

House Bill 3481

Sponsored by Representatives BARKER, KRIEGER; Representatives BOONE, GILLIAM, MATTHEWS, OLSON, SCHAUFLEER, WAND, WHISNANT, WINGARD, Senators GEORGE, JOHNSON, KRUSE (at the request of Crime Victims United)

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**.

Requires, under certain circumstances, that notice and opportunity to be heard be provided to person with privacy interest in certain records subject to criminal subpoena and motion for early production.

Authorizes court to vacate plea of guilty or no contest tendered pursuant to plea agreement under certain circumstances.

Grants crime victim right to be heard and right to appeal in proceedings relating to admission of certain evidence.

Modifies statutory provisions relating to effectuating crime victims' constitutional rights in criminal proceedings.

A BILL FOR AN ACT

1
2 Relating to criminal proceedings; amending ORS 40.210, 135.365, 135.390, 135.432, 135.857, 136.580,
3 147.500, 147.504, 147.508, 147.512 and 147.515.

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

5 **SECTION 1.** ORS 136.580 is amended to read:

6 136.580. (1) If books, papers or documents are required, a direction to the following effect shall
7 be added to the form provided in ORS 136.575: "And you are required, also, to bring with you the
8 following: (describing intelligibly the books, papers or documents required)."

9 (2) Upon the motion of the state or the defendant, the court may direct that the books, papers
10 or documents described in the subpoena be produced before the court prior to the trial or prior to
11 the time when the books, papers or documents are to be offered in evidence and may, upon pro-
12 duction **and subject to an appropriate protective order**, permit the books, papers or documents
13 to be inspected and copied by the state or the defendant and the state's or the defendant's attorneys.

14 **(3) Notwithstanding subsection (2) of this section, the court may not enter an order for**
15 **the early production of books, papers or documents unless:**

16 **(a)(A) The court finds that the moving party has complied with the notice provisions of**
17 **subsection (4) of this section; and**

18 **(B) Any victim, witness or other individual who has a privacy interest in individually**
19 **identifiable records that are the subject of the subpoena is provided with the opportunity to**
20 **exercise the rights listed in subsection (5) of this section; or**

21 **(b) The court enters an order limiting or waiving the requirements of subsections (4) and**
22 **(5) of this section for good cause.**

23 **(4) When the state or the defendant moves for early production under this section, the**
24 **moving party shall serve notice of the motion on the opposing party and on any victim, wit-**
25 **ness or other individual who has a privacy interest in individually identifiable records that**
26 **are the subject of the subpoena. If the victim, witness or other individual has a legal guard-**

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 **ian or legal representative, the notice must be served on the legal guardian or legal repre-**
 2 **sentative. The notice must be served no later than 10 days before the service of the subpoena**
 3 **directing early production and must include:**

4 (a) **The name, address and telephone number of the person filing the motion and the**
 5 **party that the person represents;**

6 (b) **A copy of the motion and the proposed subpoena directing early production;**

7 (c) **A statement that the district attorney may, in the discretion of the district attorney,**
 8 **object to a subpoena issued by the defendant;**

9 (d) **If a hearing has been set, the date, time and place of the hearing; and**

10 (e) **A description of the rights granted to the victim, witness or other individual under**
 11 **subsection (5) of this section.**

12 (5) **The victim, witness or other individual whose individually identifiable records are the**
 13 **subject of a motion for early production has the following rights:**

14 (a) **The right to be represented in the matter by an attorney provided at the individual's**
 15 **expense;**

16 (b) **The right to object to the issuance of the subpoena, either orally or in writing;**

17 (c) **The right to request a hearing;**

18 (d) **The right to present evidence and cross-examine witnesses at the hearing; and**

19 (e) **The right to request a protective order in the event the motion is granted.**

20 (6) **As used in this section, "individually identifiable records":**

21 (a) **Includes any medical, mental health, educational or other records that identify an**
 22 **individual or for which there is a reasonable basis to believe could be used to identify an in-**
 23 **dividual.**

24 (b) **Does not include medical or mental health records subject to ORS 136.447.**

25 **SECTION 2.** ORS 147.512 is amended to read:

26 147.512. (1) **Notwithstanding ORS 147.510, in any case involving a defendant charged with a**
 27 **person crime the prosecuting attorney shall, at the beginning of any judicial settlement con-**
 28 **ference, plea hearing and [any] sentencing hearing, [the prosecuting attorney shall] inform the court**
 29 **whether the victim is present. If the victim is not present, the prosecuting attorney shall in-**
 30 **form the court whether the victim was informed of the conference or hearing.**

31 (2) **In any case involving a defendant charged with a [violent felony] person crime:**

32 (a) **If the victim requests, the prosecuting attorney shall make reasonable efforts to consult the**
 33 **victim [regarding plea discussions] before making a [final] plea offer and before entering into a**
 34 **final plea agreement.**

35 (b) **Before the court accepts a plea of guilty or no contest:**

36 (A) **If the victim is present, the court shall ask whether the victim was consulted regarding**
 37 **plea negotiations, if the victim agrees or disagrees with the plea agreement as presented to the**
 38 **court and whether the victim wishes to be heard regarding the plea agreement.**

39 (B) **If the victim is not present, the court shall ask the prosecuting attorney whether the victim**
 40 **requested to be notified and consulted regarding plea negotiations. If the victim made such a re-**
 41 **quest, the court shall ask the prosecuting attorney what reasonable efforts to notify and consult**
 42 **with the victim concerning plea negotiations were made and whether the victim agrees or dis-**
 43 **agrees with the plea agreement.**

44 (c) **If the court finds that the victim requested consultation regarding plea negotiations and that**
 45 **the prosecuting attorney failed to make reasonable efforts to consult with the victim, the court shall**

1 direct the prosecuting attorney to make reasonable efforts to consult with the victim and may not
 2 accept the plea unless the court makes a finding on the record that the interests of justice require
 3 the acceptance of the plea.

4 (3) Before the court imposes sentence, the court shall ask whether the victim wishes to express
 5 the views described in ORS 137.013.

6 **SECTION 3.** ORS 135.365 is amended to read:

7 135.365. The court may at any time before judgment, upon a plea of guilty or no contest, permit
 8 *[it]* **the plea** to be withdrawn **or order the plea vacated** and a plea of not guilty substituted
 9 therefor.

10 **SECTION 4.** ORS 135.432 is amended to read:

11 135.432. (1)(a) The trial judge may not participate in plea discussions, except:

12 (A) To inquire of the parties about the status of any discussions;

13 (B) To participate in a tentative plea agreement as provided in subsections (2) to (4) of this
 14 section;

15 (C) To make the inquiries required by ORS 147.512; or

16 (D) As provided in subsection (5) of this section.

17 (b) Any other judge, at the request of both the prosecution and the defense, or at the direction
 18 of the presiding judge, may participate in plea discussions. Participation by a judge in the plea dis-
 19 cussion process shall be advisory, and shall in no way bind the parties. If no plea is entered pursu-
 20 ant to these discussions, the advice of the participating judge shall not be reported to the trial
 21 judge. If the discussion results in a plea of guilty or no contest, the parties, if they both agree to
 22 do so, may proceed with the plea before a judge involved in the discussion. This plea may be entered
 23 pursuant to a tentative plea agreement as provided in subsections (2) to (4) of this section.

24 (2) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty
 25 or no contest in the expectation that charge or sentence concessions will be granted, the trial judge,
 26 upon request of the parties, may permit the disclosure to the trial judge of the tentative agreement
 27 and the reasons therefor in advance of the time for tender of the plea. The trial judge may then
 28 advise the district attorney and defense counsel whether the trial judge will concur in the proposed
 29 disposition if the information in the presentence report or other information available at the time
 30 for sentencing is consistent with the representations made to the trial judge.

31 (3) If the trial judge concurs, but later decides that the final disposition of the case should not
 32 include the **charge or** sentence concessions contemplated by the plea agreement, the trial judge
 33 shall so advise the defendant **and the district attorney** and allow the defendant a reasonable pe-
 34 riod of time in which to either affirm or withdraw a plea of guilty or no contest. **If the trial judge's**
 35 **proposed disposition is more lenient or is otherwise materially different from the plea**
 36 **agreement, the trial judge shall so advise the defendant and the district attorney and, on**
 37 **motion of the district attorney, shall order the plea vacated. The district attorney shall no-**
 38 **tify the victim if the plea is withdrawn or vacated.**

39 (4) When a plea of guilty or no contest is tendered or received as a result of a prior plea
 40 agreement, the trial judge shall give the agreement due consideration, but notwithstanding its ex-
 41 istence, the trial judge is not bound by it, and may reach an independent decision on whether to
 42 grant sentence concessions under the criteria set forth in ORS 135.415.

43 (5) With the consent of the parties and upon receipt of a written waiver executed by the de-
 44 fendant, the trial judge may participate in plea discussions.

45 **SECTION 5.** ORS 135.390 is amended to read:

1 135.390. (1) The court shall not accept a plea of guilty or no contest without first determining
2 that the plea is voluntary and intelligently made.

3 (2) The court shall determine whether the plea is the result of prior plea discussions and a plea
4 agreement. If the plea is the result of a plea agreement, the court shall determine the nature of the
5 agreement.

6 (3) If the plea agreement includes an agreement that the district attorney will seek or not op-
7 pose dismissal of a charge in exchange for the defendant's plea of guilty or no contest to another
8 charge, the court may not accept the plea of guilty or no contest unless:

9 (a) The agreement includes a written provision that indicates whether the court is required to
10 reinstate charges that are dismissed pursuant to the agreement if the plea of guilty or no contest
11 is withdrawn **or vacated** under ORS 135.365 or the judgment of conviction is subsequently reversed,
12 vacated or set aside; and

13 (b) If the agreement requires the court to reinstate charges under the circumstances described
14 in paragraph (a) of this subsection, the defendant has provided the court with a written waiver of
15 the statute of limitations and any statutory or constitutional speedy trial or double jeopardy rights,
16 applicable to the dismissed charges.

17 (4) If the district attorney has agreed to seek charge or sentence concessions which must be
18 approved by the court, the court shall advise the defendant personally that the recommendations
19 of the district attorney are not binding on the court.

20 (5)(a) If the district attorney has provided a plea offer and agreed disposition recommendation
21 to the defendant as provided in ORS 135.405 and the defendant is entering a guilty plea based on
22 the plea offer and agreed disposition recommendation, the court shall determine whether the plea
23 is voluntarily made. Except as otherwise provided in paragraph (b) of this subsection, if the court
24 finds that the plea is voluntarily made, the court shall impose sentence as provided in the agreed
25 disposition recommendation.

26 (b) If the court determines that the agreed disposition recommendation is inappropriate in a
27 particular case, the court shall so advise the parties and allow the defendant an opportunity to
28 withdraw the plea.

29 **SECTION 6.** ORS 40.210 is amended to read:

30 40.210. (1) Notwithstanding any other provision of law, in a prosecution for a crime described
31 in ORS 163.355 to 163.427, or in a prosecution for an attempt to commit one of these crimes, the
32 following evidence is not admissible:

33 (a) Reputation or opinion evidence of the past sexual behavior of an alleged victim of the crime
34 or a corroborating witness; or

35 (b) Reputation or opinion evidence presented for the purpose of showing that the manner of
36 dress of an alleged victim of the crime incited the crime or indicated consent to the sexual acts al-
37 leged in the charge.

38 (2) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS
39 163.355 to 163.427, or in a prosecution for an attempt to commit one of these crimes, evidence of a
40 victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless
41 the evidence other than reputation or opinion evidence:

42 (a) Is admitted in accordance with subsection (4) of this section; and

43 (b) Is evidence that:

44 (A) Relates to the motive or bias of the alleged victim;

45 (B) Is necessary to rebut or explain scientific or medical evidence offered by the state; or

1 (C) Is otherwise constitutionally required to be admitted.

2 (3) Notwithstanding any other provision of law, in a prosecution for a crime described in ORS
 3 163.355 to 163.427, or in a prosecution for an attempt to commit one of these crimes, evidence, other
 4 than reputation or opinion evidence, of the manner of dress of the alleged victim or a corroborating
 5 witness, presented by a person accused of committing the crime, is also not admissible, unless the
 6 evidence is:

7 (a) Admitted in accordance with subsection (4) of this section; and

8 (b) Is evidence that:

9 (A) Relates to the motive or bias of the alleged victim;

10 (B) Is necessary to rebut or explain scientific, medical or testimonial evidence offered by the
 11 state;

12 (C) Is necessary to establish the identity of the victim; or

13 (D) Is otherwise constitutionally required to be admitted.

14 (4)(a) If the person accused of committing rape, sodomy or sexual abuse or attempted rape,
 15 sodomy or sexual abuse intends to offer evidence under subsection (2) or (3) of this section, the ac-
 16 cused shall make a written motion to offer the evidence not later than 15 days before the date on
 17 which the trial in which the evidence is to be offered is scheduled to begin, except that the court
 18 may allow the motion to be made at a later date, including during trial, if the court determines ei-
 19 ther that the evidence is newly discovered and could not have been obtained earlier through the
 20 exercise of due diligence or that the issue to which the evidence relates has newly arisen in the
 21 case. Any motion made under this paragraph shall be served on all other parties, and on the alleged
 22 victim through the office of the prosecutor **or the alleged victim's counsel of record.**

23 (b) The motion described in paragraph (a) of this subsection shall be **filed under seal and** ac-
 24 companied by a written offer of proof. If the court determines that the offer of proof contains evi-
 25 dence described in subsection (2) or (3) of this section, the court shall order a hearing in camera to
 26 determine if the evidence is admissible. At the hearing the parties may call witnesses, including the
 27 alleged victim, and offer relevant evidence. **The alleged victim has the right to be present and**
 28 **to be heard at the hearing, either personally or through counsel.** Notwithstanding ORS 40.030
 29 (2), if the relevancy of the evidence that the accused seeks to offer in the trial depends upon the
 30 fulfillment of a condition of fact, the court, at the hearing in camera or at a subsequent hearing in
 31 camera scheduled for the same purpose, shall accept evidence on the issue of whether the condition
 32 of fact is fulfilled and shall determine the issue.

33 (c) If the court determines on the basis of the hearing described in paragraph (b) of this sub-
 34 section that the evidence the accused seeks to offer is relevant and that the probative value of the
 35 evidence outweighs the danger of unfair prejudice, the evidence shall be admissible in the trial to
 36 the extent an order made by the court specifies evidence that may be offered and areas with respect
 37 to which a witness may be examined or cross-examined. An order admitting evidence under this
 38 subsection may be appealed **before trial** by the government [*before trial*] **or, if the government**
 39 **declines to appeal, by the alleged victim in lieu of the government.**

40 (5) For purposes of this section:

41 (a) "In camera" means out of the presence of the public and the jury; and

42 (b) "Past sexual behavior" means sexual behavior other than the sexual behavior with respect
 43 to which rape, sodomy or sexual abuse or attempted rape, sodomy or sexual abuse is alleged.

44 **SECTION 7.** ORS 135.857 is amended to read:

45 135.857. (1) In any criminal **investigation or** prosecution [*arising from an automobile collision*

1 *in which the defendant is alleged to have been under the influence of alcohol or drugs*], the district
 2 attorney [*prosecuting the action*] **having jurisdiction over the prosecution** shall make available,
 3 **or require the investigating agency to make available**, upon request, to the victim or victims and
 4 to their attorney, or to the survivors of the victim or victims and to their attorney, all reports and
 5 information disclosed to the defendant pursuant to ORS 135.805 to 135.873 **or that would have been**
 6 **disclosed to the defendant had the prosecution been commenced**. The reports and information
 7 shall be made available at the same time as it is disclosed to the defendant or as soon thereafter
 8 as [*may be*] is practicable after a request is received, **or, if the prosecution has not commenced,**
 9 **as soon as is practicable after a request is received**. The district attorney may impose such
 10 conditions as may be reasonable and necessary to prevent the release of the reports and information
 11 from interfering with the trial **or investigation** of the defendant. The district attorney may apply
 12 to the court for an order requiring any person receiving such reports and information to comply
 13 with the conditions of release.

14 (2) For the purpose of this section,[:]

15 [(a)] “district attorney” has that meaning given in ORS 131.005.

16 [(b)] “Drug” has that meaning given in ORS 475.005.]

17 **SECTION 8.** ORS 147.500 is amended to read:

18 147.500. As used in ORS 147.500 to 147.550:

19 (1) “Authorized prosecuting attorney” means a prosecuting attorney who, at the request of a
 20 victim, has agreed to assert and enforce a right granted to the victim by section 42 or 43, Article
 21 I of the Oregon Constitution.

22 (2) “Claim” means the allegation and proposed remedy described in ORS 147.515 (1).

23 (3) “Crime” includes an act committed by a person who is under 18 years of age that, if com-
 24 mitted by an adult, would constitute a misdemeanor or felony.

25 (4) “Criminal proceeding” means an action at law in which a person is alleged, or has been ad-
 26 judged, to have committed a crime for which there is a victim and that is conducted in the trial
 27 court before or after sentencing or disposition.

28 (5) “Critical stage of the proceeding” means:

29 (a) Release hearings or hearings to modify the conditions of release, except hearings concerning
 30 release decisions at arraignment;

31 (b) Preliminary hearings;

32 (c) Hearings related to the rescheduling of trial;

33 (d) Hearings on motions or petitions:

34 (A) Conducted pursuant to ORS 40.210 [*or*], 135.139 **or 136.580**;

35 (B) To amend, dismiss or set aside a charge, conviction, order or judgment; or

36 (C) To suppress or exclude evidence;

37 (e) Entry of guilty or no contest pleas;

38 (f) Trial;

39 (g) Restitution hearings;

40 (h) Sentencing;

41 (i) Probation violation or revocation hearings if the crime of conviction is a felony or person
 42 Class A misdemeanor and the victim has requested notice of the hearing from the prosecuting at-
 43 torney or the supervisory authority as defined in ORS 144.087;

44 (j) Hearings for relief from the requirement to report as a sex offender;

45 (k) Hearings related to a deferred sentencing agreement;

1 (L) Hearings designated as a critical stage of the proceeding in ORS 419C.273; and

2 (m) Any other stage of a criminal proceeding the court determines is a critical stage of the
 3 proceeding for purposes of section 42, Article I of the Oregon Constitution.

4 (6) “Defendant” includes a person under 18 years of age alleged to be within the jurisdiction of
 5 the juvenile court under ORS chapter 419C.

6 **(7) “Person crime” means a person felony or person Class A misdemeanor, as those**
 7 **terms are defined in the rules of the Oregon Criminal Justice Commission.**

8 [(7)] (8) “Plea hearing” means a hearing in which a defendant enters a plea of guilty or no
 9 contest.

10 [(8)] (9) “Plea of guilty or no contest” includes:

11 (a) An admission by a person under 18 years of age that the person is within the jurisdiction
 12 of the juvenile court; and

13 (b) If a juvenile court petition has been filed, entering into a formal accountability agreement
 14 under ORS 419C.230 or entering an authorized diversion program under ORS 419C.225.

15 [(9)] (10) “Prosecuting attorney” means a district attorney as defined in ORS 131.005. In a
 16 criminal proceeding conducted in the juvenile court, “prosecuting attorney” includes the juvenile
 17 department.

18 [(10)] (11) “Reasonable efforts to inform the victim” includes, but is not limited to, providing
 19 information orally, in writing, electronically or by mail to the victim’s last known address.

20 [(11)] (12) “Sentencing hearing” includes the dispositional phase of a juvenile delinquency pro-
 21 ceeding under ORS chapter 419C.

22 [(12)] (13) “Trial court” includes the juvenile court.

23 [(13)] (14) “Victim” means any person determined by the prosecuting attorney or the court to
 24 have suffered direct financial, psychological or physical harm as a result of the crime alleged in the
 25 criminal proceeding and, in the case of a victim who is a minor, **incapacitated or deceased**, the
 26 legal guardian [*of the minor*], **guardian ad litem, conservator or personal representative of the**
 27 **estate of the victim.**

28 [(14) “Violent felony” means a felony in which there was actual or threatened serious physical in-
 29 jury to a victim or a felony sexual offense.]

30 **SECTION 9.** ORS 147.504 is amended to read:

31 147.504. (1) ORS 147.500 to 147.550 effectuate the provisions of sections 42 and 43, Article I of
 32 the Oregon Constitution, **and ORS 147.430** for violations that occur in criminal proceedings and do
 33 not provide a remedy for violations that occur in any other proceeding. A remedy for a violation
 34 of section 42 or 43, Article I of the Oregon Constitution, in any other proceeding may be enforced
 35 by writ of mandamus under ORS 34.105 to 34.240.

36 (2) Nothing in ORS 147.500 to 147.550:

37 (a) Affects the authority granted by law to the prosecuting attorney to assert the public’s in-
 38 terest, including but not limited to:

39 (A) Asserting rights granted to victims by law; and

40 (B) Investigating and presenting to the court evidence relating to restitution.

41 (b) Authorizes a court to order the dismissal of a criminal proceeding or to grant a motion for
 42 judgment of acquittal, in arrest of judgment or for a new trial.

43 (c) Reduces a defendant’s rights under the United States Constitution or authorizes the suspen-
 44 sion of a criminal proceeding if the suspension would violate a right of a defendant guaranteed by
 45 the Oregon Constitution or the United States Constitution.

SECTION 10. ORS 147.508 is amended to read:

147.508. (1) At the request of a victim, the prosecuting attorney may request that the court schedule a hearing to reconsider a release decision if:

(a) The victim did not have notice of, or an opportunity to be heard at, a hearing in which the court released the defendant from custody or reduced the defendant's security amount; and

(b) The victim's request is made no later than [*seven*] **30** days after the victim knew or reasonably should have known of the release decision that is to be reconsidered.

(2) As used in this section, "release decision" includes:

(a) Decisions made at arraignment; and

(b) Decisions made at hearings described in ORS 419C.273 (4)(b)(A) to (C).

SECTION 11. ORS 147.515 is amended to read:

147.515. (1) A victim who wishes to allege a violation of a right granted to the victim in a criminal proceeding by section 42 or 43, Article I of the Oregon Constitution, shall inform the court within [*seven*] **30** days of the date the victim knew or reasonably should have known of the facts supporting the allegation. The victim shall describe the facts supporting the allegation and propose a remedy.

(2) The victim may inform the court of a claim:

(a) On a form prescribed by the Chief Justice of the Supreme Court; or

(b) On the record in open court and in the presence of the defendant and the prosecuting attorney.

(3) If the victim informs the court of a facially valid claim on a form under subsection (2)(a) of this section, the court shall promptly issue the order to show cause described in ORS 147.517.

(4) If the victim informs the court of a facially valid claim orally under subsection (2)(b) of this section and the court determines:

(a) That each person entitled to notice of the claim and a reasonable opportunity to be heard is present, the court shall hold a hearing under ORS 147.530 as soon as practicable; or

(b) That any person entitled to notice of the claim and a reasonable opportunity to be heard is not present, the court shall issue the order to show cause described in ORS 147.517.

(5) If the court determines that the victim has not alleged a facially valid claim, the court shall enter an order dismissing the claim. The order must:

(a) Include the reasons the claim was dismissed;

(b) Be without prejudice to file, within seven days from the date the victim receives the order dismissing the claim, a corrected claim for the sole purpose of correcting the deficiency identified by the court; and

(c) Be in writing, unless the order is issued on the record in open court in the presence of the victim, the prosecuting attorney and the defendant. If the court issues the order orally under this paragraph, the court shall issue a written order as soon as practicable.

(6) If a victim informs the court of a claim orally and the court does not immediately hear the matter, the court may require the victim to complete the form described in subsection (2)(a) of this section.