

(Including Amendments to Resolve Conflicts)

C-Engrossed House Bill 2651

Ordered by the Senate June 21
Including House Amendments dated April 20 and Senate Amendments
dated June 6 and June 21

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Association Chiefs of Police, Portland Police Bureau)

SUMMARY

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

Exempts law enforcement officers from crime of failing to disclose to participants that conversation is being recorded unless officer has reasonable opportunity to inform participants that conversation is being obtained. Exempts law enforcement officers deploying tasers with built-in monitoring systems from crime of failing to disclose to participants that conversation is being recorded.

Specifies effect of out-of-state convictions related to driving under influence of intoxicants on defendant in Oregon with respect to calculation of enhanced penalties for prior convictions.

Provides that defendant with felony conviction of driving under influence of intoxicants from Oregon or another state is ineligible to participate in diversion program.

A BILL FOR AN ACT

1
2 Relating to crime; amending ORS 135.240, 165.540, 165.542, 809.235, 809.730, 813.010, 813.215, 813.220
3 and 813.430.

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

5 **SECTION 1.** ORS 165.540 is amended to read:

6 165.540. (1) Except as otherwise provided in ORS 133.724 or 133.726 or subsections (2) to (7) of
7 this section, a person may not:

8 (a) Obtain or attempt to obtain the whole or any part of a telecommunication or a radio com-
9 munication to which the person is not a participant, by means of any device, contrivance, machine
10 or apparatus, whether electrical, mechanical, manual or otherwise, unless consent is given by at
11 least one participant.

12 (b) Tamper with the wires, connections, boxes, fuses, circuits, lines or any other equipment or
13 facilities of a telecommunication or radio communication company over which messages are trans-
14 mitted, with the intent to obtain unlawfully the contents of a telecommunication or radio communi-
15 cation to which the person is not a participant.

16 (c) Obtain or attempt to obtain the whole or any part of a conversation by means of any device,
17 contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all
18 participants in the conversation are specifically informed that their conversation is being obtained.

19 (d) Obtain the whole or any part of a conversation, telecommunication or radio communication
20 from any person, while knowing or having good reason to believe that the conversation, telecom-
21 munication or radio communication was initially obtained in a manner prohibited by this section.

22 (e) Use or attempt to use, or divulge to others, any conversation, telecommunication or radio

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

1 communication obtained by any means prohibited by this section.

2 (2)(a) The prohibitions in subsection (1)(a), (b) and (c) of this section do not apply to:

3 (A) Officers, employees or agents of a telecommunication or radio communication company who
4 perform the acts prohibited by subsection (1)(a), (b) and (c) of this section for the purpose of con-
5 struction, maintenance or conducting of their telecommunication or radio communication service,
6 facilities or equipment.

7 (B) Public officials in charge of and at jails, police premises, sheriffs' offices, Department of
8 Corrections institutions and other penal or correctional institutions, except as to communications
9 or conversations between an attorney and the client of the attorney.

10 (b) Officers, employees or agents of a telecommunication or radio communication company who
11 obtain information under paragraph (a) of this subsection may not use or attempt to use, or divulge
12 to others, the information except for the purpose of construction, maintenance, or conducting of
13 their telecommunication or radio communication service, facilities or equipment.

14 (3) The prohibitions in subsection (1)(a), (b) or (c) of this section do not apply to subscribers or
15 members of their family who perform the acts prohibited in subsection (1) of this section in their
16 homes.

17 (4) The prohibitions in subsection (1)(a) of this section do not apply to the receiving or obtaining
18 of the contents of any radio or television broadcast transmitted for the use of the general public.

19 (5) The prohibitions in subsection (1)(c) of this section do not apply to:

20 (a) A person who records a conversation during a felony that endangers human life[.];

21 **(b) A law enforcement officer who is in uniform and displaying a badge and who is oper-**
22 **ating a vehicle-mounted video camera that records the scene in front of, within or sur-**
23 **rounding a police vehicle, unless the officer has reasonable opportunity to inform**
24 **participants in the conversation that the conversation is being obtained; or**

25 **(c) A law enforcement officer who, acting in the officer's official capacity, deploys an**
26 **Electro-Muscular Disruption Technology device that contains a built-in monitoring system**
27 **capable of recording audio or video, for the duration of that deployment.**

28 (6) The prohibitions in subsection (1)(c) of this section do not apply to persons who intercept
29 or attempt to intercept with an unconcealed recording device the oral communications that are part
30 of any of the following proceedings:

31 (a) Public or semipublic meetings such as hearings before governmental or quasi-governmental
32 bodies, trials, press conferences, public speeches, rallies and sporting or other events;

33 (b) Regularly scheduled classes or similar educational activities in public or private institutions;
34 or

35 (c) Private meetings or conferences if all others involved knew or reasonably should have known
36 that the recording was being made.

37 (7) The prohibitions in subsection (1)(a), (c), (d) and (e) of this section do not apply to any:

38 (a) Radio communication that is transmitted by a station operating on an authorized frequency
39 within the amateur or citizens bands; or

40 (b) Person who intercepts a radio communication that is transmitted by any governmental, law
41 enforcement, civil defense or public safety communications system, including police and fire, readily
42 accessible to the general public provided that the interception is not for purposes of illegal activity.

43 (8) Violation of subsection (1) or (2)(b) of this section is a Class A misdemeanor.

44 **(9) As used in this section:**

45 **(a) "Electro-Muscular Disruption Technology device" means a device that uses a high-**

1 **voltage, low power charge of electricity to induce involuntary muscle contractions intended**
2 **to cause temporary incapacitation. “Electro-Muscular Disruption Technology device” in-**
3 **cludes devices commonly known as tasers.**

4 **(b) “Law enforcement officer” has the meaning given that term in ORS 133.726.**

5 **SECTION 2.** ORS 165.542 is amended to read:

6 165.542. (1) Within 30 days after the use of an electronic listening device under ORS 133.726 (7)
7 or 165.540 (5)(a), the law enforcement agency using the device shall report to the district attorney
8 of the county in the agency’s jurisdiction:

9 (a) The number of uses of the device and duration of the interceptions made by the law
10 enforcement agency;

11 (b) The offense investigated;

12 (c) The identity of the law enforcement agency intercepting the communication; and

13 (d) Whether the person wearing the device was a law enforcement officer or a person under the
14 supervision of the officer and the number of persons in each category who wore the device.

15 (2) During January of each year, the district attorney of a county in which electronic listening
16 devices were used under ORS 133.726 (7) or 165.540 (5)(a) shall report to the Department of Justice:

17 (a) The information required by subsection (1) of this section with respect to the use of elec-
18 tronic listening devices during the preceding calendar year; and

19 (b) The aggregate number of instances in which electronic listening devices have been used in
20 the county under ORS 133.726 (7) or 165.540 (5)(a) during the preceding calendar year.

21 (3) The law enforcement agency shall include as part of the case file any use of electronic lis-
22 tening devices under ORS 133.726 (7) or 165.540 (5)(a).

23 (4) During April of each odd-numbered calendar year, the Department of Justice shall transmit
24 to the Legislative Assembly a report including a summary of the information required by subsections
25 (1) and (2) of this section.

26 (5) Failure to comply with the reporting requirements of this section shall not affect the
27 admissibility of evidence.

28 **SECTION 3.** ORS 813.010 is amended to read:

29 813.010. (1) A person commits the offense of driving while under the influence of intoxicants if
30 the person drives a vehicle while the person:

31 (a) Has 0.08 percent or more by weight of alcohol in the blood of the person as shown by
32 chemical analysis of the breath or blood of the person made under ORS 813.100, 813.140 or 813.150;

33 (b) Is under the influence of intoxicating liquor, a controlled substance or an inhalant; or

34 (c) Is under the influence of any combination of intoxicating liquor, an inhalant and a controlled
35 substance.

36 (2) A person may not be convicted of driving while under the influence of intoxicants on the
37 basis of being under the influence of a controlled substance or an inhalant unless the fact that the
38 person was under the influence of a controlled substance or an inhalant is pleaded in the accusatory
39 instrument and is either proved at trial or is admitted by the person through a guilty plea.

40 (3) A person convicted of the offense described in this section is subject to ORS 813.020 in ad-
41 dition to this section.

42 (4) Except as provided in subsection (5) of this section, the offense described in this section,
43 driving while under the influence of intoxicants, is a Class A misdemeanor and is applicable upon
44 any premises open to the public.

45 (5)(a) Driving while under the influence of intoxicants is a Class C felony if **the current of-**

1 **fense was committed in a motor vehicle and** the defendant has been convicted [*of*], **at least**
2 **three times in the 10 years prior to the date of the current offense, of any of the following**
3 **offenses in any combination:**

4 (A) Driving while under the influence of intoxicants in violation of:

5 (i) This section; or

6 (ii) [*Its*] **The** statutory counterpart **to this section** in another jurisdiction.

7 (B) **A driving under the influence of intoxicants offense in another jurisdiction that in-**
8 **involved the impaired driving or operation of a vehicle, an aircraft or a boat due to the use**
9 **of intoxicating liquor, a controlled substance, an inhalant or any combination thereof.**

10 (C) **A driving offense in another jurisdiction that involved operating a vehicle, an aircraft**
11 **or a boat while having a blood alcohol content above that jurisdiction's permissible blood al-**
12 **cohol content.** [*at least three times in the 10 years prior to the date of the current offense and the*
13 *current offense was committed in a motor vehicle. For purposes of this subsection, a prior conviction*
14 *for boating while under the influence of intoxicants in violation of ORS 830.325 or its statutory*
15 *counterpart in another jurisdiction, or for prohibited operation of an aircraft in violation of ORS*
16 *837.080 (1)(a) or its statutory counterpart in another jurisdiction, shall be considered a prior conviction*
17 *of driving while under the influence of intoxicants.*]

18 (b) **For the purposes of paragraph (a) of this subsection, a conviction for a driving offense**
19 **in another jurisdiction based solely on a person under 21 years of age having a blood alcohol**
20 **content that is lower than the permissible blood alcohol content in that jurisdiction for a**
21 **person 21 years of age or older does not constitute a prior conviction.**

22 (6) In addition to any other sentence that may be imposed, the court shall impose a fine on a
23 person convicted of driving while under the influence of intoxicants as follows:

24 (a) For a person's first conviction, a minimum of \$1,000.

25 (b) For a person's second conviction, a minimum of \$1,500.

26 (c) For a person's third or subsequent conviction, a minimum of \$2,000 if the person is not sen-
27 tenced to a term of imprisonment.

28 (7) Notwithstanding ORS 161.635, \$10,000 is the maximum fine that a court may impose on a
29 person convicted of driving while under the influence of intoxicants if:

30 (a) The current offense was committed in a motor vehicle; and

31 (b) There was a passenger in the motor vehicle who was under 18 years of age and was at least
32 three years younger than the person driving the motor vehicle.

33 **SECTION 4.** ORS 809.235 is amended to read:

34 809.235. (1)(a) Notwithstanding ORS 809.409 (2), the court shall order that a person's driving
35 privileges be permanently revoked if the person is convicted of any degree of murder or of
36 manslaughter in the first degree and the court finds that the person intentionally used a motor ve-
37 hicle as a dangerous weapon resulting in the death of the victim.

38 (b) The court shall order that a person's driving privileges be permanently revoked if the person
39 is convicted of felony driving while under the influence of intoxicants in violation of ORS 813.010
40 or if the person is convicted [*of misdemeanor*] **for a third or subsequent time of any of the fol-**
41 **lowing offenses in any combination:**

42 (A) Driving while under the influence of intoxicants in violation of:

43 (i) ORS 813.010; or

44 (ii) [*Its*] **The** statutory counterpart **to ORS 813.010** in **another** [*any other*] jurisdiction. [*for a*
45 *third or subsequent time.*]

1 **(B) A driving under the influence of intoxicants offense in another jurisdiction that in-**
2 **volved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled**
3 **substance, an inhalant or any combination thereof.**

4 **(C) A driving offense in another jurisdiction that involved operating a vehicle while hav-**
5 **ing a blood alcohol content above that jurisdiction's permissible blood alcohol content.**

6 **(c) For the purposes of paragraph (b) of this subsection, a conviction for a driving offense**
7 **in another jurisdiction based solely on a person under 21 years of age having a blood alcohol**
8 **content that is lower than the permissible blood alcohol content in that jurisdiction for a**
9 **person 21 years of age or older does not constitute a prior conviction.**

10 (2)(a) A person whose driving privileges are revoked as described in subsection (1) of this sec-
11 tion may file a petition in the circuit court of the county in which the person resides for an order
12 restoring the person's driving privileges. A petition may be filed under this subsection no sooner
13 than 10 years after the person is:

14 (A) Released on parole or post-prison supervision; or

15 (B) Sentenced to probation if the probation is not revoked and the person is thereafter dis-
16 charged without the imposition of a sentence of imprisonment.

17 (b) The district attorney of the county in which the person resides shall be named and served
18 as the respondent in the petition.

19 (3) The court shall hold a hearing on a petition filed in accordance with subsection (2) of this
20 section. In determining whether to grant the petition, the court shall consider:

21 (a) The nature of the offense for which driving privileges were revoked.

22 (b) The degree of violence involved in the offense.

23 (c) Other criminal and relevant noncriminal behavior of the petitioner both before and after the
24 conviction that resulted in the revocation.

25 (d) The recommendation of the person's parole officer, which shall be based in part on a psy-
26 chological evaluation ordered by the court to determine whether the person is presently a threat to
27 the safety of the public.

28 (e) Any other relevant factors.

29 (4) If, after a hearing described in subsection (3) of this section, the court is satisfied by clear
30 and convincing evidence that the petitioner is rehabilitated and that the petitioner does not pose a
31 threat to the safety of the public, the court shall order the petitioner's driving privileges restored.

32 **SECTION 5.** ORS 809.730 is amended to read:

33 809.730. (1) A motor vehicle may be seized and forfeited if the person operating the vehicle is
34 arrested or issued a citation for driving while under the influence of intoxicants in violation of ORS
35 813.010 and the person, within three years prior to the arrest or issuance of the citation, has been
36 convicted of:

37 (a) Driving while under the influence of intoxicants in violation of:

38 **(A)** ORS 813.010[.]; or

39 **(B)** [Its] **The** statutory counterpart to **ORS 813.010** in another jurisdiction; [or]

40 **(b) A driving under the influence of intoxicants offense in another jurisdiction that in-**
41 **volved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled**
42 **substance, an inhalant or any combination thereof;**

43 **(c) A driving offense in another jurisdiction that involved operating a vehicle while having**
44 **a blood alcohol content above that jurisdiction's permissible blood alcohol content; or**

45 [(b)] **(d)** Murder, manslaughter, criminally negligent homicide or assault that resulted from the

1 operation of a motor vehicle in this state or in another jurisdiction.

2 **(2) For the purposes of subsection (1) of this section, a conviction for a driving offense**
3 **in another jurisdiction based solely on a person under 21 years of age having a blood alcohol**
4 **content that is lower than the permissible blood alcohol content in that jurisdiction for a**
5 **person 21 years of age or older does not constitute a prior conviction.**

6 [(2)] (3) All seizure and forfeiture proceedings under this section shall be conducted in accord-
7 ance with ORS chapter 475A.

8 **SECTION 6.** ORS 813.215 is amended to read:

9 813.215. (1) A defendant is eligible for diversion if:

10 [(1)] (a) **On the date the defendant filed the petition for a driving while under the influ-**
11 **ence of intoxicants diversion agreement,** the defendant had no charge [of], **other than the**
12 **charge for the present offense, pending for:**

13 (A) An offense of driving while under the influence of intoxicants **in violation of:**

14 (i) **ORS 813.010;** or

15 (ii) *[Its] The statutory counterpart to ORS 813.010 in [any] another jurisdiction[, other than the*
16 *charge for the present offense, pending on the date the defendant filed the petition for a driving while*
17 *under the influence of intoxicants diversion agreement];*

18 (B) **A driving under the influence of intoxicants offense in another jurisdiction that in-**
19 **volved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled**
20 **substance, an inhalant or any combination thereof; or**

21 (C) **A driving offense in another jurisdiction that involved operating a vehicle while hav-**
22 **ing a blood alcohol content above that jurisdiction's permissible blood alcohol content;**

23 [(2)] (b) The defendant has not been convicted of an offense described in **paragraph (a) of this**
24 subsection [(1) of this section] within the period beginning 10 years before the date of the commission
25 of the present offense and ending on the date the defendant filed the petition for a driving while
26 under the influence of intoxicants diversion agreement;

27 (c) **The defendant has not been convicted of a felony offense described in ORS 813.010**
28 **(5)(a);**

29 [(3)] (d) The defendant was not participating in a driving while under the influence of
30 intoxicants diversion program or in any similar alcohol or drug rehabilitation program, other than
31 a program entered into as a result of the charge for the present offense, in this state or in [any
32 other] **another** jurisdiction on the date the defendant filed the petition for a driving while under the
33 influence of intoxicants diversion agreement;

34 [(4)] (e) The defendant did not participate in a diversion or rehabilitation program described in
35 **paragraph (d) of this** subsection [(3) of this section], other than a program entered into as a result
36 of the charge for the present offense, within the period beginning 10 years before the date of the
37 commission of the present offense and ending on the date the defendant filed the petition for a
38 driving while under the influence of intoxicants diversion agreement;

39 [(5)] (f) The defendant had no charge of an offense of murder, manslaughter, criminally negligent
40 homicide or assault that resulted from the operation of a motor vehicle pending in this state or in
41 [any other] **another** jurisdiction on the date the defendant filed the petition for a driving while un-
42 der the influence of intoxicants diversion agreement;

43 [(6)] (g) The defendant has not been convicted of an offense described in **paragraph (f) of this**
44 subsection [(5) of this section] within the period beginning 10 years before the date of the commission
45 of the present offense and ending on the date the defendant filed the petition for a driving while

1 under the influence of intoxicants diversion agreement;

2 [(7)] (h) The defendant did not have a commercial driver license at the time of the offense;

3 [(8)] (i) The defendant was not operating a commercial motor vehicle at the time of the offense;
4 and

5 [(9)] (j) The present driving while under the influence of intoxicants offense did not involve an
6 accident resulting in:

7 [(a)] (A) Death of any person other than the defendant; or

8 [(b)] (B) Physical injury as defined in ORS 161.015 to any person other than the defendant.

9 **(2) For the purposes of subsection (1)(a) of this section, a conviction for a driving offense**
10 **in another jurisdiction based solely on a person under 21 years of age having a blood alcohol**
11 **content that is lower than the permissible blood alcohol content in that jurisdiction for a**
12 **person 21 years of age or older does not constitute a prior conviction.**

13 **SECTION 7.** ORS 813.220 is amended to read:

14 813.220. After the time for requesting a hearing under ORS 813.210 has expired with no request
15 for a hearing, or after a hearing requested under ORS 813.210, the court shall determine whether
16 to allow or deny a petition for a driving while under the influence of intoxicants diversion agree-
17 ment. In making a determination under this section, the court:

18 (1) Shall consider whether the diversion will be of benefit to the defendant and the community.

19 (2) May take into consideration whether there was an early recognition by the defendant during
20 the proceeding that a course of diagnosis and treatment of problem drinking, alcoholism or drug
21 dependency would be beneficial.

22 (3) May take into consideration whether there is a probability that the defendant will cooperate
23 with the diagnostic assessment and treatment agencies.

24 (4) May take into consideration whether the defendant will observe the restrictions contained
25 in the diversion agreement.

26 (5) May take into consideration whether the offense was committed in a motor vehicle and
27 whether there was a passenger in the motor vehicle who was under 18 years of age and at least
28 three years younger than the defendant.

29 (6) Shall deny the petition for a driving while under the influence of intoxicants diversion
30 agreement if the defendant failed to appear at an arraignment on the present offense without good
31 cause.

32 (7) Shall deny the petition for a driving while under the influence of intoxicants diversion
33 agreement if, **after the date the defendant filed the petition**, the defendant was charged with or
34 convicted of:

35 (a) An offense of driving while under the influence of intoxicants **in violation of:**

36 (A) **ORS 813.010**; or

37 (B) *[Its]* **The** statutory counterpart to **ORS 813.010** in *[any]* **another** jurisdiction; *[after the date*
38 *the defendant filed the petition]*

39 (b) **A driving under the influence of intoxicants offense in another jurisdiction that in-**
40 **involved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled**
41 **substance, an inhalant or any combination thereof; or**

42 (c) **A driving offense in another jurisdiction that involved operating a vehicle while having**
43 **a blood alcohol content above that jurisdiction's permissible blood alcohol content.**

44 (8) Shall deny the petition for a driving while under the influence of intoxicants diversion
45 agreement if the defendant participated in a driving while under the influence of intoxicants diver-

1 sion program or in any similar alcohol or drug rehabilitation program, other than a program entered
2 into as a result of the charge for the present offense, in this state or in [*any other*] **another** juris-
3 diction after the date the defendant filed the petition.

4 (9) Shall deny the petition for a driving while under the influence of intoxicants diversion
5 agreement if the defendant was charged with or convicted of an offense of murder, manslaughter,
6 criminally negligent homicide or assault that resulted from the operation of a motor vehicle in this
7 state or in [*any other*] **another** jurisdiction after the date the defendant filed the petition.

8 **(10) Shall deny the petition for a driving while under the influence of intoxicants diver-**
9 **sion agreement if the defendant has been convicted of a felony offense described in ORS**
10 **813.010 (5)(a).**

11 **(11) For the purposes of subsection (7) of this section, may not consider a conviction for**
12 **a driving offense in another jurisdiction based solely on a person under 21 years of age having**
13 **a blood alcohol content that is lower than the permissible blood alcohol content in that ju-**
14 **risdiction for a person 21 years of age or older as a prior conviction.**

15 **SECTION 8.** ORS 813.430 is amended to read:

16 813.430. This section establishes circumstances under which ORS 813.420 requires an increase
17 in the time for suspension of driving privileges and under which ORS 813.520 requires an increase
18 in the time before the Department of Transportation may issue a hardship permit. A person is sub-
19 ject to an increase in suspension time under this section if any of the following apply:

20 (1) The person is presently participating in a driving while under the influence of intoxicants
21 diversion program in this state or in any similar alcohol or drug rehabilitation program in this or
22 [*any other*] **another** jurisdiction.

23 (2) Within the five years preceding the date of arrest any of the following occurred:

24 (a) A suspension of the person's driving privileges under ORS 813.410 or 482.540 (1981 Replace-
25 ment Part) became effective.

26 (b) The person was convicted of:

27 **(A) Driving while** under the influence of intoxicants in violation of:

28 **(i) ORS 813.010; [or]**

29 **(ii) [Its] The** statutory counterpart to **ORS 813.010** in another jurisdiction; or

30 **(iii) A municipal ordinance in this state or another jurisdiction;**

31 **(B) A driving under the influence of intoxicants offense in another jurisdiction that in-**
32 **volved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled**
33 **substance, an inhalant or any combination thereof; or**

34 **(C) A driving offense in another jurisdiction that involved operating a vehicle while hav-**
35 **ing a blood alcohol content above that jurisdiction's permissible blood alcohol content.**

36 (c) The person commenced participating in a driving while under the influence of intoxicants
37 diversion program in this state or in any similar alcohol or drug rehabilitation program in this or
38 [*any other*] **another** jurisdiction.

39 **(3) For the purposes of subsection (2)(b) of this section, a conviction for a driving offense**
40 **in another jurisdiction based solely on a person under 21 years of age having a blood alcohol**
41 **content that is lower than the permissible blood alcohol content in that jurisdiction for a**
42 **person 21 years of age or older does not constitute a prior conviction.**

43 **SECTION 9.** If House Bill 2138 becomes law, ORS 135.240, as amended by section 1, chapter
44 194, Oregon Laws 2007 (Enrolled House Bill 2138), is amended to read:

45 135.240. (1) Except as provided in subsections (2), (4) and (5) of this section, a defendant shall

1 be released in accordance with ORS 135.230 to 135.290.

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

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

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

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

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

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

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

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

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

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

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

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

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

34 (5)(a) *[If the United States Constitution or the Oregon Constitution prohibits application of sub-*
35 *section (4) of this section, then]* Notwithstanding any other provision of law, the court shall set a
36 security amount of not less than \$50,000 for a defendant charged with *[a violent felony]* **an offense**
37 **listed in ORS 137.700 or 137.707 unless the court determines that amount to be unconstitu-**
38 **tionally excessive**, and may not release the defendant on any form of release other than a security
39 release[.] **if:**

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

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

44 **(C) The court finds that the offense is not a violent felony.**

45 **(b) In addition to the security amount described in paragraph (a) of this subsection, the court**

1 may impose any supervisory conditions deemed necessary for the protection of the victim and the
2 community. When a defendant who has been released violates a condition of release and the vio-
3 lation:

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

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

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

12 **SECTION 10. If House Bill 2268 becomes law, section 6 of this 2007 Act (amending ORS**
13 **813.215) is repealed and ORS 813.215, as amended by section 11, chapter 122, Oregon Laws 2007**
14 **(Enrolled House Bill 2268), is amended to read:**

15 813.215. (1) A defendant is eligible for diversion if the defendant meets all of the following
16 conditions:

17 [(1)] (a) **On the date the defendant filed the petition for a driving while under the influ-**
18 **ence of intoxicants diversion agreement**, the defendant had no charge [of], **other than the**
19 **charge for the present offense, pending for:**

20 (A) An offense of driving while under the influence of intoxicants **in violation of:**

21 (i) **ORS 813.010**; or

22 (ii) [Its] **The** statutory counterpart **to ORS 813.010** in [any] **another** jurisdiction[, *other than the*
23 *charge for the present offense, pending on the date the defendant filed the petition for a driving while*
24 *under the influence of intoxicants diversion agreement*];

25 (B) **A driving under the influence of intoxicants offense in another jurisdiction that in-**
26 **volved the impaired driving of a vehicle due to the use of intoxicating liquor, a controlled**
27 **substance, an inhalant or any combination thereof; or**

28 (C) **A driving offense in another jurisdiction that involved operating a vehicle while hav-**
29 **ing a blood alcohol content above that jurisdiction’s permissible blood alcohol content.**

30 [(2)] (b) The defendant has not been convicted of an offense described in **paragraph (a) of this**
31 subsection [(1) of this section] within the period beginning 10 years before the date of the commission
32 of the present offense and ending on the date the defendant filed the petition for a driving while
33 under the influence of intoxicants diversion agreement.

34 (c) **The defendant has not been convicted of a felony offense described in ORS 813.010**
35 **(5)(a).**

36 [(3)] (d) The defendant was not participating in a driving while under the influence of
37 intoxicants diversion program or in any similar alcohol or drug rehabilitation program, other than
38 a program entered into as a result of the charge for the present offense, in this state or in [any
39 other] **another** jurisdiction on the date the defendant filed the petition for a driving while under the
40 influence of intoxicants diversion agreement.

41 [(4)] (e) The defendant did not participate in a diversion or rehabilitation program described in
42 **paragraph (d) of this** subsection [(3) of this section], other than a program entered into as a result
43 of the charge for the present offense, within the period beginning 10 years before the date of the
44 commission of the present offense and ending on the date the defendant filed the petition for a
45 driving while under the influence of intoxicants diversion agreement.

1 [(5) (f) The defendant had no charge of an offense of murder, manslaughter, criminally negligent
2 homicide or assault that resulted from the operation of a motor vehicle pending in this state or in
3 *any other* **another** jurisdiction on the date the defendant filed the petition for a driving while un-
4 der the influence of intoxicants diversion agreement.

5 [(6) (g) The defendant has not been convicted of an offense described in **paragraph (f) of this**
6 subsection [(5) of this section] within the period beginning 10 years before the date of the commission
7 of the present offense and ending on the date the defendant filed the petition for a driving while
8 under the influence of intoxicants diversion agreement.

9 [(7) (h) The defendant did not hold a commercial driver license on the date of the commission
10 of the offense.

11 [(8) (i) The defendant was not operating a commercial motor vehicle at the time of the offense.

12 [(9) (j) The present driving while under the influence of intoxicants offense did not involve an
13 accident resulting in:

14 [(a) (A) Death of any person; or

15 [(b) (B) Physical injury as defined in ORS 161.015 to any person other than the defendant.

16 **(2) For the purposes of subsection (1)(a) of this section, a conviction for a driving offense**
17 **in another jurisdiction based solely on a person under 21 years of age having a blood alcohol**
18 **content that is lower than the permissible blood alcohol content in that jurisdiction for a**
19 **person 21 years of age or older does not constitute a prior conviction.**

20