to impose immediate sanctions to maintain order, due process requires that the person be afforded an opportunity to be heard. *Taylor v. Hayes*, 418 US 488, 498-99 (1974) (where conviction and punishment are delayed, it is difficult to argue that action without notice or hearing of any kind is necessary to preserve order in the court). Postponing the contempt finding removes the necessity for summary action; thus the court should not proceed under ORS 33.096. *State v. Meyer*, 31 Or App 775, 780 (1977) (finding of contempt reversed where court imposed sentence for contempt following the conclusion of the related proceeding and refused to allow defendant to be heard on the contempt).

It does not require a full-scale trial or hearing, however summary or informal the procedure, but the contemnor must have:

a. Notice of the charges;

b. An opportunity to present defenses; and

c. A right of allocution. Again, better practice is to refer to another judge. *See infra II.B.7. “Referral to Another Judge.”*

*Taylor v. Hayes*, 418 US 488, 498-99 (1974) (before attorney is adjudicated in contempt and sentenced after trial for conduct during trial, he or she should have reasonable notice and an opportunity to be heard).

7. Referral to Another Judge

A judge may be disqualified from a contempt proceeding as provided for in other cases under ORS 14.210 to ORS 14.270. The judge to whom the contempt is referred assumes authority over and conducts any further proceedings relating to the contempt. ORS 33.115. *See Phelps and Nelson*, 122 Or App 410, 414 (1993), rev den 318 Or 326 (1994).

If the judge has an actual bias against the person charged with contempt or if there is a likelihood of bias, the judge should disqualify himself or herself and transfer the contempt proceeding to another judge. Delaying imposition of punishment may eliminate the necessity for a “summary”
disposition of the proceeding, thereby entitling the contemnor
to due process protections such as notice of the charges, an
opportunity to present defenses, and a right of allocution. See
a judge to disqualify himself or herself for bias or prejudice
concerning a party); Mayberry v. Pennsylvania, 400 US 455,
464-65 (1971) (where judge does not act immediately, but
waits until end of trial to impose punishment for contempt, it is
preferable to refer to another judge).

Where trial is marked by extreme personal feelings and
personal stings, referral to another judge for the contempt
proceeding is appropriate. Mayberry v. Pennsylvania, 400 US
455, 465-66 (1971) (judge personally attacked throughout trial
was not likely to maintain that calm detachment necessary for
fair adjudication).

8. Defenses
Privilege against self-incrimination is a defense for refusing
to testify. State ex rel. Spencer v. Howe, 281 Or 599, 602 n.1
(1978).

At its discretion, the court may allow a the contemnor to
explain or present a defense. State v. Middleton, 46 Or App
381, 384, rev den 289 Or 588 (1980).

D. Findings and Judgment

1. Contempt Judgment
The imposition of a sanction for contempt must be by a
judgment. ORS 33.125(1) as amended by 2005 Or Laws, ch.
568, § 28 (effective Jan. 1, 2006).

2. Contempt Findings
The statute does not require specific findings. ORS 33.096;
State v. Errichetto, 160 Or App 73, 76 (1999); cf. former ORS
33.030, repealed by Or Laws 1991, ch. 724 (required order
reciting the facts as occurring in such immediate view and
presence of the court, determining that the person proceeded
against was guilty of contempt, and prescribing punishment
defendant was to receive). However, the findings should
include the following:

a. Authority: The judgment must recite the specific statutory
authority under which the judge holds the contemnor in
contempt, including the specific subsection of statutory
authority. See, e.g., French and French, 112 Or App 138,
141 (1992); Sommers and Sommers, 97 Or App 662, 665

Caution: A written contempt judgment is required. See
infra Appendix C: Contempt Judgment Form.

b. Facts: The judgment must recite facts supporting a finding of *wilfulness*, ORS 33.015(2); *Pritchett and Pritchett*, 156 Or App 69, 72 (1998), and of contempt committed in the court’s *immediate view and presence*. ORS 33.096. *See, e.g., State ex rel. Spencer v. Howe*, 281 Or 599, 603-04 (1978) (recitals serve dual purposes: assuring that judge gives careful attention to legal and factual elements of decision and facilitating appellate review when the decision is not made on an evidentiary record or when the precise facts and inferences on which the decision was grounded might be in doubt).


d. Defenses: Findings as to any defenses presented.

e. Sanctions: Prescribed sanction. ORS 33.105(3). *See infra II.E. “Sanctions.”*

3. **Appeal from Contempt Judgment Does Not Stay Action**

An appeal from a contempt judgment does not stay any action or proceeding to which the contempt is related. ORS 33.125(4).

E. **Sanctions**

A court may impose one or more of the following sanctions for each separate contempt of court:

1. A punitive fine of not more than $500;
2. Confinement as a punitive sanction for not more than 30 days; or
3. Probation or community service.


1. **Legislative Limitations on Summary Contempt Sanctions**

“[T]he legislature’s limitation of summary contempt sanctions to probation, community service, confinement up to 30 days, and a $500 fine does not impermissibly constrain the court’s summary abilities to preserve order in judicial proceedings.”

Note: Or Laws 1999, ch. 605, § 8 (effective Oct. 23, 1999), repealed ORS 52.050 to remove the fine and imprisonment limitations on contempt sanctions in justice courts.

**III. REMEDIAL VERSUS PUNITIVE CONTEMPT—NONSUMMARY PROCEEDINGS**

**A. Rules and Rights Vary**

Procedural rules and the person’s substantive rights vary depending on whether the proceeding is for remedial or punitive contempt. Whether the proceeding is remedial or punitive depends on the sanction sought for the contumacious conduct; it does not depend on the underlying proceeding. *See Hicks v. Feiock*, 485 US 624, 630-32 (1988).

1. **Remedial Akin to Civil**

Remedial contempt procedures are generally akin to civil procedures. ORS 33.055(7). Older case law refers to remedial contempt as “civil contempt.”

2. **Punitive Akin to Criminal**

Punitive contempt procedures are generally akin to criminal procedures. ORS 33.065(6). Older case law refers to punitive contempt as “criminal contempt.”

**B. Sanction Sought Determines Procedure**


1. **Punitive Sanction Punishes Past Contempt**

A punitive sanction is one imposed to punish a *past* contempt of court (formerly called “criminal contempt”). ORS 33.015(3). *See Paradis and Keith*, 147 Or App 144, 147 (1997).

2. **Remedial Sanction**

A remedial sanction is one imposed to:

a. Terminate a continuing contempt of court (compel compliance); or

**Note:** The purpose of the sanction ultimately determines whether the proceedings are remedial or punitive. A fine or confinement can be either. The purpose can be to punish past conduct, to terminate continuing conduct, or to compensate for injury, damages, and costs.
b. Compensate for injury, damage, or costs resulting from a past or continuing contempt of court (formerly called “civil contempt”).


3. Types of Sanctions
A court may impose either remedial or punitive sanctions for contempt. ORS 33.045(1).

a. Confinement
Confinement may be either a punitive or a remedial sanction. ORS 33.045(2).

1. Confinement is remedial if it continues or accumulates until the contemnor complies with the court’s judgment. ORS 33.045(2)(a).

2. Confinement is punitive if it is for a definite period and will not be reduced even if the contemnor complies with the court’s judgment or order. ORS 33.045(2)(b).

b. Fines
A fine may be either a remedial or a punitive sanction. ORS 33.045(3).

1. A fine is punitive if it is for a past contempt. ORS 33.045(3)(a).

2. A fine is a remedial sanction if:
   a. It is for a continuing contempt and the fine accumulates until the contemnor complies with the court’s judgment or order; or
   b. It may be partially or entirely forgiven when the contemnor complies with the court’s judgment or order. ORS 33.045(3)(b). See, e.g., Kelley and Kelley, 128 Or App 123 (1994) (affirming, as remedial sanction, order that husband pay wife $400 each month he fails to pay support, though he was not delinquent at the time of the order, when he had a history of noncompliance).

c. Required Payment to Party is Remedial
Any sanction that requires payment of amounts to one of the parties to a proceeding is remedial. ORS 33.045(4).
4. **Contempt Sanctions Are Additional**

Any sanction imposed for contempt is in addition to any civil remedy or criminal sanction that may be available as a result of the conduct constituting contempt. ORS 33.045(5).

**IV. REMEDIAL CONTEMPT PROCEEDINGS**

**A. Application of Other Provisions**

1. **Oregon Evidence Code**

   The Oregon Evidence Code applies to remedial contempt proceedings. OEC Rule 101(2).

2. **Contempt Rules**

   The Supreme Court has adopted rules, contained in UTCR chapter 19, that govern contempt proceedings. ORS 33.145; UTCR 19.010(1).

3. **Civil Rules**

   Rules in ORCP, ORAP, and UTCR that govern civil proceedings apply to remedial contempt proceedings to the extent the rules are not inconsistent with the rules in UTCR chapter 19. UTCR 19.040(1)(a), (b).

   a. ORCP references to “complaint” include the initiating motion in a remedial contempt proceeding. UTCR 19.050(2).

   b. ORCP that apply to juries and jury trials apply to remedial contempt proceedings only when:

      1. A statute or constitution provides a specific right to a jury trial; and

      2. A party claims that right.

      UTCR 19.050(3).

   c. The following ORCP do not apply to remedial contempt proceedings: 3, 5, 21C (preliminary hearings), 21D (motion to make more definite and certain), 21E (motion to strike), 23A (amendments), 24A, 24B, 25A, 32, 54A(1) (dismissal of actions; by plaintiff; by stipulation), 54E, 66, 73, 81A, 81C, 82A(3), 84, and 85. UTCR 19.050(5).

4. **Discretionary Rules**

   If, on its own motion or that of a party, a court decides that a specific procedural rule would not foster a fair and efficient
resolution in a contempt proceeding for remedial sanctions, the
court may modify the rule or adopt a new rule. Notice of the
modified or new rule must be:

a. Given to the parties; and

b. Be in writing or on the record.

UTCR 19.040(2).

5. **ORS 161.685—Effect of Nonpayment**

ORS 161.685 applies to contempt proceedings for the
contemnor’s failure to pay fines or restitution, but not for
failure to pay costs. ORS 161.685.

**B. Initiating a Remedial Contempt Proceeding**

1. **By Motion**

A proceeding for remedial sanctions begins with a motion that
requests the court to order the contemnor to appear, also known
as a motion for an order to show cause. ORS 33.055(2).

a. The motion must be accompanied by a supporting affidavit
or other documentation sufficient to give the contemnor
notice of the specific acts alleged as contempt. ORS
33.055(4).

b. The court or district attorney initiates a proceeding for
remedial sanctions for failure to pay fines or restitution
under ORS 161.685. ORS 161.685(1).

c. In addition to any other requirements, the motion and order
to appear must include:

1. The maximum sanction(s) sought;

2. Whether the initiating party seeks a sanction of
confinement; and

3. Whether the initiating party considers each sanction
sought to be remedial or punitive.

UTCR 19.020(1).

d. The trial court may award *attorney fees* under ORS
33.105(1)(e) only if a party requests them in the motion.
(concluding that court lacked authority to award attorney
fees because party did not request them in its motion);
*see Hogue and Hogue*, 118 Or App 89, 91-92 (1993)
(not necessary to include statutory basis with request for
attorney fees); see also Seever and Seever, 124 Or App 54, 60 (1993) (same).

1. The court may award attorney fees in a contempt proceeding to compel compliance with a dissolution order or decree. ORS 107.445. See also Rowland and Kingman, 131 Or App 204, 211-12 (1994) (concluding that ORS 107.445 does not apply to punitive contempt proceedings because they are not “brought to compel compliance”).

e. The motion is filed in the proceeding to which the contempt is related, if there is a related proceeding. ORS 33.055(3).

1. The county from which the original order issued has jurisdiction over, and is the proper venue for, a related contempt proceeding, even if the contemnor violates the original order in another county or another state. Pyle and Pyle, 111 Or App 184, 187 (1992).

2. An appeal from a contempt judgment will not stay any action or proceeding to which the contempt is related. ORS 33.125(4).

2. Amendment
A party may amend the initiating instrument only on motion and with the court’s approval. UTCR 19.050(4).

3. Joinder
Unless the court determines that other claims should be joined for fair resolution of the contempt matter, only the following claims may be joined with the contempt claim:

a. Claims that arise out of the order or judgment that the contemnor allegedly violated;

b. Claims that involve facts and issues that would necessarily be determined in the contempt proceeding; and

c. Other claims for contempt arising out of a related matter.

UTCR 19.050(1).

4. Who May Initiate A Proceeding For Remedial Sanctions
The following persons may initiate a proceeding for remedial sanctions or, with leave of the court, participate in the proceeding:

a. A party aggrieved by the alleged contempt of court;

b. A district attorney;
c. A city attorney;
d. The Attorney General; or
e. Any other person specifically authorized by statute to seek imposition of sanctions for contempt.

ORS 33.055(2).

5. Default by Criminal Defendant
   Only the court or district attorney may initiate a proceeding for contempt when a criminal defendant defaults on a court-ordered payment of a fine or restitution. ORS 161.685(1).

C. Service on Contemnor
   The court may issue an order directing the contemnor to appear. ORS 33.055(5)(a).

1. Personal Service
   The contemnor must be personally served with the order to appear in the manner provided by ORCP 7 and 9. ORS 33.055(5)(a).

2. Alternative Service
   If based on motion and supporting affidavit the court finds that the contemnor cannot be personally served, the court may either:
   a. Order service by a method other than personal service; or
   b. Issue an arrest warrant.

ORS 33.055(5)(a). See Hiber v. Creditors Collection Service, 154 Or App 408, 414 n.8, rev den 327 Or 621 (1998) (requirement that court make predicate finding that contemnor cannot be served personally before issuing arrest warrant on contempt charges is reasonable procedural requirement and does not unconstitutionally impair court’s contempt power).

3. Waiver
   The contemnor may waive personal service under ORS 107.835 (allowing any party to a decree under ORS chapters 25, 107, 108, 109 or 416, or ORS 110.300 to 110.441, or 124.005 to 124.040 to waive personal service in a subsequent contempt proceeding). ORS 33.055(5)(b).

   a. If the contemnor waives personal service in a subsequent contempt proceeding:
1. The contemnor must be served by substituted service; and
2. The substituted service must be by the method specified in the waiver.
ORS 33.055(5)(b).

4. **Failure to Pay**
   If a contemnor fails to pay fines or restitution under ORS 161.685, the court may initiate contempt proceedings by issuing:
   a. A show cause citation, or
   b. An arrest warrant.
ORS 161.685(1).

D. **Compelling Contemnor’s Attendance**

1. **Order or Warrant**
   If the contemnor fails to appear for a proceeding for remedial sanctions, the court may issue any order or warrant necessary to compel the contemnor’s appearance. ORS 33.075(1).

2. **Warrant Procedures**
   If the court issues a warrant, the following requirements apply:
   a. The warrant must specify a security amount. ORS 33.075(3).
   b. Unless contemnor pays the security amount on arrest, the sheriff must keep contemnor in custody until the court:
      1. Makes a release decision; or
      2. Disposes of the contempt proceedings.
ORS 33.075(3).
   c. The court must discharge contemnor from custody when contemnor:
      1. Pays, as directed, the sum specified in the warrant; or
      2. At any time before the return date of the warrant, executes and delivers to the sheriff a security release or release agreement under ORS 135.230 to 135.290 that provides that contemnor will:
         A) Appear on the return day; and
B) Abide by the order or judgment of the court or officer.

ORS 33.075(4).

d. The sheriff must return the warrant and the security deposit, if any, by the return date specified in the warrant. ORS 33.075(5).

e. Security deposited by the contemnor in a remedial contempt proceeding is not subject to the county assessment provided for in ORS 137.309(1) to (5). ORS 33.075(8).

E. Hearing Required
The court may impose a remedial sanction only after affording the contemnor the opportunity for a hearing, tried to the court. ORS 33.055(6).

1. Prehearing Requirements
The court may not impose the remedial sanction of confinement unless, before the hearing is held, the court:

a. Informs contemnor that the court may impose confinement; and

b. Affords contemnor the same right to appointed counsel required in proceedings for the imposition of an equivalent punitive sanction of confinement.

ORS 33.055(8).

2. Contemnor’s Rights

a. Generally, the contemnor has only those rights accorded a defendant in a civil action. ORS 33.055(7).


1. Generally, under the federal constitution, there is no right to a jury trial in a remedial contempt proceeding. See Shillitani v. United States, 384 US 364, 368-70 (1966) (conditional nature of civil contempt imprisonment justifies lack of safeguard of jury trial).

2. There may be a right to a jury trial in a remedial contempt proceeding under ORS 243.726(4)(b) if the amount of fine imposed, which is in the court’s discretion, poses serious risk and deprivation. See

Caution: A jury trial may be required in a remedial proceeding if a fine imposed poses serious risk and deprivation.
**Chapter 13: Contempt Power**

United Mine Workers v. Bagwell, 512 US 821, 837-38 (1994) (union had right to jury trial since it faced fines or confinement that had been imposed prospectively to compel compliance with a complex injunction, based on the need for extensive, impartial fact finding); Muniz v. Hoffman, 422 US 454, 477 (1975) ($10,000 fine imposed on 13,000 member union not enough to trigger right to trial by jury)

c. The contemnor is entitled to be **represented by counsel**; failure to inform the contemnor of that right is reversible error. ORS 33.055(8); see also State ex rel. Frohmayer v. Consumer Sounding Board, 114 Or App 41, 43-44, rev den 314 Or 574 (1992) (court did not abuse discretion in denying defendant’s request for postponement to obtain counsel when proceeding had been previously postponed for that purpose and defendant’s conduct had previously caused one attorney to resign); State ex rel. Redden v. Breck, 111 Or App 404 (1992) (failure to inform).

d. If the contemnor is not represented by counsel when coming before the court, the court must inform the contemnor of the right to counsel and the right to appointed counsel if:

1. The remedial sanction of confinement is sought; and

2. Appointed counsel would be required in a proceeding for the imposition of an equivalent punitive sanction of confinement.

ORS 33.055(9); ORS 33.055(8)(b). See ORS 33.065(6) (providing contemnor with same constitutional and statutory protections that contemnor would be entitled to in a criminal proceeding in which the fine or term of imprisonment that could be imposed is equivalent to the punitive sanctions sought).

e. Contemnor has the right to call witnesses and present evidence. Brown and Brown, 89 Or App 172 (1987) (denial of right to call witnesses is reversible error).

3. **Waiver**

   The contemnor may waive the opportunity for hearing by stipulated order filed with the court. ORS 33.055(6).

4. **Standard of Proof Depends on Sanction Sought**

   The standard of proof of a remedial sanction is **clear and convincing evidence**, unless **confinement** is sought, in which
F. Compelling Witness’s Testimony
On motion of the person initiating the remedial contempt proceeding, the court may compel a witness to testify as provided under ORS 136.617. ORS 33.085(1).

1. Self-Incrimination
   If the witness refuses to testify on the ground of self-incrimination:
   
   a. The witness is entitled to be represented by counsel;
   
   b. The moving party must show reasonable cause to believe that the witness possesses knowledge relevant to the proceeding or that no privilege applies to the evidence sought;
   
   c. The witness may show cause why the witness should not be compelled to testify; and
   
   d. When the moving party shows the required reasonable cause, the court must order the evidence produced, unless the court finds that to do so would be clearly contrary to the public interest or the court continues the proceeding under ORS 33.085(6).


   a. Oregon Constitution Requires Transactional Immunity

2. Continuance
   In lieu of compelling testimony, the court may continue the contempt proceeding until disposition of any pending criminal action against the witness whose testimony is sought. ORS 33.085(6).

3. Notice of Intent to Compel
   If the person who initiated the contempt proceeding is not represented by the district attorney, county counsel, or Attorney General, the person must serve notice of intent to compel testimony. ORS 33.085(2). The notice provisions help ensure

Note: Generally, a clear and convincing standard of proof is required for a remedial sanction. However, if confinement is sought, the standard is proof beyond a reasonable doubt.
that contempt proceedings do not unnecessarily compromise investigation or prosecution of criminal proceedings for the same or related conduct.

a. The notice must be **served** on both:

1. The district attorney of the county where the contempt proceeding is pending; and
2. The Attorney General.

ORS 33.085(2).

b. The notice must **identify the witness** whose testimony is sought to be compelled and include, if known:

1. The witness’s:
   a. Name,
   b. Date of birth,
   c. Residence address, and
   d. Social Security number;
2. Other pending proceedings or criminal charges involving the witness;
3. The case name and number of the contempt proceeding; and
4. The date, time, and place set for any hearing on the motion to compel testimony.

ORS 33.085(3).

c. The notice must be served not less than **14 calendar days** before a hearing on the motion to compel testimony. ORS 33.085(2).

d. If the notice is not served within the time required, the court must grant a continuance for at least 14 calendar days from the date the notice is served to allow the district attorney and Attorney General opportunity to be heard, unless the district attorney and Attorney General waive in writing any objection to the motion to compel. ORS 33.085(4).

4. **Prosecutor May Appear**

   In any hearing on a motion to compel testimony, the district attorney of the county in which the contempt proceeding is pending and the Attorney General each may appear to present
evidence or arguments to support or oppose the motion. ORS 33.085(5).

V. PUNITIVE CONTEMPT PROCEEDINGS

A. Application of Other Provisions

1. OEC Applies to Punitive Contempt Proceedings
   The Oregon Evidence Code applies to proceedings for punitive contempt. OEC Rule 101(2).

2. Criminal Procedure
   Generally, criminal procedure applies to proceedings for punitive contempt sanctions. ORS 33.065(5).

3. Contempt Rules
   The Supreme Court has adopted rules, contained in UTCR Chapter 19, that govern contempt proceedings. ORS 33.145; UTCR 19.010(1).

4. ORAP and UTCR
   Rules in ORAP and UTCR that govern criminal proceedings apply respectively to original and appellate punitive contempt proceedings under ORS 33.065. UTCR 19.040(1)(c).

5. ORS 161.685—Effect of Nonpayment
   ORS 161.685 applies to contempt proceedings for defendant’s failure to pay fines or restitution; it does not authorize contempt proceedings for failure to pay costs.

B. Initiating a Punitive Contempt Proceeding

1. Public Prosecutor
   As in criminal proceedings, only public prosecutors, not private parties, may seek punitive sanctions. Public prosecutors include:

   a. City attorney;
   b. District attorney;
   c. Attorney General; or
   d. Special prosecutor appointed by the court.

   ORS 33.065(2); ORS 33.065(3); see Dahlem and Dahlem, 117 Or App 343, 346 (1992) (trial court erred in imposing punitive sanction in contempt proceeding that private party initiated).
2. **Who May Initiate A Proceeding For Punitive Sanctions**
   A proceeding for imposition of *punitive sanctions* may be initiated:
   
a. On the prosecutor’s own initiative;
b. On the request of a party to an action or proceeding, except when the contempt proceeding is for failure to pay fines or restitution; or
c. On the court’s request.

   ORS 33.065(4); ORS 161.685.

3. **Failure to Pay**
   If the contempt is for failure to pay fines or restitution, only the court or district attorney may initiate the proceeding. ORS 161.685(1).

4. **Accusatory Instrument**
   An accusatory instrument must be filed to initiate a proceeding for punitive sanctions. ORS 33.065(2).
   
a. Generally, the accusatory instrument is subject to the same requirements and laws applicable to an accusatory instrument in a criminal proceeding. ORS 33.065(5).
b. To initiate a punitive contempt proceeding for failure to pay fines or restitution under ORS 161.685, the court or district attorney files a motion. ORS 161.685(1).

5. **Contents of the Accusatory Instrument**
   The accusatory instrument must:
   
a. Charge defendant with contempt of court;
b. Seek a punitive sanction;
c. Set out a separate count for each contempt of court charged; and
   
d. Include:
      
      1. The maximum sanction(s) sought;
      2. Whether the party seeks a sanction of confinement; and
      3. Whether the plaintiff considers each sanction sought to be remedial or punitive.

   ORS 33.065(2); UTCR 19.020(1).
6. **Special Prosecutor**
   The court may appoint a special prosecutor to prosecute the contempt when:
   
a. A city attorney, district attorney, or Attorney General who regularly appears before the court declines to prosecute the contempt;
   
b. The court determines that remedial sanctions would not provide an effective alternative remedy; and
   
c. The attorney the court seeks to appoint is:
      1. Authorized to practice law in this state; and
      2. Is not counsel for an interested party.

   ORS 33.065(3); see also ORS 8.710.

   a. **Compensating the Special Prosecutor**
      Reasonable compensation must be paid the appointed attorney by:
      
      1. The Oregon Department of Administrative Services if the attorney is appointed by the: Supreme Court, Court of Appeals, or Oregon Tax Court. ORS 33.065(3)(a).
      2. The city where the court is located if the attorney is appointed by a municipal court. ORS 33.065(3)(b).
      3. The county where the contempt prosecution is initiated in all other cases. ORS 33.065(3)(c).

   C. **Service on Defendant**

      1. **Warrant or Order**
         After the prosecutor files the accusatory instrument, the court may issue any warrant or order necessary to compel the appearance of defendant. ORS 33.065(4).

      2. **Citation**
         A defendant facing punitive contempt sanctions may be cited to appear in lieu of custody under ORS 133.055. ORS 33.075(2).

      3. **Failure to Pay**
         In a punitive contempt proceeding for failure to pay fines or restitution under ORS 161.685, the court may issue:
         
a. A show cause citation; or
         
b. An arrest warrant.
ORS 161.685(1).

4. **Personal Service**
   Defendant must be personally served a copy of the instrument and be arraigned. ORS 33.065(5).

5. **Demurrer**
   Defendant may move against the instrument by demurrer. ORS 33.065(5).

D. **Compelling Defendant’s Attendance**

1. **Order or Warrant**
   The court may issue any order or warrant necessary to compel the appearance of defendant. ORS 33.065(4); ORS 33.075(2).

2. **Warrant Procedures**
   If the court issues a warrant, the following requirements apply:
   a. The warrant must specify a security amount. ORS 33.075(3).
   b. Unless defendant pays the security amount on arrest, the sheriff must keep defendant in custody until the court:
      1. Makes a release decision; or
      2. Disposes of the contempt proceedings.
      ORS 33.075(3).
   c. The court must discharge defendant from custody when defendant:
      1. Pays, as directed, the sum specified in the warrant; or
      2. At any time before the return date of the warrant, executes and delivers to the sheriff a security release or release agreement under ORS 135.230 to 135.290 that provides that defendant will:
         A) Appear on the return day; and
         B) Abide by the order or judgment of the court or officer.
      ORS 33.075(4).
   d. The sheriff must return the warrant and the security deposit, if any, by the return date specified in the warrant. ORS 33.075(5). **Note:** The text of the statute refers to a return
date, however, it is not expressly made a requirement. The best practice would be to specify a warrant return date.

e. If the warrant is served and defendant does not appear, the court may:

1. Issue another warrant; or
2. Proceed against the security deposited upon the arrest. ORS 33.075(6).

f. If the security is recovered, the court may award any or all of the money recovered as remedial damages to any party to the action. ORS 33.075(7).

g. Security deposited by defendant in a punitive contempt proceeding is not subject to the county assessment provided for in ORS 137.309(1) to (5). ORS 33.075(8).

E. Hearing

1. Defendant’s Rights

a. With the exception of the right to a jury trial, defendant is entitled to the constitutional and statutory protections to which a defendant in a criminal proceeding would be entitled if facing the same fine or term of imprisonment in a criminal proceeding as is sought in the punitive contempt proceeding, including:

1. The presumption of innocence;
2. The right to a speedy trial;
3. The right to discovery; and
4. The right to counsel. ORS 33.065(6); Hicks v. Feiok, 485 US 624, 632 (1988); see State ex rel. Hathaway v. Hart, 300 Or 231 (1985) (defendant in criminal contempt proceeding for violating restraining order under Abuse Prevention Act is not entitled to jury trial).

Caution: Court must inform alleged contemnor of the right to counsel.


c. Generally, defendant does not have the right to a jury trial. However, ORS 33.065 does not affect a right to a jury trial created by another statute or other provision of law. See ORS 33.065(6).
1. Under the federal constitution, there is no right to a jury trial unless the sanction imposed makes the offense a serious one, i.e., incarceration for more than 6 months. See *Muniz v. Hoffman*, 422 US 454, 475-76 (1975).

2. Generally, in Oregon, the court may not impose a punitive sanction of more than 6 months confinement for contempt. ORS 33.105(2)(c) (maximum punitive sanction of confinement is 6 months).

   A) If the court sanctions defendant for more than one contempt and the imposed sentences aggregate to more than six months’ incarceration, defendant is entitled to a jury trial. *Codispoti v. Pennsylvania*, 418 US 506, 517 (1974).

   B) ORS 161.685(4) authorizes imposition of up to one year confinement as a sanction for contempt based on failure to pay fines or restitution. A charging instrument that seeks a maximum sanction of more than six months implicates the right to a jury trial (although a jury is constitutionally required only if the court actually imposes a sanction of more than six months).

3. There may be a right to a jury trial in a punitive contempt proceeding under ORS 243.726(4)(b) (public employee strikes), if the amount of fine imposed, which is under the court’s discretion, poses serious risk and deprivation. See *Muniz v. Hoffman*, 422 US 454, 477 (1975) ($10,000 fine imposed on 13,000 member union not enough to trigger the right to trial by jury).

   d. Defendant is entitled to appointed counsel if:

      1. Defendant is financially eligible; and

      2. A criminal defendant facing the fine or term of imprisonment sought in the punitive contempt proceeding would be entitled to appointed counsel.

   ORS 33.065(6).

2. **Standard of Proof**

   Before imposing punitive sanctions, the court must find proof of contempt beyond a reasonable doubt. ORS 33.065(9).

F. Compelling Witness’s Testimony

On motion of the person initiating the punitive contempt proceeding, the court may compel a witness to testify as provided under ORS 136.617. ORS 33.085(1).

1. Self-Incrimination

If the witness refuses to testify on the ground of self-incrimination:

a. The witness is entitled to be represented by counsel;

b. The moving party must show reasonable cause to believe that the witness possesses knowledge relevant to the proceeding or that no privilege applies to the evidence sought;

c. The witness may show cause why the witness should not be compelled to testify; and

d. When the moving party shows the required reasonable cause, the court must order the evidence produced, unless the court finds that to do so would be clearly contrary to the public interest or the court continues the proceeding under ORS 33.085(6).

ORS 136.617.

2. Continuance

In lieu of compelling testimony, the court may continue the contempt proceeding until disposition of any pending criminal action against the witness whose testimony is sought. ORS 33.085(6).

3. Special Prosecutor to Serve Notice of Intent to Compel

A court-appointed special prosecutor must serve notice of intent to compel testimony to help ensure that contempt proceedings do not unnecessarily compromise investigation or prosecution of criminal proceedings for the same or related conduct. ORS 33.085(2).

a. The notice must be served on both:

1. The district attorney of the county where the contempt proceeding is pending; and

2. The Attorney General.

ORS 33.085(2).

b. The notice must identify the witness whose testimony is sought to be compelled and include, if known:
1. The witness’s:
   a. Name,
   b. Date of birth,
   c. Residence address, and
   d. Social Security number;

2. Other pending proceedings or criminal charges involving the witness;

3. The case name and number of the contempt proceeding; and

4. The date, time, and place set for any hearing on the motion to compel testimony.

ORS 33.085(3).

c. The notice must be served not less than 14 calendar days before a hearing on the motion to compel testimony. ORS 33.085(2).

d. If the notice is not served within the time required, the court must grant a continuance for at least 14 calendar days from the date the notice is served to allow the district attorney and Attorney General opportunity to be heard, unless the district attorney and Attorney General waive in writing any objection to the motion to compel. ORS 33.085(4).

4. Prosecutor May Appear
   In any hearing on a motion to compel testimony, the district attorney of the county in which the contempt proceeding is pending and the Attorney General each may appear to present evidence or arguments to support or oppose the motion. ORS 33.085(5).

G. Pleas and Sentencing

1. Guilty or No Contest Pleas
   The court may take a not guilty plea, a guilty plea, or a plea of no contest as in any other criminal case. ORS 135.335.

2. Time of Sentencing
   After a plea or verdict of guilty, the court must set a time for sentencing. ORS 137.020(1).
The court may not sentence the defendant until at least 2 calendar days after the plea or verdict unless the court does not intend to remain in session for that time, in which case the time must be as remote as reasonably possible but no sooner than 6 hours after the plea or verdict (except with the defendant’s consent). ORS 137.020(2)(a). See Chapter 16, II. “Procedure at Sentencing.”

VI. DEFENSES

A. Inability to Comply
Inability to comply with the order, including inability to pay, is an affirmative defense for both remedial and punitive contempt. ORS 33.055(10); ORS 33.065(7); State ex rel. Mikkelsen v. Hill, 315 Or 452, 459 (1993).

1. Notice of Intent
If defendant in a punitive contempt proceeding intends to rely on evidence of inability to comply with an order of the court, then not less than five days before the punitive contempt trial, defendant must file and serve on the prosecutor a written notice of intent to offer that evidence. If defendant fails to file and serve that notice, the court:

a. Must not allow defendant to introduce evidence of inability to comply with the order at the punitive contempt proceeding; unless

b. Just cause for failure to file the notice is made to appear.
ORS 33.065(7).

2. Contemnor Bears Burden of Proof
The contemnor bears the burden of proving inability to comply with a contempt order. See State ex rel. Robertson v. Robertson, 123 Or App 157, 159-60 (1993), rev den 318 Or 350 (1994) (father’s refusal to testify not grounds for reversing trial court’s finding that he was able to pay support); State ex rel. Gibbon v. West, 118 Or App 580, 584 (1993).

Inability to comply must not be self-imposed. Berry and Berry, 95 Or App 433, 435-36 (1989) (argument that paying support would violate obligor’s free exercise of religion not a defense when obligor joined a religious organization that forbade members from having separate earnings and from supporting nonmembers).
B. Former Jeopardy
A punitive contempt proceeding is a prosecution for purposes of former jeopardy. See, e.g., State v. Delker, 123 Or App 129, 134 (1993), rev den 318 Or 326 (1994) (trial court’s dismissal of criminal charges reversed on the ground conduct that violated order was distinct from conduct on which criminal charges were based); State v. McIntyre, 94 Or App 240 (1988) (subsequent prosecution barred when conduct that violated restraining order was the same conduct on which criminal charges were based).

C. Statute of Limitations

1. In General—Two Years
Generally, proceedings for remedial and punitive sanctions must be commenced within 2 years of the act or omission constituting the contempt. ORS 33.135(1).

2. Nonsupport—Ten Years
Proceedings to impose remedial or punitive sanctions for failure to pay a support obligation by an obligor, as defined in ORS 110.303, must be commenced within 10 years of the act or omission constituting contempt. ORS 33.135(5) as amended by 2005 Or Laws, ch. 560 § 15 (effective Jan. 1, 2006). The willful failure of an obligor, as that term is defined in ORS 110.303, to pay a support obligation after that obligation becomes a judgment is a contempt without regard to when the obligation became a judgment. ORS 33.135(4) as amended by 2005 Or Laws, ch. 560 § 15 (effective Jan. 1, 2006).

3. Continuing Contempt
The two-year limitations period does not bar proceedings to impose sanctions for an act or omission that constitutes a continuing contempt at the time the contempt proceedings are initiated, such as a continuing refusal to pay. ORS 33.135(4).

4. Commencement or Tolling
Provisions of ORS chapters 33 and 131 state when limitations period begins or is tolled and when contempt proceeding commences.

a. Remedial
A proceeding to impose remedial sanctions commences when a motion with supporting affidavit requesting that the contemnor appear is filed under ORS 33.055(2). ORS 33.135(2).
b. Punitive

Proceedings to impose punitive sanctions are governed by the times specified in ORS 131.135, ORS 131.145, and ORS 131.155. ORS 33.135(3).

1. A proceeding for **punitive sanctions** commences when a warrant or other process issues, provided that it is executed without reasonable delay. ORS 131.135.

2. The limitations period starts to run on the day after defendant commits the contempt of court. ORS 131.145(1).

3. The limitations period is tolled any time that defendant:
   a. Is not an inhabitant of, or usually resident within Oregon; or
   b. Hides in Oregon so as to prevent process being served on defendant. ORS 131.145(2).

4. If defendant is out of state when the contempt occurs, the limitations period begins to run when defendant returns to Oregon. ORS 131.145(3).

5. The applicable limitations period cannot be tolled or extended by more than **three years**. ORS 131.155.

D. Underlying Order—Void Versus Voidable

1. **Void Order—No Contempt**

   If the underlying order is void, the contemnor cannot be held in contempt for violating it. See, e.g., *Rowland and Kingman*, 131 Or App 204, 210-11 (1994) (trial court properly entered judgment on pleadings in contempt proceeding on ground that underlying order was void because court lacked jurisdiction to modify an out-of-state custody decree).

2. **Order Not Then in Effect—No Contempt**

   The contemnor cannot be found in contempt for violating provisions of an order at a time when the order is not in effect. See, e.g., *Southworth and Southworth*, 113 Or App 607, 610-11, *rev den* 314 Or 574 (1992) (mother’s conduct before dissolution judgment became final cannot support judgment of contempt for violating the dissolution judgment).

3. **Voidable Order—No Defense**

   The fact that the underlying order is voidable is no defense. A voidable order must be obeyed until vacated or reversed. *State
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4. Collateral Attack

As a general rule, the contemnor may not collaterally attack the validity of an underlying order in an appeal from a judgment of contempt for disobeying that order. However, the contemnor may attack the underlying order on appeal from the contempt judgment when, for constitutional, statutory, or practical reasons, no other remedy as to that order was available by either appeal or mandamus. State v. Crenshaw, 307 Or 160, 168 (1988).

a. The contemnor may collaterally attack the underlying order on appeal from a contempt judgment when contemnor would suffer irremedial harm to a legally cognizable interest by complying with the order. State v. Crenshaw, 307 Or 160, 168 n.7 (1988); see, e.g., Dept. of Rev. v. Universal Foods Corp., 318 Or 78, 84-85 (1993) (merit of administrative subpoena could be attacked on appeal from contempt judgment because harm of disclosure would be irremedial once documents were disclosed).


E. Choice of Evils

Choice of evils is an available defense only if the contemnor’s necessary conduct is not inconsistent with other provisions of law. ORS 161.200; Downtown Women’s Center v. Advocates for Life, Inc., 111 Or App 317, 321-23 (1992) (choice of evils defense unavailable to defendants who violated injunction in attempt to prevent legal abortions).

F. Mental Illness

Mental illness is a defense as in any criminal case. See ORS 161.295 et seq.

G. Vague Restraining or Protective Order

1. Family Abuse Prevention Act

Actions that may be prohibited by a restraining order issued under the Family Abuse Prevention Act, see ORS 107.718(1)(e) and (f), are defined in ORS 107.705(4)-(7). See State ex rel. Emery v. Andisha, 105 Or App 473, 476 (1991) (concluding that terms of restraining order were not vague but
sufficiently clear for a reasonable person to understand the prohibited behavior).

2. **Stalking**
   Actions that may be prohibited by a stalking protective order, *see ORS 30.866*, are defined in ORS 163.730(1)-(3). *See Delgado v. Souders*, 146 Or App 580, 586-88, *aff’d* 334 Or. 122 (2002) (“alarm,” “coerce,” and “contact” do not render definition of the crime of stalking, *see ORS 163.732(1)*, void for vagueness; by implication, such terms in restraining order would not be too vague to put contemnor on notice of prohibited acts); *see also Hanzo v. de Parrie*, 152 Or App 525, 541-42 (1998), *rev den* 328 Or 418 (1999) (interpreting ORS 30.866 and ORS 163.732). **Note:** Effective January 1, 2002, ORS 163.730 was amended to prohibit threats conveyed *electronically*. Or Laws 2001, ch 870, § 1; ORS 163.730.

3. **Elderly and Disabled Person Abuse**
   Actions that may be prohibited by a restraining order issued under Elderly and Disabled Person Abuse Prevention Act, *see ORS 124.020(1)(c)*, are defined in ORS 124.005(1)-(3). **Note:** Or Laws 1999, ch. 738, (effective Oct. 23, 1999), expanded Elder Abuse Protection Act to provide protection for disabled persons, defined “disabled” person, and changed title of Act to Elderly and Disabled Person Abuse Prevention Act.

   **H. Conduct of Another Party**
   In most circumstances, conduct of another party to the order is irrelevant to whether the contemnor is in contempt for violating the order. *See, e.g., Barrett and Barrett*, 320 Or 372, 377-82 (1994) (affirming judgment of contempt when husband “sat in judgment of his own case” by unilaterally terminating wife’s health benefits because she failed to seek employment); *but see Southworth and Southworth*, 113 Or App 607, 611, *rev den* 314 Or 574 (1992) (mother’s violation of order not willful, because it was a consequence of father’s misconduct).

**VII. SANCTIONS**

**A. Limits on Multiple Sanctions**
Any court-imposed sanction for contempt is in addition to any civil remedy or criminal sanction that may be available in any civil or criminal proceedings arising out of the conduct constituting contempt, although the court must consider any contempt sanctions previously imposed for the same act. ORS 33.045(5).
B. Judgment
The imposition of a sanction for contempt must be by judgment. ORS 33.125(1) as amended by 2005 Or Laws, ch. 568, § 28 (effective Jan. 1, 2006). See Appendix C: Contempt Judgment Form.

1. Statutory Basis
Although the judgment need not specify the statutory basis on which the contempt was found, the better practice is to include the statutory basis. Compare Paradis and Keith, 147 Or App 144, 147-48 (1997) (because petition sought only remedial damages, contempt was necessarily remedial, and consequently, lack of statutory basis in judgment did not render it defective or unreviewable on appeal) with Bonebrake v. Eccles, 113 Or App 154, 155 n.1, rev den 314 Or 391 (1992) (holding that contempt judgment was defective on its face for failing to specify statutory basis, and noting that revisions to contempt statutes distinguishing between remedial and punitive contempt were not in effect when the judgment was entered).

C. Sanction Imposed Limited by Sanction Sought
The court may not impose a sanction greater than the sanction sought. UTCR 19.020(2). The following presumptions apply.

1. Punitive Sanction Greater Than Remedial Sanction
A punitive sanction is presumed greater than a remedial sanction. UTCR 19.020(2). See Dahlem and Dahlem, 117 Or App 343 (1992) (trial court erred in imposing punitive sanction in remedial contempt proceeding); see also Becker and Becker, 144 Or App 237 (1996) (trial court erred in awarding default judgment giving relief to husband based on amended affidavit that was never served on wife).

2. Confinement Presumed a Greater Sanction
A punitive sanction of confinement is presumed greater than other punitive sanctions; a remedial sanction of confinement is presumed greater than other remedial sanctions. UTCR 19.020(2).

D. Punitive Sanctions Are Not Exclusive
In a proceeding for punitive sanctions, the court may impose a remedial sanction in addition to or in lieu of a punitive sanction. ORS 33.065(8).

E. Punitive Sanctions and Continuing Contempt
The court may impose a punitive sanction for past conduct constituting contempt even though similar conduct is a continuing
contempt; for example, failure to pay support in past and continuing failure to pay. ORS 33.105(4).

F. Summary Contempt Sanctions
The court may summarily sanction a person who commits a contempt of court in the immediate view and presence of the court. ORS 33.096. See supra II. “Summary Contempt.”

1. Sanctions Available in a Summary Contempt Proceeding
In a summary proceeding, the court may impose one or more of the following sanctions for each separate contempt of court:
   a. A punitive fine not exceeding $500;
   b. Confinement, as a punitive sanction, not exceeding 30 days, see, e.g., Pearson and Pearson, 136 Or App 20, 25 (1995) (trial court did not abuse its discretion in imposing 30 days confinement for shouting obscenity in courtroom);
   c. Probation; or
   d. Community service.
   ORS 33.105(3).

2. Purposes
The sanction imposed should:
   a. Preserve order in the court; and
   b. Protect the authority and dignity of the court.
   ORS 33.096.

G. Maximum Remedial Sanctions
Unless otherwise provided by statute, see, e.g., ORS 243.726(4)(b) (amount of fine that may be imposed for violating an order restraining an unlawful strike is at court’s discretion), a court may impose one or more of the following remedial sanctions. ORS 33.105(1).

1. Restitution
   The court may impose payment of a sum of money sufficient to compensate a party for loss, injury, or costs suffered by the party as the result of a contempt of court. ORS 33.105(1)(a).

2. Confinement
   For other than failure to pay a fine or restitution (see ORS 161.685(4) discussed below), the court may order confinement for whichever is the shorter period:
a. So long as the contempt continues; or
b. 6 months.
ORS 33.105(1)(b).

a. **Confinement For Failure to Pay a Fine or Restitution**
   For failure to pay a fine or restitution, the term of confinement the court may impose cannot exceed whichever of the following is shorter:
   
   1. One day for each $25 of the fine or restitution;
   2. 30 days if the fine or restitution was imposed on conviction of a violation or misdemeanor; or
   3. One year in any other case.
   
   ORS 161.685(4).

3. **“Day Fines”**
   For each day the contempt continues, the court may order payment of an amount not to exceed whichever is the greater of:
   
   a. $500; or
   b. One percent of the contemnor’s annual gross income.
   
   ORS 33.105(1)(c).
   
   The amount may be imposed:
   
   a. As a fine; or
   b. To compensate a party for the effects of the continuing contempt.
   
   ORS 33.105(1)(c).

4. **Order Designed to Insure Compliance**
   The court may issue an order designed to ensure compliance with a prior order of the court, including an order imposing probation. ORS 33.105(1)(d). See, e.g., *Lovejoy Specialty Hospital v. Advocates for Life*, 104 Or App 596, 602 (1990), rev dismissed 311 Or 603 (1991) (affirming remedial sentence of confinement until defendants signed sworn statement that they would comply with the underlying order).

5. **Attorney Fees**
a. **In General**
   The court may order payment of attorney fees incurred by a party as a result of the contempt, but only if party requested them in the motion. ORS 33.105(1)(e); *Douthit v. Swift*, 125 Or App 466, 470-71 (1993) (concluding that court lacked authority to award attorney fees because party did not request them in its motion).

b. **Domestic Relations Cases**
   In any contempt proceeding in any suit for marital annulment, dissolution, or separation, the court may make an order awarding attorney fees. ORS 107.445. See also *Hogue and Hogue*, 118 Or App 89, 91-92 (1993) (holding that party must request attorney fees in motion, but is not required to state the statutory basis).

6. **Other Effective Remedy**
   The court may impose any other sanction that the court determines would be an effective remedy for the contempt. ORS 33.105(1)(f).

H. **Maximum Punitive Sanctions**
   Unless otherwise provided by statute, see, e.g., ORS 161.685(4) (limiting sanctions for contempt based on failure to pay fines or restitution), a court may impose one or more of the following punitive sanctions for each separate contempt of court. ORS 33.105(2).

1. **Fine**
   The court may order payment of a fine not to exceed whichever is the greater of:
   a. $500; or
   b. One percent of defendant’s annual gross income.
   ORS 33.105(2)(a).

2. **Forfeiture**
   The court may order forfeiture of any proceeds or profits obtained through the contempt. ORS 33.105(2)(b).

3. **Confinement**
   The court may impose confinement for not more than 6 months. ORS 33.105(2)(c). If punitive contempt sanctions are sought for failure to pay fines or restitution, the court may not impose a term of confinement that exceeds the shorter of:
   a. One day for each $25 of the fine or restitution;
b. 30 days if the fine or restitution was imposed on conviction of a violation or misdemeanor; or
c. One year in any other case.
ORS 161.685(4).

4. Probation or Community Service
The court may impose probation or community service. ORS 33.105(2)(d).

VIII. DISQUALIFICATION—REFERRAL TO ANOTHER JUDGE

A. Procedures

1. Disqualification Statutes Apply
Most procedures for disqualifying a judge, see ORS 14.210 to 14.270, apply to contempt proceedings. ORS 33.115.

a. Exception—ORS 14.260(3)
ORS 14.260(3) does not apply to contempt proceedings. ORS 33.115. A party, therefore, may disqualify a judge from a contempt proceeding even if that judge has already made rulings on issues involved in the underlying case.

2. Scope of Referral
The judge to whom the contempt is referred assumes authority over and conducts any further proceedings relating to the contempt. ORS 33.115. See Phelps and Nelson, 122 Or App 410, 414 (1993), rev den 318 Or 326 (1994).
APPENDIX A: SUMMARY CONTEMPT TRIAL GUIDE

CHAPTER 13: CONTEMPT POWER

MISCONDUCT
A party, attorney, witness, or spectator does some contemptuous act or makes some contemptuous statement in the courtroom (or in proceedings in chambers) such as counsel’s deliberate violation of a court ruling, a witness’s refusal to testify, a spectator’s disruption with profane words or gestures.

DECISION TO WARN
Will a warning deter the misconduct or must the court deal immediately with the disruptive behavior?

WARN

DO NOT WARN

MISCONDUCT DETERRED
No need to proceed with contempt matter.

MISCONDUCT NOT DETERRED

CITE FOR CONTEMPT & POSTPONE HEARING/SANCTION
Postpone hearing and sanction and refer to another judge, if needed to avoid even the appearance of impropriety, and there is no need to impose immediate sanction to maintain order:

1. Tell person you are citing him or her for contempt;
2. Describe the misconduct in detail on the record;
3. Order person to appear later at specific time and place for hearing; and
4. Consider referring to another judge.

Postponing hearing and/or sanction may entitle person to due process rights (see below).

See Appendix B for a suggested script.

MAKE REQUIRED FINDINGS AND STATUTORY BASIS ON RECORD
Make the following findings on the record and memorialize later in written judgment:

- Specific ORS sections and subsections violated;
- Facts supporting willfulness (including specific findings on any defense raised, such as self-incrimination);
- Facts supporting contempt in court’s immediate view and presence;
- Facts regarding any defense raised or available;
- Facts found beyond a reasonable doubt (burden of proof for all punitive contempt proceedings);
- Order that defendant be punished;
- The prescribed sanction (see below).

IMPOSE SANCTION
Limited by statute. Statutory sanctions are punitive (to punish past contempt of court). Court may impose one or more of the following sanctions for each separate contempt of court:

- Punitive fine not exceeding $500;
- Confinement not exceeding 30 days; or
- Probation or community service.

POSTPONE SANCTION
May have to refer to another judge, depending on delay in imposing sanction or on need to avoid even the appearance of impropriety. When the court postpones punishment and there is no need to impose immediate sanctions to maintain order, due process requires that defendant be afforded an opportunity to be heard.

Full-scale trial or hearing not required, but defendant must have:

- Notice of the charges;
- Opportunity to present defenses; and
- A right of allocution.

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- Opportunity to present defenses; and
- A right of allocution.
APPENDIX B: SCRIPT—SUGGESTED PROCEDURE FOR MAKING THE RECORD IN A SUMMARY CONTEMPT PROCEEDING

The following script provides a suggested procedure to follow once you decide to hold a person in summary contempt under ORS Chapter 33.

- “Bailiff, please take the jury out.”
  
  [Note: The jury should be excused if possible to avoid prejudice during the proceeding.]
- “The court finds that you are in contempt of the court.”
- “You are in contempt of the court under the provisions of ORS 33.015 and ORS 33.096. Specifically, you are in contempt under the following subsection(s) of ORS 33.015(2):” [Usually (a), (b) or (c)]
- “The record will reflect that you did the following:”
  
  A. Recite facts in the record that are sufficient to:
    1. Support a finding of wilfulness;
    2. Support a finding that the contemptuous behavior occurred in the court’s immediate view and presence;
  
  B. State that the behavior occurred while the court was “in session” or “during judicial proceedings;”
  
  C. Describe what the individual did, not just “ultimate facts;” and
  
  D. State the burden of proof and that it has been met. Safest to meet the beyond a reasonable doubt standard, which is the burden to meet before imposing punitive sanctions. Sanctions for summary contempt are punitive.

- Either impose sanctions or defer action.
  
  » [Impose sanctions]: “It is not possible to defer the court’s action to a later date. You are hereby found in contempt. Do you have any statements before the court imposes sanctions?”
    
    [The maximum sanctions available for summary contempt are listed in ORS 33.105(3)(a)-(c)—a punitive fine of not more than $500; confinement for not more than 30 days; or probation or community service.]
    
    [Note: Although the contemnor is not entitled to any due process rights in a summary contempt proceeding where the court finds contempt and imposes sanction immediately, it is best to give the contemnor an opportunity to speak and present any defenses at this time.]

  » [Defer action]: “Under the circumstances, the court believes it advisable to defer further action on this matter to a later date; therefore, you are to appear before this court on (date) at (time) for further hearing on this matter.” [Probably have to appoint a lawyer if sentencing can be deferred until later.]

  » [Defer action and refer to another judge]: “Under the circumstances, the court believes it advisable to defer further action on this matter to a later date and refer this matter to another judge. You will appear on (date) at (time) in Courtroom ____ for further hearing (or imposition of sanction) on this matter.”

- You then need to do an order or, if you finally disposed of the case, a judgment.
  
  [May be either a separate case file for criminal contempt or just an order within existing case file.]
APPENDIX C: CONTEMPT JUDGMENT FORM

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF ____________

In the Matter of the )
Contempt Proceeding ) CONTEMPT JUDGMENT
Against John Doe )

The Court finds that on April 1, 2005, in Courtroom 1 of the _____________ County Courthouse before the Honorable Judge Walter Fairness that John Doe committed the following conduct. That after Judge Fairness denied a Motion for Summary Judgment, John Doe picked up a book and threw it at the judge. The book struck the bench. This conduct occurred when court was in session and occurred in the Court’s immediate view and presence.

The Court further finds that when directed by the judge to leave the courtroom, John Doe refused to leave the courtroom and picked up another book from counsel table and held it as if to throw it at the judge.

The Court finds beyond a reasonable doubt that the actions of John Doe as above described were in wilful contempt of court under the provisions of ORS 33.015(2)(a) and 33.015(2)(b) and 33.096.

This Court has decided that, under the circumstances, it is not appropriate to defer making a finding of contempt or imposing sanctions to a later date.

Therefore, it is ordered as follows:

1. That John Doe is found in contempt of court under the above-cited provisions of the Oregon Revised Statutes.

2. [Choose one:]
   [A.] That John Doe is sentenced to serve two days in the county jail beginning April 1, 2005.
   [OR]
   [B.] That because of this Court’s direct involvement in the contemptuous proceeding, John Doe is directed to appear at 9:30 a.m. on April 4, 2005, before the Honorable Thomas Cross for sentencing on the contempt.

DATED this _______ day of April, 2005

________________________________
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Acknowledgements

The Oregon Judicial Department expresses sincere thanks to The Honorable Patricia Sullivan, Malheur County Circuit Court Judge, for her assistance in the revision of the OREGON JUDGES CRIMINAL BENCHBOOK, Chapter 14, “Mistrial.”

Purpose

The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 14: MISTRIAL

I. GENERALLY

A. Error Required For a Mistrial
   The court may grant a mistrial only when error has been committed. *State v. Jalo*, 27 Or App 845, 850 (1976), *rev den* (1977).

B. Effect of Granting a Mistrial
   When a court grants a motion for a mistrial the trial is terminated and the grant may not be appealed because it does not result in a judgment but in a new trial. *State v. Bauer*, 16 Or App 443, 447-48, *rev den* (1974).

C. Mistrial Should Be Avoided If Possible
   “The granting of a mistrial is a drastic remedy to be avoided if possible, consistent with fairness. Thus we have consistently held that where a potentially prejudicial impropriety occurs in the course of trial, it is proper for the trial court, in its sound discretion, to take no action at all if it determines that the impropriety is not sufficiently prejudicial as to require the intervention of the judge, or to take curative action in order to avoid the granting of a mistrial.” *State v. Embry*, 19 Or App 934, 941 (1974) (citations omitted).

II. PROCEDURE

A. Either Party May Move For a Mistrial
   Either party may move for a mistrial at any point during trial. Wayne T. Westling, *Oregon Criminal Practice* § 41.02, 447 (Michie 1996).

B. Objection and a Timely Motion
   The moving party must first object to the error with sufficient specificity to give the court and opposing counsel an opportunity to remedy the defect. *State v. Latta*, 246 Or 218, 223 n.2 (1967). A successful objection is not enough; the party must also make a timely motion for a mistrial. *State v. Walton*, 311 Or 223, 248 (1991). *See State v. Roden*, 216 Or 369, 371 (1959) (“It is well settled that a party who learns of the misconduct of a juror during the trial may not keep silent and take advantage of it in the event of an adverse verdict.”). Argument on the motion for a mistrial should occur outside the presence of the jury. *See generally State v. Bayse*, 122 Or App 608, 612 (1993); *State v. Smith*, 310 Or 1,
22 (1990); State v. Barger, 43 Or App 659, 663 (1979); OEC Rule 103(3).

C. A Timely Motion Is Contemporaneous With Objectionable Conduct


D. Hearing on Motion for Mistrial

The court may hold a hearing on the motion for a mistrial. See e.g. State v. Kimsey, 182 Or App 193, 207 (2002).

III. STANDARD TO GRANT A MISTRIAL

A. Prejudice to Either Party

“A motion for mistrial is appropriate if, during trial, an event occurs that is prejudicial to either party.” Wayne T. Westling, Oregon Criminal Practice § 41.02, 447 (Michie 1996). See State v. Jordan, 79 Or App 682, 686 (1986) (“A motion for a mistrial should be granted when it is apparent that the challenged aspect of the conduct of the trial has interfered with a defendant’s ability to obtain a fair adjudication of the facts.”); State v. Smith, 310 Or 1, 24 (1990); State v. Greenwalt, 86 Or App 96, 98, rev den 304 Or 405 (1987); State v. McCartney, 65 Or App 766, 768 (1983), rev den 296 Or 638 (1984); State v. Williams, 49 Or App 893, 897 (1980).

B. Court Has Discretion to Grant Mistrial

Abuse of discretion occurs when the trial court’s discretion is “exercised to an end not justified and clearly against the evidence and reason.” State v. Parker, 119 Or App 105, 109 rev den 317 Or 584 (1993).

IV. GROUNDS FOR MISTRIAL

A. Prosecutorial Misconduct

Examples of prosecutorial misconduct include:

1. Prosecutor’s improper remarks during voir dire, if those remarks have a likelihood of prejudicing defendant’s right to a fair and impartial trial. State v. Flores, 31 Or App 187, 190 (1977) (mistrial).

2. Prosecutor’s improper remarks during opening statements and closing arguments, such as reference to defendant’s invocation of right to remain silent or right to retain an attorney. State v. Larson, 325 Or 15, 23-25 (1997); State v. Farrar, 309 Or 132, 164, cert den 498 US 879 (1990); State v. White, 303 Or 333, 341-42 (1987) (mistrial should have been granted); State v. Cooper, 130 Or App 209, 210 n.1, rev den 320 Or 325 (1994); State v. Alvord, 118 Or App 111, 115 (1993) (mistrial should have been granted); State v. Millenburg, 112 Or App 518, 520 (1992) (mistrial should have been granted).

3. Prosecutor’s improper argument, such as questions which imply an improper burden of proof or introduction of facts not in evidence. State v. Walton, 311 Or 223, 247 (1991); State v. Smith, 310 Or 1, 22-27 (1990); State v. Proctor, 94 Or App 720, 723, rev den 308 Or 33 (1989); State v. Payton, 19 Or App 181, 185 (1974).

4. Prosecutor’s improper mention of defendant’s prior conviction. State v. Treit, 29 Or App 461, 464 (1977) (mistrial should have been granted).


6. State’s failure to disclose written or recorded statements of intended witnesses or defendant. ORS 135.815(1), (2); ORS

**B. Juror Misconduct**

Examples of juror or jury “misconduct” include:

1. Juror’s testimony in a trial where juror is sworn to sit as a juror. OEC Rule 606.


8. Juror serving on more than one case at a time. *State v. Miller*, 10 Or App 636, 639 (1972) (mistrial should have been granted).

9. Jury’s failure or inability to reach a verdict (deadlocked or “hung” jury). *U.S. v. Cawley*, 630 F2d 1345, 1348 (9th Cir.)
1980) (mistrial granted); State v. Ritchie, 144 Or 430, 434 (1933); State v. Shaffer, 23 Or 555, 556 (1893).

10. Juror sleeping during trial. U.S. v. Barrett, 703 F2d 1076, 1083 (9th Cir. 1983) (remanded for determination whether defendant was prejudiced).


1. **Hearing on Juror Misconduct**
   A hearing may be necessary to determine the facts of juror misconduct. See e.g. U.S. v. Barrett, 703 F2d 1076, 1083 (9th Cir. 1983) (“The trial judge has considerable discretion in determining whether to hold an investigative hearing on allegations of jury misconduct and in defining its nature and extent.”).

C. **Bailiff Misconduct**
   Examples of bailiff misconduct include:


D. **Witness Misconduct**

E. **Judicial Misconduct**
   Examples of judicial misconduct include:

   1. Trial judge’s statements or conduct that interferes with either party’s right to a fair trial. State v. Medina, 39 Or App 467, 471 (1979) (mistrial should have been granted).

   2. Trial judge’s testimony at trial. OEC Rule 605.
3. Trial judge’s law clerk’s testimony at trial. *Kennedy v. Great Atlantic and Pacific Tea Co.*, 551 F2d 593, 596 (5th Cir. 1977) (mistrial should have been granted); see *Lamonts Apparel, Inc. v. SI-Lloyd Associates*, 153 Or App 227, 230 (1998) (trial judge did not purport to testify as witness when explaining denial of motion).

F. Defense Counsel’s Misconduct

Given that a mistrial is appropriate when an event is prejudicial to either party, the court has discretion to grant a mistrial for misconduct by defense counsel. *See State v. Embry*, 19 Or App 934, 941-43 (1974) (“The state is equally entitled to a fair trial.”).

An example of misconduct by defense counsel would be failure to disclose written or recorded statements of intended witnesses or otherwise fail to comply with pretrial discovery statutes. See ORS 135.835; ORS 135.865 (allowing court to grant a continuance, refuse to permit witness to testify, or enter other appropriate order for failure to comply with pretrial discovery statutes).

V. ALTERNATIVES TO GRANTING MISTRIAL

A. Curative Instruction

As an alternative to granting a mistrial, the court may offer a curative instruction. *State v. Terry*, 333 Or 163, 177 (2001) (concluding that curative instruction sufficient to “neutralize the possibility of prejudice to the defendant” where witness’s statement contained an inference that defendant failed polygraph examination). However, the Oregon Supreme Court will defer to a trial court’s assessment of the need for a mistrial in most circumstances because “[t]he trial judge is in the best position to assess the impact of the complained-of incident and to select the means (if any) necessary to correct any problem resulting from it.” *State v. Wright*, 323 Or 8, 12 (1996). *See State v. Fanus*, 336 Or 63, 86 (2003) (concluding that prosecutor’s arguments misstating the law were not so prejudicial that the trial court’s failure to issue a curative instruction or to declare a mistrial sua sponte denied defendant a fair trial or amounted to an “error apparent on the face of the record”); *State v. Sparks*, 336 Or 298, 327 (2004) (same).

1. Curative Instruction May Be Sufficient

If a curative instruction is sufficient to cure the prejudice, a mistrial is not required. *State v. Schroeder*, 62 Or App 331, 342, rev den 295 Or 161 (1983) (finding no abuse of discretion in denying defendant’s motion for mistrial where the court’s instruction to the jury should have cured any prejudice
to defendant). However, when a cautionary or curative instruction cannot fully counteract the prejudicial impact of the error, mistrial is appropriate. *State v. Thompson*, 2 Or App 72, 75 (1970).

2. **Curative Instruction Does Not Equal Waiver**


B. **Other Remedies for Failure to Comply With Discovery Statutes**

If the error results from any breach of duty imposed by the pretrial discovery statutes, including nondisclosure of statements or witnesses by either party, the court may grant a continuance, refuse to permit the witness to testify, refuse to receive in evidence the material not disclosed, or enter such other order as it considers appropriate. ORS 135.815; ORS 135.835; ORS 135.865. *See State v. Gill*, 3 Or App 488, 492-93 (1970) (concluding that no prejudice occurred where prosecution’s failure to timely produce a tape-recorded statement obtained from defendant by the police on the day of the murder could have been cured by a continuance if requested).

VI. **FORMER JEOPARDY RAMIFICATIONS**

A. **Constitutional Standards**

1. **Oregon Constitution**

   “No person shall be put in jeopardy twice for the same offence . . .” Or Const Art I, § 12. “Article I, section 12, of the Oregon Constitution, bars retrial ‘when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal.’ Under that standard, the state is held ‘only to the consequence of what its official knew to be prejudicial misconduct, not what he or she should have known.’” Thus, even in those cases in which official misconduct warrants a mistrial, there must at least be a further finding that the official ‘knowingly acted in an improper and prejudicial manner, indifferent to the mistrial that could be expected to result, before reprosecution will be barred.’”

See Chapter 5, III. “Former Jeopardy.”
2. **United States Constitution**

Under the federal constitution, reprosecution is barred only if the official misconduct “giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.” *Oregon v. Kennedy*, 456 US 667, 679 (1982).

B. **Mistrial Granted Sua Sponte May Create Former Jeopardy Issues**

Mistrials granted by the court *sua sponte* are a disfavored remedy because of the former jeopardy problems they may create. *State v. Walton*, 311 Or 223, 248 n.15 (1991). “However, a former prosecution does not bar retrial if the state meets its burden of showing that a mistrial was granted for manifest necessity.” *State v. Bayse*, 122 Or App 608, 613 (1993); *State v. McFerron*, 52 Or App 325, 329-30, *rev den* 291 Or 368 (1981).

C. **Mistrial Based on Manifest Necessity Does Not Bar Retrial**

“[A]lthough both the Oregon and the United States Constitutions purport to prohibit placing a criminal defendant in jeopardy twice for the same offense, it is well settled that neither bars a retrial if the state shows that there was a ‘manifest necessity’ for terminating the defendant’s first trial before the verdict.” *State ex rel. Wark v. Freerksen*, 84 Or App 90, 94, *rev den* 303 Or 534 (1987) (citing *Arizona v. Washington*, 434 US 497 (1978)). See also *State v. Cole*, 286 Or 411, 419, *cert den* 444 US 968 (1979) (“In determining whether to permit the retrial of a defendant in a criminal case following the termination of a previous trial before a verdict has been reached, the Supreme Court of the United States . . . has established the requirement of ‘manifest necessity’ as a standard for application in such cases.”) (referring to *U.S. v. Perez*, 22 US (9 Wheat) 579 (1824)).

1. **Manifest Necessity Defined**

“Manifest necessity” in cases involving mistrial includes “physical necessity” and “the necessity of doing justice,” which arises from the court’s duty to “guard the administration of justice” from prejudice in cases involving a party’s improper conduct. *State v. Cole*, 286 Or 411, 423, *cert den* 444 US 968 (1979) (citing *State v. Schuler*, 293 N.C. 34, 235 S.E.2d 226, 233 (1977)).

2. **ORS Recognizes Distinct Types of Necessity**

ORS 131.525(1)(b)(A) allows for a subsequent prosecution when the termination of a previous prosecution was necessary.
because it was *physically impossible* to proceed with the trial in conformity with the law. ORS 131.525(1)(b)(C) allows for a subsequent prosecution when the termination of a previous prosecution was *necessary* because *prejudicial conduct* made it impossible to proceed with the trial *without injustice* to either party. *See State v. Cole*, 286 Or 411, 423, *cert den* 444 US 968 (1979) (concluding that when trial judge became so seriously ill as to be confined to a hospital and it was expected that he may be required to remain there for more than one day, the State, upon proof of such facts, sustained its burden to show that there was such a “manifest necessity” as to justify the dismissal of the jury and avoid the bar of double jeopardy).

3. **A Reasonable Alternative Action Must Be Impossible**

“We construe the constitutional standard of ‘manifest necessity’ and the statutory standard ‘impossible to proceed . . . without injustice’ to require at the least that a trial not be terminated if any reasonable alternative action is possible under the facts of each case.” *State v. Embry*, 19 Or App 934, 941-42 (1974).

**D. Statutory Circumstances Allowing for Subsequent Prosecution**

A subsequent prosecution is *not* barred when a previous prosecution was properly terminated under any of the following circumstances:

1. The defendant *consents* to the termination or *waives*, by motion, by an appeal upon judgment of conviction, or otherwise, the right to object to termination;

2. The trial court finds that a termination, other than by judgment of acquittal, is *necessary* because:
   a. It is physically impossible to proceed with the trial in conformity with law;
   b. There is a legal defect in the proceeding that would make any judgment entered upon a verdict reversible as a matter of law;
   c. Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State;
   d. The jury is unable to agree upon a verdict; or
   e. False statements of a juror on voir dire prevent a fair trial;

3. When the former prosecution occurred in a court which *lacked jurisdiction* over the defendant or the offense; or
4. When the subsequent prosecution was for an offense which was not consummated when the former prosecution began.


E. Abuse of Discretion In Granting Mistrial May Bar Retrial

“Because the trial court is in the best position for making the required determination, both the statutory and constitutional standards are satisfied if the trial judge properly concludes within the bounds of sound judicial discretion that the ends of justice would not be served by continuing the proceedings.” State ex rel. Wark v. Freersken, 84 Or App 90, 95, rev den 303 Or 534 (1987). However, a grant of a mistrial that is outside the constitutional bounds of discretion “deny[s] to the defendant his right, as phrased in Jorn, ‘. . . to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate,’ and thus bars his retrial.” State v. Embry, 19 Or App 934, 942 (1974) (concluding that grant of mistrial to State based on witness’s prejudicial testimony that could have been cured with a jury instruction was an abuse of discretion and therefore subsequent prosecution was barred) (quoting U.S. v. Jorn, 400 US 470, 486 (1971)).

F. Hung Jury Bars Retrial If Caused By Official Misconduct

Reprosecution is not barred if the jury is unable to agree on a verdict, ORS 131.525(1)(b)(D), unless the hung jury resulted directly from prosecutorial or judicial misconduct. State v. Rathbun, 287 Or 421, 432-33 (1979); State v. Bannister, 118 Or App 252, 258 (1993) (concluding that ORS 131.525(1)(b)(D) complies with Article I, § 12, of the Oregon Constitution); see also Richardson v. United States, 468 US 317, 326 (1984) (failure of jury to reach a verdict does not bar reprosecution).
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CHAPTER 15: POSTTRIAL MOTIONS

2005
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Purpose

The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 15: POSTTRIAL MOTIONS

I. POSTTRIAL MOTIONS

A. Permissible Motions

1. In a criminal case, the trial court is limited to considering a postverdict motion in arrest of judgment or a motion for new trial. Or Const Art VII (amended), § 3; State v. Metcalfe, 328 Or 309, 314 (1999); State ex rel. Haas v. Schwabe, 276 Or 853, 856-57 (1976); State ex rel. Redden v. Davis, 288 Or 283, 291 (1980).

2. After a stipulated facts trial and finding of guilty, the court may consider a motion to withdraw stipulated facts. State v. Wright, 109 Or App 495 (1991).

3. After a guilty plea and judgment, the court may consider a motion to vacate judgment and withdraw plea. State v. Voshell, 247 Or 534, 536 (1967).

B. Impermissible Motions

The trial court lacks the authority to set a verdict aside and acquit based on evidence to support verdict—i.e., there is no postverdict judgment of acquittal or judgment n.o.v. See State ex rel. Haas v. Schwabe, 276 Or 853, 856-57 (1976); State v. Metcalfe, 328 Or 309, 312-14 (1999) (concluding that ORS 136.445 does not authorize a trial court to grant a motion for judgment of acquittal after a jury verdict).

II. MOTION IN ARREST OF JUDGMENT

A. Definition

A motion in arrest of judgment is a request by defendant that no judgment be rendered on a plea or verdict of guilty. ORS 136.500.

B. Grounds For Motion

A motion in arrest of judgment may be founded only on either or both of the following demurrer-type grounds:

1. Court lacks jurisdiction over the subject of the indictment because the crime is not triable within the county, see ORS 135.630(1); and

2. Facts stated in the accusatory instrument do not constitute an offense, see ORS 135.630(4).
ORS 136.500. See State v. Touchstone, 188 Or App 45, 47-48 (2003) (concluding that the trial court erred in convicting defendant of harassment because the accusatory instrument failed to contain any language that could be construed to allege that the victim actually was harassed or annoyed, a statutory element without which the instrument would not state facts sufficient to constitute an offense); State v. Barker, 140 Or App 82, 84, rev den 323 Or 265 (1996) (“Only if an accused can admit the truth of every allegation of fact in an indictment and still be innocent of a crime, is the indictment insufficient.”); State v. Carpenter, 29 Or App 879, 884 (1977) (“ORS 136.500, as it applies to accusatory instruments other than indictments, provides that the only ground for a motion in arrest of judgment is insufficiency of the accusatory instrument to state a crime.”).

When Motion Attacks Sufficiency of Instrument For First Time
The accusatory instrument will be less strictly construed if the motion in arrest of judgment raises its insufficiency for first time. State v. Anderson, 242 Or 457, 462 (1966) (stating rule that “the allegations of an indictment or complaint will be construed with less strictness when their sufficiency is first challenged by a motion in arrest of judgment”).

Motion Cannot Be Raised to Test Sufficiency of Evidence
A motion in arrest of judgment does not test the sufficiency of the evidence until after the court has found it well taken on either or both grounds as provided in ORS 136.500. State v. Foster, 229 Or 293, 299 (1961) (“It is only after a motion on such grounds has been made and after the court has found it well taken that a duty arises under [ORS 135.515 (formerly ORS 136.830)] and [ORS 136.525 (formerly ORS 136.840)] to consider the evidence, or want of it, and act accordingly.”).

Example: Judgment of Acquittal Treated as Premature Motion In Arrest of Judgment
State v. Hankins, 197 Or App 345 (2005): At the close of the State’s case, the defendant moved for a judgment of acquittal, arguing that the indictment failed to allege all of the elements of the crime of delivery of marijuana to a minor. The trial court denied the motion without considering the merits of defendant’s argument, reasoning that a challenge to the sufficiency of the indictment should have been raised by a pretrial demurrer. The defendant appealed and the Court of Appeals affirmed, reasoning that, because defendant’s motion for a judgment of acquittal, which challenged the sufficiency of the indictment, properly stated grounds for a demurrer and not for a judgment of acquittal, the trial court did not err in
declining to treat the motion as a demurrer—plus the defendant did not argue that it should. *See State v. Hankins*, 194 Or App 140, 143 (2004). On reconsideration, the defendant contended that a motion for a judgment of acquittal was a proper method to challenge the sufficiency of an indictment at trial, citing *State v. Meyers*, 76 Or App 420 (1985).

The court stated: “[T]he Supreme Court resolved in *State v. McKenzie*, 307 Or 554, 771 P2d 264 (1989), how a trial court should treat a motion for a judgment of acquittal that challenges the sufficiency of an indictment. Under *McKenzie*, a motion for a judgment of acquittal that challenges the sufficiency of an indictment should be treated as a premature motion in arrest of judgment. A court may consider the merits of such a motion at trial. *Id.* at 561. However, a court may refuse to consider the motion and deny it because it is premature. *Id.* If a court refuses to consider the merits of the motion and the defendant is convicted, the defendant must renew the motion after the conviction in order to preserve for appellate review the issue whether the indictment was sufficient. *Id.*” *State v. Hankins*, 197 Or App 345, 347-48 (2005). The court held that given the trial court’s refusal to consider the merits of the defendant’s challenge to the sufficiency of the indictment at trial and because the defendant did not renew his motion after he was convicted he did not preserve the issue to raise it on appeal.

C. **When Motion May Be Taken**

A motion in arrest of judgment raised after a judgment has been entered must be made within the time allowed to file a motion for a new trial, and may be made and heard as the court directs. ORS 136.500.

1. **Timing**

A motion in arrest of judgment must be filed *within 10 days after entry of the judgment*, and the opposing motion must be filed within 10 days following the filing of the motion, unless the court allows further time. The court must hear and determine the motion no later than 55 days following entry of the judgment. ORCP 64F (made applicable to the criminal code by ORS 136.535).

D. **Effect of Motion**

The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation as before indictment. ORS 136.505.
1. **Order When Evidence Shows Guilt**
   When evidence at trial establishes reasonable grounds to believe defendant is guilty of the crime charged or any other crime, granting the motion is not a bar to another action. The court must recommit or release the defendant pending a new accusatory instrument. ORS 136.515.

2. **Order When Evidence Is Insufficient**
   When evidence is insufficient to charge any crime, granting motion is a bar to another action. The court must discharge defendant if in custody, or exonerate the release and refund the security. ORS 136.525.

### III. MOTION FOR NEW TRIAL

#### A. Generally

A motion for new trial is a request by the defendant to set aside judgment and allow a new trial to reexamine issues of fact in the same court. ORCP 64A (made applicable to the criminal code by ORS 136.535). See Or Const Art VII (amended), § 3 (providing that “no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict”).

#### 1. Application of ORCP to New Trials

ORCP 64A, B, and D to G apply to and regulate new trials in criminal actions. ORS 136.535.

#### 2. State May Not Request New Trial

A new trial may not be granted on application of the State. ORS 136.535.

#### 3. New Trial on Court’s Initiative

The court may grant a new trial on its own initiative, provided that the order:

a. States that a new trial is being granted on the court’s initiative;

b. Is made within 30 days after the entry of judgment; and

c. Contains a statement setting forth fully the grounds upon which the order was made.

ORCP 64G (made applicable to the criminal code by ORS 136.535). See State ex rel. Schrunk v. Johnson, 97 Or App 420, 422-23, rev den 308 Or 382 (1989) (precluding trial judge from granting a new trial because her order was not reduced to
writing and filed within 30 days of the entry date of the original
judgment; rejecting argument that oral statement was sufficient
to satisfy ORCP 64G).

4. **Motion Can't Be Used to Set Aside a Guilty Plea**
   “A motion for a new trial is not a proper way to question the
validity of a plea of guilty.” *State v. Voshell*, 247 Or 534, 536
(1967).

**B. Grounds For New Trial**

A former judgment may be set aside and a new trial granted in an
action where there has been a trial by jury on the motion of the
party aggrieved for any of the following causes materially affecting
the substantial rights of such party.

1. **Irregularity In the Proceedings**
   A mistrial may be granted for irregularity in the proceedings
   of the court, jury, or adverse party, or any order of the court,
or abuse of discretion, by which such party was prevented
   from having a fair trial. ORCP 64B(1) (made applicable to the
criminal code by ORS 136.535).

2. **Misconduct**
   A mistrial may be granted for misconduct of the jury or of the
   State. ORCP 64B(2) (made applicable to the criminal code by
ORS 136.535); *State v. Jones*, 126 Or App 224, 227, rev den
318 Or 583 (1994).

   a. **Jury Misconduct**
      The burden is upon the defendant to show by *clear and
      convincing evidence* that the juror’s misconduct deprived
the defendant of a fair trial. *State v. Gardner*, 230 Or
569, 575-76 (1962) (stating that “the verdict will stand
unless the evidence clearly establishes that the misconduct
constitutes a serious violation of the juror’s duty and
deprives complainant of a fair trial”).

   i. **Misconduct Must Have Affected the Verdict**
      A new trial should be granted only when a juror’s
misconduct affected the outcome in the case. *State v.
(setting aside verdicts because juror’s failure to disclose
on voir dire her familiarity with and preconceived
distrust of defendant constituted juror misconduct
that could well have tainted the verdicts in which she
participated); *State v. Sands*, 248 Or 213, 216 (1967)
(concluding that juror’s unauthorized visit to the locus
in quo constituted misconduct but could not have affected the outcome of the case because her vote either way would not have changed the result since the verdict was eleven to one; judgment affirmed).

ii. **Policy Is to Protect Jury Verdicts**

“There is a strong policy in Oregon to protect jury verdicts from attack. Only limited kinds of juror misconduct justify a new trial. The kind of misconduct that will be considered in an attack on a verdict is misconduct that is extrinsic to the communications between jurors during the deliberative process or that amounts to fraud, bribery, forcible coercion or any other obstruction of justice that would subject the offender to contempt of court or criminal prosecution.”

*State v. Jones*, 126 Or App 224, 227, *rev den* 318 Or 583 (1994). *See State v. Gardner*, 230 Or 569, 571 n.1 (1962) (providing examples of juror misconduct occurring during communications between jurors while involved in the deliberative process which were held not to justify a new trial).

b. **Prosecutorial Misconduct.**

The prosecutor’s misconduct must be prejudicial. *State v. Meidel*, 241 Or 367, 371-72 (1965) (finding no abuse of discretion where trial court found district attorney’s statements improper but not sufficiently prejudicial to merit the granting of a new trial).

i. **Prosecution’s Failure to Disclose Evidence**

Prosecutorial misconduct includes the failure to disclose evidence “of substantial significance for the defense.” *Hanson v. Cupp*, 5 Or App 312, 320 (1971); *see State v. Williams*, 11 Or App 255 (1972) (concluding that prosecutor’s failure to disclose victim’s “rap sheet” to defendant warranted new trial because it would reasonably have been anticipated to enable the production of “evidence of substantial significance for the defense” upon the crucial issue of self-defense, the sole issue upon which guilt or innocence depended; motion for new trial should have been granted).

3. **Accident or Surprise**

A mistrial may be granted for accident or surprise that ordinary prudence could not have guarded against. ORCP 64B(3) (made applicable to the criminal code by ORS 136.535). “The
general rule is that a party may not use a surprise as a basis for seeking a new trial unless the party moved for a continuance so as to respond during the trial, thus possibly eliminating the need for a new trial.” Mitchell v. Mt. Hood Meadows Oreg., 195 Or App 431, 440 (2004); State v. Gardner, 33 Or 149, 152-53 (1898).

4. Newly Discovered Evidence
A mistrial may be granted for newly discovered evidence, material to defendant’s case, which defendant could not with reasonable diligence have discovered and produced at trial. ORCP 64B(4) (made applicable to the criminal code by ORS 136.535).

a. Requirements For Evidence to Justify a New Trial
Evidence that may justify a court in granting a new trial must meet the following requirements:

1. It must be such as will probably change the result if a new trial is granted;
2. It must be such as, with reasonable diligence, could not have been discovered before or during the trial;
3. It must be such that it cannot, with reasonable diligence, be used during trial;
4. It must be material to an issue;
5. It must not be merely cumulative; and
6. It must not be merely impeaching or contradicting of former evidence.


b. Motion Based on Newly Discovered Evidence Is Not Favored

5. Insufficiency of Evidence
A mistrial may be granted for insufficiency of the evidence to justify the verdict or other decision, or that it is against law. ORCP 64B(5) (made applicable to the criminal code by ORS 136.535).

a. Court’s Determination of Sufficiency of Evidence Limited
The trial court’s review of the record is limited to determining whether any substantial evidence exists to

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support the verdict. *State v. Gardner*, 225 Or 376, 379 (1961); Or Const Art VII (amended), § 3.

**b. Standard For Determining Sufficiency of Evidence**

“In ruling on the sufficiency of the evidence in a criminal case, the question is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found that the essential elements of the crime have been proven beyond a reasonable doubt.” *State v. Allison*, 325 Or 585, 588 (1997). See *State v. Krummacher*, 269 Or 125, 137-38 (1974) (stating similar appellate standard of review).

**c. Possible Waiver If Not Raised in Motion For Acquittal**

Moving for a new trial on the ground of insufficient evidence to justify a verdict may be waived if defendant did not raise the issue by motion for judgment of acquittal under ORS 136.445. See *State v. Long*, 195 Or 81, 127 (1952) (“In this case [defendant] has attempted to raise the questions which could have been presented by a motion for directed verdict [(now know as motion for judgment of acquittal)]. Under these circumstances, the motion for a new trial was not a permissible procedure for raising the question as to the sufficiency of the evidence.”).

6. **Error in Law**

A mistrial may be granted for an error in law occurring at trial to which defendant objected or excepted. ORCP 64B(6) (made applicable to the criminal code by ORS 136.535).

**C. What Is Not Grounds for Motion for New Trial**

1. **Incompetence of Trial Counsel Not Grounds for New Trial**

Incompetence of trial counsel is not grounds for a new trial, even though the attorney may have blundered. *State v. McGhee*, 31 Or App 1089, 1091 (1977).

2. **Failure to Object Waives Defect**

Generally, failure to object during trial to known error waives defect, and error cannot be grounds for new trial. *State v. Langley*, 214 Or 445, 477, cert den 358 US 826 (1958) (“[T]he rule is that when a party having knowledge of an error or an irregularity during the trial fails to call it to the attention of the court and remains silent, speculate on the result, he is deemed to have waived the error, and the denial of a motion for a new trial based upon that ground presents no reviewable
D. Timing of Motion For New Trial
A motion for a new trial must be filed within 10 days after entry of the judgment, and the opposing motion must be filed within 10 days following the filing of the motion, unless the court allows further time. The court must hear and determine the motion no later than 55 days following entry of the judgment. ORCP 64F (made applicable to the criminal code by ORS 136.535).

1. On Court’s Own Motion
The court may grant a new trial on its own motion within 30 days after entry of judgment; the motion must state that it is on the court’s own initiative and must contain a statement setting forth fully the grounds upon which the order was made. ORCP 64G (made applicable to the criminal code by ORS 136.535).


E. Procedure

1. Specification of Grounds and Affidavits or Declarations
   a. A motion for a new trial must plainly specify the grounds upon which it is based, otherwise, the court may not consider the motion.
   b. A motion based on the grounds provided in ORCP 64B(1) to (4) must include an affidavit or declaration setting forth the facts upon which motion is based.
   c. The ground of newly discovered evidence (ORCP 64B(4)) requires affidavits or declarations of any witness or witnesses showing what their testimony will be, or a showing of good reasons for their nonproduction.

   ORCP 64D (made applicable to the criminal code by ORS 136.535).

2. Counteraffidavits or Counterdeclarations May Be Offered
   a. If the motion for a new trial is supported by affidavits or declarations, counteraffidavits or counterdeclarations may be offered by the adverse party.
   b. In considering a motion for new trial, it is appropriate to refer to any proceedings in the case prior to the verdict or other decision sought to be set aside.
ORCP 64E (made applicable to the criminal code by ORS 136.535).

F. Court Has Discretion to Allow Motion

“The question of whether to grant a new trial is generally a matter within the discretion of the trial judge.” State v. Drummond, 6 Or App 558, 565 (1971).

“The denial of a motion for a new trial made after entry of judgment is not reviewable on appeal, unless it is based on newly discovered evidence or juror misconduct.” State v. Mayer, 146 Or App 86, 88 (1997) (refusing to address denial of motion for new trial regarding sexual abuse conviction because neither ground was raised). See generally State v. Sullens, 314 Or 436, 440-43 (1992) (reviewing relevant statutes and case law to conclude that a motion for a new trial based on newly discovered evidence can be reviewed by the Court of Appeals); State v. Montgomery, 294 Or 417 (1983) (distinguishing “appealability” and reviewability”).

IV. MOTION TO AMEND JUDGMENT

A. Court Retains Authority to Correct or Modify Erroneous Sentence

On motion of one of the parties or its own motion, after written notice to all parties, the sentencing court may modify its judgment and sentence to correct any arithmetic or clerical errors or to delete or modify any erroneous term in the judgment. ORS 138.083(1). The filing of a proper appeal generally divests the trial court of jurisdiction to amend a judgment, however, notwithstanding such a filing, the court retains authority to modify a criminal judgment pursuant to ORS 138.083(1). State v. Lavitsky, 171 Or App 506, 515 (2000).

1. Defendant’s Right to Notice and to Be Present

The defendant’s right to notice is provided in ORS 138.083(1). The defendant’s right to be present for a sentence modification derives from ORS 137.030(1) and the 14th Amendment to the U.S. Constitution. However, “when the modification is administrative as opposed to substantive, that is, when the modification involves neither disputed facts nor the exercise of judicial discretion but occurs entirely by operation of law, the defendant’s absence is not prejudicial.” State v. Riley, 195 Or App 377, 384 (2004) (concluding that although the trial court erred in failing to provide defendant with the notice required by ORS 138.083(1) and subsequently modifying the sentence in defendant’s absence, the error was harmless and did not require
reversal because the modification did not involve disputed facts or the exercise of judicial discretion but the application of law).

B. Court May Amend Judgment Based on Invalid Sentence

Once a valid sentence is executed, the trial court lacks authority to modify it. However, if the initial sentence was not in accordance with the appropriate sentencing statutes (and is therefore invalid), the court has in fact failed to pronounce a sentence and retains the authority to impose one. *State v. Horsley*, 168 Or App 559, 561-64 (2000) (concluding that trial court possessed authority to modify erroneous term in judgment on State’s motion to amend to add an omitted term of post-prison supervision as required by sentencing guidelines). “Sentences that violate the statutes lack valid sentencing authority . . . and the trial court may modify them as necessary.” *Id.* at 561. *See also State v. Riley*, 195 Or App 377, 382 (2004) (concluding that the court’s action modifying an erroneous term in an original and first amended judgment complied with ORS 138.083(1)); *State v. Whitlock*, 187 Or App 265, 269 (2003) (“[A] sentence that does not conform to law is invalid; when a trial court imposes such a sentence it is a legal nullity, and the trial court subsequently has the authority to impose a lawful sentence even if the defendant is already in the custody of the Department of Corrections.”); ORS 137.010(1).
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Purpose
The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 16: SENTENCING

I. PRINCIPLES, AUTHORITY, AND SENTENCING DISCRETION

A. Introduction
Sentencing law is fairly divisible into two broad categories: 1) the few constitutional, legislative, and policy prescriptions that provide the purposes toward which any sentencing discretion should be directed, and 2) the few constitutional and many legislative and administrative rules that determine the range of sentencing options and the procedures by which sentences are imposed. Both draw on constitutional, statutory, and regulatory authorities. The former reflect a mix of evolving directives that ultimately raise the issue whether courts are responsible in any part for best efforts at crime reduction. The latter comprise a growing body of law concerning the variety of dispositions available, maximum and minimum penalties, sentencing guidelines, consecutive and concurrent sentencing, dangerous and sexually violent dangerous offender provisions, and probation, and the associated procedures and formal requirements.

B. Purposes of Sentencing
Oregon’s articulations of sentencing purposes have varied considerably from the 1971 Criminal Code Revision, which carried forward the original Oregon Constitution’s emphasis on reformation and proportionality under the utilitarian framework of the 1962 Model Penal Code; the 1989 Sentencing Guidelines, which presumed that ordered just deserts constrained by prison resources would serve public safety; the 1995 recognition of principles of “restorative justice;” and the emergence of data-driven sentencing in pursuit of public safety, beginning with a 1996 amendment to the Oregon Constitution and the 1997 legislative session, and continuing through recent sessions.

1. Oregon Law as of the 1971 Criminal Code Revision
As of this revision, and since statehood, Art I, § 15 of the Oregon Constitution provided: “Laws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice.” As part of the 1971 Criminal Code Revision based on the 1962 Model Penal Code, ORS 161.025 declared the following purposes of sentencing:

- “To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those
convicted, and their confinement when required in the interests of public protection.” ORS 161.025(1)(a).

- “To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.” ORS 161.025(1)(f).

- “To safeguard offenders against excessive, disproportionate or arbitrary punishment.” ORS 161.025(1)(g).

Oregon law prior to the 1989 sentencing guidelines left largely to the broad discretion of the trial judge which sentencing objectives to pursue and how to pursue them. Although courts were to consider the particular defendant and offense and to weigh the different sentencing objectives, it was up to the sentencing judge to determine which objectives were to receive primary weight and which were secondary. *State v. Biles*, 287 Or 63 (1979); *State v. Dinkel*, 34 Or App 375, 385 (1978), rev den 285 Or 195 (1979). The court was free to consider the deterrent effect on others in selecting a sentence, *State v. Paltzer*, 8 Or App 491, 492 (1972). Subject to the necessity of statutory authority (*State v. Duncan*, 15 Or App 101, 103 (1973)), and within statutory limits, the sentencing court was “granted almost complete discretion” to determine the “appropriate sentence.” *State v. Turner*, 247 Or 301, 312 (1967). Similarly, the trial judge had broad discretion whether and when to suspend imposition or execution of sentence and to place a defendant on probation subject to conditions. *State v. Hovater*, 37 Or App 557, 562 (1978).

2. **The Advent of Sentencing Guidelines**

Without modifying ORS 161.025, the 1989 Legislature adopted sentencing guidelines for felony sentences that restrict discretion and structure sentences around crime seriousness, criminal history, and prison resources. The goals were reducing the disparity among sentences for like offenders for similar crimes, “truth in sentencing” as between sentences imposed and time actually served, and, within the limits of correctional resources, “appropriate punishment” and “security of the people in person and property.” OAR 213-002-0001. Subject to regulatory, statutory, and constitutional restrictions discussed in subsequent portions of this chapter, for felony sentences, judges are to impose a presumptive sentence based on crime seriousness and criminal history, and may “depart” upward or downward from that presumptive sentence only based upon “substantial and compelling” factors of “aggravation” or “mitigation.” OAR 213-008-0001, *et seq.*
The bases for such departures are subject to review by the defense or by the State. ORS 138.222.

Although three of 99 grid blocks may involve consideration of the likelihood of rehabilitation through “optional probation” (OAR 213-005-0006), the guidelines do not otherwise encourage any judicial attention to what disposition is most likely to serve public safety through the statutory modes of “deterrent influence,” “correction and rehabilitation,” and “confinement when required in the interests of public protection.” ORS 161.025(1)(a). Rather, the guidelines presume that presumptive sentences will serve the goals of public safety and appropriate punishment. State v. Wilson, 111 Or App 147, 150 (1992).

For a discussion of the mechanics of the guidelines, see infra VII. “Felony Sentencing Guidelines.”

3. Restorative Justice
In recognition that “restorative justice” measures such as victim-offender mediation may improve the quality of justice perceived by victims of crime, increase the collection of restitution, and reduce an offender’s propensity to commit future crimes (see ORS 135.980(1)), the 1995 Legislature broadly authorized the use of mediation by criminal justice agencies, and expressly authorized courts to “[i]nclude participation in mediation as a condition of probation.” ORS 135.953(2)(c). Domestic assault and sex crimes are probably excluded. See ORS 135.951(3).

4. Drug Courts and Other Therapeutic Courts
DUII diversion courts have been around for a long time. There, the judge performs the traditional role of adjudicating issues of eligibility, performance, success, and failure. More recent are drug courts and other “problem solving” courts, in which the court employs influence previously restricted to denunciation to promote recovery or otherwise to encourage a community of defendants to succeed in overcoming addiction or some other factor underlying their criminal behavior. Drug courts are the most common form of these “therapeutic courts,” but DUII intensive supervision, domestic violence, and mental health specialty courts have allowed courts to employ their sanctions and their influence to promote reformation in powerful new ways. See http://www.nadcp.org/ (last visited Nov. 29, 2005) and http://www.law.arizona.edu/depts/upr-intj/ (last visited Nov. 29, 2005). In jurisdictions with treatment courts, it may
be permissible to sentence an offender to participate in that process, or to transfer sentencing itself to such a court.

If sentencing to or by an appropriate treatment court is an available option, the court might consider and invite counsel to address whether such a disposition is most consistent with public safety or other sentencing objectives. Defendants may have discussed such a choice with counsel, and have chosen for convenience or other reasons to reject the opportunity. It may be productive to discuss the reasons with the defendant. Even if the defendant’s choice does not change, the information gained through such a discussion may well be useful for fashioning an effective sentence.

5. **The Focus on Public Safety and Data-Driven Sentencing**
   As a result of 1996 Ballot Measure 26, Or Const Art I, § 15 now provides “Laws for the punishment of crime shall be founded on these principles: protection of society, personal responsibility, accountability for one’s actions and reformation.” (Amended by 1995 S.J.R. 32 and adopted by the people Nov. 5, 1996.) A series of subsequent proclamations seek crime reduction through informed sentencing:


   b. The 1997 Oregon Judicial Conference resolved “that in the course of considering the public safety component of criminal sentencing, juvenile delinquency dispositions, and adult and juvenile probation decisions, judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct.” 1997 Judicial Conference Resolution #1.

   c. Pursuant to its statutory charge to produce a plan for “public safety, offender accountability, crime reduction and prevention and offender treatment and rehabilitation” through the criminal justice system, the Criminal Justice Commission in 2001 published its “Public Safety Plan” recommending that Oregon “develop availability of
offender-based data in order to track an offender through the criminal justice system and to facilitate data-driven pre-trial release, sentencing and correctional supervision decisions.” Oregon Criminal Justice Commission, PUBLIC SAFETY PLAN, Recommendation Number 1, p.5 (March 2001) available at http://www.ocjc.state.or.us/PSP.htm (last visited Nov. 29, 2005).

d. The 2003 Legislature directed that increasing proportions of program funds in corrections budgets be devoted to “evidence-based” programs. 2003 Or Laws, ch. 669, § 5.

e. The 2005 Legislature directed that presentence investigations provide “analysis of what disposition is most likely to reduce the offender’s criminal conduct, explain why that disposition would have that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity.” 2005 Or Laws, ch. 473, § 1.

f. The 2005 Legislature directed the Criminal Justice Commission to “conduct a study to determine whether it is possible to incorporate consideration of reducing criminal conduct and the crime rate into the commission’s sentencing guidelines and, if it is possible, the means of doing so.” 2005 Or Laws, ch. 474, § 1.

C. Pursuing Sentencing Objectives
The bulk of this chapter ultimately describes the options legally available to a sentencing judge and the procedures by which to exercise those options. This subpart, in contrast, provides an analytical framework for the exercise of sentencing discretion within legal limits, and in pursuit of the objectives of sentencing declared by law, including safety of society, accountability, deterrence, reformation, and incapacitation. See supra I.B. “Purposes of Sentencing.”

1. The Existence of Discretion
Notwithstanding the limitation of judicial discretion accomplished by sentencing guidelines, various laws establishing minimum sentences, fines, and required sentencing elements for specific crimes, the vast majority of sentencing occasions will afford a sentencing judge substantial discretion, including:

a. For misdemeanors, the length of incarceration up to the applicable maximum, the duration of any probation, whether any probation is formal or “bench,” whether to
add specific conditions of probation (including alternative sanctions, programs, or treatment) or to delete any general conditions of probation.

b. For felonies subject to presumptive probation, the length of any custody sanction units (jail days) within the presumptive range, the nature and duration of any non-jail sanction units (alternative sanctions or other non-jail dispositions carrying “sanction units”), whether to add specific conditions of probation (including alternative sanctions, programs, or treatment) or to delete any general conditions of probation (see ORS 137.540).

c. For felonies subject to presumptive prison, the length of the prison term within the presumptive range, and whether to recommend any conditions during prison or post-prison supervision.

d. For felonies subject to optional probation, assuming the facts support optional probation under the law, whether to impose probation in lieu of presumptive prison.

e. For all felonies subject to the guidelines, assuming the requisite “substantial and compelling” reasons exist (and that constitutional prerequisites for establishing enhancement facts have been met), whether to depart from the presumptive sentence by durational or dispositional departure.

f. For all sentences involving a term of incarceration, assuming the requisite “substantial and compelling” reasons exist, whether to foreclose “any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or program of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing” (see ORS 137.750(1)).

g. For sentences involving more than one crime, or imposed while the defendant is already subject to a prior sentence of incarceration, assuming that circumstances permitting consecutive sentences are present (see infra IX. “Concurrent and Consecutive Sentences” and ORS 137.123), whether to impose a consecutive or concurrent sentence.

h. Even for sentences subject to “Ballot Measure 11” mandatory minimum sentences, assuming the requisite facts and compliance with applicable constitutional principles, whether to impose consecutive or concurrent
sentences or to depart upward beyond the mandatory minimum.

i. For financial obligations, how much fine in addition to any applicable minimum to impose (up to the maximum), whether to award a compensatory fine, and whether to waive or suspend all or part of any financial obligation subject to waiver or suspension.

j. For probation violations, whether to revoke or to modify the conditions of probation, and if to revoke, how to exercise any discretion as to the sanction available upon revocation.

2. Practical Limits on Discretion

Notwithstanding a range of discretion available under the law, many factors may impose practical limits on the choices available to a sentencing judge:

a. Plea Bargains Other Than “Contract Pleas”

Although there is substantial pressure not to upset the expectations of counsel that generate dispositions by plea negotiation in the vast majority of criminal cases, a judge is not bound by a recommended sentence. ORS 135.432(4). The Judicial Conference policy that “invite[s] advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct” has no exception for negotiated pleas, and judges may properly inquire which objectives the recommended sentence serves, whether those are the appropriate objectives or the only appropriate objectives, and in any event whether some modification might better serve the desired or some more significant purpose. Judges may choose to provide leadership and direction by such inquiries for the purpose of guiding future plea negotiations.

b. Plea Bargains Constituting “Contract Pleas”

Although a judge may participate in a “contract plea” which limits the judge’s sentencing choices to acceptance of the agreement and following its terms or rejection of the plea and allowing the defendant to withdraw the plea, ORS 135.432(2), (3), the judge has ample opportunity to inquire as to the ends and means of the sentencing component of the agreement before agreeing to the negotiated result, and to seek agreement of both sides should reasons to deviate from the agreed disposition become apparent by the time of sentencing. Ultimately, as with all plea agreements, the judge is responsible for the final sentence and has a role in...
determining what it attempts to accomplish and by what means. The judge’s leverage is the power to reject the plea.

c. Other Wants, Warrants, and “Holds”

A finely crafted sentence may be entirely frustrated by the existence of holds from other counties, states, or the federal jurisdiction—or even other proceedings pending in the same jurisdiction. For example, a plan for alternative sanctions or programs during probation may be impractical (or at least postponed) because once “released” from any term of incarceration, the defendant may remain in custody and transported to the detaining court or other pending matter in the same court for further disposition. The judge may wish to inquire of the parties:

• Whether the sentence before the court is merely a means of disposing of a pending matter so that the defendant can be moved along to a more significant matter for disposition (it is not uncommon, also, for offenders serving substantial prison terms to arrange through counsel and the prosecutor to dispose of pending less serious matters with concurrent time).

• What impact the present sentence may have on the success of any pre-existing sentence—for example, will consecutive local time on this sentence render the offender ineligible for any programs during an existing period of imprisonment? If so, which programs, would the offender otherwise get into and benefit from that program, and how does any likelihood of such benefit compare with whatever public safety results from prolonging incapacitation—in light of any likely increase or decrease in post-prison recidivism?

• Whether sentencing might productively be postponed for pursuit of negotiated “global settlement” of other matters; it is occasionally possible to persuade counsel to accomplish settlement across county, state, and even federal jurisdictional lines.

d. Immigration Holds

Whether a defendant faces deportation as a result of the conviction before the court is, of course, frequently of tremendous importance to the defendant and pivotal to plea negotiations. But it also dramatically affects the feasibility of sentencing choices otherwise available. In general, a defendant will be required to serve any term of incarceration before being deported, but may be precluded—whether by ineligibility or deportation—from
participating in a probationary sentence. On the other hand, not all non-citizens (“legal” or otherwise) are actually likely to be deported simply because they have been convicted of a crime in state court. A judge may inquire whether defense counsel is fully apprized of these circumstances, and routine inquiry may promote future investigation by counsel. As to “illegals” who will remain in the jurisdiction, it may well be technically unlawful for them to comply with the typical probation requirement of employment (ORS 137.540(1)(f)), and they may be barred from participation in publicly funded programs the court might otherwise consider.

e. **Language Issues**  
The unavailability of interpreters may frustrate some otherwise appropriate alternative or program dispositions in the case of non-English-speaking defendants.

f. **State and Local Resource Limitations**  
As state and local budgets and priorities vacillate, the actual availability of all dispositions may vary dramatically. Local jail authorities may release sentenced prematurely; Oregon Health Plan modifications may make some private treatment programs unavailable to offenders of limited means; public entities may choose to terminate or restrict correctional programs or alternatives or treatment efforts. The Department of Corrections may withdraw or expand programs, treatment, or alternative incarceration opportunities that might otherwise figure in a carefully strategized sentencing package.

g. **The Defendant’s Resources and Circumstances**  
Assuming the validity of any economic or employment restrictions of the defendant, an otherwise plausible set of sentencing components may be unworkable because the defendant has no practical public or private transportation to a provider, or no means to pay for any required services.

3. **Discretion as to Incarceration Sentences**

a. **What We “Know” About Incarceration**  
Although opinions vary and debate is often heated, these propositions seem sufficiently supportable in the literature to serve as useful general hypotheses:

- Incapacitation is generally the most reliable means short of capital punishment by which to prevent new offenses
outside jail or prison by an offender, but only during the period of actual incarceration.

- Notions of proportionality and, increasingly, the scarcity of resources drastically limit the duration of incapacitation available, particularly for less serious and more common crimes.

- When misdemeanor recidivism is included, recidivism rates after incarceration average over 60%, but vary widely depending on the nature and extent of criminal history, the offender, and—at least by correlation—our sentencing decisions.

- Except for medium risk person offenders, and high and medium risk sex offenders [for which the data are insufficient to provide statistical significance], the recidivism rate after an alternative sanction is lower than the recidivism rate after a jail sanction.

- For some offenders and with respect to jail terms on the lower end of the spectrum, (1) a sentence that is short enough to allow an offender to retain employment, housing, and relationships may ultimately serve public safety better than a longer term; (2) work crew community service has the lowest reconviction rates for high and medium risk offenders; and (3) community sanctions have lower reconviction rates than jail sanctions.

- High risk offenders have similar rates of reconviction regardless of how long they are incarcerated.

- For medium risk offenders, the longer the term of incarceration, the higher the recidivism rate after release.

- For purposes of achieving compliance with terms of probation, repeated short sanctions (such as five days) are at least as effective as escalating sanctions (such as five days for the first violation, 30 for the second, and 90 for the third).

These are but generalities that may be overcome by individual circumstances—different things work or not on different offenders—and by sentencing objectives other than crime reduction.
b. Considerations Relevant to Incarceration Decisions

In deciding whether to impose incarceration and, if so, what period of incarceration to include within the legally and practically available range, the court might consider and invite advocates to address:

- How much actual incapacitation is available for this defendant after any credit for time served?

- What range of incarceration is consistent with proportionality? (See ORS 161.025(1)(f), (g))

- If the object is to incapacitate the offender, how does the period of safety accomplished by incapacitation compare to safety likely to result from any competing period of supervision? For example, depending on the offender, the nature of the risk posed by the offender, the length of available incarceration, and the availability of any modes of rehabilitation, alternative incarceration, or supervision, it may or may not better serve public safety to withhold some portion of the available term of incarceration for a period of probation in which to seek to enforce conditions designed to reduce the offender’s risk to the public well after any available term of incapacitation. An offender for whom there is a great deal of time available who represents a grave risk of future harm and presents little likelihood of reformation by means of existing programs is clearly a candidate for maximum incapacitation. Lower risk offenders, those susceptible to rehabilitation, or those for whom only a short term of incapacitation is available, may be better candidates for shorter incapacitation and longer supervision with conditions.

- If the object is to ensure that the offender will receive and cannot walk away from treatment or some other rehabilitative program, is the program actually available to the offender in custody, what is the offender’s actual likelihood of participating in the program, and what do we know about the likelihood that such participation will have any impact on the risk represented by the offender to the public?

- If the object is to stabilize an offender who needs mental health medications, or to prepare an addicted offender for meaningful participation in treatment, what is the likelihood that the offender will accept the medications (jails cannot compel inmates to take medications) or participate in recovery?
• If the object is to respond to the interests of a specific victim, what do we know about those needs and how any particular sentence is likely to affect those interests? For example, in the case of a child victim of sex abuse, a treatment provider may be in the best position to address whether the victim would best be served by a sentence that is sufficient in severity to remove any doubt about the defendant’s sole blame for the incidents [many child victims tend to blame themselves] or by a sentence that does not aggravate the victim’s sense of guilt for disrupting a family—or whether the victim is even likely to be aware of the sentence.

• If the object is to provide a period of safety to a domestic violence victim, are there plans in place for the victim and is the available remaining custody time adequate in light of those plans?

• If the object is to secure future compliance with directives (in the event of a jail sanction for a continued probation), how does the amount of time stack up against what we know about what works?

• If the object is if to impose a consequence for the offender’s misbehavior, how does the amount of time compare with what we know about what works?

• If the purpose is risk-reduction, how does the duration under consideration comport with the offender’s risk level and the community safety interests in most efficient deployment of the custody slots the offender would be occupying?

• If the purpose is risk-reduction, how does the period of safety accomplished by incapacitation compare with any increased risk of post-incarceration recidivism?

4. Discretion as to Sentences that Rely on Programs

a. What We “Know” About Programs
The mid-20th Century enthusiasm for the medical model and rehabilitation programs, see, e.g., Williams v. New York, 337 US 241, 69 S Ct 1079 (1949), was considerably tempered when they were studied with some rigor and largely found to be without statistical validation. By the mid 1970s some researchers and policy-makers were proclaiming that “nothing works.” Although many rehabilitation programs—and alternative sanctions—
continue to be regularly employed as sentencing options even though their effectiveness in reducing criminal behavior is not supported by any data, others have benefited from scrutiny, science, and experience. Although opinions vary and debate is often heated, these propositions seem sufficiently supportable in the literature to serve as useful hypotheses:

- It is far more useful to consider whether a viable program is likely to benefit a particular offender or offenders with certain characteristics in common than to consider whether a program “works” in the abstract; different things work or not on different people.

- According to a National Institute of Corrections “meta-analysis” of 154 research papers, while “traditional punishments” and “inappropriate treatment” increase recidivism (by 7 and 6 percent, respectively), “appropriate treatment” reduces recidivism by 30%.

- Programs that work tend to have these characteristics:

  1. They target multiple criminogenic factors;
  2. They formulate treatment plans based on rigorous, competent, and objective offender assessment;
  3. They employ an evidence-based theory of criminal behavior, e.g., cognitive-behavioral;
  4. They are intensive;
  5. They tailor the modality to the offender’s learning style and personality;
  6. They include a relapse prevention component;
  7. They integrate with community-based services; and
  8. They monitor program development, staff development, and training, and include program evaluation with appropriate performance measures.

It was in light of this body of literature that the 2003 Oregon Legislature directed that increasing proportions of program funds in corrections budgets be devoted to “evidence-based” programs. 2003 Or Laws, ch. 669, § 5.

b. Considerations Relevant to Program Decisions

In deciding whether to employ a special condition of probation or to rely on the probationary authority to employ a program under the authority of general conditions
of probation (including whether to employ “optional probation” when available under the guidelines), or whether to employ incarceration to access a program in custody, the court might “consider and invite advocates to address:”

- The availability of the program to the offender in terms of its waiting list, its expense, its location, its eligibility criteria, and any competing “holds.”
- The suitability of the program for the offender (e.g., a good drug treatment program may be inappropriate for an offender with “dual-diagnosis” needs).
- The extent to which the program is “evidence-based.”
- The extent to which there is any data supporting the effectiveness of the program in achieving reduction in criminal behavior.
- With respect to community-based programs, the relative risk to the community or to specific foreseeable victims in light of the likelihood that the offender will enter, participate in, and benefit from the program as compared with the risk the offender represents during and after any competing term of incarceration.

5. Discretion as to Alternative Sanctions and Other Early Release Programs

“Alternative sanctions” generically refer to any disposition that serves to impose a penal consequence as part of a sentence but is imposed in the alternative to a jail or prison sanction. The purposes of such a sanction include punishment per se (presumably at least in part for general and specific deterrence), but may also include rehabilitative objectives. Within the context of a prison or jail sentence, the custodial authority (local or Department of Corrections) will have the power to release the defendant to an “alternative sanction” unless the court has lawfully precluded the exercise of that power for a specific offender. ORS 137.750.

“Alternative sanctions” may be employed by a local custodial authority to adhere to jail population limits, but it may also use “furlough” or other devices to release offenders. “Matrix” releases and other devices employed to avoid exceeding jail population limits function without direct judicial control. ORS 137.520.
a. **Generic “Alternative Sanctions”**

Alternative community service, electronic monitoring, GPS [global positioning system] monitoring, forest camp, and work release are all examples of generic alternative sanctions. Considerations relevant to exercising any discretion to employ such sanctions include all of those relevant to “program” decisions, as correlations between these dispositions and recidivism are as available and significant as those involving programs. In addition, a sentencing judge might consider and invite advocates to address:

- How does the offender’s risk level compare with those competing for jail space?
- How does the decision whether to employ an alternative sanction relate to the offender’s ability to maintain employment, housing, positive relationships, or to participate in treatment?
- What is the actual availability of the alternative to this offender?
- How likely is it that this offender will participate successfully?
- In the case of alternative community service, what is the likely assignment and is it suitable for any reformatory objectives, or is an informal substitute more likely to accomplish the desired impact on the offender?

b. **“Alternative Sanctions” Available to the Custodial Authority**

ORS 137.750(1) provides that a judge imposing jail or prison “shall order . . . that the defendant may be considered by the executing or releasing authority for any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program or program of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing, unless the court finds on the record in open court substantial and compelling reasons to order that the defendant not be considered for such leave, release or programs.” At the state level, this may be “boot camp,” a “half way house,” a reduced security “therapeutic community,” or other disposition by which the offender is no longer in secure custody. At the local level, the offender may be released to a secure or non-secure treatment facility, work release, mere “furlough,” or similar disposition.
Assuming any applicable constitutional prerequisites are satisfied (as of this writing, the appellate courts have not resolved whether *Blakely v. Washington*, 542 US 296, 124 S Ct 2531 (2004), and therefore 2005 SB 528 [2005 Or Laws, ch. 463], applies to the denial of these “SB 936” benefits), the court might consider and invite advocates to address the same questions as those appropriate for incarceration, program, and generic alternative sanction decisions as outlined in previous paragraphs. In addition:

- How does denying these options for a specific offender affect the custodial authority’s ability to administer population limits consistently with public safety?
- How does denying these options for a specific offender affect the custodial authority’s ability to employ them as incentives for inmate management and control?
- How does allowing these benefits affect public safety in terms of this offender’s risk level and the interests of any specific potential victim, and will denying them likely promote the early release of an inmate with a higher risk level? For example, local jails forced to release offenders because of bed shortages may employ risk assessment to assign levels to ensure that they release the least dangerous offenders first; denying early release to a low level offender may result in releases of offenders with higher scores.
- Would the options in question motivate the offender to participate in programs that would reduce his risk to the public upon release?

### c. Local Jail “Matrix” Release Practices

Local jails have the authority to release offenders before and after sentence is imposed as necessary to adhere to lawful limits on jail populations. ORS 137.520(3). As discussed with respect to considerations relevant to incarceration sentences, the likelihood of an early release may be relevant to a sentencing analysis. But judges may want to have input into the release criteria employed by the local custodial authority. For example, judges might want to seek accommodation for:

- Defendants whose incarceration is required to maintain the credibility of a therapeutic court;
- Defendants who must be held until a treatment bed is available; and
• Defendants who represent a risk to a foreseeable victim, such as in the case of domestic violence.

Although the court has limited actual control, the local custodial authority may well be willing to adjust its release criteria, and hence the allocation of beds, in response to such needs. With or without such adjustments, however, the local authority may well be doing a responsible job of minimizing risk to the public in determining which offenders to release.

6. Discretion as to Financial Sanctions
As discussed below in section IV. “Financial Sanctions,” the court may impose financial components consisting of fines [up to the maximum for the category of misdemeanor or felony, and subject to any statutory minimum fine], assessments, court appointed counsel fees, restitution, or compensatory fines. Depending on the particular crime and financial component in issue, the court may or may not have the power to waive or suspend all or part.

a. Considerations Regarding Restitution and Compensatory Fines
ORS 137.106(1) (as amended by 2005 Or Laws, ch. 564, § 2 (effective Jan. 1, 2006)) provides that the court “shall” award restitution in the full amount of “economic damages” [formerly “pecuniary damages”] that it finds a victim to have suffered, and ORS 137.101 affords a court the power to deem all or a portion of a fine a “compensatory fine” payable to the victim in the nature of punitive damages.

Restitution is no longer subject to the former requirement that the court consider the defendant’s ability to pay and the impact of restitution obligations on rehabilitation. See ORS 137.106 (2001). It remains common, however, for parties to a plea petition to arrange for a smaller amount than the total to be ordered as restitution—which they may be able to do by controlling the basis on which a court can find the extent of economic damage.

2005 HB 2230 [2005 Or Laws, ch. 564] amended the restitution statutes to prefer direct victims to indirect victims (such as insurers), but restitution awards generally come from only half of payments received from or on behalf of a defendant—the other half goes to other categories of financial obligations until they are paid in full. Compare ORS 137.103 (2005) with ORS 137.295 (2005).
Compensatory fines, however, are disbursed before all other financial obligations until paid in full. ORS 137.295(2)(a), (3) (2005).

Fines, and therefore compensatory fines, continue to be subject to the requirement that the court consider the defendant’s ability to pay [including on an installment plan] “with due regard to the other obligations of the defendant.” ORS 161.645; State v. Ross, 199 Or App 1, 14, adhered to as modified 200 Or App 143 (2005); State v. Ignacio Gutierrez, 197 Or App 496, adhered to as modified 199 Or App 521 (2005).

The upshot is that if there is any money coming in from a defendant, it is likely to reach the victim twice as quickly if designated a compensatory fine as would the same amount as a restitution award—until and unless restitution is the only financial obligation remaining.

b. Considerations Regarding All Financial Obligations
The prospect of payment of any financial obligations may vary widely, depending upon the defendant’s circumstances, additional obligations (including any financial obligations from other criminal cases, and court-ordered child or spousal support), likely incarceration (as a result of the case in which sentence is being imposed or any other sentences), work history, any disabilities, and any inpatient treatment needs. Recent experience suggests that collection efforts like those of the retail credit industry have been far more successful at collecting financial obligations from defendants than traditional mechanisms.

It is not unusual for both parties to agree that all financial obligations be waived or suspended when a defendant’s sentence will include a long term of incarceration. For other defendants, repayment of financial obligations—particularly restitution, but also court appointed counsel fees and any other fines or fees—may be plausible and even a significant sign of rehabilitation because it represents taking responsibility, making amends to a victim, or accepting accountability for the offense. But, when payment is wholly unrealistic, financial obligations may for some offenders undermine rehabilitation by providing another opportunity for failure, and may undermine accountability by providing another occasion for nonperformance without any consequences.
To the extent that the court has discretion as to the amount and category of financial sanctions, a sentencing judge might consider and invite advocates to address such questions as:

- How any new financial obligations might interact with other financial obligations of the defendant, including other criminal matters, domestic relations support orders, administrative garnishments.

- How any new financial obligations will affect the defendant’s ability to pay for (or claim an excuse for not participating in) treatment or counseling.

- The extent of the defendant’s likely ability to pay in the short run and in the long run.

- Whether a victim’s interest in full payment would be served by inviting or allowing the victim to waive restitution in favor of the same or a different amount as a compensatory fine.

- Whether the defendant’s payment schedule should be adjusted to accommodate short-term treatment costs (or alcohol evaluation fees).

7. **Discretion as to Form and Duration of Probation**

For felonies, the sentencing guidelines and related rules prescribe the presumptive length of probation, and assume that probation will be formal. As to felony probations, the rules of the Criminal Justice Commission (OAR 213-005-0007 to 213-005-0010) provide substantial discretion, and allow the judge:

a. “[W]ithout departure [to] impose a duration of bench probation other than the presumptive durations . . . when necessary to ensure the conditions and purposes of probation are met.”

b. To “extend the length of probation . . . upon finding a violation or violations of the conditions of probation or when necessary to ensure that the conditions of probation are completely satisfied.”

c. “[B]y departure [to] impose a greater term of supervised probation when necessary to ensure that the conditions and purposes of probation are met.”

d. Without departure as to listed sex offenses, to impose probation up to the statutory maximum sentence for the offense, and as to other sex offenses up to five years.
e. To “shorten or terminate a probationary sentence or transfer supervision to bench probation upon a finding that supervision is no longer necessary to accomplish the purposes of the imposed sentence.”

As to misdemeanors, the court has discretion to impose up to five years probation, formal or bench. ORS 137.010.

To the extent that the court has discretion to choose the form of probation, it is significant that formal (“supervised”) probation may result in any of a wide range of actual supervision. OAR 213-005-0014 directs the Department of Corrections and its designees to “use a risk assessment classification system to classify offenders for supervision purposes,” so that—depending upon the court’s style of supervision of bench probations—formal probation may result in greater or lesser actual supervision than bench probation. In addition, local arrangements may provide for “enhanced” bench probation or special forms of probation for defined groups of offenders, all of which may affect the actual level of supervision implied by any choice among formal or bench probation variations.

Finally, depending upon their availability and the local arrangement for notifying the court of nonattendance, termination, or unauthorized departure, programs or alternative sanctions such as work release, inpatient treatment, or even community service may provide the court with a mechanism for notice of noncompliance that may compete favorably or unfavorably with that provided by the level of formal supervision available for the offender in question.

a. Considerations Regarding the Form and Duration of Probation

A sentencing judge choosing between forms and among durations of probation might consider and invite advocates to address:

- The likely actual supervision resulting from formal as opposed to bench probation given the offender’s risk level.

- Whether a recommendation for assignment to any available formal probation specialty unit (such as mental health or impaired driving) would serve the court, the community, or the offender.

- Whether any specialized form of bench supervision is available and sufficient to substitute for any benefits of supervised probation.
Whether a shortened period of supervision is sufficient to serve the objectives of probation and commensurate with conserving court or formal probation resources, given the opportunity to extend probation sufficient in the event of probation violations.

Whether extended supervision is appropriate in view of the circumstances of the offender and any plan for the offender’s treatment or rehabilitation.

Whether any component of alternative sanction or treatment provides prompt notification sufficient to obviate formal probation, given the opportunity to convert bench probation into supervised probation in the event of a probation violation.

Whether formal supervision is necessary to provide direction and assistance for engaging the offender in needed services, treatment, or counseling.

What form and duration of probation best correlates with success for offenders like the one before the court.

b. Considerations Regarding Conditions of Probation

ORS 137.540 prescribes general conditions that apply to all probations unless the court orders otherwise, and permits the court to impose “special conditions of probation that are reasonably related to the crime of conviction or the needs of the defendant for the protection of the public or reformation of the offender, or both.” [Oregon appellate courts have so far declined to address unpreserved assertions that there may be circumstances under which imposing special conditions of probation invokes the jury trial right recognized by Blakely v. Washington, 542 US 296, 124 S Ct 2531 (2004).] In determining whether to impose special conditions or delete general conditions of probation, a sentencing court might consider and invite advocates to address:

Whether, in the case of supervised probation, the probationary authority is or is not in a better position than the court to determine the suitability of a specific condition.

Whether it is appropriate to include a condition without qualification, or to invite attention to the possible suitability of a condition by adding a qualification such as “if and as directed by the probation officer.”
Whether the condition is one that is reasonably likely to reduce the offender’s likelihood of engaging in future criminal conduct.

Whether the condition, or any general condition, is likely to impede or promote the offender’s ability to obtain or maintain employment, or otherwise to fulfill other conditions of probation.

Whether the condition is necessary to serve the interests of a victim or potential victims of the offender.

8. **How to Get Information to Support Informed Sentencing Decisions**

1997 Judicial Conference Resolution #1, in addition to encouraging judges to consider and invite advocates to address what is most likely to reduce the offender’s future criminal conduct, also encourages judges “to seek and obtain training, education and information to assist them in evaluating the effectiveness of available sanctions, programs, and sentencing options in reducing future criminal conduct.” Addressing the issues suggested in this part of this chapter, “Pursuing Sentencing Objectives,” will frequently require that a court obtain information not typically provided as part of the traditional approach to sentencing decisions. There are several sources.

a. **Telephone**

A telephone on the bench is potentially a tremendously valuable tool. Once the court assembles contact information for local probation managers, common treatment providers, and correctional officials responsible for prison programs of particular interest, a phone call can answer—or at least narrow—questions about eligibility, suitability, and waiting lists for programs or forms of alternative incarceration. A phone call can also answer questions about the likely level of supervision or the availability and suitability of any specialized probation officers or probation units.

A telephone is particularly powerful in verifying assertions about the defendant’s employment status, obligations in other counties, role in supporting or caring for dependents, and living arrangements. (Skillfully used, the telephone can prompt an untruthful or exaggerating defendant to correct or revise claims about all of these areas—even without completing the phone call.)
b. Counsel

1997 Judicial Conference Resolution #1 states that “judges should consider and invite advocates to address the likely impact of the choices available to the judge in reducing future criminal conduct.” Advocates who competently respond to such an invitation should, within the bounds of their respective responsibilities to their clients, assist the court in providing answers to questions such as those suggested above. Although a defense attorney may on many occasions be restrained by a client’s wishes about the outcome, on other occasions zealous advocacy on behalf of those wishes may well require assembling information that is also helpful to the court in fashioning the optimum sentence. And prosecutors presumably have an interest in promoting the sentence that is, within the applicable lawful limits, most likely to reduce future harm.

Yet, outside the arena of juvenile law, in which counsel typically address the disposition with at least as much preparation as “jurisdiction” (the equivalent of the guilt phase for adults), counsel in criminal matters often have no expectation that they are required to assemble information (other than mere aggravation and mitigation) with which to advocate for an outcome. Sentencing judges can affect attorneys’ expectations by routinely posing the questions to counsel and, if necessary, setting over sentencing decisions until the requisite information has been assembled. It may also be helpful to provide written guidelines about the court’s expectations for sentencing argument. [An example is available on the Criminal Bench page of the Multnomah County Judges web site, at http://mulsrv22/browser/Criminal_Bench.htm (last visited Nov. 29, 2005).]

c. Presentence Reports

Although they are now available in relatively few cases, presentence reports may provide much of the information necessary for crafting the optimal sentence in those cases in which they are available. Although in the past such reports have included a wealth of information about the crime and the offender’s history, they often failed directly to address how the suggested sentence is most likely to produce crime reduction (or serve any other purpose of sentencing). 2005 Senate Bill 914 (2005 Or Laws, ch. 473, § 1 (effective January 1, 2006)), however, amended ORS 144.791 to require such reports to “provide an analysis of what disposition is most likely to reduce the offender’s criminal conduct, explain why that disposition would have
that effect and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity.”

Judges may wish to provide feedback on the adequacy of the new forms of presentence reports to their local report writers, and to suggest areas in which information is typically useful.

d. Probation Officers

Probation officers routinely receive training on correctional and criminological matters, and are required by their work to maintain familiarity with correctional resources available locally. Probation officers receive bulletins on “what works” according to the Department of Corrections or national sources such as the National Institute of Justice and the National Institute of Corrections. They are trained on risk assessment, “stage of change” analysis, needs assessment, and addressing criminogenic factors.

Yet, when they communicate with the court, they rarely bring their knowledge and training to the task, apparently expecting the court to be concerned only with punishment and enforcement. Although this may provide optimal results for some cases, in general it fails to make best use of the training and experience of the probation officer. It is possible to improve the collaboration between probation and judicial functions.

Judges might consider engaging the local probation authority in an effort to transform probation violation reports into analyses of the needs, behavior, and options for dealing with a probationer in the way that is most likely to serve public safety. If the probation officer has done risk assessment, needs analysis, or other assessments of the offender, those evaluations—and their implications—can be shared with the court. The probation officer is often in the best position to know what resources are or are not available to the offender and which among those available have some chance of “working” on a particular offender. And the role of the probation officer in probation violation hearings can be transformed so that the officer becomes the court’s expert and advocate on best practices in sentencing.

For an account of one county’s efforts in this area, see *Sentencing Support Tools and Probation in Multnomah*
General Sources

A large number of sources are available by which to access both information on local and state resources and developing research and analysis about the effectiveness of sentencing options. The Criminal Bench page of the Multnomah County Judges web site (http://mulsrv22/browser/Criminal_Bench.html (last visited Nov. 29, 2005)) provides links to the Department of Corrections and treatment provider directories; the Crime and Corrections page (http://mulsrv22/browser/crime_and_corrections.html (last visited Nov. 29, 2005)) provides links to local, state, and national sites, public and private, containing a wealth of research and data concerning the efficacy of correctional devices and dispositions.

D. Sentencing Options and Procedures

1. Constitutional Requirements

   Constitutional principles affect sentencing in three primary areas: proportionality or severity; participation, notice, and “due process;” and, with respect to facts critical to an enhanced sentence, jury trial and burden of proof.

a. Proportionality and Severity

   Regardless of disagreement within the United States Supreme Court whether the Eighth Amendment to the United States Constitution has anything to do with proportionality, see Harmelin v. Michigan, 501 US 957, 111 S Ct 2680 (1991), the Oregon Constitution provides that “Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.” Or Const, Art I, § 16. See State v. Thorp, 166 Or App 564, 572 (2000) (stating that Article I, § 16 “forbids only those sentences that are grossly disproportionate to the crime”); State v. Spinney, 109 Or App 573 (1991) (sentencing guidelines do not violate Or Const Art I, § 16).

   i. “Cruel and Unusual” Defined

      A punishment is “cruel and unusual” when it is so disproportionate to the offense as to shock the moral sense of all reasonable persons as to what is right and proper in the circumstances. State v. Ronniger, 7 Or App 447, 461 (1971); see State v. Silverman, 159 Or
Inherent Disproportionality

Article I, § 16 of the Oregon Constitution prohibits legislation prescribing a penalty greater for a lesser included offense than for the greater including offense. *State v. Shumway*, 291 Or. 153, 164 (1981) (25 years for murder; 15 or 20 years for aggravated murder); *Cannon v. Gladden*, 203 Or 629 (1955) (holding that a sentence of life imprisonment for assault with intent to commit rape was unconstitutionally disproportionate, because it was greater than the 20-year maximum sentence that could be imposed for a completed rape). This principle does not apply beyond lesser included or inchoate crimes or to unrelated crimes. *State v. Turner*, 296 Or 451 (1984). When the court has discretion to impose any sentence for a misdemeanor and the guidelines impose a mandatory sentence of probation for lesser felonies, existence of the guidelines does not render defendant’s sentence of incarceration for a misdemeanor disproportionate. *See State v. Rice*, 114 Or App 101, 106-07, *rev den* 314 Or 574 (1992) (“It is fundamental that the legislature may classify criminal conduct in different ways and designate different penalties. . . . That legislative power is circumscribed by the constitutional requirement of proportionality.”) The sentencing guidelines do not violate state constitutional requirement that penalties be proportionate to offense even though repeat offender convicted of lesser crime may be subject to more severe sentence than first offender convicted of greater felony. *State v. Spinney*, 109 Or App 573 (1991).

b. Participation, Notice, Due Process

In Oregon, whether “normal due process procedural rights, that is, notice, opportunity to be heard, opportunity to present evidence, etc., are applicable to a sentencing hearing” is academic because statutes provide those rights. *DeBolt v. Cupp*, 19 Or App 545 (1974). A defendant has a constitutional right, limited by substantial reasons for nondisclosure, to be apprized of information upon which a judge may rely for exercising sentencing discretion. *Compare Buchea v. Sullivan*, 262 Or 222 (1972), *with Williams v. New York*, 337 US 241, 69 S Ct 1079 (1949).
Sentencing is a critical stage at which constitutional rights to counsel apply. *Gebhart v. Gladden*, 243 Or 145 (1966). This right to counsel extends to any pre-sentence investigator’s interview with the defendant. *State ex rel. Russell v. Jones*, 293 Or 312 (1982).

A defendant has a constitutional right to be present and to be heard (the right of “allocution”) at the time of sentencing. *State v. DeCamp*, 158 Or App 238 (1999); *DeAngelo v. Schiedler*, 306 Or 91 (1988).

c. **Jury Trial, Burden of Proof as to Enhancement Facts**

When a fact not established by the conviction itself is prerequisite to an increase in the severity of a sentence, a defendant has a constitutional right to have that fact tried by a jury and proved beyond a reasonable doubt. *Blakely v. Washington*, 542 US 296, 124 S Ct 2531 (2004); *State v. Dilts*, 337 Or 645 (2004). An exception exists as to the fact of a prior conviction, but this exception does not extend to the existence of juvenile adjudications. *State v. Harris*, 339 Or 157, 170-75 (2005). This right applies:


- Arguably, to consecutive sentences “for separate convictions arising out of a continuous and uninterrupted course of conduct” under ORS 137.123(5). *State v. Taylor*, 198 Or App 460 (2005) (issue identified, not addressed as unpreserved).

The 2005 Legislature prescribed procedures for addressing “*Blakely*” issues in 2005 Or Laws, ch. 463, discussed below with respect to upward departures, see VII.G. “Departure Sentences,” and other enhanced sentences. See *infra* VIII. “Other Sentencing Enhancements/Variations.” The procedures apply to any “fact that is constitutionally required to be found by a jury in order to increase the
sentence that may be imposed upon conviction of a crime.” 2005 Or Laws, ch. 463, § 1(2) (effective July 7, 2005). The legislation is subject to a 2008 sunset provision. These general principles apply:

- The defendant’s right to a jury trial and proof beyond a reasonable doubt is triggered whenever the State or the court seeks a sentence beyond that available by law based on the conviction alone.

- Within the range of sentencing discretion afforded by the conviction (and as extended by any established or admitted enhancement facts), there is no Blakely issue as to any factfinding implicit in the exercise of that discretion.

- The defendant can waive the right to jury trial, subject to the general requirements for a knowing and intelligent waiver of a constitutional right.

- The defendant may effectively admit enhancement facts.

- The admission or the determination of an enhancement fact does not require the more severe penalty unless it triggers a mandatory minimum sentence, but has the effect of extending sentencing discretion upward to a greater maximum than would apply without that fact.

- There is no jury trial or reasonable doubt requirement to establish a fact in “mitigation” of a sentence.

   Under its statutory duty to impose punishment, the court may exercise discretion within the manner allowed by statute. State v. Turner, 247 Or 301, 312 (1967); State v. Duncan, 15 Or App 101, 103 (1973). “A trial court has a duty to pass sentence in accordance with the pertinent sentencing statutes, ORS 137.010(1), and a sentence’s validity is determined solely by how well it comports with those statutes.” State v. Horsley, 168 Or App 559, 562 (2000). “Sentences that violate the statutes lack valid sentencing authority, ORS 137.010(1), and the trial court may modify them as necessary.” Id. at 561.

a. Judicial Discretion and Responsibility for Sentencing
   The statutes that define offenses impose a duty upon the court having jurisdiction to pass sentence in accordance with ORS 137.010 or, for felonies committed on or after November 1, 1989, in accordance with rules of the Oregon
Criminal Justice Commission, unless otherwise specifically provided by law. ORS 137.010(1).

Although sentencing guidelines, mandatory minimum sentence provisions, and other legislation have substantially limited judicial sentencing discretion, the wide discretion that continues is to be exercised in view of the purposes of sentencing. See, e.g., State v. Hval, 174 Or App 164 (2001). See supra I.B. “Purposes of Sentencing.”

3. Authorized Dispositions

a. Imprisonment and Fines
When a person is convicted of an offense and the court does not suspend the imposition or execution of any part of a sentence or when a suspended sentence or sentence of probation is revoked, the court must impose the following sentence:

1. A term of imprisonment;
2. A fine;
3. Both imprisonment and a fine; or
4. Discharge of the defendant.
ORS 137.010(7).

b. Suspend Imposition or Execution of Sentence
When a person has been convicted of an offense other than a felony committed on or after November 1, 1989, if the court is of the opinion that it is in the best interests of the public as well as of the defendant, the court may suspend the imposition or execution of any part of a sentence for any period of not more than five years. ORS 137.010(3). See ORS 137.010(4) (providing period of not more than six years upon finding of probation violation).

c. Conditional Discharge
Whenever defendant pleads or is found guilty of possession of a controlled substance under ORS 475.992(3) or 2005 Or Laws, ch. 708, §§ 18, 23, 28, 33, or 38 (effective Aug. 16, 2005), or of a property offense that is motivated by a dependence on a controlled substance, the court, without entering a judgment of guilt and with the consent of the defendant and the DA, may:

1. Defer proceedings;
2. Place defendant on probation;

3. Enter an adjudication of guilt and impose sentence upon violation of a term or condition of probation; and

4. Discharge and dismiss the proceedings upon successful completion of probation.


d. **Retention of Authority to Correct Certain Errors in Sentence**

The sentencing court retains authority after entry of judgment of conviction to modify its judgment and sentence to correct arithmetic or clerical errors or to delete or modify any erroneous term in the judgment. ORS 138.083(1). See *State v. Riley*, 195 Or App 377, 382 (2004) (concluding that the court’s action modifying an erroneous term in an original and first amended judgment complied with ORS 138.083(1)); *State v. Whitlock*, 187 Or App 265, 269 (2003) (“[A] sentence that does not conform to law is invalid; when a trial court imposes such a sentence it is a legal nullity, and the trial court subsequently has the authority to impose a lawful sentence even if the defendant is already in the custody of the Department of Corrections.”).

II. **PROCEDURE AT SENTENCING**

A. **Time of Sentencing**

After a plea or verdict of guilty, the court must set a time for sentencing. ORS 137.020(1).

The court may not sentence the defendant until **at least 2 calendar days after the plea or verdict** unless the court does not intend to remain in session for that time, in which case the time must be as remote as reasonably possible but **no sooner than 6 hours** after the plea or verdict (except with the defendant’s consent). ORS 137.020(2)(a).

1. **Defendant in Custody**

If the defendant is in custody following the verdict, the court must pronounce judgment as soon as practicable, but in any case **within 7 calendar days** following the verdict if no presentence investigation is ordered, and within 7 calendar days after delivery of the presentence report to the court if a
presentence investigation has been ordered; however, the court may delay pronouncement of judgment beyond these limits for good cause shown. ORS 137.020(3).

In any event, the court must not delay for more than 31 calendar days after the plea or verdict the sentencing of a defendant in custody, except for good cause shown. ORS 137.020(2)(b).

2. Defendant Not in Custody
In any event, the court must not delay for more than 56 calendar days after the plea or verdict the sentencing of a defendant not in custody, except for good cause shown. If sentencing is delayed more than 56 calendar days, then any period of probation imposed runs from the date of plea or verdict. ORS 137.020(2)(b).

3. Delay When Calendar Day is Not a Judicial Day
If the final calendar day is not a judicial day then the court may delay sentencing until the next judicial day. ORS 137.020(4).

B. Notice of Right to Appeal
At the time the court pronounces judgment, the defendant, if present, must be advised of the right to appeal and of the procedure for protecting that right; if the defendant is not present, the court must so advise the defendant in writing. ORS 137.020(5)(a).

If the defendant is sentenced subsequent to a plea of guilty or no contest or upon probation revocation or sentence suspension, or if the defendant is resentenced after an order by an appellate court or a post-conviction relief court, the court must advise the defendant of the limitations on appealability imposed by ORS 138.050(1) and ORS 138.222(7). If the defendant is not present, the court must so advise the defendant in writing. ORS 137.020(5)(b).

C. Indeterminate Sentence for Felonies Committed Prior to Nov. 1, 1989
Whenever any person is convicted of a felony committed prior to November 1, 1989, the court must sentence such person to imprisonment for an indeterminate period of time, unless it imposes a sentence other than imprisonment. The court must state and fix in the judgment and sentence a maximum term for the crime, which must not exceed the maximum term of imprisonment provided by law; and judgment must be given accordingly. ORS 137.120(1).

Practice Note: Although in serious cases, particularly those in which a presentence investigation is ordered, there are good reasons for delay, the vast majority of defendants will want to proceed to sentencing and “waive time.” The reason for the statutory delay is to avoid tainting sentencing discretion with the passions of the judge aroused by the gruesome details of the crime—but in the vast majority of cases, judicial passion is predictably absent. When a defendant seeks delay for no apparent reason, inquiring may allow the court to address the defendant’s concern and avoid an otherwise unnecessary hearing. For example, a TSI (“turn self in”) date may be all the defendant desires.
D. Presence of Defendant at Sentencing

1. Felony Conviction

   a. Defendant May Appear Via Simultaneous Transmission
      The defendant may appear by being physically present in the court or by *simultaneous electronic transmission* if:

      1. Authorized by court rule under 2005 Or Laws, ch. 566, § 4(3) (effective July 20, 2005);
      2. The parties and the court agree; and
      3. Such appearance is not specifically prohibited by statute.


2. Administrative Change to Sentence
   Defendant’s presence is *not* required when the court makes a nonmaterial, administrative change to a sentence. State v. Kliment, 45 Or App 511 (1980).

3. Substantive Change to Sentence
   The court must make any substantive change in the sentence in the defendant’s presence, or the sentence may be invalidated. See State v. Blake, 7 Or App 307, 311 (1971) (modifying judgment to provide for defendant to serve consecutive rather than concurrent sentences was substantive change in sentence).

4. Misdemeanor Conviction
   For purpose of giving judgment, if the conviction is for a misdemeanor, the court may enter judgment in the defendant’s absence. ORS 137.030(1).

E. Appearance by Victim
   At the time of sentencing, the victim or the victim’s next of kin has the right to appear personally or by counsel, and has the right to reasonably express any views concerning the crime, the person responsible, the impact of the crime on the victim, and the need for restitution and compensatory fine. ORS 137.013. See Or Const

**F. Defendant’s Right of Allocution**

“Once [the fact that a "criminal prosecution" for the purposes of Article I, § 11 includes an ordinary sentencing hearing] has been established, it requires almost no interpretive work on our part to decide that defendant has the right, not only procedural, but constitutional, to be heard at sentencing, since the Oregon Constitution unambiguously grants the accused the right to be heard during the entire criminal prosecution.” *DeAngelo v. Schiedler*, 306 Or 91, 94 (1988). *But see State v. Rogers*, 330 Or 282, 300-01 (2000) (“[T]he trial court has the authority to exercise reasonable discretion regarding allocution by a defendant to ensure that the trial is orderly and expeditious.”).

**G. Applicability of Evidence Code**

Generally, the evidence code does not apply to sentencing proceedings except proceedings under ORS 138.012 (automatic review by Supreme Court) and 163.150 (aggravated murder sentencing), as required by ORS 137.090 (considerations in determining aggravation or mitigation), or proceedings on *enhancement facts* under 2005 Or Laws, ch. 463, §§ 2-7 (effective July 7, 2005). ORS 40.015(4)(d) as amended by 2005 Or Laws, ch. 463, § 8 (effective July 7, 2005).

**III. IMPRISONMENT SANCTIONS**

**A. Maximum Confinement Penalties for Felony Convictions**

1. **“Felony” Described**

Except as provided in ORS 161.585 (classification of certain crimes determined by punishment) and 161.705 (reduction of certain felonies to misdemeanors), a crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a **maximum term of imprisonment of more than one year**. ORS 161.525. See ORS 161.585 (allowing classification as misdemeanors of certain felonies committed prior to Nov. 1, 1989).
a. **Reduction of Certain Felonies to Misdemeanors**

Notwithstanding ORS 161.525, the court may enter judgment of conviction for a **Class A misdemeanor** and make disposition accordingly when:

1. A person is convicted of:
   - Any Class C felony;
   - A Class B felony of delivery of marijuana for consideration pursuant to 2005 Or Laws, ch. 708, § 31(2) (effective Aug. 16, 2005);
   - A Class B felony of possession of marijuana pursuant to 2005 Or Laws, ch. 708, § 33(2) (effective Aug. 16, 2005); or
   - Any of these felonies or of a Class A felony pursuant to ORS 166.720 (racketeering activity) and has successfully completed a sentence of probation; AND

2. The court, considering the nature and circumstances of the crime and the history and character of the defendant, believes that it would be **unduly harsh** to sentence the defendant for a felony.


2. **Maximum Statutory Prison Terms for Felonies**

The maximum term of an indeterminate sentence of imprisonment for a **felony** is as follows:

a. Class A felony—20 years;

b. Class B felony—10 years;

c. Class C felony—5 years;

d. Unclassified felony: As provided in the statute defining the crime.

ORS 161.605. See ORS 137.120 (for felonies committed before Nov. 1, 1989, court must impose indeterminate prison sentence not to exceed maximum; for felonies committed on or after Nov. 1, 1989, court must impose sentence pursuant to Oregon Criminal Justice Commission (OCJC) rules); ORS 137.121 (OCJC rules govern maximum consecutive sentences for felonies committed on or after Nov. 1, 1989).
Note that for purposes of the constitutional right to a jury trial and proof beyond a reasonable doubt for sentence enhancement facts, the sentencing guidelines and related rules determine the maximum sentence. See infra VII.G.1.c “Statutory Maximum.”

3. **Local Confinement as a Special Condition of Probation**
   For felonies committed prior to Nov. 1, 1989, as a special condition of probation the court may impose confinement in the county jail or restrict the probationer to his or her own residence, or a combination thereof for a period not to exceed the lesser of one year or one-half of the maximum period of confinement that could be imposed for the offense. ORS 137.540(2)(a).

4. **Aggravated Murder**
   Except as otherwise provided in ORS 137.700 (Measure 11), when a defendant is convicted of aggravated murder, the defendant must be sentenced (pursuant to ORS 163.150) to:
   - Death;
   - Life imprisonment without the possibility of release or parole; or
   - Life imprisonment.
   ORS 163.105(1)(a).

   a. **Sentencing Procedure for Aggravated Murder**
      Upon a finding that the defendant is guilty of aggravated murder, the court, except as otherwise provided in ORS 163.150(3) (providing procedure for a juvenile offender), must conduct a separate sentencing proceeding to determine whether the defendant must be sentenced to life imprisonment, as described in ORS 163.105(1)(c), life imprisonment without the possibility of release or parole, as described in ORS 163.105(1)(b), or death. The court must conduct the proceeding before the trial jury as soon as practicable. If the defendant has pleaded guilty, the sentencing proceeding must be conducted before a jury impaneled for that purpose. ORS 163.150(1)(a).

   i. **Evidence May be Presented**
      In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim’s family, and
any *aggravating or mitigating evidence* relevant to the issue of whether the defendant should receive a death sentence. However, neither the State nor the defendant may be allowed to introduce repetitive evidence that has previously been offered and received during the trial on the issue of guilt. The court must instruct the jury that all evidence previously offered and received may be considered for purposes of the sentencing hearing. The State and the defendant or the counsel of the defendant must be permitted to present arguments for or against a sentence of death and for or against a sentence of life imprisonment with or without the possibility of release or parole. ORS 163.150(1)(a).

### ii. Issues Submitted to the Jury

Upon the conclusion of the presentation of the evidence, the following issues must be submitted to the jury:

a. Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;

b. Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

c. If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased; and

d. Whether the defendant should receive a death sentence.

ORS 163.150(1)(b). *See also* ORS 163.150(1)(c) *et seq.* (providing further procedures for aggravated murder sentencing proceeding).

### 5. Murder

The court must sentence a person convicted of murder, who was at least 15 years of age at the time of committing the murder, to *life imprisonment*. ORS 163.115(5)(a).

### 6. Treason

The court must sentence a person convicted of treason to *life imprisonment*. ORS 166.005(3).
B. Minimum Confinement Penalties for Felony Convictions

1. Court May Impose a Minimum Term of Imprisonment
   In any felony case, the court may impose a minimum term of imprisonment of up to one-half of the sentence it imposes. ORS 144.110(1).

2. Aggravated Murder
   If sentenced to life imprisonment for an aggravated murder conviction, the court must order that the defendant be confined for a minimum of 30 years without the possibility of parole, release to post-prison supervision, release on work release or any form of temporary leave or employment at a forest or work camp. ORS 163.105(1)(c).

   a. Where State Does Not Seek Death Penalty
      When the defendant is found guilty of aggravated murder and the State does not seek the death penalty, the court must conduct a sentencing proceeding to determine whether the defendant must be sentenced to life imprisonment without the possibility of release or parole as described in ORS 163.105(1)(b) or life imprisonment as described in ORS 163.105(1)(c). ORS 163.150(3)(a)(B).

      In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim’s family. 2005 Or Laws, ch. 480, § 1(3)(a)(B) (effective Jan. 1, 2006).

      The court must instruct the jury that it will sentence the defendant to life imprisonment without the possibility of parole unless 10 or more jurors find that there are sufficient mitigating circumstances to warrant life with the possibility of parole. ORS 163.150(3)(b).

3. Murder
   When a defendant is convicted of murder, the court must order that the defendant be confined for a minimum of 25 years without the possibility of parole, release to post-prison supervision, release on work release or any form of temporary leave or employment at a forest or work camp. ORS 163.115(5)(b).
4. **Mandatory Minimums Do Not Violate Punishment Principles**

5. **Measure 11 Offenses**

   a. **Felonies Committed on or After April 1, 1995**
      The mandatory minimum sentences for the following felonies committed on or after April 1, 1995, are:

      - Murder—300 months;
      - Attempt or Conspiracy to Commit Aggravated Murder—120 months;
      - Attempt or Conspiracy to Commit Murder—90 months;
      - Manslaughter I—120 months;
      - Manslaughter II—75 months;
      - Assault I—90 months;
      - Assault II—70 months;
      - Kidnapping I—90 months;
      - Kidnapping II—70 months;
      - Rape I—100 months;
      - Rape II—75 months;
      - Sodomy I—100 months;
      - Sodomy II—75 months;
      - Unlawful Sexual Penetration I—100 months;
      - Unlawful Sexual Penetration II—75 months;
      - Sexual Abuse I—75 months;
      - Robbery I—90 months;
      - Robbery II—70 months.

   ORS 137.700(2)(a). *See OAR 213-009-0001(1)* (providing that if a mandatory prison sentence is required or authorized by statute, the sentence imposed must be that determinate sentence or the sentence under OAR, whichever is longer).
b. **Felonies Committed On or After October 4, 1997**

The mandatory minimum sentences for the following felonies committed **on or after October 4, 1997**, are:

- **Arson I** (when the offense represented a threat of serious physical injury)—90 months;
- **Using a Child in Display of Sexually Explicit Conduct**—70 months;
- **Compelling Prostitution**—70 months.

ORS 137.700(2)(b).

c. **Exceptions to Measure 11 Mandatory Minimums**

If the court, on the record at sentencing, makes the findings set forth in ORS 137.712(2), and finds that a substantial and compelling reason under the rules of the Oregon Criminal Justice Commission (OCJC) justifies a lesser sentence, it may impose a sentence according to the rules of the OCJC that is **less** than the minimum sentence that otherwise may be required by ORS 137.700 or ORS 137.707 for the following offenses:

- **Manslaughter II** as defined in ORS 163.125;
- **Assault II** as defined in ORS 163.175(1)(b);
- **Kidnapping II** as defined in ORS 163.225;
- **Robbery II** as defined in ORS 164.405;
- **Rape II** as defined in ORS 163.365;
- **Sodomy II** as defined in ORS 163.395;
- **Unlawful Sexual Penetration II** as defined in ORS 163.408; and
- **Sexual Abuse I** as defined in ORS 163.427(1)(a)(A).

ORS 137.712(1) (applies to Manslaughter II, Assault II, Kidnapping II, and Robbery II committed on or after **Oct. 4, 1997**); 2001 Or Laws, ch. 851, §§ 5-6 (ORS 137.712(1) applies to Rape II, Sodomy II, Unlawful Sexual Penetration II, and Sexual Abuse I committed on or after **Jan. 1, 2002**).

d. **Measure 11 Minimums Do Not Violate Punishment Principles**

The Measure 11 mandatory minimum sentences provided in ORS 137.700 and ORS 137.707 aimed at protecting the public do not violate Art I, § 15 of the Oregon Constitution.
State v. Lawler, 144 Or App 456, 468 (1996), rev den 326 Or 390 (1998). Note: Art I, § 15 has been amended since Lawler so as to remove the proscription of “vindictive justice” and to insert “safety of society”—strengthening the legality of mandatory minimums under that section.

e. Interaction of Measure 11 and Sentencing Guidelines

Measure 11 sentences are mandatory and thus not subject to the 200% and 400% limitations of OAR 213-012-0020; however, convictions for non-Measure 11 offenses arising during the same criminal episode are subject to the limitations and can affect the total consecutive sentences which the court may impose. State v. Langdon, 151 Or App 640, 647 (1997), aff’d 330 Or 72 (2000); see OAR 213-012-0020 (200% rule); OAR 213-008-0007(3) (400% rule).

The court must first impose sentences under the guidelines or Measure 11, whichever imposes at least the mandatory minimum prescribed by Measure 11, then calculate the maximum presumptive term available for all of the felony offenses under the guidelines. If the sum of Measure 11 sentences exceeds the maximum available term under OAR 213-012-0020, the court may not impose additional consecutive incarceration terms on non-Measure 11 offenses. State v. Langdon, 151 Or App 640, 647 (1997), aff’d 330 Or 72 (2000). See infra IX.C.12 “Measure 11—Consecutive Sentences” (discussing concurrent and consecutive sentences and Measure 11).

f. Constitutionality of Measure 11 Minimum Sentences


Note: Oregon’s appellate courts have repeatedly rejected arguments that specific sentences under specific circumstances are unconstitutionally disproportionate “as applied,” but have never suggested that a Ballot Measure 11 sentence cannot be disproportionate in violation of Art I, § 15 “as applied.” See supra I.D.1. “Constitutional Requirements.”
g. Measure 11 Minimums Supersede Guidelines
Where a Measure 11 mandatory minimum sentence exceeds the maximum sentence under the guidelines, the Measure 11 sentence requirement supersedes the sentencing guidelines limit. *State v. Ferman-Velasco*, 157 Or App 415, 422 (1998), *aff’d* 333 Or 422 (2002).

6. Measure 4—Denny Smith Act (ORS 137.635)

a. Determinate Sentence for Felony Convictions
Whenever the court sentences a convicted defendant for any of the following felonies (unless a death penalty is imposed) and the defendant has *previously been convicted of any of the following felonies*, the court must determine and impose a *determinate sentence* (the court cannot place the defendant on probation), and the defendant must serve the entire determinate sentence:

- **Murder** and any aggravated form of murder;
- **Manslaughter I**;
- **Assault I**;
- **Kidnapping I**;
- **Rape I**;
- **Sodomy I**;
- **Unlawful Sexual Penetration I**;
- **Burglary I**;
- **Arson I**; and
- **Robbery I**.


b. Mandatory Minimum Sentences Apply
Any mandatory minimum sentence otherwise provided by law also applies. ORS 137.635(1). *See also infra VII.H.2 “ORS 137.635—Denny Smith Act” (regarding sentencing under ORS 137.635 when a crime is classified as presumptive probation under the guidelines).*
c. ORS 137.635 Sentencing Considerations

- When applicable, the court has authority to sentence defendant under dangerous offender statute (ORS 161.725) or ORS 137.635, but not both. *State v. Andrews*, 118 Or App 107 (1993).

- If ORS 137.635 conditions are satisfied, application of statute is mandatory, and the court’s failure to do so is error. *State v. Clark*, 146 Or App 590, 593 (1997).

- When a conviction is subject to both the guidelines and ORS 137.635, the court may impose guidelines sentence and order that defendant be subject to release restrictions in ORS 137.635(1) with respect to that sentence. *State v. Shafer*, 116 Or App 667 (1992), rev *den* 315 Or 644 (1993).

- The ORS 137.635 “maximum sentence otherwise provided by law” restriction requires the court to make departure findings if it imposes a sentence in excess of presumptive guidelines sentence. *State v. Woodin*, 131 Or App 171 (1994).

- Defendant has been “previously convicted” under ORS 137.635 if found guilty by plea or verdict of prior listed crime before committing listed crime for which he or she currently is being sentenced. *State v. Allison*, 143 Or App 241, 256, *rev den* 324 Or 487 (1996); see *State v. Rosson*, 145 Or App 574, *rev den* 325 Or 369 (1997) (defendant previously was convicted of listed felony “as defined in” relevant Oregon statute because elements of felony committed in previous conviction were same as those for listed felony).

- When the court imposes sentence under ORS 137.635, it must indicate in the judgment that the defendant is subject to that section. ORS 137.635(3).

7. Presumptive Sentences for Repeat Property Offenders

Unless the rules of the Oregon Criminal Justice Commission prescribe a longer presumptive sentence, convictions for the following crimes result in a presumptive sentence of 19 months:

- **Aggravated Theft I** under ORS 164.057; or

- **Burglary I** under ORS 164.225—*if the person has:*

  a. A previous conviction for aggravated theft in the first degree under ORS 164.057, burglary in the first degree
under ORS 164.225, robbery in the second degree under ORS 164.405 or robbery in the first degree under ORS 164.415; or

b. **Four previous convictions** for any combination of the other crimes listed in ORS 137.717(2) (*see infra “Enumerated Offenses”).

ORS 137.717(1)(a). *See also ORS 137.717(5)(a), (b)* (clarifying when a conviction is deemed to have occurred for felonies committed on or after Nov. 1, 1989, and prior to Nov. 1, 1989); ORS 137.717 (1997) (providing that convictions of listed previous property crimes occurring on or after July 1, 1997, and before Jan. 1, 2000 result in imposition of mandatory minimum sentences); *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 603, *cert den* 522 US 994 (1997) (defining presumptive sentence).

Unless the rules of the Oregon Criminal Justice Commission prescribe a longer presumptive sentence, convictions for the following crimes result in a presumptive sentence of 13 months:

- **Theft I** under ORS 164.055;
- **Unauthorized Use of a Vehicle** under ORS 164.135;
- **Burglary II** under ORS 164.215;
- **Criminal Mischief I** under ORS 164.365;
- **Computer Crime** under ORS 164.377;
- **Forgery I** under ORS 165.013;
- **Identity Theft** under ORS 165.800;
- **Possession of a Stolen Vehicle** under ORS 819.300; or
- **Trafficking in Stolen Vehicles** under ORS 819.310—*if the person has:*
  
a. A previous conviction for aggravated theft in the first degree under ORS 164.057, unauthorized use of a vehicle under ORS 164.135, burglary in the first degree under ORS 164.225, robbery in the second degree under ORS 164.405, robbery in the first degree under ORS 164.415, possession of a stolen vehicle under ORS 819.300 or trafficking in stolen vehicles under ORS 819.310; or
b. Four previous convictions for any combination of the other crimes listed in ORS 137.717(2) (see infra “Enumerated Offenses”).

ORS 137.717(1)(b).

a. Enumerated Offenses
The crimes to which ORS 137.717(1) applies are:

- Theft II under ORS 164.045;
- Theft I under ORS 164.055;
- Aggravated Theft I under ORS 164.057;
- Unauthorized Use of a Vehicle under ORS 164.135;
- Burglary II under ORS 164.215;
- Burglary I under ORS 164.225;
- Criminal Mischief II under ORS 164.354;
- Criminal Mischief I under ORS 164.365;
- Computer Crime under ORS 164.377;
- Forgery II under ORS 165.007;
- Forgery I under ORS 165.013;
- Criminal Possession of a Forged Instrument II under ORS 165.017;
- Criminal Possession of a Forged Instrument I under ORS 165.022;
- Fraudulent Use of a Credit Card under ORS 165.055;
- Identity Theft under ORS 165.800;
- Possession of a Stolen Vehicle under ORS 819.300;

and

- Trafficking in Stolen Vehicles under ORS 819.310.

ORS 137.717(2).

b. Alternatives to the Presumptive Sentence
The court may impose a sentence other than the presumptive sentence provided by ORS 137.717(1) if the court imposes:

1. A longer term of incarceration than is otherwise required or authorized by law; or
2. A departure sentence authorized by the rules of the Oregon Criminal Justice Commission based upon findings of substantial and compelling reasons.


8. **Presumptive Sentences for Repeat Felony Sex Offenders**
   The presumptive sentence for a sex crime that is a felony is **life imprisonment** without the possibility of release or parole if the defendant has been sentenced for sex crimes that are felonies at least two times prior to the current sentence. ORS 137.719(1).

   a. **Alternative to the Presumptive Sentence**
      The court may impose a sentence other than the presumptive sentence provided by ORS 137.719(1) if the court imposes a departure sentence authorized by the rules of the Oregon Criminal Justice Commission based upon findings of **substantial and compelling reasons**. ORS 137.719(2).

9. **Minimum Sentence for Assaulting a Public Safety Officer**
   A person convicted of assaulting a public safety officer—a Class C felony—must be sentenced to not less than 7 days of imprisonment and may not be granted bench parole or suspension of sentence nor released on a sentence of probation before serving at least seven days of the sentence of confinement. ORS 163.208(3)(a).

   If the victim is a **peace officer**, the person must be sentenced to not less than 14 days of imprisonment and may not be granted bench parole or suspension of sentence nor released on a sentence of probation before serving at least 14 days of the sentence of confinement. ORS 163.208(3)(b).

10. **Felony DUII Conviction**
    In addition to any fine or other penalty, a felony DUII conviction under ORS 813.010(5) requires the court to impose and not suspend execution of a sentence requiring the person either to:

    a. Serve at least **48 hours of imprisonment** (which must be served consecutively unless justice requires otherwise); or

    b. Perform not less than **80 hours of community service** pursuant to ORS 137.129(4).

ORS 813.020(2).
11. Presumptive Sentence for Delivery of Methamphetamine

Unless the OCJC rules prescribe a longer presumptive sentence, the presumptive sentence for delivery of methamphetamine under 2005 Or Laws, ch. 708, §§ 16 or 17 (effective Aug. 16, 2005) is 19 months if the person has two or more previous convictions for any combination of:

a. Delivery or manufacture of methamphetamine;

b. Delivery or manufacture of methamphetamine within 1,000 feet of a school; or

c. Possession of a precursor substance with intent to manufacture a controlled substance.


a. Alternatives to the Presumptive Sentence

The court may impose a sentence other than the presumptive sentence provided by 2005 Or Laws, ch. 708, § 8(1)(c) if the court imposes:

1. A longer term of incarceration than is otherwise required or authorized by law; or

2. An upward or downward durational departure sentence authorized by law or the rules of the OCJC based upon findings of substantial and compelling reasons (unless otherwise noted in 2005 Or Laws, ch. 708, § 8(1)(c)).


C. Maximum Confinement Penalties for Misdemeanor Convictions

1. “Misdemeanor” Described

A crime is a misdemeanor if it is so designated in any statute of this state or if a person convicted thereof may be sentenced to a maximum term of imprisonment of not more than one year. ORS 161.545.

2. Maximum Prison Terms for Misdemeanors

Sentences for misdemeanors must be for a definite term of imprisonment, which the court must fix within the following maximum limitations:
• Class A misdemeanor—1 year;
• Class B misdemeanor—6 months;
• Class C misdemeanor—30 days;
• Unclassified misdemeanors—as provided in the statute defining the offense.

ORS 161.615. See ORS 161.555(3) (providing that any offense defined by statute that does not specify its classification or its penalty is a Class A misdemeanor); State v. Rice, 114 Or App 101, 106-07, rev den 314 Or 574 (1992) (discretionary misdemeanor terms are not rendered disproportionate because of existence of felony sentencing guidelines); State v. Miller, 114 Or App 235 (1992) (sentencing guidelines do not apply to misdemeanors).

3. Local Confinement as a Special Condition of Probation
For misdemeanors committed on or after Nov. 1, 1989, as a special condition of probation the court may impose confinement in the county jail or restrict the probationer to his or her own residence, or a combination thereof for a period not to exceed the lesser of one year or one-half of the maximum period of confinement that could be imposed for the offense. ORS 137.540(2)(a).

D. Minimum Confinement Penalties for Misdemeanor Convictions
1. Offenses Involving Alcoholic Liquors
   a. Providing Alcohol to a Minor
      Upon a third or subsequent conviction of making alcohol available to a person under the age of 21, the court must impose at least a mandatory minimum sentence of not less than 30 days of imprisonment (plus a fine of $1,000). ORS 471.410(4)(c).
   
   b. Providing Alcohol to a Visibly Intoxicated Person
      Upon a third or subsequent conviction of selling, giving or otherwise making available alcohol to any person who is visibly intoxicated, the court must impose at least a mandatory minimum sentence of not less than 30 days of imprisonment (plus a fine of $1,000). ORS 471.410(4)(c).
   
   c. Additional Sanctions
      The court may not waive or suspend imposition or execution of the mandatory minimum sentence required by ORS 471.410(4), and, in addition to the mandatory
sentence, may require the violator to make restitution for any damages to property where the alcoholic liquor was illegally consumed or may require participation in volunteer service to a community service agency. ORS 471.410(5).

2. Misdemeanor DUII Conviction

When a person is convicted of DUII in violation of ORS 813.010, in addition to any fine or other penalty, the court must impose and not suspend execution of a sentence requiring the person either to:

a. Serve at least 48 hours of imprisonment (which must be served consecutively unless justice requires otherwise); or

b. Perform not less than 80 hours of community service pursuant to ORS 137.129(4).

ORS 813.020(2). See State v. Taylor, 115 Or App 76, 78 (1992) (“[T]he specific requirement under ORS 813.020(2) that DUII offenders serve at least 48 hours imprisonment or perform community service permits imposition of a jail term as a sentence or as a condition of probation for that offense.”); State v. Oary, 112 Or App 296 (1992).

E. Place of Confinement

1. Felony Convictions

a. Commitment to the Department of Corrections

If the court imposes imprisonment in excess of 12 months for a felony conviction, the court must commit defendant to the Department of Corrections (DOC) and may not designate the correctional facility in which the defendant is to be confined. ORS 137.124(1)(a). See State v. Stewart, 6 Or App 264 (1971); Bartholomew v. Reed, 477 F Supp 223, 231 (D. Or. 1979), aff’d in part, rev’d in part on other grounds 665 F2d 915 (9th Cir. 1982) (inmates have no right to choose or remain at a certain institution or any justifiable expectation that they will not be transferred except for misconduct).

b. Commitment to the County

If the court imposes imprisonment of 12 months or less for a felony conviction, the court must commit the defendant to the legal and physical custody of the supervisory authority of the county in which the crime of conviction occurred. ORS 137.124(2)(a).
However, notwithstanding ORS 137.124(2)(a), when the court imposes imprisonment of 12 months or less for a felony conviction and orders it to be served consecutively to a term of incarceration exceeding 12 months that was imposed for a prior or contemporaneous felony conviction, the court must commit the defendant to the legal and physical custody of the DOC. ORS 137.124(2)(b).

2. Misdemeanor Convictions

a. Commitment to the County
   If the court imposes imprisonment for a misdemeanor, it must commit the defendant to the custody of the supervisory authority of the county in which the crime of conviction occurred. ORS 137.124(4). See OAR 213-003-0001(19) (defining “supervisory authority”).

b. Imprisonment When County Jail is not Suitable
   Whenever it appears to the court that there is no sufficient jail of the proper county suitable for the confinement of the defendant, the court may order the confinement of the defendant in the jail of an adjoining county or, if there is no sufficient and suitable jail in the adjoining county, then in the jail of any county in the state. ORS 137.140; ORS 137.330(1) (providing that the proper county for imprisonment is that where the judgment was given, except on a change of venue, in which case the proper county is that where the action was commenced). See State v. Leathers, 271 Or 236 (1975) (discussing intent of ORS 137.140 in relation to court’s authority to order prisoner to serve sentence in place other than county of conviction).

F. Termination of Court’s Jurisdiction
   Once the defendant begins to serve a sentence, the court lacks jurisdiction to modify or vacate that sentence in any manner. State v. Highland, 28 Or App 251, 254 (1977); State v. Jacobs, 200 Or App 665, 674-75 (2005) (trial court retained authority to modify sentence that had not been executed—“a prison sentence is not executed until the defendant is delivered to the custody of the Department of Corrections”).

G. Court May Not Impose Conditions of Parole
   The court may not impose conditions of parole as part of a sentence but may make express recommendations to the parole board for special conditions of parole. State v. Potter, 108 Or App 480 (1991); State v. Edwards, 103 Or App 410 (1990); OAR 213-011-0001; OAR 213-011-0003.
IV. FINANCIAL SANCTIONS

A. Fines for Felonies

1. Maximum Fines for Felonies
   The maximum fines for felonies are:
   - Murder or aggravated murder—$500,000;
   - Class A Felony—$375,000;
   - Class B Felony—$250,000;
   - Class C Felony—$125,000;
   - Unclassified felony—as provided in the statute defining the crime.
   ORS 161.625(1), (2).

a. Where Defendant Has Gained Money or Property
   If a person has gained money or property through the commission of a felony, in lieu of imposing the fine authorized for the crime under ORS 161.625(1) or (2), the court may sentence the defendant to pay a fixed amount, not exceeding double the amount of the defendant’s gain from the commission of the crime. ORS 161.625(3)(a).

2. Minimum Fine for Felony DUI
   In addition to any other sentence that may be imposed, the court must fine a person convicted of a fourth or subsequent DUII a minimum of $2,000 if the person is not sentenced to a term of imprisonment. ORS 813.010(6)(c); ORS 813.010(5) (making DUII a Class C felony if the defendant has been convicted of DUII at least three times in the 10 years prior to the date of the current offense and the current offense was committed in a motor vehicle).

B. Fines for Misdemeanors

1. Maximum Fines for Misdemeanors
   The maximum fines for misdemeanors are:
   - Class A Misdemeanor—$6,250;
   - Class B Misdemeanor—$2,500;
   - Class C Misdemeanor—$1,250;
• Unclassified misdemeanor—as provided in the statute defining the crime.

ORS 161.635(1).

a. Where Defendant Has Gained Money or Property
If a person has gained money or property through the commission of a misdemeanor, in lieu of imposing the fine authorized for the crime under ORS 161.635(1), the court may sentence the defendant to pay a fixed amount, not exceeding double the amount of the defendant’s gain from the commission of the offense. ORS 161.635(3).

2. Minimum Fines for Certain Misdemeanors

a. Offenses Involving Alcoholic Liquors

i. Providing Alcohol to a Minor
For a conviction of making alcohol available to a person under the age of 21 (a Class A misdemeanor), the court must impose at least a mandatory minimum fine as follows:

• Upon a first conviction—$350;
• Upon a second or subsequent conviction—$1,000.

ORS 471.410(4).

ii. Providing Alcohol to a Visibly Intoxicated Person
For a conviction of giving or otherwise making alcohol available to any person who is visibly intoxicated (a Class A misdemeanor), the court must impose at least a mandatory minimum fine as follows:

• Upon a first conviction—$350;
• Upon a second or subsequent conviction—$1,000.

ORS 471.410(4).

iii. Additional Sanctions
The court may not waive or suspend imposition or execution of the mandatory minimum fine required by ORS 471.410(4), and, in addition to the fine, may require the violator to make restitution for any damages to property where the alcoholic liquor was illegally consumed. ORS 471.410(5).
b. Misdemeanor DUI
In addition to any other sentence that may be imposed, the court must fine a person convicted of DUII as follows:

- Upon a first conviction, a minimum of $1,000;
- Upon a second conviction, a minimum of $1,500;
- Upon a third conviction, a minimum of $2,000 if the person is not sentenced to a term of imprisonment.

ORS 813.010(6).

i. Maximum Fine for DUII Committed in Vehicle With Minor
Notwithstanding ORS 161.635, $10,000 is the maximum fine that a court may impose on a person convicted of misdemeanor DUII if:

1. The current offense was committed in a motor vehicle; and
2. There was a passenger in the motor vehicle who was under 18 years of age and was at least three years younger than the person driving the motor vehicle.

ORS 813.010(7).

c. Criminal Driving While Suspended or Revoked
In addition to any other sentence that may be imposed, if a person is convicted of criminal driving while suspended or revoked and the underlying suspension resulted from DUII, the court must impose a fine of at least $1,000 if it is the person’s first conviction and at least $2,000 if it is the person’s second or subsequent conviction. ORS 811.182(5).

C. Fines for Violations

1. Maximum Fines for Violations
The maximum fines for violations are:

- Class A—$725;
- Class B—$360;
- Class C—$180;
- Class D—$90;
- The amount otherwise established by statute for any specific fine violation.
ORS 153.018(2).

a. Special Corporate Fines for Violations
   Unless a special corporate fine is specified in the statute creating the violation, the sentence to pay a fine for a violation committed by a corporation cannot exceed twice the fine established under ORS 153.018(2). ORS 153.018(3).

b. Where Defendant Has Gained Money or Property
   If a person or corporation has gained money or property through the commission of a violation, in lieu of imposing the fine authorized for the crime under ORS 153.018(2) or (3), the court may sentence the defendant to pay a fixed amount, not exceeding double the amount of the defendant's gain from the commission of the violation. ORS 153.018(4).

d. Possession of Less Than One Ounce of Marijuana
   Unlawful possession of less than one avoirdupois ounce of marijuana is a violation, punishable by a fine of not more than $1,000. 2005 Or Laws, ch. 708, § 33(3) (effective Aug. 16, 2005).

e. Delivery of Less Than Five Grams of Marijuana
   Unlawful delivery of less than five grams of the dried leaves, stems, or flowers of marijuana for no consideration is a violation, punishable by a fine of not more than $1,000. 2005 Or Laws, ch. 708, § 31(3)(b) (effective Aug. 16, 2005).

2. Minimum Fines for Violations
   Notwithstanding any other provision of law, the court may not defer, waive, suspend, or otherwise reduce the fine for a violation to an amount less than:

   • 75% of the base fine amount established for a Class A, B, C, D, or unclassified violation; or

   • 20% of the base fine amount established for a specific fine violation.

ORS 153.093(1). See also ORS 153.093(2)(b) (providing that ORS 153.093(1) does not allow a court to reduce any fine amount below the minimum established by statute for the offense); ORS 153.015 (defining “unclassified” and “specific fine” violations).
a. **Possession of Less Than One Ounce of Marijuana**
   Unlawful possession of less than one avoirdupois ounce of marijuana is a violation, punishable by a fine of not less than $500. 2005 Or Laws, ch. 708, § 33(3) (effective Aug. 16, 2005).

b. **Delivery of Less Than Five Grams of Marijuana**
   Unlawful delivery of less than five grams of the dried leaves, stems, or flowers of marijuana for no consideration is a violation, punishable by a fine of not less than $500. 2005 Or Laws, ch. 708, § 31(3)(b) (effective Aug. 16, 2005).

3. **Base Fine Amount for Violations**
   The court must impose minimum base fines for all violations. See ORS 153.125 to 153.145.

   a. **Calculating the Base Fine Amount**
      The base fine required in violation proceedings is the sum of a foundation amount calculated under ORS 153.125 to 153.145 plus the unitary and county assessments established under ORS 137.290 and 137.309 for the violation. The amount of the county assessment under ORS 137.309 must be calculated using the foundation amount determined under ORS 153.125 to 153.145, and may not be calculated using the maximum fine for the violation. ORS 153.125(1). See infra IV.F.2. “Assessments.”

   b. **Foundation Amount: General Violations**
      Except as otherwise provided in ORS 153.125 to 153.145, the foundation amount to be used in calculating the base fine required in a violation proceeding is 50% of the maximum fine established for the violation. ORS 153.125(2).

   c. **Foundation Amount: Specific Fine Violation**
      Except as otherwise provided in ORS 153.125 to 153.145, the foundation amount to be used for a specific fine violation in calculating the base fine required in a violation proceeding is the maximum fine provided for the violation. ORS 153.125(3).

   d. **Foundation Amount Can't be Less Than the Minimum Fine**
      If the law creating a violation establishes a minimum fine, and the foundation amount calculated for the violation under ORS 153.125 to 153.145 is less than the minimum fine for the violation, the foundation amount to be used in
calculating the base fine is the *minimum fine* established for the violation. ORS 153.125(4).

e. **Increased Foundation Amount for Certain Violations**
The foundation amount to be used in calculating the base fine under ORS 153.125 is *60% of the maximum fine* established for the violation if the enforcement officer issuing the citation notes on the citation that the offense was:

- A *substantial contributing factor to an accident* that resulted in property damage or personal injury; or
- That the violation created a *substantial risk of injury* to another person.

ORS 153.128(1). *See also* ORS 153.128(2), (3) (providing exceptions for a charge of careless driving under ORS 811.135 and a charge of illegal U-turn under ORS 811.365 under certain circumstances).

f. **Increased Foundation Amount for Certain Traffic Violations**
The foundation amount to be used in calculating the base fine under ORS 153.125 to 153.145 is *80% of the maximum fine* established for the violation if the enforcement officer issuing the citation notes on the citation that the offense occurred in:

- A *highway work zone* and is subject to the provisions of ORS 811.230;
- A *posted school zone* and is subject to the provisions of ORS 811.235; or
- A *safety corridor* and is subject to the provisions of section 5, chapter 1071, Oregon Laws 1999.

ORS 153.131. *See* 2003 Or Laws, ch. 100, § 1 (repealing 1999 Or Laws, ch. 1071, § 5 on January 1, 2008); 2003 Or Laws, ch. 100, § 2 (sunset safety corridor provisions on January 1, 2008). *Note:* 2001 Or Laws, ch. 421, § 1 amended 1999 Or Laws, ch. 1071, § 5 to specify that the court may not waive, reduce, or suspend the base fine amount or the minimum fine required for traffic violations that occurred in a designated highway safety corridor.

g. **Base Fines for Wildlife Law Violations**
The base fine amounts for a violation of wildlife laws or rules as described in ORS 496.992(2) are as follows:
• Violations that do not involve the taking of wildlife, except for violations of the nonresident licensing provisions of ORS 497.102 and 497.121 and the provisions of ORS 496.994—$75;

• Violations that involve the taking of nongame mammals or game birds, and size or quantity limits for fish and shellfish, except salmon, steelhead trout and sturgeon—$150;

• Violations that involve the taking of salmon, steelhead trout, sturgeon, wildlife not otherwise provided for, and all other wildlife offenses—$299.

ORS 496.951(1); ORS 153.134. See also ORS 496.951(3) (providing that a court may not establish a base fine amount for a violation of an offense described in ORS 496.951(1) other than the amount listed in that section).

h. Authority of Courts to Establish Higher Base Fine Amounts
ORS 153.125 to 153.145 establish minimum base fine amounts for violations—the court may adopt higher base fine amounts subject to its jurisdiction. ORS 153.142.

i. Base Fines are Rounded Off to the Nearest Dollar
Any base fine amount must be rounded off to the nearest dollar. ORS 153.145.

D. Maximum Fines for Corporations
If no special corporate fine is specified in the statute defining the offense, the maximum fines that can be imposed on a corporation for the following convictions are:

• Felony—$50,000;

• Class A misdemeanor or an unclassified misdemeanor for which a term of imprisonment of more than 6 months is authorized—$5,000;

• Class B misdemeanor or an unclassified misdemeanor for which the authorized term of imprisonment is not more than 6 months—$2,500;

• Class C misdemeanor or an unclassified misdemeanor for which the authorized term of imprisonment is not more than 30 days—$1,000;

• Offense outside the Oregon Criminal Code—as provided in the statute defining the offense.

ORS 161.655(1), (2).
1. **Where Defendant Corporation Has Gained Money or Property**
   If a corporation has gained money or property through the commission of an offense, in lieu of imposing the fine authorized for the crime under ORS 161.655(1) or (2), the court may sentence the corporation to pay a fixed amount, not exceeding *double the amount of the corporation’s gain* from the commission of the offense. ORS 161.655(3).

2. **Special Corporate Fines for Violations**
   Unless a special corporate fine is specified in the statute creating the violation, the sentence to pay a fine for a violation committed by a corporation cannot exceed twice the fine established under ORS 153.018(2). ORS 153.018(3).

**E. Restitution & Compensatory Fines**

1. **Restitution**
   When a person is convicted of a crime or a violation described in ORS 153.008 that has resulted in *economic damages*, the district attorney shall present evidence, prior to the time of sentencing, of the nature and amount of the damages. If the court finds from the evidence that a victim suffered pecuniary damages, in addition to any other sanction, the court must:

   a. Include in the judgment a requirement that the defendant pay the victim *restitution* in a specific amount that equals the full amount of the victim’s economic damages as determined by the court; or

   b. Include in the judgment a requirement that the defendant pay the victim restitution, and that the specific amount of restitution will be established by a supplemental judgment based upon a determination made by the court within 90 days of entry of the judgment. The court may extend the time within which the determination and supplemental judgment may be completed for good cause.


**Note**: Because restitution is an aspect of criminal law, *State v. Rosenbaum*, 57 Or App 11, 14 (1982), defendant’s civil right to a jury trial is not implicated. *State v. Hart*, 299 Or 128, 139 (1985) (concluding that a defendant is not entitled to a jury trial regarding the amount of restitution); *State v. McMillan*, 199 Or App 398, 400-02 (2005) (reaffirming Hart).
a. **Criminal Activity Must be Proven or Admitted**

“A trial court can order restitution only for monetary damages caused by a defendant’s criminal activity that is either proven or which the defendant admits.” *State v. Jones*, 113 Or App 425, 427 (1992) (concluding that, although defendant pled guilty to DUII, the trial court erred in imposing restitution because the State failed to prove that that criminal activity was the cause of the injuries suffered by the victim when it simply proved that the accident occurred while defendant was, by his own admission, driving while intoxicated—that fact standing alone was insufficient to prove what caused the damages). *See ORS 137.103(1)*; *State v. Howett*, 184 Or App 352, 356 (2002) (“The plain import of ORS 137.106 is that, when a person is convicted of a crime, the trial court may impose restitution for damages . . . arising out of the facts or events constituting that crime or any other criminal conduct admitted by the defendant.”); *State v. Boswell*, 52 Or App 535, 538, *rev den* 291 Or 419 (1981) (signing plea petition admitting culpability was sufficient to authorize restitution); *State v. Cox*, 35 Or App 169, 173 (1978) (concluding in theft case that where there was unresolved questions as to whether the defendant took the missing property defendant could not be ordered to make restitution for property she had not admitted or been convicted of taking).

b. **Criminal Activity Must be the “But For” Cause of Damages**

ORS 137.106 permits restitution as long as the damages were caused in a “but for” sense by the criminal activities for which defendant was convicted or other criminal conduct admitted. *State v. Stephens*, 183 Or App 392, 395-97 (2002); *State v. Bullock*, 135 Or App 303, 307 (1995) (“For purposes of restitution, causation is met by applying a ‘but for’ standard.”).

c. **Restitution Cannot be Imposed as Condition of Parole**

A sentencing court lacks the authority to order a defendant to pay restitution as a condition of parole. *State v. Gaines*, 103 Or App 646, 647 (1990) (interpreting judgment ordering defendant to make restitution “as a condition of parole” as a sentence to pay restitution but suspending payment until defendant is paroled). *See also State v. Kipp*, 52 Or App 1011, 1014 (1981); *State v. Secreto*, 54 Or App 709, 711 (1981).
d. **Payment of Restitution May be Resumed Upon Release**
Whenever an inmate who has been ordered to pay restitution under ORS 137.106, but with respect to whom payment of all or a portion of the restitution was suspended until the inmate’s release, is released, the State Board of Parole and Post-Prison Supervision may establish a schedule by which payment of the restitution must be resumed. ORS 144.275. See *State v. Ewing*, 36 Or App 573, 575 (1978).

e. **Counseling Costs May be Awarded as Restitution**
The court properly may order restitution that includes past counseling costs and anticipated future counseling costs. *State v. Allen*, 122 Or App 587, rev den 318 Or 97 (1993).

f. **Loss of Income May be Awarded as Restitution**
Loss of income may be included in an award of restitution, but not future impairment of earning capacity. 2005 Or Laws, ch. 564, § 1(2) (amending ORS 137.103(2); effective Jan. 1, 2006); ORS 31.710(2)(a) (defining “economic damages” to include “objectively verifiable monetary losses,” including loss of income).

g. **Expenses for Victim’s Care May be Awarded as Restitution**

h. **Finding Whether Victim Suffered Economic Damages Required—Effect on Civil Action**
The court must impose restitution if it finds from the evidence presented by the district attorney that a victim suffered economic damages. ORS 137.106(1) as amended by 2005 Or Laws, ch. 564, § 2 (effective Jan. 1, 2006); ORS 31.710(2)(a) (defining “economic damages”). If the court is unable to find from that evidence that a victim suffered economic damages, it must make a finding on the record to that effect. ORS 137.106(2) as amended by 2005 Or Laws, ch. 564, § 2 (effective Jan. 1, 2006). No finding made by the court or failure of the court to make a finding under ORS 137.106(1) limits or impairs the rights of a person injured to sue and recover damages in a civil action as provided in ORS 137.109. ORS 137.106(3).
Payment of Restitution May be Delayed for Inability to Pay
If a judgment orders the payment of restitution pursuant to ORS 137.106(1), the court may delay the enforcement of monetary sanctions, including restitution, only if the defendant alleges and establishes to the satisfaction of the court the defendant’s inability to pay the judgment in full at the time the judgment is entered. ORS 137.106(4).

Payment Schedule When Defendant is Unable to Pay
If the court finds that the defendant is unable to pay, the court may establish or allow an appropriate supervising authority to establish a payment schedule, taking into consideration the financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant. ORS 137.106(4).

Defendant May Object and Be Heard
If the defendant objects to the imposition, amount or distribution of the restitution, the court must allow the defendant to be heard on such issue at the time of sentencing or at the time the court determines the amount of restitution. ORS 137.106(5). See State v. Gray, 153 Or App 296, 299, modified 155 Or App 162 (1998) (court erred in amending judgment to include restitution without giving notice to defendant and reconvening hearing).

Compensatory Fines
Unless the issue of punitive damages has been previously decided on a civil case arising out of the same act and transaction, the court may order that the defendant pay any portion of a fine imposed as a penalty for the commission of a crime resulting in injury separately to the clerk of the court as a compensatory fine, if the victim:

a. Suffered economic damages as a result of the offense; and

b. Has a remedy by civil action.

ORS 137.101(1); 2005 Or Laws, ch. 564, § 1(4) (amending ORS 137.103(4); effective Jan. 1, 2006); State v. Barkley, 315 Or 420, 437-38, cert den 510 US 837 (1993). See generally State v. McGinnis, 105 Or App 154, 156 (1991) (concluding that imposition of a compensatory fine does not give a defendant the right to a civil jury determination of criminal sanctions).
a. **Direct Physical Injury Not Required**
ORS 137.101 does not require that the person or victim “injured” as a result of a defendant’s criminal activities must have suffered a “direct physical injury” thereby. *State v. Barkley*, 315 Or 420, 437, *cert den* 510 US 837 (1993).

b. **Compensatory Fines May be in Addition to Restitution**
The court may assess a compensatory fine in addition to restitution. ORS 137.101(2).

c. **Payment of Compensatory Fine May be Resumed on Parole**
Whenever an inmate who has been ordered to pay a compensatory fine under ORS 137.101, but with respect to whom payment of all or a portion of the fine was suspended until the inmate’s release, is released, the State Board of Parole and Post-Prison Supervision may establish a schedule by which payment of the fine must be resumed. ORS 144.275.

F. **Costs & Assessments**

1. **Costs**

a. **Costs Specially Incurred in Prosecuting Defendant**
The court may impose *costs and expenses specially incurred by the State in prosecuting the defendant*, including a reasonable attorney fee for appointed counsel pursuant to ORS 135.045 or 135.050 and a reasonable amount for fees and expenses incurred pursuant to preauthorization under ORS 135.055. ORS 161.665(1). *See State v. Armstrong*, 44 Or App 219, 223, *rev den* 289 Or 45 (1980) (expense of transporting defendant to Oregon after waiver of extradition was a cost specially incurred by State in prosecuting defendant and was properly assessed as part of the sentence); *but see State v. Gile*, 161 Or App 146, 151-55 (1999) (court cannot require person found guilty except for insanity to pay state expenses).

i. **Chargeable Expenses Must Occur After Formal Charge**
Costs charged to the defendant must be for expenses incurred after defendant has been charged with a crime. *State v. Twitty*, 85 Or App 98, 105, *rev den* 304 Or 56 (1987) (concluding that costs for a psychiatric evaluation made before defendant was indicted for the murder could not properly be assessed against him); *State v. Haynes*, 61 Or App 43, 46 (1982) (concluding
that expenses incurred by the State following a formal charge may properly be imposed against the defendant).

b. Repayment of Costs For Cases Filed After January 1, 1998
In cases in which the accusatory instrument was filed after January 1, 1998, and in which the court appointed counsel to represent the defendant, the court may include in its judgment an order that the defendant repay in full or in part the administrative costs of determining the defendant’s eligibility for appointed counsel and the costs of legal and other services related to providing appointed counsel. ORS 151.505(1) (Application/Contribution Program). The court may not order the person to pay such costs unless the person is or may be able to pay them. ORS 151.505(4).

i. Reasonable Attorney Fee for Appointed Counsel
Costs repayable under ORS 151.505(1) include a reasonable attorney fee for appointed counsel and a reasonable amount for expenses authorized under ORS 135.055. ORS 151.505(2). A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the Public Defense Services Commission under ORS 151.216. ORS 161.665(1).

c. Impermissible Costs
Costs do not include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. ORS 161.665(1). See State v. Washburn, 48 Or App 157, 159-60 (1980); State v. Marino, 25 Or App 817 (1976); State v. Fuller, 12 Or App 152, 157 (1973), aff’d 417 US 40 (1974).

d. Court Must Consider Defendant’s Ability to Pay
The court may not sentence a defendant to pay costs under ORS 161.665 unless the defendant is or may be able to pay them. In determining the amount and method of payment of costs, the court must consider the financial resources of the defendant and the nature of the burden that payment of costs will impose. ORS 161.665(4). See State v. San Antonio, 96 Or App 282 (1989) (court erred in failing to consider defendant’s ability to pay before imposing costs); State v. Mitchell, 48 Or App 485, 490 (1980) (when court found defendant “was able-bodied and had demonstrated an ability to make sufficient earnings to pay the cost requested,” record indicated defendant earned an income
prior to his arrest, and defendant would likely be paroled before serving his full sentence, adequate basis existed for initial imposition of costs).

e. **Court May Remit Costs or Modify Payment**
   If a defendant who is not in contempt for failing to pay costs under ORS 161.665 petitions the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675, if it appears to the satisfaction of the court that payment of the amount due will impose *manifest hardship* on the defendant or the immediate family of the defendant. ORS 161.665(5).

f. **Costs of Collection**
   The court must add to any judgment in a criminal action that includes a monetary obligation the fees required by ORS 1.202. ORS 137.118(4) as amended by 2005 Or Laws, ch. 501, § 2 (effective Jan. 1, 2006).

i. **Account Administration Fees**
   The court must add a fee of not less than $25 and not more than $50 to any judgment that includes a monetary obligation that the court or judicial branch is charged with collecting. The fee must be added to cover the cost of establishing and administering an account for the debtor and may be added only if the court gives the defendant a period of time in which to pay the obligation after the financial obligation is imposed. ORS 1.202(1).

ii. **Collection Fees**
   To cover the costs of collection, a court that uses the Department of Revenue or a private collection agency must add a fee (not to exceed the actual costs of collection) to any judgment referred for collection that includes a monetary obligation the court is charged with collecting. ORS 1.202(2).

iii. **Administration and Collection Fees May Not be Waived**
   The court may not waive or suspend the fees required by ORS 1.202(1) or (2). ORS 1.202(3).

g. **Costs of Defense Witnesses**
   In conjunction with ORS 136.602, ORS 161.665 clearly provides the trial court with the authority to order a
defendant to repay witness fees that have been paid in the first instance by the State. *State v. Ferman-Velasco*, 157 Or App 415, 418 (1998), aff’d 333 Or 422 (2002).

h. **Costs of Indigent Appellant**
   
   Except as provided in ORS 151.505, the court, after the conclusion of an appeal of its initial judgment of conviction, may include in its general judgment, or enter a supplemental judgment that includes, a requirement that a convicted defendant pay as costs a reasonable attorney fee for counsel appointed pursuant to ORS 138.500 (providing for appointment of counsel for indigent appellant). ORS 161.665(2).

2. **Assessments**

   Whenever the court imposes a fine, including a suspended fine, for a violation of law (except parking violations), certain assessments are required.

a. **Unitary Assessments For Offenses Committed on or After October 23, 1999**

   In all cases of conviction for the commission of a crime or violation, excluding parking violations, the court must impose, in addition to any other monetary obligation, a *unitary assessment* in the nature of a fine in an amount as follows:

   • $107 on a felony conviction;
   • $67 on a misdemeanor conviction;
   • $97 on a DUII conviction;
   • $37 on any violation.


i. **Additional Amounts for Certain Offenses**

   For offenses committed on or after July 1, 1995, the unitary assessment amount provided in ORS 137.290(1) must include an additional:

   • $42 if defendant was driving a vehicle requiring a commercial driver license and the conviction was for violating ORS 811.100 (violation of basic speed rule) or ORS 811.111 (violation of speed limit); and
   • $500 for any ORS Chapter 163 offenses.
ORS 137.290(2); 1995 Or Laws, ch. 555, § 7.

ii. **When Court May Waive Unitary Assessment**

The court may waive payment of the unitary assessment, in whole or in part, if, upon consideration, the court finds that payment of the assessment or portion thereof would impose upon the defendant a total monetary obligation *inconsistent with justice in the case*. In making its determination, the court must consider:

a. The financial resources of the defendant and the burden that payment of the unitary assessment will impose, with due regard to the other obligations of the defendant; and

b. The extent to which such burden can be alleviated by allowing the defendant to pay the monetary obligations imposed by the court on an installment basis or on other conditions to be fixed by the court.

ORS 137.290(3). *See also ORS 137.290(4)* (allowing court to waive all or part of the unitary assessment required under ORS 137.290(1) or ORS 137.290(2)(a) when the court does not impose a fine).

b. **County Assessments For Offenses Committed on or After January 1, 2006**

Whenever the court imposes a sentence of a fine, term of imprisonment, probation or any combination thereof, including a sentence imposed and thereafter suspended, as a penalty for a crime or a violation (excluding parking violations), a *county assessment* in addition to such sentence must be collected. The assessment is not part of the penalty or in lieu of any part thereof, and the amount must be as follows:

- $5, when the fine or forfeiture is $5 to $14.99.
- $15, when the fine or forfeiture is $15 to $49.99.
- $18, when the fine or forfeiture is $50 to $99.99.
- $25, when the fine or forfeiture is $100 to $249.99.
- $30, when the fine or forfeiture is $250 to $499.99.
- $66, when the fine or forfeiture is $500 or more.

ORS 137.309(1), (2) as amended by 2005 Or Laws, ch. 804, § 6 (effective Jan. 1, 2006).Former county assessment fee schedules:

- For offenses committed on or after **Nov. 1, 1994**, but before **Jan. 1, 2006**: $5 to $14.99—$5; $15 to $49.99—$12; $50 to $99.99—$14; $100 to $249.99—$20; $250 to; $499.99—$24; $500 or more—$59. *See ORS 137.309 (2003).*

- For offenses committed on after **July 1, 1991**, but before **Nov. 1, 1994**: $5 to $14.99—$3; $15 to $49.99—$7; $50 to $99.99—$8; $100 to $249.99—$12; $250 to; $499.99—$14; $500 or more—$35. *See ORS 137.309 (1991).*
When County Assessment May be Waived

The court may waive the assessment, in whole or in part, if it finds that:

a. The defendant is indigent; or

b. Imposition of the assessment would constitute an undue hardship.

ORS 137.309(4).

c. DUII Assessment

In addition to any fine or other penalty, the court must impose a $130 fee on a DUII conviction, unless the court waives the fee for indigent defendants or makes provision for installment payments. ORS 813.020(1)(a); ORS 813.030.

G. Standards for Imposing Financial Obligations

1. Standards for Imposing Fines

In determining whether to impose a fine and its amount, the court must consider:

a. Defendant’s financial resources;

b. Burden that payment of fine will impose, with due regard to defendant’s other obligations; and

c. Defendant’s ability to pay fine by installments or on other conditions to be fixed by the court.


2. Standards for Imposing Restitution

a. Court May Delay Payment of Restitution

If the defendant alleges and establishes an inability to pay the judgment in full at the time it is entered, the court may delay the enforcement of restitution upon finding that the defendant is unable to pay and may establish, or allow an appropriate supervising authority to establish, a payment schedule, taking into consideration:

1. The financial resources of the defendant; and

2. The burden that payment of restitution will impose.

ORS 137.106(4).
b. **Amount of Restitution Must be Reasonable**

i. **Statutory Maximum Amount Under Apprendi & Blakely**
ORS 137.106(1) “does not permit any finding of the court to result in a sentence beyond the statutory maximum. Rather, the statute authorizes the court to require the payment of restitution as part of the judgment of conviction in an amount ‘that equals the full amount of the victim’s pecuniary damages as determined by the court.’” ORS 137.106(1)(a). The statutory maximum is, in other words, the amount of pecuniary damages as determined by the court, and no more.” *State v. McMillan*, 199 Or App 398, 403, (2005) (concluding that *Apprendi* and *Blakely* were not violated—assuming *arguendo* their application to restitution—where trial court found that defendant was responsible for the theft of 89 head of cattle and accordingly ordered defendant to pay $85,969 in restitution based on the value of the cattle). *See also State v. Gutierrez*, 197 Or App 496, 505, (2005) (“Because restitution does not implicate liberty interests in the same manner as incarceration, *Apprendi* and *Blakely* arguably do not apply to its imposition.”); *Blakely v. Washington*, 542 US 296, 124 S Ct 2531 (2004); *Apprendi v. New Jersey*, 530 US 466 (2000).

**Note:** 2005 Or Laws, ch. 564, § 2 (effective Jan. 1, 2006) amends ORS 137.106 to apply to “economic” damages rather than “pecuniary” damages).

c. **Definitions**
The statutory definitions concerning restitution include the following:

- **Restitution** is full, partial, or nominal repayment of *economic damages* to a victim and is independent of and may be awarded in addition to a compensatory fine. 2005 Or Laws, ch. 564, § 1(3) (amending ORS 137.103(3); effective Jan. 1, 2006). *See also ORS* 31.710(2)(a) (defining “economic damages”).

- **Economic damages** are objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services,
burial and memorial expenses, loss of income and past impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less. 2005 Or Laws, ch. 564, § 1(2) (amending ORS 137.103(2); effective Jan. 1, 2006); ORS 31.710(2)(a) (defining “economic damages”).

- **Criminal activities** include any offenses for which defendant is convicted or any other criminal conduct admitted by the defendant. ORS 137.103(1). See *State v. Zimmerman*, 37 Or App 163, 166 (1978).

- **Victim** includes:
  1. The person against whom the defendant committed the criminal offense, if the court determines that the person suffered economic damages as a result of the offense;
  2. Any other person whom the court determines has suffered economic damages as a result of the defendant’s criminal activities;
  3. The **Criminal Injuries Compensation Account**, if it has expended moneys on behalf of the victim against whom the defendant committed the criminal offense (see *State v. Spino*, 143 Or App 619 (1996)); and
  4. An **insurance carrier**, if it has expended moneys on behalf of the victim against whom the defendant committed the criminal offense (see *State v. Divers*, 51 Or App 351, 355 (1981)).

ORS 137.103(4) as amended by 2005 Or Laws, ch. 564, § 1(4) (effective Jan. 1, 2006). **Note:** Any **coparticipant** in the defendant’s criminal activities is not a “victim.” 2005 Or Laws, ch. 564, § 1(5). A “victim” may include a city or municipality, or a corporation. See *State v. Pettit*, 73 Or App 510, 514, rev’d *den* 299 Or 522 (1985) (city).

d. **Expiration of Restitution Remedies**
Judgment remedies for a judgment in a criminal action that includes a money award for restitution expire **50 years** after
the entry of the judgment. ORS 18.180(4) as amended by 2005 Or Laws, ch. 618, § 1 (effective Jan. 1, 2006).

e. Further Considerations Concerning Restitution

1. The court must:
   - Determine the direct victim(s) and apportion the restitution. State v. Divers, 51 Or App 351, 354 (1981); State v. Calderilla, 34 Or App 1007, 1010 (1978).
   - Set a specific amount of restitution that equals the full amount of the victim’s economic damages as determined by the court. ORS 137.106(1)(a), (b) as amended by 2005 Or Laws, ch. 564, § 2 (effective Jan. 1, 2006).
   - Allow the defendant to be heard at the time of sentencing or at the time the court determines the amount of restitution if the defendant objects to the imposition, amount, or distribution of restitution. ORS 137.106(5).

2. The court may:
   - Delay the enforcement of restitution if the defendant is unable to pay. If the court finds that the defendant is unable to pay, the court may establish or allow an appropriate supervising authority to establish a payment schedule that takes into account the financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant. ORS 137.106(4).
   - Hold a defendant liable for a reward paid as a result of the defendant’s convicted criminal activity. State v. Hazlitt, 77 Or App 344, 349 (1986).
   - Impose a restitution obligation that extends beyond the period of defendant’s sentence, including post-prison supervision (but not beyond a maximum duration of 50 years, as with civil judgment). State v. Motschenbacher, 163 Or App 202, 204-05 (1999); ORS 18.180(4) as amended by 2005 Or Laws, ch. 618, § 1 (effective Jan. 1, 2006); ORS 18.194(3) as...

- Treat the replacement value of stolen property as the proper measure of economic damages for restitution purposes. *State v. Wise*, 150 Or App 449, 455 (1997).


3. The court may not:


- Order restitution as a condition of parole or set the manner of payment on parole. *State v. Kipp*, 52 Or App 1011, 1014 (1981).

- Order defendant to borrow money from a third person not within the court’s jurisdiction in order to pay restitution. *State v. Gammond*, 75 Or App 27, 29 (1985).

- Delegate its authority to determine the amount of restitution. *State v. Rose*, 45 Or App 879 (1980); *State v. Johnson*, 39 Or App 711, 714 (1979), *aff’d in part, rev’d in part on other grounds* 289 Or 359 (1980); see also ORS 137.160(1).

3. **Standards for Imposing Compensatory Fines**

   The court must construe the statutory authorization for compensatory fines liberally in favor of the victim(s). ORS 137.101(1).

a. **Defendant’s Ability to Pay**

   The court must consider the defendant’s ability to pay as a prerequisite to imposing a compensatory fine. *State v. Packer*, 140 Or App 488 (1996).

b. **Pecuniary Loss**

   Pecuniary loss must be shown before the court may impose a compensatory fine. *State v. Smith*, 116 Or App 558, 563 (1992), *adhered to* 120 Or App 438 (1993); see *State v. Donahue*, 165 Or App 143, 146 (2000) (mere fact that victim is scheduled to go to counseling does not establish
pecuniary loss from defendant’s criminal activities; court improperly awarded compensatory fine).

c. **When Pecuniary Loss Compensable**


4. **Standards for Imposing Costs**

a. **Defendant’s Ability to Pay**

The court may not sentence a defendant to pay costs under ORS 161.665 unless the defendant is or may be able to pay them. In determining the amount and method of payment of costs, the court must consider the:

1. Financial resources of the defendant; and
2. Nature of the burden that payment of costs will impose.

ORS 161.665(4).

5. **Standards for Imposing Unitary Assessments**

a. **Court May Waive Unitary Assessment**

The court may waive payment of the unitary assessment, in whole or in part, if, upon consideration, the court finds that payment of the assessment or portion thereof would impose upon the defendant a total monetary obligation *inconsistent with justice in the case*. ORS 137.290(3).

b. **Considerations by Court**

In deciding whether to waive payment of the unitary assessment, the court must consider:

1. The financial resources of the defendant;
2. The burden that payment of the unitary assessment will impose, with due regard to the other obligations of the defendant; and
3. The extent to which such burden can be alleviated by allowing the defendant to pay the monetary obligations imposed by the court on an installment basis or on other conditions to be fixed by the court.

ORS 137.290(3). *See also* ORS 137.290(4) (allowing court to waive all or part of the unitary assessment required under
ORS 137.290(1) or ORS 137.290(2)(a) when the court does not impose a fine).

6. Standards for Imposing Attorney Fees

a. Defendant's Ability to Pay
The court may not order repayment of reasonable attorney fees under ORS 161.665 (costs specially incurred in prosecuting defendant including reasonable attorney fee for appointed counsel) or ORS 151.505 (costs related to provision of appointed counsel for cases filed after January 1, 1998), unless the court finds that the defendant is or may be able to pay them. ORS 161.665(4); ORS 151.505(4).

b. Determining Amount and Method of Payment
In determining the amount and method of payment, the court must take into account:

1. Defendant’s financial resources; and
2. The nature of the burden that payment will impose.

ORS 161.665(4); ORS 151.505(4).

c. A Reasonable Attorney Fee Determined by PDSC
A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the Public Defense Services Commission under ORS 151.216. ORS 161.665(1).

d. Remission of Payment
A defendant who has been ordered to pay reasonable attorney fees under ORS 161.665 or ORS 151.505, may petition the court for remission of payment, and the court may remit all or part of the amount due if payment will impose manifest hardship on the defendant or the defendant’s immediate family. ORS 161.665(5); ORS 151.505(5).

H. Time and Method of Payment of Fines, Restitution, & Costs
When defendant, as part of a sentence or as a probation condition, is required to pay a sum of money for any purpose, the court may order payment immediately, within a specified time, or in installments. If defendant is imprisoned, payment is enforceable if the court expressly finds the defendant has assets to pay all or part of the amounts owed. ORS 161.675(1).

If defendant is sentenced to probation or has imposition or execution of sentence suspended, the court may make payment
of the money a condition of probation or suspension of sentence. ORS 161.675(2). The court (or court clerk or probation officer if directed by the court) may establish a schedule of payments to satisfy the obligation, and the court must review the schedule of payments upon defendant’s motion at any time, so long as the obligation remains unsatisfied. ORS 161.675(3).

1. Effect of Sentencing Guidelines
Sentencing guidelines have no effect upon the court’s ability to impose any restitution, fine, fee or other monetary obligation authorized or required by law. OAR 213-009-0003.

I. Enforcement of Payment

1. Show Cause Motion
Upon default on payment, the court on its own motion or on the DA’s motion may require defendant to show cause why default should not be treated as contempt. ORS 161.685(1).

2. Citation or Arrest Warrant
The court may issue a show cause citation or arrest warrant for defendant’s appearance. ORS 161.685(1).

3. Contempt Sanctions
The court may impose contempt sanctions authorized by ORS 33.105, except that sanctions must not exceed the shorter of:

• 1 day for each $25 of the fine or restitution;
• 30 days on a violation or misdemeanor; or
• 1 year on any other case.
ORS 161.685(2); ORS 161.685(4).

4. Revocation of Probation
The court may revoke probation only if it specifically finds that:

• Defendant has the present financial ability to repay without hardship to the defendant or the defendant’s family; and
• Defendant’s failure to repay is intentional contumacious default.

State v. Fuller, 12 Or App 152, 159 (1973), aff’d 417 US 40 (1974); see State v. Meyer, 31 Or App 775, 779 (1977) (evidence that defendant had income during period of nonpayment or could have sought employment to produce
income during period of nonpayment was sufficient finding by court to revoke probation).

5. No Contempt Finding
Even if no contempt is found, the court still may enter an order:
- Allowing additional time for payment;
- Reducing payment or installment amounts; or
- Revoking all or part of the financial obligation.
ORS 161.685(5).

6. Collection of Judgments
The court may order a default collected by any means authorized by law for collecting judgments, including a levy of execution or garnishment. ORS 161.685(6). See Wilkins v. Frink, 158 Or App 76, 79, rev den 328 Or 418 (1999) (statute does not require default as condition to collection).

7. Payment by Corporations
The person authorized to make disbursements for a corporation or association has the duty to make such payments, and the court may treat failure to make payment as contempt. ORS 161.685(3).

8. Enforcement of Money Judgment
A money judgment against a criminal defendant may be enforced as a judgment in a civil action, ORS 137.450, and is a judgment in favor of the State and may be enforced only by the State. ORS 18.048(5) as amended by 2005 Or Laws, ch. 618, §§ 7, 8 (effective Jan. 1, 2006); 1999 Or Laws, ch. 1064, § 5. However, a restitution award does not limit or impair the right of a victim to sue and recover damages from the defendant in a civil action. ORS 137.109(1).

V. PROBATION

See also Chapter 17, “Probation & Probation Revocation Proceedings.”

A. Generally
A defendant can object to but cannot refuse a probationary sentence. ORS 137.010(5). The court’s power to suspend execution of a sentence continues until the defendant is delivered to the custody of the DOC. ORS 137.010(6).

B. Felonies
1. **Felonies Committed Before November 1, 1989**
   After considering the best interests of the public and the defendant, the court may suspend imposition or execution of any part of the sentence for any period of not more than **five years**. ORS 137.010(3). See *State v. Martin*, 282 Or 583, 588 (1978) (before guidelines, court had discretion whether to place defendant on probation for a felony). Upon defendant’s subsequent violation of felony probation and in lieu of revocation, the court may extend suspension period to a date not more than **six years** from the original sentence date, minus any time during which the probationer has absconded from supervision. ORS 137.010(4).

2. **Felonies Committed on or After November 1, 1989**
   The court must sentence the defendant in accordance with Oregon Criminal Justice Commission (OCJC) rules, unless otherwise provided by law. ORS 137.010(1).

   a. **Presumptive Probation Sentences**
      Except as provided by OAR 213-009-0001, or otherwise established by ORS 137.717 or ORS 137.719, if the offense is classified in a grid block **below the dispositional line**, the presumptive sentence must be:

      1. A term of probation which may include custody and conditions of supervision; or

      2. Straight jail subject to the limits in OAR 213-005-0013.

   OAR 213-005-0007. See infra VII.E. “Optional and Presumptive Probation Sentences.”

   b. **Minimum Probation for Felony Sex Offenders**
      If the court suspends the imposition or execution of a part of a sentence of, or imposes a sentence of probation on, any person convicted of violating or attempting to violate ORS 163.365 (*Rape II*), 163.375 (*Rape I*), 163.395 (*Sodomy II*), 163.405 (*Sodomy I*), 163.408 (*Unlawful Sexual Penetration II*), 163.411 (*Unlawful Sexual Penetration I*), 163.425 (*Sexual Abuse II*), or 163.427 (*Sexual Abuse I*), the court must sentence the defendant to at least **five years probation** and no more than the maximum statutory indeterminate sentence for the offense. ORS 137.012; OAR 213-005-0008(2)(c).
C. Misdemeanors

1. **Maximum Probationary Sentence**
   If the court suspends imposition or execution of any part of sentence for an offense other than a felony, the court may impose a probationary sentence of not more than *five years*. ORS 137.010(3), (4); OAR 213-005-0008(2)(e).

2. **When Probation Period Begins**

3. **Probation Merges with Post-Prison Supervision**
   When probation is imposed consecutive to incarceration, the probation term merges into the term of post-prison supervision. OAR 213-012-0020(4)(a); *State v. Brown*, 119 Or App 162, 163 (1993), *modified* 126 Or App 162 (1994).

D. **Credit for Time Served**

1. **Imprisonment After Arrest and Before Trial**
   A defendant sentenced to a jail term as a condition of probation is entitled to credit against that jail term for time previously served in jail awaiting trial. ORS 137.320(4); ORS 137.370(2)(a). *See also State ex rel. Curry v. Thompson*, 156 Or App 537, 541-42 (1998), *rev den* 328 Or 365 (1999) (defendant entitled to presentence incarceration credit for time served in another state on Oregon warrant).

2. **Jail Term as Part of Probationary Sentence for Certain Felonies**
   Unless the court orders otherwise, a defendant who has served time in jail as part of a probationary sentence for a felony committed on or after *July 18, 1995*, must receive credit for time served after arrest and before sentence began. ORS 137.372(2) (legislative response to *Holcomb v. Sunderland*, 321 Or 99 (1995)).

3. **Limited Discretion to Grant or Deny Credit Upon Revocation**
   The court has *limited discretion* to grant or deny credit for time served as a probation condition or as part of a probationary
sentence under the guidelines when it revokes probation and imposes a prison sentence. ORS 137.545(7); State v. Bullock, 122 Or App 472, 474 (1993).

E. Measure 11
Measure 11 creates situations affecting the court’s authority to grant probation:

- The authority provided to the court under OAR 213-005-0006 to grant optional probation on offenses that fall in grid blocks 8-G, 8-H, or 8-I does not apply to Measure 11 offenses. ORS 137.700; ORS 137.712.

- Notwithstanding ORS 137.700 and 137.707, if the court, on the record at sentencing, makes the findings set forth in ORS 137.712(2), and finds that a substantial and compelling reason under the rules of the OCJC justifies a lesser sentence, it may impose a sentence according to the rules of the OCJC that is less than the minimum sentence that otherwise may be required by ORS 137.700 or 137.707—including probation—for the following offenses:
  - Manslaughter II as defined in ORS 163.125;
  - Assault II as defined in ORS 163.175(1)(b);
  - Kidnapping II as defined in ORS 163.225;
  - Robbery II as defined in ORS 164.405;
  - Rape II as defined in ORS 163.365;
  - Sodomy II as defined in ORS 163.395;
  - Unlawful Sexual Penetration II as defined in ORS 163.408; and
  - Sexual Abuse I as defined in ORS 163.427(1)(a)(A).

ORS 137.712(1) (applies to Manslaughter II, Assault II, Kidnapping II, and Robbery II committed on or after Oct. 4, 1997); 2001 Or Laws, ch. 851, §§ 5-6 (ORS 137.712(1) applies to Rape II, Sodomy II, Unlawful Sexual Penetration II, and Sexual Abuse I committed on or after Jan. 1, 2002).

- If a defendant sentenced to probation under ORS 137.712 violates probation by committing a new crime, the court must revoke probation and impose the presumptive sentence under OCJC rules. ORS 137.712(5).
F. Repeat Property Offenders
The court may impose a departure sentence of probation under the OCJC’s rules instead of the sentences provided in ORS 137.717(1) for repeat property offenders if “substantial and compelling reasons” justify the departure. ORS 137.717(3)(b).

VI. COMMUNITY SERVICE

A. Community Service as Part of Sentence
A judge may sentence an offender to community service either as an alternative to incarceration or fine or probation, or as a condition of probation, provided that:

1. The offender consents to donate labor for the welfare of the public;
2. The tasks are within the offender’s capabilities; and
3. The service is to be performed within a reasonable length of time during hours the offender is not working or attending school.

ORS 137.128(1).

B. Limitations on Length of Community Service
The length of a community service sentence must be within these limits:

- Violation—not more than 48 hours;
- Misdemeanor other than DUII—not more than 160 hours;
- Felony committed prior to November 1, 1993—not more than 500 hours;
- Felony committed on or after November 1, 1993—as provided in the rules of the OCJC (OAR 213-005-0012(2)(e) provides that 16 hours of community service equals one sanction unit);
- DUII—not less than 80 hours or more than 250 hours.

ORS 137.129.

C. Failure to Perform Community Service
Failure to perform a community service sentence may be grounds for contempt of court. ORS 137.128(2).
VII. FELONY SENTENCING GUIDELINES

A. Statutory Basis for Guidelines

1. Application
   The sentencing guidelines apply to felony convictions committed on or after November 1, 1989, unless it cannot be determined whether the felony was committed on or after November 1, 1989. If it cannot be determined whether the felony was committed on or after November 1, 1989, the court must sentence the defendant as if the felony had been committed prior to November 1, 1989. ORS 137.010(2).

2. Sentencing Must Be Under OCJC Rules
   For felonies committed on or after November 1, 1989, the court must sentence the defendant under OCJC rules unless otherwise specifically provided by law. ORS 137.010(1).

3. Judgment of Conviction
   The court's judgment of conviction that includes a prison term for a felony committed on or after November 1, 1989, must:
   a. State the length of incarceration and post-prison supervision; and
   b. Provide that if defendant violates post-prison supervision, defendant will face possibility of additional imprisonment under OCJC rules.

ORS 137.010(10).

4. Sentencing Guidelines Are Not Retroactive

B. Basic Approach of Guidelines
   The sentencing guidelines are intended to serve their objectives, see supra I.B.2. “The Advent of Sentencing Guidelines,” by defining presumptive sentences based on crime seriousness and criminal history, subject to limited discretion to depart for substantial and compelling reasons, for:

   • Felony convictions; and
   • Post-prison or probation supervision violations.

   OAR 213-002-0001(2). See OAR 213-002-0001(3) (providing basic principles underlying the guidelines).
The **Sentencing Guidelines Grid** can be obtained on the Criminal Justice Commission’s web site at [www.ocjc.state.or.us](http://www.ocjc.state.or.us).

C. **Sentencing Guidelines Grid**

The sentencing guidelines grid is a two-dimensional classification tool:

- The vertical axis classifies the current crimes of conviction on a **Crime Seriousness Scale**, and
- The horizontal axis classifies criminal histories on a **Criminal History Scale**.

OAR 213-004-0001(1). *See State v. Guthrie*, 112 Or App 102, 105-06 (1992) (one principal policy underlying guidelines is that ranking crime seriousness provides protection from personal assault for individuals).

1. **Crime Seriousness Scale**

The Crime Seriousness Scale consists of 11 categories of crimes of relatively equal seriousness. OAR 213-004-0002(1). *See generally OAR 213-017-0000 et seq.* (crime seriousness scale); OAR 213-018-0000 et seq. (offense subcategories); OAR 213-019-0000 et seq. (drug offense subcategories).

   a. **Aggravated Murder Is Not Ranked**

       Aggravated murder is not ranked because the statutory sentence is set as death or mandatory life imprisonment (*see ORS 163.095-163.105*). OAR 213-004-0003.

   b. **Drug-Related Offenses Are Separately Classified**

       Drug-related offenses are separately classified and subclassified, as set forth in OAR 213-019-0000 through 0015. OAR 213-004-0002(3).

   c. **Unranked Offenses Are Subject to Court's Discretion**

       Except for Aggravated Murder (ORS 163.095-163.105), when a person is convicted of any other felony which is omitted from the Crime Seriousness Scale, the sentencing judge must determine the appropriate crime category for the current crime of conviction and state on the record the reasons for the offense classification. OAR 213-004-0004. *See State v. Rathbone II*, 110 Or App 419, 421 (1991) (concluding that this rule provides the sentencing court with discretion to determine the seriousness of an unranked offense), rev den 313 Or 300 (1992); *State v. Young*, 161 Or App 507, 513 (1999), rev den 329 Or 590 (2000) (ranking decisions are left to court’s discretion).
d. Attempts and Solicitations
The court must rank attempted and solicited crimes on the crime seriousness scale at two crime categories below the appropriate category for the completed crime. OAR 213-004-0005(1)-(2). But see State v. Evans, 113 Or App 210, 214-15 (1992) (court properly may rank conspiracy conviction at same level as contemplated offense).

i. Exceptions
The court must rank:

- A conviction for attempted aggravated murder, or soliciting aggravated murder at category 10; and
- A conviction for an attempt or solicitation of an offense ranked on the Crime Seriousness Scale at crime category 1 or 2 at crime category 1.


2. Criminal History Scale

a. Categories
The Criminal History Scale includes 9 mutually exclusive categories used to classify an offender’s criminal history score. OAR 213-004-0006. See also OAR 213-004-0007.

b. Calculating Criminal History Score
Criminal history score is calculated according to the extent and nature of the offender’s criminal history at the time the current crime(s) of conviction is sentenced. OAR 213-004-0006(1).

c. Prior Convictions Determine Criminal History
Defendant’s criminal history is based on the number of adult felony and Class A misdemeanor convictions and juvenile adjudications in the offender’s criminal history at the time the current crime(s) of conviction is sentenced. OAR 213-004-0006(2).

i. Items That May Not Be Included in Criminal History
The court may not count in defendant’s criminal history:

- Prior adult convictions or juvenile adjudications which have been expunged;
Prior findings of “guilty except for insanity;” and
A conviction for which sentence has not been imposed.

OAR 213-004-0006(2). See State v. Bucholz, 317 Or 309 (1993) (if defendant is before court for sentencing on convictions entered in separate cases or that are based on crimes committed during separate criminal episodes, court may adjust criminal history as it imposes sentence on each group of convictions).

d. Classifying Prior Offenses
Whether a prior offense should be classified as a misdemeanor conviction or a felony conviction for criminal history purposes must be determined by the classification of the offense at the time of conviction rather than by the sentence imposed for the crime. OAR 213-004-0006(3). See former OAR 253-04-006(3) (“single-judicial proceeding rule” for determining criminal history was repealed effective Nov. 1, 1993, but may apply to crimes committed before that date).

e. Counting Prior Misdemeanor Convictions
Every two prior adult convictions of person Class A misdemeanors in the offender’s criminal history must be counted as one adult conviction of a person felony for criminal history purposes. OAR 213-004-0008.

f. Out-of-State Adult Convictions
An out-of-state adult conviction must be used to classify the offender’s criminal history if the elements of the offense would have constituted a felony or Class A misdemeanor under current Oregon law. OAR 213-004-0011(1). State v. Golden, 112 Or App 302, 306 (1992); see State v. Lee, 110 Or App 42, 43 n.2 (1991) (federal convictions counted in criminal history score).

g. Out-of-State Juvenile Adjudications
Out-of-state juvenile adjudications must be used to classify the offender’s criminal history if the elements of the offense would have constituted a felony under current Oregon law if committed by an adult. OAR 213-004-0011(2).

h. Proof of Criminal History
The offender’s criminal history must be admitted in open court by the offender or determined by a preponderance of the evidence at the sentencing hearing by the sentencing

i. **Errors in the Criminal History Summary**
The offender must immediately notify the district attorney and the court with *written notice* of any error in the proposed criminal history summary, and the State has the burden of producing further evidence to satisfy its burden of proof as to any disputed part or parts of the criminal history. OAR 213-004-0013(3).

i. **Criminal History and the Plea Agreement**
The defendant’s criminal history classification must be accurately represented to the court in a plea agreement, and if there is disagreement regarding a prior conviction or juvenile adjudication, the DA and defense may, subject to the court’s approval, stipulate to the inclusion, exclusion or classification. OAR 213-007-0002. *See Nichols v. United States*, 511 US 738, 748-49 (1994) (inclusion of uncounseled misdemeanor convictions in defendant’s criminal history did not violate Sixth or Fourteenth Amendments); *see also State v. Holliday*, 110 Or App 426, 428, *rev den* 313 Or 211 (1992) (defendant had burden to demonstrate conviction was uncounseled).

j. **Separate Criminal Acts Within One General Transaction**

k. **When Conviction Occurs**
For purposes of determining criminal history, a conviction is considered to have occurred *upon the pronouncement of sentence in open court*. OAR 213-004-0006(2). *See State v. Plourd*, 125 Or App 238, 243 (1993); *State v. Bergeson*, 138 Or App 321, 325 (1995) (sentencing court erred in imposing sentence to which guidelines are applicable without first ranking convictions as per guidelines).

D. **Presumptive Prison/Post-Prison Supervision Sentence**
For offenses classified in a grid block *above the dispositional line*, the court must impose a presumptive sentence of:
1. A **term of imprisonment** within the durational range of months stated in the grid block; and

2. A **term of post-prison supervision** determined by the crime seriousness category of the most serious crime of conviction.

OAR 213-005-0001(1); OAR 213-005-0002(1), (2).

1. **Determining Term of Incarceration**
   The court should select the center of the range for the usual case and reserve upper and lower limits for aggravation and mitigation insufficient to warrant a departure. OAR 213-005-0001(1).

2. **Where Prison Term Served**
   Terms of incarceration 12 months or less must be served at the direction of the supervisory authority; terms of incarceration greater than 12 months must be served in the legal and physical custody of the Department of Corrections. OAR 213-005-0001(2).

   **Exception:** If the court sentences defendant to 12 months or less for **Assault III**, the defendant must serve sentence in custody of the Department of Corrections. OAR 213-005-0001(4); ORS 163.165(2).

3. **Mandatory Imposition of Post-Prison Supervision**
   The guidelines mandate imposing post-prison supervision as part of all prison sentences—the court does **not** have discretion whether to impose post-prison supervision. OAR 213-005-0002(1). *See State v. Pinkowsky*, 111 Or App 166, 169 (1992) (basic principle underlying guidelines is that offenders released from prison must be under post-prison supervision for a period of time).

4. **When Post-Prison Supervision Term Begins**
   The term of post-prison supervision begins upon completion of the offender’s prison term or such term as directed by the supervisory authority. For offenders successfully completing the alternative incarceration program (boot camp) described in ORS 421.500 *et seq.*, the term of post-prison supervision begins upon release pursuant to ORS 421.508(3). OAR 213-005-0002(3). *See also Baty v. Slater*, 164 Or App 779, 781, rev den 331 Or 191 (2000) (stating that the commencement date for post-prison supervision terms “is not altered merely because the Department of Corrections may, as the result of an erroneous calculation of the term of imprisonment, fail to
timely release an offender for service of the post-prison term in the community").

5. Duration of Post-Prison Supervision
The duration of post-prison supervision must be determined by the crime seriousness category of the most serious current crime of conviction. OAR 213-005-0002(2).

a. Terms of Post-Prison Supervision
Post-prison supervision terms are:

- 1 year for Crime Categories 1-3;
- 2 years for Crime Categories 4-6; and
- 3 years for Crime Categories 7-11.

OAR 213-005-0002(2)(a).

b. Sexual Offenses
Notwithstanding OAR 213-005-0002(2)(a), for an offender sentenced for sexual offenses subject to ORS 144.103 (Rape I and II, Sodomy I and II, Unlawful Sexual Penetration I and II, and Sexual Abuse I and II), the period of post-prison supervision must be the maximum statutory indeterminate sentence for that violation less the term of imprisonment served. OAR 213-005-0002(2)(b)(C); ORS 144.103. See State v. Linebaugh, 149 Or App 771, rev den 326 Or 234 (1997); State v. Umtuch, 144 Or App 366 (1996), rev den 324 Or 654 (1997).

c. Murder & Aggravated Murder
The term of post-prison supervision for an offender serving a sentence for murder or aggravated murder must be for the remainder of the offender’s life, unless the Board finds a shorter term appropriate; in no case may the term of supervision be less than three years. OAR 213-005-0004(1). See State v. Morgan, 316 Or 553, 560 (1993).

d. Sexually Violent Dangerous Offenders
In addition to any sentence of imprisonment required by law, the court must impose a period of post-prison supervision that extends for the remainder of the offender’s life if the person:

1. Was 18 years of age or older at the time the person committed the crime;
2. Is a sexually violent dangerous offender; and
3. Is convicted of one of the following crimes (or an attempt to commit):
   a. Unlawful sexual penetration in the first degree; or
   b. Rape in the first degree and sodomy in the first degree if the victim was:
      • Subjected to forcible compulsion by the person;
      • Under 12 years of age; or
      • Incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.


i. Sanction for Violation of Post-Prison Supervision
   A sexually violent dangerous offender may be incarcerated up to 180 days for any violation of post-prison supervision; the sanction may be imposed repeatedly during the term of post-prison supervision for subsequent violations. OAR 213-005-0004(5).

e. Dangerous Offenders
   ORS 144.232 specifies post-prison supervision terms for dangerous offenders. OAR 213-005-0002(5). See ORS 144.232(4) (dangerous offender’s post-prison supervision term is difference between incarceration term and portion of term actually served). See infra VIII.B. “Dangerous Offender Classification.”

f. Assault in the First Degree to a Child Under Six Years of Age
   2005 Or Laws, ch. 513, § 1 (effective Jan. 1, 2006) expands Assault I to include a person who intentionally or knowingly causes serious physical injury to a child under six years of age. A person sentenced to a term of imprisonment for this crime must serve a term of post-prison supervision equal to the maximum statutory indeterminate sentence for that violation less the term of imprisonment served. 2005 Or Laws, ch. 513, § 2 (effective Jan. 1, 2006).

6. Conditions May Not Be Imposed
   The court has no authority to impose post-prison supervision or incarceration conditions; however, the court does have

7. **Maximum Terms of Post-Prison Supervision**
   The term of post-prison supervision, when added to the prison term, may not exceed the statutory maximum indeterminate sentence for the crime of conviction. When the total duration of any sentence (prison incarceration and post-prison supervision) exceeds the statutory maximum indeterminate sentence described in ORS 161.605, the sentencing judge must first reduce the duration of post-prison supervision to the extent necessary to conform the total sentence length to the statutory maximum. OAR 213-005-0002(4). **Note:** This maximum does not apply to murder, aggravated murder, or a sexually violent dangerous offender. *See* OAR 213-005-0004.

E. **Optional and Presumptive Probation Sentences**

1. **Optional Probation**
   If an offense is classified in grid blocks 8-G, 8-H or 8-I, the court may impose an optional probationary sentence by finding on the record that:
   a. An appropriate treatment program is likely to be more effective than the presumptive prison term in reducing risk of offender recidivism;
   b. The recommended treatment program is available and defendant can be admitted to it within a reasonable time period; and
   c. The probationary sentence will serve community safety interests by promoting offender reformation.

   OAR 213-005-0006(1). *See also* OAR 213-005-0008(1)(c) (providing three years as presumptive term for optional probationary sentence for Crime Categories 6-8).

   Without findings, a probationary sentence under grid blocks 8-G, 8-H and 8-I (normally presumptive prison blocks) constitutes a departure. OAR 213-005-0006(3).

2. **When Optional Probation is Not Available**
   The sentencing judge may not impose an optional probationary sentence if:
a. A firearm was used in the commission of the offense;

b. At the time of the offense, the offender was under correctional supervision status for a felony conviction or a juvenile adjudication as defined in OAR 213-003-0001(11); or

c. The offender’s conviction is for Manufacture of a Controlled Substance involving substantial quantities of methamphetamine as defined at ORS 475.996(1)(a).

OAR 213-005-0006(2).

3. Presumptive Probation

a. Sentences
For offenses classified in a grid block below the dispositional line, the presumptive sentence is determined by the crime seriousness category of the most serious current crime of conviction and must be:

1. A term of probation which may include custody and conditions of supervision; or

2. Straight jail subject to the limits in OAR 213-005-0013. OAR 213-005-0007; OAR 213-005-0008(1). See State v. Lucas, 113 Or App 12, 14, rev den 314 Or 176 (1992) (sentencing guidelines have eliminated practice of suspending imposition or execution of sentence as predicate for placing felon on probation).

b. Sanction Units—Custody Supervision
When imposing a probationary sentence, the sentencing judge may require that the offender serve a term of custody supervision in a correctional facility or as part of a custody program; the term of custody supervision is imposed as a number of sanction units. OAR 213-005-0011(1). See State v. Anderson, 111 Or App 294, 298 (1992) (sentencing court does not have to impose sanction units when initially passing sentence).

i. Number of Sanction Units
The number of sanction units that may be imposed as part of a presumptive probationary sentence are determined by the grid block classification of the offense. OAR 213-005-0011(2).
ii. **Satisfying Sanction Units with Jail Term**
OAR 213-005-0013(1) provides the maximum number of sanction units that may be satisfied by an imposed jail term as part of a probationary sentence. The court may exceed the limitation on jail sanction units (up to the maximum number of sanction units) if, after consulting with the supervisory authority, the court finds on the record that local jail space is available for a longer term. OAR 213-005-0013(3).

iii. **Non-Jail Sanction Units**
The court may impose additional non-jail sanction units (determined by grid block classification) to sanction violations of conditions of a probation sentence. OAR 213-005-0011(5) (applies to crimes committed on or after Nov. 1, 1993); OAR 213-005-0011(6) (applies to crimes committed on or after Jan. 1, 2002); OAR 213-005-0011(7).

iv. **Custodial Rehabilitation Programs**
Where the sentencing judge finds that a custodial rehabilitation program designed to deal with drug or alcohol abuse or sexual behavior is essential to minimize the offender’s likelihood of engaging in future criminal conduct, the requirement that the offender enter and satisfactorily complete such a program may not be limited by the sanction units set forth in OAR 213-005-0011 or OAR 213-005-0012. OAR 213-005-0012(5).

c. **Duration of Probation**
The presumptive duration of probation must be determined by the crime seriousness category of the most serious current crime of conviction:

- 18 months for Crime Categories 1 - 2;
- 2 years for Crime Categories 3 - 5;
- 3 years for Crime Categories 6 - 8; and
- 5 years for Crime Categories 9 - 11.

OAR 213-005-0008(1).

i. **Imposing a Different Duration Without Departure**
The sentencing judge may without departure impose a duration of bench probation other than the presumptive durations when necessary to:
1. Ensure the conditions and purposes of probation are met;

2. Extend the length of probation upon finding a violation or violations of the conditions of probation; or

3. Ensure that the conditions of probation are completely satisfied.

OAR 213-005-0008(2)(a).

d. Departures
The sentencing judge must impose the presumptive sentence provided by the guidelines unless the judge finds substantial and compelling reasons to impose a departure. OAR 213-008-0001. For example, the sentencing judge may by departure impose a greater term of supervised probation (not to exceed 5 years) when necessary to ensure that the conditions and purposes of probation are met. OAR 213-005-0008(2)(b), (2)(e).

e. Modification of Probation Terms
Upon finding that supervision is no longer necessary to accomplish probation purposes, the court may modify the probationary sentence without a hearing by:

1. Shortening probation;

2. Terminating probation; or

3. Transferring supervision to bench probation.

OAR 213-005-0010.

4. Length of Probation Term May Not Exceed Five Years
A probation term may not exceed five years; and, in determining the time served on a sentence of probation, the court may not count time during which the offender has absconded from supervision and a bench warrant has been issued for the offender’s arrest. OAR 213-005-0008(2)(e); OAR 213-005-0008(3).

5. Probation Terms Must be Served Concurrently
When the sentencing judge imposes multiple sentences consecutively, the probationary term must be:

a. The presumptive post-prison supervision term imposed for the primary offense if the sentence for any offense includes a prison term; or
b. The presumptive probation term of each offense imposed concurrently if no sentence includes a prison term.


F. Stipulations Subject to Approval of Sentencing Judge

1. Stipulated Grid Block
   Subject to the approval of the sentencing judge, the district attorney and defense may stipulate to the grid block classification within the Sentencing Guidelines Grid that will provide the presumptive sentence for the offender. If the sentencing judge accepts the stipulated grid block classification and imposes a sentence other than the presumptive sentence for the stipulated grid block, the sentence is a departure. OAR 213-007-0003.

2. Stipulated Presumptive Sentences
   The district attorney and the defense may stipulate to a specific sentence within the presumptive sentence range for the stipulated grid block classification, which must be imposed if the sentencing judge accepts the plea agreement. OAR 213-007-0004.

3. Stipulated Non-Presumptive Sentence
   The district attorney and defense may stipulate to a sentence outside the presumptive sentence range for a stipulated grid block classification. If the parties stipulate to an optional probationary sentence, the sentencing judge may accept the plea agreement only after making the findings as required by OAR 213-005-0006. If the parties stipulate to a departure sentence, the sentencing judge may accept the plea agreement if the judge finds on the record substantial and compelling reasons for the departure. OAR 213-007-0005.

Practice Tip: If the sentencing court deems the stipulated non-presumptive sentence appropriate but is unable to make the requisite optional probation or departure findings, it may be practical to recommend a stipulation to a grid block under which that sentence would be presumptive.
G. Departure Sentences

1. Definitions
   “Departure” means a sentence, except an optional probationary sentence, which is inconsistent with the presumptive sentence for an offender, OAR 213-003-0001(5), and may be either a “dispositional” or “durational” departure.

a. Dispositional Departure
   A dispositional departure occurs when the court imposes a prison term on a conviction in a presumptive probation grid block or imposes a probationary sentence on a conviction in a presumptive prison grid block (other than in case of a proper optional probationary sentence). OAR 213-003-0001(6).

b. Durational Departure
   A durational departure occurs when the court imposes a term of incarceration or probation that is different from the presumptive sentence (either longer or shorter). OAR 213-003-0001(8).

c. “Statutory Maximum”
   In Apprendi v. New Jersey, 530 US 466, 490 (2000), the Court held under the Sixth Amendment right to a trial by jury that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” In Blakely v. Washington, 542 US 296, 124 S Ct 2531, 2537 (2004), the Court concluded that the “statutory maximum” sentence a judge may impose must be based solely on “the facts reflected in the jury verdict or admitted by the defendant,” and not on any additional judicial findings. Thus, the relevant statutory maximum is not the maximum “indeterminate sentence of imprisonment” provided in ORS 161.605, for example, because the imposed sentence must be based solely on the jury verdict or facts admitted by the defendant. See Blakely v. Washington, 542 US 296, 124 S Ct 2531, 2537 (2004) (rejecting the State’s argument that Apprendi was not violated because state law provided a 10-year maximum sentence for class B felonies).

   Consistent with Blakely v. Washington, 542 US 296, 124 S Ct 2531 (2004), “the relevant ‘prescribed statutory maximum’ under the Oregon sentencing guidelines is the presumptive sentence that the court determines based on
the offender’s criminal history and crime seriousness score. Guidelines departure sentences, which require judicial findings of fact and are not, under the current scheme, based on facts found by the jury, do not comport with the Sixth Amendment to the United States Constitution.” State v. Sawatzky, 195 Or App 159, 172 (2004). See State v. Dilts, 337 Or 645, 655 (2004) (“[U]nder Blakely, a trial court may impose a sentence that exceeds the presumptive sentence if the facts on which the increased sentence is based are determined by a jury.”).

2. General Considerations

a. Court’s Authority to Depart
The court must find substantial and compelling reasons to impose a departure sentence and must state such reasons on the record at the time of sentencing. OAR 213-008-0001; ORS 137.671. See State v. Ferrell, 146 Or App 638, 642 (1997); State v. Tracy, 116 Or App 329, 332 (1992) (court can depart both dispositionally and durationally if each departure is supported by a separate substantial and compelling factor); State v. Hopkins, 112 Or App 458 (1992) (defendant’s voluntary intoxication and fact that burglary and assault convictions arose from domestic dispute did not support downward departure without more explanation from court).

b. Court’s Discretion to Depart

c. Segregating Departure Factors
The court must segregate the factor(s) utilized in imposing a departure sentence. State v. Petrie, 139 Or App 474, 478 (1996) (concluding that trial court improperly relied on the factor of persistent involvement in similar offenses to impose a departure sentence on defendant’s attempted aggravated murder conviction because defendant had no record of prior assaultive offenses; remanding to the court to “identify the evidentiary bases of the aggravating factors that it finds” and “clarify on which factor or factors it relies to impose sentence on each conviction”).

d. Constitutionality of Guidelines
The court in State v. Dilts, 337 Or 645 (2004), did not find the sentencing guidelines unconstitutional, but simply
required that they be applied in a way that respects the Sixth Amendment. Thus, “[t]he Sixth Amendment, as interpreted in Blakely, prohibits the trial court from imposing a sentence in excess of the presumptive sentence unless a jury finds the aggravating facts or the defendant effectively waives that jury trial right.” Id. at 654.

3. **Mitigating Factors**

OAR 213-008-0002(1)(a) provides a *nonexclusive* list of mitigating factors the court may consider in determining whether substantial and compelling reasons for a departure exist. *See also* ORS 137.080(2). Those factors are:

- a. The victim was an aggressor or participant in criminal conduct associated with crime of conviction.
- b. Offender acted under duress or compulsion.
- c. Offender’s mental capacity was diminished other than by voluntary drug or alcohol abuse.
- d. Offense was principally accomplished by another, and offender exhibited extreme caution or concern for the victim.
- e. Offender played a minor or passive role in the crime.
- f. Offender cooperated with the State with respect to crime of conviction or other criminal conduct by defendant or other person (*note*: the offender’s refusal to cooperate with the State cannot be considered an aggravating factor). *See State v. Hays*, 155 Or App 41, 50, rev den 328 Or 40 (1998), *cert den* 527 US 1006 (1999) (discussing factor).
- g. Degree of harm or loss attributed to current crime of conviction was significantly less than typical.
- h. Degree of harm or loss attributed to current crime of conviction was significantly less than typical for such offense.
- i. Offender’s criminal history indicates that offender lived conviction-free within community for significant period of time preceding the current crime. *See State v. Lucas*, 113 Or App 12, 15, rev den 314 Or 176 (1992) (defendant’s lack of criminal history is not mitigating factor unless court explains why that fact is so exceptional that a presumptive sentence would not accomplish guidelines’ purpose).
- j. Offender is amenable to treatment; appropriate treatment program is available; program likely will be more effective than presumptive prison term in reducing risk of recidivism; and probation will serve community safety interests by promoting reformation. *See State v. Waage*,

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<td>1. Victim was an aggressor or participant.</td>
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<td>2. Duress or compulsion.</td>
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<td>3. Diminished mental capacity.</td>
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<td>5. Minor or passive role in crime.</td>
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<td>6. Cooperation with the State.</td>
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<td>7. Degree of harm or loss significantly less than typical.</td>
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<td>8. Significant period of conviction-free living within community.</td>
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160 Or App 156, 164-65 (1999) (appropriate treatment program to which defendant can be admitted within reasonable time carries connotation of possibility, or at most probability, and not certainty); OAR 213-008-0002(1)(a)(I) (applies to crimes committed on or after Nov. 1, 1993).

OAR 213-008-0002(1)(a). See also State v. Kennedy, 113 Or App 134, 138 (1992) (aggravating and mitigating factors listed are neither mandatory nor exclusive but are simply some considerations court may or may not use to make departure determinations); State v. Nelson, 119 Or App 84, 89 n.3 (1993) (guidelines do not preclude court from citing multiple factors in support of departure); State v. Wilson, 111 Or App 147, 151 n.4, 152 (1992) (guidelines do not require court to make findings of more than one aggravating or mitigating factor in order to support departure); State v. Parsons, 135 Or App 188, rev den 322 Or 168 (1995) (sodomy/conspiracy case involving victim who was passed out drunk; court erred in departing on basis that defendant did not use force, victim voluntarily became intoxicated, and parties previously had consensual sexual relationship).

a. Judically Crafted Mitigating Factors
As of the date of this publication, it appears that there are no recognized judicially crafted mitigating factors. However, the “nonexclusive” list in OAR 213-008-0002(1)(a) suggests that sentencing courts may craft mitigating factors where the court finds on the record substantial and compelling reasons to impose the departure. See State v. Hopkins, 112 Or App 458, 460-61 (1992) (concluding that where the record of the sentencing proceeding consisted only of a colloquy in which the court noted defendant's voluntary intoxication and the fact that the burglary and assault convictions arose from a domestic dispute, the sentencing court erred in imposing a downward departure because it “gave no explanation why those circumstances were so exceptional that the imposition of the presumptive sentence would not accomplish the purposes of the guidelines”).

b. Mitigating Factors Are Not Subject to Apprendi
Judicial findings on mitigating factors do not invoke a defendant’s Due Process or constitutional jury trial rights: “a judge that finds [a mitigating factor] is neither exposing the defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater

4. **Aggravating Factors**

OAR 213-008-0002(1)(b) provides a *nonexclusive* list of aggravating factors the court may consider in determining whether substantial and compelling reasons for a departure exist. *See also* ORS 137.080(2). Those factors are:

a. Deliberate cruelty to the victim.

b. Offender knew or had reason to know of the victim’s particular vulnerability, such as extreme youth, age, disability or ill health of the victim, which increased harm or threat of harm caused by offender’s criminal conduct. *See Boxberger v. Board of Parole*, 123 Or App 339, 341-42, *rev den* 318 Or 97 (1993) (ages of victims properly considered as particular vulnerability notwithstanding that age of victim was also element of crime of first degree sodomy); *State v. Ambrose*, 117 Or App 298, 301 (1992) (“particular vulnerability” can include defendant being trusted friend of victim); *State v. Newman*, 113 Or App 102, 105, *rev den* 314 Or 176 (1992) (“particular vulnerability” can include victim being substantially younger than required element, physically threatened, or a child who previously has been sexually abused).

c. Threat of or actual violence toward a witness or victim.

or unadjudicated similar crimes unrelated to offense for which sentence is being imposed).


g. Offense involved multiple victims or incidents (may not be cited if captured in a consecutive sentence).


j. Degree of harm or loss attributed to current crime of conviction was significantly greater than typical for such an offense. See State v. Allred, 165 Or App 226, 229-31 (2000); State v. Mitchell, 136 Or App 99, 102 (1995); State v. Nelson, 119 Or App 84, 88 (1993) (even if loss is element of offense, greater loss than typical can be utilized as aggravating factor).


a. **Judicially Crafted Aggravating Factors**

The court may also consider the following as aggravating factors:


- Offender’s past actions show a pattern of assaultive conduct (thus incarceration is necessary to ensure

- Offender’s status of being on probation or on community release from prison at time crime was committed (demonstrates offender’s disregard for any laws and inability to be deterred from new criminal activity). *State v. Jenkins*, 199 Or App 384 (2005) (departure factor of being on supervision implicates whether that status failed to deter the defendant from committing further offenses); *State v. Williams*, 133 Or App 191, 195 n.2, *rev den* 321 Or 512 (1995); *State v. Mitchell*, 113 Or App 632 (1992); *State v. Hill*, 112 Or App 213 (1992).


- Future efforts to rehabilitate offender will not be successful. *State v. Estes*, 131 Or App 188, 193 (1994), *rev den* 320 Or 569 (1995) (finding no abuse of discretion where trial court sufficiently explained why the imposition of the presumptive sentence would not accomplish the purpose of the guidelines to ensure the security of the public).

b. **Aggravating Factors After Apprendi & Blakely**

Other than the fact of a prior conviction, a trial court may not impose an upward departure sentence based on factual findings that have not been proved to a jury beyond a reasonable doubt or, if the defendant waived the right to a jury trial on sentence-enhancement facts pursuant to 2005

“The Court held in *Blakely* that, under the Sixth Amendment, a defendant has a right to have additional facts that may increase his or her sentence beyond the otherwise applicable maximum sentence decided by a jury, rather than by a trial judge.” *State v. Dilts*, 337 Or 645, 652 (2004). See *State v. Warren*, 195 Or App 656, 669 (2004) (stating that *Apprendi v. New Jersey*, 530 US 466 (2000), “established as a matter of general principle that any fact that has the consequence of enhancing a prescribed statutory sentence constitutes, in effect, an element of an aggravated offense and therefore must be pleaded and proved”).

*Blakely* also makes clear that “whenever a trial court, in the absence of an effective waiver, imposes a sentence that exceeds the presumptive sentence on the basis of aggravating facts found by the trial court rather than by a jury (other than the fact of a prior conviction), that sentence amounts to an unconstitutional application of the sentencing guidelines.” *State v. Dilts*, 337 Or 645, 653 (2004). See *State v. Etter*, 200 Or App 52, 54 (2005) (applying *Dilts* to conclude that the trial court impermissibly imposed an upward departure sentence in reliance on the additional fact that defendant had committed the offense while criminal charges were pending in another county where that fact was not admitted and not found by a jury).

**i. Authority to Submit Aggravating Factors to Jury**

“Nothing in *Blakely* precludes a sentencing court from deciding whether jury-determined aggravating factors constitute a substantial and compelling reason to impose a sentence that exceeds the presumptive range.” *State v. Upton*, 339 Or 673 (2005) (concluding that trial court in a pre-SB 528 case had authority to submit alleged “persistent involvement” and “vulnerable victim” aggravating factors to jury in compliance
with Apprendi and Blakely). **Note:** 2005 Or Laws, ch. 463 (Senate Bill 528) authorizes a court to submit enhancement facts to the jury.

c. **Sentencing Jury Does Not Create Double Jeopardy**

In *State v. Sawatzky*, 339 Or 689 (2005), the court held that, given the fact that a sentencing proceeding on remand is not a second prosecution but the “continuation of a single prosecution,” the defendant had “no statutory or constitutional jeopardy right that prohibit[ed] the empaneling of a jury to determine whether certain aggravating factors may support the imposition of sentences that exceed the presumptive range for the crimes to which [she] pleaded guilty” because challenging the legality of her sentences in the Court of Appeals could not give her “any justifiable expectation of finality.”

5. **Enhancement Facts & the Blakely Bill**

2005 Senate Bill 528, referred to as the “Blakely fix,” became effective on **July 7, 2005** when it was signed by the Governor. The bill was enacted to correct the constitutional defects of the sentencing guidelines scheme that commits the duty of finding aggravating factors exclusively to the trial court using less than a reasonable-doubt standard. *Felony Sentencing in Oregon*, Ch. 7, § 7-1.3.3.1 (OCDLA Supp. 2005). *See ORS 137.090(1)(c); State v. Mack*, 108 Or App 643, 646 (1991), rev’d 313 Or 300 (1992).

a. **“Enhancement Fact” Defined**

An enhancement fact is any fact “that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime.” 2005 Or Laws, ch. 463, § 1(2) (effective July 7, 2005).

b. **Notifying Defendant of Intent to Rely on Enhancement Facts**

In order to rely on an enhancement fact that increases the defendant’s sentence, the State must notify the defendant by:

1. Pleading the enhancement fact in the accusatory instrument; or

2. Providing written notice to the defendant of the enhancement fact and its intention to rely on it within a reasonable time after filing the accusatory instrument.

c. **Offense-Related Enhancement Facts**

When an enhancement fact relates to an *offense* charged in the accusatory instrument, the court must submit it to the jury during the *trial phase*, unless the defendant:

1. Defers trial of the enhancement fact to the sentencing phase upon the court’s finding that trying it during the trial phase would unfairly prejudice the jury’s verdict on an underlying offense; or

2. Makes a written waiver of the right to a jury trial on the enhancement fact and: (1) admits the enhancement fact, or (2) elects to have the enhancement fact tried to the court during the sentencing phase if the defendant is found guilty.


i. **Facts Not Admitted Must be Tried by Same Fact-Finder**

If there are multiple offense-related enhancement facts and the defendant does not admit to all of them, the defendant must elect to have the remaining facts tried by either the jury *or* the court—*i.e.*, the defendant cannot split enhancement facts between triers of fact. 2005 Or Laws, ch. 463, § 3(3) (effective July 7, 2005).

d. **Defendant-Related Enhancement Facts**

When an enhancement fact relates to the *defendant*, the court must submit it to the jury during the *sentencing phase* if the defendant is found guilty of the offense to which the enhancement fact applies, unless the defendant makes a written waiver of the right to a jury trial on the enhancement fact and either:

1. Admits to the enhancement fact; or

2. Elects to have the enhancement fact tried to the court during the sentencing phase.


i. **Facts Not Admitted Must be Tried by Same Fact-Finder**

If there are multiple defendant-related enhancement facts and the defendant does not admit to all of them, the defendant must elect to have the remaining facts tried by either the jury *or* the court—*i.e.*, the defendant...

e. Waiver on Guilt Also Waives Jury on Enhancement Facts
When a defendant waives the right to a jury trial on the issue of guilt, the waiver automatically constitutes a written waiver of the right to a jury trial on all enhancement facts. 2005 Or Laws, ch. 463, § 5 (effective July 7, 2005).

f. Sentencing Phase
All evidence received during the trial phase may be considered by the jury or the court during the sentencing phase. 2005 Or Laws, ch. 463, § 6 (effective July 7, 2005). Unless the defendant waives the right to a jury trial on defendant-related enhancement facts, the sentencing phase must be conducted in the trial court before the jury following a finding of guilt by the jury. 2005 Or Laws, ch. 463, § 4(5) (effective July 7, 2005). Except the provisions governing privileges, the Oregon Evidence Code applies to the sentencing phase. 2005 Or Laws, ch. 463, § 8 (effective July 7, 2005).

g. Burden of Proof
The State has the burden of proving an enhancement fact beyond a reasonable doubt. 2005 Or Laws, ch. 463, § 7(2) (effective July 7, 2005).

i. Jury Trial
When an enhancement fact is tried to a jury, any question relating to it must be submitted to the jury, and the enhancement fact is not proven unless a number of jurors equal to or greater than the minimum number required to find the defendant guilty of the crime both:

1. Found the defendant guilty; and
2. Find that the State has met its burden of proof regarding the enhancement fact.


ii. Bench Trial
An enhancement fact tried to the court is not proven unless the court finds that the State has met its burden of proof regarding the enhancement fact. 2005 Or Laws, ch. 463, § 7(4) (effective July 7, 2005).
h. **Court Need Not Enhance Sentence Based on Jury's Findings**
   Although the court may not reexamine any finding made by a jury relating to an enhancement fact, notwithstanding the jury’s findings, the court is not required to impose an enhanced sentence. 2005 Or Laws, ch. 463, § 7(5) (effective July 7, 2005).

i. **Multiple Defendants**
   If two or more defendants are being tried in the same proceeding, each one must make the appropriate elections regarding enhancement facts. 2005 Or Laws, ch. 463, §§ 3(5), 4(4) (effective July 7, 2005).

6. **Other Departure Factors**

   a. **Necessary Element of Mandatory Sentence**
      The court may not use as an aggravating factor any aspect of the current crime of conviction which serves as a necessary element of a statutory mandatory sentence, if that aspect also is used to impose a mandatory sentence. OAR 213-008-0002(3).

   b. **Factual Aspect of Crime as Statutory Element**
      If a factual aspect of a crime is a statutory element of the crime or is used to subclassify the crime on the Crime Seriousness Scale, that aspect of the current crime of conviction may be used as an aggravating or mitigating factor only if the criminal conduct constituting that aspect of the current crime of conviction is significantly different from the usual criminal conduct captured by the aspect of the crime. OAR 213-008-0002(2). See State v. Newman, 113 Or App 102, 104 n.3, rev den 314 Or 176 (1992); State v. Guthrie, 112 Or App 102, 106 (1992) (generally, a fact establishing an element of crime cannot be used as an aggravating factor unless the aspect is “significantly different from the usual criminal conduct captured by the aspect of the crime”).

   c. **Court Cannot Punish Offender for Pleading Guilty**
      “We have previously made it clear that the record must affirmatively show that the court sentenced the defendant solely on the facts of his case and his personal history, and not as punishment for pleading not guilty and proceeding to trial.” State v. Reid, 140 Or App 293, 299 (1996).
7. **Departure Limitations on the Use of Sanction Units**
   A departure on the number of sanction units imposed as part of a probationary sentence may not total more than double the maximum number of sanction units permitted as part of the sentence. OAR 213-008-0006(1). The maximum number of sanction units that may be used to impose a jail term as part of a probationary sentence may not exceed the maximum number of sanction units included in the sentence. OAR 213-008-0006(2).

8. **Durational Departures**
   
   a. **Durational Departure Limited to Double Presumptive Term**
      A durational departure from a presumptive prison term must not total more than double the maximum duration of the presumptive prison term. OAR 213-008-0003(2).

      **Note:** Doubling limit applies to murders committed on or after Nov. 1, 1993; for murders committed on or after April 1, 1995, doubling limit applies only to defendants whose presumptive maximums exceed greater than one-half the 300-month Measure 11 minimum).

   b. **Departure May Not Exceed Maximum Indeterminate Sentence**
      In no case may a durational departure exceed the statutory maximum indeterminate sentence described in ORS 161.605. OAR 213-008-0003(2) (applies to crimes committed on or after Nov. 1, 1993). *See State v. Umtuch*, 144 Or App 366 (1996), rev *den* 324 Or 654 (1997).

      i. **Limitation Does Not Apply to Dangerous Offenders**
         The limit on durational departures in OAR 213-008-0003(2) does not apply to indeterminate sentences imposed on a dangerous offender under ORS 161.725 and ORS 161.737. OAR 213-008-0003(3) (applies to crimes committed on or after Nov. 1, 1993).

   c. **Durational Departures 12 Months or Less**
      Durational departure sentences of **12 months or less** are served at the direction of the supervisory authority. OAR 213-008-0003(4) (applies to crimes committed on or after Nov. 1, 1997); see OAR 213-003-0001(19) (defining “supervisory authority”).

      **Exception:** Terms of incarceration of 12 months or less imposed for **Assault III** (ORS 163.165(2)) are served in
custody of the DOC. OAR 213-008-0003(5) (applies to crimes committed on or after Nov. 1, 1999).

d. Durational Departures Greater Than 12 Months
Durational departures greater than 12 months are served in the custody of the DOC. OAR 213-008-0003(4).

9. Dispositional Departures

a. Limitations
When departing from a presumptive probation sentence and imposing a prison term, the court must impose the following sentences:

- Up to 6 months prison plus 12 months post-prison supervision for crime categories 1 and 2 or grid blocks 3-G through 3-I;
- Up to 12 months prison plus 12 months post-prison supervision for grid blocks 3-A through 3-F;
- Up to 12 months prison plus 24 months post-prison supervision for grid blocks 4-C through 4-I and 5-G through 5-I;
- Up to 18 months prison plus 24 months post-prison supervision for grid blocks 5-F and 6-F through 6-I;
- Up to 18 months prison plus 36 months post-prison supervision for grid blocks 7-F through 7-I.

OAR 213-008-0005(1), (2); OAR 213-005-0002(2)(a).

b. Additional Departure
Any sentence other than as set forth in OAR 213-008-0005(1) constitutes an additional departure, and the court must state additional substantial and compelling reasons for imposing the sentence. OAR 213-008-0005(3). The sentence imposed must not exceed double the maximum duration set forth in the guidelines. OAR 213-008-0005(3) (applies to crimes committed on or after Nov. 1, 1993).

c. Dispositional Departures 12 Months or Less
Dispositional departure sentences of 12 months or less are served at the direction of the supervisory authority. OAR 213-008-0005(4) (applies to crimes committed on or after Nov. 1, 1997); see OAR 213-003-0001(19) (defining “supervisory authority”).
Exception: Terms of incarceration of 12 months or less imposed for Assault III (ORS 163.165(2)) are served in custody of the DOC. OAR 213-008-0005(5) (applies to crimes committed on or after Nov. 1, 1999).

d. Dispositional Departures Greater Than 12 Months
Dispositional departures greater than 12 months are served in the custody of the DOC. OAR 213-008-0005(4).

10. Limitations on Downward Departures

a. Manufacture of Methamphetamine
When sentencing a person convicted of manufacture of methamphetamine under 2005 Or Laws, ch. 708, § 14 or § 15 (effective Aug. 16, 2005), the court may not impose a sentence of optional probation or grant a downward dispositional departure or a downward durational departure of more than one-half of the presumptive prison sentence under the guidelines if the person has a previous conviction for:

1. Delivery or manufacture of methamphetamine;
2. Delivery or manufacture of methamphetamine within 1,000 feet of a school; or
3. Possession of a precursor substance with intent to manufacture a controlled substance.


b. Delivery of Methamphetamine
When sentencing a person convicted of delivery of methamphetamine under 2005 Or Laws, ch. 708, §§ 16 or 17 (effective Aug. 16, 2005), the court may not impose a sentence of optional probation or grant a downward dispositional departure under the guidelines if:

1. The delivery involved a substantial quantity of methamphetamine as described in ORS 475.996; and

2. The person has a previous conviction for:
   a. Delivery or manufacture of methamphetamine;
   b. Delivery or manufacture of methamphetamine within 1,000 feet of a school; or
   c. Possession of a precursor substance with intent to manufacture a controlled substance.
H. Statutory Sentencing Requirements

1. Mandatory Prison Sentence
   If a statute requires or authorizes a mandatory prison sentence, the court must impose the determinate sentence under the statute or the guidelines sentence, \textit{whichever is longer}. OAR 213-009-0001(1); ORS 137.637.

   a. First-Time Firearm Offender
      Notwithstanding OAR 213-009-0001(1), if it is the first time an offender is subject to the provisions of ORS 161.610(4)(a) (providing mandatory minimum for use or threatened use of a firearm), the court may impose a lesser sentence in accordance with the OCJC rules. ORS 161.610(5); OAR 213-009-0001(3).

2. ORS 137.635—Denny Smith Act
   If ORS 137.635 requires the imprisonment of an offender for whom the grid provides presumptive probation, the court must sentence the offender to imprisonment for the following durations:
   \begin{itemize}
     \item 11-12 months for an offense classified in Grid Block 7-I;
     \item 12-13 months for an offense classified in Grid Block 7-H;
     \item 13-14 months for an offense classified in Grid Block 7-G;
     \item 14-15 months for an offense classified in Grid Block 7-F.
   \end{itemize}
   OAR 213-009-0001(2).

3. Application of Guidelines to Mandatory Sentencing Statutes
   The guidelines do not displace statutes requiring imposition of mandatory sentences on:
   \begin{itemize}
     \item Dangerous offenders. ORS 161.725 \textit{et seq.}; \textit{State v. Davis}, 315 Or 484, 495 (1993) (under ORS 161.737(2), court must indicate on record the presumptive sentence that would have been imposed had court not imposed dangerous offender sentence).
   \end{itemize}

• Use or threatened use of a firearm—except first-time offender. ORS 161.610(4), (5); State v. Johnson, 125 Or App 655, 658 (1994).

• Repeat property offenders. ORS 137.717; State v. Bagley, 158 Or App 589 (1999).

See also ORS 137.010(1); ORS 137.637; OAR 213-009-0001(1).

I. Financial Impositions
The court may impose any restitution, fine, fee, or other monetary payment authorized or required by law in addition to the presumptive or departure sentence. OAR 213-009-0003.

VIII. OTHER SENTENCE ENHANCEMENTS/ VARIATIONS

A. Enhanced Gun Minimums on Felonies

1. Minimum Prison Sentence
   If pleaded and proved that defendant used or threatened to use a firearm (whether operable or inoperable) during commission of a felony, the court must impose minimum terms of imprisonment as follows:

   • First conviction, 5 years; but if machine gun, short-barreled rifle or shotgun, or equipped with firearms silencer, 10 years (see exception below);

   • Second conviction, 10 years; but if machine gun, short-barreled rifle or shotgun, or equipped with firearms silencer, 20 years;

   • If gun minimum imposed previously for second conviction, upon any subsequent conviction, 30 years.

   ORS 161.610(4). See State v. Wedge, 293 Or 598, 602-03 (1982) (court may not sentence defendant to mandatory minimum gun term unless defendant admits use or threatened use of firearm on record or jury has found defendant used or threatened firearm use); State v. Thiehoff, 169 Or App 630, 635-36 (2000) (court erred in imposing minimum sentence based on its own post-jury verdict finding that defendant personally did the shooting); State v. Pies, 104 Or App 646, 650 (1990) (without actual or threatened use, defendant’s possession
of firearm does not support imposition of minimum gun sentence); *State v. Earls*, 69 Or App 75, 81, *rev den* 297 Or 824 (1984) (it was permissible for legislature in enacting enhanced gun minimums to determine that defendant who has used a firearm in the commission of a felony must serve a minimum period of incarceration); *State v. Thiesies*, 63 Or App 200, 203 (1983) (defendant must be *personally* armed with firearm for gun minimum to be imposed); see also *State v. Johnson*, 125 Or App 655, 658-59 (1994) (firearm minimum is not a presumptive sentence under guidelines but a mandatory term).

### a. Exception for First-Time Offenders

If it’s the defendant’s first conviction under ORS 161.610(4)(a), the court may:

- For felonies committed before November 1, 1989, suspend or impose a lesser sentence, if express mitigating circumstances are found and set forth in sentencing statement; or
- For felonies committed on or after November 1, 1989, impose a lesser sentence in accordance with the guidelines.

ORS 161.610(5); OAR 213-009-0001(3).

### 2. Multiple Felony Convictions

If defendant has been convicted of several felonies involving the use or threatened use of a firearm, whether committed during a single criminal episode or transaction or at separate times, but has not been sentenced on any of the felonies, the court may impose only one gun minimum at sentencing. *State v. Hardesty*, 298 Or 616 (1985); *State v. Black*, 161 Or App 662 (1999); see *State v. Wells*, 82 Or App 283, 286 (1986) (defendant who commits two felonies in two separate criminal episodes and is convicted in two separate criminal proceedings is subject to only one mandatory minimum gun sentence unless second felony was committed after punishment for first felony).

### 3. Imposition of Firearm or Guidelines Sentence

If firearm minimum is longer than guidelines sentence, the court must impose the firearm minimum; if the firearm sentence is shorter, the court must impose the guidelines sentence. ORS 137.637; OAR 213-009-0001(1); *State v. Walker*, 117 Or App 527 (1992), *rev den* 315 Or 644 (1992); *State v. Stalder*, 117 Or App 289, 292 (1992).
4. **Limitation on Consecutive Sentences**
   Gun minimum sentences are subject to guidelines’ limitations on consecutive sentences. *State v. Johnson*, 125 Or App 655, 659 (1994); see OAR 213-012-0020(2)(b) (200% rule).

B. **Dangerous Offender Classification**

1. **Presentence Investigation and Examination**
   Upon motion of the district attorney, and if, in the opinion of the court, there is reason to believe that the defendant falls within ORS 161.725 (standards for sentencing of dangerous offender), the court must order a presentence investigation and an examination by a psychiatrist or psychologist. The court may appoint one or more qualified psychiatrists or psychologists to examine the defendant in the local correctional facility. ORS 161.735(1).

   a. **Deadline for Completing Examination**
      Each appointed psychiatrist and psychologist must complete the examination of the defendant within 30 days (subject to additional extensions not to exceed 30 days) and file a written report with the court, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity. ORS 161.735(3). See *State v. Smith*, 84 Or App 487, 490 (1987) (unless defendant can show prejudice, failure to complete examination within time set forth in ORS 161.735(3) does not preclude court from sentencing defendant as dangerous offender); see also *State v. Brown*, 82 Or App 256 (1986); *State v. Hunter*, 58 Or App 99, 110 (1982), rev den 294 Or 391 (1983) (defendant who refuses interview by psychiatrist or psychologist cannot then argue it is not possible to find defendant suffers from severe personality disorder indicating propensity toward criminal activity).

   b. **Hearing on Psychiatric Examination**
      Upon receipt of the examination report and presentence report, the court must set a time for a hearing unless both the State and the defendant waive the hearing. At the hearing, both parties may question any psychiatrist or psychologist who examined the defendant. ORS 161.735(5).

   c. **Examination Report Not Binding on Fact-Finder**
      The finder of fact is not bound by the examination report and may make its own determination based on all the

2. **Findings Required to Sentence a Dangerous Offender**

“[W]ith the exception of the fact of a defendant’s prior convictions, if the consequence of finding a fact is the imposition of a sentence outside the prescribed statutory maximum for the crime for which the jury found the defendant guilty, the Sixth and Fourteenth Amendments require that the fact be proved to the jury beyond a reasonable doubt.” *State v. Warren*, 195 Or App 656, 670 (2004) (concluding under *Apprendi v. New Jersey*, 530 US 466 (2000), and *Blakely v. Washington*, 542 US 296, 124 S Ct 2531 (2004), that imposition of a 30-year dangerous offender sentence based on the trial court’s finding that defendant suffered from a severe personality disorder as provided in ORS 161.725(1)(a) violated his right under the Sixth and Fourteenth Amendments to have that fact proved to a jury beyond a reasonable doubt). However, if the defendant produces evidence at trial that is sufficient to support the trial court’s finding that defendant is subject to an enhanced sentence as a dangerous offender, the application of *Apprendi* is lost. *State v. Heilman*, 339 Or 661 (2005) (stating “*Apprendi* and *Blakely* do not foreclose the state’s use of facts that the defendant chooses to admit at trial).

a. **Class A Felony**

When the defendant is being sentenced for a Class A felony, the jury or, if the defendant waives the right to a jury trial, the court must find that:

1. Because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public; and

2. The defendant suffers from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

and whether it is a Class A or a lesser felony. However, it cannot determine as a matter of law whether the felonious act seriously endangered another.”). See generally Apprendi v. New Jersey, 530 US 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”).

b. Non-Class A Felony & Previous Unrelated Felony Conviction

When the defendant is being sentenced for a Class B or C felony, and has previously been convicted of a felony not related to the instant crime as a single criminal episode, the jury or, if the defendant waives the right to a jury trial, the court must find that:

1. Because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public;

2. The defendant suffers from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another; and

3. The defendant is being sentenced for a felony that seriously endangered the life or safety of another.

ORS 161.725(1)(b) as amended by 2005 Or Laws, ch. 463, § 9 (effective July 7, 2005). See State v. Allen, 68 Or App 5, 9, rev den 297 Or 547 (1984) (statutory definition of crime with which defendant is charged is not dispositive of whether defendant actually endangered another’s life or safety; the focus is on the circumstances surrounding the commission of the felony).

i. Previous Felony Conviction

A previous felony conviction includes:

• A previous felony conviction in Oregon;

• A previous conviction in federal court, other than in a court-martial, if punishable by death or imprisonment for a term of one year or more; or

• A previous conviction by court-martial or court of any other state if punishable by death or imprisonment for one year or more and would have been a felony if convicted in Oregon.
ORS 161.725(2) as amended by 2005 Or Laws, ch. 463, § 9 (effective July 7, 2005).

A previous felony conviction does not include:

- An offense committed when defendant was less than 16 years of age;
- A conviction rendered after commission of the instant crime;
- A conviction unconditionally discharged more than 7 years before commission of the instant crime; or
- A conviction denounced only by military law.

ORS 161.725(3) as amended by 2005 Or Laws, ch. 463, § 9 (effective July 7, 2005).

ii. **Evidence of a Previous Conviction**

The court must consider as *prima facie* evidence of the previous conviction:

- An authenticated copy of the judicial record of the conviction;
- An authenticated copy of the fingerprints of the subject of that conviction; and
- Testimony that fingerprints of the subject of that conviction are the defendant’s.

ORS 161.735(7). The court may also use other procedures to determine proof of a previous felony conviction. ORS 161.735(8).

c. **Non-Class A Felony**

When the defendant is being sentenced for a Class B or C felony, the jury or, if the defendant waives the right to a jury trial, the court must find that:

1. Because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public;
2. The defendant suffers from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another;
3. The defendant is being sentenced for a felony that seriously endangered the life or safety of another; and
4. The defendant previously has engaged in *unlawful conduct* not related to the instant crime as a single criminal episode.

ORS 161.725(1)(c) as amended by 2005 Or Laws, ch. 463, § 9 (effective July 7, 2005).

3. **Application of the Blakely Bill (SB 528)**
The facts required to be found to sentence a defendant as a dangerous offender are *enhancement facts*, as defined in 2005 Or Laws, ch. 463, § 1(2) (effective July 7, 2005), and therefore sections 2 to 7 of 2005 Or Laws, ch. 463 apply to making determinations of those facts. ORS 161.735(9) as amended by 2005 Or Laws, ch. 463, § 10(9) (effective July 7, 2005).

4. **Sentencing the Defendant**
   If, after considering the evidence in the case or in the presentence hearing, the jury or, if the defendant waives the right to a jury trial, the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant as a dangerous offender. ORS 161.735(6) as amended by 2005 Or Laws, ch. 463, § 10 (effective July 7, 2005).

   a. **Maximum Indeterminate Sentence**
      The court may sentence a dangerous offender to an indeterminate sentence of imprisonment not to exceed 30 years. ORS 161.725(1) as amended by 2005 Or Laws, ch. 463, § 9 (effective July 7, 2005).

   b. **Dangerous Offender Sentence is a Departure Sentence**
      A dangerous-offender sentence imposed under ORS 161.725 and 161.735 for felonies committed on or after November 1, 1989, constitutes a departure from the sentencing guidelines. ORS 161.737(1). *See State v. Davis*, 315 Or 484, 490, 494-95 (1993). **Note:** For crimes committed **before July 13, 1993**, when the court imposes a dangerous offender sentence on a conviction subject to the guidelines, the sentence constitutes a departure and is subject to guidelines governing length of consecutive sentences. *See* 1993 Or Laws, ch. 334, § 6.

   i. **Crimes Committed Before November 1, 1989**
      For offenders convicted of a felony committed **prior** to November 1, 1989, the court may impose a minimum term of imprisonment of up to one-half of the sentence it imposes; unless the offender is convicted of aggravated murder or murder, in which case the date of the crime is irrelevant. ORS 144.110(1); 1989 Or
5. **Imposing Dangerous Offender Sentence**

The following considerations apply in imposing a dangerous offender sentence:

a. The court may not sentence defendant both on the underlying felony and as a dangerous offender—only one sentence of up to 30 years is proper. *State v. Brown*, 82 Or App 256, 258 (1986); *State v. Downs*, 69 Or App 556 (1984).


d. Where applicable, the court has authority to sentence defendant under dangerous offender statute or Denny Smith Act (ORS 137.635), but not both. *State v. Andrews*, 118 Or App 107 (1993).

e. A dangerous offender minimum sentence under ORS 161.725 does not punish defendant’s “status” of suffering from a severe personality disorder, nor is it “cruel and unusual punishment” under the Oregon Constitution. *See State v. Caughey*, 89 Or App 605, 607, *rev den* 305 Or 672 (1988) (minimum sentence reflects legislative recognition that disorder causes defendant to commit dangerous crimes and be less amenable to rehabilitation and that defendant should be subject to increased incarceration for protection of public).


6. **Durational Limits Do Not Apply to Dangerous Offenders**

The limits on durational departures established by the “200%” rule and the “400%” rule do not apply to the indeterminate sentence imposed on a dangerous offender under ORS 161.725 and 161.737. OAR 213-008-0003(3); OAR 213-008-0007(3) (applies to crimes committed on or after Nov. 1, 1993); OAR
C. Sexually Dangerous Person Classification

When the defendant has been convicted of a sexual offense under ORS 163.305 to 163.467 or ORS 163.525 and there is probable cause to believe the defendant is a sexually dangerous person, before imposing sentence, the court may continue the time for sentencing and commit the defendant for evaluation and report to a facility designated under ORS 426.670 for a period not to exceed 30 days. ORS 426.675(1). See ORS 426.670 (authorizing the Department of Human Services to establish and operate treatment programs for sexually dangerous persons).

1. Hearing to Determine Whether Defendant is Sexually Dangerous

If the facility reports to the court that the defendant is a sexually dangerous person and that treatment available may reduce the risk of future sexual offenses, the court must hold a hearing to determine by clear and convincing evidence that the defendant is a sexually dangerous person. ORS 426.675(2). See State v. Cunningham, 82 Or App 292 (1986) (court cannot base a finding on report by psychiatrist or psychologist who has only reviewed other reports because ORS 426.675 requires that defendant be personally examined; mere review of presentence report and police reports does not satisfy statute).

The State and the defendant have the right to call and cross-examine witnesses at the hearing. The defendant may waive the hearing. ORS 426.675(2).

2. Sentencing

If the court finds that the defendant is a sexually dangerous person and that available treatment will reduce risk of future sexual offenses, the court may impose:

• Probation on the condition that defendant participate and successfully complete a treatment program for sexually dangerous persons pursuant to ORS 426.670;

• Imprisonment with an order that defendant be assigned by the DOC to a treatment program for sexually dangerous persons pursuant to ORS 426.670; or

• Any other sentence authorized by law.

ORS 426.675(3). See State v. Sanders, 35 Or App 503, 509 (1978), rev den 285 Or 195 (1979) (under appropriate circumstances, court may sentence defendant as both a “dangerous offender” and a “sexually dangerous offender”).
**D. Sexually Violent Dangerous Offender Classification**

In addition to any sentence of imprisonment required by law, the court must impose a period of post-prison supervision that extends for the *remainder of the offender’s life* if the person:

1. Was 18 years of age or older at the time the person committed the crime;
2. Is a sexually violent dangerous offender; and
3. Is convicted of (or an attempt to commit):
   a. Unlawful sexual penetration in the first degree; or
   b. Rape in the first degree and sodomy in the first degree if the victim was:
      • Subjected to forcible compulsion by the person;
      • Under 12 years of age; or
      • Incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.


1. **Definition**

   A “sexually violent dangerous offender” is a person who has psychopathic personality features, sexually deviant arousal patterns, or interests and a history of sexual assault, and presents a substantial probability of committing a crime listed in ORS 137.765(3). ORS 137.765(1)(b) as amended by 2005 Or Laws, ch. 463, § 11 (effective July 7, 2005).

2. **Presentence Investigation and Examination**

   A court must order a presentence investigation and an examination of the defendant by a psychiatrist or psychologist upon motion of the district attorney if:
   a. The defendant is convicted of a crime listed in ORS 137.765(3); and
   b. In the opinion of the court, there is reason to believe that the defendant is a sexually violent dangerous offender as defined in ORS 137.765.

ORS 137.767(1)(a). The court may appoint one or more qualified psychiatrists or psychologists to examine the defendant in the local correctional facility. ORS 137.767(1)(b).
The State must pay all costs connected with the examination. ORS 137.767(2).

a. Deadline for Completing Examination
The examination must be completed within 30 days if the defendant is in custody or within 60 days if the defendant is not in custody (the court may order extensions not exceeding 30 days). Each psychiatrist or psychologist appointed to examine the defendant must file a written report of findings and conclusions, including an evaluation of whether the defendant is predisposed to commit a crime listed in ORS 137.765(3) because the defendant has:

1. Psychopathic personality features; and
2. Sexually deviant arousal patterns or interests.
ORS 137.767(3).

b. Hearing on Psychiatric Examination
Upon receipt of the examination and presentence reports the court must set a time for a sentence hearing, at which the district attorney and the defendant may question any psychiatrist or psychologist who examined the defendant. ORS 137.767(5).

c. Defendant's Right to Independent Examination
The defendant may retain a psychiatrist, psychologist or other expert to perform an examination on the defendant’s behalf, who must be given reasonable access to:

1. The defendant for the purpose of the examination; and
2. All relevant medical and psychological records and reports.
ORS 137.769(1). If the defendant is financially eligible for appointed counsel, the defendant may request preauthorization to incur the fees and expenses of the psychiatrist, psychologist or other expert as provided in ORS 135.055(3). ORS 137.769(2).

d. Offender's Right to Petition for Modification
A person sentenced as a sexually violent dangerous offender may, after a period of 10 years, petition the sentencing court for a resentencing hearing requesting that the judgment be modified to terminate post-prison supervision. ORS 137.771(1). If the petition is denied, the offender may petition again for a resentencing hearing after an additional five years. ORS 137.771(6). See generally...
ORS 137.771(2)-(3) (allowing the court to order an examination and a hearing on the petition; providing factors to consider in whether to amend the judgment).

3. Application of the Blakely Bill (SB 528)
   The fact that a person is a sexually violent dangerous offender is an enhancement fact, as defined in 2005 Or Laws, ch. 463, § 1(2) (effective July 7, 2005), and therefore sections 2 to 7 of 2005 Or Laws, ch. 463 apply to making determinations of that fact. ORS 137.767(7) as amended by 2005 Or Laws, ch. 463, § 12(7) (effective July 7, 2005). See also Apprendi v. New Jersey, 530 US 466 (2000); Blakely v. Washington, 542 US 296, 124 S Ct 2531 (2004).

4. Sentencing the Defendant
   If, after considering the evidence in the case or in the sentence hearing, the jury or, if the defendant waives the right to a jury trial, the court finds that the defendant is a sexually violent dangerous offender, the court must sentence the defendant to post-prison supervision that extends for the remainder of the offender’s life as provided in ORS 137.765. ORS 137.767(6) as amended by 2005 Or Laws, ch. 463, § 12(6) (effective July 7, 2005).

E. Guilty Except for Insanity

1. Dispositional Determination
   After entry of judgment of guilty except for insanity, the court must, on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as provided in ORS 161.327 (giving jurisdiction to the Psychiatric Security Review Board) or 161.329 (discharge), whichever is appropriate. ORS 161.325(1).

   a. Order Giving Jurisdiction to PSRB—Findings
      If the court finds that the person would have been guilty of a felony, or of a misdemeanor during a criminal episode in the course of which the person caused physical injury or risk of physical injury to another, the court must order that a psychiatric or psychological evaluation be performed and a report of the evaluation be provided to the court if an evaluation was not performed or a report was not provided to the court prior to trial. ORS 161.327(1)(a) as amended by 2005 Or Laws, ch. 685, § 1a (effective Jan. 1, 2006).

      Upon receipt of the evaluation, the court must order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment if the court
finds by a *preponderance of the evidence* that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to:

1. A state hospital designated by the Department of Human Services (DHS) if the person is at least 18 years of age; or

2. A secure intensive community inpatient facility designated by DHS if the person is *under 18 years of age*.

ORS 161.327(1)(a) as amended by 2005 Or Laws, ch. 685, § 1a (effective Jan. 1, 2006). When a court orders a psychiatric or psychological evaluation of a *financially eligible* person, the court must order the public defense services executive director to pay a reasonable fee for the evaluation from funds available for that purpose. 2005 Or Laws, ch. 685, § 1a(1)(c) (effective Jan. 1, 2006).

i. **Immediate Commitment or Conditional Release**

The court must determine whether the person should be committed to a state hospital or conditionally released pending any hearing before the board. ORS 161.327(2). In determining whether a person should be conditionally released, the court may order evaluations, examinations, and compliance as provided in ORS 161.336(4) and 161.346(2), and must have as its primary concern the protection of society. ORS 161.327(4), (5).

A) **Ordering Commitment**

If the court finds that the person presents a *substantial danger to others* and is not a proper subject for conditional release, the court must commit the person to a state hospital for custody, care, and treatment pending hearing before the board. ORS 161.327(2)(a).

B) **Ordering Conditional Release**

The court may order the person conditionally released, subject to those supervisory orders of the court as are in the best interests of justice, the protection of society, and the welfare of the person, if the court finds that:

1. The person presents a substantial danger to others *but* that the person can be adequately
controlled with supervision and treatment if conditionally released; and

2. Necessary supervision and treatment are available (the court must designate a person or state, county, or local agency to supervise the person upon release—subject to those conditions as the court directs in the order for conditional release—and, prior to the designation, provide notice and an opportunity to be heard).

ORS 161.327(2)(b).

ii. Additional Determinations
If the court makes an order under ORS 161.327, it also must:

1. Determine on the record the offense of which the person otherwise would have been convicted;

2. State on the record the mental disease or defect on which the defendant relied for the guilty except for insanity defense; and

3. Make specific findings on whether there is a victim of the crime and whether the victim wants to be notified of any PSRB hearings concerning the defendant and of any conditional release, discharge, or escape of the defendant.

ORS 161.325(2) as amended by 2005 Or Laws, ch. 337, § 1(2) (effective Jan. 1, 2006).

iii. PSRB Jurisdiction
“Once jurisdiction passes to PSRB, the trial court’s jurisdiction terminates, and it has no authority to order conditions of release or otherwise interfere with PSRB’s supervision of the case.” State v. Pilip, 111 Or App 649, 650 (1992).

A) Period of Jurisdiction
The period of jurisdiction of the board must be equal to the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity. ORS 161.327(1) as amended by 2005 Or Laws, ch. 685, § 1a(1)(b) (effective Jan. 1, 2006). See State v. Brooks, 187 Or App 388, 397 (2003) (“the length of PSRB jurisdiction [is] to be measured by the statutory indeterminate
maximum sentence rather than by the guidelines presumptive sentence”) State v. Norman, 71 Or App 389, 392-93 (1984), rev den 299 Or 31, cert den 471 US 1139 (1985) (concluding that trial court lacks discretion to lessen period of PSRB’s jurisdiction); State v. Carrol, 54 Or App 445, 447, rev den 292 Or 334 (1981) (providing that court may extend the defendant’s maximum term of commitment to PSRB if the defendant is determined to be a “dangerous offender”).

B) Consecutive PSRB Terms Allowed

b. Order of Discharge
The court must discharge the person from custody if it finds that the defendant:

1. Is no longer affected by mental disease or defect; or
2. If so affected, no longer presents a substantial danger to others and does not need care, supervision, or treatment.

ORS 161.329. See State v. Brooks, 187 Or App 388, 398 (2003) (noting that “a PSRB commitment under ORS 161.327(1) must be based on a factual finding that a person is affected by a mental disease or defect and ‘presents a substantial danger to others requiring commitment.’ At any time after that initial determination, if a court or PSRB determines that the person no longer presents a substantial danger to others, the person will be discharged.”).

2. Mental Disease or Defect Defined
A person is considered to have mental disease or defect requiring supervision when the disease may, with reasonable medical probability, occasionally become active and, when active, render the person a danger to others. ORS 161.327(3).

3. Sentencing Guidelines Inapplicable
IX. CONCURRENT AND CONSECUTIVE SENTENCES

A. General Principles

1. Imposition of Sentence
   The court may impose a sentence concurrent with or consecutive to any other sentence which previously has been imposed or is simultaneously imposed upon the same defendant. ORS 137.123(1). See Trahan v. Cupp, 8 Or App 466, 468, rev den, cert den 409 US 884 (1972) (before enactment of ORS 137.123, court had inherent power to impose concurrent and consecutive sentences for single offense).

   a. Consecutive Sentences Must be Explicit
      Unless the court’s judgment expressly provides for consecutive sentences, a sentence is deemed to be concurrent. ORS 137.123(1).

2. When Court May Impose Concurrent or Consecutive Sentence
   The court may impose a concurrent or consecutive sentence if the defendant:

   a. Simultaneously is sentenced for offenses that do not arise from the same continuous and uninterrupted course of conduct; or

   b. Previously was sentenced by any other court in the United States to a sentence which defendant has not yet completed.

   ORS 137.123(2); see State v. Duran, 108 Or App 282, 284 (1991) (ORS 137.123 does not limit court’s discretion to impose consecutive terms of imprisonment when convictions did not arise out of continuous and uninterrupted course of conduct).

   a. Finding May be Subject to Apprendi
      The finding that the offenses “do not arise from the same continuous and uninterrupted course of conduct” required under ORS 137.123(2) may be subject to the constitutional requirements of Apprendi v. New Jersey, 530 US 466 (2000): “[T]he ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” Blakely

3. Statutory Provisions Apply to Guidelines Sentences

When multiple convictions have been entered against a single defendant, the sentencing judge may impose consecutive or concurrent sentences as provided by ORS 137.123 and 137.370 for felonies subject to the guidelines. OAR 213-012-0010.

B. Concurrent Sentences

The court must impose a concurrent sentence if the defendant has been found guilty of more than one criminal offense arising out of a continuous and uninterrupted course of conduct, unless the court complies with the procedures set forth in ORS 137.123(5) (providing discretion to impose consecutive sentences). ORS 137.123(4). See infra “Discretion to Impose Consecutive Sentences.”

C. Consecutive Sentences

1. Mandatory for Crime Committed While Incarcerated

The court must impose a consecutive sentence when the defendant is sentenced for a crime committed while the defendant was incarcerated after sentencing for the commission of a previous crime. ORS 137.123(3).

2. Discretion to Impose Consecutive Sentences

The court has discretion to impose consecutive terms of imprisonment for separate convictions arising out of a continuous and uninterrupted course of conduct only if the “court” finds that:

a. The criminal offense for which a consecutive sentence is contemplated was not merely an incidental violation of a separate statutory provision in the course of the commission of a more serious crime but rather was an indication of defendant’s willingness to commit more than one criminal offense; or

b. The criminal offense for which a consecutive sentence is contemplated caused or created a risk of causing greater or qualitatively different loss, injury, or harm to the victim or to a different victim than was caused or threatened by the other offense(s) committed during a continuous and uninterrupted course of conduct.

consecutive sentences for repetition of same crime committed against same victim when defendant has had time to renounce criminal objectives before acting further; State v. Goltz, 169 Or App 619, 624 (2000) (concluding that the trial court did not err in imposing consecutive sentences on two counts of attempted aggravated murder where each of defendant’s acts of attempted murder put two victims at risk).

a. **Findings May be Subject to Apprendi**

The findings required under ORS 137.123(5) may be subject to the constitutional requirements of Apprendi v. New Jersey, 530 US 466 (2000): “[T]he ‘statutory maximum’ for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. In other words, the relevant ‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” Blakely v. Washington, 542 US 296, 124 S Ct 2531, 2537 (2004) (citations omitted). See also 2005 Or Laws, ch. 463, §§ 1-7 (effective July 7, 2005); State v. Taylor, 198 Or App 460 (2005).

Additionally, if the finding in ORS 137.123(5)(a) that the criminal offense for which a consecutive sentence is contemplated “was an indication of defendant’s willingness to commit more than one criminal offense” is an enhancement fact related to the defendant, it must be submitted to the jury during the sentencing phase if the defendant is found guilty of the offense. 2005 Or Laws, ch. 463, § 4 (effective July 7, 2005).

3. **Felonies Committed on or After November 1, 1989**

Subject to ORS 161.605 (providing maximum indeterminate sentences for felony convictions), OCJC rules govern the maximum consecutive sentences that may be imposed for felonies committed on or after November 1, 1989, whether as terms of imprisonment, probation, or both. ORS 137.121.

4. **Multiple Consecutive Guidelines Sentences**

Multiple consecutive sentences must consist of an incarceration term and a supervision term. OAR 213-012-0020(1).

5. **Presumptive Incarceration Term**

The presumptive incarceration term of consecutive sentences is the sum of:
a. The presumptive incarceration or prison term imposed pursuant to a dispositional departure for the primary offense; and

b. Up to the maximum incarceration term in the Criminal History I Column for each additional offense imposed consecutively.

OAR 213-012-0020(2)(a). See State v. Shaffer, 121 Or App 131, 134 (1993) (“shift to column I” rule applies only to consecutive sentences; when sentencing to concurrent terms of imprisonment, court should utilize prescribed grid block); see also State v. Rojas-Montalvo, 153 Or App 222, 226, rev den 327 Or 193 (1998); State v. Thomas, 133 Or App 754, 758 (1995) (it is error to fail to “shift to column I” on consecutive sentences arising out of a single incident).

6. The “200%” Rule
The total incarceration term of the consecutive sentences, including the incarceration term for the primary offense, may not exceed twice the maximum presumptive incarceration term or the prison term imposed pursuant to a dispositional departure of the primary sentence, except by departure as provided by OAR 213-008-0007. OAR 213-012-0020(2)(b).

7. The “400%” Rule
When one or more durational departure sentences are imposed, OAR 213-008-0007(3), in conjunction with OAR 213-012-0020(2)(b), provides the limit for the incarceration term of the consecutive sentences known as the “400%” rule: “When a departure sentence is imposed for any individual offense sentenced consecutively, the incarceration term of that departure sentence shall not exceed twice the maximum incarceration term that may be imposed for that offense as provided in OAR 213-012-0020(2)(a).” OAR 213-008-0007(3). See, e.g., State v. Skelton, 153 Or App 580, 589-91, rev den 327 Or 448 (1998) (discussing the “400%” rule).

a. Calculating the Sentence
The court first calculates the presumptive incarceration term of each felony conviction subject to guidelines arising from a single episode; it then may impose a departure sentence on any or all of the individual convictions not to exceed 200%. Because the presumptive incarceration terms already will have been limited by operation of the 200% rule, the maximum incarceration term that the court may impose for all the consecutive sentences together by departure cannot exceed four times the maximum

b. **When 200% and 400% Rules Not Applicable**

The 200% and 400% rules do not apply to:


- Cases in which the court imposes consecutive sentences for crimes with different victims. OAR 213-012-0020(5); OAR 213-008-0007(3) (applies to crimes committed on or after Dec. 5, 1996); 1999 HJR 94 (Ballot Measure 74, passed by electorate at Nov. 2, 1999, election and effective Dec. 2, 1999, provides that court’s authority to sentence consecutively for crimes against different victims may not be limited; repealing 400% rule in those circumstances); see also *State v. Lanig*, 154 Or App 665, 675 (1998) (constitutional amendment applies retroactively).

c. **Dispositional Departure Sentences**


8. **Partially Consecutive and Concurrent Sentences**

Under the authority granted in ORS 137.123 to impose both consecutive and concurrent sentences, the court has implicit authority to impose sentences that are partially consecutive and concurrent. *State v. Carlson*, 160 Or App 651 (1999), rev den 329 Or 589 (2000); *State v. Trice*, 159 Or App 1, 5, rev den 329 Or 61 (1999).
9. **Sentence Consecutive to Life Sentence**  

10. **Sentence Consecutive to Unexecuted Sentence**  

11. **Jail Probationary Sentence Consecutive to Prison Sentence**  
The court may impose a jail sentence as a probation condition on one crime consecutive to a prison sentence on another crime; it also may impose a jail sentence consecutive to another jail sentence imposed as a condition of probation on another crime. *State v. Walker*, 77 Or App 464, *rev den* 300 Or 722 (1986).

The court *cannot* require defendant to serve a jail sentence imposed as a probation condition and order the sentence served consecutive to a prison/jail sentence if the probation expires before defendant is released from custody. *State v. Nunn*, 84 Or App 642, 644 (1987).

If the court suspends execution of a term of imprisonment and places defendant on probation, the court cannot, after revoking probation, order term of imprisonment to run consecutive to another term of imprisonment. *State v. Harper*, 86 Or App 11 (1987).

12. **Measure 11—Consecutive Sentences**  
The court must use the following procedure when imposing consecutive sentences in a case that involves Measure 11 sentences:

   a. The court first should determine the maximum term available for all of the felony offenses under the guidelines, using as applicable either the 200% or 400% rule.

   b. Once the court has determined the mandatory minimum sentence for Measure 11 offenses and the guidelines maximum sentence, it can impose the actual sentence.

   c. If the guidelines sentence is less than the mandatory minimum, the court must impose the mandatory minimum for Measure 11 offenses and impose concurrent sentences on others.

   d. If the guidelines maximum is higher, the court has more discretion. In that case, the court must impose the
mandatory minimum, but may impose guidelines sentences up to the amount allowable under the 200% or 400% rule, whichever is applicable.

*State v. Skelton*, 153 Or App 580, 591, *rev den* 327 Or 448 (1998); *State v. Langdon*, 151 Or App 640, 646-48 (1997), *aff’d* 330 Or 72 (2000) (400% rule does not limit length of consecutive Measure 11 sentences but may limit court’s ability to order a sentence imposed on a conviction for a non-Measure 11 offense to be served consecutive to a minimum sentence imposed on Measure 11 conviction based on a crime that defendant committed during same criminal episode).

X. **MERGER**

A. **Multiple Violations**

When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as there are separate statutory violations. ORS 161.067(1). *But see State v. Barrett*, 331 Or 27, 36-37 (2000) (defendant convicted of aggravated murder of single victim under alternative theories should result in one murder conviction, although the judgement should set forth each of the theories on which the defendant was convicted).

**Note:** When dealing with a burglary charge coupled with a theft or criminal mischief charge pleaded as the intended crime of burglary, the burglary and theft or criminal mischief constitute only one punishable offense. *State v. Pritchett*, 90 Or App 342, 345, *rev den* 305 Or 672 (1988).

B. **Multiple Victims**

1. **Separately Punishable Offenses**

   When the same conduct or criminal episode violates only one statutory provision but involves two or more victims, there are as many separately punishable offenses as there are victims. ORS 161.067(2).

2. **When Multiple Victims Considered Single Victim**

   The court must consider two or more persons owning joint interest in real property as a single victim for purposes of determining the number of separately punishable offenses if the property is the subject of:
   - Theft;
• Unauthorized use of a vehicle;
• Criminal Possession of Rented or Leased Personal Property;
• Burglary;
• Criminal Trespass;
• Arson and related offenses; or
• Forgery and related offenses.
ORS 161.067(2).

C. Same Victim With Multiple Violations

1. Repeated Violations of Same Statute
When the same conduct or criminal episode violates only one statutory provision and only involves one victim, but nevertheless involves repeated violations of the same statutory provision against the same victim, there are as many separately punishable offenses as there are violations. ORS 161.067(3).

a. “Sufficient Pause” Proviso
To be separately punishable, each violation must be separated from other violations by a sufficient pause in the defendant’s criminal conduct to afford the defendant an opportunity to renounce the criminal intent. ORS 161.067(3). See State v. Barnum, 333 Or 297, 303 (2002) (trial court erred in imposing separate sentences on burglary convictions for theft and arson where the only evidence of a sufficient pause was the fact that keys were stolen from a rack some distance from the bedroom where the fire was set—to be separately punishable, “one crime must end before another begins”); State v. White, 202 Or App 1 (2005) (rejecting the State’s argument that two kidnapping convictions were separately punishable because they involved two kidnappings—one when defendant pushed the victim back into her apartment, and one arising from defendant’s actions once he was in the apartment—separated by a “sufficient pause” because the record would not permit a rational trier of fact to find a second kidnapping based on defendant’s pulling of the victim through her apartment).

i. Sufficient Pause Finding May be Subject to Apprendi
The “sufficient pause” requirement under ORS 161.067(3) may be subject to the constitutional

2. **Certain Sexual Offenses Constitute Separate Violations**

Each method of engaging in deviate sexual intercourse as defined in ORS 163.305, and each method of engaging in unlawful sexual penetration as defined in ORS 163.408 and ORS 163.411 constitutes separate violations of their respective statutory provisions for purposes of determining the number of statutory violations. ORS 161.067(3).

D. **General Principles of Merger**

1. **Elements of Proof**


2. **When Offenses Do Not Merge**


3. **Lesser Included Offenses**

Lesser included offenses predicated on the same conduct merge with the greater offense, unless separated by a “sufficient pause.” *State v. Sanders*, 189 Or App 107, 74 P3d 1105 (2003), *rev den* 336 Or 657 (2004) (holding that convictions for the lesser-included offense of second-degree assault should have merged with the conviction of first-degree assault); *State v. White*, 202 Or App 1 (2005) (concluding that trial court erred in not merging two convictions for assault IV with conviction for assault II).

4. **Specific Merger Applications**

- ORS 161.067(1) permits separate convictions for burglary and any crime that a burglar intended to commit within the building entered; however, theft and criminal mischief, if pleaded as the intended crimes, merge with burglary. *See State v. Pritchett*, 90 Or App 342, 345, *rev den* 305 Or 672 (1988) (discussing former ORS 161.062(1); offenses of burglary and rape do not merge).
• Convictions of third degree rape and sodomy based on the victim being under 16 years of age did not merge with convictions for first degree rape and sodomy of the same victim based on forcible compulsion. *State v. Crotsley*, 94 Or App 347, 350 (1988), aff’d 308 Or 272 (1989).

• Charges on two counts of forgery merged—one for falsely making and completing and the other for uttering—and defendant should have received only one sentence. *State v. Kizer*, 308 Or 238, 243 (1989).

• When handguns were two separate objects and there was evidence they were concealed by separate acts and offenses not directed toward single criminal objective, the trial court properly imposed probation on each count of unlawful possession of a firearm. *State v. Collins*, 100 Or App 311, 314 (1990).

5. Inchoate Crimes

a. **Multiple Inchoate Offenses Merge**
   A person may not be convicted for more than one attempt, solicitation, or conspiracy offense for conduct designed to commit or to culminate in commission of the same crime. ORS 161.485(2). *See State v. Rickards*, 133 Or App 592, 593 (1995) (trial court erred as a matter of law by failing to merge convictions for attempted first degree assault and conspiracy to commit first degree assault into a single conviction under ORS 161.485(2)).

b. **Inchoate and Completed Versions of an Offense Merge**
   A person may not be convicted on the basis of the same course of conduct of both the actual commission of an offense and an attempt or conspiracy to commit that offense or the solicitation of that offense. ORS 161.485(3). *See State v. Scott*, 135 Or App 319, 323, rev den 321 Or 560 (1995). However, a conviction for an attempt to commit a greater offense does not merge with a conviction for a lesser included offense arising out of the same conduct. *State v. O’Hara*, 152 Or App 765, 769, rev den 327 Or 305 (1998).

6. Sentencing

a. **Court Must Sentence on Crime Remaining After Merger**
   For the purposes of merger, the court must sentence on the remaining crime. *State v. Green*, 145 Or App 175, 177 (1996) (trial court committed error of law by not merging
defendant’s convictions for conspiracy and attempt to commit the same substantive crimes when it merged “for sentencing” attempt convictions and imposed additional sentence of probation on those convictions).

b. Court Must Sentence on the More Serious Crime
In a merger situation, the court must impose sentence only on the crime that carries the greater maximum sentence—i.e., the more serious crime. *State v. Woolard*, 259 Or 232 (1971) (holding that when only a single sentence is authorized for conduct that violates more than one criminal statute, the trial court is bound to convict and sentence the defendant for the more serious crime, i.e., the one carrying the greater maximum sentence).

i. Court Must Consider Rank on Crime Seriousness Scale
Because the sentencing guidelines have changed how the “seriousness” of a crime is determined, sentencing for merger purposes is no longer only a question of statutory classification but also involves the ranking of the crime on the crime seriousness scale. *State v. Seaman*, 115 Or App 180, 182 (1993) (trial court did not err when it merged convictions and sentenced defendant on a class C felony, which ranked higher on the crime seriousness scale than a class B felony based on the same incident).

XI. OTHER SENTENCING CONSIDERATIONS

A. Presentence Investigations

1. Duties of Probation Officers
When directed by the court, probation officers must fully investigate and report to the court in writing on the circumstances of:

- The offense;
- Criminal record;
- Social history; and
- Present condition and environment of any defendant.

ORS 137.530(1); ORS 137.630(1)(a).
2. **General Contents of Presentence Report**

The presentence report must contain a statement of the victim describing the effect of the defendant’s offense on the victim or an explanation of why such statement is not present. ORS 137.530(2), (3). See ORS 137.530(4) (“Victim” means the person or persons who have suffered financial, social, psychological, or physical harm as result of an offense, and includes, in case of any homicide or abuse of corpse in any degree, an appropriate member of decedent’s immediate family).

Additionally, the presentence report may include:


a. **Minimum Contents of Presentence Reports for Felonies Subject to Guidelines**

Each presentence report prepared for an offender to be sentenced for one or more felonies subject to the guidelines, must at a minimum include:

1. A summary of the factual circumstances of the crime(s);

2. The appropriate crime classification including subclassification if applicable;

3. A listing of all prior adult felonies, Class A misdemeanors, and prior juvenile adjudications and an assessment of the appropriate criminal history classification;

4. The proposed grid block classification and presumptive sentence for each crime;
5. Recommended probation conditions if grid block is below dispositional line;

6. A victim statement as required by ORS 137.530(2);

7. A recommendation as to whether departure is appropriate, including aggravating or mitigating factors; and

8. Any additional information as provided upon request of the sentencing judge.

OAR 213-013-0010(1)-(6).

i. **Waiver**

The sentencing court may waive requirement of information necessary to establish a presumptive sentence if that information has been made part of an accepted plea agreement. OAR 213-013-0010(7).

b. **Rules of Evidence Do Not apply**


c. **Unrepresented Defendant—Collateral Attack**

If in a previous proceeding the defendant was not represented by counsel or advised of the right to counsel, and did not intelligently waive that right, prior juvenile adjudications and criminal convictions obtained in those proceedings are subject to collateral attack when listed in the presentence report. *State v. Flores*, 13 Or App 556, 559-60 (1973).

3. **Presence of Defense Counsel**


4. **Presentence Report—Probation**

Unless the court directs otherwise, no defendant may be sentenced to probation until a presentence investigation report has been prepared and considered by the court. ORS 137.530(1).

5. **Presentence Report—Felony**

When a defendant is convicted of a felony, including a felony sexual offense, the court may order a presentence report on its
own motion or on request of the DA or the defendant. ORS 144.791(1).

a. **DOC Required to Provide Analysis of Appropriate Disposition**
   The DOC is required to provide in the presentence report an analysis of what disposition is most likely to reduce the offender’s criminal conduct, explain why that disposition would have that effect, and provide an assessment of the availability to the offender of any relevant programs or treatment in or out of custody, whether provided by the department or another entity. ORS 144.791(3)(a) as amended by 2005 Or Laws, ch. 473, § 1 (effective Jan. 1, 2006).

6. **Presentence Report—Felony Sexual Offense**
   The court must order a presentence report if the defendant is convicted of a felony sexual offense, unless:

   • Defendant, as part of the same prosecution, is convicted of aggravated murder;
   • The offense requires imposition of a mandatory minimum prison sentence and no departure is sought by the court, the DA, or the defendant; or
   • The offense requires imposition of a presumptive prison sentence and no departure is sought by the court, the DA, or the defendant.

   ORS 144.791(2).

7. **Sentencing Reports on Felons Must Be Submitted to OCJC**
   A sentencing report must be submitted to the Oregon Criminal Justice Commission by the sentencing court for each sentence imposed for felonies subject to the guidelines. OAR 213-013-0001. See OAR 213-013-0001(2)-(4) (providing what information is required to be in report).

8. **Disclosure of Presentence Information**
   a. **Availability of Presentence Report**
      The presentence report is not a public record and must be available only to:
      • Sentencing court;
      • Appellate or review courts;
      • DOC;
• Board of Parole and Post-Prison Supervision;
• DA;
• Defendant or defendant’s counsel; and
• Persons or agencies having a legitimate professional interest in information likely to be contained in the report.

ORS 137.077.

b. Disclosure Required at Least 5 Days Before Sentencing
At least five judicial days before sentencing the defendant, the court must make available to the DA, the defendant, or defendant’s counsel a copy of the presentence report and all other written information concerning the defendant that the court considers in imposing sentence. ORS 137.079(1). See State v. Eder, 29 Or App 375, 378-79 (1977) (court must disclose raw test data upon which evaluation of defendant was made or provide adequate alternative to disclosure).

c. Defendant’s Rights
Defendant has a constitutional right to a copy of that part of a presentence report which deals with public information and relates to defendant’s prior criminal record. Buchea v. Sullivan, 262 Or 222, 237 (1972); see State v. Green, 49 Or App 949, 952 (1980) (court erred in denying defendant’s request for presentence report and making copy of report available only in chambers for defense counsel to review).

9. Nondisclosure of Presentence Information

a. Discretion
The court may except from disclosure parts of the presentence report or other written information considered by the court that are:

• Not relevant to a proper sentence;
• Diagnostic opinions which might seriously disrupt a program of rehabilitation if known by defendant; or
• Sources of information which were obtainable with an expectation of confidentiality.

ORS 137.079(2).
b. Requirements
The court must:

1. Inform the parties whenever information contained in the report or other written information is not disclosed; and

2. State the reasons for nondisclosure.

ORS 137.079(3). See State v. Miller, 49 Or App 955, 957-58 (1980) (oral summary of presentence report by court is not sufficient); State v. McCaffrey, 45 Or App 87, 90 (1980) (failure to state reasons for nondisclosure can result in reversal and resentencing).

10. Corrections to Criminal History

a. Felonies Committed Before November 1, 1989
The defendant may file a written motion to correct the criminal history prior to the date of sentencing. ORS 137.079(4).

b. Felonies Committed on or After November 1, 1989
The defendant must provide written notification to the court and the DA of any error in the criminal history prior to the date of sentencing. ORS 137.079(5); OAR 213-004-0013(3). The state has the burden of proving by a preponderance of the evidence any disputed part of the criminal history. ORS 137.079(5)(c).

c. Attacking Uncounseled Convictions
A defendant may collaterally attack any prior juvenile adjudications and criminal convictions shown in the presentence report that were obtained in a proceeding where defendant was unrepresented by counsel, was not advised of his right to counsel, or did not intelligently waive his right to counsel. State v. Flores, 13 Or App 556, 559-60 (1973). Note: Proof of a prior juvenile adjudication is subject to Blakely v. Washington, 542 US 296, 124 S Ct 2531 (2004), and requires proof beyond a reasonable doubt and the right to a jury trial. State v. Harris, 339 Or 157, 170-75 (2005).

d. Court Makes Factual Corrections
earlier version of ORS 138.083; court had authority to enter amended judgment more than 60 days after judgment of conviction in order to conform written judgment to sentence orally imposed).

i. **Modifications After Sentence in Effect**
   After defendant has begun to serve (put into effect) a probationary or incarceration sentence, the court lacks authority to modify the sentence, except for corrections of arithmetic or clerical errors or modification of erroneous terms under ORS 138.083(1). *State v. Scott*, 237 Or 390, 400 (1964); *Buchea v. Sullivan*, 262 Or 222, 241 (1972).

11. **Defendant’s Right to Explain or Contradict**
   Defendant has the right to explain or contradict matters in the presentence report.

12. **Reference to Presentence Report by Court**
   The court is not required to support the sentence imposed by explicitly referring to the presentence report. *State v. Rogers*, 34 Or App 523, 525-26 (1978).

B. ** Eligibility for Leave, Release, or Other Programs**

1. **Commitment to the DOC**
   When the court imposes a term of incarceration on crimes committed on or after **Dec. 5, 1996**, it must order on the record in open court as part of the sentence imposed that the defendant may be considered by the executing or releasing authority for any form of temporary leave from custody, reduction in sentence, work release, alternative incarceration program, or program of conditional or supervised release authorized by law for which the defendant is otherwise eligible at the time of sentencing, unless it finds substantial and compelling reasons to order that the defendant not be considered for such leave, release, or programs. ORS 137.750(1). *See State v. Woods*, 165 Or App 551, 553 (2000).

a. **Court Must Authorize Eligibility in Judgment**
   The executing or releasing authority may consider the defendant for leave, release, or other programs only upon order of the sentencing court appearing in the judgment. ORS 137.750(2).
b. **Types of Leave, Release, or Other Programs Available**

The DOC form of leave, release, or other program that corresponds to the language of ORS 137.750(1) is as follows:

- **Temporary leave from custody** includes “emergency leave” under ORS 421.166 or “short-term transitional leave” under ORS 421.168. See OAR 291-063-0005 et seq.

- **Reduction in sentence** includes earned time credit reduction of a term of incarceration under ORS 421.121, see OAR 291-097-0005 et seq, or the advancement of a release date by the Board of Parole and Post-Prison Supervision of an inmate who is suffering from a severe medical condition or who is elderly or permanently incapacitated. ORS 144.126(1). See OAR 255-040-0028.

- **Work release** includes programs under ORS 144.410 to 144.525. See OAR 291-149-0100 et seq.

- **Alternative incarceration programs** includes the military-style boot camp program under ORS 421.504 and the intensive alternative incarceration addiction program under ORS 421.506.

- **Conditional or supervised release** includes the “Second Look” program under ORS 420A.203, available to persons who were under 18 at the time of the offense. See infra XII.F. “‘Second Look’ Proceedings.”

2. **Commitment to the County**

When a court commits a defendant to the custody of a supervisory authority of a county under ORS 137.124, the court must order on the record in open court as part of the sentence imposed that the defendant may be considered by the supervisory authority for any form of **alternative sanction** authorized by ORS 423.478, unless the court finds on the record in open court substantial and compelling reasons to order that the defendant not be considered for alternative sanctions. ORS 137.752(1). The supervisory authority may consider the defendant for alternative sanctions only upon order of the sentencing court appearing in the judgment. ORS 137.752(2).

3. **Authority to Modify Judgment**

For crimes committed and judgments entered on or after Dec. 5, 1996, a sentencing court retains authority after entry of a
judgment of conviction to modify its judgment and sentence
to comply with the requirements of ORS 137.750 or ORS
137.752. ORS 137.754.

C. Form of Judgment Document
The judge in a criminal action must ensure that the creation and
filing of a judgment document complies with ORS 137.071. ORS
137.071(1).

1. Requirements
A judgment document in a criminal action must:

a. Be plainly titled as a judgment;

b. Be separate from any other document in the action (it may
have attached affidavits, certificates, motions, stipulations,
and exhibits as necessary or proper in support of the
judgment);

c. Include the name of the court rendering the judgment and
the file number or other identifier;

d. Include the names of any parties in whose favor the
judgment is given and the names of any parties against
whom the judgment is given;

e. Include the signature of the judge rendering the judgment,
or the signature of the court administrator if the court
administrator is authorized by law to sign the judgment
document;

f. Include the date the judgment document is signed;

g. Indicate whether the defendant was determined to be
financially eligible for purposes of appointed counsel in the
action;

h. Indicate whether the court appointed counsel for the
defendant in the action;

i. Indicate, where applicable, whether the defendant
knowingly waived any right to an attorney after having
been informed of that right;

j. Include the identity of the recorder or reporter for the
proceeding or action who is to be served under ORS
138.081;

k. Include any information specifically required by statute or
by court rule;
1. Specify clearly the court’s determination for each charge in the information, indictment, or complaint;

m. Specify clearly the court’s disposition, including all legal consequences the court establishes or imposes (if the determination is one of conviction, the judgment document must include any suspension of sentence, forfeiture, imprisonment, cancellation of license, removal from office, monetary obligation, probation, conditions of probation, discharge, restitution, community service, and all other sentences and legal consequences imposed by the court);

n. Include the identities of the attorney for the State and the attorney, if any, for the defendant; and

o. Comply with ORS 18.048 if it includes a money award as defined in ORS 18.005.

ORS 137.071; ORS 18.038.

a. Additional Contents for Convictions Under the Guidelines
   For felony convictions under the guidelines, the judgment of conviction must:

   1. State the length of incarceration and post-prison supervision; and

   2. State that violation of post-prison supervision conditions will result in additional sanctions.

OAR 213-005-0005.

2. Single Conviction and Sentence—Separate Charges
   If only one conviction and sentence can be entered after a plea, guilty verdict, or no contest plea on more than one charge, the judgment must pronounce sentence on each separate charge but must provide that all but the most serious charge is vacated when the time for appeal has run or the case is affirmed on appeal. State v. Cloutier, 286 Or 579, 602 (1979).

D. Amendment of Sentences

1. Clerical Errors and Erroneous Terms
   Even after an appeal is filed, the sentencing court retains authority after entry of judgment of conviction to modify its judgment and sentence to correct arithmetic or clerical errors or to delete or modify any erroneous term in the judgment. ORS 138.083(1). See State v. Hamlin, 151 Or App 481, 487 (1997), rev den 327 Or 173 (1998); State v. Perry, 140 Or App 18, 22

2. **Court May Not Modify Sentences After Execution**

   a. **Modification of Sentences Stayed Pending Appeal**
      If the court clearly denotes in the original judgment that execution of incarcerative sentences is to be stayed pending appeal, the court retains the authority to modify the sentencing order. *State v. Lebeck*, 171 Or App 581, 589-90 (2000) (court retained authority to modify sentences from confinement to probation when it “clearly denoted in not less than four places in the original judgment that imprisonment under the incarcerative sentences was to be suspended pending appeal”).

3. **Void or Erroneous Sentence**
   When the original sentence imposed is *void*, the court must impose a new sentence. *State v. Leathers*, 271 Or 236, 240-41 (1975); see *State v. Froembling*, 237 Or 616, 621, *cert den* 379 US 937 (1964) (court may resentence defendant even if defendant has begun serving the sentence).

   When the original sentence imposed is *erroneous* and remanded for resentencing, the court can recalculate the applicable guidelines grid block and impose sentence under recalculated computations. *State v. Campbell*, 130 Or App 263, *rev den* 320 Or 453 (1994).

4. **Sentencing After New Trial**
   a. **After Conviction**
      If an appeal or post-conviction relief proceeding grants defendant a new trial for error other than an erroneous sentence, the court, upon conviction in the new trial, cannot impose a sentence greater than the sentence originally imposed. *State v. Turner*, 247 Or 301, 313 (1967). See *State v. Stewart*, 21 Or App 555 (1975) (same rule applies
to a new sentence imposed in probation revocation proceedings).

b. After Probation Violation
If a defendant originally sentenced to imprisonment is placed on probation following a new trial, the court may impose a greater sentence than the sentence originally imposed if defendant thereafter violates probation. *State v. Holmes*, 287 Or 613, 618 (1979).

E. Discharge of Offenders

1. Full Discharge
If the court imposes a sentence of discharge, the defendant must be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, probationary supervision, or conditions. ORS 161.715(3).

a. Not Guilty Plea
If a defendant pleads not guilty and is tried and found guilty, a sentence of discharge is a judgment on a conviction for all purposes, including an appeal by the defendant. ORS 161.715(4).

b. Guilty Plea
If a defendant pleads guilty, a sentence of discharge is not appealable, but for all other purposes is a judgment on a conviction. ORS 161.715(5).

2. Standards for Discharge
The court may discharge defendant if:

a. The conviction is for an offense other than murder, treason, or a Class A or B felony; and

b. The court is of the opinion that no proper purpose would be served by imposing any condition upon defendant’s release.

ORS 161.715(1). If the discharge is for a felony, the court must set forth in the record the reasons for its action. ORS 161.715(2).

3. Conditional Discharge
Whenever defendant pleads or is found guilty of possession of a controlled substance under ORS 475.992(3) or 2005 Or Laws, ch. 708, §§ 18, 23, 28, 33, or 38 (effective Aug. 16, 2005), or of a property offense that is motivated by a dependence on a controlled substance, the court, without
entering a judgment of guilt and with the consent of the defendant and the DA, may:

a. Defer proceedings;
b. Place defendant on probation;
c. Enter an adjudication of guilt and impose sentence upon violation of a term or condition of probation; and
d. Discharge and dismiss the proceedings upon successful completion of probation.


a. **Conditional Discharge Is Not an Adjudication of Guilt**
   Conditional discharge and dismissal is without adjudication of guilt and is not a conviction for purpose of any disqualifications or disabilities imposed upon conviction. There may be only one discharge and dismissal with respect to any person. ORS 475.245; 2005 Or Laws, ch. 708, § 57 (effective Aug. 16, 2005).

b. **Conditional Discharge Is Not Subject to Appeal**
   Conditional discharge is not subject to appeal because it is not a final court disposition. *State v. Spencer*, 130 Or App 158, 162-63 (1994).

**XII. CONSIDERATIONS IN SENTENCING JUVENILES**

**A. Jurisdiction of Adult Court Over Juveniles**

1. **Generally**
   A criminal court has jurisdiction over *juveniles* who are:
   - Prosecuted under ORS 137.707 (Measure 11); or
   - Waived to adult court by order of the juvenile court.
   ORS 137.707 (waiver by juvenile court not required); *see* ORS 419C.349 (providing grounds for waiver of juveniles 15 years of age or older who are not subject to ORS 137.707).

2. **Aggravated Murder (Measure 11)**
   A juvenile alleged to have committed aggravated murder on or after April 1, 1995, when the juvenile was between ages 15 and
17, “shall be prosecuted as an adult in criminal court.” ORS 137.707(1).

3. **Other Measure 11 Offenses**

A juvenile alleged to have committed any of the offenses listed in ORS 137.707(4)(a) on or after April 1, 1995, or any of the offenses listed in ORS 137.707(4)(b) on or after October 4, 1997, when the juvenile was between ages 15 and 17, “shall be prosecuted as an adult in criminal court.” ORS 137.707(1); ORS 137.705(2); State v. Lawler, 144 Or App 456, 462 (1996), rev den 326 Or 390 (1998). See also ORS 137.707(4) (providing complete list of offenses).

4. **Waiver to Adult Court**

a. **Juveniles Age 15 or Older**

The juvenile court may order a juvenile age 15 years or older waived to adult court for prosecution on non-Measure 11 crimes under circumstances set forth in ORS 419C.349. See ORS 419C.349 (sets forth grounds for waiver of juveniles 15 years of age or older who are not subject to ORS 137.707).

b. **Juveniles Under Age 15**

After a hearing, the juvenile court may order a juvenile under age 15 waived to adult court if the juvenile is alleged to have committed acts that, if committed by an adult, would constitute Aggravated Murder, Murder, Rape I, Sodomy I, or Unlawful Sexual Penetration I, if:

1. The youth is represented by counsel during the waiver proceedings; and
2. The juvenile court makes the findings required under ORS 419C.349(3) and (4).

ORS 419C.352.

B. **Detention Pending Sentencing**

Pending sentencing in adult court, the court may order waived juveniles age 16 years or older to be detained in the county jail (or other place where adult prisoners are detained), but must order waived juveniles under age 16 to be detained, if at all, in a county juvenile detention facility. ORS 419C.130(1)(b).

**Exception:** The court may not order detention of juveniles waived for motor vehicle, boating, game, or property offenses, violations, misdemeanors, or nonpayment of fines in a county jail.
or other place where adults are detained. ORS 419C.130(2); ORS 419C.370.

C. Sentencing Juveniles Under Measure 11

1. Aggravated Murder
   The court may not sentence a juvenile under 18 years of age who commits aggravated murder to death, but the court may impose a sentence of life imprisonment. ORS 137.707(2); ORS 137.707(7)(a); ORS 163.105(1)(a).

   a. Court Must Conduct Sentencing Proceeding
      The court must conduct a sentencing proceeding to determine whether the defendant must be sentenced to life imprisonment without the possibility of release or parole as described in ORS 163.105(1)(b) or life imprisonment as described in ORS 163.105(1)(c). ORS 163.150(3)(a)(B).

      In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, including, but not limited to, victim impact evidence relating to the personal characteristics of the victim or the impact of the crime on the victim’s family. 2005 Or Laws, ch. 480, § 1(3)(a)(B) (effective Jan. 1, 2006).

   b. Instructing the Jury
      Under ORS 163.150(3)(b), the court must instruct the jury that the court will sentence the juvenile to life imprisonment without the possibility of parole unless 10 or more jurors find that there are sufficient mitigating circumstances to warrant life with the possibility of parole. See generally ORS 163.150 (providing procedure for sentencing a juvenile convicted in adult court of aggravated murder).

2. Felonies Committed on or After April 1, 1995
   The court must sentence a juvenile between ages 15 and 17 who is convicted of any of the crimes listed in ORS 137.707(4)(a) to mandatory minimum sentences. ORS 137.707(2); ORS 137.707(4)(a). See also ORS 137.700(2)(a) (providing identical mandatory minimum sentences for adult offenders).

3. Felonies Committed on or After October 4, 1997
   The court must sentence a juvenile between ages 15 and 17 who is convicted of Arson I, Using Child in Display of Sexually Explicit Conduct, or Compelling Prostitution to
mandatory minimum sentences. ORS 137.707(2), ORS 137.707(4)(b). See also ORS 137.700(2)(b) (providing identical mandatory minimum sentences for adult offenders).

4. **No Discretion to Impose a Lesser Sentence**

When a juvenile has been convicted under Measure 11, the court has no discretion to impose a lesser sentence and may not allow reduced terms or temporary releases from custody. ORS 137.707(2).

**Exceptions:** If a juvenile is convicted of Manslaughter II, Assault II, Kidnapping II, or Robbery II committed on or after **Oct. 4, 1997**, or Rape II, Sodomy II, Unlawful Sexual Penetration II, or Sexual Abuse I committed on or after **Jan. 1, 2002**, and the court makes the findings under ORS 137.712(2) for a dispositional departure sentence, the court may impose a guidelines sentence that is **less** than the minimum sentence under ORS 137.707. ORS 137.712(1). See 2001 Or Laws, ch. 851, §§ 5-6.

a. **Findings Required to Impose Lesser Sentence**

ORS 137.712(2) requires the court to make specific findings on the record by a *preponderance of the evidence* in order to impose a lesser sentence pursuant to the exceptions provided in ORS 137.712(1). The court may consider any evidence presented at trial and may receive and consider any additional relevant information offered by either party at sentencing. ORS 137.712(3).

5. **Sentencing in Adult or Juvenile Court**

When a juvenile charged with a Measure 11 crime is found guilty of a lesser-included, non-Measure 11 offense for which waiver is otherwise authorized, the DA may request a hearing to determine whether sentence will be imposed in adult or juvenile court. ORS 137.707(7)(b).

a. **Considerations by Court**

In determining whether to sentence a juvenile in adult or juvenile court, the court must consider the criteria for waiver generally, consisting of:

- The youth at the time of the alleged offense was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved;
- The amenability of the juvenile to available treatment;
- The protection of the community;
The aggressive, violent, premeditated, or willful manner in which the offense was alleged to have been committed;

- The juvenile’s previous history;
- The juvenile’s prior record of acts that would be crimes if committed by an adult;
- The gravity of the loss, damage, or injury caused or attempted during the offense;
- The prosecutive merit of the case; and
- The desirability of disposing of all cases in one trial.

ORS 137.707(7)(b); ORS 419C.349(3), (4).

b. Jurisdiction

If the court retains jurisdiction, it must sentence the juvenile as an adult under the guidelines. If the court does not retain jurisdiction, it must:

1. Order preparation of a presentence report;
2. Set forth in a memo any observations and recommendations the court deems appropriate; and
3. Enter an order transferring the case to juvenile court.

ORS 137.707(5)(b)(A); ORS 137.707(7)(b).

D. Sentencing on Waiver From Juvenile Court

1. Sentencing Guidelines Apply


2. Mandatory Minimum Sentences

The court may not impose a mandatory minimum sentence on a juvenile who has been waived to adult court. ORS 161.620. See State v. Jones, 315 Or 225, 231 (1992) (“mandatory minimum sentence” defined as statutorily required minimum sentence); State v. Davilla, 157 Or App 639, 644-45 (1998) (determinate guidelines sentence is not “mandatory minimum sentence”). Exceptions to ORS 161.620 include the following:
a. **Aggravated Murder**
   The court must sentence a juvenile convicted of aggravated murder committed on or after April 1, 1995, to a life sentence with a 30-year minimum term. ORS 161.620(1); ORS 163.105(1)(c).

b. **Murder**
   The court must sentence a juvenile (who was at least 15 years of age at time of crime) convicted of murder to imprisonment for life with a 25-year minimum sentence. ORS 163.115(5)(a), (b). See ORS 419C.349(2)(a); ORS 137.707(1)(a), (4)(a)(A); *State v. Lawler*, 144 Or App 456, 463 (1996), rev den 326 Or 390 (1998) (Measure 11 controls over ORS 161.620 to extent it is inconsistent).

c. **Felony Involving Use of Firearm**
   The court may, but is not required to, impose a minimum sentence on a juvenile who has been convicted of a felony involving use of a firearm. ORS 161.610(6); ORS 161.620(2) (applies to crimes committed on or after Oct. 23, 1999).

E. **Commitment of Juveniles**
   The court must commit a juvenile sentenced under Measure 11 or after waiver from juvenile court to custody of the DOC (12 months or more incarceration) or to the county jail (less than 12 months incarceration). ORS 137.124(1)(a), (4); OAR 213-005-0001(2). See ORS 137.124(5) (providing for transfer of Measure 11 juveniles from DOC to OYA); ORS 137.124(6) (providing for transfer of waived juveniles).

F. **“Second Look” Proceedings**

   1. **Application**
      “Second look” sentencing provisions apply only to juveniles who were under age 18 at the time the crime was committed (on or after June 30, 1995) for which the juvenile received a prison sentence of at least 24 months. ORS 420A.203(1)(a).

   2. **Eligibility of Juveniles for “Second Look”**

      a. **Measure 11**
         Juveniles convicted of Measure 11 offenses are *not* eligible for a “second look” hearing. ORS 420A.203(1)(a)(A), (B); ORS 137.707(5)(b)(A), (7)(b).
b. **Waived Juveniles**
   Waived juveniles (including those waived after being found guilty of lesser-included, non-Measure 11 offenses) are entitled to a “second look” hearing once they have served one-half of their sentence. ORS 420A.203(1)(b).

3. **Second Look Hearing**
   The Oregon Youth Authority (OYA) or the DOC (whichever has physical custody of the person) must file notice and request for a second look hearing in the sentencing court no more than 120 days and not less than 60 days before the juvenile has served one-half of the sentence. ORS 420A.203(2)(a). Upon receiving the notice and request for a hearing, the sentencing court must schedule a hearing for a date not more than 30 days after the date on which the person will have served one-half of the sentence imposed (unless the parties agree on a later date), and must notify the juvenile and the juvenile’s parents, the records supervisor of the correctional institution where the juvenile is incarcerated, and the DA who prosecuted the case. The court also must make reasonable efforts to notify the victim and the victim’s parents or legal guardians and any other person who has filed a written request for notice. ORS 420A.203(2)(b)-(d).

   a. The hearing must be open to the public, and the court must record the hearing. ORS 420A.203(3)(h), (i)

   b. The State and the juvenile are parties to the proceeding (the DA represents the State). ORS 420A.203(3)(a), (c).

   c. The juvenile has the right to appear with counsel, and the court must appoint counsel if the juvenile is financially eligible for appointed counsel at state expense. ORS 420A.203(3)(b).

   d. The court must determine admissibility of evidence as if the hearing were a sentencing proceeding. ORS 420A.203(3)(d).

   e. The court may consider relevant written reports of the OYA, the DOC, and qualified experts, as well as witness testimony. ORS 420A.203(3)(e).

   f. Within a reasonable time before the hearing, the court must give the juvenile an opportunity to examine reports that the State, the OYA, and the DOC intend to submit to the court. ORS 420A.203(3)(e).

   g. The juvenile must be given access to the juvenile’s OYA and DOC records (unless otherwise provided by law
or by order of the court based on good cause). ORS 420A.203(3)(f).

h. The juvenile may examine all witnesses called by the State, subpoena and call witnesses on the juvenile’s behalf, and present evidence and argument. ORS 420A.203(3)(g) (amendment effective Oct. 4, 1997 permits witnesses to appear by telephone or other two-way electronic communication device).

i. The juvenile has the burden of proving by clear and convincing evidence that the juvenile:

1. Has been rehabilitated and reformed;
2. Would not be a threat to the victim, the victim’s family, or the community if conditionally released; and
3. Would comply with release conditions.
ORS 420A.203(3)(k).

a. **Post-Hearing Disposition**

   At the conclusion of the hearing and after considering and making findings regarding each of the factors in ORS 420A.203(4)(b), the court must:

1. Order that the person serve the entire remainder of the sentence of imprisonment imposed; or
2. Order that the person be conditionally released under ORS 420A.206 at such time as the court may order, if the court finds that the person:
   a. Has been rehabilitated and reformed;
   b. Is not a threat to the safety of the victim, the victim’s family or the community; and
   c. Will comply with the conditions of release.
ORS 420A.203(4)(a).

4. **Release Plan and Release Order**

   If the court determines that conditional release is the appropriate disposition after the hearing required by ORS 420A.203, the court must order the DOC to prepare the release plan. ORS 420A.206(1).

   a. The court may order the DOC to revise the release plan, and if the court still does not approve of the plan, the court
itself may make changes to the plan. ORS 420A.206(1)(b), (c).

b. In addition to any other conditions, the final release plan must include the release conditions listed at ORS 420A.206(1)(c)(A)-(H). ORS 420A.206(1)(c).

c. The court must issue the conditional release order after approval of the plan. ORS 420A.206(2).

d. The court’s conditional release order must:

1. State the release conditions;

2. Require the juvenile to comply fully with release conditions;

3. Confirm that the juvenile has been given a copy of the release conditions;

4. Continue the juvenile’s commitment to custody of the DOC;

5. Provide that the DOC or its designee must supervise the juvenile;

6. Provide that the supervision period is the entire remainder of the sentence; and

7. Require the DOC to submit reports to the court regarding the juvenile’s performance on conditional release.

ORS 420A.206(2)(a)-(g). See ORS 420A.206(2)(g) (DOC must submit reports to court no later than 90 days after conditional release and at least every 180 days thereafter).

e. The court retains jurisdiction over the juvenile during the period of conditional release. ORS 420A.206(3)(a).

f. The court may amend the release order but must give the juvenile and the DOC reasonable time to comment on modifications. ORS 420A.206(3)(b).

5. Violation of Release Order

If, after a hearing, the court finds that the juvenile has violated a condition of release, the court must:

a. Impose sanctions, such as adjustment to level of supervision or suspension or revocation of conditional release; or
b. Revoke conditional release and order the juvenile committed to custody of the DOC for the remainder of the sentence imposed.

ORS 420A.206(4), (5).
## Table of Authorities

### Authorities

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**Purpose**

The *OREGON JUDGES CRIMINAL BENCHBOOK* is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 17: PROBATION AND PROBATION REVOCATION

I. PROCEEDINGS PRIOR TO SENTENCING GUIDELINES

A. Suspending Imposition of Execution of Sentence
   For convictions for felonies committed before November 1, 1989, the sentencing guidelines do not apply. The court may suspend imposition or execution of any part of a sentence for up to five years. ORS 137.010(3).

B. Probation Duration
   The court may impose and execute a sentence of probation for a definite or indefinite period of up to five years. ORS 137.010(4).

1. Probation Extended in Lieu of Revocation
   If a defendant on felony probation violates probation, a court may extend probation in lieu of revocation for not more than six years from the date of original imposition of sentence. ORS 137.010(4).

2. Calculating the Extended Probation Period
   In calculating the five-year and six-year periods, the court excludes the time from when defendant absconded from probation and a bench warrant issued until defendant was arrested on a probation violation. ORS 137.010(4).

C. Objections to Suspended Sentence
   If the court announces that it will suspend imposition or execution of any part of a sentence, defendant may object and request imposition of the full sentence. The court need not agree. Defendant may also object to a sentence of probation, and again, the court may refuse the request for different terms. Defendant may not refuse probation. ORS 137.010(5).

D. Absent Suspension or Revocation
   If the court does not suspend imposition or execution of a sentence or if it revokes a suspended or probation sentence, the court must impose:

   1. A term of imprisonment;
   2. A fine;
   3. Both imprisonment and a fine; or
4. Discharge of the defendant.

ORS 137.010(7).

E. **Felonies Committed Before November 1, 1989 and Misdemeanors**

For defendants sentenced for felonies committed before November 1, 1989, and for any misdemeanor, the court that imposed probation may revoke defendant’s probation after a summary hearing, and:

- If execution of some other part of the sentence has been suspended, the court must execute the remainder of the sentence imposed;

- If no other sentence has been imposed, the court may impose any other sentence that it originally could have imposed.

ORS 137.545(5). **Note:** The trial court may not amend the sentence following revocation of probation. *See State v. Anderson*, 149 Or App 506, 508 (1997) (trial court erred in imposing additional provisions on a suspended sentence following revocation of probation).

II. **PROCEEDINGS UNDER SENTENCING GUIDELINES**

A. **Guidelines Apply to Felonies Committed on or After Nov. 1, 1989**


1. **Application**

   The Oregon Criminal Justice Commission (OCJC) rules that were in force when defendant committed the crime apply:

   - **Original rules (OAR ch. 253)** apply only to crimes committed on November 1, 1989, through October 31, 1993.


   - **Current rules (OAR ch. 213)** apply only to crimes committed on or after November 1, 1995. Amendments to OAR ch. 213 effective March 8, 1996, November 1, 1997,
November 1, 1999, and January 1, 2000, apply to crimes committed on or after those dates.

B. Jail as Probation Condition
In all presumptive probation cases, the court may impose:

1. A jail term as a probation condition; or
2. A jail term without a probation term.

OAR 213-005-0007(1)(a), (b).

C. Presumptive Duration of Probation
The presumptive duration of probation sentences are determined by the crime seriousness category of the most serious current crime of conviction. OAR 213-005-0008(1). The maximum duration is five years. OAR 213-005-0008(2)(e).

1. Court May Extend Probation Duration
Under certain conditions, the court may extend the duration with bench probation or by departure, e.g., for sexual offenses, to a maximum term of five years. OAR 213-005-0008(2). See OAR 213-005-0008(2)(c) (amendment effective Nov. 1, 1999; when sentencing defendant convicted of listed sex offenses to probation, court must impose probation for at least 5 years and no more than maximum statutory sentence); State v. Maki, 115 Or App 367 (1992).

2. Determining Probation Time Served
In determining probation time served, the court excludes time during which defendant absconded and a bench warrant issued for defendant’s arrest. OAR 213-005-0008(3).

D. Credit for Time Served
Unless the sentencing judge orders otherwise, the court must give a defendant who has been revoked from a probationary sentence for a felony subject to the guidelines credit for time served:

- In jail after arrest and before the probation sentence begins; or
- For time served in jail as part of probation sentence.

This also applies to a defendant who has been ordered confined as part of probation sentence for a felony committed on or after July 18, 1995. ORS 137.372.

E. Interim Release
For any misdemeanor or for felonies committed on or after November 1, 1989, the court, in imposing a jail term pursuant to probation, may authorize, limit, or prohibit defendant’s release
on pass, furlough, leave, work, or educational release. ORS 137.520(2).

F. Altering a Probationary Sentence
The court may **shorten** or **terminate** a probationary sentence or **transfer** supervision to bench probation upon a finding that supervision is no longer necessary to accomplish the purposes of the imposed sentence—no hearing is required. OAR 213-005-0010. If the court wishes to **modify** probation, *e.g.*, extend it or switch it from bench to supervised probation, the court must hold a hearing. *State v. Warner*, 118 Or App 726 (1993).

G. Certain Repeat Felony Offenders Ineligible for Probation
A defendant convicted of one of the following felonies, who has **previously been convicted of any of the following felonies**, is not eligible for probation:

- **Murder**, as defined in ORS 163.115, and any aggravated form;
- **Manslaughter I**, as defined in ORS 163.118;
- **Assault I**, as defined in ORS 163.185;
- **Kidnapping I**, as defined in ORS 163.235;
- **Rape I**, as defined in ORS 163.375;
- **Sodomy I**, as defined in ORS 163.405;
- **Unlawful Sexual Penetration I**, as defined in ORS 163.411;
- **Burglary I**, as defined in ORS 164.225;
- **Arson I**, as defined in ORS 164.325; and
- **Robbery I**, as defined in ORS 164.415.

ORS 137.635(1), (2).

H. Measure 11
Measure 11 requires the court to impose **mandatory minimum sentences** for listed offenses. *See* ORS 137.700-707. *See also State ex rel. Huddleston v. Sawyer*, 324 Or 597, cert den 522 US 994 (1997) (upholding constitutionality of Measure 11). The authority provided to the court under OAR 213-005-0006 to grant optional probation on offenses that fall in grid blocks 8-G, 8-H, or 8-I does **not** apply to Measure 11 offenses. ORS 137.700; ORS 137.712.

1. Exceptions to Measure 11 Requirements
   Notwithstanding ORS 137.700 and 137.707, if the court, on the record at sentencing, (1) makes the findings set forth in ORS
137.712(2), and (2) finds that a substantial and compelling reason under the rules of the Oregon Criminal Justice Commission (OCJC) justifies a lesser sentence, it may impose a sentence according to the rules of the OCJC that is less than the minimum sentence that otherwise may be required by ORS 137.700 or 137.707—including probation—for the following offenses:

- **Manslaughter II**, as defined in ORS 163.125;
- **Assault II**, as defined in ORS 163.175(1)(b);
- **Kidnapping II**, as defined in ORS 163.225;
- **Robbery II**, as defined in ORS 164.405;
- **Rape II**, as defined in ORS 163.365,
- **Sodomy II**, as defined in ORS 163.395;
- **Unlawful Sexual Penetration II**, as defined in ORS 163.408; and
- **Sexual Abuse I**, as defined in ORS 163.427(1)(a)(A).

ORS 137.712(1) (applies to Manslaughter II, Assault II, Kidnapping II, and Robbery II committed on or after Oct. 4, 1997; 2001 Or Laws, ch. 851, §§ 5-6 (ORS 137.712(1) applies to Rape II, Sodomy II, Unlawful Sexual Penetration II, and Sexual Abuse I committed on or after Jan. 1, 2002).

### a. Violation of Probation Condition Results in Revocation

If a defendant sentenced to probation under ORS 137.712 violates probation by committing a new crime, the court must revoke probation and impose the presumptive sentence under OCJC rules. ORS 137.712(5).

### I. Repeat Property Offenders

The court may impose a departure sentence of probation under the OCJC’s rules instead of the sentences provided in ORS 137.717(1) for repeat property offenders if “substantial and compelling reasons” justify the departure. ORS 137.717(3)(b). See generally ORS 137.717 (providing presumptive sentences for certain repeat property offenses that may limit the court’s discretion to impose probation).

### J. Conditional Discharge

Whenever a person pleads guilty to or is found guilty of a **misdemeanor** (other than DUII or a misdemeanor involving domestic violence) the court may, upon motion of the district
attorney, defer further proceedings and place the person on probation without entering a judgment of guilt—*if the person*:

1. Consents to the disposition;
2. Has not previously been convicted of any offense in any jurisdiction;
3. Has not been placed on probation under ORS 475.245 (allowing conditional discharge for possession of a controlled substance or of a property offense that is motivated by a dependence on a controlled substance);
4. Has not completed a diversion under ORS 135.881 to 135.901; and
5. Agrees to pay the unitary assessment for which the person would have been liable if the person had been convicted.

ORS 137.533(1).

**1. Successful Completion of Conditional Discharge**

If defendant successfully completes probation, the court must discharge the person and dismiss the proceedings. ORS 137.533(4).

**2. Violation of Conditional Discharge**

If defendant violates probation, the court may enter an adjudication of guilt and proceed as otherwise provided. ORS 137.533(4).

### III. GENERAL TERMS AND CONDITIONS OF PROBATION

**A. Court’s Statutory Authority**

The court has statutory authority to restrict or take away a convicted defendant’s liberties by imposing probation conditions. ORS 137.540.

**1. Authority Continues Until Delivery of Custody to DOC**

The power of the judge of any court to suspend execution of any part of a sentence or to sentence any person convicted of a crime to probation continues until the person is delivered to the custody of the Department of Corrections. ORS 137.010(6).
B. General Probation Conditions

The probation sentence must contain the following general conditions, unless the court specifically deletes them. The probationer must:

1. Pay supervision fees, fines, restitution, or other fees ordered by the court. See State v. Johnston, 176, Or App 418, 423 (2001) (phrase “other fees” in ORS 137.540(1)(a) includes amounts imposed by sentencing court to recover costs or expenses incurred by county in maintaining an offender in local correctional facility).

2. Not possess or use controlled substances except pursuant to a medical prescription.

3. Submit to a breath or urine test for controlled substance or alcohol use if defendant has history of substance abuse or the court finds reasonable suspicion that defendant has illegally used controlled substances.

4. Participate in a substance abuse evaluation as directed by the supervising officer and follow the evaluator’s recommendations if there are reasonable grounds to believe defendant has history of substance abuse.

5. Remain in Oregon until Department of Corrections or appropriate county community corrections agency grants permission to leave.

6. If physically able, find and maintain gainful, full-time employment, approved schooling, or a full-time combination of both. The court may waive this requirement only after making findings and stating reasons for the waiver. See ORS 137.540(7) (court may not revoke probation for defendant’s failure to apply for or accept employment at any work place where there is a labor dispute, as defined in ORS 622.010).

7. Change neither employment nor residence without prior permission from Department of Corrections or appropriate county community corrections agency.

8. Permit the parole and probation officer to visit the probationer or the probationer’s work site or residence and to conduct a walk-through of the common areas and of the rooms in the residence occupied by or under the control of the probationer. See 2005 Or Laws, ch. 264, § 3 (amending ORS 137.540(1)(h) to include “parole” officer; effective June 20, 2005). See also State v. Guzman, 164 Or App 90, 96-97, 990 P2d 370 (1999), rev den 331 Or 191 (2000) (“Although a home visit reasonably could extend to the common areas of a probationer’s residence unless specifically deleted by the court, general probation conditions include:

- Pay financial obligations;
- No use or possession of controlled substances;
- Submit to breath or urine testing;
- Participate in a substance abuse evaluation;
- Remain in Oregon;
- Maintain employment or schooling;
- No change of employment or residence without permission;
- Permit officer to visit and walk-through work site or residence;
- Consent to search of person, vehicle, and premises;
- Obey all laws;
- Promptly and truthfully answer all inquiries;
- No possession of weapons, firearms, or dangerous animals;
- Complete a sex offender treatment program (if applicable);
- Participate in a mental health evaluation;
- Report and obey the direction of the officer;
- Report as a sex offender (if applicable).
where visitors are customarily allowed, the authority to conduct a home visit does not carry with it the authority to inspect private areas of the residence.”); State v. Gulley, 324 Or 57, 59 (1996).

9. Consent to search of person, vehicle, or premises by probation officer if officer has reasonable grounds to believe the search will find evidence of a violation.

10. Submit to fingerprinting or photographing, or both, when asked for supervision purposes by Department of Corrections or appropriate community corrections agency.

11. Obey all municipal, county, state, and federal laws.

12. Promptly and truthfully answer all reasonable inquiries by Department of Corrections or appropriate county community corrections agency.

13. Not possess weapons, firearms, or dangerous animals.

14. If recommended by the supervising officer, successfully complete a sex offender treatment program approved by the supervising officer and submit to polygraph examinations at the direction of the supervising officer if the probationer:
   a. Is under supervision for a sex offense under ORS 163.305 to 163.467;
   b. Was previously convicted of a sex offense under ORS 163.305 to 163.467; or
   c. Was previously convicted in another jurisdiction of an offense that would constitute a sex offense under ORS 163.305 to 163.467 if committed in this state.

15. Participate in a mental health evaluation as the supervising officer directs and follow the evaluator’s recommendation.

16. Report as required and abide by the direction of the supervising officer.

17. If required to report as a sex offender under ORS 181.596, report periodically to proper law enforcement officials or agencies.

ORS 137.540(1)(a)-(p); 2005 Or Laws, ch. 558 § 1 (amending ORS 137.540(1)(m) (effective July 20, 2005).

C. Court Must Set Terms and Conditions of Probation
The court must set the terms and conditions of probation and not the probation officer or the county probation department. State

IV. SPECIAL CONDITIONS OF PROBATION

A. Court’s Authority to Impose Special Probation Conditions
In addition to the general conditions, the court may impose any special probation conditions that are reasonably related to the crime of conviction, the protection of the public, or reformation of the probationer. ORS 137.540(2). See State v. Caffee, 116 Or App 23, 28 (1992), rev den 315 Or 312 (1993).

B. Offenses Committed Before November 1, 1989, and Misdemeanors Committed On or After November 1, 1989
For crimes committed prior to November 1, 1989, and misdemeanors committed on or after November 1, 1989, the court may impose special probation conditions, including, but not limited to:

- Confinement in the county jail;
- Restriction to probationer’s residence or its premises; or
- A combination of confinement and restriction.

Such confinement, restriction, or combination thereof cannot exceed one-half the statutory maximum period of confinement for the offenses for which defendant was convicted, or one year, whichever is less. ORS 137.540(2)(a). See State v. Taylor, 115 Or App 76 (1992); State v. Armstrong, 106 Or App 486 (1991) (under prior version of ORS 137.540(2)(a), court could not impose jail time as condition of probation for misdemeanor); State v. Allen, 120 Or App 526 (1993) (1991 amendment to ORS 137.540 allowing jail time for misdemeanors is not retroactive for misdemeanors committed on or after November 1, 1989, and before the June 10, 1991, effective date of amendment).

C. Felonies Committed on or After November 1, 1989
For felonies committed on or after November 1, 1989, the court may impose special probation conditions as provided in the sentencing guidelines, including, but not limited to:

- Confinement in the county jail;
- Other custodial sanctions under community supervision; or
- A combination of confinement and custodial sanctions.

D. **Probationer May Be Required to Sell Assets to Pay Restitution**
   For crimes committed on or after **December 5, 1996**, the court may require the probationer to sell any assets in order to pay restitution. ORS 137.540(2)(c).

E. **Special Probation Conditions Limiting Probationer’s Residence**

1. **Minor Victim of Sex Crime or Assault May Request That Probationer Not Reside Within 3 Miles of Victim**
   If a person is released on probation following conviction of a **sex crime**, as defined in ORS 181.594, or an **assault**, as defined in ORS 163.175 or 163.185, and the **victim was under 18 years of age**, the court, if requested by the victim, must include as a special condition of the person’s probation that the person not reside within **three miles** of the victim **unless**:
   
a. The victim resides in a county having a population of less than 130,000 and the person is required to reside in that county;

   b. The person demonstrates to the court by a preponderance of the evidence that no mental intimidation or pressure was brought to bear during the commission of the crime;

   c. The person demonstrates to the court by a preponderance of the evidence that imposition of the condition will deprive the person of a residence that would be materially significant in aiding in the rehabilitation of the person or in the success of the probation; or

   d. The person resides in a halfway house, meaning a publicly or privately operated profit or nonprofit residential facility that provides rehabilitative care and treatment for sex offenders.


   A victim may request imposition of the special condition of probation at the time of sentencing in person or through the prosecuting attorney. 2005 Or Laws, ch. 642, § 1(3)(b) (effective Jan. 1, 2006).

   a. **When Victim Moves Within 3 Miles of Probationer**
      If the court imposes the special condition of probation described in this subsection and if at any time during the period of probation the victim moves to within three miles of the probationer’s residence, the court may **not** require the probationer to change the probationer’s residence in order
to comply with the special condition of probation. 2005 Or Laws, ch. 642, § 1(3)(c) (effective Jan. 1, 2006).

2. Sex Offender Released on Probation May Not Reside With Other Sex Offenders on Supervision

When a person who is a sex offender, as defined in ORS 181.594, is released on probation, the court must impose as a special condition of probation that the person not reside in any dwelling in which:

a. Another sex offender who is on probation, parole, or post-prison supervision resides, without the approval of the person’s supervising parole and probation officer; or

b. More than one other sex offender who is on probation, parole, or post-prison supervision resides, without the approval of the director of the probation agency that is supervising the person or of the county manager of the Department of Corrections.

2005 Or Laws, ch. 576, § 1a(3) (effective Jan. 1, 2006). As soon as practicable, the supervising parole and probation officer must review the person’s living arrangement with the person’s sex offender treatment provider to ensure that the arrangement supports the goals of offender rehabilitation and community safety. Id.

V. ISSUES ARISING FROM GENERAL CONDITIONS OF PROBATION

A. Submitting to a Search

1. Random Police Searches Not Allowed

The State may not impose random police searches as a condition of probation, even if defendant consents as part of a plea agreement. See State v. Campbell, 128 Or App 592 (1994); State v. Smith, 117 Or App 473 (1992) (interpreting prior version of ORS 137.540); ORS 137.540(1)(i).

2. Defendant’s Consent to Warrantless Search

Defendant’s agreement to consent to future warrantless searches must be interpreted to permit searches only on reasonable grounds and only by the probation officer, not by the police. State v. Davis, 133 Or App 467, 473-74, rev den 321 Or 429 (1995); State v. Wilcox, 44 Or App 173 (1980).
3. **Defendant’s Refusal to Submit to Search**

   If defendant refuses to submit to probation officer’s reasonable search, the officer has no authority to conduct a warrantless search. Defendant’s refusal, however, may violate the probation terms and be grounds for probation revocation. *State v. Davis*, 133 Or App 467, 473, *rev den* 321 Or 429 (1995); *State v. Guzman*, 164 Or App 90, 97, 990 P2d 370 (1999), *rev den* 331 Or 191 (2000) (“a probationer’s later refusal to consent does not constitute a consent but serves as a violation of his agreement to consent”).

4. **Probation Condition Requiring Searches**

   A condition that defendant submit to warrantless searches should expressly limit a search to when “reasonable grounds” exist to believe that evidence of a violation will be found. *State v. Teater*, 107 Or App 769 (1991) (interpreting prior version of ORS 137.540); ORS 137.540(1)(i).

5. **“Reasonable Grounds” to Search**

   “Reasonable grounds” exist if a probation officer can “identify specific and articulable facts which, under the totality of the circumstances, support a reasonable inference that evidence of a probation violation will be found in the place to be searched.” *State v. Gulley*, 131 Or App 242, 246 (1994), *aff’d* 324 Or 57 (1996).

B. **Financial Conditions of Probation**

1. **Types of Financial Conditions**

   The court may impose the following financial probation conditions:

   a. Fines for violations (ORS 153.018), misdemeanors (ORS 161.635), and felonies (ORS 161.625);

   b. Restitution (ORS 137.103 *et seq.*; ORS 161.675 *et seq.*);

   c. Compensatory fines (ORS 137.101);

   d. Repayment of court-appointed attorney fees unless defendant is unable to pay (ORS 161.665 *et seq.*);

   e. Monthly probation supervision fees (ORS 137.540(1)(a)); and

   f. Fines for defendant’s financial gain through commission of a felony (ORS 161.625(2)-(5)), a misdemeanor (ORS 161.635(3)), or a violation (ORS 153.018(4)).
2. Considerations Before Imposing Any Fine
   Before imposing any fine, the court must consider
   
   a. Defendant’s financial resources;
   b. The burden that payment of a fine will impose;
   c. Defendant’s other obligations; and
   d. Defendant’s ability to pay a fine by installments or on other conditions the court may impose.


C. Restitution

1. Purpose of Restitution
   “The theory of restitution is penological: It is intended to serve rehabilitative and deterrent purposes by causing a defendant to appreciate the relationship between his criminal activity and the damage suffered by the victim.” State v. Dillon, 292 Or 172, 179 (1981).

2. Victim’s Constitutional Right to Prompt Restitution
   Article I, § 42(1)(d) grants to victims in all criminal proceedings and juvenile delinquency proceedings the “right to receive prompt restitution from the convicted criminal who caused the victim’s loss or injury.”

3. Definitions
   a. “Economic Damages” Defined
   Economic damages are objectively verifiable monetary losses including but not limited to reasonable charges necessarily incurred for medical, hospital, nursing and rehabilitative services and other health care services, burial and memorial expenses, loss of income and past impairment of earning capacity, reasonable and necessary expenses incurred for substitute domestic services, recurring loss to an estate, damage to reputation that
is economically verifiable, reasonable and necessarily incurred costs due to loss of use of property and reasonable costs incurred for repair or for replacement of damaged property, whichever is less. ORS 137.103(2) as amended by 2005 Or Laws, ch. 564, § 1(2) (effective Jan. 1, 2006); ORS 31.710(2)(a) (defining “Economic damages”).

b. “Victim” Defined
   A “victim” includes:

1. The person against whom the defendant committed the criminal offense, if the court determines that the person suffered economic damages as a result of the offense;

2. Any other person whom the court determines has suffered economic damages as a result of the defendant’s criminal activities;

3. The Criminal Injuries Compensation Account, if it has expended moneys on behalf of the victim against whom the defendant committed the criminal offense (see State v. Spino, 143 Or App 619 (1996)); and

4. An insurance carrier, if it has expended moneys on behalf of the victim against whom the defendant committed the criminal offense (see State v. Divers, 51 Or App 351, 355 (1981)).


4. Restitution Required if Victim Suffered Economic Damage
   When a person is convicted of a crime, or a violation as described in ORS 153.008, that has resulted in economic damages, and the court finds from the evidence of the nature and amount of such damages presented by the district attorney that a victim suffered economic damages, in addition to any other sanction, the court must:

a. Include in the judgment a requirement that the defendant pay the victim restitution in a specific amount that equals the full amount of the victim’s economic damages as determined by the court; or

b. Include in the judgment a requirement that the defendant pay the victim restitution, and that the specific amount of
restitution will be established by a supplemental judgment based upon a determination made by the court within 90 days of entry of the judgment.

ORS 137.106(1) as amended by 2005 Or Laws, ch. 564, § 2 (effective Jan. 1, 2006). See also ORS 419C.450(1)(a) (providing for payment of restitution by juveniles).

a. Payment of Restitution May be Delayed for Inability to Pay
A court may delay the enforcement of monetary sanctions, including restitution, only if the defendant alleges and establishes to the satisfaction of the court the defendant’s inability to pay the judgment in full at the time the judgment is entered. ORS 137.106(4). See State v. Hval, 174 Or App 164, 180 (2001); State v. Edson, 329 Or 127, 133-35 (1999); State v. Motschenbacher, 163 Or App 202, 205 (1999) (trial court “meaningfully considered” defendant’s ability to pay restitution); State v. Hart, 329 Or 140, 148 (1999) (trial court is not required to make findings regarding defendant’s ability to pay in order to impose sentence of restitution).

i. Payment Schedule When Defendant is Unable to Pay
If the court finds that the defendant is unable to pay, the court may establish or allow an appropriate supervising authority to establish a payment schedule, taking into consideration the financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant. ORS 137.106(4).

ii. Defendant May Object and Be Heard
If the defendant objects to the imposition, amount or distribution of the restitution, the court must allow the defendant to be heard on such issue at the time of sentencing or at the time the court determines the amount of restitution. ORS 137.106(5). See State v. Gray, 153 Or App 296, 299, modified 155 Or App 162 (1998) (court erred in amending judgment to include restitution without giving notice to defendant and reconvening hearing); State v. Crooks, 84 Or App 440, 447 (1987) (untimely objection waives error)

5. Discretionary Features of a Restitution Order

• If the restitution amounts have not been fully incurred by the victim at time of sentencing, but are “reasonably predictable,” the court may set a maximum restitution limit

- The court may require defendant to sell defendant’s property to pay restitution, if the property is connected to the offense. *See State v. Montgomery*, 106 Or App 150, 152 (1991) (court erred in ordering car not used in manner related to theft conviction sold to pay restitution); *State v. Gammond*, 75 Or App 27 (1985) (court erred in ordering defendant to borrow against her house for restitution on bad check charge).

- The court may order defendant to pay restitution on dismissed charges if, as part of a plea negotiation, defendant: (1) agrees to pay restitution to victims on dismissed cases; or (2) admits criminal liability. *State v. Davis*, 57 Or App 322, 326 (1982).

6. **Court’s Authority to Amend Judgment’s Restitution Terms**

At any time after entry of a judgment upon conviction of a crime, the court may amend that part of the judgment relating to restitution if, in the original judgment, the court included language imposing, recommending, or requiring restitution but failed to conform the judgment to the requirements of ORS 18.048 (governing criminal judgments containing money awards) or any other law governing the form of judgments in effect before January 1, 2004. ORS 137.107.

Notwithstanding the filing of a notice of appeal, the sentencing court retains authority to determine the amount of restitution and to enter a supplemental judgment to specify the amount and terms of restitution. ORS 138.083(2).

D. **Costs of Prosecution and Repayment of Attorney Fees**

1. **Costs Specially Incurred in Prosecuting Defendant**

If the court enters a judgment of conviction, it may impose *costs and expenses specially incurred by the State in prosecuting the defendant*, including a reasonable attorney fee for appointed counsel pursuant to ORS 135.045 or 135.050 and a reasonable amount for fees and expenses incurred pursuant to preauthorization under ORS 135.055. ORS 161.665(1).

a. **Repayment of Costs For Cases Filed after January 1, 1998**

In cases in which the accusatory instrument was filed after January 1, 1998, and in which the court appointed counsel to represent the defendant, the court may include in its judgment an order that the defendant repay in full or in part
the administrative costs of determining the defendant’s eligibility for appointed counsel and the costs of legal and other services related to providing appointed counsel. ORS 151.505(1).

i. Reasonable Attorney Fee for Appointed Counsel
Costs repayable under ORS 151.505(1) include a reasonable attorney fee for appointed counsel and a reasonable amount for expenses authorized under ORS 135.055. ORS 151.505(2).

b. Court Must Consider Defendant’s Ability to Pay
The court may not sentence a defendant to pay costs under ORS 161.665 or ORS 151.505 unless the defendant is or may be able to pay them. In determining the amount and method of payment of costs, the court must consider the financial resources of the defendant and the nature of the burden that payment of costs will impose. ORS 161.665(4) ORS 151.505(4).

c. Permissible Costs
Costs specially incurred in prosecuting the defendant generally include:


d. Impermissible Costs
Costs of prosecution do not include:


• Expenses inherent in providing a constitutionally guaranteed jury trial. ORS 161.665(1).

• Expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law. ORS 161.665(1).

e. **Court May Remit Costs or Modify Payment**

If a defendant who is not in contempt for failing to pay costs under ORS 161.665 petitions the court that sentenced the defendant for remission of the payment of costs or of any unpaid portion of costs, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675, if it appears to the satisfaction of the court that payment of the amount due will impose *manifest hardship* on the defendant or the immediate family of the defendant. ORS 161.665(5). *See State v. Mitchell*, 48 Or App 485, 490 (1980).

VI. **ISSUES ARISING FROM SPECIAL CONDITIONS OF PROBATION**

A. **Jail Time**

1. **Jail as Probation Condition Under Felony Sentencing Guidelines**

On the use of jail as part of a probation sentence, the felony sentencing guidelines allow the court to impose:

a. Jail as a probation condition for a term equal to *one-third* of the jail sanction units in the guidelines grid blocks;

b. One or more jail terms as a sanction for probation violations; or

c. Both jail as a probation condition and as a sanction for probation violations, as long as the total jail time does not exceed the maximum sanction units.

ORS 213-005-0013(2). *See* OAR 213-005-0012(2)(a) (each day of jail incarceration equals one sanction unit).

The court may order longer jail terms if the court finds adequate jail space exists. An upward departure cannot exceed the maximum number of jail sanction units allowed:
• At sentencing (90 units); and
• For probation violations (180 units).

OAR 213-005-0013(3).

2. Jail as Part of Probationary Sentence
   If the court imposes a probationary sentence as a *dispositional departure* or as an optional probationary sentence, the court may impose up to **180 jail sanction units** as part of the sentence. If the court imposes more than 180 sanction units, the court must make an upward departure. OAR 213-005-0011(3).

B. Polygraph Examinations
   Polygraphs are a permissible condition of probation, but the results of the examination generally are not admissible in a criminal proceeding. *State v. Tenbusch*, 131 Or App 634, 644 (1994), *rev den* 320 Or 587, *cert den* 516 US 991 (1995); *State v. Behar*, 39 Or App 503 (1979); see *State v. Sullivan*, 152 Or App 75, 81 (1998) (polygraph evidence inadmissible *per se*); but see *Frohmdahl and Frohmdahl*, 314 Or 496 (1992) (polygraph evidence admissible when not offered to prove truth of matter asserted); see also Westling, *Oregon Criminal Practice* § 45.04f, 504 (1996) (legislature removed provision for periodic polygraph examination from ORS 137.540(2), but judicial decisions approving condition have not been overruled; court possibly has discretion to impose polygraph condition).

   **Note:** The court may require a *sex offender defendant* to submit to polygraph examinations as a *general* probation condition. ORS 137.540(1)(m).

C. Community Service

1. Community Service as Condition of Probation
   A judge may sentence an offender to community service either as an alternative to probation, or as a condition of probation, provided that:
   a. The offender consents to donate labor for the welfare of the public;
   b. The tasks are within the offender’s capabilities; and
   c. The service is to be performed within a reasonable length of time during hours the offender is not working or attending school.
ORS 137.128(1). See ORS 137.131 (requiring community service as a probation condition for offense involving graffiti).

2. **Limitations on Length of Community Service**
   The length of a community service sentence must be within these limits:
   
   - Violation—not more than 48 hours;
   - Misdemeanor other than DUII in violation of ORS 813.010—not more than 160 hours;
   - Felony committed prior to November 1, 1993—not more than 500 hours;
   - Felony committed on or after November 1, 1993—as provided in the rules of the OCJC;
   - DUII under ORS 813.010—not less than 80 hours or more than 250 hours.

   ORS 137.129. See also OAR 213-005-0012(2)(e) (16 hours of community service satisfies 1 sanction unit).

3. **Effect of Failure to Perform Community Service**
   Failure to perform a community service sentence may be grounds for revocation of probation or contempt of court. ORS 137.128(2).

D. **Nonstatutory Special Conditions of Probation**

1. **Statutory Special Conditions Are Not Exclusive**
   Special probation conditions available to the court are not limited to those set forth in ORS 137.540(2).

   Compare cases reversing special probation conditions: *State v. Martin*, 282 Or 583 (1978) (prohibiting defendant from residing with her husband held invalid because of inadequate findings); *State v. Jackson*, 141 Or App 123, 126-27 (1996) (requiring a defendant convicted of assault not to talk about her crime or circumstances of her conviction with anyone but her probation officer, lawyer, and DA struck down as overbroad); *State v. Saxon*, 131 Or App 662 (1994) (defendant not to associate with her husband for five years too broad; court must consider if “less intrusive” alternatives exist); *State v. Asher*, 40 Or App 455, rev den 287 Or 149 (1979) (defendant to act as drug informant held invalid because of inadequate findings); *State v. Jacobs*, 71 Or App 560 (1984) (defendant not to reside in Troutdale held invalid because it was too broad); *State v. Ferre*, 84 Or App 459 (1987) (defendant not
to enter Coos County held invalid because it was too broad); with cases affirming special conditions: *State v. Kline*, 155 Or App 96, 99 (1998) (defendant not “father any child” until completing drug treatment and anger management programs, and without prior written approval of court); *State v. Estey*, 121 Or App 251 (1993) (defendant not to associate with girlfriend); *State v. Sprague*, 52 Or App 1063, *rev den* 291 Or 514 (1981) (10:00 p.m. curfew upheld because supported by findings and narrowly drawn); *State v. Heath/Nearing*, 82 Or App 207 (1986) (environmentalist convicted of trespass barred from reentering Pyramid Creek timber area); *State v. Douglas*, 82 Or App 222 (1986) (no alcohol consumption for two years).

2. **Requirements For Imposing Nonstatutory Special Conditions**

The court may impose any special probation conditions that are reasonably related to the crime of conviction, the protection of the public, or reformation of the probationer. ORS 137.540(2).

a. **Establish a Factual Record**

The trial court must establish a factual record to support the imposition of a special condition of probation. *State v. Saxon*, 131 Or App 662, 664 (1994). The court’s statement on the record need not be in form of detailed findings, but must refer to facts that justify the special condition, e.g., the pre-sentence report. *See State v. Mack*, 156 Or App 423, 428 (1998) (evidence at trial or at sentencing hearing may establish factual record to support court’s imposition of special probation condition); *State v. Behar*, 39 Or App 503, 505 (1979) (court properly considered presentence report containing information regarding defendant’s prior criminal record in setting probation conditions).

b. **Least Restrictive Conditions**

The court must consider the least restrictive conditions that will accomplish the purpose of the special condition. *State v. Saxon*, 131 Or App 662, 665 (1994).

3. **Special Probation Condition Must Be Specific**


E. **Probation-Sentencing Related Problems**

1. **Probation May Run Consecutive to Jail Term**

Probation may run consecutive to an incarceration term up to not more than 5 years from the pronouncement of judgment.

2. **Limit on Consecutive Probation Terms**

3. **Consecutive Probationary Sentences**
If the sentence for the primary offense(s) is a probationary sentence, the supervision term of consecutive sentences must be the presumptive probation term of each offense, imposed concurrently. OAR 213-012-0020(4)(b).

4. **Consecutive Probation Terms and Incarceration Sentence**
When the incarceration sentence on the primary offense already includes a term of post-prison supervision, the court may not impose consecutive probation terms on remaining counts. *State v. Hagan*, 140 Or App 454, 456-57 (1996); OAR 213-012-0020; OAR 213-005-0002(1); see *State v. Dummit*, 115 Or App 487, 490 (1992) (probation term becomes part of post-prison supervision term of incarceration sentence).

F. **Credit for Time Served**

1. **Imprisonment After Arrest and Before Sentencing**

2. **Discretion to Grant or Deny Credit Upon Revocation**
Notwithstanding the provisions of ORS 137.370(2)(a), an offender who has been revoked from a probationary sentence for a felony subject to the sentencing guidelines must receive credit for the time served in jail after arrest and before commencement of the probationary sentence or for the time served in jail as part of the probationary sentence unless the sentencing judge orders otherwise. ORS 137.372(1). See also ORS 137.545(7); *State v. Bullock*, 122 Or App 472, 474 (1993).

3. **Confinement as Part of Probationary Sentence for Felonies**
Notwithstanding the provisions of ORS 137.320(4), an offender who has been ordered confined as part of a probationary
sentence for a felony committed on or after July 18, 1995, must receive credit for the time served in jail after arrest and before commencement of the term unless the sentencing judge orders otherwise. ORS 137.372(2) (legislative response to Holcomb v. Sunderland, 321 Or 99 (1995)).

G. Appeal of Probationary Sentence

1. No Authority to Stay Probation Pending Appeal
   The court lacks authority to stay the probationary term pending appeal—defendant remains on probation and subject to probation conditions during pendency of the appeal. State v. Popp, 118 Or App 508, 510 (1993).

2. Discretion to Release Defendant Pending Appeal
   The court has statutory authority to release defendant pending appeal. See ORS 135.285(2).

H. Order Transferring Defendant to Custody

1. Misdemeanors or Felonies Committed Before November 1, 1989
   The court must specify the agency that will supervise the defendant’s probation.

2. Felonies Committed on or After November 1, 1989
   When the court imposes confinement as a probation condition, the court must sentence defendant directly to the custody of the sheriff or the supervisory authority with jurisdiction over the county jail. ORS 137.523(1); OAR 213-005-0012(3)(a); see OAR 213-003-0001(19) (defining “supervisory authority”).

   When the court recommends a custodial facility or program other than jail as a probation condition, the court must sentence defendant directly to the custody of the supervisory authority with jurisdiction over the facility or program. The court first must determine that:

   a. Space is available in the facility or program; and

   b. Offender meets the eligibility criteria for the facility or program.

   ORS 137.523(2); OAR 213-005-0012(3)(b).
VII. CONTESTING A CONDITION OF PROBATION

A. Direct Appeal
If defendant objected at sentencing to a probation condition, defendant may contest the condition in an appeal from the sentence that imposed the condition. *State v. Hindman*, 125 Or App 434, 437 (1993).

B. Revocation

VIII. MODIFICATION OF PROBATION TERMS

A. Court May Modify Probation Conditions at Any Time
The court may at any time modify or add to probation conditions, including discharging defendant from probation. ORS 137.540(6) as amended by 2005 Or Laws, ch. 576, § 1 (effective Jan. 1, 2006) & 2005 Or Laws, ch. 642, § 1 (effective Jan. 1, 2006); ORS 137.545(1)(b); OAR 213-005-0010 (allowing court to shorten or terminate probation or transfer supervision to bench probation without a hearing). *See also State v. Daves*, 145 Or App 443, 445 (1996), *rev den* 327 Or 83 (1998); *State v. Warner*, 118 Or App 726 (1993). When the court extends a probation term, the court must allow a hearing. *See infra* IX.C. “Probation Violation Hearings.”

1. Adding a Probation Condition
The court may add a probation condition at a later time if the record of the original sentencing or a later hearing supports the condition. *State v. Karussos*, 82 Or App 248, 252 (1986). *See State v. Zimmerman*, 166 Or App 635, 639-40 (2000) (court acted well within its authority to modify conditions of defendant’s probation in such a way as to ensure that the rehabilitative purposes of probation would continue to be served when, upon defendant’s request, it vacated a compensatory fine and modified suspension of noncompensatory fine).

B. Failure to Abide by Conditions of Probation
The court need not find that defendant violated the original probation order, however, if defendant fails to abide by all general and special probation conditions, the court may:

1. Arrest probationer;
2. Modify conditions;
3. Revoke probation; or

4. Impose structured, intermediate sanctions in accordance with ORS 137.595.

ORS 137.540(5) as amended by 2005 Or Laws, ch. 576, § 1 (effective Jan. 1, 2006) & 2005 Or Laws, ch. 642, § 1 (effective Jan. 1, 2006). See also ORS 137.595(3) (providing 60 days maximum custodial sanction that may be imposed for probation violation).

IX. PROBATION VIOLATIONS

A. In General

1. Revocation Is Discretionary
   Defendant has no right to probation. The court may revoke probation if the court finds that defendant has:
   - Participated in new criminal activity; or
   - Violated one or more probation conditions.
   

2. Exception for Defendant's Failure to Pay Financial Obligations
   The court has limited discretion to revoke probation when defendant fails to pay a fine or restitution.

   • The court must determine whether defendant made a bona fide effort to comply with the probation terms imposing a fine or restitution.

   • If defendant made a bona fide effort to comply, the court may revoke probation only if other punishment measures are not adequate to meet the State’s interests in punishment and deterrence.


a. Failure to Pay Restitution
   The court may not revoke probation because of defendant’s failure to pay restitution unless the court determines from the totality of circumstances that the purposes of probation are not being served. ORS 137.540(7) as amended by 2005 Or Laws, ch. 576, § 1 (effective Jan. 1, 2006) & 2005 Or Laws, ch. 642, § 1 (effective Jan. 1, 2006) (applies to crimes committed on or after December 5, 1996).
B. General Revocation Principles

1. Probation Revocation Is a Civil Proceeding


a. *Crawford* Does Not Extend Sixth Amendment to Probation Revocation Proceedings

The Sixth Amendment to the United States Constitution guarantees the right of defendants “[i]n all criminal prosecutions” to confront “testimonial” witnesses. *Crawford v. Washington*, 541 US 36, 68-69 (2004). Because a probation revocation proceeding is not a criminal proceeding, *Crawford* does not extend the confrontation right to such proceedings. *U.S. v. Hall*, 419 F3d 980, 985 (9th Cir. 2005). “Rather, a due process standard is used to determine whether hearsay evidence admitted during revocation proceedings violates a defendant’s rights.” *Id.* Hence, in the Ninth Circuit, revocation proceedings are governed by the due process standards of the Fifth Amendment (and Fourteenth Amendment in state court), not the Sixth Amendment’s right to confrontation. *See State v. Abd-Rahmaan*, 154 Wash 2d 280, 287-90, 111 P3d 1157 (2005) (“The United States Supreme Court and this court have recognized the different due process requirements existing in parole revocation hearings as opposed to the right to confrontation in criminal prosecutions. For the purposes of confrontation, the former are analyzed under the Fourteenth Amendment, while the latter are analyzed under the Sixth Amendment.”).

Note: There is a split in the federal courts as to whether *Crawford* applies to revocation proceedings. *See U.S. v. Hall*, 419 F3d 980, 985 (9th Cir. 2005) (*Crawford* does not apply); *U.S. v. Martin*, 382 F3d 840 (8th Cir. 2004) (same); *U.S. v. Kirby*, 418 F3d 621 (6th Cir. 2005) (same); *U.S. v. Aspinall*, 389 F3d 332 (2d Cir. 2004) (same) abrogated on other grounds as recognized in *U.S. v. Fleming*, 397 F3d 95, 99 n.5 (2d Cir. 2005). *But see Ash v. Reilly*, 354 F Supp 2d 1 (D.D.C. 2004) (holding that the scope of a defendant’s right to confront and cross-examine witnesses at a revocation proceeding is “as has been expounded in *Crawford v. Washington*”).
2. **Revocation When Defendant Not Guilty of Crime**
   The court may revoke probation even though a jury found defendant not guilty of the charge that formed the basis for the probation violation proceeding because all that is required is that the trial judge be satisfied that the purposes of probation are not being served, or that the terms of probation have been violated. *State v. Fortier*, 20 Or App 613, 617, rev den (1975) (court did not err in applying the preponderance of the evidence standard to conclude that defendant violated his probation through his alleged involvement with narcotics even though defendant was acquitted on all counts stemming from those allegations).

3. **Revocation When Defendant Appeals Conviction**
   The court may revoke probation on defendant’s conviction of a new crime even though the conviction has been appealed. *State v. Spicer*, 3 Or App 80, 81 (1970); see *State v. Tejeda*, 111 Or App 398 (1992) (court did not err in revoking defendant’s probation after conviction of new crime despite defendant’s continuing claim of innocence).

4. **Legislative Policy**
   To protect the public, the court must compel defendant’s compliance with probation conditions by responding to violations with swift, certain, and fair punishments. ORS 137.592(1). Before sentencing defendant to prison on a probation violation, the court must:
   a. Ensure that available prison space is used to house defendants who constitute a serious threat to the public; and
   b. Consider the availability of prison space and local resources.
   ORS 137.592(2).

C. **Probation Violation Hearings**

1. **Probationer’s Federal Due Process Rights**
   Due Process entitles the probationer to:
   - *Written notice* of the reason for revoking probation;
   - A *continuance* if defendant does not receive notice in time to prepare for the probation violation hearing;
   - *Disclosure* of evidence the State intends to offer at the hearing;
• **Assistance of counsel**, including court-appointed counsel, unless expressly waived; and

• **A hearing.**


a. **Due Process Requirements at the Revocation Hearing**

Due Process imposes the following requirements at the revocation hearing:

1. Hearing must be held on the record before a neutral and detached hearing officer or judge; *and*

2. The defendant has the right to:
   - **Appear in person;**
   - **Testify; and**
   - **Confront and cross-examine adverse witnesses, unless the court specifically finds good cause for denying confrontation.**


i. **Confrontation and the Comito Balancing Test**

“Under *Morrissey v. Brewer*, 408 US 471 (1972)”, every releasee is guaranteed the right to confront and cross-examine adverse witnesses at a revocation hearing, unless the government shows good cause for not producing the witnesses. This right to confrontation ensures that a finding of a supervised release violation will be based on verified facts. Accordingly, in determining whether the admission of hearsay evidence violates the releasee’s right to confrontation in a particular case, the court must weigh the releasee’s interest in his constitutionally guaranteed right to confrontation against the Government’s good cause for denying it.” *U.S. v. Comito*, 177 F3d 1166, 1170 (9th Cir. 1999) (citations omitted). See *U.S. v. Hall*, 419 F3d 980, (9th Cir. 2005) (applying Comito factors to conclude that supervised releasee’s due process rights were not violated by admission of hearsay
testimony at revocation proceeding because the Government’s substantial showing of good cause for not producing the witness, a domestic violence victim, outweighed the releasee’s interest in confrontation where the Government made every effort to produce the witness and the hearsay evidence was substantially corroborated).

D. Procedure—Probation Violations

1. Prehearing Procedure
The court may issue a warrant and cause defendant to be arrested for violating any probation conditions. ORS 137.545(2). See also ORS 137.545(8) (allowing issuance of warrant for defendant whose sentence has been suspended but who has not been sentenced to probation).

a. Arrest and Detention of Defendant
Any parole and probation or other peace officers may:

• Arrest defendant without a warrant for violating any probation condition; and

• Detain defendant until defendant is brought before the court or sanctioned.

ORS 137.545(2) as amended by 2005 Or Laws, ch. 264, § 4 (effective June 20, 2005).

b. Timeliness of Disposition
Defendant must appear before the court or agree to sanctions during the first 36 hours in custody (excluding weekends and holidays), unless the probation officer or supervisory personnel authorize later disposition. A later disposition must take place in no more than 5 judicial days. ORS 137.545(2).

c. When Probationer Does Not Consent to Sanctions
If the defendant does not consent to intermediate sanctions, the parole and probation officer, as soon as practicable, but within 1 judicial day, must:

1. Report the arrest or detention to the court that imposed probation; and

2. Promptly submit to the court a report showing how defendant has violated the probation conditions.
ORS 137.545(2) as amended by 2005 Or Laws, ch. 264, § 4 (effective June 20, 2005).

d. Appearance Before a Magistrate Within 36 Hours

Except for good cause shown or at defendant’s request, defendant must appear before the court within 36 hours. The court may order defendant:

1. Held in custody pending a violation or revocation hearing;
2. Released on the condition that defendant appear at the revocation hearing;
3. Transferred to the court that imposed probation; or
4. Released subject to an additional order that defendant report within seven calendar days to the court that imposed probation, if defendant is detained on an out-of-county warrant.

ORS 137.545(3).

2. Consolidated Probation Violation Proceedings

When defendant has been sentenced to probation in more than one county and is detained on an out-of-county warrant for a probation violation, the court may consider consolidation of some or all pending probation violation proceedings on motion of the DA or defense counsel, or on the court’s own motion. ORS 137.545(4). See ORS 137.547 (procedure for consolidated probation violation proceedings).

3. Felonies Committed Before November 1, 1989 and Misdemeanors

For defendants sentenced for felonies committed before November 1, 1989, and for any misdemeanor, the court that imposed probation may revoke defendant’s probation after a summary hearing, and:

- If execution of some other part of the sentence has been suspended, the court must execute the remainder of the sentence imposed;
- If no other sentence has been imposed, the court may impose any other sentence that it originally could have imposed.

ORS 137.545(5). Note: The trial court may not amend the sentence following revocation of probation. See State v. Anderson, 149 Or App 506, 508 (1997) (trial court erred
in imposing additional provisions on a suspended sentence following revocation of probation).

4. **Felonies Committed on or After November 1, 1989**
   The court that imposed the probation sentence may revoke defendant’s probation and impose a sanction under the guidelines. ORS 137.545(5)(b). See also OAR 213-010-0001; OAR 213-010-0002.

5. **When Revocation Hearing Held**
   Except for good cause shown, if the revocation hearing is not conducted *within 14 calendar days* following the arrest or detention of the probationer, the probationer must be released from custody. ORS 137.545(6).

6. **Credit for Time Served**
   In ordering defendant confined following probation revocation, the court *may* give credit for time served to a defendant who previously has been confined in the county jail pursuant to probation or as part of a probationary sentence under the guidelines. ORS 137.545(7).

7. **Revocation of Suspended Sentence**
   If the court has suspended sentence but has not sentenced defendant to probation, the court may issue a warrant and cause defendant’s arrest and appearance before the court at any time within the maximum period for which defendant might originally have been sentenced. After summary hearing, the court may then:
   - Revoke the suspended sentence; and
   - Execute the sentence imposed.

   ORS 137.545(8).

8. **Failure to Appear**
   If defendant fails to appear or report to a court for further revocation proceedings, the district attorney in the county to which defendant was ordered to appear or report may prosecute the failure to appear. ORS 137.545(9).

9. **Simultaneous Electronic Transmission of Revocation Hearing**
   The probationer may admit or deny the probation violation by being physically present at hearing or by means of *simultaneous electronic transmission* as described in 2005 Or Laws, ch. 566, § 4 (effective July 20, 2005). ORS 137.545(10) as amended by 2005 Or Laws, ch. 566, § 11 (effective July 20, 2005). *See generally* 2005 Or Laws, ch.
10. Victim’s Rights
Upon request, the *victim* has the right to:

a. Notice from the district attorney of any hearing that may result in probation revocation;

b. Appear personally at the hearing; and

c. Reasonably express any view relevant to the issues before the court.

ORS 137.545(11) (applies to all criminal actions pending or commenced on or after December 5, 1996). Nonappearance of the victim does not affect the validity of the revocation proceedings. ORS 137.545(11)(b).

11. Standard of Proof for Revocation

12. Rules of Evidence Do Not Apply—Except Privileges
Except for the provisions governing privileges, the Oregon Rules of Evidence do not apply to probation revocation proceedings—unless required by ORS 137.090 (determining aggravation or mitigation). OEC Rule 101(4)(e). *See State v. Kissell*, 83 Or App 630, 634, *rev dismissed* 303 Or 369 (1987); *see also* 1981 Conference Committee Commentary to OEC Rule 101(4)(e) (suggesting that, pursuant to ORS 137.090, the OEC should apply to testimony of witnesses called in aggravation or mitigation at dispositional phase of a probation revocation proceeding).

a. *Crawford Does Not Apply*
13. **Exclusionary Rule**

14. **Scope of the Hearing**
   The hearing should be limited to the narrow issue of misconduct alleged to constitute a violation of the conditions of probation; however, the hearing must provide a fair and trustworthy procedure for discovering the truth of any facts that may be in dispute. *Perry v. Williard*, 247 Or 145, 147 (1967).

   a. **Evidence of Aggravation or Mitigation**
      After finding a probation violation, in determining aggravation or mitigation, the court must consider:
      
      - Any evidence received during the proceeding;
      - The presentence report, where one is available; and
      - Any other evidence relevant to aggravation or mitigation that the court finds trustworthy and reliable.

      ORS 137.090(1).

15. **Findings Required**
   When revoking probation, the court should make the following findings:

   - A probation violation has been proven by a preponderance of the evidence; and
   - The purposes of probation are not being served.


   a. **Failure to Pay a Financial Obligation**
      If the violation involves failure to pay a financial obligation, the court must specifically find:

      1. The defendant had the ability to pay without causing hardship to defendant or defendant’s family; and
      2. The failure to pay was an intentional, contumacious default.

      *State v. Fuller*, 12 Or App 152, 159 (1973), aff’d 417 US 40 (1974). *See also ORS 137.540(7) as amended by 2005
Or Laws, ch. 576, § 1 (effective Jan. 1, 2006) & 2005 Or Laws, ch. 642, § 1 (effective Jan. 1, 2006) (preventing the court from revoking probation for failure to pay restitution unless it determines from the totality of the circumstances that the purposes of probation are not being served; applies to crimes committed on or after December 5, 1996).

16. Defendant Admits Violation
When the defendant admits to a probation violation, the court need not undertake a detailed colloquy, but should make three determinations on the record:

a. Defendant \textit{knowingly} admits the violation;

b. Defendant \textit{voluntarily} admits the violation; and

c. Defendant \textit{understands} that, based on the admission, the court may revoke probation and sentence defendant to the maximum authorized punishment for the original crime.


17. Former Jeopardy
Neither constitutional former jeopardy nor statutory former jeopardy (ORS 131.515) applies to probation revocation hearings. \textit{State v. Maricich}, 101 Or App 212, 214 (1990) (“a probation revocation proceeding is not a criminal prosecution”).

a. The court may revoke probation even if defendant is acquitted in a separate case on the charge on which the probation violation is based. \textit{State v. Fortier}, 20 Or App 613, 617, \textit{rev den} (1975); see \textit{State v. Kelley}, 119 Or App 496 (1993) (prior revocation of probation in another case based on same criminal conduct does not bar prosecution on ground of former jeopardy).

b. A finding in defendant’s favor in a probation violation proceeding does not preclude the state from filing another probation violation proceeding based on another violation arising out of the same transaction. \textit{State v. Maricich}, 101 Or App 212 (1990). However, issue preclusion may bar the State’s case.

18. Issue Preclusion
Issue preclusion does not apply unless at the earlier probation revocation hearing, the State attempted to prove the subsequent criminal charge by fully litigating its elements on the record.

19. Standard for Review of Court’s Decision to Revoke Probation

The appellate courts apply the following standards in reviewing a lower court’s decision to revoke probation:

- Whether the court’s finding of a violation is supported by a preponderance of the evidence; and
- Whether the court’s decision to revoke probation was arbitrary or capricious (i.e., whether the court abused its discretion in revoking probation).


20. Appeal By the State

ORS 138.060(1)(c), providing for appeal by the State from “an order made prior to trial suppressing evidence,” does not authorize the State to appeal evidentiary rulings in probation revocation proceedings. State v. Hindman, 125 Or App 434, 436 (1993).

The State may appeal from a probation revocation hearing order finding that defendant who was sentenced to probation under ORS 137.712 has not violated a condition of probation by committing a new crime. ORS 138.060(1)(f).

E. Posthearing Imposition of New Sentence

Sentencing guidelines govern sanctions on probation revocation for crimes subject to the guidelines. State v. Jerue, 134 Or App 668 (1995). See OAR 213-010-0002(1) (providing maximum sanctions for revocation). Imposition of a new sentence following a revocation hearing for crimes other than felonies committed on or after November 1, 1989 is governed by ORS 137.010(3)-(4).
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Purpose
The Oregon Judges Criminal Benchbook is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 18: TRAFFIC CRIMES AND VIOLATIONS

I. INTRODUCTION

A. Differences Between Traffic Crimes and Traffic Violations
   A “traffic offense” is any offense defined under the traffic code or under a local ordinance. ORS 801.555. Traffic offenses can include felonies, misdemeanors and violations. ORS 801.545; ORS 801.557 (defining “traffic violation” as an offense that is not punishable by a term of imprisonment). It is not unusual for a charge to be reduced from a traffic crime or to be issued as a violation. See ORS 161.566; ORS 161.568.

1. Traffic Violation Is Civil in Nature
   Since a traffic violation carries no risk of imprisonment, it is basically a civil case. As the court noted in State v. Dahl, 336 Or 481, 485 (2004): “Although a traffic violation is an ‘offense’ within the meaning of the criminal code, ORS 161.505, it is not a crime, ORS 161.515. A traffic violation is instead civil. Consistently with that designation, ORS chapter 153 provides that only some criminal procedural rules will apply to violations. See ORS 153.030 (so providing).”

Because traffic violations are civil, rather than criminal in nature, the procedural rules are determined more by statutory provisions than by constitutional rights. ORS chapter 153 and certain portions of the traffic code (e.g., ORS chapter 810) contain most of those procedures.

2. Determine at Arraignment Whether Charge Is Crime or Violation
   It is important to establish at the arraignment whether the charge is a traffic crime or violation, because this will determine the procedures and potential penalties in the case. It is usually most efficient to resolve related charges together. However, it is not unusual for traffic crimes and violations to be processed separately. Although uniform traffic citations can be used to charge misdemeanors as well as violations, Oregon law prohibits listing a crime on the same citation as violations. ORS 153.045(2).

B. Double Jeopardy
   If violations and crimes arising out of the same criminal episode are handled separately, there is not usually a double jeopardy or collateral estoppel problem. ORS 153.108. Subsequent prosecution of a crime is not barred if a related violation is resolved first. State v. Warner, 200 Or App 65, 77 (2005)
(concluding that defendant’s prosecution for the Class B traffic violation of careless driving was not criminal in nature and therefore Article I, § 12 of the Oregon Constitution did not bar the State from criminally prosecuting defendant for reckless driving and DUII); State v. Page, 200 Or App 55, 60 (2005) (concluding that defendant’s prosecution for a violation did not bar his subsequent prosecution for DUI arising from the same episode).

II. TRAFFIC CRIMES

A. Common Traffic Crimes and Classifications

A “traffic crime” is any traffic offense that is punishable by a jail sentence. ORS 801.545. See ORS 161.515 (describing “crime”).

1. Attempting to Elude a Police Officer

   Fleeing or attempting to elude a police officer is a:

   a. **Class C felony** if the person flees in a vehicle.

   b. **Class A misdemeanor** if the person leaves vehicle and flees.

   ORS 811.540(3).

2. Driving While Suspended or Revoked (DWS/R)

   The penalties for criminal DWS/R are as follows:

   a. **Class B felony** if suspension or revocation resulted from:

      1. Any degree of murder, manslaughter, criminally negligent homicide, or assault resulting from the operation of a motor vehicle; or

      2. Felony DUI.

   ORS 811.182(3).

   b. **Class A misdemeanor** if suspension or revocation is a result of any of the following:

      1. Suspension under ORS 809.411(2) for any degree of recklessly endangering, menacing, or criminal mischief, resulting from the operation of a motor vehicle.

      2. Revocation under ORS 809.409(4) for perjury or making a false affidavit to the Department of Transportation (“ODOT”).

      3. Suspension under ORS 813.410 for refusal to take test prescribed in ORS 813.100 (chemical test of breath or...
blood) or for taking a breath or blood test that discloses a blood alcohol content (BAC) of at least:

- .08 while driving noncommercial vehicle; or
- .04 while driving commercial vehicle; or
- Any amount of alcohol if driver is under 21.

4. Suspension of commercial driver’s license for hit and run resulting in property damage, or failure of or refusal to take chemical test.


6. Revocation resulting from habitual offender status under ORS 809.640.

7. Suspension resulting from any crime punishable as a felony with proof of a material element involving the operation of a motor vehicle (other than the crimes described in ORS 811.182(3)).

8. Suspension for failure to perform duties of a driver under ORS 811.705 (hit and run resulting in injury to persons).

9. Suspension for reckless driving under ORS 811.140.

10. Suspension for fleeing or attempting to elude a police officer under ORS 811.540.

11. Suspension or revocation resulting from misdemeanor DUII under ORS 813.010.

12. Suspension for use of commercial vehicle in commission of a crime punishable as a felony.


a. Mandatory Minimum Fine if Underlying Suspension Is DUII

If a criminal DWS/R conviction is based on an underlying suspension that resulted from DUII, then, in addition to any other sentence, the court must impose a minimum fine of:

- $1,000 for the first conviction; or
- $2,000 for a second or subsequent conviction.

ORS 811.182(5).
3. **DUII—Class A Misdemeanor**
   DUII is a **Class A misdemeanor** if:
   
   - .08 or above BAC;
   - Under influence of intoxicating liquor, controlled substance, or inhalant; or
   - Under influence of any combination of intoxicating liquor, inhalant, and controlled substance.


4. **DUII—Class C Felony if 3 Prior Convictions**
   DUII is a **Class C felony** if:
   
   a. At least 3 **prior convictions** of DUII in Oregon or another jurisdiction in 10 years preceding current offense (including prior boating and aircraft UII convictions); and
   
   b. Current offense was committed in a motor vehicle.

   ORS 813.010(5).

5. **Failure to Carry or Present License**
   Failure to carry or present a license to a police officer is a **Class C misdemeanor**. ORS 807.570(5). *See State v. Bea*, 318 Or 220, 228-29 (1993). It is a **defense** to later produce a license or driver permit that was valid at the time of the offense. ORS 807.570(3).

6. **False Application for License**
   Providing a false application for a license is a **Class A misdemeanor**. ORS 807.530(2).

7. **Giving False Information to a Police Officer**
   Giving false information to a police officer is a **Class A misdemeanor**. ORS 807.620(2).

8. **False Swearing to Receive a License**
   False swearing to receive a driver license is a **Class A misdemeanor**. ORS 807.520(2).

9. **Failure to Perform Duties of Driver—Hit and Run**
   Failure to perform the duties of a driver when **property** is damaged is a **Class A misdemeanor**. ORS 811.700(2). *See State v. Foote*, 154 Or App 227, 230 (1998) (statute construed; crime requires proof of actual damage to property).
Failure to perform the duties of a driver to *injured persons* is a **Class C felony**. ORS 811.705(2)(a). This offense is a **Class B felony** if a person suffers serious personal injury, as defined in ORS 161.015, or dies from the accident. ORS 811.705(2)(b). *See also State v. Hval*, 174 Or App 164, 172 (2001) (misdemeanor hit and run under ORS 811.700 and felony hit and run under ORS 811.705 impose independent duties on driver; State could charge defendant under either statute if evidence supported charge).

10. **Misuse of Identification Card**
   Misuse of an identification card is a **Class A misdemeanor**. ORS 807.430(2).

11. **Permitting Misuse of License**
    Permitting the misuse of a license is a **Class A misdemeanor**. ORS 807.590(2).

12. **Reckless Driving**
    Reckless driving is a **Class A misdemeanor**. ORS 811.140(3).

13. **Organizing a Speed Racing Event**
    Organizing a speed racing event is a **Class C felony**. ORS 811.127(4).

14. **Transfer of Documents for Purposes of Misrepresenting Age**
    Transferring documents for the purpose of misrepresentation is a **Class A misdemeanor**. ORS 807.510(2).

15. **Unlawful Production of License Forms or Identification Cards**
    Unlawful production of identification cards, licenses, permits, forms, or camera cards is a **Class C felony**. ORS 807.500(2).

16. **Using Another’s License**
    Using another’s license is a **Class A misdemeanor**. ORS 807.600(2).

17. **Using Invalid License**
    Using an invalid license is a **Class A misdemeanor**. ORS 807.580(2).

18. **Vehicular Assault of Bicyclist or Pedestrian**
    Vehicular assault of a bicyclist or pedestrian is a **Class A misdemeanor**. ORS 811.060(3).
19. Reckless Endangerment of Highway Workers
Reckless endangerment of highway workers is a Class A misdemeanor. ORS 811.231(2).

20. Failure to Return Suspended, Revoked, or Canceled License
Failure to return a suspended, revoked, or canceled license is a Class C misdemeanor. ORS 809.500(3).

B. Venue for Traffic Crimes
When a traffic offense is punishable as a crime, venue is proper in the county in which the offense occurred. ORS 131.305. See State v. McCown, 113 Or App 627, 630-31 (1992) (traffic crimes are subject to general venue provisions). See also ORS 131.315 (providing special venue provisions).

C. Arraignment & Entry of Plea

1. General Advice of Rights
The general advice that the court must impart to a criminal defendant at arraignment and entry of plea is discussed in Chapter 1, “Pretrial,” and Chapter 3, “Entry of Plea.”

2. Right to Transfer to Circuit Court
In any justice court that has not become a court of record under ORS 51.025, a defendant charged with a misdemeanor must be notified immediately after entering a plea of not guilty of the right to have the matter transferred to the county’s circuit court. ORS 51.050(2).

3. DUII—Additional Advice Regarding Penalty
The court should provide a nonfelony DUII defendant the following additional advice:

- Maximum imprisonment: 1 year. ORS 161.615(1).
- Maximum fine: $6,250. ORS 161.635(1). Note: Notwithstanding ORS 161.635, the maximum fine that may be imposed on a DUII conviction is $10,000 if (1) the current offense was committed in a motor vehicle, and (2) there was a passenger under 18 years of age in the motor vehicle who was at least 3 years younger than the driver. ORS 813.010(7).
- Mandatory imprisonment or community service: 48 hours in custody or 80-250 hours of community service. ORS 813.020(2); ORS 137.129(4). See State v. Mourlas, 120 Or App 19, rev den 317 Or 272 (1993) (probation conditioned on community service and payment of fine).
Mandatory minimum fine of:
1. $1,000 on a first conviction;
2. $1,500 on a second conviction; or
3. $2,000 on a third or subsequent conviction.
ORS 813.010(6).

Attendance at a victim impact treatment session and payment of a $5-$50 fee may be required (in counties that have victim impact program). ORS 813.020(3).

Costs of driving record: In addition to any other costs, the court must charge and collect from defendant the costs of obtaining defendant’s driving records. ORS 153.624.

$130 fee described in ORS 813.030 (waiver allowed for indigent defendants) in addition to any other fine. ORS 813.020(1)(a).

Completion of a screening interview to determine alcoholism, drug dependency, or dependency on inhalants, and completion of an appropriate treatment program at own expense. ORS 813.020(1)(b). See ORS 813.021 (providing requirements for screening interview and treatment program); ORS 813.021(1)(b) as amended by 2005 Or Laws, ch. 303, § 1 (effective July 1, 2005) (providing the $150 fee defendant is required to pay directly to the agency or organization conducting the screening interview) ORS 813.021(1)(b) as amended by 2005 Or Laws, ch. 303, § 1 (effective July 1, 2005).

License suspension of 1 to 3 years. ORS 813.400(1); ORS 809.428(2). Note: A person convicted of misdemeanor DUII for a third or subsequent time (or of felony DUII), is subject to permanent revocation of driving privileges as provided in ORS 809.235. ORS 813.400(2) as amended by 2005 Or Laws, ch. 436, § 2 (effective Jan. 1, 2006).

Mandatory revocation for “habitual offenders.” Under ORS 809.600, if the defendant has certain other convictions within 5 years of the DUII conviction, ODOT must revoke the defendant’s driving privileges. See infra II.1.2. “Habitual Offenders.”

Impoundment or immobilization and mandatory suspension of registration: On a second or subsequent conviction of DUII, the court must order defendant’s motor vehicle (or the motor vehicle defendant was operating when arrested) impounded or immobilized, ORS 809.700(1)(b), and must
order DMV to suspend registration of that vehicle. ORS 809.010(1)(b).

D. Special DUII Trial Considerations

1. Procedure

   Specific statutes, ordinances, and rules governing traffic cases apply to DUII. *See e.g.* ORS 813.326 (procedure for trial of felony DUII).

2. Right to Jury Trial
   In Circuit courts, a DUII defendant has the right to a jury trial and must waive jury trial in writing. ORS 136.001(1). *See State v. Baker,* 328 Or 355 (1999) (declaring part of ORS 136.001(1) granting State right to demand jury trial unconstitutional). In justice court, DUII defendant must demand a jury trial. ORS 156.110.

3. Certain Rules of Civil Procedure Apply
   ORCP 58B, C and D and 59B to F, G(1), (3), (4), and (5), and H apply to DUII trials. ORS 136.330.

4. Questions to Veniremen on Religious Beliefs
   Potential jurors may be questioned on religious beliefs if directly relevant in a DUII trial. *State v. Barnett,* 251 Or 234 (1968) (holding that a defendant accused of abortion should have been permitted to inquire on voir dire about the religious beliefs of veniremen).

5. Evidentiary Issues
   a. Judicial Notice of Observable Conduct
      The court may take judicial notice of the fact that certain observable behaviors, such as odor of breath, lack of muscular coordination, and speech difficulties, are symptoms or “signs” of alcohol intoxication. *State v. Clark,* 286 Or 33, 39-40 (1979). *See also State v. Ross,* 147 Or App 634, 637-40 (1997) (discussing *Clark*).

   b. Consequence of Refusal to Submit to Field Sobriety Test
      If a person refuses or fails to submit to field sobriety tests as required by ORS 813.135, evidence of the person’s
refusal or failure to submit is admissible in any criminal action for DUII. ORS 813.136.

c. **Temporary Traffic Stop is Not “Custody”**

### E. Sentencing Issues

1. **Costs Incurred in Obtaining Driving Records**
   In addition to any other costs charged a person convicted of a traffic offense, the court must charge as costs and collect from the offender any actual costs incurred in obtaining driving records. ORS 153.624 (no waiver for indigent defendants). *See also* ORS 801.555 (defining “traffic offense”).

2. **Increased Base Fines**
   Base fines are increased for certain traffic offenses that occur in highway work zones, school zones, or safety corridors and cannot be reduced at all. ORS 153.131; ORS 811.230; ORS 811.235; 1999 Or Laws, ch. 1071, § 5.

3. **Mandatory Sentencing Items for DUI Offenders**
   At sentencing for a DUII, the court must:
   
   a. Impose the mandatory minimum fine provided in ORS 813.010(6).
   
   b. Require defendant to pay the $130 fee described in ORS 813.030 (waiver allowed for indigent defendants) in addition to any other fine. ORS 813.020(1)(a).
   
   c. Require defendant to complete a screening interview to determine alcoholism, drug dependency, or dependency on inhalants, pay $150 to the agency conducting the interview, and complete of an appropriate treatment program at defendant’s expense. ORS 813.020(1)(b); ORS 813.021(1)(b) as amended by 2005 Or Laws, ch. 303, § 1 (effective July 1, 2005).
   
   d. Impose and not suspend execution of 48 hours in custody or 80-250 hours of community service. ORS 813.020(2); ORS 137.129(4).
   
   e. Suspend or revoke the person’s license as provided in ORS 813.400.

*See generally* Chapter 16, “Sentencing.”
4. Discretionary Sentencing Items
In addition to any other fine or imprisonment, the court may:

- Require that a defendant convicted of a traffic offense successfully complete a defensive driving or other appropriate driver improvement course. The court can suspend the defendant’s license until the course is completed, or suspend the license later if the course is not completed by a specific time. ORS 809.270(1).
- Order a vehicle impounded or immobilized under certain circumstances. See ORS 809.700.
- Require a DUII offender to attend a victim impact treatment session and pay fee. ORS 813.020(3).
- Recommend to ODOT whether to issue a hardship permit to the defendant. ORS 807.250(1).

F. Suspension, Restriction, or Revocation of Driving Privileges

1. Failure to Pay Fine or Obey Court Order
If the defendant is convicted of any traffic offense and fails or refuses to pay a fine or to comply with any condition upon which payment of the fine or any part of it was suspended, the court may:

- Notify ODOT to suspend driving privileges under ORS 809.290(2) (except for failure to pay a fine relating to any parking, pedestrian, or bicycling offense); or
- Restrict driving privileges.
ORS 809.210(1), (5).

a. Procedure for Placing Restrictions on Driving Privileges
The court may place restrictions on driving privileges, including any restriction, condition, or requirement, which remain in effect until ended by the court. The court:

1. Must immediately advise ODOT of the restrictions; and
ORS 809.210(3). See also ORS 807.120 (providing restrictions). The court may punish violations of restrictions under ORS 807.010 (Class B violation).

2. Suspension or Revocation of Nonresident Driving Privileges
A court may suspend or revoke the driving privileges to operate a motor vehicle in Oregon of any nonresident for any cause
for which the driving privileges of an Oregon resident may be suspended or revoked. ORS 809.230.

3. **Suspension for Inhalant or Controlled Substances Conviction**

   Unless the court finds *compelling circumstances* not to order suspension of driving privileges, the court must prepare and send to ODOT, within 24 hours of conviction, an order of suspension of driving privileges when a person is convicted of:

   a. Any offense involving manufacturing, possession, or delivery of controlled substances; or
   
   b. DUII (in violation of ORS 813.010 or of a municipal ordinance) if the person was under the influence of an inhalant or a controlled substance.

   ORS 809.265(1).

G. **Mandatory Suspension of Driving Privileges**

1. **Failure to Appear**

   If a defendant fails to appear in a proceeding charging the defendant with a traffic offense (except for failure to pay a fine relating to any parking, pedestrian, or bicycling offense) or with a violation of ORS 471.430, the court must:

   a. Notify ODOT to suspend driving privileges under ORS 809.280(5) for failure to appear if the defendant is charged with a traffic crime or with a violation of ORS 471.430 (purchase or possession of liquor by person under 21); or
   
   b. Notify ODOT to suspend driving privileges under ORS 809.290(1) if the defendant is charged with a traffic violation—and
   
   c. Certify in the notice that the defendant failed to appear in the manner required by the court or by law.

   ORS 809.220(1), (2), (5). *See also* ORS 809.220(3) (providing for termination of suspension).

2. **Conviction of a Crime**

   Upon conviction of (1) *recklessly endangering another person* resulting from the operation of a motor vehicle, (2) *menacing* resulting from the operation of a motor vehicle, (3) any degree of *criminal mischief* resulting from the operation of a motor vehicle, (4) *reckless driving*, (5) *hit and run* resulting in property damage, (6) *fleeing or attempting to elude* a police officer, or (7) *reckless endangerment of highway workers*, the court must:
a. Impose the suspension at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;

c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for a period of:

- **90 days** for a first offense;
- **1 year** for a second offense committed within 5 years of a separate offense; or
- **3 years** for a third or subsequent offense committed within a 5-year period that includes two or more separate offenses.

ORS 809.411(1)-(6); ORS 809.240; ORS 809.250(1), (2); ORS 809.428(1).

Upon conviction of *misdemeanor DUII*, the court must:

a. Impose the suspension at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;

c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for a period of:

- **1 year** for a first offense;
- **3 years** for a second offense committed within 5 years of a separate offense; or
- **Permanently** for a third or subsequent offense committed in any jurisdiction.

ORS 813.400(2); ORS 809.235(1)(b) as amended by 2005 Or Laws, ch. 436, § 1 (effective Jan. 1, 2006); ORS 809.240; ORS 809.250(1), (2); ORS 809.428(2). See generally State v. Oeleis, 100 Or App 590 (1990) (trial court erred in suspending license for three years on first DUII conviction); State v. Lyman, 30 Or App 955 (1977) (holding that the operative date
of a prior DUII conviction was the date of conviction in circuit court following appeal de novo from municipal court).

Upon conviction of criminal trespass under ORS 164.245, or of theft of gasoline under ORS 164.043, 164.045 or 164.055, the court must:

a. Impose the suspension at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;

c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for a period of 6 months.

ORS 809.411(7), & (8) as amended by 2005 Or Laws, ch. 403, § 1(7)-(8) (effective Jan. 1, 2006); ORS 809.240; ORS 809.250(1), (2).

Upon conviction of an offense described in ORS 809.310 (such as false or fraudulent application for license, misuse of license, giving false information to police, etc.), the court must:

a. Impose the suspension at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;

c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for a period of 1 year.

ORS 809.411(9) as amended by 2005 Or Laws, ch. 403, § 1 (effective Jan. 1, 2006); ORS 809.240; ORS 809.250(1), (2).

Upon conviction of assault in the second, third, or fourth degree resulting from the operation of a motor vehicle, the court must:

a. Impose the suspension at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;
c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted from the date the person is released from incarceration or, if the sentence does not include incarceration, from the date ODOT revoked the privileges for a period of:

- **8 years** if the conviction is for assault II;
- **5 years** if the conviction is for assault III; or
- **1 year** if the conviction is for assault IV.

ORS 809.411(10) as amended by 2005 Or Laws, ch. 403, § 1 (effective Jan. 1, 2006); ORS 809.240; ORS 809.250(1), (2).

### 3. Tobacco Purchase by Minor

Upon a second conviction through misrepresentation of age, the court must suspend the driving privileges and right to apply for driving privileges for a period not to exceed 1 year of a person under 18 years of age who purchases, attempts to purchase, or acquires tobacco products. ORS 167.401(3)(b). See ORS 809.423(2) (requiring ODOT to suspend driving privileges upon notification of court’s order); ORS 431.840(2) (defining “tobacco products”).

### 4. Conviction of Speeding Over 100 MPH

Upon conviction of speeding at 100 miles per hour or greater, the court must suspend ODL for not less than 30 days nor more than 90 days, and must impose a fine of $1000. 2005 Or Laws, ch. 491, § 1(5) (effective Jan. 1, 2006).

### H. Mandatory Suspension of Commercial Driver License (CDL)

#### 1. Conviction of an Offense

a. **Hit and Run & Felonies Involving Commercial Vehicle**

Upon conviction of: (1) hit and run under ORS 811.700 (resulting in property damage) or ORS 811.705 (resulting in injured persons) while operating a commercial motor vehicle; (2) a crime punishable as a felony involving the operation of a commercial motor vehicle other than the felony described in ORS 809.413(3) as amended by 2005 Or Laws, ch. 649, § 20 (effective July 27, 2005); (3) driving a commercial motor vehicle with a suspended or revoked CDL; or (4) murder, manslaughter, criminally
negligent homicide, or assault in the first degree resulting from the operation of a commercial motor vehicle, the court must:

1. Impose the suspension at the time of conviction;

2. Take immediate possession of the person’s license or driver permit;

3. If necessary, issue a temporary driver permit under ORS 807.320; and

4. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for a period of:

- **1 year** if the person has *not* previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13, and the person was *not* driving a commercial motor vehicle containing a hazardous material;

- **3 years** if the person has *not* previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13, and the person was *not* driving a commercial motor vehicle containing a hazardous material; or

- **Lifetime of the person** if the has previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13.

ORS 809.413(1), (2), (4), & (5) as amended by 2005 Or Laws, ch. 649, § 20 (effective July 27, 2005); ORS 809.240; ORS 809.250(1), (2).

b. **Felony Involving Controlled Substance & Commercial Vehicle**

Upon conviction of a crime punishable as a *felony that involves the manufacturing, distributing, or dispensing of a controlled substance*, as defined in ORS 475.005, and in which a motor vehicle or a commercial motor vehicle was used, the court must:

1. Impose the suspension at the time of conviction;

2. Take immediate possession of the person’s license or driver permit;
3. If necessary, issue a temporary driver permit under ORS 807.320; and
4. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for the lifetime of the person.

ORS 809.413(3) as amended by 2005 Or Laws, ch. 649, § 20 (effective July 27, 2005); ORS 809.240; ORS 809.250(1), (2).

c. **Subsequent Conviction of a Serious Traffic Violation**

Upon the subsequent conviction of a *serious traffic violation* that occurred within 3 years of a previous conviction for a serious traffic violation that arose out of a separate incident, the court must:

1. Impose the suspension at the time of conviction;
2. Take immediate possession of the person’s license or driver permit;
3. If necessary, issue a temporary driver permit under ORS 807.320; and
4. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted consecutive to any other suspension for a serious traffic violation for a period of:
   - 60 days if it is a second conviction; or
   - 120 days if it is a third or subsequent conviction.

ORS 809.413(6) as amended by 2005 Or Laws, ch. 649, § 20 (effective July 27, 2005); ORS 809.240; ORS 809.250(1), (2). See also ORS 801.477 (defining “serious traffic violation”).

d. **DUII While Operating Commercial Vehicle**

Upon conviction of **DUII** while the person was driving a commercial motor vehicle, in addition to any other suspension under ORS 813.400, the court must:

1. Impose the suspension at the time of conviction;
2. Take immediate possession of the person’s license or driver permit;

3. If necessary, issue a temporary driver permit under ORS 807.320; and

4. Forward the license or permit and a copy of the suspension order to ODOT, which must suspend the driving privileges of the person convicted for a period of:

- **1 year** if (1) the suspension is because the person was convicted of DUII under ORS 813.010 or because a breath or blood test under ORS 813.100 disclosed that the person had a **BAC of .04% or more**, (2) the person has not previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13, and (3) the person was not driving a commercial motor vehicle containing a hazardous material;

- **3 years** if (1) the suspension is for refusal of a test under ORS 813.100, (2) the person has not previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13, and (3) the person was not driving a commercial motor vehicle containing a hazardous material;

- **3 years** if (1) the suspension is because the person was convicted of DUII under ORS 813.010 or because a breath or blood test under ORS 813.100 disclosed that the person had a **BAC of .04% or more**, (2) the person has not previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13, and (3) the person was driving a commercial motor vehicle containing a hazardous material;

- **5 years** if (1) the suspension is for refusal of a test under ORS 813.100, (2) the person has not previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13, and (3) the person was driving a commercial motor vehicle containing a hazardous material; or

- **Lifetime of the person** if the has previously been convicted of an offense described in 2005 Or Laws, ch. 649, § 13 or had a CDL suspended as described in 2005 Or Laws, ch. 649, § 13.
ORS 813.404 as amended by 2005 Or Laws, ch. 649, § 25 (effective July 27, 2005); ORS 813.403; ORS 809.240; ORS 809.250(1), (2).

I. Mandatory Revocation of Driving Privileges

1. Conviction of a Crime
   
   Except as otherwise provided in ORS 809.235 (permanent revocation), upon conviction of any degree of murder, manslaughter, or criminally negligent homicide resulting from the operation of a motor vehicle, or assault in the first degree resulting from the operation of a motor vehicle, the court must:

   a. Impose the revocation at the time of conviction;

   b. Take immediate possession of the person’s license or driver permit;

   c. If necessary, issue a temporary driver permit under ORS 807.320; and

   d. Forward the license or permit and a copy of the revocation order to ODOT, which must revoke the driving privileges of the person convicted for a period of 8 years from the date the person is released from incarceration or, if the sentence does not include incarceration, from the date ODOT revoked the privileges.

   ORS 809.409(2); ORS 809.240; ORS 809.250(1), (2).

   Upon conviction of hit and run resulting in injured persons under ORS 811.705, the court must:

   a. Impose the revocation at the time of conviction;

   b. Take immediate possession of the person’s license or driver permit;

   c. If necessary, issue a temporary driver permit under ORS 807.320; and

   d. Forward the license or permit and a copy of the revocation order to ODOT, which must revoke the driving privileges of the person convicted for a period of:

   - 1 year; or

   - 5 years if the court indicates on the record of conviction that a person was killed as a result of the accident.

   ORS 809.409(3); ORS 809.240; ORS 809.250(1), (2).
Upon conviction of perjury, or the making of a false affidavit to ODOT under any state law requiring vehicle registration or regulating vehicle operation, the court must:

a. Impose the revocation at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;

c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the revocation order to ODOT, which must revoke the driving privileges of the person convicted for a period of 1 year.

ORS 809.409(4); ORS 809.240; ORS 809.250(1), (2).

Upon conviction of any felony with a material element involving the operation of a motor vehicle, the court must:

a. Impose the revocation at the time of conviction;

b. Take immediate possession of the person’s license or driver permit;

c. If necessary, issue a temporary driver permit under ORS 807.320; and

d. Forward the license or permit and a copy of the revocation order to ODOT, which must revoke the driving privileges of the person convicted for a period of 1 year.

ORS 809.409(5); ORS 809.240; ORS 809.250(1), (2).

2. Habitual Offenders

A person’s driving privileges must be revoked as a habitual offender for a period of 5 years if the person, within a five-year period, has been convicted of 3 or more of the following offenses as evidenced by the records maintained by ODOT or by the records of a similar agency of another state:

- Any degree of murder, manslaughter, criminally negligent homicide, assault, recklessly endangering another person, menacing, or criminal mischief resulting from the operation of a motor vehicle;

- DUl under ORS 813.010;

- Criminal DWS/R, under ORS 811.182;
Reckless driving under ORS 811.140;

Hit and run under ORS 811.700 or 811.705;

Fleeing or attempting to elude a police officer under ORS 811.540;

Any violation of a traffic ordinance of a city, municipal or quasi-municipal corporation that substantially conforms to offenses described under this section; or

Any violation of offenses under any federal law or any law of another state, including subdivisions thereof, that substantially conforms to offenses described in this section.

ORS 809.600(1), (4); ORS 809.650(2).

A person’s driving privileges must be revoked as a habitual offender for a period of 5 years if the person, within a five-year period, has been convicted of 20 or more of any one or more of the following offenses as evidenced by the records maintained by ODOT or by a similar agency of another state:

- Any offenses enumerated in ORS 809.600(1);
- Any offense specified in the rules of the department adopted under ORS 809.605;
- Any violation of a traffic ordinance of a city, municipal or quasi-municipal corporation that substantially conforms to offenses described under this section; or
- Any violation of offenses under any federal law or any law of another state, including subdivisions thereof, that substantially conforms to offenses described in this section.

ORS 809.600(2), (4); ORS 809.650(2). See also OAR 735-064-0220(2) (listing offenses that count toward habitual offender status). Note: When the 20th conviction occurs after a lapse of two years or more from the last preceding conviction, a person’s driving privileges may not be revoked under ORS 809.600(2) until the person’s 21st conviction within a five-year period. ORS 809.600(3).

J. Permanent Revocation of Driving Privileges

Notwithstanding ORS 809.409(2) (mandatory revocation for any degree of murder or manslaughter), the court must permanently revoke a person’s driving privileges if the court finds that the

The list of traffic offenses that count toward habitual offender status is available for download at: http://www.oregon.gov/ODOT/DMV/docs/735_064_0220.pdf (last visited Sept. 27, 2005).
person \textit{intentionally used a motor vehicle as a dangerous weapon resulting in the death of the victim} and the person is convicted of:

- Any degree of \textit{murder}; or
- \textit{Manslaughter I}.

ORS 809.235(1)(a).

The court must \textit{permanently revoke} a person’s driving privileges if the person is convicted of \textit{felony DUII} in violation of ORS 813.010, or a \textit{misdemeanor DUII} in violation of ORS 813.010 or its statutory counterpart in any other jurisdiction for a \textit{third or subsequent time}. ORS 809.235(1)(b) as amended by 2005 Or Laws, ch. 436, § 1 (effective Jan. 1, 2006); ORS 813.400(2) as amended by 2005 Or Laws, ch. 436, § 2 (effective Jan. 1, 2006).

1. \textbf{Petition to Restore Driving Privileges}

A person whose driving privileges have been permanently revoked under ORS 809.235(1) may petition the court to restore the person’s driving privileges no sooner than 10 years after the person is released on parole or post-prison supervision, or is sentenced to probation if the probation is not revoked and the person is thereafter discharged without the imposition of a sentence of imprisonment. ORS 809.235(2) as amended by 2005 Or Laws, ch. 436, § 1 (effective Jan. 1, 2006). The district attorney of the county in which the person resides must be named and served as the respondent in the petition. 2005 Or Laws, ch. 436, § 1 (effective Jan. 1, 2006)

After holding a hearing and considering several factors to determine whether to grant the petition, the court may restore the petitioner’s driving privileges if it is satisfied by \textit{clear and convincing evidence} that the petitioner is rehabilitated and does not pose a threat to public safety. ORS 809.235(3), (4).

\textbf{K. Rescission of Suspension or Revocation Upon Appeal}

If a suspension or revocation of driving privileges is based upon a conviction, the court that entered the judgment of conviction \textit{may} direct ODOT to rescind the suspension or revocation if the person:

1. Has appealed the conviction; and

2. Requests in writing that the court direct ODOT to rescind the suspension or revocation pending the outcome of the appeal.

ORS 809.460(1). However, if a person’s CDL was suspended under ORS 809.413, ORS 813.403, or 2005 Or Laws, ch. 649, § 13 (effective July 27, 2005), ODOT may \textit{not} rescind the suspension.
until the conviction is reversed on appeal. ORS 809.460(4) as amended by 2005 Or Laws, ch. 649, § 17 (effective July 27, 2005).

The court must notify ODOT immediately if the conviction is affirmed on appeal, the appeal is dismissed, or the appeal is not perfected within the statutory period. ORS 809.460(3).

L. Court-Ordered Suspension of Vehicle Registration

1. Offenses
   The court must order ODOT to suspend registration for up to 120 days when the defendant is convicted of:
   
   - DWS/R under ORS 811.175 or ORS 811.182; or
   - Second or subsequent DUII under ORS 813.010.
   
   ORS 809.010(1), (3).

2. Vehicles
   The court must order suspension of the registration of:
   
   - Any vehicle owned by convicted person; and
   - Any vehicle the convicted person was operating at the time of arrest—if the court is satisfied by clear and convincing evidence that the owner knew or had good reason to know that the convicted person:
     
     - Did not have a valid license and knowingly consented to operation of vehicle by convicted person; or
     - Was operating the vehicle while under the influence of intoxicants.

   ORS 809.010(2), (5). See also ORS 801.375 (defining “owner”).

M. Court-Ordered Motor Vehicle Impoundments or Immobilization

1. Offenses
   A court may order a motor vehicle impounded or immobilized for not more than 1 year upon conviction of:
   
   - DWS/R; or
   - A second or subsequent DUII under ORS 813.010.

   ORS 809.700(1), (2). See also ORS 801.360 (defining “motor vehicle”).
2. **Vehicles**
   The court *may* impound or immobilize:
   - Any vehicle owned by convicted person; and
   - Any vehicle registered in Oregon that the convicted person was operating at the time of arrest—if the court is satisfied by a *preponderance of the evidence* that the owner knew or had good reason to know that the convicted person:
     a. Did not have a valid license and knowingly consented to operation of vehicle by convicted person; *or*
     b. Was operating the vehicle while under the influence of intoxicants.

   ORS 809.700(3), (4), (9).

3. **Seizure and Forfeiture of Motor Vehicle**
   In accordance with ORS 475A.005 *et seq.*, the court may order seizure and forfeiture of a motor vehicle if a person is arrested or cited for **DUII** and, within the last three years, has been convicted of:
   - **DUII**; or
   - Murder, manslaughter, criminally negligent homicide, or assault that resulted from operation of motor vehicle.

   ORS 809.730(1).

**N. Diversion Agreement Available to DUII Defendants**

1. **Procedures**
   a. The court must inform a **DUII** defendant at arraignment that a diversion agreement may be available if the defendant meets certain criteria in ORS 813.215. ORS 813.200(1).

   b. Defendant must file petition *within 30 days* after the date of the defendant’s first appearance on the summons unless the court allows later filing for good cause shown—the filing of a demurrer, a motion to suppress, or a motion for an omnibus hearing does not constitute good cause. ORS 813.210(1)(a). Supreme Court determines form of DUII diversion petition. ORS 813.200(3).

   c. Entry of not guilty or no contest plea or starting trial precludes filing of diversion petition. ORS 813.210(1)(b).
d. Within 15 days after the date of service, prosecutor may file with court a written objection to petition and request for a hearing. ORS 813.210(5).

2. **Eligibility**

A defendant is eligible for diversion when:

a. Defendant had no charge of DUII, other than charge for present offense, pending in any jurisdiction on date defendant filed petition for DUII diversion agreement;

b. Defendant has not been convicted of DUII in any jurisdiction within period beginning 10 years before date present offense was committed and ending on date defendant filed DUII diversion petition;

c. Defendant was not participating in DUII diversion program, other than a program entered into as result of present offense charged, on date defendant filed DUII diversion petition;

d. Defendant did not participate in diversion or “similar” rehabilitation program, other than a program entered into as result of present offense charged, within period beginning 10 years before date present offense was committed and ending on date defendant filed DUII diversion petition;

e. Defendant had no charge of murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle pending on date defendant filed DUII diversion petition;

f. Defendant had not been convicted of murder, manslaughter, criminally negligent homicide, or assault that resulted from the operation of a motor vehicle within period beginning 10 years before date of commission of present offense and ending on date defendant filed DUII diversion petition;

g. Defendant did not have a commercial driver license at the time of the offense;

h. Defendant was not operating a commercial motor vehicle at the time of the offense; and

i. The present DUII offense did not involve an accident resulting in death of any person other than defendant or physical injury under ORS 161.015 to any person other than defendant.

3.  Factors

a.  Mandatory Item
The court must consider whether diversion will benefit defendant and the community. ORS 813.220(1).

b.  Discretionary Items
The court may consider:

1.  Whether defendant recognized early that treatment would be beneficial;

2.  Whether there is a probability that defendant will cooperate with treatment;

3.  Whether defendant will observe the restrictions of diversion; and

4.  Whether the offense was committed in a motor vehicle and whether there was a passenger in the motor vehicle who was under 18 years of age and at least three years younger than the defendant.

ORS 813.220(2)-(5).

4.  Victims’ Rights
When DUII offense involves damage to property of person other than defendant, victim of property damage has right to be present and heard at any hearing on DUII diversion petition; the DA or city attorney must notify victim. ORS 813.222.

5.  Mandatory Denial of Diversion
The court must deny diversion when:

a.  Defendant failed to appear at arraignment for present offense without good cause;

b.  Defendant was charged with or convicted of DUII offense in any jurisdiction after date petition filed;

c.  Defendant participated in DUII diversion program or similar alcohol and drug rehabilitation program, other than the diversion program for current offense, after date petition filed; or

d.  Defendant was charged with or convicted of murder, manslaughter, criminally negligent homicide, or assault that
resulted from the operation of a motor vehicle after date petition filed.

ORS 813.220(6)-(9).

6. Allowing the Diversion

When the court allows a petition for a DUII diversion agreement, it must:

a. Accept the guilty plea or no contest plea filed as part of the petition but withhold entry of a judgment of conviction;

b. Sign the petition and indicate thereon the date of allowance of the diversion period, the length of the diversion period, and the date upon which the DUII occurred;

c. Make the agreement a part of the record;

d. Notify ODOT of the diversion agreement within 48 hours;

e. Stay the DUII offense proceeding pending completion or termination of the diversion agreement; and

f. Allow the diversion for a period of 1 year.

ORS 813.230(1), (2), (3).

7. Extension of Diversion Period

Within 30 days prior to end of current diversion agreement, defendant may apply by motion to court in which agreement was entered for order extending diversion period. ORS 813.225(1).

a. Granting Petition for Extension

The court may grant a petition for an extension filed under this section if the court finds that the defendant made a good faith effort to complete the conditions of the diversion agreement and that the defendant can complete the conditions of the diversion agreement within the requested extended diversion period. ORS 813.225(4). An extension may not exceed 180 days and the court may grant only one. ORS 813.225(5), (6).

If the defendant fully complies with the conditions of the diversion agreement within the extended diversion period, the court may dismiss the charge with prejudice under ORS 813.250. ORS 813.225(7). If the court finds that the defendant failed to comply with the diversion agreement within the extended diversion period, the court must enter the guilty plea or no contest plea filed as part of the
petition, enter a judgment of conviction, and sentence the defendant. *Id.*

b. **Denying the Extension**
   If the court denies the extension, the court must enter the guilty plea or no contest plea filed as part of the petition, enter a judgment of conviction, and sentence the defendant. ORS 813.225(8).

8. **Denying the Diversion**
   When the court denies the petition for a diversion, it must continue the DUII offense proceeding against the defendant and the guilty or no contest plea filed as part of the petition for a diversion may *not* be used. ORS 813.230(4).

9. **Completion or Termination of Diversion**
   a. **Successful Completion**
      A defendant who has fully complied with and performed the conditions of the diversion agreement within the diversion period, may move the court to dismiss the charge with prejudice. ORS 813.250(1). If the defendant does not move to dismiss the charge *within 6 months* after conclusion of the diversion period, the court may dismiss the charge on its own motion if it finds that the defendant fully complied with and performed the conditions of the diversion agreement and gives notice of that finding to the DA or city attorney. ORS 813.250(3).

   b. **Early Termination of Diversion**
      At any time before the court dismisses the DUII charge, the court on its own motion or on the motion of the DA or city attorney may issue an order requiring defendant to appear and show cause why the court should not terminate the diversion agreement, stating the reasons for the proposed termination and an appearance date. ORS 813.255(1).

   i. **Grounds for Early Termination**
      The court must terminate the diversion agreement and enter the guilty plea or no contest plea that was filed as part of the petition if:

      - At the hearing on the order to show cause it finds by a *preponderance of the evidence* that (1) the defendant failed to fulfill the terms of the diversion agreement, or (2) the defendant did not originally qualify for the diversion; or
• The defendant fails to appear at the hearing. ORS 813.255(3), (5).

ii. Partial Fulfillment May be Considered at Sentencing
If the court terminates the diversion agreement and enters the guilty plea or no contest plea, the court may take into account at time of sentencing any partial fulfillment by the defendant of the terms of the diversion agreement. ORS 813.255(4).

10. Statements During Treatment Inadmissible
No statement that defendant makes during assessment or treatment to a person employed by a treatment agency may be used in any criminal or civil action or proceeding arising out of same conduct which is the basis of the DUII charge. ORS 813.250(4).

III. TRAFFIC VIOLATIONS

A. Overview

1. “Traffic Violation” Defined
“Traffic violation” means a traffic offense that is designated as a traffic violation in the statute or ordinance defining the offense, or any other offense defined in the Oregon Vehicle Code that is punishable by a fine but that is not punishable by a term of imprisonment. Penalties for traffic violations are as provided for violations generally in ORS 153.018. ORS 801.557. See ORS 153.008 (describing “violation”); ORS 161.505 (describing “offense”).

a. Traffic Violation is a Civil Action
“Although a traffic violation is an ‘offense’ within the meaning of the criminal code, ORS 161.505, it is not a crime, ORS 161.515. A traffic violation is instead civil. Consistently with that designation, ORS chapter 153 provides that only some criminal procedural rules will apply to violations. See ORS 153.030 (so providing).” State v. Dahl, 336 Or 481, 485 (2004) (footnotes omitted).
Since violations are civil, not criminal, some of the rights and procedures guaranteed by the constitution to criminal defendants are not provided in violation cases. For example, there is no right to a jury trial for a violation; these cases are tried to the court. ORS 153.076(1). Proof in a violation need only meet a preponderance of the
Evidence standard; only crimes must be proven beyond a reasonable doubt. ORS 153.076(2). On the other hand, violation defendants are given certain rights by statute that are similar to those in criminal cases; *e.g.*, ORS 153.076(3) and (4), which provide a right to discovery and a right to remain silent, respectively.

2. **Venue for Traffic Violations**
   When a traffic offense is punishable as a violation, venue is proper (1) in the county where the violation was committed; or (2) any other county whose county seat is closer to where the violation occurred. ORS 153.036(1).

   a. **Change of Venue for Traffic Violations**
      If a violation proceeding is commenced in a county other than the county in which the violation occurred, the defendant may request a change of venue to that county; unless the violation was committed within a city and the proceeding was commenced in that city’s municipal court. ORS 153.036(3).

   b. **General Venue Rules Apply to Violations in Circuit Courts**
      Except as specifically provided in ORS 153.036, venue in violation proceedings in **circuit courts** is governed by the general venue provisions in ORS 131.305 to 131.415. ORS 153.036(4).

3. **Violation Adjudication Procedure**
   ORS 153.030 to ORS 153.121 provide the procedure for adjudication of violations, including issuing the citation, minimum requirements for summonses, procedures for trial, entry of judgment, the effect of judgments, and appeals.

B. **Uniform Violation Citations**

1. **Pretrial Procedures**
   a. **Who May Issue Citations**
      Except as provided in ORS 810.410 (providing for arrest and issuance of a citation based on a traffic violation by police officers), an *enforcement officer* may issue a violation citation only if the conduct alleged to constitute a violation takes place in the presence of the enforcement officer and the enforcement officer has reasonable grounds to believe that the conduct constitutes a violation. ORS 153.042(1).
i. Enforcement Officer Defined
An “enforcement officer” includes:

- Law enforcement officers of the State or any political subdivision;
- An investigator of the DA’s office who has been certified as a peace officer;
- An investigator of the Criminal Justice Division of the DOJ; and
- Persons specifically authorized under law.
ORS 153.005(1).

ii. Note on UTCs
Most enforcement officers issue citations from a ticket book containing uniform citation forms. Commonly called “UTCs”, these multi part forms are printed in a format approved by the Oregon Supreme Court. ORS 153.045(2); ORS 1.525. Commonly used language and court information is preprinted on these citation forms. The officer then handwrites in the specifics of each offense, a description of the defendant, and other pertinent details. When the citations are printed on NCR (no carbon required) paper, the officer can give the defendant a copy of the charges at the scene. This copy can serve as both the “summons” and a copy of the complaint. On the back of the summons, most jurisdictions give the defendant information about how to respond to the citation.

The remaining copies of the citation are the complaint, the abstract of court record and the police record. The complaint is filed with the court; it often serves as the charging instrument. The back can be used as a record of court proceedings and as a judgement. The abstract of court record is retained by the court during the proceedings, but is sent to DMV if there is a conviction. ORS 810.370. The police records copy, which is often used for officers’ notes, can be retained by the police or sent to the courts for storage.

Some jurisdictions, notably Clackamas County and the City of Portland, are developing electronic citations. Although defendants would still get a paper copy of the charges at the scene, the other parts of the citation could be transmitted and stored electronically.
iii. **Private Person May Initiate Violation Proceeding**

A private person may bring a violation proceeding for traffic violations under ORS chapters 801 to 826 or any violation of rules adopted pursuant to those chapters if the violation constitutes an offense. ORS 153.058(1), (8)(b).

b. **Jurisdiction**

1. Circuit courts have concurrent jurisdiction with justice and municipal courts. ORS 3.132.

2. Municipal court has concurrent jurisdiction with circuit courts and justice courts over all violations committed or triable in city where court is located, except felonies. ORS 221.339. *See generally State v. Prickett, 136 Or App 559 (1995), aff’d in part, rev’d in part 324 Or 489 (1997) (jurisdiction over DUII cases).*

3. Justice court has jurisdiction over offenses within county and concurrent jurisdiction with circuit court and municipal court, except felonies. ORS 51.050.

c. **Venue**

A violation proceeding may be commenced in:

1. The county in which the violation was committed; or

2. Any other county whose county seat is a shorter distance by road from the place where the violation was committed than is the county seat of the county in which the violation was committed.

ORS 153.036(1).

If a violation proceeding is commenced in the *county in which the violation was committed*, the proceeding may be commenced in a circuit or justice court of the county or, if the violation was committed within a city, in the municipal court. ORS 153.036(2).

If action is commenced in a *county other than that in which the offense was committed*, defendant may remove to county in which violation was committed, except when the violation was committed within a city and the proceeding is commenced in the municipal court of the city. ORS 153.036(3).
Who May Prosecute

The district attorney or city attorney may prosecute violations, but only if a defense attorney appears or if good cause is shown; the court must give timely notice to the district attorney or city attorney if defense counsel is to appear at trial. ORS 153.076(6); ORS 8.660(2) (district attorney may not conduct prosecutions when city attorney is prosecuting).

If the district attorney or city attorney do not appear in trial of a violation, the peace officer who issued the citation may participate in trial by presenting evidence, examining witnesses, and making certain legal arguments. ORS 153.083.

Required Contents of Citation

A violation citation must contain the following:

1. Complaint in the form prescribed by ORS 153.048;
2. Abstract of court record;
3. Police record; and
4. A summons in the form prescribed by ORS 153.051.

ORS 153.045(3). A citation must include a peace officer’s certification of sufficient grounds that a crime was committed. The certification is deemed equivalent to a sworn complaint. If the citation does not conform, the court may set it aside on defendant’s motion made before entry of plea. The State may appeal a pretrial ruling on a motion to set aside, and the court may amend a complaint at its discretion. ORS 133.069 as amended by 2005 Or Laws, ch. 566, § 1 (effective July 20, 2005). See generally ORS 133.055 et seq. (criminal citations).

Minimum Requirements for Summons

A summons in a violation citation must contain at least the following:

a. Name of court, name of defendant, date on which the citation was issued, name of enforcement officer issuing citation, and time and place at which defendant is to appear in court;

b. Violation stated in language readily understood by persons making a reasonable effort to do so, and date, time, and place at which violation is alleged to have occurred;
c. Notice to defendant that a complaint will be filed;

d. Base fine amount for violation; and

e. Statement notifying defendant that a monetary judgment may be entered against defendant for up to maximum amount of fines, assessments, restitution, and other costs allowed by law for violation if defendant fails to make all required appearances at the proceedings.

ORS 153.051. Often, the summons is a carbon copy of the original complaint, which the officer will file with the court.

ii. Minimum Requirements for Complaint

The complaint in a violation citation must contain at least the following:

a. Name of court, name of state or city or other public body in whose name the action is brought, and name of defendant;

b. Violation stated in language readily understood by persons making reasonable effort to do so, and the date, time, and place at which violation is alleged to have occurred; and

c. Certificate that enforcement officer has reasonable grounds to believe violation was committed by defendant.

ORS 153.048(1). The court must set aside the complaint on defendant’s motion before plea when the complaint does not conform to requirements. ORS 153.048(2). The court may amend a complaint in its discretion. ORS 153.048(3).

f. Appearance by Defendant

A defendant who has been issued a violation citation must either:

1. Personally appear at the time indicated in the summons;

2. Make a first appearance before time indicated in summons by:

    • Submitting to the court an oral or written request for trial;

    • Pleading no contest by delivering to court payment for base fine and statement explaining or mitigating
violation (delivery of statement constitutes waiver of trial and consent to judgment forfeiting base fine); or

- Executing the appearance, waiver of trial, and guilty plea that appears on summons and delivering summons with payment of the base (defendant may also attach statement mitigating or explaining violation).

ORS 153.061(1), (2). See also ORS 153.061(5) (providing that the court may require a defendant to personally appear in any case).

i. When Defendant Appears

If defendant appears, arraignment proceeds and court informs defendant of:

- Charge (ORS 135.020);
- Types of possible pleas—guilty, not guilty, no contest, conditional (ORS 135.335);
- Right to make a statement in mitigation or explanation as part of a guilty plea (ORS 153.061(4));
- Right to hire a lawyer—defense counsel may not be provided at public expense in any proceeding in which only violations are charged (ORS 153.076(5));
- Possible penalty—fine plus assessment (ORS 153.061(3), (6)); and
- Reporting of conviction to ODOT (ORS 809.010; ORS 810.370).

ii. Defendant’s Choices Before Arraignment

Before arraignment, defendant may:

a. Request trial orally or in writing (court may require defendant to deposit base fine);

b. Plead no contest, pay base fine, and offer written explanation; or

c. Plead guilty, pay base fine, and waive trial, with explanation.

ORS 153.061(2).
When Trial is Required

The court may require that a trial be held in any violation proceeding. If the defendant requests a trial under ORS 153.061, or a trial is required by the court or by law, the court must set a date, time, and place for the trial. ORS 153.070.

Notice of Date, Time, and Place of Trial

Unless notice is waived by the defendant, the court must mail or otherwise provide to the defendant notice of the date, time, and place at least five days before the date set for trial. If the citation is for a traffic violation, or is for a violation of ORS 471.430 (minor in possession of alcohol), the notice must contain a warning to the defendant that if the defendant fails to appear at trial, the driving privileges of the defendant are subject to suspension under ORS 809.220 (requiring the court to order suspension of a person’s driving privileges when that person fails to appear on a charge of minor in possession of alcohol). ORS 153.073.

C. Trial

1. Procedures

a. Trial is to the court, without a jury. ORS 153.076(1).

b. Trial may not be sooner than seven days after citation issued, unless defendant waives seven-day period. ORS 153.076(1).

c. State has the burden of proof by a preponderance of the evidence. ORS 153.076(2).

d. Pretrial discovery rules in ORS 135.805 to 135.873 apply. ORS 153.076(3).

e. Defendant has right not to testify. ORS 153.076(4).

f. Testimony may be by affidavit per court rules. ORS 153.080.

g. Defendant has right to cross-examine witnesses. State v. Hovies, 320 Or 414, 417 (1994).

h. If the city attorney or the DA do not appear, the peace officer who issued the violation citation may participate in trial by presenting evidence, examining witnesses, and making certain legal arguments. ORS 153.083.
2. **Sentencing**  
   At sentencing, the court may:
   
a. Impose fine; order costs, assessments, and restitution; require that fine, costs, or restitution be paid out of base fine; and remit balance of base fine. ORS 153.090(1).

b. Suspend any portion of judgment upon condition that defendant pay nonsuspended portion of fine within specified time period. ORS 153.090(4).

c. Order license suspension or impose restrictions if defendant refuses to pay a fine or comply with any condition upon which the fine was suspended. ORS 809.210(1).

d. Order community service in lieu of fine. ORS 137.128(1).

e. Order driver improvement course. ORS 809.270(1).

   a. **Limitations When Traffic Offender Holds a CDL**
      If a person holds a commercial driver license, a court may not defer entry of a judgment or allow an individual to enter into a diversion program that would prevent a conviction for any traffic offense, whether committed while driving a motor vehicle or a commercial motor vehicle, from appearing on the driving record of the holder. 2005 Or Laws, ch. 649, § 30(7) (effective July 27, 2005) (does not apply to parking violations).

3. **Maximum Fines for Violations**
   The *maximum* fines for violations are:
   
   - Class A—$720;
   - Class B—$360;
   - Class C—$180;
   - Class D—$90;

   - The amount otherwise established by statute for any specific fine violation.

   ORS 153.018(2). However, if a charge is reduced from a misdemeanor to a violation, the maximum fine is the same as it would have been had it remained a misdemeanor. ORS 161.566; ORS 161.568. To any fine imposed, the judge or the clerk should add statutory fees and assessments, such as the unitary assessment (ORS 137.290) and the county assessment (ORS 137.309). The “base fine” amount the officer writes on the front of the citation usually includes these assessments. See
ORS 153.125 to ORS 153.145. The court must also charge as costs and collect from defendants the actual costs of obtaining driving records of the defendant. ORS 153.624.

A court may not defer, waive, suspend, or otherwise reduce a fine to an amount less than 75% of the base fine. ORS 153.093(1)(a). Base fines are increased for certain traffic offenses that occur in highway work zones, school zones, or safety corridors and cannot be reduced at all. ORS 153.131; ORS 811.230; ORS 811.235; 1999 Or Laws, ch. 1071, § 5.

A standard schedule of base fine amounts is published by the State Court Administrator, ORS 153.138, but courts have the option of adopting higher base fine amounts. ORS 153.142. Some courts have established a violations bureau, which allows clerks to accept payment for fines at lesser amounts based on a driver’s record. ORS 153.800. This obviates the need for good drivers to ask a judge for a fine reduction; the clerk has limited authority to accept lower amounts based on a court approved schedule.

a. Where Defendant Has Gained Money or Property
If a person or corporation has gained money or property through the commission of a violation, in lieu of imposing the fine authorized for the crime under ORS 153.018(2) or (3), the court may sentence the defendant to pay a fixed amount, not exceeding double the amount of the defendant's gain from the commission of the violation. ORS 153.018(4).

D. Failure to Appear, Pay Fine, or Obey Court Order

1. Failure to Appear
If a defendant fails to appear in a proceeding charging the defendant with a traffic offense (except for failure to pay a fine relating to any parking, pedestrian, or bicycling offense) or with a violation of ORS 471.430, the court must:

a. Notify ODOT to suspend driving privileges under ORS 809.280(5) for failure to appear if the defendant is charged with a traffic crime or with a violation of ORS 471.430 (purchase or possession of liquor by person under 21); or

b. Notify ODOT to suspend driving privileges under ORS 809.290(1) if the defendant is charged with a traffic violation—and

c. Certify in the notice that the defendant failed to appear in the manner required by the court or by law.
ORS 809.220(1), (2), (5). See also ORS 809.220(3) (providing for termination of suspension).

2. Failure to Pay Fine or Obey Court Order
If the defendant is convicted of any traffic offense and fails or refuses to pay a fine or to comply with any condition upon which payment of the fine or any part of it was suspended, the court may:

- Notify ODOT to suspend driving privileges under ORS 809.290(2) (except for failure to pay a fine relating to any parking, pedestrian, or bicycling offense); and
- Restrict driving privileges.
ORS 809.210(1), (5).

a. Procedure for Placing Restrictions on Driving Privileges
The court may place restrictions on driving privileges, including any restriction, condition, or requirement, which remain in effect until ended by the court. The court:

1. Must immediately advise ODOT of the restrictions;
2. Must notify ODOT upon removal of a restriction; and
3. May punish violation of the restriction as provided in ORS 807.010.
ORS 809.210(3). See also ORS 807.120 (providing restrictions).

E. Appeal
If a justice court or municipal court has become a court of record under ORS 51.025 or ORS 221.342, an appeal from a judgment involving a violation must be as provided in ORS chapter 19 for appeals from judgments entered by circuit courts, except that the standard of review is the same as for an appeal from a judgment in a proceeding involving a misdemeanor or felony. ORS 138.057(1) as amended by 2005 Or Laws, ch. 266, § 2 (effective Jan. 1, 2006). If a justice court or municipal court has not become a court of record under ORS 51.025 or ORS 221.342, the appeal from a judgment involving a violation entered by the justice court or municipal court may be taken to the circuit court for the county in which the justice court or municipal court is located. ORS 138.057(1) (an appeal to a circuit court must be taken in the manner provided in ORS 138.057(1)).
F. Special Considerations

1. Violation and Crime as Part of Same Criminal Episode
   Notwithstanding ORS 131.505 to 131.535, if a person commits both a crime and a violation as part of the same criminal episode, the prosecution for one offense does not bar the subsequent prosecution for the other. However, evidence of the first conviction is not admissible in any subsequent prosecution for the other offense. ORS 153.108(1). See State v. Warner, 200 Or App 65, 77 (2005) (concluding that defendant’s prosecution for the Class B traffic violation of careless driving was not criminal in nature and therefore Article I, § 12 of the Oregon Constitution did not bar the State from criminally prosecuting defendant for reckless driving and DUII); State v. Page, 200 Or App 55, 60 (2005) (concluding that defendant’s prosecution for a violation did not bar his subsequent prosecution for DUII arising from the same episode).

2. Use of Plea, Finding, or Proceeding
   Notwithstanding ORS 43.130 and ORS 43.160, no plea, finding, or proceeding upon any violation may be used for the purpose of res judicata or collateral estoppel, nor may any plea, finding, or proceeding upon any violation be admissible as evidence in any civil proceeding. ORS 153.108(2). See Ryan v. Ohm, 39 Or App 947, rev den 287 Or 301 (1979).

3. Impeachment by Use of Traffic Violation
   Conviction of a traffic violation is not admissible to impeach the character of a witness in any civil or criminal action. ORS 40.355(7).
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CHAPTER 19: INTERPRETERS

2005

Oregon Judges
Criminal Benchbook

Oregon Judicial Department
Office of the State Court Administrator
Court Programs and Services Division
Purpose

The OREGON JUDGES CRIMINAL BENCHBOOK is designed to summarize statutes and case law in select topical areas of Oregon criminal law with the goal of assisting trial judges in their duties on the bench. In no way is it intended to offer legal advice or substitute for the service of a competent professional in researching original sources of authority.

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CHAPTER 19: INTERPRETERS

I. INTRODUCTION

A. General Policy

To secure a person’s constitutional rights and other rights, courts must provide qualified interpreters to persons who are unable to readily understand or communicate in the English language because of a non-English-speaking cultural background or a disability. ORS 45.273(1).

A criminal defendant who does not speak English has a due process right to an interpreter to interpret the proceedings so that defendant can participate effectively in his or her own defense. Arizona v. Natividad, 111 Ariz 191 (1974).

B. Definitions

1. “Translate” and “Interpret”

“Interpret” is the appropriate professional term for the oral transfer of meaning from one language into another. See State Court Administrator Policies for Interpreters § 2.4 (2005). See also Code Prof. Resp. for Interpreters (Applicability).

“Translate” is the professional term for the transfer of meaning from one language into another, including converting written information from one language into another. See State Court Administrator Policies for Interpreters § 2.12 (2005). See also Code Prof. Resp. for Interpreters (2005) (Applicability). Note: Several references in ORS do not respect the professional terminology, probably because the drafter was not familiar with the profession, not because the drafter intended to differentiate.

2. “Non-English-Speaking Person”

A “non-English-speaking person” is a person, who by reason of place of birth or culture:

a. Speaks a language other than English; and

b. Does not speak English with adequate ability to communicate effectively in the proceedings.

ORS 45.275(9)(b) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

3. “Disabled Person”

A “disabled person” is a person who:
Cannot readily understand the proceedings because of deafness or a physical hearing impairment; or

b. Cannot communicate in the proceedings because of a physical speaking impairment.

ORS 45.285(4)(b).

4. “Qualified Interpreter” for a Non-English-Speaking Person
A qualified interpreter to a non-English-speaking person must be readily able to:

a. Communicate with the non-English-speaking person;

b. Orally transfer the meaning of statements to and from English and the non-English-speaking person’s language; and

c. Interpret in a manner that conserves the meaning, tone, level, style, and register of the original statement, without additions or omissions.

ORS 45.275(9)(c) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

a. Dialect, Slang, or Specialized Vocabulary
A qualified interpreter must be able to interpret the dialect, slang, or specialized vocabulary used by the non-English-speaking party or witness. ORS 45.275(9)(c) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

5. “Qualified Interpreter” for a Disabled Person
A qualified interpreter to a disabled person must be readily able to:

a. Communicate with the disabled person;

b. Interpret the proceedings, and

c. Accurately repeat and interpret the statements of the disabled person to the court.

ORS 45.285(4)(d).

II. QUALIFIED AND CERTIFIED INTERPRETERS

A. General Requirements for All Interpreters

1. The court must qualify in-court interpreters as experts under the Oregon Evidence Code. OEC Rule 604.
2. Interpreters must take an oath or affirmation to make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter’s best skills and judgment in accordance with the standards and ethics of the interpreter profession. OEC Rule 604. See also Code Prof. Resp. for Interpreters § 1 (2005) (providing that interpreters must “render a complete and accurate interpretation or sight translation, without altering, omitting anything from, or adding anything to what is stated or written”).

3. The interpreter must state the interpreter’s name on the record and indicate whether the interpreter is certified under ORS 45.291. ORS 45.275(8) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005). Note: If the person is certified under ORS 45.291, the interpreter need not make the oath or affirmation required by OEC Rule 604 or submit the interpreter’s qualifications on the record. Id.

B. General Requirements for Qualified Interpreters

1. Conflict of Interest
   A qualified interpreter must not have a “conflict of interest with any of the parties or witnesses in the proceeding.” ORS 45.288(3)(a). See also Code Prof. Resp. for Interpreters § 3 (2005).

Conflicts include:

a. Being a friend, relative, or adversary of a person involved in the case;

b. Being the attorney serving as counsel in the case;

c. The interpreter has served in an investigative capacity in the case at issue for any party involved in the case;

d. The interpreter has been previously retained by a law enforcement agency to assist in the preparation of the case at issue;

e. The interpreter, or the interpreter’s spouse or child has a financial interest in or may benefit from the outcome of the case; and

f. The interpreter has been involved in the choice of counsel for the case.

2. Cooperation
A qualified interpreter must be able to work cooperatively with the judge and the person in need of an interpreter or the counsel for that person. ORS 45.288(3)(c).

3. Consecutive and Simultaneous Interpretation

a. Qualified Interpreters Do Both
A qualified interpreter should be able to interpret consecutively and simultaneously. If the interpreter is not capable of simultaneous interpreting or is otherwise inexperienced, see infra V.F. “Qualified But Inexperienced Interpreter.”

b. Consecutive Interpretation for Non-English-Speaking Witnesses
When interpreting a non-English-speaking witness’s testimony, the interpreter interprets:

1. The questions asked of the witness from English into the witness’s primary language after each question is asked; and
2. The witness’s response into English after the witness responds.

The interpretation is complete and accurate, but not verbatim. For example, “red herring” translated to Spanish verbatim is “red fish” and does not have the same meaning as “red herring.” One correct interpretation is “false lead.”

c. Simultaneous Interpretation for Non-English-Speaking Witnesses
When interpreting the proceedings for a witness who does not readily understand English or who is hearing-impaired, the interpreter renders what is said into the target language just after it is said.

Sign language interpreters use “simultaneous” rather than “consecutive” interpretation when a deaf, hearing-impaired, or speech-impaired person testifies.

C. General Requirements for Certified Interpreters

1. Certification Program
The certification program administered by the State Court Administrator establishes interpreter certification for services to non-English-speaking persons, other than for deaf, hearing-
impaired, and speech-impaired persons. The program establishes

a. Minimum competency for court interpreters;

b. Education programs for court interpreters; and

c. Examinations to test court interpreters for minimum competency and ethics.

ORS 45.291(1).

2. When Court Must Appoint Certified Interpreter

The court must appoint an Oregon Certified Court Interpreter whenever a certified court interpreter is available, able, and willing to serve, with one exception: The court has discretion to appoint a noncertified but otherwise qualified interpreter if a party or witness so requests. ORS 45.288(1). See also Preamble to Code Prof. Resp. for Interpreters (2005).

a. Disqualifications

The court may not appoint an interpreter if the interpreter:

1. Has a conflict of interest with any of the parties or witnesses in the proceeding;

2. Is unable to understand the judge, party, or witness or cannot be understood by the judge, party, or witness; or

3. Is unable to work cooperatively with the judge and the person in need of an interpreter or with the counsel for that person.

ORS 45.288(3).

3. Languages for Which Certified Interpreters are Available

Currently the Oregon Judicial Department only certifies interpreters in Spanish, Vietnamese, and Russian. Certified interpreters have ID badges signed by the state court administrator, which include their certification number and expiration date.

III. INTERPRETERS FOR NON-ENGLISH-SPEAKING PARTIES OR WITNESSES

A. Court Requirement

The court must appoint a qualified interpreter in any civil or criminal proceeding whenever it is necessary to:
1. Interpret the proceedings to a non-English-speaking party;

2. Interpret the testimony of a non-English-speaking party or witness; or

3. Assist the court in performing its duties and responsibilities.

ORS 45.275(1).

B. “Parties” in Juvenile Cases

1. Dependency Cases

From the time a petition is filed, “parties” in juvenile dependency cases under 419B.100 and 419B.500 include:

- The child or ward;
- The parents or guardian of the child or ward;
- A putative father of the child or ward who has demonstrated a direct and significant commitment to the child or ward by assuming, or attempting to assume, responsibilities normally associated with parenthood, including but not limited to:
  1. Residing with the child or ward;
  2. Contributing to the financial support of the child or ward; or
  3. Establishing psychological ties with the child or ward;
- The State;
- The juvenile department;
- A court appointed special advocate, if appointed;
- The Department of Human Services or other child-caring agency with temporary custody of the child or ward; and
- The tribe in cases subject to the Indian Child Welfare Act.

a. **Intervenor as Party**
   An intervenor who is granted intervention under ORS 419B.116 is a party to a proceeding under ORS 419B.100 but is not a party to a proceeding under ORS 419B.500.
   2005 Or Laws, ch. 450, § 8(1)(b) (effective July 7, 2005)

2. **Delinquency Cases**
   At the *adjudication* stage of a delinquency proceeding, the parties to the proceeding are the youth and the State. At the *dispositional* stage of a delinquency proceeding, the following are also parties:

   - The parents or guardian of the youth;
   - A court appointed special advocate, if appointed;
   - The Oregon Youth Authority or other child care agency, if the youth is temporarily committed to the agency; and
   - An intervenor who petitions or files a motion on the basis of a child-parent relationship under ORS 109.119.

   ORS 419C.285(1).

**IV. INTERPRETERS FOR PARTIES OR WITNESSES WITH A DISABILITY**

A. **Court Requirement**
   The court is required to appoint a *qualified interpreter* and make available appropriate assistive communication devices whenever it is necessary to interpret the proceedings to a *disabled person* or to interpret the testimony of a disabled person. This includes appointing a qualified interpreter for a *court-ordered deposition*, if no other person is responsible for providing an interpreter. ORS 45.285(1).

B. **The Americans with Disabilities Act (ADA)**

1. **Prohibits Discrimination**
   Title II of the Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in state and local government services. See 42 USC §§ 12115-12161.

2. **Definition of a Person with Disabilities**
   A disabled individual means a person:
a. With a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

b. With a record of such an impairment; or

c. Who is regarded as having such an impairment.

42 USC § 12102(2).

C. Oregon Statutes Regarding People with Disabilities

1. Similar to ADA
   Oregon has statutes similar to the ADA that define disability and mandate that reasonable accommodations be granted to those persons with disabilities. See ORS 44.545; ORS 44.547; ORS 659A.100; ORS 659A.103; ORS 410.060; ORS 410.710; ORS 410.715.

2. ADA Definition of Disability is Broader
   Even though Oregon has statutes similar to the ADA, the ADA definition of disability is broader than the definition of “disabled person” in ORS 45.285(4)(b). Note: Although ORS uses “disabled person,” the preferred term is “person with a disability.”

D. Qualifications
   The court must take special care to appoint an interpreter who is uniquely qualified to interpret in the language used by the disabled person. See People v. Rodriguez, 546 NYS2d 769 (1989) (”[T]he level of communication skill of the person needing assistance must be matched with the level of communication skill or competency of the interpreter . . . .”).

E. Interpreters for Hearing-Impaired Persons

1. ASL
   American Sign Language (ASL) is the language most commonly used by hearing-impaired Americans, especially those whose hearing was impaired, or who became deaf early or were born with the impairment.

2. Other Manual Systems
   Other “manual communication systems” frequently used are
   • Pidgin Sign English;
   • Manual English; and
3. **Relay Interpreting**

“Relay interpreting” may be needed if the disabled person has never learned standard signing or finger spelling. For example, the disabled person may communicate only with gestures. Relay interpreters have studied to become experts in communicating with gesture. If the relay interpreter is deaf or hearing- or speech-impaired, the court should appoint a second interpreter to interpret the relay interpreter’s ASL into spoken English.

4. **Real Time Reporting or Computer-Assisted Transcription**

The court may need to appoint a real time reporter with a monitor or other projection system to provide a written record of a proceeding as it occurs, so that a late-deafened person who is not fluent in sign language may read the transcription in real time. While not considered “interpreting,” real time transcription may be the best or only way to provide meaningful access to the proceeding.

F. **Interpreters for Persons with Cognitive Disability**

See Appendix D for the Attorney General’s extensive opinion on how to handle requests for process interpreters. Some persons with a cognitive disability request a “process interpreter” under the Americans with Disabilities Act (ADA).

1. **Motion and Hearing at Court’s Discretion**

UTCR 7.060(1) requires a party to “notify” the court to request special accommodation under the ADA. The court has discretion to require a party to file a motion and may hold a hearing if the court determines any additional fact-finding is necessary to permit the court to respond to the request.

2. **“Meaningful” and “Necessary” Accommodation**

The court has authority to determine whether a process interpreter would be a meaningful accommodation. If specific facts and findings support the court’s conclusion that a process interpreter is not a meaningful or necessary accommodation, the court would not need to pay for the requested accommodation. See the appendix to Appendix D for a list of inquiries that the court may use in making such a determination.
V. CONDUCTING COURT PROCEEDINGS USING INTERPRETERS

A. Uniform Trial Court Rules Require Notice

1. Timeliness
   When a person requires an interpreter or auxiliary aid, the court must be notified as soon as possible, but no later than 4 judicial days in advance of the proceeding. UTCR 7.060 (ADA accommodations); UTCR 7.070 (foreign language interpreters).

2. Waiver
   The court may waive the 4-day notice requirement for good cause. UTCR 7.060; UTCR 7.070.

B. Suggested Foundation Questions to Qualify the Interpreter

1. Suggested Questions to Ask Certified and Noncertified Interpreters
   a. “Do you hold the Oregon Certified Court Interpreter credential issued by the Office of the State Court Administrator?”
   b. “Have you read and do you understand and agree to adhere to the Code of Professional Responsibility for Interpreters in Oregon Courts?”
   c. “Having that code in mind, are you aware of any conflicts of interest you may have in this particular case?”
   d. “Have you had an opportunity to speak with the person in this case who needs an interpreter? Can you readily communicate with the non-English-speaking person?”

   See ORS 45.275(8) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005) (requiring a noncertified interpreter to submit qualifications on the record); ORS 45.275(9)(b) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005) (defining a non-English-speaking person).

2. Suggested Foundation Questions to Ask Noncertified Interpreters
   a. “What is your native language?”
   b. “How did you learn English and the target language?”
   c. “How long have you been speaking English and the target language?”
d. “Have you had any formal training in either language? Where, and how long?”

e. “Can you read both languages?” (Not for ASL interpreters.)

f. “What is the highest grade you completed in school?”

g. “Have you ever interpreted in court before? Where? How often?”

h. “Are you certified by any other state or the federal courts?” (Not for ASL interpreters.)

i. “Do you hold one or more certifications from any national organizations? Please explain what was involved in obtaining this certification.”

j. “Have you received any special training in court interpreting?”

k. “Describe the simultaneous and consecutive modes of interpretation and how they differ.”

l. “Do you ever summarize statements while interpreting? Do you understand that the law requires you to interpret everything said by all parties?”

See Appendix B for checklist form courts may choose to use to establish an interpreter’s qualifications.

C. Interpreter Oath

The court swears the interpreter in as an officer of the court.


The interpreter must make an oath or affirmation to “make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter’s best skills and judgment in accordance with the standards and ethics of the interpreter profession.” OEC Rule 604; ORS 45.275(8) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).

The following oath follows the statutory language:

“Do you solemnly swear or affirm to make a true and impartial interpretation of the proceedings in an understandable manner using your best skills and judgment in accordance with the standards and ethics of the interpreter profession?”

D. Number of Interpreters Needed

Note: If the person is certified under ORS 45.291, the interpreter need not make the oath or affirmation required by OEC Rule 604 or submit the interpreter’s qualifications on the record. ORS 45.275(8) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).
1. **Multiple Parties Needing Same Language Interpreter**

   a. **Separate Interpreters**
      The court can afford each party a separate interpreter *if needed* to avoid a conflict of interest. *See ORS 45.273(1)* (declaring a state policy to secure constitutional rights of person unable to readily understand or communicate in English). **Please note “Preferred Procedure” below.**

   b. **Preferred Procedure**
      To ensure uniform interpretation, one interpreter interprets the proceeding through closed circuit electronic transmission system, and all parties needing an interpreter listen by means of individual headphones.

      If an interpreter for the proceeding provides interpretation to multiple parties, one other interpreter must be available to assist in communication between client and attorney during proceedings.

2. **Party and Witnesses Needing Interpreter**
   The court should provide two interpreters for cases in which a party needs an interpreter and witnesses also need the same language interpreter. If only one interpreter is used, the party needing an interpreter would be left without the ability to consult with his or her attorney while the interpreter is interpreting at the witness stand. *See People v. Rioz*, 161 Cal App 3d 905, 207 Cal Rptr 903 (1984) (using only one interpreter to interpret for the party and witness resulted in a reversal of conviction); *see also State v. Dam*, 111 Or App 15, 18 n.1 (1992); *People v. Aguilar*, 35 Cal 3d 785, 677 P2d 1198 (1984).

3. **Exception When Separate Interpreters Not Available**
   When separate interpreters are not available, for example in rural communities, then the potential conflict should be disclosed and any waiver put on the record.

E. **Jury Issues**

1. **UCrJl No. 1002**
   The court should give the Uniform Criminal Jury Instruction in criminal trials in which an interpreter is being used for the parties or witnesses. UCrJl No. 1002, “Use of an Interpreter.”
2. **Instructing the Jury if a Jury Panel Member Knows the Language Being Interpreted**

*See generally* New Jersey Supreme Court Task Force on Interpreter and Translation Services, § 1.2 (1985); *Amaru v. Stratton*, 209 NJ Super 1, 18, 506 A2d 1225, 1234 (1985).

a. **Suggested Instruction**

“If any of you understand the language of the witness, disregard completely what the witness says in the other language. Consider as evidence only what is provided by the court interpreter in English.”

b. **Sign Language**

When a party needs sign language interpretation and a potential juror understands sign language, it may not be appropriate for the potential juror to serve, because the juror may be able to observe and understand privileged attorney-client communications.

An alternative solution to removing the potential juror is to provide the hearing-impaired party real time interpretation (similar to closed caption television) if available and the party reads and understands English.

c. **Removing a Juror—ADA Implications**

Before removing a hearing-impaired juror or juror with another disability, the court should consider whether removal might violate the ADA’s antidiscrimination provisions.

3. **Non-English-Speaking Jurors**

a. Court proceedings must be conducted in English; therefore, a person who does not speak English is not qualified to serve as a juror. The court may provide an interpreter so that the court can determine a potential juror’s English-speaking abilities and to interpret an explanation of this requirement to the potential juror. *See Commonwealth v. Acen*, 396 Mass 472, 487 NE2d 189 (1986).

b. Challenges to allow non-English speaking persons to serve as jurors have been unsuccessful in some jurisdictions. These challenges have generally been based on due process and equal protection guarantees. Oregon’s appellate courts have not yet addressed this issue. *See Commonwealth v. Acen*, 396 Mass 472, 487 NE2d 189 (1986); Majorie A. Shields, *Prejudicial Effect of Juror’s Inability to Comprehend English*, 117 A.L.R.5th 1 (2004).
4. Jurors Who Are Disabled

a. Persons who are disabled are not ineligible to act as jurors and cannot be excluded from the jury list or from jury service because of their disability. See ORS 10.030(3)(a); People v. Guzman, 76 NY2d 1, 555 NE2d 259, 556 NYS2d 7 (1990); Galloway v. Superior Court of the District of Columbia, 816 F Supp 12 (DDC 1993).

b. On written request of a deaf, hearing-impaired, or speech-impaired juror, and on the court’s finding that the juror needs an interpreter or assistive communication device, the court must appoint a qualified interpreter or provide an assistive communication device. ORS 10.115(2).

c. The court must administer to the qualified interpreter appointed for a disabled juror an oath “that the interpreter will accurately communicate the proceedings to the juror and accurately repeat the statements of the juror.” ORS 10.115(3).

d. Except as provided in ORS 10.115(5), a qualified interpreter appointed for a disabled juror must be present during deliberations by the jury on which the juror serves. The interpreter may not participate in the jury deliberations in any manner except to facilitate communication between the disabled juror and the other jurors or other persons with whom the jurors may communicate, and the court must so instruct the jury and the interpreter. ORS 10.115(4).

e. When a disabled juror serves on a trial jury each party to the proceeding must stipulate to the presence of the qualified interpreter appointed for the juror during jury deliberations, and must prepare and deliver to the court proposed instructions in respect to the interpreter. ORS 10.115(5).

F. Qualified But Inexperienced Interpreter

Sometimes the only interpreter who is available to interpret, particularly when one is needed to interpret an uncommon language or dialect, is one who is qualified but not experienced in interpreting in court proceedings.

The court can assist the interpreter and help ensure that the proceedings go smoothly by doing the following:

1. Provide the interpreter with a copy of the Code of Professional Responsibility for Interpreters in the Oregon Courts and ask
the interpreter to read it. Questions can be referred to Court Interpreter Services.

2. Explain to the interpreter the type and purpose of the legal proceeding and its structure (e.g., arraignment, preliminary hearing, etc.).

3. Advise the interpreter of the need for simultaneous interpretation if interpreting for a party, and consecutive interpretation if interpreting for a witness. See supra II.B.3 “Consecutive and Simultaneous Interpretation.” If the interpreter is not proficient in simultaneous interpretation, it may be necessary for the court to instruct everyone to speak in phrases, with long pauses, to enable the person to interpret consecutively for a party.

4. Advise the interpreter where to sit, preferably at counsel table right behind the party and the party’s attorney, or next to a witness at the witness stand.

5. Advise the interpreter of the pertinent protocol and order of proceedings.

6. Assure the interpreter that it is appropriate to address the court or ask for a clarification if the interpreter does not understand a phrase or procedure.

7. Summarize for the interpreter the facts of the case and allow the interpreter to read in advance any pertinent documents to become familiar with necessary vocabulary.

8. If possible, allow the inexperienced interpreter to observe an experienced interpreter (even working with another target language) interpreting a proceeding before beginning the case for which the inexperienced interpreter is to interpret—this is often possible, for example, for an arraignment, particularly in larger counties.

9. Explain to both the interpreter and the person for whom the interpreter is interpreting that the interpreter is not permitted to give advice.

10. Provide the interpreter with a pencil and pad of paper.

11. Encourage the interpreter to bring dictionaries or reference materials to court.

G. When a Party or Counsel Challenges an Interpreter

1. If a party or counsel believes an interpretation might materially alter the meaning of the words or phrases interpreted, the party or counsel should bring this to the judge’s attention.
2. The judge should conduct an inquiry outside the presence of the jury, if any, as to the materiality of the alleged error. If the judge finds that the error might affect the understanding of the trier of fact, the judge should:

   a. Have the question and answer at issue read;

   b. Have the challenger specify the alleged error and suggest the correct interpretation of the challenged material; and

   c. Inquire of the interpreter if the alternative proposed by the challenger is acceptable to the interpreter.

3. If the interpreter and challenger do not reach agreement, the judge should decide which interpretation is proper after hearing both sides. The court should:

   a. Presume that the assigned interpreter’s version is correct; and

   b. Place the burden of proof on the party challenging the interpretation. If the interpreter challenged is not certified, the judge may call in a certified interpreter to consult regarding the interpretation.


H. Judge’s Responsibility When Judge Believes Interpretation Incorrect

If the judge believes an interpretation might materially alter the meaning of the words or phrases interpreted, the judge has a responsibility to act. However, the judge cannot insert himself or herself into the proceeding as a witness and correct the record based on the judge’s own opinion regarding how a phrase should be interpreted.

1. The judge should conduct an inquiry outside the presence of the jury, if any, as to the materiality of the alleged error. The judge should:

   a. Have the question and answer at issue read; and

   b. Inquire of the interpreter if the interpreter stands by the interpreter’s previous version.

2. If the interpreter stands by the interpreter’s previous version, the judge may call in a certified interpreter to review the question and answer and the interpreter’s version. This review should occur outside the presence of the jury.

3. If the certified interpreter believes the challenged interpreter’s version is incorrect and offers a different interpretation, the judge must make a determination between the two versions.
If the judge decides on the certified interpreter’s version, the judge may allow the challenged interpreter to make the correction on the record, or the judge may amend the record and advise the jury. The judge may decide to remove the challenged interpreter from the case, and appoint a certified interpreter.

4. If the certified interpreter confirms that the interpretation is correct, the judge should abide by the certified interpreter’s expert linguistic opinion.

I. Tips to Use Interpreters Properly in the Courtroom

1. The Interpreter Must Be Able to Hear and Be Heard
   a. Require counsel and witnesses to speak in audible voices.
   b. Speak in phrases, with long pauses when needed for consecutive interpretation. Instruct and remind counsel to speak in phrases with long pauses. Do not be impatient. Few judges, parties, or witnesses are used to communicating through interpreters. If you coach those who are not familiar with the process, the proceeding will be smoother and less intimidating for all participants.
   c. Allow the interpreter to sit wherever hearing is best facilitated, generally beside the witness or party unless the interpreter is using sound equipment.
   d. To prevent undue fatigue, keep the pace of the speech within the particular interpreter’s ability.
   e. Do not let two or more people talk at the same time.

2. Give the Interpreter Periodic Recesses
   Generally, the interpreter cannot work efficiently for more than 30 minutes at a time. Often, the interpreter is the only one in the courtroom talking all of the time. Courts should provide periodic recesses. In lieu of frequent recesses (proceedings likely to go longer than two hours), courts should provide two interpreters to relieve one another every half hour. See Mirta Vidal, New Study on Fatigue Confirms Need for Team Interpreting, (1997) (reprinted in Appendix C).

3. General Tips
   a. Advise counsel to avoid false starts, questions within questions, and parenthetical statements.
b. Speak directly to the party or witness, not to the interpreter, and advise counsel to do likewise. For example, do not say to the interpreter, “Ask him where he was.” Rather, say, “Where were you” directly to the party.

c. Provide the interpreter in advance all relevant documents to enable the interpreter to prepare for expected interpretation and unique terminology, such as medical terms.

d. Before trial, allow the interpreter to spend a few minutes conversing with the person who needs the interpreter. This enables the interpreter to determine the person’s geographic origin, level of vocabulary, etc. Remind the interpreter not to talk about the facts of the case.

e. If available, provide accurately translated common legal forms.

f. Some legal concepts do not exist in some languages or cultures, including such fundamental concepts in the American legal system as the right to a jury trial. If an interpreter advises the court of this problem, the court should instruct the attorney or witness to rephrase the term in a less culturally-bound way.

VI. INTERPRETER-CLIENT PRIVILEGE

A person with a disability or a non-English-speaking person who has used an interpreter has a privilege to refuse to disclose and to prevent an interpreter from disclosing any communications to which the person was a party that were made while the interpreter was providing interpretation services for the person. The privilege extends only to those communications between the person needing the interpreter and another, and translated by the interpreter, that would otherwise be privileged under the Oregon Evidence Code (e.g., communication between the person and the person’s attorney that the interpreter interprets). OEC Rule 509-1 (disabled person-sign language interpreter privilege); OEC Rule 509-2 (non-English-speaking person-interpreter privilege). See also Code Prof. Resp. for Interpreters § 6 (2005) (requiring interpreters to understand the rules of privileged information).

VII. CODE OF PROFESSIONAL RESPONSIBILITY FOR INTERPRETERS
A. Adopted 1995
The Oregon Supreme Court adopted the *Code of Professional Responsibility for Interpreters in the Oregon Courts* on May 19, 1995 in Chief Justice Order No. 95-042, published in Oregon Appellate Court Advance Sheets 1995, No. 15. A copy of the order is included in Appendix A.

B. Code Serves as Guide
The Code is a guide for “all persons, agencies, and organizations who administer, supervise use of, or deliver interpreting services to the courts.” Code Prof. Resp. for Interpreters (2005) (Applicability).

C. Permissible Deviation
In unique situations, the court, “in order to ensure effective communication,” may authorize deviation from the Code. Code Prof. Resp. for Interpreters (2005) (Applicability).

D. Code Violations
If an interpreter violates the Code, the court or State Court Administrator may remove the interpreter from a court’s list of qualified or certified interpreters. Code Prof. Resp. for Interpreters (2005) (Applicability).

E. Judge’s Responsibility
Each judge should be familiar with the canons of the *Code of Professional Responsibility for Interpreters in the Oregon Courts* and its commentary:

- Canon 1. Accuracy and completeness.
- Canon 2. Representations of qualifications.
- Canon 3. Impartiality and avoidance of conflict of interest—court or proceeding interpreter.
- Canon 4. Impartiality and avoidance of conflict of interest—interpreter appointed to work with state-paid, appointed attorney.
- Canon 5. Professional demeanor.
- Canon 6. Confidentiality.
- Canon 7. Restriction of public comment.
- Canon 8. Scope of practice.
• Canon 10. Duty to report ethical violations.
• Canon 11. Professional development.

VIII. COMPENSATION TO INTERPRETERS

A. Interpreters for Non-English-Speaking Party or Witness

1. The court may not charge a fee to any person for appointing an interpreter to interpret witness testimony or to assist the court in performing the duties and responsibilities of the court. ORS 45.275(2).

2. The court may not charge a non-English-speaking party who is unable to pay for interpreter services, nor may a fee be charged for an interpreter appointed to determine whether the person is non-English-speaking or unable to pay. ORS 45.275(2). See also ORS 45.275(3) (providing procedure for determining inability to pay).

B. Interpreter for Disabled Party or Witness

The court may not charge a disabled person for the appointment of an interpreter or the use of an assistive communication device, nor may a fee be charged for an interpreter or device used to determine whether the person is disabled. ORS 45.285(2).

C. Cases Where Appointed Counsel Is Provided

Fees necessary for the purpose of communication between appointed counsel and a client or witness in a criminal case must be payable from the Public Defense Services Account established by ORS 151.225. ORS 45.275(4)(c).

D. Substituted Interpreter

1. Where Party or Witness Is Dissatisfied with Interpreter

If a party or witness is dissatisfied with the interpreter appointed by the court, the party or witness may request the appointment of a different certified interpreter. The request must be made in a manner consistent with the policies and notice requirements of the court or agency relating to the appointment and scheduling of interpreters. If the substitution of another interpreter will delay the proceeding, the person making the request must show good cause for the substitution. ORS 45.275(5) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005).
2. Party or Witness Must Pay Additional Costs
   Any party may object to the use of any interpreter for good cause, but must bear any additional costs beyond the amount required to pay the original interpreter unless the court has appointed a different interpreter for cause. ORS 45.275(5) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005). See generally 2005 Or Laws, ch. 385, § 2(6) (effective June 29, 2005) (allowing a judge or hearing officer on own motion to substitute a different interpreter for the interpreter initially appointed in a proceeding at any time for any reason).

IX. LOCATING QUALIFIED INTERPRETERS
   If your court administrative staff needs assistance in locating a qualified interpreter, please contact the Court Interpreter Services (CIS) office in Court Programs and Services Division at 503.986.7021.

   CIS has gathered names of qualified interpreters for many languages from other state courts, non-governmental agencies, colleges and universities, medical facilities, and private language agencies. CIS is more than happy to assist you.

   If your court administrative staff has been able to locate a qualified interpreter, please call the number above and share the interpreter’s information with CIS. CIS is always interested in getting good referrals and expanding the list of qualified interpreters.
APPENDIX A: CHIEF JUSTICE ORDER NO. 95-042

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of Establishing a Code of Professional Responsibility for Interpreters in Oregon Courts ORDER NO. 95-042

The Oregon Supreme Court, on February 21, 1992, established the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System (Order No. 92-022).


Recommendation Number 2-4 of the May 1994 Report suggested that the Chief Justice appoint a committee to draft the court interpreters code of ethics (code). ORS 45.291.

On June 15, 1994, the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System Implementation Committee (Implementation Committee) was appointed (Order No. 95-017, March 15, 1995, nunc pro tunc).

The Implementation Committee, working with the Oregon Judicial Department State Court Administrator’s Office, published in the December 5, 1995, Oregon Appellate Court Advance Sheets, a draft of the proposed code requesting comments. Upon receipt of the comments, a new draft was submitted to the Implementation Committee, in addition to those parties having made prior comment, requesting further comment. The final code now has been forwarded to the Chief Justice for approval.

IT HEREBY IS ORDERED that the Code of Professional Responsibility for Interpreters in Oregon Courts, a copy of which is attached as a part of this order, is adopted and becomes effective immediately.

DATED this 19th day of May 1995.

/s/ Wallace P. Carson, Jr.
Wallace P. Carson, Jr.
Chief Justice

CHAPTER 19: INTERPRETERS

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APPENDIX B: ESTABLISHING AN INTERPRETER’S QUALIFICATIONS

Establishing an Interpreter’s Qualifications

ORS 45.275(8)-(9) as amended by 2005 Or Laws, ch. 385, § 2 (effective June 29, 2005) requires an interpreter to be at least a “qualified interpreter” to serve in the courts in Oregon. ORS 45.288 further requires the court to appoint an interpreter who is both qualified and certified, if available. If no certified interpreter is available, able, and willing to serve, the appointed interpreter still must meet the statutory requirements for qualification and state his or her qualifications on the record. When the court knows the interpreter well, the court may allow the parties to stipulate that the interpreter’s qualifications are on record with the court.

To establish a new or unfamiliar interpreter’s qualifications, the court should ask the following questions:

1. What is your native language?
2. How did you learn English and the target language?
3. How long have you been speaking
   a. English?    b. The target language?
4. Have you had formal training in either language? Where, and how long?
5. Can you read both languages? (Not for ASL interpreters.) How well do you read each?
6. What is the highest grade you completed in school? What was your primary language in school?
7. Do you believe you can communicate with the non-English-speaking person (or party); i.e. have you talked with the person already or would you like a few minutes now to talk?
8. Have you ever interpreted in court before? Where? How often?
9. Have you taken the Oregon Certified Court Interpreter Examination? Have you earned the Oregon Certified Court Interpreter credential? Has any other state or federal court certified you to interpret (language)? (Not for ASL interpreters.)
10. Do you hold any certifications from any national organizations? Please explain what was involved in obtaining this certification.
11. Describe any special training you have in court interpreting.
12. Describe the simultaneous and consecutive modes of interpretation.
13. Do you ever summarize statements while interpreting? Do you understand that the law requires you to interpret everything said by all parties?
14. Have you read the Code of Professional Responsibility for Interpreters in the Oregon Courts? Do you understand it? Briefly describe the main points.

Case Name: __________________________
Case No. #: __________________________
Interpreter Name: ____________________
Date: ________________________________
Established Qualifications For: __________________________

s4b98017
The practice of having simultaneous interpreters work in teams of two during lengthy assignments, although standard procedure in all other forums requiring interpretation, has never been universally accepted by the courts. In most state and many federal courts, it is simply not done. Attempts by interpreters to institute the policy have met with resistance from judges who consider it wasteful and administrators who cite budgetary constraints. But a study recently conducted at the University of Geneva has contributed important new information on the subject: its findings provide further scientific evidence to support the position that accuracy is directly related to the length of time that a person interprets.

The study by Barbara Moser-Mercer and her colleagues (forthcoming) at the University of Geneva’s Ecole de Traduction et d’Interpretation constitutes the first part of a two-part study on stress and fatigue in conference interpreting. Its aim is to examine the fatigue factor during extended turns, as well as the coping behavior of interpreters when under stress. The subjects—five native English-speakers working from German into English, whose professional experience ranged from 12 to 25 years in the booth—were told to work until they could no longer provide acceptable quality. During the first 30 minutes the frequency of errors—as measured with an elaborate error scale—rose steadily. The interpreters, however, “appeared to be unaware of this decline in quality,” according to the report, as most of them continued on task for another 30 minutes.

The error scale included several different categories by which quality can be determined. “Looking at the total number of errors,” the report states, “we can see that the frequency increases from three minutes to 30 minutes.”

The category of most serious errors, i.e., errors in meaning, rose consistently with increased time on task. At 60 minutes, all subjects committed a total of 32.5 meaning errors. “Considering that each meaning error, no matter how minor, does distort the message, a considerable increase in the number of meaning errors after 30 minutes on task does represent a significant decline in output quality,” the authors argue. In the category of nonsense, the number of errors committed by the subjects almost doubled after 30 minutes on task—from 4.5 after 15 minutes to 8.5.

Moser-Mercer and her colleagues conclude:

The increase in the number of meaning errors combined with the interpreters’ lack of awareness of this drastic decrease in quality shed some light on the validity of interpreters’ judgment of their own output quality [...] This lack of judgment appears to be the result of cognitive overload: a situation in which the interpreter tries to economize on processing capacity and allocate resources only to those parts of the interpreting process that will ensure continuous output (irrespective of the quality provided) [...] We can conclude from this that shorter turns do indeed preserve a high level of quality, but that interpreters cannot necessarily be trusted to make the right decision with regard to optimum time on task.

This is an important insight, since many interpreters, fearful of not getting work or of exposing what is erroneously perceived as a weakness, will insist that they can work for extended periods of time without any adverse consequences to accuracy. It also raises an obvious question: if interpreters themselves are unable to judge the length of time beyond which the quality of their performance declines significantly, how can anyone else have the power to decide how long an interpreter should work without relief?

An additional conclusion reached by the University of Geneva team concerned the subjects’ emotional
response to increased time on task. “Interpreters seem to experience an increase in stress during the first 30 minutes, as indicated by a rise in cortisole levels, but with task overload respond with an ‘I couldn’t care less’ feeling,” they report, adding: “This is borne out by anecdotal evidence according to which interpreters try to deflect responsibility for the quality of output when they consider the demands to be unrealistic; this would include increased time on task, extremely fast speakers, and long working hours.”

Stress investigated among UN interpreters. H. McIlvaine Parsons, a fellow at the Institute for Behavioral Research, in Silver Spring, MD, reached similar conclusions in a consultation he conducted in 1975 for the United Nations. The study was part of an investigation that followed a job action in which UN interpreters stayed away from their jobs for one day to protest “working hours and the stress and tension they said resulted from working more than seven half-day sessions per week.” McIlvaine Parsons’ objective was in part to “create a wider understanding than there seemed to be of the interpretation process. If some of these factors could be ameliorated,” he argues, “the interpreters might experience less stress and tension and they might be less likely to avoid that stress and tension by failing to come to work.”

McIlvaine Parsons reported that “the interpreters were emphatic that more than three hours in a booth [taking turns with a colleague] resulted in excessive stress and tension, especially compared with a shorter time.” Other factors rated by the subjects as stressful or extremely stressful included: the speaker talking very fast, lack of clarity or coherence by the speaker, the need for intense concentration, inexperience with the subject matter, a speaker’s accent, long speaker utterances between pauses, background noise in the meeting room, and mispositioning of the speaker’s microphone relative to the speaker.

As a result of his study, McIlvaine Parsons recommended to the UN Secretariat “that a simultaneous interpreter should not be required to work more than three half-day sessions in succession.” It should be borne in mind that UN interpreters work in teams of two at all times.

Skeptics might be inclined to argue that these studies do not refer specifically to interpreters who work in court and are therefore not applicable to this sector. A comparison of court and conference interpreting, however, can easily demonstrate that the former is in fact more demanding and stressful than the latter.

What is fatigue? Although the definition of the word fatigue seems obvious, there is considerable confusion among the general public and the legal profession about its meaning and consequences in a courtroom setting. Fatigue for interpreters is not primarily physical, as in the case of athletes, whose muscles become strained after sustained exertion: it is mental fatigue. It results from complex mental processing and the high degree of concentration the interpreter must have to hear, then understand, analyze, and finally express ideas coherently in another language. “Most people do not realize that an interpreter uses at least 22 cognitive skills when interpreting,” states Patricia Michelsen in an article published in The Court Management and Administration Report. Other studies of simultaneous interpretation have shown that fatigue is exacerbated by environmental factors that interfere with various aspects of the cognitive process.

Taking into consideration both cognitive processes and environmental interference, the degree of concentration required of an interpreter is many times greater than that of any other person in a courtroom. In a 1995 study on fidelity assessment in consecutive interpretation, Daniel Gile reports that a group of subjects asked to rate an interpretation “waned errors that had not been made by the interpreter on the other.” This is not surprising to interpretation teachers, according to Gile, since “ordinary listening entails too much loss, and [...] interpreters have to listen to speakers with much more concentration than is usual in everyday life.”

While conference interpreters must cope with the stress generated by the job’s cognitive demands, their booth-enclosed environment is relatively stress-free compared to a courtroom setting. As Michelsen indicates, “Conference interpreters work under better conditions: they concentrate on only one speaker at a time, often have a prepared text of the speech ahead of time, address the audience in only one level of
rhetoric, and usually do not have audibility problems.”

Environmental factors and loss of accuracy. Audibility is one of the key factors contributing to the stress suffered by court interpreters. In 1974, an enlightening study on the effects of noise on the performance of simultaneous interpreters was conducted by David Gerver, then at the University of Durham, Great Britain. He found that, as the listening conditions deteriorated, significantly more errors were committed by the subjects when interpreting than when shadowing (repeating a spoken text in the same language).

This finding, according to Gerver, “suggested that difficulty in perceiving source language passages reduced the ability of simultaneous interpreters to monitor their own interpretations into the target language.” He added that other studies indicated that “levels of noise which would not necessarily impair perception of speech by simultaneous conference interpreters could interfere with the processes involved in the retrieval and transformation of the messages being interpreted.” Listening conditions are most relevant to any discussion of interpreter stress and fatigue. Since monitoring their own utterances and making corrections is one of the many cognitive functions performed by interpreters, if their ability to self-correct is impaired, their level of stress and resulting fatigue also increase proportionately. “It is perhaps not surprising,” Gerver comments, “that simultaneous interpreters are particularly sensitive to environmental noise and that they will often refuse to work in conditions which, to the observer at least, do not appear particularly stressful.” While Gerver’s study was conducted with a monitored increase in noise level, the same conclusions would apply to a situation in which the interpreter is simply unable to hear, as too often occurs in the courtroom.

Given that acoustic impairments cause conference interpreters stress and fatigue, we can safely conclude that court interpreters are at a distinctly greater disadvantage acoustically, and therefore subjected to even more severe stress. Unlike conference interpreters, who work in soundproof booths and hear the sound through headphones connected to a stationary microphone, court interpreters hear telegraphic, often-interrupted messages from speakers distributed throughout the courtroom. Although many courts have microphones, they are not multidirectional and often distort the sound more than they amplify it. The interpreter must then filter this message through myriad other noises polluting the audible space, such as telephones ringing, jurors coughing, babies crying in the gallery, and so on.

The best kept secret in the courtroom may well be that interpreters are often unable to hear what they are expected to interpret. When interpreting simultaneously into a microphone, they are invariably made to position themselves at the point furthest away from the witness stand, so as not to disturb jurors and those testifying. When no simultaneous equipment is available, the interpreter is obliged to sit next to the defendant—the hardest place from which to hear the proceedings. (By contrast, court reporters are granted the choice spot in the well of the courtroom to maximize their ability to hear every word uttered.) Moreover, no one seems to realize that the interpreter’s hearing is further obstructed by the sound of his or her own voice overlapping the original speaker’s at all times, creating an additional acoustical impediment.

The bolder or more experienced interpreters will interrupt to insist that the parties speak up or rearrange themselves to improve audibility. But courtroom atmospheres are not always conducive to intransigence on the part of someone who is supposed to be invisible and unobtrusive, and even well-meaning judges and court clerks often have little or no control over antiquated sound systems or acoustically faulty architecture.

All of the factors found by the various studies described here to be major causes of conference interpreter stress and fatigue—acoustics, prolonged periods on task, lack of familiarity with relevant terminology, excessively fast or incoherent speakers, etc.—are in fact more applicable to interpreters in court than in any other setting. Moreover, judiciary interpreters have the additional pressure of knowing that nothing less than the life and liberty of human beings are at stake in the proceedings they are called on to duplicate in a defendant’s native tongue. The awareness that each word mistranslated or omitted hinders the non-
English speakers’ ability to follow the proceedings against them is a constant source of tension. Whereas the conference setting allows for much more flexibility, interpreting in court requires greater precision, since a complete and faithful rendition must include hesitations, false starts, repetitions, and inaccuracies. It follows then that judiciary interpreters face more demanding and stressful working conditions than their counterparts elsewhere.

Studies corroborate empirical evidence. While these studies make an important contribution to the body of scientific data needed for a better understanding of the interpreting process and its complexities, they merely corroborate what practicing interpreters have known and argued all along: that work quality, i.e., accuracy and coherence, begins to deteriorate after approximately 30 minutes of sustained simultaneous interpreting, and that the only way to ensure a faithful rendition of legal proceedings is to provide interpreters with adequate relief at approximately half-hour intervals.

Conscientious administrators in several federal courts, the United Nations and the U.S. State Department recognized the need for tandem interpreting and adopted the practice early on. Team interpreting, in fact, dates back to the Nuremberg Trials. At the State Department, which according to Harry Obst, Director of the Office of Language Services, handles 200 to 300 interpreting missions in 100 different locations per day, it is considered an inviolable policy. In response to a request from Ed Baca of the Administrative Office of the U.S. Courts, Obst pointed out that, “The policy on simultaneous interpreters is simple and corresponds to that of all other responsible interpreting services in the entire world (United Nations, European Commission, International Red Cross, International Court of Justice, foreign ministries in other nations). No individual simultaneous interpreter is allowed to work for more than 30 minutes at a time.” The letter continues, “This is also done for the protection of the users. After 30 minutes the accuracy and completeness of simultaneous interpreters decrease precipitously, falling off by about 10 percent every five minutes after holding a satisfactory plateau for half an hour.” The reason, Obst explains, is that “The human mind cannot hold the needed level of focused concentration any longer than that. This fact has been demonstrated in millions of hours of simultaneous interpretation around the world since 1948. It is not a question of opinion. It is simply the result of empirical observation.”

Echoing the results of the University of Geneva study, Obst adds that although some interpreters believe they can interpret longer than that, they do so because after 30 minutes “they can no longer differentiate between interpreting the original message or just babbling into the target language. Their mind is too tired to evaluate their own performance.” The policy on the part of court administrators that interpreters work for an hour or more without relief, says Obst, “makes sense only in budgetary terms. It makes reliable interpreting impossible and denies the client who has to rely on the interpreter the due process that every person is entitled to under our laws.”

And that is precisely the point. Unlike their colleagues in any other sector, judiciary interpreters are placed under oath to “truly and accurately interpret” the proceedings. Accuracy in a legal context is not an academic concept or an abstraction that can be quantified in relative terms. It is the cornerstone that guarantees limited-English litigants equality under the law. That was the spirit of the Court Interpreters Act enacted in 1978. It is also the spirit of the Code of Professional Responsibility drafted by the Administrative Office of the U.S. Courts, which compels interpreters to “fulfill a special duty to interpret accurately and faithfully” and “perform to the best of their ability to assure due process for the parties” and “refuse any assignment [...] under conditions which substantially impair their effectiveness.” If interpreters are to be expected to comply with these canons, they will need the full support of administrators in both the state and federal courts, who will place due process considerations above the temptation to trim their budgets at the expense of those who come before the bar of justice.

References

Duenas Gonzalez, Roseann, Victoria F. Vazquez and Holly Mikkelson. 1991. Appendix C: Code of


An earlier version of this article appeared in Proteus, Vol. VI, No. 1.

Mirta Vidal is a federally certified court and conference interpreter and past Chair of the Board of the National Association of Judiciary Interpreters and Translators, Inc. (NAJIT).
December 3, 1998

MEMORANDUM

TO: Members of the Judicial Conference
    Trial Court Administrators

FROM: Kingsley Click
    State Court Administrator

RE: Cognitive Disabilities and the Americans with Disabilities Act; Attorney General Opinion Request OP 1998-7

Since the passage of the Americans with Disabilities Act of 1990, the Oregon Judicial Department has received a number of requests for cognition assistance (or “process” interpreters) to assist people with cognitive disabilities who are involved in court, or court-related, proceedings. We sought the advice of the Attorney General’s office on how courts might handle such requests, including a procedure courts could use to process the requests; criteria for determining whether a cognitive disability exists; and how to determine whether, or what, accommodation is appropriate.

Attached is Opinion Request OP 1998-7, the November 12, 1998, response from the Attorney General’s office to our request for advice. We believe this letter provides a useful analysis of portions of the Americans with Disabilities Act, generally, as well as specific recommendations for addressing requests for cognitive assistance or a process interpreter. Included with the letter is an appendix containing, in summary fashion, suggested inquiries for evaluating if a person has a disability, is qualified for assistance, and if the requested accommodation is appropriate.

We hope you will find this advice letter helpful. A copy of this cover memo and opinion also is posted to the OSCA DOCS on SCAdom01. For further information on matters relating to the Americans with Disabilities Act please contact: Dennis Dickenson or Terrie Chandler, Personnel Division (503/986-4501 and 503/986-5926, respectively) (employment issues); Leola McKenzie, Trial Court Programs (503/986-5942) (court program issues); or Scott Crampton, Management Services Division (503/986-5550) (court facility issues).
Kingsley W. Click  
State Court Administrator  
Supreme Court Building  
1163 State St.  
Salem, OR 97310-0260

Re: Opinion Request OP 1998-7

Dear Ms. Click:

You have asked for advice regarding the handling of requests received by the Oregon Judicial Department under the Americans with Disabilities Act (ADA) for “process interpreters” to assist individuals with cognitive disabilities who are involved in a court proceeding.¹ We set forth your questions and our short answers below, followed by a discussion.

1. To respond to a request for a “process interpreter,” may the court request a represented party to file a motion and hold a hearing on the motion?

Uniform Trial Court Rule (UTCR) 7.060 provides a mechanism for a party to a court proceeding to request special accommodation for an individual. Any additional factfinding necessary to permit the court to respond to a request for any accommodation is within the court’s discretion.

2. What criteria should the court use to determine that a cognitive disability actually exists and that accommodation using outside assistance such as a “process interpreter” is necessary for proper accommodation?

A list of inquiries that may be used in making such a determination is contained in the Appendix of this opinion.

¹ We set forth your questions and our short answers below, followed by a discussion.
3. Does the court have qualitative decision-making authority to determine whether providing a process interpreter (either generally or a particular person) would be a meaningful accommodation? Must the court pay for assistance that is not, in its opinion, a meaningful or necessary accommodation to provide ADA access?

The court has authority to determine whether a process interpreter would be a meaningful accommodation. If specific facts and findings support the court’s conclusion that a process interpreter is not a meaningful or necessary accommodation, the court would not need to pay for such assistance.

4. In determining whether a “process interpreter” accommodation is required, may the court consider whether the party is represented by counsel in the matter?

Depending on the facts related to a requested accommodation, legal counsel may suffice as a reasonable accommodation.

5. Should any different criteria be used if the request is to provide a “process interpreter” in a court-connected setting outside of the courtroom (e.g., arbitration, mediation, pretrial release, indigence verification, Citizen Review Board hearings, public counter) instead of in a courtroom proceeding? In other words, is there a higher threshold or standard to meet for a courtroom proceeding?

No. The same criteria apply, although the application of the criteria may be affected by the facts related to the disability and the nature of the court’s activity, service or program.

6. If the Judicial Department is required to provide “process interpreters” for individuals with cognitive disabilities at state expense, how would the courts determine who is qualified to serve in this role?

The court may make case-by-case determinations or develop standards.

Discussion

The ADA, 42 USC § 12101 et seq., protects qualified individuals with disabilities from discrimination on the basis of a disability. Title II of the ADA covers discrimination in state and local government services, programs and activities. Title II coverage is not limited to “executive agencies,” but includes activities of the judicial branches of state and local governments. 28 CFR § 35.102.

Title II prohibits discrimination on the basis of disability, stating:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 USC § 12132. The United States Department of Justice (US DOJ) has issued rules implementing the requirements of Title II in 28 CFR Part 35, including additional commentary contained in Appendix A of Part 35. The ADA and implementing regulations require state and local government entities, including state courts, to modify policies, practices and procedures to prevent disability discrimination, to remove communication barriers, and to provide accessible services.
1. Requiring a Motion and Hearing

You first ask whether, in order to properly respond to a request for a “process interpreter,” the court may request a represented party to file a motion and hold a hearing on the motion for a process interpreter. Unless a person identifies himself or herself as having a disability and requests an accommodation, a court has no obligation under the ADA. A represented party seeking a “process interpreter” or “cognition assistant” is requesting an accommodation based on the ADA. UTCR 7.060 provides the following procedure for requesting accommodations:

(1) If special accommodation under the ADA is needed for an individual in a court proceeding, the party needing accommodation for the individual must notify the court as soon as possible, but no later than two judicial days in advance of the proceeding. For good cause shown, the court may waive the two-day advance notice.

(2) Notification to the court must provide:

(a) the name of the person needing accommodation;

(b) the person’s status in the proceeding;

(c) the type of disability needing accommodation; and

(d) the type of accommodation, aural interpreter, or auxiliary aid needed or preferred.

This rule is comparable to requirements in other states.

The notification process described in UTCR 7.060 appears to provide a reasonable means by which a court can be apprised of a request for an accommodation and obtain initial information to determine the suitability of a requested accommodation. A request for a “process interpreter” or “cognition assistant” should be handled the same as a request for other accommodation under the rule. Because the rule is silent about how the court should handle a request, a trial court has some discretion in determining whether additional information is necessary to respond to the notification and, if so, the manner in which the court will obtain that information. Consequently, a trial court could conclude that some kind of factfinding may be appropriate, including requiring the requesting party to file a motion and holding a hearing, before determining the necessity of a requested accommodation.

2. Criteria to Determine Whether Disability Exists and Whether Accommodation Is Necessary

You next ask what criteria the court should use to determine that a cognitive disability actually exists and that an accommodation using outside assistance, such as a “process interpreter” is necessary for proper accommodation. We analyze this issue by focusing first on the fact that the ADA applies only to individuals with a “disability” who are “qualified” to participate in the services, programs, or activities of the public body.

A. Determining Whether Disability Exists

...
For purposes of the ADA, an individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

28 CFR § 35.104.

A “cognitive disability,” referred to in your questions, is not specifically mentioned in either the ADA or the federal regulations implementing Title II of the ADA. The ADA and its implementing regulations broadly define “mental impairment,” however, as “any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 28 CFR § 35.104.

The American Bar Association’s Commission on Mental and Physical Disability Law has discussed cognitive communication disorders, stating:

Cognitive communication disorders are impairments that affect individuals’ abilities to receive or impart information. The most prominent cognitive communication disorders are learning disabilities, which involve “difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning or mathematical abilities,” wrote Smith and Luckasson, in Introduction to Special Education (1992).

Learning disabilities include conditions such as dyslexia, attention deficit hyperactivity disorder, hyperactivity, hypoactivity, and developmental aphasia. The causes of most learning disabilities are unclear, although they seem to be related to organic brain dysfunctions. Learning problems primarily attributed to visual, hearing, or motor impairments, mental retardation or emotional disturbance, or environmental, cultural, or economic disadvantages are not considered learning disabilities.

There are other cognitive communicative disorders, in addition to learning disabilities, that affect speech, hearing, and language. These arise from birth defects, brain dysfunctions, illness, strokes, trauma or diseases affecting the central nervous system, and head injuries.

Parry, American Bar Association Commission on Mental and Physical Disability Law, Mental Disabilities and the Americans with Disabilities Act, Appendix A at 155 (2nd ed 1997) [hereinafter Mental Disabilities and the ADA]. Consequently, there may be cognitive impairments that would qualify as mental impairments under the ADA.

Having a mental impairment, however, is not enough by itself to meet the definition of a disability under the ADA. “Under the ADA, the principle interpretive concern -- and also limitation -- is whether the mental characteristic at issue substantially limits a major life activity.” Id. at 9. The term “substantial limitation” is defined by the US DOJ as follows:
A person is considered an individual with a disability * * * when the individual’s important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people. A person with a minor, trivial impairment, such as a simple infected finger, is not impaired in a major life activity. A person who can walk for 10 miles continuously is not substantially limited in walking merely because, on the eleventh mile, he or she begins to experience pain, because most people would not be able to walk eleven miles without experiencing some discomfort.

28 CFR Part 35 Appendix A (emphasis added). See also cases cited in Price v. National Board of Medical Examiners, 966 F Supp 419, 422 (SD W Va 1997). The court in Price was not persuaded that medical students with learning disabilities required accommodations for the licensing examination since the students had histories of significant scholastic achievement in comparison with average students. The court noted:

The “comparison to most people” approach has practical advantages as well. Courts are ill-suited for determining whether a particular medical diagnosis is accurate. Courts are better able to determine whether a disability limits an individual’s ability in comparison to most people. Additionally, this functional approach is manageable and, over time, will promote a uniform and predictable application of the ADA.

Id. at 427.

Short-term or transitory illnesses are not covered by the ADA if they do not place substantial limitations on a person’s major life activities. The Ninth Circuit concluded that a temporary cancer-related psychological disorder was not a disability because it was a nonchronic impairment of three and a half months duration with only minimal long-term impact. Sanders v. Arneson Products, Inc., 91 F3d 1351 (9th Cir 1996), cert denied 117 S Ct 1247, 137 L Ed2d 329 (1997).

Analyzing the same definition of “substantial limitation” in the context of Title I of the ADA (related to employment), the EEOC’s Technical Assistance Manual indicates that individuals with stress-related conditions associated with common family or employment problems are not covered under the ADA. This type of mental condition is neither a recognized impairment nor the type of impairment that would substantially limit the individual’s ability to function. Mental Disabilities and the ADA, supra, at 10 (citing U.S. Equal Employment Opportunity Commission, A Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act (1992) at II-3).

In some cases, an individual’s inability to understand judicial proceedings may be the result of factors that are not disabilities. For example, a person who is illiterate or who has limited English language knowledge may have difficulty understanding written material, but that difficulty is not the effect of a disability. Physical or mental impairment does not include simple physical characteristics, nor does it include environmental, cultural or economic disadvantages. Similarly, the definition does not include common personality traits, such as poor judgment or quick tempers when these characteristics are not symptoms of a physical or mental impairment. 28 CFR Part 35 App. A. To the extent that an individual’s inability to understand is based on one of these non-disability factors, the ADA does not apply.5

Because of the possibility that a person’s inability to understand the judicial process may not be based on a disability that substantially limits a major life activity, when a person claims to have a cognitive impairment and requests an accommodation, it is appropriate for the court to seek a factual confirmation.
This may be done by answering the following questions:

1. Does the requestor have a perceived or diagnosed mental impairment (present or past) and, if so, what is the nature and severity of the impairment; and

2. Does the perceived or diagnosed mental impairment substantially limit a major life activity in comparison to most people in the general population?

(A list of these and the other suggested inquiries discussed in this opinion is provided in the Appendix attached hereto). The importance of obtaining an individualized assessment of the requestor’s mental impairment and the extent to which it limits major life activities is heightened because the definition of “disability” includes persons who are “regarded as having” a mental impairment. It is important that the courts not treat people as having a mental disability without an objective individualized assessment of the nature and severity of the mental impairment.

The ADA permits the courts to require a person requesting accommodation to provide, at his or her own expense, current documentation from a qualified professional concerning the disability. *Guckenberger v. Boston University*, 974 F Supp 106, 135 (D Mass 1997). Nevertheless, the court cannot impose documentation requirements that unnecessarily screen out or tend to screen out the truly disabled. 42 USC § 12182(b)(2)(i). This could occur if the court required burdensome documentation related to the diagnosis or specified qualifications of persons making the diagnosis or recommending accommodations without being able to demonstrate the necessity for those requirements. *Guckenberger*, 974 F Supp at 135-140. Documentation requests from the court to the person requesting accommodation should identify the essential functions of participating in the particular judicial proceeding and may ask the professional evaluator to address the types of questions listed in Appendix Section A and B.

**B. Determining Whether Person Is a “Qualified Individual with a Disability” Who Can Participate Without Accommodation or Auxiliary Aids**

Assuming that the requestor is a person with a disability, the next question is whether that person is “qualified.” The requirements of the ADA apply only to individuals with a disability who are “qualified” to participate in the Title II service, activity or program. Title II defines the term “qualified individual with a disability,” as

an individual with a disability who, *with or without reasonable modifications* to rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, *meets the essential eligibility requirements for the receipt of services or the participation in programs or activities* provided by a public entity.

42 USC § 12131(2) (emphasis added). In *Galloway v. Superior Court of District of Columbia*, 816 F Supp 12, 16 (D DC 1993), the court characterized the “qualified individual” inquiry in the context of a judicial proceeding as having two parts:

1. What are the essential functions of participation in the particular judicial proceeding; and

2. Can this individual with a disability meet these requirements?
A determination that a person has a disability that substantially limits a major life activity is neither descriptive nor conclusive about how the individual actually functions. Once the court has determined the essential functions of participation in the particular judicial proceeding, the individual’s abilities and disability-related limitations must be assessed.

Practical guidance in determining whether a disability will impair the requestor’s ability to participate in judicial proceedings can be gained by examining the manner and means by which the individual with a disability conducts his or her everyday life. See e.g., Galloway, 816 F Supp at 18; People v. Caldwell, 603 NYS2d 713, 715 (NY City Crim Ct 1993). The court can look to the requestor’s daily activities to determine whether the impairment is actually a barrier to the requestor’s understanding of or participation in the judicial proceeding. Equally significant is establishing whether the requestor relies on the requested accommodation, such as a “process interpreter” or “cognition assistant,” for ordinary activities.

Many lay people have a difficult time understanding adjudications and the judicial system, regardless of whether they have a disability. Conversely, not all people with disabilities have difficulty participating in the judicial process. For example, an individual who has a disability related to infertility may have a disability that substantially limits a major life activity, while being fully capable of participating in the judicial activities without the provision of any assistance related to the disability. The stress of being involved in the underlying cause of the judicial proceeding or the judicial proceeding itself will not be sufficient to meet the definition of mental disability under the ADA. The ADA applies when the disability substantially limits the individual’s ability to participate in the services, programs or activities of the court in comparison to most people.

Thus, the court should determine if there is a nexus between the nature and severity of the disability and its effect on the individual’s ability to participate in the judicial proceedings with or without the provision of interpreters or the modification of court policies and procedures. If the individual with a disability is qualified to participate without assistance, the court may deny a request for assistance.

C. Determining Whether a Reasonable Accommodation Will Make the Individual with a Disability “Qualified” to Participate and Whether a Requested Accommodation Is Appropriate

Even if the individual with a mental impairment does not initially appear to be “qualified,” the court must then determine whether any of the following would make the individual “qualified”:

1. Reasonable modifications to rules, policies or practices;
2. Removal of communication barriers; or
3. Provision of auxiliary aids and services.

42 USC § 12131(2). Collectively, these three elements are referred to as reasonable accommodation. “An accommodation is generally any change in the work [or court] environment or in the way things are customarily done that enables an individual with a disability to enjoy equal opportunities.” Thomas v. Davidson Academy, 846 F Supp 611, 618 (MD Tenn 1994); accord Burch v. Coca-Cola Co., 119 F3d 305, 314-15 (5th Cir 1997) (“In all cases a reasonable accommodation will involve a change in the status quo, for it is the status quo that presents the very obstacle that the ADA’s reasonable accommodation provision
attempts to address.

The following analysis can be used to determine whether a request for a “process interpreter,” “cognition assistant” or other accommodation is required to permit an individual with a disability to be “qualified” to participate in the judicial proceeding. A court’s decision to approve a requested accommodation must depend on the specific factual context of the individual requestor and the nature of his or her participation in the judicial proceeding, rather than generalizations or stereotypes about the effects of a particular disability or the effectiveness of a particular accommodation.

(1) **Is the requested accommodation a “personal service” that the ADA does not require the court to provide?**

The court is *not* required to provide “personal services” to a person with a disability. 28 CFR § 35.135 provides:

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting or dressing.

(Emphasis added.) The federal commentary states that the personal services exception under Title II “parallels an analogous provision” in US DOJ’s regulations for Title III (public accommodations operated by private entities). 28 CFR Part 35 App A. The commentary to the Title III regulations explains “personal services” as follows:

The Department wishes to clarify that measures taken as alternatives to barrier removal, such as retrieving items from shelves or providing curb service or home delivery, are not to be considered as personal services. Similarly, minimal actions that may be required as modifications in policies, practices or procedures under § 36.302, such as a waiter’s removing the cover from a customer’s straw, a kitchen’s cutting up food into smaller pieces, or a bank’s filling out a deposit slip, are not services of a personal nature within the meaning of § 36.306. (Of course, such modifications may be required under § 36.302 only if they are “reasonable.”) Similarly, this section does not preclude the short-term loan of personal receivers that are part of an assistive listening system.

Of course, if personal services are customarily provided to the customers or clients of a public accommodation, e.g., in a hospital or senior citizen center, then these personal services should also be provided to persons with disabilities using the public accommodation.

28 CFR Part 36 Appendix B. As the rule and commentary illustrate, the ADA does not require the courts to provide highly personalized attention or services to individuals with disabilities. In *McCauley v. Winegarden*, 60 F3d 766 (11th Cir 1995), the court held that a defendant’s request that the trial court create a “filtered environment” (“life support systems,” “required medical aids” and “additional medical aids”) to accommodate a person with multiple chemical sensitivities was equivalent to requiring the court to provide “personal devices,” which was not required by the ADA.

Depending on the facts, the requested use of a “process interpreter” may really be a personal service
in the nature of an attendant, and not fundamentally different than an attendant employed for the purpose of aiding with eating or toileting. Under those circumstances, a court could conclude that the ADA does not require it to provide a “process interpreter” or “cognition assistant” any more than the courts are required to provide a personal attendant for judicial proceedings.

(2) Is the requested accommodation a reasonable modification of judicial policies, practices or procedures?

The court may consider whether the request is for a modification of the court’s policies and procedures. The ADA rule requiring reasonable modifications is itself qualified, as follows:

A public entity shall make reasonable modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program or activity.

28 CFR § 35.130(b)(7) (emphasis added).

Many policies and procedures, while seemingly neutral, can have an adverse impact on people with disabilities by preventing them from participating equally in a program or service. For example, a courthouse may prohibit animals from entering the building. Legitimate reasons support this policy, but its blanket enforcement would bar individuals who are blind from using their seeing eye dogs in the building. A reasonable modification of this policy would exempt individuals with disabilities who use animals to assist them.

A commonly requested modification is for additional time to perform an activity or for the allotted time to be broken up into increments. See D’Amico v. New York Board of Bar Examiners, 813 F Supp 217 (WD NY 1993). In the case of a person having difficulty understanding or processing information, a reasonable modification may include segmenting the proceeding into smaller time periods to minimize confusion. Another reasonable modification might be to permit frequent breaks in a proceeding to allow the person to confer with counsel about the proceedings. In People v. Caldwell, 603 NYS2d 713, 714 (NY City Crim Ct 1993), the court identified several accommodations made for a juror who was blind, such as moving the juror to the seat closest to the witness stand, reading all documents into the record, providing a large print version of a transcript, and having the judge give an oral description of certain court documents.

When an individual with a mental impairment requests a “process interpreter,” the court will need to determine whether the request constitutes a reasonable modification of judicial policies and procedures or would fundamentally alter the nature of those policies and procedures. The requestor has the initial burden of proving that “the requested modification is [generally] reasonable,” that is, “in the run of cases.” Johnson v. Gambrinus Co., 116 F3d 1052, 1059 (5th Cir 1997). The ADA does not require the court to take any action that it can demonstrate would result in a fundamental alteration of the nature of the service, program or activity. 28 CFR §§ 35.130(b)(7). The nature of judicial proceedings is reasonably well defined and the rules for addressing the competency of witnesses or parties have been established for many years. In its adjudicatory role, the court is providing a forum for resolving disputes and a service of applying the law to factual disputes. Basic qualifications of mental competency are not required to be altered by the ADA. Similarly, a court may issue criminal failure to appear warrants to require a defendant to appear and explain her absences even though the defendant claims that a disability prevented her appearance at
court hearings. *Marks v. Supreme Court of Virginia*, 1995 WL 879685, 20 MPDLR 809 (ED Va Mar 25, 1995). The court’s function is to adjudicate disputes. The court is not a mental health counseling service, so requiring the court to provide counseling to permit a party to participate could fundamentally alter the nature of the “service, program or activity” offered by the court.

Likewise, the court is not required to permit the use of a “process interpreter” if it would fundamentally alter the nature of the judicial proceeding. Fundamental standards of mental competency or the role of legal counsel need not be altered. See *Motto v. City of Union City*, 177 FRD 308, 310 (D NJ 1998) (allowing a learning disability specialist to paraphrase questions would fundamentally alter defendant’s right to cross-examine the plaintiff). The court should maintain a record of any denial of a requested modification of policies or procedures on the basis that the modification would fundamentally alter the judicial proceeding.

(3) **Will the requested accommodation remove communication barriers related to the disability?**

A public entity must “take appropriate steps to ensure that communications with applicants, participants, and members of the public with disabilities are as effective as communications with others.” 28 CFR § 35.160. Individuals with mental impairments may have difficulty communicating as a result of their mental impairment or because of a separate physical impairment. The requirement of removing communication barriers can refer to the availability of telecommunications that permit a person with a disability to call the courthouse, or providing information and signs about the courthouse facilities. It may also include the provision of “auxiliary aids and services,” discussed below.

If the requested accommodation is not related to the barrier imposed by the particular disability, a request for that accommodation may be denied. In *Guckenberger*, 974 F Supp at 147-149, the court upheld a policy denying math course substitutions for specific learning disabled students because the university was able to demonstrate that their disability did not prevent these students from learning math. The *Guckenberger* case addressed, among other things, whether the requested accommodation actually addressed the particular impairment that substantially limited the individual’s ability to participate.

In *Motto v. City of Union City*, 177 FRD at 309-10, a federal court found that the assistance of legal counsel was an “equally effective means of communication” when it denied a plaintiff’s request for learning disability specialist to paraphrase complex language. The court found it would accommodate plaintiff’s condition “simply by asking legal counsel to phrase questions in a manner which renders them more understandable.” (We discuss the role of legal counsel in greater detail below in response to Question 4.)

(4) **Is the requested accommodation an “auxiliary aid or service” that the ADA requires the court to provide?**

Under the ADA, the court must provide those “auxiliary aids and services” necessary to afford individuals with disabilities an equal opportunity to participate in judicial proceedings. 28 CFR § 35.160. The definition of “auxiliary aids and services” describes a variety of communication services and devices for persons with vision or hearing impairments, as well as the catch-all phrase: “Other similar services and actions.” 28 CFR § 35.104(4) (emphasis added). In determining what type of aids and services are necessary, the public entity must “give primary consideration to the requests of the individual with disabilities.” 28 CFR § 35.160(b)(2). Deference to the request of the individual with a
disability is desirable because of the range of disabilities, the variety of auxiliary aids and services, and different circumstances requiring effective communication. The court must honor the individual’s choice of an auxiliary aid or service unless the court can demonstrate either: (a) that another effective means of communication exists, or (b) that use of the means chosen would fundamentally alter the nature of the program. 28 CFR § 35.160 and Part 35 App A.

A familiar “auxiliary aid” is an interpreter for the hearing impaired. The Oregon Legislature has recognized the importance of providing interpreters in judicial proceedings in ORS 45.273, which provides:

It is declared to be the policy of this state to secure the constitutional rights and other rights of persons who are unable to readily understand or communicate in the English language because of a non-English speaking cultural background or a disability, and who as a result cannot be fully protected in legal proceedings unless qualified interpreters are available to provide assistance.

ORS 45.285 authorizes a court to appoint a qualified interpreter for criminal or civil proceedings if a “disabled person” is a party or witness.

Interpreters required by the ADA must be “qualified interpreters.” A “qualified interpreter” is defined as:

an interpreter who is able to interpret effectively, accurately, and impartially both receptively and expressively, using any necessary specialized vocabulary.

28 CFR § 35.104 (emphasis added).

The use of the term “process interpreter” is a misnomer. The word “interpreter” in “process interpreter” may mischaracterize the function and purpose of the “process interpreter” because interpretation may not occur. A comparison between a language or sign language interpreter and a “process interpreter” demonstrates the significant differences between them. A language or sign language interpreter directly translates from one language to another language, subject to standards of accuracy and impartiality. Similarly, transcriptions, written materials, amplifiers, closed caption, videotext displays, brailled material, audio recordings (other forms of auxiliary aids and services besides interpreters) provide accurate and impartial translation or amplification of the actual spoken or written words. Thus, the services required to be provided by a language or sign language interpreter are services that permit accurate and impartial transmittal of spoken or written words.

In contrast to any other authorized auxiliary aid or service, a “process interpreter” or cognition assistant may provide an explanation, commentary or interpretive analysis of what is said in court rather than a translation of the actual words spoken. On occasion, Oregon courts have allowed social workers and mental health professionals to “explain the proceedings” to those they are assisting which is different from interpreting the actual spoken or written words. By no means do such assistants actually provide verbatim actual and impartial interpretations. By permission of the court, or by self-initiated enthusiasm for the role, an assistant has often taken on the role of advocate, embellishing on the client’s statements by giving explanations or characterizations -- functions that would be strictly prohibited for an interpreter. Furthermore, there are no ADA standards by which to assess the qualifications of a “process interpreter” or cognition assistant.
In 1997, the Office of Civil Rights (OCR) of the United States Department of Health and Human Services investigated a complaint that the State Office for Services to Children and Families (SOSCF) had violated the ADA because, among other things, SOSCF caseworkers refused to communicate with the complainant “in a manner which is as effective as communication with others by not providing him a cognitive/psychological interpreter and notetaker so that he could understand.” Findings Letter from Floyd Plymouth, OCR Investigator, Region 10 to Gary Weeks, Director, Department of Human Resources, Docket No. 1096000111 (February 5, 1997) (Findings). The complainant was disabled by a somatoform pain disorder, schizotypal personality disorder and traumatic brain injury with a record of impairments, including head trauma, major depression and learning disorder. OCR found that SOSCF took appropriate steps to communicate with the complainant without providing him a cognitive/psychological interpreter, by conversing in normal manners of speaking, using TDD in response to his TDD calls, and providing “hands on” demonstrations rather than solely using verbal instruction. Findings, at 5. OCR further found:

Without knowing what a [cognitive] interpreter is, neither SOSCF nor OCR has an objective, reasonable method of determining whether a person serving as a [cognitive] interpreter does so effectively, accurately, and impartially.

Thus, we determine that SOSCF is not required to provide Mr. Winters a [cognitive/ psychological] interpreter in that he has not provided objective information justifying the need for such. Further we conclude that SOSCF has provided Mr. Winters appropriate auxiliary aids.

Findings at 5-6 (brackets in original). Although this OCR investigation lacks the precedential effect of a judicial finding, it provides some indicia that the federal agency charged with investigating civil rights complaints does not consider a request for a “cognitive/psychological interpreter” to equate with other auxiliary aids.

(5) Are there any other accommodations to address the requestor’s disability-related limitations?

Finally, the court should consider whether other accommodations (modifications of policies or procedures or removal of communication barriers) would address the requestor’s disability-related limitations instead of the requested accommodation. In the process of determining the facts and applying the analysis required by the ADA, the court may conclude that denial of a requested accommodation is appropriate. The denial of a particular accommodation request, however, still requires the court to determine whether an alternative accommodation would be sufficient to permit participation in the judicial proceedings. 28 CFR § 35.164. For example, a court may deny an auxiliary aid or service if it determines that another effective means of communication exists. If the assistance of counsel would be effective to assure communication and participation by the requestor, the court may deny the requested accommodation and “take any other action” to “ensure that, to the maximum extent possible, the individuals with disabilities receive the benefits or services provided by” the court. 28 CFR § 35.164. A California federal court decided that under Title II a transit authority did not have to provide real time computer-aided transcription at its meetings as long as other ADA-approved auxiliary aids or services were provided for requestors with hearing impairments. Dobard v. San Francisco Bay Area Rapid Transit Dist., No. 92-3563-DLJ (ND Ca Sept 7, 1993), 1993 WL 372256, 18 MPDLR 510, aff’d 56 F3d 71 (9th Cir 1995).
In sum, there must be a connection between the provision of an accommodation and the effect of the disability that would permit the requestor to be “qualified” to participate in the judicial proceeding. “[I]f a person is unable to participate in or meet legitimate eligibility requirements for a service, program or activity with or without reasonable modification due to his or her mental disability, there can be no discrimination finding under Title II.” MENTAL DISABILITIES AND THE ADA, supra, at 77 (emphasis added). In Southeastern Community College v. Davis, 442 US 397, 99 S Ct 2361, 60 L Ed2d 980 (1979), the Court held that a nursing school did not discriminate by denying a request for an interpreter for a woman who was deaf who, notwithstanding the availability of an interpreter, could not benefit from the services of the interpreter because she could never become a nurse. The Davis case suggests that unless the provision of a “cognition assistant” or any other accommodation would make the requestor “qualified” to participate in the proceeding, such request may be denied without discrimination.

3. Decision-Making Authority

As the foregoing discussion of accommodation criteria demonstrates, the court has substantial qualitative decision-making authority. Any request for accommodation must be considered in the specific context of both the requestor’s impairment and the extent to which the impairment creates a barrier to the requestor’s participation in the specific judicial proceedings at issue. One of the policies of the ADA is to foster individualized decision-making that is not based on stereotypes or misunderstandings about individuals with disabilities. UTCR 7.060 provides a reasonable means for apprising the court of a request for an accommodation, but the court has substantial discretion to obtain the information necessary to respond to the request.

Assuming that the requestor is a qualified individual with a disability, the court’s discretion in determining whether a process interpreter would be a meaningful accommodation is limited by the following ADA precepts:

1. Although the ADA emphasizes the individualized nature of the accommodation process, the US DOJ rules also require the court to consider the broader context of the accommodation request. Discrimination can occur under the following circumstances identified in 28 CFR § 35.130 if, for example, the court, on the basis of disability:

(a) Denies a qualified individual with a disability the opportunity to participate in or benefit from the court’s programs or services;

(b) Affords a qualified individual with a disability an opportunity to participate in or benefit from the court’s programs or services that is not equal to that afforded others;

(c) Uses criteria that screen out qualified individuals with disabilities;

(d) Limits participation in regular programs or activities, even if permissible separate programs are established;

(e) Limits a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the court programs or services; or

(f) Places a surcharge on services to individuals with disabilities.
In particular, the court must take “appropriate steps” to ensure that communications with participants with disabilities are “as effective as communications with others,” giving primary consideration to the request of the person with disabilities. 28 CFR § 160. Reasons for denial of a requested accommodation must be provided to the requestor in writing. See 28 CFR § 35.164.

2. The Judicial Department must provide a “grievance procedure” under 28 CFR § 35.107(b) “providing for prompt and equitable resolution of complaints” under the ADA.\(^\text{13}\) The ADA contains a statutory preference for informal or alternative means of dispute resolution, 42 USC § 12212, which is consistent with the requirement of a grievance procedure.

4. Effect of Representation by Counsel

Depending on the facts related to a request for a “process interpreter,” a court may determine that representation by counsel is a reasonable accommodation. The individualized nature of an accommodation request cannot be avoided, however, by adopting a blanket policy of appointing legal counsel in all cases where a “process interpreter” is requested. Moreover, there may be cases in which a party’s legal counsel is the person requesting the “process interpreter” to assist the party. Nevertheless, legal counsel’s understanding of judicial proceedings and the legal and ethical obligations of attorneys who represent clients with impairments generally makes representation by counsel an important factor in determining reasonable accommodation.

Historically, the appointment of qualified legal counsel has been sufficient to assist individuals in understanding and participating in the judicial proceedings. Counsel serves the function of advising clients about the judicial process. An attorney representing a client with a mental disability has an obligation to attempt to communicate effectively with a client who has special needs in order to determine the client’s point of view and desired action. See ZUCKERMAN, CHARMATZ, MENTAL DISABILITY LAW: A PRIMER (4th ed 1992) at 16 [hereinafter “PRIMER”]. Certain institutionalized patients who have a diagnosis of mental illness may also receive legal and protective services through the system created under the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 USC § 10841.

Attorneys are themselves generally subject to the ADA, either as a Title II public entity if their services are paid under contract or employment with the government or as a public accommodation as defined in Title III of the ADA.\(^\text{14}\) See 28 CFR Part 36. Under both Title II and Title III of the ADA, an attorney is obligated to provide reasonable accommodations, 28 CFR §§ 35.130(7), 36.302, and to “furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.” 28 CFR 35.160; 28 CFR § 36.303(c). See e.g., Cooper v. State, 565 NW2d 27, 31 (Minn App 1997), review denied (reviewing effectiveness of assistance of counsel for failure to provide sign language interpreter for meetings with hearing impaired defendant). Consequently, as a part of the attorney’s representation of a client with a mental impairment, an attorney subject to the ADA is required to provide necessary accommodations to permit the client to obtain the benefits of legal counsel, at no additional cost to the client. 28 CFR §§ 35.130(f), 36.301(c).\(^\text{15}\)

In addition, attorneys are subject to ethical constraints in the representation of impaired clients. See PRIMER, supra, at 17.\(^\text{16}\) The Oregon Code of Professional Responsibility permits an attorney to seek appointment of a guardian or to “take other protective action which is least restrictive with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client’s own interest.

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Because of the significant role of attorneys in advising clients with mental impairments about judicial proceedings as well as the legal and ethical obligations on attorneys who represent impaired clients, appointment of counsel (at no cost to the unrepresented party) may provide “other effective means of communication,” see *Motto v. City of Union City*, 177 FRD at 309-310, or an appropriate “modification of policies and procedures” in cases where the mentally impaired party does not appear to be able to understand the judicial proceedings.

5. Court-Connected Setting Outside of the Courtroom

You have also asked whether any different criteria should be used if the request is to provide a “process interpreter” accommodation to people with cognitive disabilities in court-connected settings outside of the courtroom (e.g., arbitration, mediation, pretrial release, indigence verification, Citizen Review Board hearings, public counter). In other words, is there a higher threshold or standard to meet for a courtroom proceeding?

All of the programs, services, or activities of the Judicial Department are subject to the requirements of Title II of the ADA. Under Title II, even the Judicial Department’s activities performed through contractual or other arrangements are subject to the same standards as the courts, and the Judicial Department can be held accountable for the discriminatory conduct of its component entities. Consequently, all contracts should specify that the contractor is responsible for compliance with Title II of the ADA. In addition, the various programs and activities of the Judicial Department should be able to identify the staff responsible for obtaining and scheduling interpreters or other accommodations upon request.

As with adjudicative proceedings, the nature of an accommodation will depend upon factors such as the length and complexity of the proceeding or activity, the particular function the person with a disability has in the activity, and the relationship between the disability and the disabled person’s ability to participate in that activity. An arbitration or mediation may be as lengthy and complex as a courtroom trial. In contrast, the public counter staff’s contact with a person with a disability generally may be brief and involve relatively simple issues. Nevertheless, the public counter staff are perhaps more likely to have contact with a broader spectrum of people with disabilities than other Judicial Department staff. Counter staff should be trained on how to respond to people with disabilities, how to handle alternative communication devices such as TTY devices, and how to obtain additional assistance if necessary.

Just as the criteria for determining the need for accommodation will remain constant, the Judicial Department may reasonably request persons with disabilities to provide a reasonable notification to the court-related program of the need for the accommodation. In each of the court-related programs or activities, the court should inform participants how to request accommodations, 28 CFR § 35.163; the court may also require an individual to give the program a reasonable period of time to respond to the request. We understand that the Judicial Department posts its Notice of Compliance with ADA outlining its procedures for requesting accommodations and its complaint procedures.

6. Qualifications for “Process Interpreters”

Finally you ask, assuming the Judicial Department is required to provide a “process interpreter” for
an individual with a cognitive disability at state expense, how courts should determine who is qualified to serve in that role.

The term “process interpreter” is not contained in the ADA or the US DOJ rules implementing the ADA. Unlike interpreters for the hearing impaired, there are no certification or formal qualification standards for “process interpreters” or “cognition assistants.” The Judicial Department could consult with professionals who are knowledgeable about communication issues affecting individuals with mental impairments to develop qualification standards for “cognition assistants” or “process interpreters.” Assuming for the sake of argument that a “cognition assistant” was determined to be a reasonable accommodation in a particular case, the court could make a case-by-case determination about qualifications that are appropriate, perhaps including the use of experts to make that determination.

If the “process interpreter” will be functioning similarly to other kinds of language interpreters, the court could apply standards applicable to language interpreters. The Oregon Supreme Court has promulgated a Code of Professional Responsibility for Interpreters in Oregon Courts (Code). A review of that Code suggests that these standards, while intended for non-English speaking persons or persons who have a hearing or speech impairment could be made to be applicable in the case of “process interpreters,” except for the certification standards referenced therein. To the extent that a request for a “process interpreter” requires a deviation from the specific applicability of the Code, the Code authorizes exceptions to address “unique situations.”

Sincerely,

Donald C. Arnold
Chief Counsel
General Counsel Division

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1/ For reasons discussed below, we note that the term “process interpreter” does not accurately reflect the specific function of interpreting; rather, the function appears to involve explaining or assisting the person with a cognitive disability who is involved in the court proceedings. The court may look behind the label to identify the actual function of the requested accommodation. Since the term “interpreter” has a specific meaning that does not apply to the function of explaining, we will use the term “cognition assistant” interchangeably with the term “process interpreter.”

2/ The Rehabilitation Act of 1973 (Section 504), 42 USC § 12101(b)(1) and (2), and 29 USC § 701, the predecessor of the ADA, has great substantive similarity to the ADA and these remedial laws are construed similarly. Section 504 “was the first broad federal statute aimed at eradicating discrimination against individuals with disabilities” in programs that received federal funds. Helen L. v DiDario, 46 F3d 325, 330 (3rd Cir 1995), cert denied 516 US 813, 116 S Ct 64 133 L Ed2d 26 (1995). The ADA applies to government entities regardless of their funding source. For purposes of this opinion, we construe the ADA consistently with the prior caselaw and standards developed under the Rehabilitation Act. 42 USC § 12201.

3/ See e.g., Local Rules of the First Judicial District, Rule 9 (Colorado); Rules of the Circuit Court of the Third Judicial Circuit, Rule 55 (Missouri) (written notice within 5 days of receipt of notice of the hearing, both represented and unrepresented). Maryland’s Rules of Procedure include a form with a checklist of
various kinds of accommodations that the courts may provide, including familiarization with courtroom layout, interpreter, lighting, quiet room, recesses at intervals, scheduling, small room. Rules of Procedure, 1-332 (Maryland).

* Alcoholism is defined as a “mental impairment” in the federal regulations implementing Title II of the ADA. 28 CFR § 35.104; see also ORS 430.315. Title II of the ADA, which is applicable to judicial services, does not expressly address the effect of alcoholism. In an employment setting covered by Title I of the ADA, alcoholism is not protected as a disability if it involves on-the-job drinking or working while alcohol-impaired, although a person who is receiving treatment is covered. 42 USC § 12114.

The federal rules implementing Title II expressly address illegal use of drugs in 28 CFR § 35.131. Title II protects persons who participate in or have completed supervised drug rehabilitation program and no longer use drugs illegally, but it does not protect “current” drug users, even if a licensed physician were to conclude that the individual’s drug use was due to a disease. 28 CFR § 35.131. “Current” illegal use of drugs means use that occurred recently enough to justify a belief that the person’s illegal drug use is a continuing problem. 28 CFR § 35.104. Therefore, when illegal drug use is the cause of the requestor’s alleged mental impairment, the ADA does not require the court to provide any accommodation.

In addition, persons who have disabilities that pose a “direct threat” are not covered by the ADA. 28 CFR Part 35 App A; cf. 28 CFR § 36.208. A “direct threat” is a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures, or by the provision of auxiliary aids and services. As for determining whether a person poses a direct threat, the US DOJ notes:

The determination that a person poses a direct threat to the health or safety of others may not be based on generalizations or stereotypes about the effects of a particular disability. It must be based on an individualized assessment, based on reasonable judgment that relies on current medical evidence, or the best available objective evidence, to determine: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures will mitigate the risk. * * *

Making this assessment will not usually require the services of a physician. Sources for medical knowledge include guidance from public health authorities * * * .

28 CFR Part 35 App A.

* Appendix A of 28 CFR Part 35 explains:

The perception of the covered entity is a key element of this test. A person who perceives himself or herself to have an impairment, but does not have an impairment, and is not treated as if he or she has an impairment, is not protected under this test.

* * * * *

The rationale for this third test * * * was articulated by the Supreme Court in [School Board of Naussau County v. Arline]. The Court noted that although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. * * * The Court concluded that, * * * “Congress acknowledged that society’s accumulated myths and fears about disability * * are as handicapping as are the physical limitations that flow from actual impairment.”
Individuals alleging a disability protected by the ADA have the burden of establishing with medical evidence the existence of the alleged disability. See Kalekristos v. CTF Hotel Management Corp., 958 F Supp 641, 657 (DDC 1997). After a person has been determined to have a disability and to require accommodation, the United States Department of Justice rules provide that:

(f) A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.

28 CFR § 35.130(f) (emphasis added). The federal commentary explains:

Such measures may include the provision of auxiliary aids or of modifications required to provide program accessibility.

*** The Department has already recognized that imposition of the cost of courtroom interpreter services is impermissible under section 504. *** [W]here a court system has an obligation to provide qualified interpreters, “it has the corresponding responsibility to pay for the services of the interpreters.”

28 CFR Part 35 Appendix A (citations omitted). Until the person requesting accommodation has sufficiently demonstrated to the court that he or she is a qualified individual with a disability and the need for accommodation, the court has no obligation under the ADA. Consequently, we do not believe that the court is required by the ADA to bear the costs of obtaining documentation related to the existence of a disability or the need for accommodation.

The court is not required to provide “personal services” to a person with a disability. 28 CFR § 35.135 provides:

This part does not require a public entity to provide to individuals with disabilities personal devices, such as wheelchairs; individually prescribed devices, such as prescription eyeglasses or hearing aids; readers for personal use or study; or services of a personal nature including assistance in eating, toileting or dressing.

In McCauley v. Winegarden, 60 F3d 766 (11th Cir 1995), the court held that a defendant’s request that the trial court create a “filtered environment” (“life support systems,” “required medical aids” and “additional medical aids”) to accommodate a person with multiple chemical sensitivities was equivalent to requiring the court to provide “personal devices,” which was not required by the ADA.

Depending on the facts, the requested use of a “process interpreter” may really be a personal service in the nature of an attendant, and not fundamentally different than an attendant employed for the purpose of aiding with eating or toileting. A court could conclude that the ADA does not require it to provide a “process interpreter” or “cognition assistant” any more than the courts are required to provide a personal attendant for judicial proceedings.

One circuit court has held that this burden, at least with regard to modifications in the workplace, is only a “burden of production” and, as such, “is not a heavy one.” Borkowski v. Valley Cent. School Dist., 63 F3d 131, 138 (2nd Cir 1995) (finding that “[i]t is enough for the plaintiff to suggest the existence of a

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plausible accommodation, the costs of which, facially, do not clearly exceed its benefits").

10 The ADA defines “auxiliary aids and services” as including:

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

42 USC § 12102(1).

11 Even though the regulations and commentary have limited the concept of “auxiliary aids and services” to aural and visual communication disorders, 28 CFR § 35.104, App A, the American Bar Association Commission (ABA) on Mental and Physical Disability Law historically has advocated for a broader application of that term to include other kinds of communication disabilities. Nonetheless, the ABA acknowledges that “it is more difficult to conceptualize which aids and services would benefit various mental disabilities,” MENTAL DISABILITIES AND THE ADA, supra, at 16, and no court to date has expressly endorsed this particular interpretation of the federal regulation.

12 ORS 45.285 defines “disabled person” as:

a person who cannot readily understand the proceedings because of deafness or a physical hearing impairment, or cannot communicate in the proceedings because of a physical speaking impairment.

ORS 45.285(4)(b). This definition does not include a person with a mental impairment, although a person with a mental impairment may also have a hearing or other physical impairment that would qualify him or her for a hearing or speaking interpreter.

13 Your office informs us that the Judicial Department’s grievance procedure is posted and available at each court location. This procedure includes contact information for the Department’s state-wide ADA coordinator, as well as the ADA coordinator and ADA grievance contact for each court location.

14 Title III of the ADA only applies to businesses with 15 or more employees, so a small law office may not be subject to Title III. Oregon law prohibits discrimination against disabled persons by places of public accommodation, regardless of size. ORS 659.425(4). Oregon law does not thereby make a small law office subject to the ADA.

15 Court-appointed counsel may seek reimbursement for accommodations provided to qualified individuals with disabilities. Assuming a court receives such a request, the court should follow the same analysis used in this opinion to determine whether the request should be granted.

16 For example, the American Bar Association explains that its Model Rules of Professional Conduct
state that “if a client’s ability to make adequately considered decisions in connection with the representation is impaired ... because of ... mental disability ... the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.” (Rule 1.14) The Comment to the rule states that the lawyer-client relationship is based on the assumption that clients, when properly advised and assisted, are capable of making decisions about important matters. “When the client ... suffers from a mental disorder or disability, however, maintaining the ordinary client-lawyer relationship may not be possible in all respects ... Nevertheless, a client lacking legal competence often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being.” This Rule advises that attorneys “may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes the client cannot adequately act in the client’s own interest.”


17 This aspect of the ADA is much broader than the interpreter requirements of ORS 45.285, which are limited to “civil or criminal proceedings, including a court-ordered deposition if no other person is responsible for providing an interpreter.”

18 Courts have held that under the ADA, liability may be imposed on a principal for the statutory violations of its agents. See Rosen v. Montgomery County Maryland, 121 F3d 154 n 3 (4th Cir 1997) and cases cited therein.

The ADA regulations require “a public entity that employs 50 or more persons” to designate an ADA coordinator and to establish an ADA grievance procedure. 28 CFR § 35.107. See, e.g., Utah Code of Judicial Administration, Rule 3-417 (appointing ADA coordinator and describing ADA complaint procedure). The State Court Administrator’s Office should inform all of the programs sponsored by the courts about the ADA coordinator and any available grievance procedure.

APPENDIX

Suggested Inquiries for Evaluating Whether a Person Has a Disability, Whether that Person Is “Qualified” to Participate and Whether a Reasonable Accommodation Must Be Provided

A. Is there a disability?

1. Does the requestor have a perceived or diagnosed mental impairment (present or past), and if so, what is the nature and severity of the impairment?

2. Does the perceived or diagnosed mental impairment substantially limit the requestor’s ability to participate in a major life activity in comparison to most people in the general population?

3. Does the reaction of others to the perceived or diagnosed mental impairment limit the requestor’s ability to participate in a major life activity in comparison to most people in the
B. Is the individual a “qualified individual”?

1. What are the essential functions of participating in the particular judicial proceeding?

2. Based upon the person’s daily activities, is the impairment a barrier to actually understanding or participating in the judicial proceeding?

3. Does the individual rely upon the requested accommodation, or other accommodations, for ordinary activities?

4. Can this individual with a disability meet the essential functions for participation in the particular judicial proceeding with or without reasonable accommodation?

C. Is a requested accommodation appropriate?

1. Is the requested accommodation a reasonable modification of judicial policies, practices or procedures?

2. How does the requested accommodation address the particular mental impairment or other disability that substantially limits the requestor’s ability to participate in the judicial proceeding and, in particular, will a requested accommodation render the requestor qualified to participate?

3. Is the requested accommodation an “auxiliary aid or service” that the ADA requires the court to provide?

4. Is the requested accommodation a “personal” device or service that the court is not required to provide?

5. Are there any other accommodations (modifications of policies or procedures, removal of communication barriers or in some cases, appointment of counsel) that will address the requestor’s limitations instead of the requested accommodation?
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