



# Legislative Testimony

Oregon Criminal Defense Lawyers Association

May 4, 2015

The Honorable Jeff Barker, Chair  
House Judiciary Committee, Members

**RE: Senate Bill 391-A**

Dear Chair Barker and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments in support of Senate Bill 391-A.

1. In net effect, Senate Bill 391-A prohibits a practice that interferes with the judicial administration of security (commonly referred to as bail). SB 391-A prohibits law enforcement agencies from seizing money that is deposited, or attempted to be deposited, with a jail administrator unless the law enforcement agency first secures a court order authorizing the seizure. Jail administrators operate as designees of the court when accepting security. Notwithstanding existing Oregon law which requires the designee to promptly deposit the security with the clerk of the court, this bill is necessary because seizures without court orders have occurred around the state.

2. Senate Bill 391-A also allows a person to post security with the clerk of the court during normal business hours of the court. This provision is necessary in avoid the use of private enterprise kiosks which charge a 4% fee, over-and-above the bail amount.

**Problem: Law enforcement seizure of security without judicial oversight**

3. The right to bail is a protected civil liberty under both the Eighth Amendment of the US Constitution and Article I Section 14 of the Oregon's Constitution. The setting of the bail amount and the posting of bail is a function of the Judicial Department. Specifically, ORS 135.270 provides that after the security amount has been set, a person may post security with either the clerk of the court, or *with the court's designee*.

Across Oregon, many county courts have designated the jail administrator as its designee for receiving bail security.

4. Oregon law further provides that after receiving the security amount, the court's designee "*shall*" deposit the security with the clerk of the court "*within a reasonable time.*"

**ORS 135.270 Taking of security.** When a security amount has been set by a magistrate for a particular offense or for a defendant's release, any person designated by the magistrate may take the security and release the defendant to appear in accordance with the conditions of the release agreement. The person *designated by the magistrate shall* give a receipt to the defendant for the security so taken *and within a reasonable time deposit the security with the clerk of the court having jurisdiction of the offense.* (Emphasis supplied)

5. The problem arises when law enforcement agencies internally "flag" certain cases for special attention by jail administrators in the event a person attempts to deposit bail security. In so "flagging" the case, law enforcement officers interrupt the bail transaction, interrogate the person attempting to post the security, often bring in canines to search cash security, and at the conclusion of the "investigation," seize the money. The time it takes for the jail to alert the case agent to the person's presence, for the case agent to arrive at the jail and interrogate the person and possibly undertake a canine search far exceeds the amount of time it would take to secure a court order or warrant. This activity and seizure of security occurs outside the knowledge and oversight of the court.

6. This taking of security constitutes a seizure under both federal and Oregon constitutional law, and is prohibited without a search warrant by the Fourth Amendment and Article I Section 9. There is no exigency associated with the seizure, as the presence and location of the security remains constant (i.e., on deposit with the clerk of the court) and will not dissipate during the time necessary to acquire court authorization.

7. This practice occurs throughout the United States, but it is most prevalent in states that operate without bail bondsmen (Oregon, Wisconsin, Illinois and Kentucky). See the articles posted on OLIS with respect to national attention on this issue.

**Problem: Transfer of seized money to federal government in contravention of current state law**

8. After seizing the security, most often a law enforcement agency will not initiate state forfeiture proceedings but rather will simply transfer the money to the federal government under the federal Equitable Sharing Program. 21 U.S.C. §881. The motivations for doing so are legion. Under the federal Equitable Sharing Program, the federal government will do the work of prosecuting forfeiture proceedings; it can forfeit the money with a lower burden of proof than is required under Oregon forfeiture law;

and most importantly, it will share 80% of the forfeited proceeds with the local seizing agency, whereas under Oregon forfeiture law the seizing agency receives a smaller percentage not to exceed 50% of the forfeiture proceeds. See ORS 131A.360.

9. Attorney General Eric Holder recently issued an order limiting the use of the federal Equitable Sharing Program, but there are exceptions to Mr. Holder's order such that use of the federal program is not obsolete.

10. Transferring the security to the federal government without a court order is already prohibited by state law. Article XV Section 10 (13) of the Oregon Constitution provides:

**(13) Restrictions on State transfers.** Neither the State of Oregon, its political subdivisions, nor any forfeiting agency shall transfer forfeiture proceedings to the federal government unless a state court has affirmatively found that:

(a) The activity giving rise to the forfeiture is interstate in nature and sufficiently complex to justify the transfer;

(b) The seized property may only be forfeited under federal law; or

(c) Pursuing forfeiture under state law would unduly burden the state forfeiting agencies.

**Solution: Expressly prohibiting seizure of security without a court order**

11. SB 391-A corrects these abuses by clearly proscribing the following:

Section 2 subsection (1): Prohibits law enforcement agencies from seizing any deposit, or attempted deposit of security with the clerk of the court, or the clerk's designee, without first obtaining either: (a) a search warrant application issued upon probable cause under ORS 133.545, or (b) a court forfeiture seizure order under ORS 131A.060.

Section 2 subsection (2): If security is seized by court order, a law enforcement agency is prohibited from transferring or distributing the security without a further court order specifically authorizing the transfer or distribution. This provision is necessary in order to force compliance with Article XV Section 10 (13) of the Oregon Constitution.

**Problem: Mandatory posting of security through private enterprise kiosks**

12. When security is not seized by law enforcement, jail administrators will often require a person to post security through use of a private enterprise kiosk in the jail lobby. These privately operated kiosk systems charge a fee of approximately 4% of the bail amount. This percentage fee is the kiosk company's profit, over-and-above the

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\$750 that is kept by the State of Oregon after bail is posted. ORS 135.265 (2). Increasingly, it is becoming impossible to avoid use of these private kiosk systems because court clerks refuse to accept security deposits at the courthouse, and instead direct the person posting security to its designee, which is the jail administrator.

**Solution: Requiring the clerk of the court to accept security during normal business hours of the court**

13. Section 3 specifically allows a person to deposit security with the clerk of the court, rather than a designee, during normal business hours of the court. This provision allows a person posting bail to avoid the percentage fee charged by the private kiosk company.

Thank you for your consideration of these comments. Please do not hesitate to contact me if you have any questions.

*Respectfully submitted,*

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