

# House Bill 3341

Sponsored by COMMITTEE ON JUDICIARY

## 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 **as introduced**.

Modifies ability of court to impose less than mandatory minimum sentence for certain offenses under certain circumstances.

Authorizes resentencing of defendants previously ineligible for lesser sentence with consent of district attorney.

## A BILL FOR AN ACT

1  
2 Relating to crime; creating new provisions; amending ORS 137.712 and section 1, chapter 35, Oregon  
3 Laws 2008; and providing for criminal sentence reduction that requires approval by a two-thirds  
4 majority.

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

6 **SECTION 1.** ORS 137.712 is amended to read:

7 137.712. (1)(a) Notwithstanding ORS 137.700 and 137.707, when a person is convicted of  
8 manslaughter in the second degree as defined in ORS 163.125, assault in the second degree as de-  
9 fined in ORS 163.175 (1)(b), kidnapping in the second degree as defined in ORS 163.225, rape in the  
10 second degree as defined in ORS 163.365, sodomy in the second degree as defined in ORS 163.395,  
11 unlawful sexual penetration in the second degree as defined in ORS 163.408, sexual abuse in the first  
12 degree as defined in ORS 163.427 (1)(a)(A) or robbery in the second degree as defined in ORS  
13 164.405, the court may impose a sentence according to the rules of the Oregon Criminal Justice  
14 Commission that is less than the minimum sentence that otherwise may be required by ORS 137.700  
15 or 137.707 if the court, on the record at sentencing, makes the findings set forth in subsection (2)  
16 of this section and finds that a substantial and compelling reason under the rules of the Oregon  
17 Criminal Justice Commission justifies the lesser sentence.

18 When the court imposes a sentence under this subsection, the person is eligible for a reduction in  
19 the sentence as provided in ORS 421.121 and any other statute.

20 (b) In order to make a dispositional departure under this section, the court must make the fol-  
21 lowing additional findings on the record:

22 (A) There exists a substantial and compelling reason not relied upon in paragraph (a) of this  
23 subsection;

24 (B) A sentence of probation will be more effective than a prison term in reducing the risk of  
25 offender recidivism; and

26 (C) A sentence of probation will better serve to protect society.

27 (2) A conviction is subject to subsection (1) of this section only if the sentencing court finds on  
28 the record by a preponderance of the evidence:

29 (a) If the conviction is for manslaughter in the second degree:

30 (A) That the defendant is the mother or father of the victim;

**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 (B) That the death of the victim was the result of an injury or illness that was not caused by  
2 the defendant;

3 (C) That the defendant treated the injury or illness solely by spiritual treatment in accordance  
4 with the religious beliefs or practices of the defendant and based on a good faith belief that spiritual  
5 treatment would bring about the victim's recovery from the injury or illness;

6 (D) That no other person previously under the defendant's care has died or sustained significant  
7 physical injury as a result of or despite the use of spiritual treatment, regardless of whether the  
8 spiritual treatment was used alone or in conjunction with medical care; and

9 (E) That the defendant does not have a previous conviction for a crime listed in subsection  
10 [(4)] (5) of this section or for criminal mistreatment in the second degree.

11 (b) If the conviction is for assault in the second degree:

12 (A) That the victim was not physically injured by means of a deadly weapon;

13 (B) That the victim did not suffer a significant physical injury; and

14 (C) That the defendant does not have a previous conviction for a crime listed in subsection  
15 [(4)] (5) of this section.

16 (c) If the conviction is for kidnapping in the second degree:

17 (A) That the victim was at least 12 years of age at the time the crime was committed; and

18 (B) That the defendant does not have a previous conviction for a crime listed in subsection  
19 [(4)] (5) of this section.

20 (d) If the conviction is for robbery in the second degree:

21 (A) That the victim did not suffer a significant physical injury;

22 (B) That, if the defendant represented by words or conduct that the defendant was armed with  
23 a dangerous weapon, the representation did not reasonably put the victim in fear of imminent sig-  
24 nificant physical injury;

25 (C) That, if the defendant represented by words or conduct that the defendant was armed with  
26 a deadly weapon, the representation did not reasonably put the victim in fear of imminent physical  
27 injury; and

28 (D) That the defendant does not have a previous conviction for a crime listed in subsection  
29 [(4)] (5) of this section.

30 (e) If the conviction is for rape in the second degree[,] **or** sodomy in the second degree [*or sexual*  
31 *abuse in the first degree*]:

32 (A) That the victim was at least 12 years of age, but under 14 years of age, at the time of the  
33 offense;

34 (B) That the defendant does not have a [*prior*] **previous** conviction for a crime listed in sub-  
35 section [(4)] (5) of this section;

36 (C) That the defendant has not been previously found to be within the jurisdiction of a juvenile  
37 court for an act that would have been a felony sexual offense if the act had been committed by an  
38 adult;

39 (D) That the defendant was [*no more than five years older than the victim*] **under 30 years of**  
40 **age** at the time of the offense;

41 (E) That the offense did not involve sexual contact with any minor other than the victim; and

42 (F) That the victim's lack of consent was due solely to incapacity to consent by reason of being  
43 under 18 years of age at the time of the offense.

44 (f) If the conviction is for unlawful sexual penetration in the second degree:

45 (A) That the victim was 12 years of age or older at the time of the offense;

1 (B) That the defendant does not have a *[prior]* **previous** conviction for a crime listed in sub-  
 2 section *[(4)]* **(5)** of this section;

3 (C) That the defendant has not been previously found to be within the jurisdiction of a juvenile  
 4 court for an act that would have been a felony sexual offense if the act had been committed by an  
 5 adult;

6 (D) That the defendant was *[no more than five years older than the victim]* **under 30 years of**  
 7 **age** at the time of the offense;

8 (E) That the offense did not involve sexual contact with any minor other than the victim;

9 (F) That the victim's lack of consent was due solely to incapacity to consent by reason of being  
 10 under 18 years of age at the time of the offense; and

11 (G) That the object used to commit the unlawful sexual penetration was the hand or any part  
 12 thereof of the defendant.

13 **(g) If the conviction is for sexual abuse in the first degree:**

14 **(A) That the victim was at least 12 years of age, but under 14 years of age, at the time**  
 15 **of the offense;**

16 **(B) That the defendant does not have a previous conviction for a crime listed in sub-**  
 17 **section (5) of this section;**

18 **(C) That the defendant has not been previously found to be within the jurisdiction of the**  
 19 **juvenile court for an act that would have been a felony sexual offense if the act had been**  
 20 **committed by an adult;**

21 **(D) That the offense did not involve sexual contact with any minor other than the victim;**  
 22 **and**

23 **(E) That the victim's lack of consent was due solely to incapacity to consent by reason**  
 24 **of being under 18 years of age at the time of the offense.**

25 **(3) If the court makes the findings described in subsections (1)(a) and (2) of this section**  
 26 **and imposes a sentence that is less than the minimum sentence that otherwise may be re-**  
 27 **quired by ORS 137.700 or 137.707, the court may not impose a sentence of optional probation**  
 28 **or grant a downward dispositional or durational departure and shall impose a sentence that**  
 29 **is at least the presumptive sentence of imprisonment under the rules of the Oregon Criminal**  
 30 **Justice Commission if:**

31 **(a) The conviction is for sexual abuse in the first degree as defined in ORS 163.427**  
 32 **(1)(a)(A) and the defendant was 30 years of age or older at the time of the offense.**

33 **(b) The conviction is for rape in the second degree as defined in ORS 163.365, sodomy in**  
 34 **the second degree as defined in ORS 163.395 or unlawful sexual penetration in the second**  
 35 **degree as defined in ORS 163.408 and the defendant was more than five years older than the**  
 36 **victim at the time of the offense.**

37 **(c) The conviction is for sexual abuse in the first degree as defined in ORS 163.427**  
 38 **(1)(a)(A), rape in the second degree as defined in ORS 163.365, sodomy in the second degree**  
 39 **as defined in ORS 163.395 or unlawful sexual penetration in the second degree as defined in**  
 40 **ORS 163.408 and:**

41 **(A) The defendant was a public or private official as that term is defined in ORS 419B.005**  
 42 **at the time of the offense; or**

43 **(B) The defendant transmitted a sexually transmitted disease to the victim.**

44 *[(3)]* **(4) In making the findings required by subsections (1) and (2) of this section, the court may**  
 45 **consider any evidence presented at trial and may receive and consider any additional relevant in-**

1 formation offered by either party at sentencing.

2 [(4)] (5) The crimes to which subsection (2)(a)(E), (b)(C), (c)(B), (d)(D), (e)(B), [and] (f)(B) and  
 3 (g)(B) of this section refer are:

- 4 (a) A crime listed in ORS 137.700 (2) or 137.707 (4);
- 5 (b) Escape in the first degree, as defined in ORS 162.165;
- 6 (c) Aggravated murder, as defined in ORS 163.095;
- 7 (d) Criminally negligent homicide, as defined in ORS 163.145;
- 8 (e) Assault in the third degree, as defined in ORS 163.165;
- 9 (f) Criminal mistreatment in the first degree, as defined in ORS 163.205 (1)(b)(A);
- 10 (g) Rape in the third degree, as defined in ORS 163.355;
- 11 (h) Sodomy in the third degree, as defined in ORS 163.385;
- 12 (i) Sexual abuse in the second degree, as defined in ORS 163.425;
- 13 (j) Stalking, as defined in ORS 163.732;
- 14 (k) Burglary in the first degree, as defined in ORS 164.225, when it is classified as a person  
 15 felony under the rules of the Oregon Criminal Justice Commission;
- 16 (L) Arson in the first degree, as defined in ORS 164.325;
- 17 (m) Robbery in the third degree, as defined in ORS 164.395;
- 18 (n) Intimidation in the first degree, as defined in ORS 166.165;
- 19 (o) Promoting prostitution, as defined in ORS 167.012; and
- 20 (p) An attempt or solicitation to commit any Class A or B felony listed in paragraphs (a) to (L)  
 21 of this subsection.

22 [(5)] (6) Notwithstanding ORS 137.545 (5)(b), if a person sentenced to probation under this sec-  
 23 tion violates a condition of probation by committing a new crime, the court shall revoke the pro-  
 24 bation and impose the presumptive sentence of imprisonment under the rules of the Oregon Criminal  
 25 Justice Commission.

26 [(6)] (7) As used in this section:

27 (a) “Conviction” includes, but is not limited to:

28 (A) A juvenile court adjudication finding a person within the court’s jurisdiction under ORS  
 29 419C.005, if the person was at least 15 years of age at the time the person committed the offense  
 30 that brought the person within the jurisdiction of the juvenile court. “Conviction” does not include  
 31 a juvenile court adjudication described in this subparagraph if the person successfully asserted the  
 32 defense set forth in ORS 419C.522.

33 (B) A conviction in another jurisdiction for a crime that if committed in this state would con-  
 34 stitute a crime listed in subsection [(4)] (5) of this section.

35 (b) “Previous conviction” means a conviction that was entered prior to imposing sentence on the  
 36 current crime provided that the prior conviction is based on a crime committed in a separate crim-  
 37 inal episode. “Previous conviction” does not include a conviction for a Class C felony, including an  
 38 attempt or solicitation to commit a Class B felony, or a misdemeanor, unless the conviction was  
 39 entered within the 10-year period immediately preceding the date on which the current crime was  
 40 committed.

41 (c) “Significant physical injury” means a physical injury that:

- 42 (A) Creates a risk of death that is not a remote risk;
- 43 (B) Causes a serious and temporary disfigurement;
- 44 (C) Causes a protracted disfigurement; or
- 45 (D) Causes a prolonged impairment of health or the function of any bodily organ.

**SECTION 2.** Section 1, chapter 35, Oregon Laws 2008, is amended to read:

**Sec. 1.** (1) When a court sentences a defendant to a term of incarceration that exceeds one year, the defendant may request a determination of the defendant's eligibility for release on post-prison supervision under ORS 421.508 (4). The court shall order in the judgment that the Department of Corrections may release the defendant on post-prison supervision under ORS 421.508 (4) only if, after a hearing, the court finds that:

(a) The defendant meets the eligibility requirements of subsections (2) and (3) of this section;

(b) The defendant was not on probation, parole or post-prison supervision for an offense listed in ORS 137.712 [(4)] (5) or 811.705 (2)(b) at the time of the commission of the current crime of conviction;

(c) The defendant has not previously been released on post-prison supervision under ORS 421.508 (4);

(d) The harm or loss caused by the crime is not greater than usual for that type of crime;

(e) The crime was not part of an organized criminal operation; and

(f) After considering the nature of the offense and the harm to the victim, the defendant's successful completion of the program would:

(A) Increase public safety;

(B) Enhance the likelihood that the defendant would be rehabilitated; and

(C) Not unduly reduce the appropriate punishment.

(2) Except as provided in subsection (4) of this section, a defendant may not be released on post-prison supervision under ORS 421.508 (4) if the defendant is being sentenced for a crime under ORS 163.145, 163.165 (1)(a) or (b), 163.525 or 811.705 (2)(b).

(3) A defendant may not be released on post-prison supervision under ORS 421.508 (4) if the defendant is being sentenced for a crime listed in ORS 137.700, 137.707, 163.095 or 181.594 (4).

(4) Notwithstanding subsection (1) of this section, the parties may stipulate to a defendant's eligibility for release on post-prison supervision under ORS 421.508 (4). If the court accepts the stipulation, the court does not need to make explicit findings regarding the factors described in subsection (1)(b) to (f) of this section. The parties may not stipulate to the defendant's release on post-prison supervision under ORS 421.508 (4) if the defendant is being sentenced for a crime described in subsection (3) of this section.

(5) If the court makes the findings described in subsection (1) of this section or accepts the stipulation of the parties under subsection (4) of this section, the court shall:

(a) Order on the record in open court as part of the sentence imposed that the defendant may be considered by the department for release on post-prison supervision under ORS 421.508 (4); and

(b) Include the order described in paragraph (a) of this subsection in the judgment.

(6) Subject to the requirements of this section, the court may order that the defendant serve a minimum period of incarceration before the defendant is released on post-prison supervision under ORS 421.508 (4). Nothing in this section authorizes the release of the defendant on post-prison supervision before the defendant has served the period of time described in ORS 421.508 (4)(b).

**SECTION 3. (1) This section applies to prosecutions for rape in the second degree under ORS 163.365, sodomy in the second degree under ORS 163.395, unlawful sexual penetration in the second degree under ORS 163.408 and sexual abuse in the first degree under ORS 163.427 (1)(a)(A) if:**

(a) **The offense was committed on or after April 1, 1995, but before the effective date of this 2009 Act; and**

1 (b) A sentence has been imposed before the effective date of this 2009 Act.

2 (2) Only upon joint written consent of the sentenced defendant and the state, as repres-  
 3 ented by the district attorney of the county of conviction, the court of conviction may en-  
 4 tertain, in accordance with ORS 137.712, as amended by section 1 of this 2009 Act, a petition  
 5 for a resentencing hearing. The petition must allege facts sufficient to establish a basis un-  
 6 der ORS 137.712, as amended by section 1 of this 2009 Act, for imposition of a sentence that  
 7 is less than the minimum sentence. The district attorney may file a response either in  
 8 support of or in opposition to the petition.

9 (3) When a petition is filed under subsection (2) of this section, the sentencing court shall  
 10 determine, based on the defendant's petition and the response, if any, filed by the district  
 11 attorney, whether the defendant is eligible under ORS 137.712, as amended by section 1 of  
 12 this 2009 Act, for a sentence that is less than the minimum sentence and whether a lesser  
 13 sentence may be appropriate. If the court determines that the defendant is eligible and that  
 14 a lesser sentence may be appropriate, the court may order a resentencing hearing. Other-  
 15 wise, the court shall enter an order denying the defendant's petition.

16 (4) If the court orders a resentencing hearing, the court shall determine at the hearing,  
 17 in accordance with ORS 137.712, as amended by section 1 of this 2009 Act, whether imposition  
 18 of a lesser sentence is warranted. If the court determines that a lesser sentence is war-  
 19 ranted, the court shall state on the record the substantial and compelling reasons in support  
 20 of the lesser sentence, vacate the judgment, impose the lesser sentence and enter an  
 21 amended judgment. If the court determines that a lesser sentence is not warranted, the  
 22 court shall enter an order denying the defendant's petition.

23 **SECTION 4.** (1) This section applies to prosecutions for rape in the second degree under  
 24 ORS 163.365, sodomy in the second degree under ORS 163.395, unlawful sexual penetration in  
 25 the second degree under ORS 163.408 and sexual abuse in the first degree under ORS 163.427  
 26 (1)(a)(A) if:

27 (a) The offense was committed on or after April 1, 1995, but before the effective date of  
 28 this 2009 Act; and

29 (b) A sentence has not been imposed before the effective date of this 2009 Act.

30 (2) Only upon joint written consent of the convicted defendant and the state, the court  
 31 in which the prosecution of an offense described in subsection (1) of this section is pending  
 32 may entertain a motion requesting that the defendant be sentenced under ORS 137.712, as  
 33 amended by section 1 of this 2009 Act. The district attorney may file a response either in  
 34 support of or in opposition to the motion.

35 (3) When a motion is filed under subsection (2) of this section, the court shall determine  
 36 whether the defendant is eligible under ORS 137.712, as amended by section 1 of this 2009  
 37 Act, for a sentence that is less than the minimum sentence and whether a lesser sentence  
 38 may be appropriate. If the court determines that the defendant is eligible and that a lesser  
 39 sentence may be appropriate, the court may impose sentence as provided in ORS 137.712, as  
 40 amended by section 1 of this 2009 Act. Otherwise, the court shall enter an order denying the  
 41 motion.

42 **SECTION 5.** (1) The sentencing court retains authority, irrespective of any notice of ap-  
 43 peal after entry of judgment of conviction, to modify its judgment and sentence to reflect the  
 44 results of a resentencing hearing ordered under section 3 of this 2009 Act. If a sentencing  
 45 court enters an amended judgment under section 3 of this 2009 Act and an appeal is pending,

1 the sentencing court shall immediately forward a copy of the amended judgment to the ap-  
2 pellate court. Any modification of the appeal necessitated by the amended judgment shall be  
3 pursuant to an appropriate order by the appellate court.

4 (2) If any court holds that the requirement of joint written consent by the state and the  
5 defendant required for the court to entertain a petition for a resentencing hearing or a mo-  
6 tion for alternate sentencing under section 3 or 4 of this 2009 Act is invalid, it is the intent  
7 of the Legislative Assembly that the joint written consent requirement is nonseverable from  
8 the other portions of this section and sections 3 and 4 of this 2009 Act and that this section  
9 and sections 3 and 4 of this 2009 Act shall be entirely invalidated but the amendments to ORS  
10 137.712 by section 1 of this 2009 Act shall stand.

11