



# MEMORANDUM

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Committee Counsel

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**LPRO: LEGISLATIVE POLICY AND RESEARCH OFFICE**

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## **Staff Explanation of Small Work Group Revisions LC 45 Section 14:**

### **Work Group Participants:**

Erin Pettigrew, Oregon Judicial Department

Carl Macpherson, Executive Director, Multnomah Public Defenders

Mae Lee Browning, Oregon Criminal Defense Lawyers Association

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### **A. Identifying the Problem**

In March 2020, Oregon Judicial Department sought legislative authority to extend or suspend certain mandatory statutory timelines that apply to the procedure of cases during the COVID-19 state of emergency, including the mandatory timelines to conduct jury trials. Following concerns expressed about the broad authority proposed, a work group was convened to develop a proposal that addressed those concerns.

The stakeholder work group objective was to develop a mechanism that allowed for narrowly tailored flexibility of circuit court judges to extend a person's pre-trial detention beyond 180 days in a limited set of circumstances.

### **B. Work Group Process**

The resulting "tiered" approach was agreed upon after thorough discussion contemplating the need for rigid standards that can be applied with discretion on a case-by-case basis. The primary concern of the group was to limit any discretion to extend the 180-day limit to only those cases where the court finds a person distinguishably dangerous and therefore warranting further detention. It was the general belief and intent of the group that these cases will be the exceptions to the norm.

### **C. The Tiered Approach**

#### **a. Tier 1 – The No-Bail Hold**

The first available standard of review is one that currently exists in statute and provides the only current mechanism under which a judge may hold a defendant in custody beyond 180 days pending trial in cases that do not allege murder or attempted murder.

Subsection 3(A) of section 14 of LC 45 is the language that creates, for ease of reference, “Tier 1” criteria. The provision directs judges back to ORS 135.240 which dictates which individuals MUST constitutionally be held in custody without bail. The first level of review is triggered as an individual approaches 180 days in custody and COVID-19-related precautions prevent a trial from being provided. It directs judges to first review a case according to the criteria laid out in ORS 135.240, even though the court may not have previously conducted such a review and a previous release hearing. In order to be held without bail and without opportunity for release, the court must find the following:

- 1) probable cause that a violent felony was committed; and
- 2) there is a danger of physical injury or sexual assault to the public or the victim of the crime if the defendant is released.

If the judge finds that those two factors exist, then they MUST set NO bail and the defendant is not releasable until a trial, regardless of when that happens, unless the state has stipulated to a bail amount. All participating stakeholders agreed that this standard is exceptionally high and currently reserved for only very egregious cases.

There was general agreement that the provision excludes cases involving violent crimes committed by evidently dangerous individuals. The following two tiers of review were intended to create the availability of discretionary review of cases that do not rise to the standard of requiring no bail, but do warrant discretionary authority to extend pre-trial custody based on evidence presented in a hearing.

#### **b. Tier 2**

The following section creates a new standard of review just slightly less burdensome than the previous. “Tier 2” offenses allow for review of cases involving “violent felonies” that do not arise to necessitating a “no-bail” hold but who represent an articulable risk of physical injury to the public or the victim if released. This provision allows a judge to acknowledge an individual’s dangerousness and deny pre-trial release beyond 180 days, but a judge may instead set an appropriate bail amount for release.

#### **c. Tier 3**

Finally, “Tier 3” accounts for any crimes that are not captured above that justifies extension of pre-trial custody, but the charges do not themselves announce or warrant such concern. Domestic violence cases, for example, were specifically discussed by the group as potentially necessitating a mechanism to extend custody in a misdemeanor case. These may be cases where an individual’s history with a victim is not reflected in their criminal history, but the evidence can clearly establish a pattern of violence that cannot be restrained outside of custody. In these cases, the court must find that an individual poses a substantial and specific danger to the public or the victim and no combination of release conditions sufficiently mitigate that danger. Legislators should view the “Tier 3” cases as requiring the highest level of scrutiny among the degrees of review provided for in this section because it is the most expansive in scope.