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Oregon Judicial Department
Supervisor to Staff Span of Control
February 2023

The OJD statewide ratio for 2022 is 1:10.6.

The ratio comes from the following data pulled as of 09/01/2022:

- Total number of filled and vacant non-supervisory positions = 1648
- Total number of filled and vacant supervisory positions = 156

The report **does not** include:

- Temporary employees
- Pro-Tem Positions
- Judges

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Enterprise Technology Services Division (ETSD)

Executive Summary – Appellate System Upgrade

March 2023

Summary:

The appellate court system in use today was installed in 2007. Several enhanced functionalities have been added over the years (see below), however, the core system and code base is over 13 years old. Having been in sustained use without a significant code refresh presents on-going operational and supportability issues as multiple vendors are involved, the code base has reached its maximum functionality, and security patching has become challenging.

System History and Completed Action Items:

In December 2006 OJD installed the Appellate Court Case Management System (C-Track) product developed by Lt. Court Tech (later absorbed by Thomson Reuters). The appellate court system procured and installed only included the case management components for the court. Over the next several years the following major functionality was added:

- May 2007 C-Track release 2/Public Access to Case Register
- January 2008 Financial system tied to FIAS
- March 2008 Court of Appeal Matter Management added
- May 2008 Supreme Court and Court of Appeals statistical reports added
- July 2008 Supreme Court Operations Management Matter Creation and Assignment Matter Processing added
- January 2009 eFiling added
- January 2011 Electronic Document Management added
- July 2016 Public Document Access added
- December 2016 FIAS link terminated – new financial system implemented
- February 2019 TR contract signed for in-dept system discovery. Completed in June 2019

At this time, OJD's appellate court case management system is comprised of four (4) distinct software components/vendors. C-Track (TR); OnBase data and document management (Hyland); ImageSoft which ties the two systems together; and NIC-USA provide the appellate court eFiling infrastructure through Oregon Department of Administrative Service (DAS).

Goals of Appellate System Upgrade:

- Update the digital infrastructure
- Enhance existing functionality
- Provide a complete product (case management, document storage/retrieval),
- Convert OJD's appellate eFiling from DAS hosted to OJD hosted accommodating Self-Represented Litigants (SLRs), and
- Lower overall system complexity

Adopted Mission Statement:

Enhance system stability by reducing system complexity. Implement a system that balances the need to maintain or appropriately replace current key functionality. Support court operations while remaining on an upgrade path with a product that will permit OJD to take advantage of future product enhancements. Expand online services to improve access to justice.

Identified timeline:

- Business process discovery – completed June 2019
- Contract with TR for services – completed in February 2022
- Code delivery, data migration, business process documentation – March 20221 through June 2023
- Final system testing, data migration, and QA March 2023-July 2023
- Staff Training September 2023
- Deployment November 2023

Executive Summary – Pretrial Case Management System

The 2021 Legislative Assembly enacted Oregon Laws 2021, chapter 643, initially introduced as Senate Bill (SB) 48 (2021) by the Oregon Criminal Justice Commission, to provide consistent release decision-making across the state; reduce reliance on security release; include provisions for victim notification and input; and balance the rights of the defendant and presumption of pretrial release against community and victim safety and the risk of failure to appear.

On July 1, 2022, each circuit court Presiding Judge issued a standing pretrial release order (PRO) pursuant to section 2 of Oregon Laws 2021, chapter 643, codified at ORS 135.233, and Chief Justice Order (CJO) 22-010.

The Pretrial Release Case Management System project aligns with the OJD Strategic Campaign, Initiative 1.6 Statewide Pretrial Release System to ensure that Oregon has an effective and consistent statewide pretrial release system. The Pretrial Release CMS project objective is to implement a statewide software solution for Oregon's circuit courts to manage and track pretrial release. The statewide solution will integrate (exchange data) with OJD's existing Odyssey CMS, manage pretrial tracking, and provide data elements for comprehensive reporting to stakeholders.

The Oregon Judicial Department (OJD) employs RAOs in many circuit courts across the state, and OJD intends to expand RAO capacity and pretrial programs in every jurisdiction in the state. These programs will support the collection of consistent data and improved business processes. RAOs are an integral function of these programs and work in tandem with county pretrial offices in every jurisdiction.

Within the project scope, the Pretrial Release CMS activities include:

- Document workflow requirements for Pretrial Release CMS.
- Determine user interface requirements for external (county jails) and internal users.

- Develop functional and technical requirements, which contains data elements necessary for information to be exchanged with Odyssey CMS and in alignment with statistical reporting.
- Data exchanges with CJIS data sources
- Contract with selected vendor for product and services using OJD procurement process.
- Develop and implement statewide communication and training plans.
- Ensure configuration is in place to support Cloud hosted or on premises solution.
- Conduct comprehensive testing of Pretrial Release CMS product and integrations to ensure critical issues are identified and resolved prior to go-live.
- Develop, update, and publish Pretrial Release CMS business processes to online help system.
- Develop, publish, and distribute end user Pretrial Release CMS training curriculum and provide training to internal and external stakeholders.
- Develop, publish, and distribute technical Pretrial Release CMS training curriculum and provide training for court technical staff.
- Deploy Pretrial Release CMS statewide.

Project Phases	**Start**	**Finish**
Initiation	5/31/2022	9/30/2023
Monitor and Control	5/31/2022	12/29/2023
Analysis	6/6/2022	11/14/2022
Planning	6/13/2022	12/1/2022
Development	10/17/2022	9/29/2023
Testing and Validation	10/31/2022	10/24/2023
Implementation	11/28/2022	12/22/2023
Project Close	11/2/2023	12/29/2023

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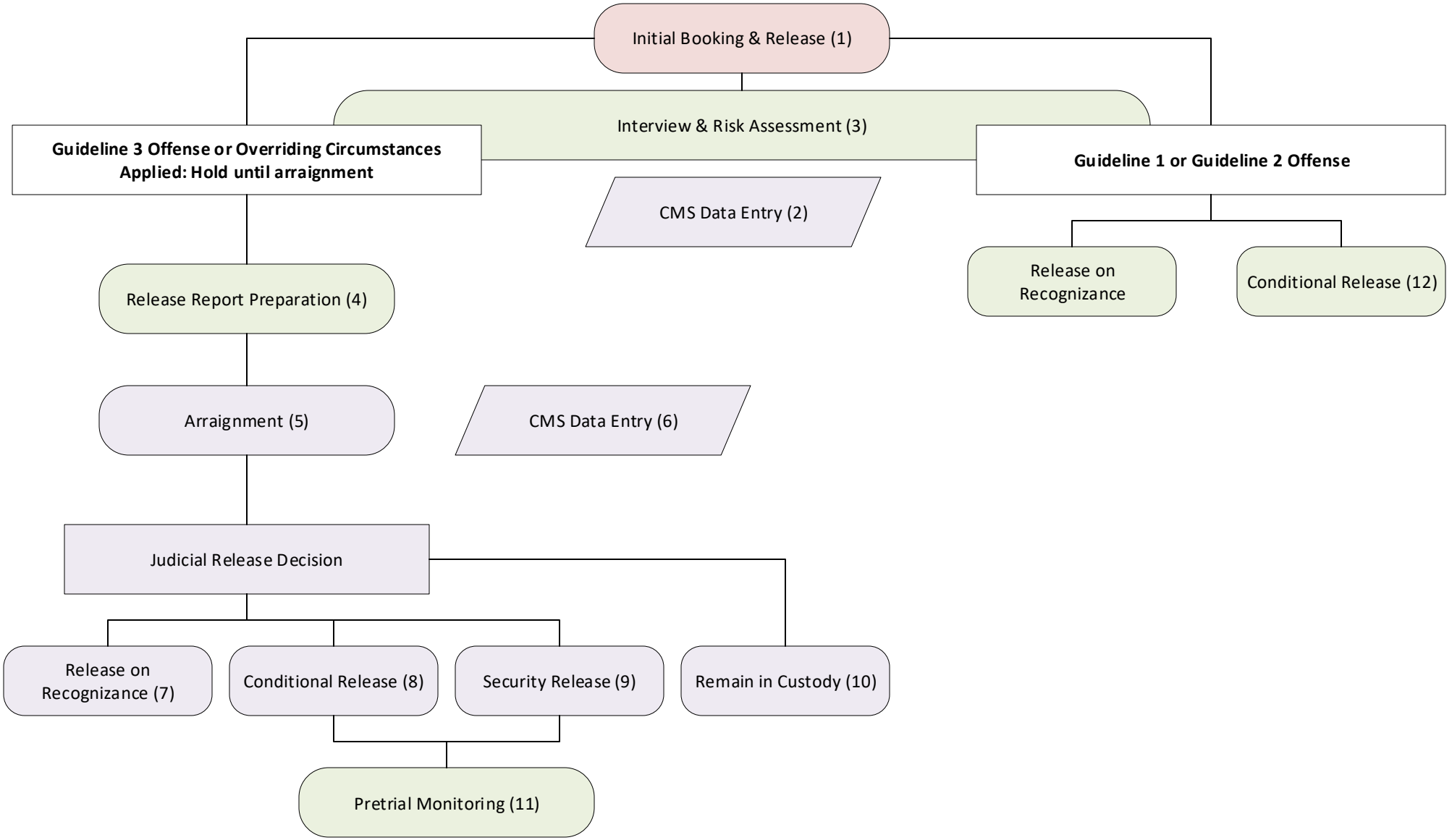
The Oregon Pretrial Process



Sheriff/entity supervising local correctional facility

OJD RAO's, County pretrial programs, sheriff, or local correctional facility may complete these steps

OJD RAO's or the court are primarily responsible for these functions

1. Following the local presiding judge order (PJO), the sheriff or entity supervising the local correctional facility will release any individual booked into custody on a Guideline 1 or Guideline 2 offense. Individuals booked into custody on a Guideline 3 or with applicable overriding circumstances will be held for a judicial release decision at arraignment or initial appearance. This includes any offense that constitutes domestic violence. As described in step 3, the risk assessment may allow for an individual to be released or may constitute an overriding circumstance resulting in hold until initial appearance/arraignment.

2. Either OJD RAO or Court Staff will collect data on who has been booked and released, and who has been held, as well as conditions imposed, in the OJD Pretrial Case Management System.

3. OJD Pretrial Programs are directed by CJO 22-010 to consider using a pretrial assessment tool that has been locally validated for their county population. Counties that employ OJD Release Assistance Officers may delegate authority to release individuals who were held by the PJO. RAO's are directed by statute to interview all individuals held for arraignment. The risk assessment may allow for an individual to be released (if an RAO has been delegated authority) or in certain jurisdictions may constitute an overriding circumstance and move an individual to be held for initial appearance/arraignment.

4. Release Assistance Officers are directed by statute to prepare a release report that includes verified primary and secondary release criteria, the victim's position on release and a recommendation for release to the court. RAOs may also include information on assessments related to domestic violence, behavioral health, substance abuse and specialty court eligibility, and sex offenses. Where they exist, county pretrial programs may interview adults in custody and provide a report to the court.

5. A release decision shall be made at initial arraignment unless the court finds good cause to postpone the release decision. Good cause includes that the district attorney plans on seeking preventative detention. Upon a finding that release of the person on personal recognizance is unwarranted, the judge shall proceed to consider conditional release under ORS 135.260. Only after determining that conditional release is unwarranted, or if otherwise required by ORS 135.230 to 135.290, may the judge proceed to consider security release under ORS 135.265.

6. The OJD Pretrial CMS will be utilized to provide a consistent, statewide data collection point for all release decisions, which conditions were imposed, violations of conditions, and communication with individuals released pretrial including text-to-court reminders and call in monitoring.

7. A person in custody, otherwise having a right to release, shall be released upon the personal recognizance unless release criteria show to the satisfaction of the magistrate that such a release is unwarranted or if the offense precludes release on recognizance.

8. Upon a finding that release of the person on personal recognizance is unwarranted, the judge shall proceed to consider conditional release under ORS 135.260.

9. Only after determining that release on personal recognizance or conditional release is unwarranted, or if otherwise required by ORS 135.230 to 135.290, may the judge proceed to consider security release under ORS 135.265.

10. A release decision shall be made at initial arraignment unless the court finds good cause to postpone the release decision. Good cause includes that the district attorney plans on seeking preventative detention.

11. Either county or OJD pretrial programs may monitor individuals who are released pretrial to ensure public safety and that the individual returns to court, including the use of GPS monitoring and text-to-court reminders.

12. All individuals are released with a release agreement that has, at minimum, release conditions from ORS 135.250 (release on recognizance), and if specified in the county's PJO, will also incorporate specific conditions of release based on person-specific criteria.

UPDATED **OTHER FUNDS ENDING BALANCES FOR THE 2021-23 & 2023-25 BIENNIA**

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Agency: Oregon Judicial Department
Contact Person (Name & Phone #): John Fagan - 503-983-0983

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)	(i)	(j)
Other Fund Type	Program Area (SCR)	Treasury Fund #/Name	Category/Description	Constitutional and/or Statutory reference	2021-23 Ending Balance In LAB	2021-23 Ending Balance Revised	2023-25 Ending Balance In CSL	2023-25 Ending Balance Revised	Comments
Limited	102-00-00-00000	0401 / General Fund	Miscellaneous Receipts	279A.290	700,000	900,000	809,988	800,000	Clearing house account for Other Funds - requires at least $650,000 to clear payroll for grants and agreements
Limited	200-00-00-00000	0401 / General Fund	Juror Improvement	10.075	400,000	830,000	815,821	850,000	Due pandemic, reduced spending in this account during 21-23 biennium
Limited	102-00-00-00000	1086/OJD Operating Account	OJD Operating Account	1.009	661,104	850,000	600,000	800,000	
Limited	400-00-00-00000	1178/State Court Security Account	Security Account	1.178	204,452	1,500,000	1,400,000	1,400,000	21-23, returned Capital Funds, deposits into the account from punitive damage awards per ORS 31.735(1)(c) provides that these types of payment are to be deposited "in the State Court Facilities and Security Account established under ORS 1.178, and may only be used for the purposes specified in ORS 1.178(2)(d).
Limited	101-00-00-00000	0401 / General Fund	Court Publications Account	2.165	592,798	40,000	9,366	0	Printed medium sales are dropping
Limited	100-00-00-00000	0401 / General Fund	Court Forms	21.363	0	0	0	0	
Limited	200-00-00-00000	0401 / General Fund	Court Interpreter/Shorthand Report Certification	45.294	162,782	168,000	145,124	150,000	
Limited	101-00-00-00000	0401 / General Fund	State of Oregon Law Library	357.203	1,792,862	1,250,000	1,890,820	800,000	Increasing assessments and costs due to statewide license agreements (used by all agencies for online law resources)
Limited	102-00-00-00000	0401 / General Fund	State Citizen Review Board Operating Account	419A.128		350,000	0	300,000	
Limited	100-00-00-00000	0401 / General Fund	Application Contribution Program	151.216, 151.489	0	0	0	0	
Limited	102-00-00-00000	1482/OR Courthouse Cap Construction	Oregon Courthouse Capital Construction and Improvement Fund	1.187/Section 64 Chapter 723 Or Law 2013	0	126,508,700	0	0	March 2023 Bond Sales for Clackamas, Benton and Crook counties - no anticipated disbursements by EOB
Limited	102-00-00-00000	1479/State Court Technology Fund	State Court Technology Fund	1.012	0	0	0	0	Modified CSL - Tech Fund does not have enough revenue to support required spending and limitation
Limited	087-00-00-00000	4185/Sup Ct Interior CC	Supreme Court Building Renovation and Seismic Retrofit Capital Account	Section 9 (C) Chapter 661 Or Law 2019	0	0	0	0	No Capital limitation in 2023-25

2021-23 ARPA ENDING BALANCES

Agency: Oregon Judicial Department
Contact Person (Name & Phone #): John Fagan - 503-983-0983

(a)	(b)	(c)	(d)	(e)	(f)	(g)	(h)
SCR	Program Description	2021-23 LAB	2021-23 Ending Balance	2021-23 Amount Obligated	2023-25 POP Y/N	2023-25 POP #	Comments
102	Supreme Court Building Non-bondable	5,000,000	-				Project Completed - final billing of project expenses and application of ARPA funds
102	Data Project	1,000,000	-				
220	Pass-through Curry County Courthouse Replacement	3,500,000	3,500,000		N		New county commissioners must reaffirm project - project may be delayed until 23-25 biennium
220	Pass-through Crook County Planning	169,827					

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Office of the State Court Administrator

Civil & Criminal Programs Division

Court Records Integrity Program
Work Progress Report

March 6, 2023

Funded by: ARPA Coronavirus State Fiscal Recovery Fund

81st Legislative Assembly

A. EXECUTIVE SUMMARY

In Oregon, a motion to set aside (commonly referred to as expungement) initiates the legal process to obtain a court order sealing a record of a criminal arrest and conviction. If the motion is granted, upon entry of the court's order, the legal effect of an expungement is that the arrest or conviction did not occur, the record does not exist (to either confirm the existence of an arrest or conviction or to provide a copy of any record) (ORS 137.225). All official records of the arrest, citation, charge, and conviction are to be sealed. Separately, an application for expunction introduces the removal by destruction or sealing of all records and references associated with a case. (ORS 419A.260 – 419A.269).

As described, set aside and expunction are legal proceedings for granting relief to eligible individuals based on Oregon Law. Set aside refers to adult criminal records. Expunction refers to juvenile records. Throughout this report, the common term "expungement" will be used to describe the set-aside and expunction process and work progress. Whether set aside or expunction, the administrative workload for courts to expunge the case record by destruction or sealing is significant, ranging from 30 minutes for a case containing a single criminal charge to 7 hours for a multi-charge case.

National trends indicate that collateral consequences (impacts not directly resulting from an arrest or conviction) cause significant barriers, and when individuals are aware of and given an opportunity to seek relief through expungement, they will do so. Changes to Oregon statute[1] in 2021 through the enrollment of Senate Bill (SB) 397 went into effect January 1, 2022, and the volume of motions to set aside increased by 400%. Through the reduction of fees associated with the petition-based process, and removing other barriers, SB 397 increased the number of individuals able to take advantage of the opportunity for relief.

The Oregon Judicial Department's (Judicial Department's) Strategic Campaign includes a commitment to improving access to justice by eliminating barriers, simplifying and streamlining court processes, and improving services to meet the needs of the people who have been historically marginalized or underserved. That commitment aligns with emerging trends related to expungement. The Judicial Department is committed to promoting consistency in business processes statewide, streamlining procedures, and, where possible, developing automation of technology solutions to expedite and equalize opportunities for relief.

The Court Records Integrity (CRI) pilot program was established in February 2022, after the Judicial Department was allocated funding through Oregon's American Rescue Plan Act (ARPA) grant. Guided by an inclusive vision and data-informed decision making, the CRI program has begun to streamline court processes and identify technology solutions. CRI has updated business processes, provided training and a resource line for questions, established a peer group for court staff processing expungements, mapped the expungement process to identify opportunities for automation, and identified centralized tasks to expedite responses to both the public and local court questions.

The ARPA grant created an opportunity to further explore and address the issues that make the expungement process cumbersome for the public and labor intensive for courts. The primary objectives of the pilot program are as follows:

- Determine the extent to which eligible records can be identified using automation by mapping statutory eligibility criteria (arrests, convictions, offenses, waiting periods, disqualifiers, etc.) to

[1] ORS 137.225 (2021)

their associated data points across systems (LEDS, Oregon eCourt, and local government and tribal courts).

- Map the expungement process from application to expungement to identify where human intervention is necessary or where other barriers to automation exist.
- Diagram the data flow to understand how local and state systems communicate with each other. This includes identifying the data source(s) that are available to the public.
- Create policy recommendations to streamline the eligibility process and overcome the barriers to automation of the expungement process.
- Create and/or modify existing integrations across systems and develop automated processes for expunging records.
- Identify court staffing needs after the opportunities for automation are identified and implemented, as some human intervention will continue to be necessary to supplement automated processes.
- Fund existing efforts for courts currently engaged in back scanning case files into Odyssey, the Oregon eCourt electronic case management system.

CRI has successfully piloted several of the grant objectives. Governor Brown's mass pardon of single-charge marijuana possession cases[2] provided an opportunity to implement automated processes to expedite expunging records. Under Oregon law, the case records of pardoned offenses are set aside. The Judicial Department was able to coordinate sealing 47,140 cases through a centralized process, significantly reducing the workload impact to the local circuit courts. The Judicial Department was able to offer immediate relief to individuals pardoned by removing these 47,140 cases sealing the electronic circuit court case record on the day that the order was issued.

This report outlines the work that the CRI program has started through the capital investment of ARPA funding, related to Oregon's petition-based expungement process. Program staff have focused on maximizing resources to address each objective by identifying crucial, high-priority elements of the project and achieve the outlined goals.

[2] Oregon Judicial Department. *Marijuana Pardons*. Available at: https://www.courts.oregon.gov/forms/Pages/marijuana-pardon.aspx. Accessed March 2, 2023.

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1 SUPPORT FOR COURT PROCESSING OF EXPUNGEMENTS

Section 1 ARPA goals:

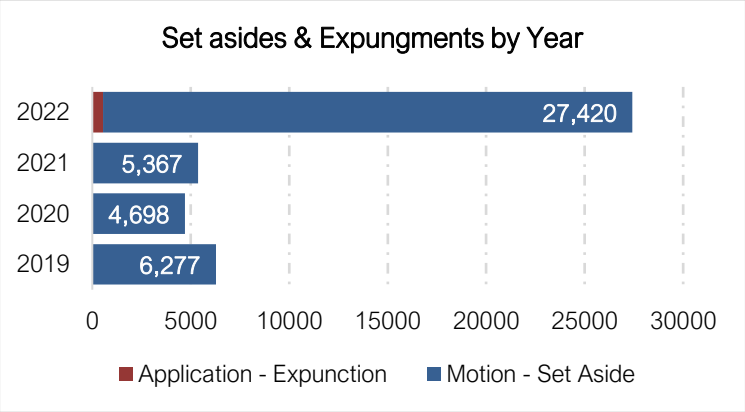
- Creation of policy recommendations to streamline the eligibility process and overcome the barriers to automating the expungement process.
- Identifying remaining staffing needs at courts after the opportunities for automation are identified, as most likely some human intervention will continue to co-exist with automated processes.
- Funding existing efforts for courts currently engaged in back scanning case files into Odyssey.

The 2021 statutory changes to expungement (adult set asides, juvenile expungement, and evictions) resulted in approximately 27,000 petitions being filed with the courts in 2022 – a 400% increase over prior years. SB 397 eliminated the filing fee for the set-aside motion, reduced fees for the criminal records check, and updated the statute to direct that the court "shall grant the motion and enter an order" if there is no objection and the behavior of the person is not creating a risk to public safety. In July 2022, the CRI program engaged with circuit courts to identify areas to streamline the manual processing of expungements. This support takes several different forms:

- Peer Collaboration Meetings for courts and staff to share ideas and innovations, and barriers related to expungement processing.
- Drive business process consistency through creation and maintenance of a Q&A knowledgebase.
- Sharing statewide data trends on various aspects of expungement filings and case processing.

Greatly exceeding pre-pandemic levels of approximately 500 expungement filings per month, 2022 saw more than 2,200 motions monthly. [Figure 1.1.1]. Filings appear to have stabilized at 2,000 per month, though courts continue to have difficulty handling this volume increase.

Figure 1.1.1



Detailed in Figure 1.1.2, 49% of the expungement requests filed in 2022 have been granted, while 50% are pending and less than 1% were denied.

Figure 1.1.2

Case Type	Filed	Granted	Denied	Pending
Driving	1,247	439	56	785
Drug	4,577	2,502	67	2,054
Non-criminal	6,887	3,055	237	3,714
Other	4,161	2,133	72	2,113
Person	3,213	1,649	80	1,706
Property	7,335	3,704	116	3,702
Grand Total	**27,420**	**13,482**	**628**	**14,074**

1.1 PEER COLLABORATION MEETINGS

CRI has established monthly peer collaboration meetings to meet with court staff tasked with processing expungements. The process provides an active forum for court staff across all 27 judicial districts to engage in discussions related to expungement processing and barriers and challenges that courts encounter in that processing, as well as to engage with each other and the CRI program staff to identify business process and data entry improvements.

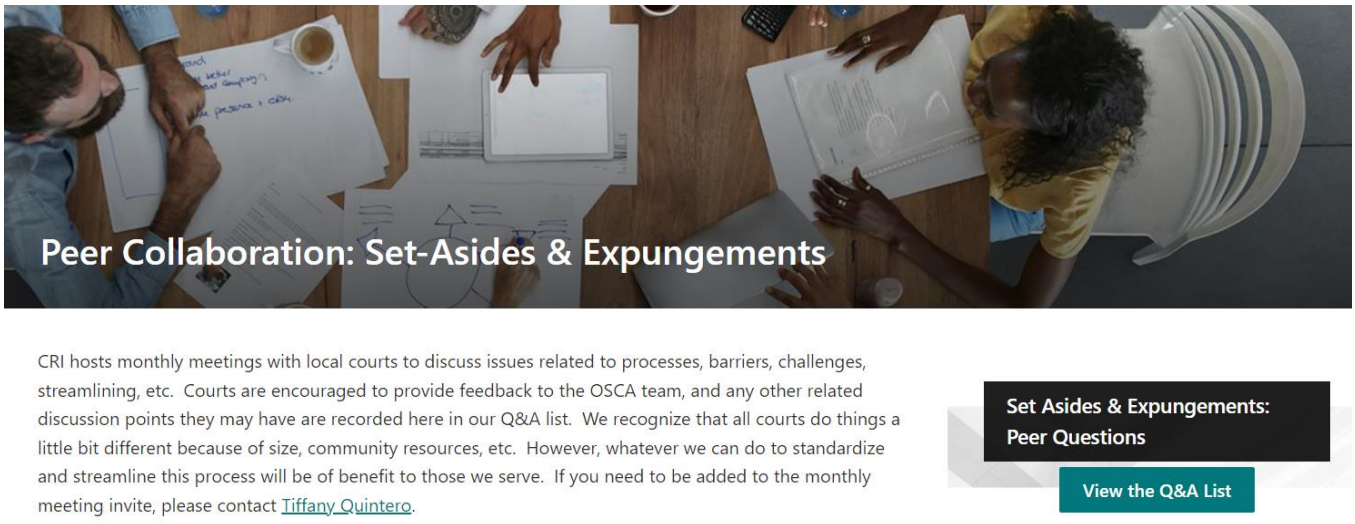
Peer collaboration meetings accomplish several program goals, but most important, provide a regular conduit to the CRI program for clarification of business process and legal issues, consistency in implementing those processes, and establishing best practices in interacting with agency partners (e.g., local attorneys and law enforcement). Information shared through the peer collaboration is populated into a question and answer (Q&A) knowledgebase on expungement processing to serve as a resource to courts.

1.2 BUSINESS PROCESS CLARIFICATION & CONSISTENCY

One of the main goals of CRI is to establish consistency in statewide processes. The program has developed subject-matter expertise that the courts rely on when clarification of business process is necessary. The primary means of collecting business process questions and communicating responses and recommendations is the CRI program's Q&A knowledgebase on SharePoint. [Figure 1.2.1]. All courts have access to this information, and it is regularly updated as challenges are identified and resolved.

Updates to this Q&A knowledgebase will continue through the duration of the program's work on expungements. As CRI progresses further into establishment of an automated expungement process, the knowledgebase will also include information courts need to know about that process and their role.

Figure 1.2.1 Peer Collaboration SharePoint Q&A knowledgebase

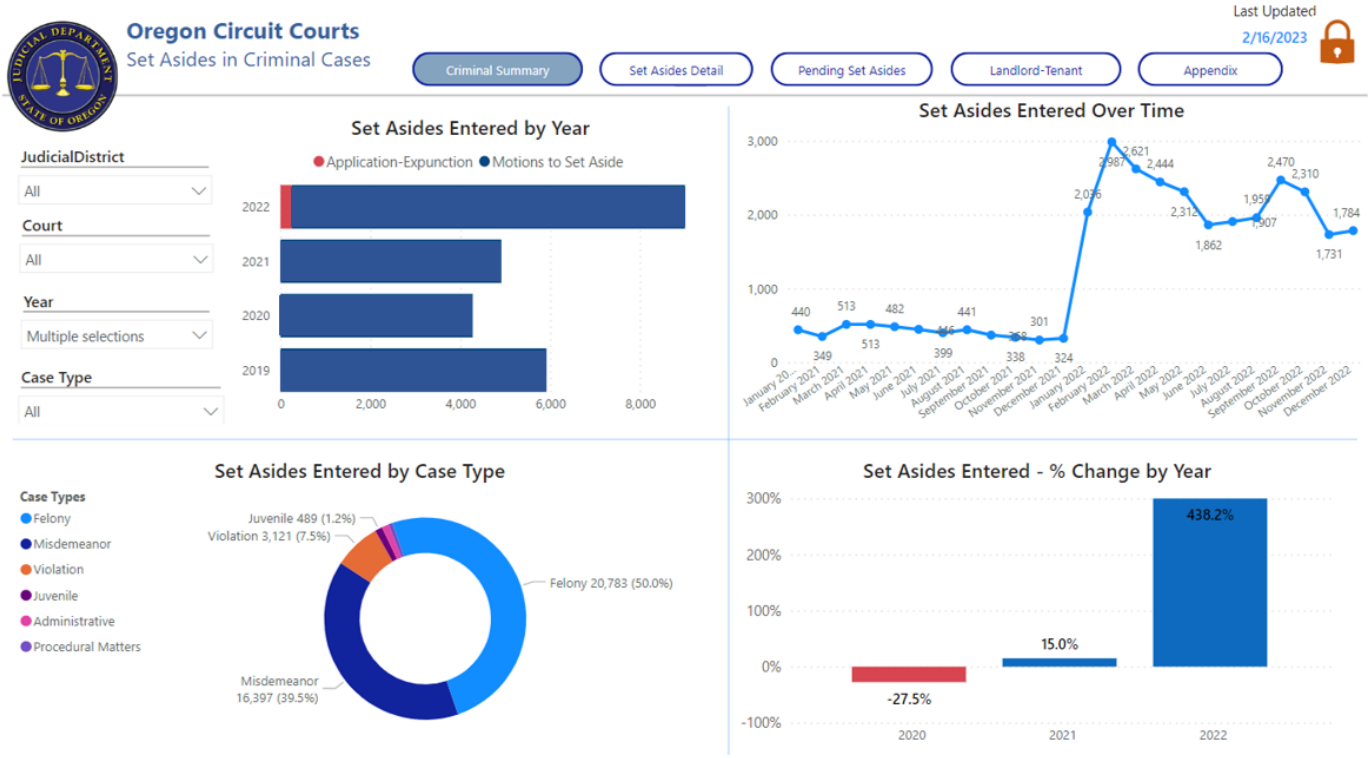


1.3 SET ASIDE AND EXPUNGEMENT DATA DASHBOARD

The Judicial Department has developed dashboards to quickly provide data on statewide trends, over time and by county, on several detailed aspects of expungement cases. Using a data-informed approach, the dashboard offers case-level detail related to motion filings, including percentage change month-over-month, motions granted or denied, and pending motions beyond the objection period.

Through data visualizations (charts and graphs), individual courts and CRI can identify trends. The dashboards also serve as a resource to identify data entry inconsistencies and business process efficiencies. Due to the substantial increase in expungement volume, dashboards are critical for courts to view aggregate data that is timely and useful for their day-to-day processing needs, as well as an inventory of motions and case data.

Figure 1.4.1 Internal Judicial Department Set Aside and Expungement Dashboard



2 GOVERNOR'S MARIJUANA PARDON CASE PROCESSING

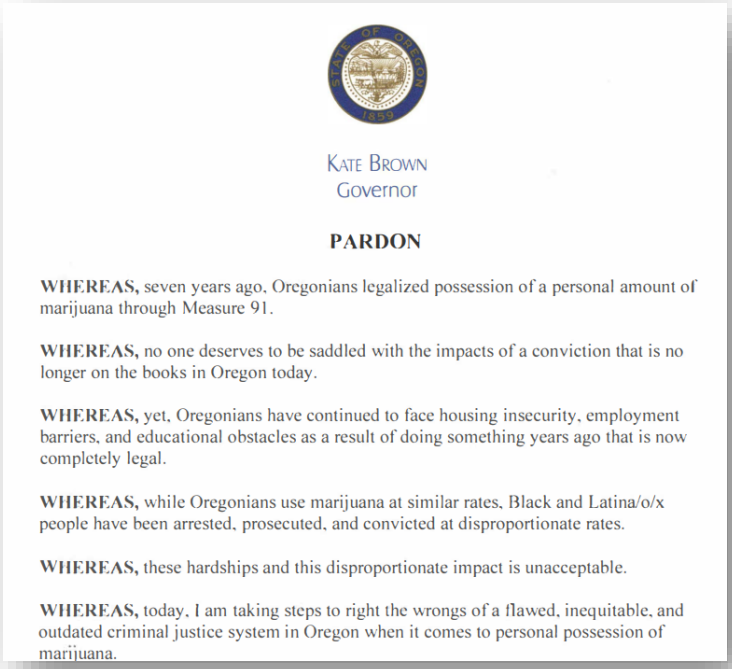
Governor Brown issued a pardon on November 21, 2022, to pardon people in 47,140 *simple cases*[3] involving only marijuana possession charges, where the individual was 21 years old or older at the time of the offense, and there were no victims on the case. The Judicial Department created an automated process that handled most of the work and ensured compliance with statutory requirements.

Section 2 ARPA goals:

- Determine the extent to which eligible records can be identified using automation by mapping eligibility criteria (arrests, convictions, offenses, waiting periods, disqualifiers, etc.) to their associated data points across systems (LEDS, eCourt, local and tribal courts).
- Map the expungement process from application to expungement to identify where human intervention is required or where other barriers to automation exist.
- Diagram the data flow to understand how each local and state system communicates with each other. This includes identifying the data source(s) that flow out to the public.
- Create policy recommendations to streamline the eligibility process and overcome the barriers to automating the expungement process.

By gathering input and detailed feedback from subject-matter experts in courts, and applying insight from past planning efforts, the Judicial Department was able to successfully implement a process granting immediate relief to an estimated 43,570 individuals[4] (47,140 cases) in accordance with ORS 144.653(2), greatly reducing the administrative workload in circuit courts. If circuit courts had to process the Governor's marijuana pardon without automation, estimates indicate it would have taken a full-time court staff 147 months (or 12.25 FTE for one year).

The marijuana pardon case processing project served as a pilot for several of the ARPA project goals, was a catalyst for developing data visualization tools, and ultimately proved as a successful test case for automating significant portions of expungements.



KATE BROWN
Governor

PARDON

WHEREAS, seven years ago, Oregonians legalized possession of a personal amount of marijuana through Measure 91.

WHEREAS, no one deserves to be saddled with the impacts of a conviction that is no longer on the books in Oregon today.

WHEREAS, yet, Oregonians have continued to face housing insecurity, employment barriers, and educational obstacles as a result of doing something years ago that is now completely legal.

WHEREAS, while Oregonians use marijuana at similar rates, Black and Latina/o/x people have been arrested, prosecuted, and convicted at disproportionate rates.

WHEREAS, these hardships and this disproportionate impact is unacceptable.

WHEREAS, today, I am taking steps to right the wrongs of a flawed, inequitable, and outdated criminal justice system in Oregon when it comes to personal possession of marijuana.

[3] For the purposes of automation, the Judicial Department defines simple cases as single-charge cases where the entire case is eligible to be sealed. Administrative tasks related to co-defendants and document redaction are not required.

[4] In some instances, an individual person had more than one case that met the Governor's criteria for the pardon issued on November 21, 2022. Therefore, the number of unique individuals granted relief is less than the number of cases pardoned.

2.1 PARTNER AGENCY ENGAGEMENT

CRI utilized the marijuana pardon case processing to establish communication pathways to various partner agencies with an interest in the pardon cases and streamlining expungements generally. [Table 2.1.1]. The program communicated details related to case processing, timelines, technical requirements, and outcomes through an operational plan.

The pardon case processing has resulted in follow-up conversations with several partner agencies including Oregon State Police (OSP) and the Department of Corrections (DOC) regarding the process by which the Judicial Department conveys sealed case data to those agencies. Partner agency collaboration will continue to identify areas where efficiencies and streamlined data transfer can be expanded and adapted.

Table 2.1.1 Partner agency engagement

Partner Agency	Participants

Oregon Judicial Department	• All Circuit Courts
	  ○ Presiding Judges
	  ○ Trial Court Administrators
	  ○ Court Records Departments
	• Office of the State Court Administrator
	  ○ Executive Services Division
	  ○ Civil & Criminal Programs Division
	  ○ Office of General Counsel
	  ○ Office of Legislative Affairs
	  ○ Enterprise Technology Services Division
	  ○ Business & Fiscal Services Division
	  ○ Court of Appeals

Government	• Governor's office • Legislative branch • Oregon State Police • Department of Corrections • Community Corrections (36 counties) • District Attorneys (ODAA, 36 counties) • Public defense (OPDS, OCDLA, listserv) • Local law enforcement (154 agencies)
Non-Government	• Judicial Department Bulk Data Customers (10)
Public	• Recipients of Governor's marijuana pardon

2.2 AUTOMATED PROCESSING

The framework for processing the Governor's marijuana pardon was developed by combining detailed feedback from subject-matter experts in courts and insights from past planning efforts and court processes. The focus was implementation of an automated method to quickly process the pardoned cases by sealing the records the same day the pardon is issued.

Table 2.2.1 Marijuana pardoned case counts

Marijuana Pardoned Cases	Counts
Total cases	47,140 cases
Total individuals	43,570 individuals
Cases with outstanding warrants	4 cases
Cases with financial balance	16,135 cases
Total financials remediated	$14,400,000

Three overlapping goals guided this work:

1. Granting relief to individuals in accordance with ORS 144.653(2);
2. Reducing administrative workload in circuit courts; and
3. Adhering to statutory requirements to seal cases included in the pardon.

With these goals in mind, the plan was intentionally streamlined to automate much of the work to seal the 47,140 pardoned cases, while complying with Judicial Department's legal obligations. [Table 2.2.1]

Initially, CRI collaborated with the Judicial Department's data team to query the Oregon eCourt case management system and produce a list of case records based on the Governor's pardon eligibility criteria. The Office of the State Court Administrator (OSCA) collaborated by answering questions, identifying nuances in the data, and encouraging partner agency communication.

The same day that the Governor announced the pardon, every circuit court Presiding Judge executed a batch Presiding Judge Order (Batch PJO), that included case numbers of all affected cases in each

county and granted authority to OSCA to seal the cases through an automated process. OSCA facilitated the recall of cases from collections, where applicable, addressed the remediation of financial balances and warrants, attached unique set-aside orders to each case, as well as provided partner agencies with the list of cases and corresponding case information to facilitate their obligation to seal records subject to the Batch PJOs. Partner agencies have engaged in a more manual process to seal their records. Fully automating a process would include consideration of the information system communication or integrations across these partner agencies.

The outline in Table 2.2.2 provides a list of the tasks executed that aligned with the plan. Scheduling around holidays and Judicial Department routine technology maintenance weekends, OSCA was able to accomplish end-to-end efforts within four weekends, completing all automation tasks by January 15, 2023.

Table 2.2.2 Task Completion

Completed	Associated Task
November 21, 2022	• Governor issues executive order • Presiding judges issued a presiding judge order authorizing the automated sealing of cases • All cases recalled from collections • All cases successfully sealed and removed from public access by 7:00pm
November 25, 2022	Data table provided to partner agencies
December 2, 2022	Over $14 million fines and fees were remitted in the 15,967 cases included in the Governor's marijuana pardon with outstanding fines and fees
Weekend of December 9, 2022	Applied unique automated orders to each case in Group 1 ~ Clackamas, Crook/Jefferson, Curry, Lincoln, Marion, Washington
Weekend of January 6, 2023	Applied unique automated orders to each case in Group 2 ~ Benton, Coos, Deschutes, Douglas, Josephine, Lane, Malheur, Multnomah, Sherman, Tillamook, Wallowa
Weekend of January 13, 2023	Applied unique automated orders to each case in Group 3 ~ Baker, Clatsop, Columbia, Gilliam, Grant, Harney, Hood River, Jackson, Klamath, Lake, Linn, Morrow, Polk, Umatilla, Union, Wasco, Wheeler, Yamhill
Week of January 16, 2023	OSCA responded to 42 requests for a copy of the order to seal; 12 orders will be mailed to the individual; 30 cases were not within the pardon scope, or a case could not be located. These 30 individuals will have an opportunity to respond with more information to identify their case.

2.3 MARIJUANA PARDON AUTOMATION OUTCOMES

Key outcome measures for the automation of the Governor's marijuana pardon were divided into two groups. Several measures were communicated to the individual circuit courts through a data dashboard. Additionally, other outcomes were collected to evaluate effectiveness and inform the future development of automation efforts.

2.3.1 AUTOMATION OUTCOME MEASURES

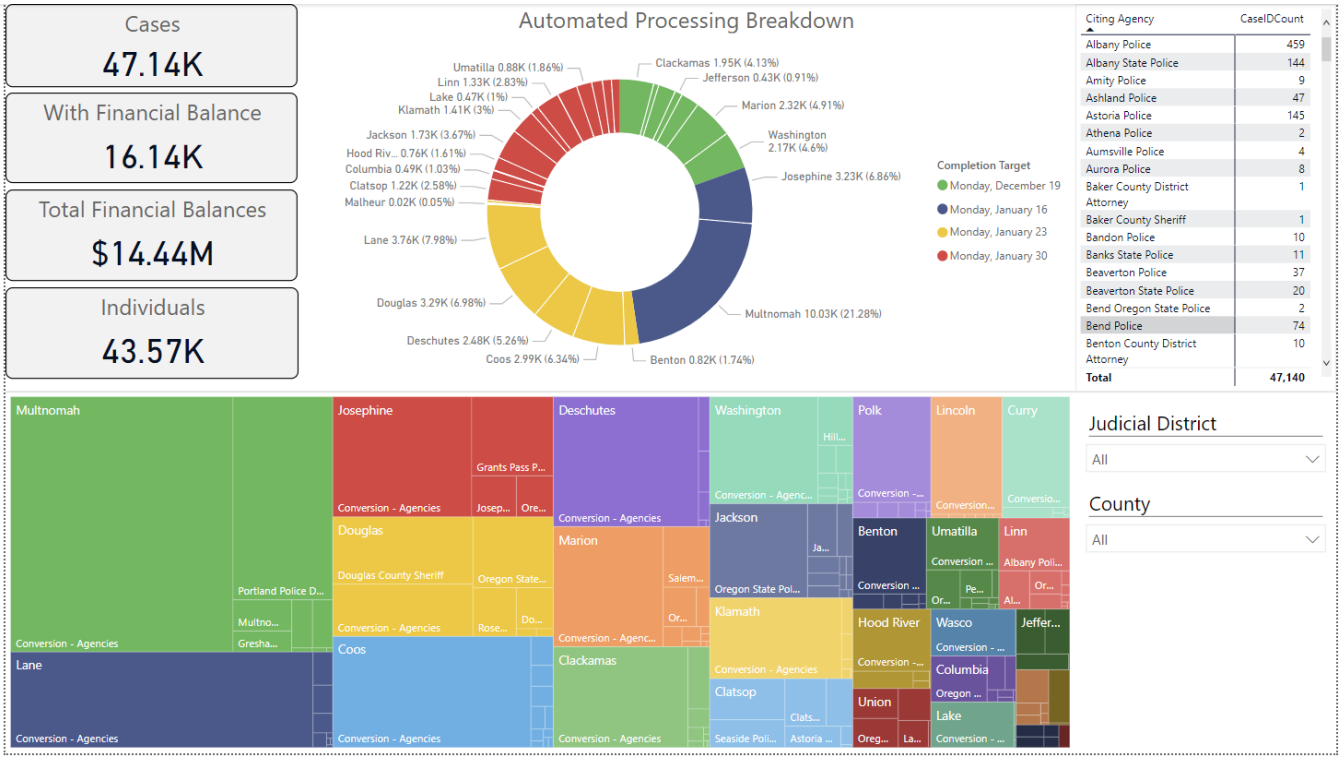
The marijuana pardon project tracked the following outcomes of the automated process to include removal of warrants, financials, recalls from collections, sealing, and attachment of the unique order to seal to each individual case. [Table 2.3.1.1]. Case records that include paper files and other media (audio and video recordings) were outside of the scope of automation. These records were sealed through administrative efforts by court staff.

Table 2.3.1.1 Automation Outcome Measures

Outcome Measure	Count of Cases	Percentage
Cases successfully processed entirely by automation	46,390	98.4%
Cases which encountered one or more errors requiring manual intervention	753	1.6%
A. Sealing of cases		
Cases sealed through automation	47,140	100.0%
Cases requiring manual intervention to seal	0	0.0%
B. Remediation of Financials		
Cases recalled from collections	15,846	100.0%
Balances remediated through automation	15,385	95.4%
Balances requiring manual intervention to clear	750	4.6%

The data dashboard for the Governor's marijuana pardon presented a visual display of outcome measures related to the automated processing. Data visualization by county included: case type, case filing date, remitted fines and fees, citing agency, and the outcomes included in Table 2.3.1.1. [Table 2.3.1.2].

Figure 2.3.1.2 Marijuana Pardon Data Dashboard



2.3.2 **UTILIZATION OUTCOME MEASURES**

Tasked with identifying efficiencies and streamlining processes, the CRI program included outcome measures resulting from the Governor's marijuana pardon to measure utilization and the impact of the systems and tools supporting the overall program goals, specifically, the time required to deliver the Judicial Department's legal requirements of the Governor's pardon. [Table 2.3.2.1].

Table 2.3.2.1 Utilization Outcome Measures

Outcome Measure	Time Utilization
Processing time	
Script to seal all cases	Less than 2 minutes
Publish new data set to Judicial Department's Online Records Search (out-of-cycle)	Approximately 25 minutes
Script to remove cases from collections	Less than 30 minutes
Script to remove financial balances from cases	Approximately 19 hours
Action to add unique order to seal to each case	Approximately 39 hours over 3 weekends

It is important to know the total processing time required to add the unique order to seal. This total processing time, multiplied by the number of cases processed, gives the CRI program a more accurate picture of human capital required to do this work. While this relationship is the most resource intensive portion of the automation, the marijuana pardon project demonstrated that approximately 1,300 cases can be processed through automation each hour. Without automation, those cases would have required 30 minutes of manual processing time, or 81 8-hour days for a court staff.

2.4 **PUBLIC COMMUNICATIONS & ORDER REQUEST PROCESS**

An important aspect of the pardon case processing involved ways to engage with the public. Individuals whose cases were included in the pardon did not receive notice from the Office of the Governor that their case was included in the pardon. The Judicial Department anticipated that a number of these individuals would contact the court to request a copy of the Order to Seal as a result of the Governor's pardon, and others would inquire as to whether their case was included in the pardon. OSCA identified a method, through a public-facing request form, to address an individual's request for a copy of the unique order to seal a pardoned case through a central process where requests are managed and processed by CRI staff.

The Judicial Department's webpage was updated to include instructions on how to determine if a person's case was included in the Governor's pardon; access case records through the Judicial Department's Online Records Search website; and request a copy of the court order sealing the case. The webpage and its documents (e.g., order request form, instructions to access case records, and frequently asked questions) were translated into Spanish, Russian, Vietnamese, Arabic, Chinese, and Chuukese.

3 SET ASIDES AND EXPUNGEMENT DATA MAPPING & AUTOMATION PLANNING

The improvement and investment of technology has led to an increase in interconnectivity and inter-dependability. As a result, the need to share data and increase efficiencies is a business priority. Oregon eCourt provides the framework to leverage technology to adapt and integrate old and often disparate systems and processes to provide the services individuals need today, but more work needs to be done, particularly in clearing a person's criminal history. Tasked with mapping the Judicial Department's internal information systems and external integrations, the CRI program has worked to identify barriers and mitigation strategies to automate components of the expungement process. [Appendix A: Data In-and-Out of Oregon eCourt].

CRI has developed a set of functional requirements for a suite of partially to fully automated processes that can be applied to cases with expungement orders entered through manual case processing. While the current statutory schema for eligibility and sealing requirements and the continued existence of paper case files prevent the Judicial Department from fully automating the process, additional efficiencies can be realized in circuit courts and centralized work.

Data entry and quality assurance is a critical component of successful automation and data initiatives. Through a standardized, statewide process to maintain data through its Oregon eCourt system, the Judicial Department can ensure that statewide data is accessible while centralized analysis can evaluate whether data is being entered appropriately and provide training when discrepancies are uncovered. Without the right tools and processes in place, workflows across individual courts could create inconsistencies for statewide data reporting.

Section 3 ARPA goals:

- Determine the extent to which eligible records can be identified using automation by mapping eligibility criteria (arrests, convictions, offenses, waiting periods, disqualifiers, etc.) to their associated data points across systems (LEDS, Oregon eCourt, local government and tribal courts).
- Map the expungement process from application to expungement to identify where human intervention is required or where other barriers to automation exist.
- Diagram the data flow to understand how each local and state system communicates with each other. This includes identifying the data source(s) that flow out to the public.
- Create and/or modify existing integrations across systems and develop automated processes for expunging records.

While technology should simplify data-related process, the implementation of solutions that communicate across multiple information systems can often complicate the process. The CRI program has taken time to pay careful attention to "identifying the problem" and creating technical and policy options to address it. [Appendix B: Oregon eCourt Data Mapping Plan] Oregon's complex statutory scheme for set asides[5] makes full automation impossible with current resources and technology. [Appendix C: Criminal Set Aside Process with Petitioner]. Therefore, the CRI program has prioritized internal solutions while concurrently sharing technical limitations with partners developing statutory changes. The Judicial Department is grateful to be an active participant in these collaborative efforts, addressing what is technically feasible through automation.

[5] ORS 137.225 (2021)

3.1 AUTOMATON ELIGIBILITY ANALYSIS

The CRI program has completed the analysis assessing the viability of an automated eligibility process for cases under ORS 137.225 and 475C.397. The eligibility analysis for juvenile cases under ORS 419A.262 *et seq.* is ongoing. For adult criminal arrests, citations, charges, and convictions, the statutory criteria were broken down into discrete components and each was mapped (where possible) to existing case or party data maintained by the Judicial Department in one or more of its case management systems[6]. Each criterion was assigned a one to four rating based on how easily it can be automated, using the following scale:

1) Cannot be automated because the criterion is subjective, not data-based, or data needed is not available to the Judicial Department.
2) Theoretically possible to automate, but would require data maintained by partner agencies which may or may not be made available to the Judicial Department through some means
3) Possible to automate with Judicial Department-maintained data, but with complications such as the historical nature of data on past cases, issues arising from the obsoletion and removal of charge and disposition codes, or changes over time to statutes that form the basis for charge codes used in Odyssey, the Judicial Department's centralized case management system implemented statewide in late 2016.
4) Clearly and easily automated with Judicial Department-maintained data.

Most eligibility criteria under ORS 137.225 and 475C.397 fell within either rating three or four, however significant barriers were identified in approximately 30% of the eligibility criteria (rating one or two).

3.2 BARRIER IDENTIFICATION AND MITIGATION OPTIONS

Several barriers to a fully automated solution have been identified, categorized, and characterized, to include:

- Over 30 unique barriers have been identified across business process, budget, and technical capabilities of Judicial Department or partner agencies' data systems.
- ~33% of all barriers relate to inability to automate statutory eligibility criteria (e.g., subsequent conviction, probation violations, and whether an individual is currently incarcerated).
- ~20% of barriers are feasibility issues (e.g., feasibility for an automated process to incorporate cases with no electronic case record).
- Technology limitations preclude the automation of partial set asides and expungement due to redaction requirements.

Analysis of options to mitigate or circumvent some, or all, of these barriers Is ongoing. While the CRI program continues to identify efficiencies in business process and integrations, statutory changes and

[6] Judicial Department case management systems include: Specialty Court Management System (SCMS), Appellate Case Management System (ACMS), Supervision (pretrial), Jury, Language-access Interpreting & Billing Requests Application (LIBRA).

funding of Policy Option Package 103 in the 2023-25 Chief Justice Recommended Budget will inform next steps.

4 OUTCOMES

Accessibility and availability of court case files that are complete and accurate are fundamental to the effectiveness and efficiency of court operations. The integrity, or organization and completeness, of the file affects the decision-making process. Evaluating distinct categories of records (file type: on-site, off-site, paper files, microfiche with case status) will ensure that records management practices are consistent statewide.

Reliability of a court's electronic case record is measured by comparing the electronic case summary to the complete file (paper file or other media). To make this comparison, entries on the case file summary should match the documents in the file. Measures may include a count of the number of cases where every document-related entry on the electronic case record has corresponding documents in the case file, and conversely, each document in the case file is listed on the electronic case record. In this instance, the CRI program would rely on individual court staff to assist in identifying paper files or other media, to calculate the percentage of cases for which "Yes" was answered to both by file type with case status.

Integrity of a court's electronic case record is measured by determining appropriate criteria for mandatory file contents and organization. It is critical that electronic case records are complete with an accurate case file summary. Criteria for this measure might include documents scanned into the file, correctly captioned, and date stamped in the correct location in sequence. A random sample of electronic case records can be used for the measure.

Like the Governor's marijuana pardon, automation outcomes and utilization outcome measures will be captured for automated actions addressed through policy implementation. [Table 4.1].

Table 4.1 Utilization Outcome Measures

Automation Outcome Measures	Utilization Outcome Measures
Cases successfully processed entirely by automation	Processing time
Cases which encountered one or more errors requiring manual intervention	Script to seal all cases
Cases sealed through automation	Publish new data set to Judicial Department's Online Records Search (out-of-cycle)
Cases requiring manual intervention to seal	Script to remove cases from collections
Cases recalled from collections	Script to remove financial balances from cases
Balances remediated through automation	Action to add unique order to seal to each case
Balances requiring manual intervention to clear	

5 FINANCIAL

5.1 ARPA FUNDING

The Judicial Department was allocated $1,000,000 during the 2021-23 biennium to begin to address the issues that make the set-aside and expungement process cumbersome for the public, and labor intensive

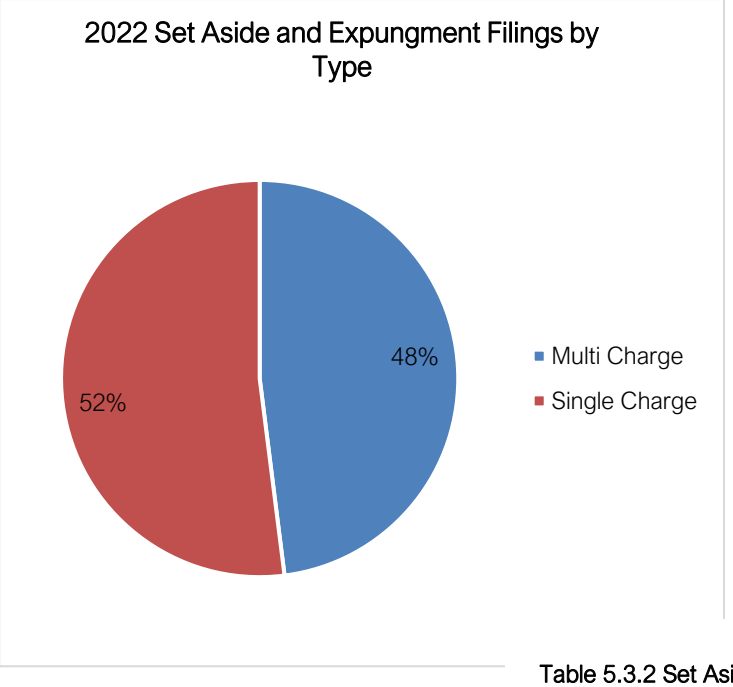
for the courts. The pilot CRI program was established in February 2022 as a result of the funding and has worked to perform the efforts described in this report. Remaining funding will allow this work to continue through December 2023.

5.2 SUPPLEMENTAL COURT FUNDING

The 2021 legislature adopted SB 397, modifying the procedure for filing motions to set aside, and reducing the waiting period. Among other modifications to Oregon law, the bill eliminated the filing fee, reduced fees for the criminal records check, and directs that *the court shall grant a motion for set aside if no objection to the motion is received within a set number of days from the filing date*[7].

The statutory change resulted in approximately 27,000 expungement petitions being filed with the courts in 2022, a **400% increase** over prior years. Approximately half of those have been granted and 480 were denied. Of the remaining pending motions, 60% are within the statutory timeline for filing an objection.

Figure 5.3.1



It is important to note that the volume of petition-based expungement will remain high, regardless of contemplated automation implementation. While it only takes approximately 30 minutes for a single-charge motion to be processed by court staff, a multi-charge case takes between 4- and 7-hours depending on complexity. Close to 50% of the petition-based process involves multi-charge case files, or otherwise requires manual efforts to process the motion.

For 2022, the increase in motions resulted in a need for at least 21 additional FTE in circuit courts dedicated to set-aside motions, at an estimated cost of $3,500,000. [8] [Table 5.3.1].

The Judicial Department did not receive additional positions with the passage of SB 397 for the 2021-23 biennium. It was challenging to foresee the impact of the bill, but the

Table 5.3.2 Set Aside and Expungements by Processing Hours (converted to FTE)

Year	2019	2020	2021	2022
Multi Charge processing days (4 hours)	1,647	1,221	1,449	6,581
Single Charge processing days (30 min)	214	141	154	891
Total 8-hour Days	1,861	1,362	1,603	7,472
Total FTE to complete within 1-year	7.16	5.24	6.17	28.74

[7] ORS 137.225 (3)(b) (2021)
[8] Judicial Services Specialist 3, assuming 260 workdays/year based on the 2022 Judicial Department classification and compensation plan.

fiscal impact estimate submitted by the Judicial Department predicted an indeterminate, but significant workload increase.

5.3 POP 103 Fresh Start Expunction Program

To ensure equitable and efficient processing of set asides and expungement for qualified individuals, address the increased volume of motions for relief by automating processes (where possible), and prioritize expedited processing when motions for relief are granted, the Judicial Department has requested new statewide set-aside and expungement processing resources.

As the federal ARPA funding comes to a close, Policy Option Package (POP) 103 *Fresh Start Expunction Program* will add dedicated central staff and judicial authority to monitor petitions, case documents, and objections that will allow petitions and orders to be quickly resolved.[9] This investment will also provide resources to work with judicial system partners to streamline and automate processes (when possible) to expedite relief and enhance access to justice, while working to equalize opportunities for members of the community.

6 Recommendations

As described in Section 3, the CRI program has reviewed the statutory requirements for ease of administrative effort, feasibility, and readability as it relates to automation of set asides and expungement. Recommendations were reviewed with an eye toward implementation feasibility, reduction of complexity, and relevance to increasing access to justice. Through the process of mapping information systems, the Judicial Department has identified areas in current legislative proposals to improve draft language clarity, which may serve as a template for future automation projects related to civil and criminal cases. In addition, the automation framework developed for the Governor's marijuana pardon may apply to efforts that address objective eligibility criteria and internal process improvements.

6.1 Policy Recommendations

Additional Judicial Department policy recommendations are being explored including: (1) retention and disposal policies for court records; (2) policies for access to records and safeguarding nonpublic and confidential information; (3) criteria and procedures for achieving systematic control over all types of recorded information under the control of the courts; and (4) criteria and procedures for identifying and disposing of court records eligible for disposal.

The purpose of these potential policies would be to ensure that full and accurate records are created, captured, maintained, made accessible, stored, and legally disposed of in accordance with Oregon law and court rule. Under the current statutory schema, these recommendations apply to all records of the Judicial Department regardless of format and media.

[9] Oregon Judicial Department. *Chief Justice Recommended Budget 2023-25*. Page 219.

6.2 GOVERNANCE COMMITTEE

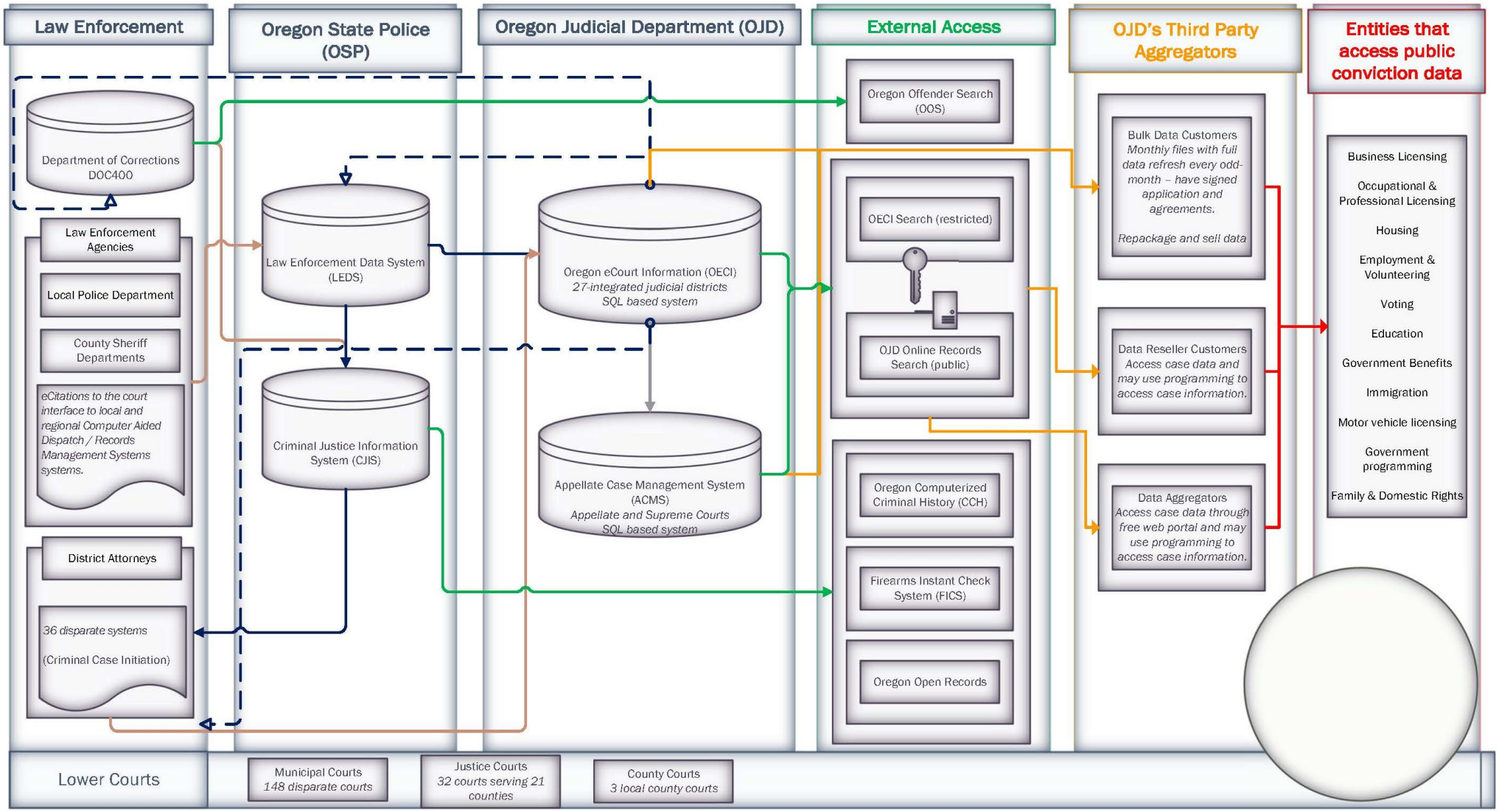
The proposed governance committee would solicit and receive input, evaluate, and make recommendations to the Chief Justice and State Court Administrator through multi-agency collaboration to improve information technology system digital workflows by identifying barriers, developing procedures, and adapting existing systems. Immediate goals to address automation efforts could include:

- Establish approved scope of work and requirements
- Build, test, and deploy infrastructure updates as required
- Integration for automation (where possible) between the Judicial Department, Department of Corrections, Oregon State Police, district attorneys, Office of Public Defense Services, and local law enforcement agencies
- Operations support, including reports, identified by partner agencies
- Budget for each agency to provide steady operational support

It is important to set consistency standards based on an "outside-in" view. That is, look at system and consistency requirements from the perspective of external system users – attorneys, self-represented litigants, businesses, and the public – when designing forms, setting standards, and defining requirements. In general, the justice system should provide the simplest standard interface that requires the least amount of data entry to accomplish the required task for both experienced and inexperienced legal practitioners. This makes it easier to work with the system and thereby increases efficiency and improves access within the court.

The primary responsibility of the governance committee would be to ensure that the Judicial Department's investments in court records integrity meet the operational and access to justice goals and priorities of the justice system. Through the review and consideration of data-informed policy recommendations, the governance committee will help inform the identification of future technology considerations and business process best practices in furtherance of the Judicial Department Strategic Campaign.

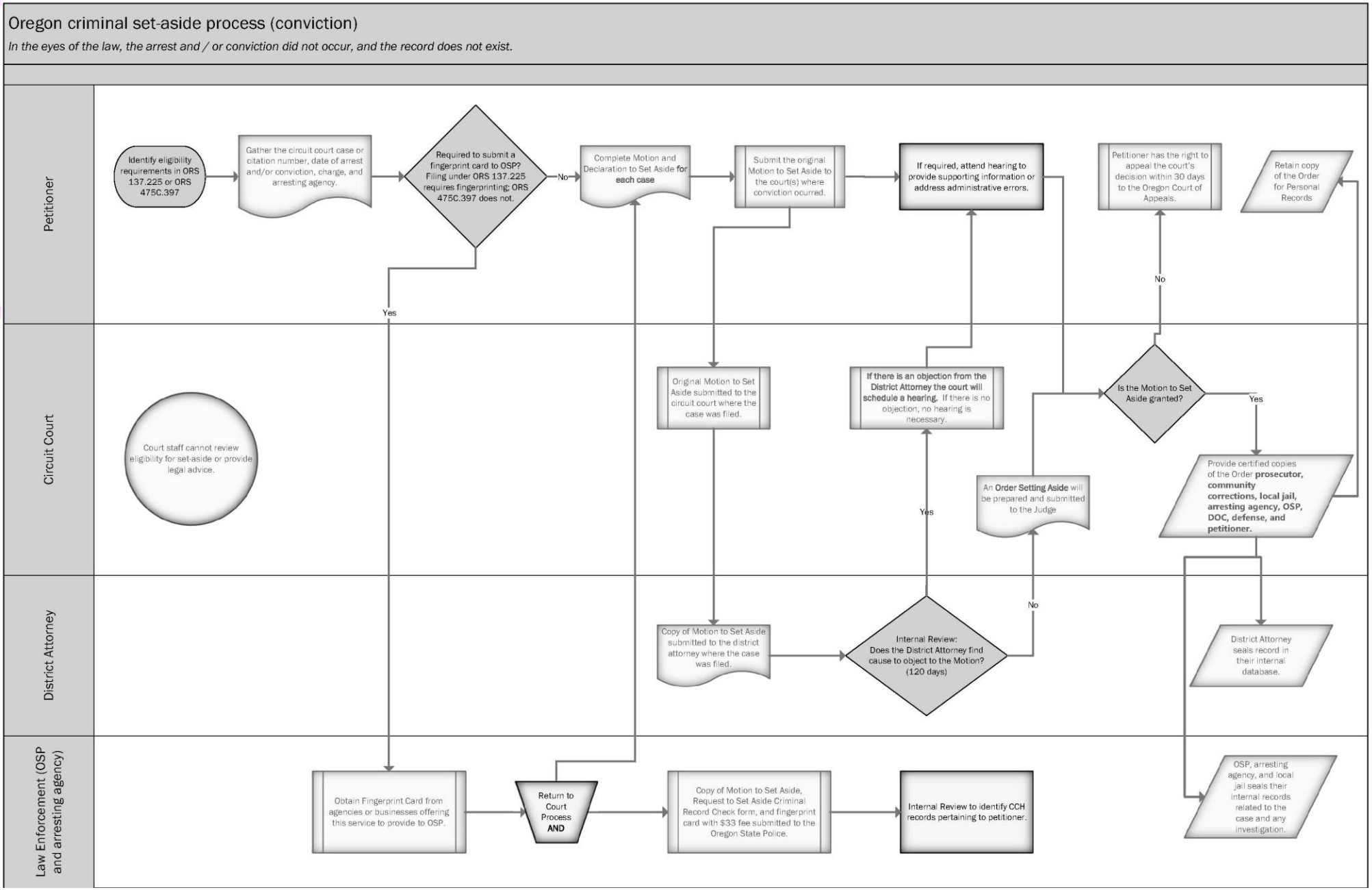
APPENDIX A: DATA IN-AND-OUT OF OREGON ECOURT



APPENDIX B: OREGON ECOURT DATA MAPPING PLAN

	Phase 1	Phase 2 Deeper Dive into Technical and Business Processes Evaluation of Automation Options Identification of Barriers		Phase 3 Analysis of Barrier Mitigation Options / Trade-offs Identification of Required Manual Processes Specification of Automation Requirements		Phase 4
		2a: Eligibility & OJD Internal	**2b:** Partners & Public Data	**3a:** Eligibility & Internal	**3b:** Partners & Public Data	
Phase Objectives	• Orient CRI team to the various systems at issue • Gather high-level technical and business process info on each system re: case data and set asides • Gather info re: development, deployment, or procurement stage each system is in • Identify appropriate technical and BP SMEs for each system / program • Create roadmap and plan for remaining data mapping project phases	• Perform technical & BP deep dive on OJD systems re: data, tools, platforms, methods of data transfer, data entry, etc. • Map in detail the existence, location, structure, completeness, etc. of data needed for eligibility determination • Evaluate feasibility of automated eligibility determination algorithm • Identify and evaluate automated processes for the dissemination of expungement data to internal OJD systems • Identify barriers to any of the above • List and circulate unresolved questions needing input from OJD SMEs doing system configuration/implementation	• Perform technical & BP deep dive on partner and public data systems re: data, tools, platforms, methods of data transfer, data entry, etc. • Map in detail the availability, location, structure, completeness, etc. of data in partner systems needed for eligibility determination • Identify and evaluate automated processes for the dissemination of expungement data to partner and public data systems • Identify barriers to any of the above • List unresolved questions needing input from partner agencies	• Receive and analyze responses from OJD SMEs on unresolved questions from Phase 2 • Identify mitigation options to all barriers identified in Phase 2a and evaluate technical and BP trade-offs of each • Identify barriers where no mitigation options exist to define where & to what extent manual processes are required • Define functional requirements for automated eligibility determination and recording • Define functional requirements for internal OJD expungement data transfer processes	• Receive and analyze responses from partner SMEs from Phase 2 • Identify mitigation options to all barriers identified in Phase 2b and evaluate technical and BP trade-offs of each • Identify barriers where no mitigation options exist to define where & to what extent manual processes are required • Define functional requirements for expungement data to partner agencies • Define functional requirements for expungement data to public data / bulk customers	• Identify and list policy recommendations stemming from phase 2 & 3 technical discussions and barrier identification • Draft, circulate for review, edit, and finalize Set-Aside Automation report, in accordance with ARPA grant requirements
Completion Date	Nov 4, 2022	Dec 30, 2022	Jan 31, 2023	Mar 17, 2023	Apr 30, 2023	Jun 30, 2023
Scope Details		Phase 2a Scoping	Phase 2b Scoping	Phase 3a Scoping	Phase 3b Scoping	
Relevant SMEs / Collaborators	• Specialty Courts Team • Appellate Support Team • Pre-Trial Team • Jury System Team • CLAS • OPDS IT / Analysts • OSP (LEDS/CJIS) • BFSD (Data Customers)	• Specialty Courts Team • Appellate Support Team • Pre-Trial Team • CLAS • Jury System Team	• OPDS IT / Analysts • OSP (LEDS/CJIS) • BFSD (Data Customers) • Dept. of Corrections • Local booking agencies • Local District Attorneys	• ETSD Business Process Analysts • ETSD Integrations team • Circuit courts (possibly needed for assessment of manual processes)	• BFSD Data Team • OSP Technical Contact • DOC Technical Contact • Sampling of local booking agency and DA contacts?	• OSCA Leadership • OJD Legislative Team • Office of General Counsel

APPENDIX C: CRIMINAL SET ASIDE PROCESS WITH PETITIONER



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Oregon Public Safety Task Force Report
Per House Bill 2238 (2017)

4 December 2020

Oregon Criminal Justice Commission

Ken Sanchagrin
Interim Executive Director

The mission of the Oregon Criminal Justice Commission is to improve the legitimacy, efficiency, and effectiveness of state and local criminal justice systems.

Executive Summary

In 2017, the Oregon Legislature passed House Bill 2238, which reconvened the Public Safety Task Force. The Legislature charged the Task Force with studying security release in Oregon, with a focus on reducing racial and ethnic disparity in pretrial incarceration. Under that broad charge, the Legislature included three specific areas of focus: (1) repealing statutes authorizing security release in favor of courts, or another entity with delegated authority, making release decisions; (2) utilizing pretrial release risk assessments; and (3) methods of reducing failure to appear at court hearings.

The PSTF completed an initial report by its statutory deadline of September 15, 2018. Given the complexity of the questions the Legislature asked the PSTF to study, the Task Force opted to submit a follow-up report to address those issues in ways not available by the initial reporting deadline. Further, the PSTF elected to add two addition focus areas to its inquiry: reducing economic disparity in pretrial incarceration and improving pretrial data collection practices.

In the intervening years, the PSTF has engaged in first of its kind data collection, systems and local practice information gathering, state constitutional and statutory legal analysis, far-reaching stakeholder outreach, and operating workgroups to respond to the inquiries before them.

This report aims to put the Legislature's pretrial release inquiries in the greater context of the overarching criminal justice system, provide as much data and information as is presently known about current operations and the statutory and constitutional framework framing these operations, and suggest policy changes.

The PSTF met over a two-year period and included diverse representation and engagement from various stakeholders. The recommendations are a product of this multi-year process and the final form presented herein were discussed by the Task Force over the course of three meetings in late 2020. It is important to note, however, that their inclusion in this report should not be considered an endorsement by each and every task force member or the organizations they represent. Further, the recommendations are general in nature and will likely require further policy work to determine the best path forward for Oregon.

<u>Racial, Ethnic, and Economic Disparity in Pretrial Release Recommendations</u>

- Support robust jail diversion programs as well as other programming and tools for defendants with behavioral health or other conditions, such as housing instability, that contribute to criminal justice system involvement but do not pose public safety risks.
- Encourage the increased use of currently existing "cite-in-lieu of custody" laws by law enforcement to avoid jail bookings for persons who do not pose public safety risks.
- Provide resources and require jails and courts to establish processes to collect and record racial and ethnic demographic data specific to the pretrial phases of case adjudication. Improvements must include remedying gaps in race data collection (i.e., adding Hispanic/Latino and Native American/American Indian to race categories collected) and developing processes that allow defendants to self-identify race and ethnicity, rather than relying on staff perceptions.

Security Release/Cash Bail & Delegated Release Authority Recommendations

- Reduce reliance on security release (either repeal security release entirely or restrict use to only when no non-monetary conditions would achieve defendant's appearance in court).
- If security release is retained, repeal presumptive minimum security release amounts in favor of judges determining appropriate security release amounts on a case-by-case basis and to prevent against wealth-based detention.
- Employ preventive detention law (argue at pretrial release hearings whether defendants are releasable vs. detainable) rather than using high security amounts as a proxy for achieving detention for defendants who are legally bailable.
- Support employment of more release assistance officers in judicial districts and empower them to make release decisions in appropriate cases to free up court resources for judges to make individualized pretrial release decisions on more challenging cases.
- Support employment of more pretrial release staff (judicial branch or executive branch) to perform pretrial information gathering, interviews, and assessments so that judges have as much case-specific information as possible at the time of release decision-making.
- Clarify in policy or statute the roles of judicial release assistance officers, with delegated discretionary release authority, and executive branch pretrial staff, with administrative release authority (meaning they may carry out judicial orders but may not use exercise release decision-making discretion).

Pretrial Risk Assessment Tool Recommendations

- Support and fund the implementation of limited number of tools statewide.
- Require local validation of tools and provide state support for obtaining local tool validation.
- Require public-facing transparency of pretrial risk tool use.

Reducing Failure to Appear Recommendations

- Require and provide funding for courts and pretrial staff to employ pretrial court reminders to the greatest extent possible.
- Support improvements to FTA data tracking and analysis.
- Consider court form revisions to make court appearance information easier to read, understand, and follow.
- Utilize technology to support more virtual court appearances consistent with constitutional rights.

Data Improvement Recommendations

- Support and fund improvements to pretrial data standardization, collection, reporting, and analysis (jail data, court data, pretrial program data), including, but not limited to:
  - Race and ethnicity data; tribal affiliation data
  - Pretrial status data (charges pending vs. other jail statuses), such as pretrial length of stay
  - Time to case disposition data
  - Failure to appear data
  - Violations of release agreement data
- Standardize data definitions and collection requirements for jail and court data elements.
- Require routine joint jail, CJC, and OJD reports on pretrial metrics and program outcomes.

Victim's Rights and Domestic Violence Safety Recommendations

- Allow for adequate time for information regarding domestic violence cases or cases in which there is risk of harm to victims or the public to collect harm-related information to make available to court or delegated release decision maker by the time a release decision is made (use pretrial hearings rather than arraignment).
- Ensure that release assistance officers are following the instructions and guidance they have received from presiding judges.
- To the maximum extent possible, input from the victim shall be sought prior to making a release decision.
- Employ domestic violence-specific safety assessments or risk assessment tools to supplement standard pretrial risk assessment scores or staff reports to ensure danger to victims adequately considered.
- Ensure that protective order dockets are not scheduled at the same time as arraignments so that victims are not forced to choose between exercising their constitutional right to be heard at pretrial hearings and other critical events.
- Ensure victims are notified of pretrial events and rights to be heard (including in culturally competent approaches).
- Ensure victims have opportunities to be heard and include means for options that do not require in-person presence if not preferred.
- Provide judges, court staff, pretrial staff, and other system actors with robust training on domestic violence risks and best-practices for rights enforcement and safety panning in the pretrial phase of cases.

Pretrial Professional Development, Best Practices, Standards, and Implementation Guidance

- Employ trainings for pretrial staff, judges and court staff, district attorneys, defense attorneys, and victim services, on pretrial legal requirements and pretrial program practices.
- Establish means for community outreach and education on pretrial processes and program purposes.
- Appoint or create a pretrial services practice advisory council to guide program compliance and implementation.
- Adopt statewide best-practice requirements and data collection standards for pretrial programs.

Public Safety Task Force Membership

Senator Floyd Prozanski, Chair, Senate District 4
Senator Denyc Boles, Senate District 10
Representative Tawna Sanchez, House District 43
Representative Ron Noble, House District 24
Steve Berger, Director, Washington County Community Corrections
Lane Borg, Executive Director, Office of Public Defense Services
Hon. John Collins, Circuit Court Judge (25th Judicial District, Yamhill County)
Melissa Erlbaum, Executive Director, Clackamas Women's Services
Paige Clarkson, Marion County District Attorney
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1. Introduction

1.1. Public Safety Task Force Origins

In 2017, the Oregon Legislature passed House Bill 2238, which reconvened the Public Safety Task Force.[1] The Legislature charged the Task Force with studying specific issues concerning pretrial incarceration, the impact of criminal fines and fees, and the implementation of the state's Justice Reinvestment program.[2] This report focuses on the pretrial components of the Task Force's work, as outlined by HB 2238, Section 2(a)(A)-(C). Specifically, the subsections of HB 2238 gave the Task Force the following mandate regarding pretrial:

> (2) The task force shall:
> (a) Study security release in Oregon, focusing on reducing racial and ethnic disparity in pretrial incarceration, including:
> (A) Repealing statutes authorizing security release in favor of courts, or another entity with delegated authority, making release decisions;
> (B) Utilizing pretrial release risk assessments; and
> (C) Methods of reducing failure to appear at court hearings[.]

The Task Force first convened in mid-2018 and set to work on HB 2238's areas of study. In support of this work, the Task Force convened three subcommittees: (1) statutory; (2) data and evaluation; and (3) domestic violence and victim's rights. The statutory subcommittee focused on evaluating the legal framework of Oregon's pretrial process, including the Oregon Constitution and the Oregon Revised Statutes, as well as on the practical and legal consequences of amending those laws. The data and evaluation subcommittee focused on available pretrial data, data gaps, existing pretrial program practices and best practices, and risk assessment tools. The domestic violence and victim's rights subcommittee focused on victim procedural and safety concerns and the effective enforcement of victim's rights during the pretrial period. The subcommittees were open to local and state criminal justice stakeholders, advocates, and interested members of the public.

1.2. Preliminary Task Force Report 2018

The Public Safety Task Force was subject to a legislative deadline of September 15, 2018, to submit a report making recommendations on the topics listed in HB 2238.[3] Because the PSTF appointments were completed in only May of 2018, the group did not have sufficient time to adequately undertake tasks as complex as those required in HB 2238. To satisfy the legislative deadline, however, the PSTF produced a preliminary report, identifying the primary hurdles in need of attention in order to complete its work.[4] In this preliminary report, the PSTF described key data deficits and added two elements to its slate of recommendations: (1) identifying and

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[1] H.B. 2238, 79th Legislative Session (2017), at (2)(a)(A-C).
[2] H.B. 3194, 77th Legislativ Session (2013).
[3] H.B. 2238, 79th Legislative Session (2017), at (2)(a)(A-C).
[4] Oregon Criminal Justice Commission, Task Force on Public Safety, House Bill 2238 Report (2018), https://www.oregon.gov/cjc/CJC%20Document%20Library/2018_09_15_PublicSafetyTaskForceReport.pdf

bridging gaps in state pretrial data elements from jails, courts, and pretrial programs; and (2) adding economic disparity to the focal points of the pretrial study. The intent of the PSTF was to follow-up on this preliminary report with a more comprehensive report once more Oregon specific data concerning the state's pretrial practices were available. This report serves as that follow-up.

This current report focuses on responding to the questions set forth by the Oregon Legislature, namely, studying Oregon's security release system with a focus on reducing racial and ethnic disparity in pretrial incarceration. This includes three sub-points: (1) considering the implications of repealing security release in favor of courts (or entities with delegated authority) making release decisions; (2) the use of risk-assessment tools; and (3) reducing failure-to-appear rates in Oregon courts.

In addition to addressing those issues, the report addresses other critical policy issues in the pretrial context, such as what Oregon pretrial jail and court data are presently available, as well as an assessment of those data. It also includes descriptions of the operations of currently operating pretrial programs, overviews of other states' pretrial reform efforts, and recommendations from the Task Force as to what the Oregon Legislature and Governor's Office could consider during the 2021 legislative session as well as what local systems could consider adopting voluntarily. Finally, a detailed legal history of Oregon bail law and policy is included in the Appendices, along with other information.

2. Oregon Pretrial Processes and Operations

2.1. What is "bail" in Oregon?

In Oregon, "bail" refers to a system by which a defendant may, if eligible, obtain pretrial release (release from jail while any charges are pending) by way of some method of assurances to the court that the defendant will comply with certain conditions during the pretrial phase of case adjudication, including but not limited to: showing up to court when required and not getting re-arrested while on release.[5]

Oregon is a "right to bail" state, meaning that the Oregon Constitution provides persons subject to Oregon law with the right to be released pretrial (i.e., the right to be admitted to bail) so long as the offenses for which a defendant is charged are not subject to preventive detention.[6] Preventive detention occurs if a defendant is charged with certain "unbailable" offenses and there is a particular threshold of evidence met finding that a defendant may be held in jail with no means of obtaining release while those charges are pending.[7] As discussed in detail in the following sections, the crimes of murder, treason, and violent felonies are subject to preventive detention. Other crimes, however, such as misdemeanor domestic violence, are not.

2.2. Oregon Constitutional Provisions Related to Bail

The Oregon Constitution has four provisions that affect legal rights to and the administration of bail in Oregon. Article I, section 14 (1859) and Article I, section 43 (1999) are Oregon's bail provisions specifying which offenses are bailable and which may not be, if a judge finds that certain evidence justifies a defendant being preventively detained as the case proceeds.

Specifically, Article I, section 14, of the Oregon Constitution, provides that,

"Offences [sic], except murder, and treason, shall be bailable by sufficient sureties. Murder or treason, shall not be bailable, when the proof is evident, or the presumption strong."[8]

Further, Article I, section 43, provides, in relevant part, that,

"Murder, aggravated murder and treason shall not be bailable when the proof is evident or the presumption strong that the person is guilty. Other violent felonies shall not be bailable when a

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[5] *Rico-Villalobos v. Giusto*, 339 Or 197, X at n 2, 118 P3d 246 (2005) (explaining that "courts often continue to use the term 'bail' as shorthand to describe pretrial release or the amount of security deposit required for such release").
[6] *See, e.g., State v. Sutherland*, 329 Or 359, 364, 987 P2d 501 (1999) (explaining that the framers' use of the "mandatory 'shall'" in the article's text "*requires* courts to set bail for defendants accused of crimes other than murder or treason")(emphasis in original); *Larsen v. Nooth*, 292 Or App 524 (2018) (J. James, concurring) (recognizing Oregon's constitutional right to bail); *Rico-Villalobos v. Giusto*, 339 Or 197, 118 P3d 246 (2005) (same); *Priest*, 314 Or at 413, 418 (noting "the right to suitable bail guaranteed by Article I, section 14" and discussing Oregon's right to bail concept as "revolutionary"); *State ex rel. Connall v. Roth*, 258 Or 428, 482 P2d 740 (1971)(referring to defendant's right to bail); *Hanson v. Gladden*, 246 Or 494, 495, 426 P2d 465 (1967)("with certain exceptions the defendant in a criminal case * * * is entitled to be admitted to bail").
[7] Or Const, Art I, § 43 (1999), ORS 135.240(2),(4),(5).
[8] Or Const, Art I, § 14 (1859).

court has determined there is probable cause to believe the criminal defendant committed the crime, and the court finds, by clear and convincing evidence, that there is danger of physical injury or sexual victimization to the victim or members of the public by the criminal defendant while on release."[9]

The Oregon Constitution also has a prohibition against excessive bail in Article I, section 16 (1859), which provides, in relevant part, that,

"Excessive bail shall not be required, nor excessive fines imposed."

Finally, Article I, section 42(1)(b), provides Oregon crime victims, in relevant part, with the right "to be heard at the pretrial hearing" of defendants.

The Oregon Constitution uses the term "bail" because it is the legal term used for obtaining release from incarceration during adjudication of grievances or crimes for more than 1,000 years and was the contemporary term when the Oregon Constitution was enacted in 1859. For a comprehensive review of the circumstances that led to Oregon's bail provisions, please see Appendix A.

2.3. Oregon Statutory Provisions Related to Release during the Pretrial Period

Chapter 135 of the Oregon Revised Statutes provides most of the statutory legal framework guiding pretrial processes, specifically the "Release of Defendant" provisions between ORS 135.230 to ORS 135.295. The term "bail" was stricken from virtually all Oregon statutes during a comprehensive criminal code revision in 1973, but the concept of bail persists by way of more modern parlance and processes. For a comprehensive review for how Oregon's revised bail statutes came to be, please see Appendix A.

Presently, Oregon pretrial statutes provide for four possible outcomes should a person be cited for a crime and given a notice to appear or arrested for a crime and taken to jail: (1) personal recognizance release; (2) conditional release; (3) security release; and (4) pretrial detention.

- Personal recognizance release: means the release of a defendant upon the promise of the defendant to appear in court at all appropriate times.[10]

- Conditional release: means a nonsecurity release which imposes regulations on the activities and associations of the defendant.[11]

- Security release: means a release conditioned on a promise to appear in court at all appropriate times which is secured by cash, stocks, bonds or real property.[12]

[9] Or Const, Art I, § 43 (1999).
[10] ORS 135.230(6).
[11] ORS 135.230(2).
[12] ORS 135.230(12).

- Pretrial detention: offenses that are not bailable per the Oregon Constitution, meaning murder, treason, and violent felonies.[13] Article I, sections 42 and 43, define "violent felonies" as "a felony in which there was actual or threatened serious physical injury to a victim or a felony sexual offense."[14]

By statute, the Legislature provided that an individual in custody "'shall be released upon his personal recognizance unless release criteria show to the satisfaction of the magistrate that such a release is unwarranted.'"[15] This presumption, however, only applies to cases not involving murder, treason or other violent felonies. Table 2.3.1 provides a list of the types of release events found in the Oregon Judicial Department's Pretrial Dataset provided to the Criminal Justice Commission.

Table 2.3.1. Types of Release Events by Case (2017-2019)

Release Type	Percent
Agreement - Conditional Release	29.13%
Agreement - Recognizance Forced Release	2.66%
Agreement - Recognizance Release	25.36%
Agreement - Security Release	8.83%
Agreement - Supervised Pretrial Release	5.10%
Order - Release†	1.88%
Order - Revoke Recognizance Release	1.61%
Order - Revoke Security Release Agreement	0.14%
No Release Event at any Point in the Case	33.49%

† Includes "Recognizance Security Conditional Release" and "Release from Custody"

As shown in Table 2.3.1, between 2017 and 2019, nearly 33.5 percent of cases had no release event recorded at any point in the case, which means that defendants in those cases were either in custody during the pretrial period or were never arrested and lodged. The data provided by the Oregon Judicial Department has no integration with county jails and does not track citations in lieu of custody so this is a known data gap which they are working to remedy. For the other release event types, it is important to note that defendants can have their release type changed at different points of a case or revoked due to some form of noncompliance during the pretrial period (due to this, the percentages total more than 100 percent). With that in mind, however, important trends are still apparent. Recognizance release, as the "default," accounts for approximately 25 percent of all release types, while an additional 2.7 percent of recognizance releases occur pursuant to a forced release. Conditional release and supervised pretrial release accounted for 29.1 and 5.1 percent of release events, respectively. Finally, security release accounted for nearly 9 percent of release types.

It is important to note, however, that the share of cases resulting in a release event of some type varies by crime type. As shown in Figure 2.3.1, while across all crime types the share of cases with release agreements is 67 percent, when broken down by crime type there is a range of 59 percent to 84 percent for person crimes and DUII crimes, respectively. Further, the share of cases with release events also vary by county and/or judicial district, as shown in Table 2.3.2.

[13] Or Const, Art I, § 14; Or Const, Art I, § 43(1)(b), codified in Oregon statute at ORS 135.240(2),(4), and (5).
[14] Or Const, Art I, § 42(5)(d); Or Const, Art I, § 43(2)(b).
[15] William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974). See also 135.245(3).

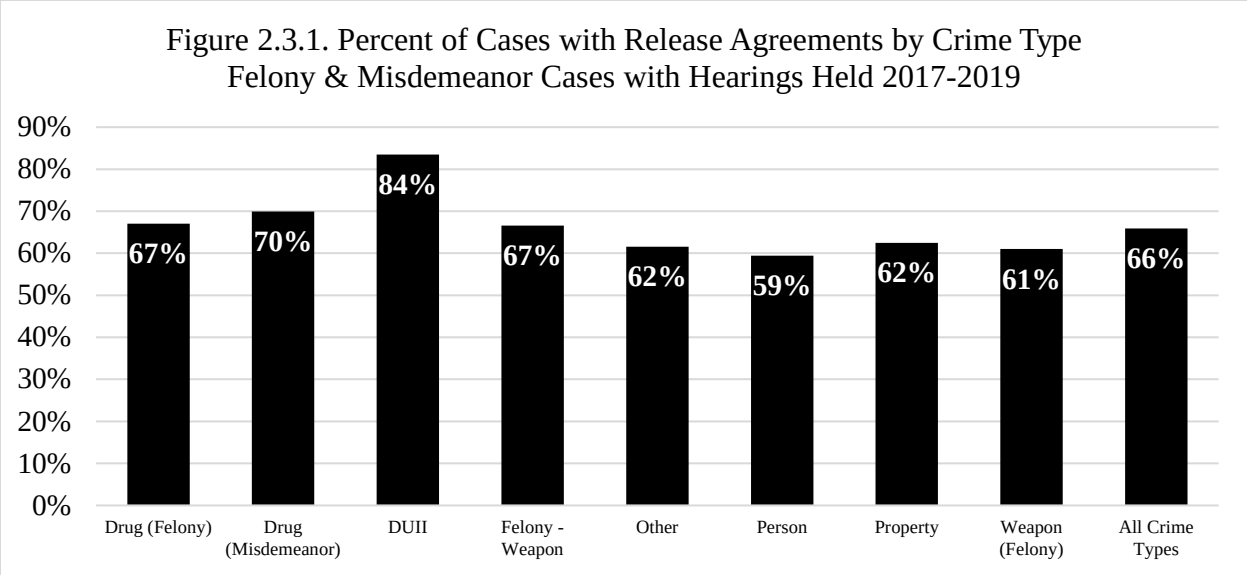


Table 2.3.2 Cases Processed by Judicial District and Share of Cases with Release Agreements

JD#	Counties in Judicial District	Cases with Hearings	Cases with Release Agreements	Pct. Cases with Release Agreements
8	Baker	1,194	795	66.6%
21	Benton	5,228	4,407	84.3%
5	Clackamas	20,842	12,455	59.8%
18	Clatsop	3,745	2,772	74.0%
19	Columbia	3,163	2,953	93.4%
15	Coos, Curry	9,451	5,864	62.0%
22	Crook, Jefferson	5,988	4,060	67.8%
11	Deschutes	15,763	11,322	71.8%
16	Douglas	8,462	5,194	61.4%
7	Gilliam, Hood River, Sherman, Wasco	6,250	4,179	66.9%
24	Grant, Harney	1,185	973	82.1%
1	Jackson	25,516	19,168	75.1%
14	Josephine	10,014	8,128	81.2%
13	Klamath	8,265	5,628	68.1%
16	Lake	1,022	787	77.0%
2	Lane	12,785	6,495	50.8%
17	Lincoln	6,585	4,673	71.0%
23	Linn	9,283	6,753	72.7%
9	Malheur	3,412	2,434	71.3%
3	Marion	20,588	15,543	75.5%
6	Morrow, Umatilla	8,676	5,996	69.1%
4	Multnomah	60,229	31,438	52.2%
12	Polk	5,526	3,763	68.1%
27	Tillamook	2,999	1,908	63.6%
10	Union, Wallowa	2,644	1,886	71.3%
20	Washington	25,392	17,266	68.0%
25	Yamhill	6,511	4,714	72.4%

2.4. Security Release

As shown in the previous section, security release accounts for roughly nine percent of all release events in the Oregon Judicial Department's Pretrial Dataset. To contextualize the amount of money collected under these security release agreements, Table 2.4.1 reports data from the Oregon Judicial Department broken down by case type for the years 2018 and 2019.

Table 2.4.1. Security Release Amounts Posted (2018-2019)

Case Type	2018	2019
Felony Charges	$14,931,978	$16,023,941
Misdemeanor Charges	$4,990,120	$4,267,038
Administrative Criminal	$1,050,114	$347,405
Procedural Matters	$1,100,865	$1,152,964
Criminal Violations	$4,290	$11,800
Total	**$22,077,367**	**$21,803,148**

At the conclusion of the case, the security posted is first applied to the security release fee (15% of the security posted up to $750) and then to the defendants remaining financial obligations on the case which can include fines, fees, and restitution. Amounts applied to the security release fee are sent to the state general fund. Amounts applied to fines, fees, and restitution are sent to the state general fund, criminal fine account or crime victims in accordance with statute. In addition to fines, fees and restitution, security release can also be applied to outstanding child support obligations. Any remaining amounts are returned to the defendant or surety. Table 2.4.2 provides a breakdown of selected disbursements of security release funds, including those funds returned to sureties and defendants.

Table 2.4.2. Security Release Amounts Dispersed (2018-2019)

Case Type	2018	2019
Restitution	$870,279	$363,577
Compensatory Fines	$387,519	$239,671
Child Support	$248,338	$168,043
Case Fines and Fees	$2,589,342	$2,036,253
To Security Release Fee	$1,792,057	$1,310,955
Other	$1,010,917	$698,883
Returned to Surety	$5,343,243	$3,192,026
Returned to Defendant	$3,966,936	$2,521,678
Forfeited Security Release	$1,796,206	$1,418,839

2.5. Other Aspects of Pretrial Release in Oregon

Oregon, compared to other states, already has a relatively progressive pretrial release system. In 1973, SB 80 ushered in several important reforms. First, SB 80 shifted towards presumptive recognizance release, stating that an individual in custody "'shall be released upon his personal recognizance unless release criteria show to the satisfaction of the magistrate that such a release

is unwarranted.'"[16] This provision was intended to establish "that a defendant in custody is presumed entitled to release on personal recognizance."[17]

Second, SB 80 created a 10-percent security release system. This was perhaps the most significant reform, as it moved Oregon away from a bail system that allowed commercial bail bonds companies to operate, which accounted for much of monetary bail paid to release defendants at the time. Finally, the Senate Bill also created a new option for Oregon presiding judges to delegate release authority to release assistance officers.

2.6. Existing Pretrial Operations

The pretrial phase of a criminal case is universal, meaning that all defendants have a period between first contact with law enforcement concerning alleged conduct, being charged with a crime, and disposition of charges filed, if any. However, Oregon's pretrial operations vary widely across its 36 counties and 27 judicial districts. While all jurisdictions have a pretrial period, less than half of Oregon jurisdictions have any kind of "pretrial program." Two of the 10 operational pretrial programs in Oregon have operated for nearly 50 years (Lane and Multnomah counties), one has operated for nearly a decade (Yamhill County), and the remaining programs have been around for less than five years.

Even those jurisdictions with some form of pretrial program have broad variations from place to place in terms of pretrial staff, tools or screenings used to assess a defendant, and means and methods of presenting information to chiefly judges for consideration in making a pretrial release decision, but defense counsel, prosecutors, and victims as well. Additionally, the existing pretrial operations are operated by both judicial and executive branch agencies, varying in internal practice jurisdiction to jurisdiction, including such things like staffing roles and discretionary decision-making, which defendants are eligible for pretrial screening, non-statutory security release amounts found in judicial orders (commonly called bail schedules), pretrial monitoring practices, data collection, and others.

Presently, Oregon has no framework setting standards or best-practices for existing pretrial program operations. The Pretrial Justice Network (PJN) is a group of Oregon community-corrections and court-based pretrial program leaders and staff that work together to improve existing pretrial operations and assist new programs in launching. The PJN uses, among other sources, the National Institute of Corrections pretrial literature and the National Association of Pretrial Services Agencies literature and standards as sources of best practice.

Nine of Oregon's county-based pretrial programs are funded through the Justice Reinvestment Grant program overseen by the Criminal Justice Commission. These costs, nearly all of which are devoted to pretrial staff, amount to approximately $2.7 million annually.[18] Additionally, three counties fund pretrial programs out of local funds, which amount to approximately $3.9 million annually. Five judicial districts employ release assistance officers, the staff costs for

[16] William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974)
[17] William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974) (emphasis added).
[18] Oregon Criminal Justice Commission, 2019 Justice Reinvestment Grant Program Applications.

which amount to approximately $700,000 to over one million annually.[19] In total, approximately 63 pretrial staff are employed across 16 counties (covering 15 judicial districts), amounting to annual personnel costs of approximately $7.25 million annually.

Table 2.6.1 provides an overview of the pretrial programs that exist across the state as of the publication of this report.

Table 2.6.1. Oregon Pretrial Operations Overview

Counties/Judicial Districts With Pretrial Operations
• Clackamas (CCSO/P&P, in jail division) • Clatsop (CCSO/jail division) • Columbia (Community Justice) • Klamath (KCSO/jail division) • Lane (w/OJD RAOs/LCSO deputies) • Lincoln (LCSO/jail division) • Multnomah (split - Recog-DCJ/Close-Street-MCSO) • Yamhill (Community Justice)
Counties Currently Implementing Pretrial Programs
• Benton (BCSO) • Deschutes (DCSO/OJD) • Jackson (Community Justice) • Marion (MCSO)
Judicial Districts w/ Release Assistance Officers
• Josephine (14th JD) - 1 • Union/Wallowa (10th JD) - 1 • Washington (20th JD) – 2
Counties without pretrial programming or RAOs
• Baker (8th JD) • Coos & Curry (15th JD) • Crook & Jefferson (22nd JD) • Douglas (16th JD) • Grant and Harney (24th JD) • Hood River, Wasco, Sherman, Gilliam, Wheeler (7th JD) • Lake (26th JD) • Linn (23rd JD) • Malheur (9th JD) • Morrow & Umatilla (6th JD) • Polk (12th JD) • Tillamook (27th JD)
Program Totals
• County programs (pretrial staff employed by counties): 10 counties employing ~51 staff • Judicial districts with any release assistance officers: 5 JDs employing 13 RAOs in Oregon • Total pretrial staff in Oregon (executive branch + OJD RAOs): 63 staff • OJD/Sheriff programs: 2 (Lane & Deschutes) • Total counties with any pretrial program and/or RAOs (judicial or executive branch staff): 16 • Total counties without any pretrial program or RAOs: 20

[19] One judicial district, JD 11, employs a release assistance officer who is funded, through an agreement between the court and the county, by the Deschutes County Sheriff's Office.

3. The Impetus for Pretrial Reform

A new wave of pretrial reform efforts has been underway in jurisdictions nationwide for the better part of the last decade. Issues within this phase of criminal adjudication are numerous. The issue of cash bail at the forefront of many criminal justice reform agendas in states across the country. These concerns focus on the impacts monetary forms of bail have on poor persons, particularly Black, Indigenous, and Persons of Color (BIPOC), who, due to wage gaps and other systemic and institutional disparities, may face more frequent and longer incarceration pretrial due to inabilities to meet financial bail requirements in order to obtain their freedom. However, concerns also exist regarding unintended consequences of the reform practices employed by many jurisdictions, such as in the employment of pretrial risk assessment tools as well as possible effects on public safety. At the state level in Oregon, system actors as well as other interested parties share similar concerns to those listed above, while also seeking solutions to inconsistent practices, operations, and data collection between jurisdictions during the pretrial phase of criminal cases.

3.1. Wealth-Based Release Lawsuits

A plethora of civil rights cases have been filed (and a sizeable number won) across the country over the last several years, primarily raising arguments that poor defendants unable to pay monetary bail are deprived of their civil rights in bail systems that provide for wealth-based detention practices.[20] These suits are primarily based on allegations that defendants' federal Equal Protection rights have been violated.

Recently, litigation of this kind has also come to Oregon. In *Rassmussen v. Garrett*, petitioners brought a habeas corpus action in Oregon District Court, alleging Due Process and Equal Protection violations of the Fourteenth Amendment because bail amounts were set in their respective cases that the petitioners could not afford to pay.[21] Petitioners sought to be released or to have new bail hearings concerning their detention. In its analysis, the District Court reaffirmed the notion that "[a] state … cannot imprison an individual awaiting trial solely on account of his indigency …" while also finding that the foregoing does not equate to a right to affordable bail.[22] The court then went on to find, with regards to the petitioners' cases, that each was afforded due process in their respective release hearings and that there was no indication that petitioners were imprisoned solely based on their inability to pay bail. On September 27, 2020 the District Court denied petitioners' habeas request and dismissed the suit, although petitioners have filed an appeal with the 9th Circuit Court of Appeals.

3.2. Sentencing Outcomes and Pretrial Detention

Research in other states has raised the concern that there may be a correlation between the length of time a defendant is incarcerated pretrial and the likelihood that the defendant will receive an

[20] *See, e.g.*, *Holland v. Rosen*, 895 F3d 272 (3d Cir 2018); *ODonnell v. Harris Cnty.*, 892 F3d 147 (5th Cir 2018); *In re Humphrey*, 233 Cal Rptr 3d 129, 417 P3d 769 (Cal 2018).
[21] *Rasmussen v. Garrett*, PACER No. 3:20-cv-00865-IM (2020).
[22] *Ibid*, p. 46.

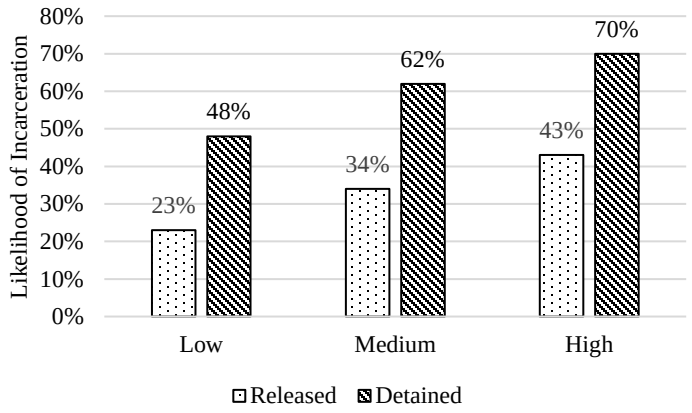
incarceration sentence, among other negative consequences.[23] In 2018, the Criminal Justice Commission commissioned a study with criminal justice researchers at Portland State University (PSU) to replicate and extend, where possible, research conducted in other jurisdictions.

In July 2019, Portland State University researchers released a study of the sentencing outcomes of pretrial defendants utilizing data from nine Oregon counties: Clackamas, Clatsop, Columbia, Coos, Deschutes, Klamath, Lincoln, Multnomah, and Yamhill counties, for the years 2016-2017, accounting for a sampling of 3,390 unique criminal defendants.[24] Following the release of this study, the researchers submitted their manuscript for peer review, and the study passed peer review and was accepted for publication in mid-2020.[25]

To conduct the analysis, the study utilized propensity score techniques, matching defendants with regards to their gender, county, most serious charge type, number of charges, prior outcomes (e.g., past supervision violations, jail commitments, convictions for person, property, and drug crimes), risk level, whether they were represented by a private/public attorney, mental health, plea type, and prior FTA convictions. The study, therefore, was able to compare individuals who matched on all of the factors listed above, with the sole difference being whether they were detailed fully during the pretrial period versus released at some point.

The outcomes of interest were twofold (1) the sentencing outcome (incarceration versus probation); and (2) the length of sentence imposed upon case disposition. The results found that the likelihood of incarceration among detained defendants was twice that of defendants released prior to their case disposition. When broken down by risk level this pattern becomes readily apparent. As shown in Figure 3.2.1, an average defendant at a given risk level has a significantly higher likelihood of receiving an incarceration sentence if they were detained versus released prior to their disposition.

Figure 3.2.1. Effects of Fully Detaining Defendants on Sentence Type, by Risk Level



3.3. Cost Benefit Study of the Expansion of Pretrial Release in Oregon

Regardless of the method used to make pretrial release decisions, underlying all of these decisions is a judgment of the likelihood that the individual will fail to appear for their court date

[23] *See*, e.g., Christopher T. Lowenkamp, Ph.D., Marie VanNostrand, Ph.D., Alexander Holsinger, Ph.D., The Hidden Costs of Pretrial Detention (2013).
[24] Christopher Campbell and Ryan M. Labrecque, Ph.D., Effect of Pretrial Detention in Oregon, 10 (2019).
[25] Campbell, C.M., Labrecque, R.M., Weinerman, M., and Sanchagrin, K. (2020). Gauging detention dosage: Assessing the impact of pretrial detention on sentencing outcomes using propensity score modeling. *Journal of Criminal Justice*, 70, 101719.

as well as the likelihood that the released individual will commit a crime during the pretrial period, each posing direct costs to society. In an effort to quantify both the costs and benefits of possible pretrial program expansion in Oregon, the Criminal Justice Commission engaged in a cost-benefit analysis study during the middle of 2020.

Using the best available administrative data, this analysis examined the effect of increasing the number of individuals on pretrial release and also implementing an earlier release from pretrial detention for those who are currently held for a lengthy pretrial period. Specifically, of approximately 59,000 criminal cases filed in 2018, the hypothetical policy evaluated in the report assumed that about 9,000 additional individuals would be released and that there would be a reduction in the time detained during the pretrial period for about 22,000 additional individuals. To identify the possible effect of this hypothetical policy change, the CJC considered jail costs, pretrial supervision costs, the cost of a failure to appear by a released defendant, the costs of crimes committed by defendants on pretrial release, and benefits attributable to continued employment and housing for released individuals.

The results of this cost benefit analysis demonstrated that benefits attributable to avoided jail costs along with housing and employment benefits would lead to an overall net cost savings even when considering system costs and crime costs. It is important to note, however, that the savings identified, which totaled over $68 million statewide, would not be actualized either at the state level or all at one time (thus, this research should not be viewed as a potential source of immediate funding for pretrial release programs by Legislators). To illustrate, several costs/benefits are included in $68 million that are either intangible, are borne by individuals outside of government, or are annualized costs of large, intermittent expenditures. Thus, these figures estimate that Oregonians would likely experience a net, societal gain with this policy change that has a monetized value of $68 million.

4. Oregon Data Relevant to Pretrial Policy Discussions

When the PSTF began its work in 2018, Oregon had virtually no statewide data to effectively track pretrial-relevant information in jails or courts, at least not in a way that was readily accessible for analysis. Much of the last two years of work focused on resolving data deficit issues to the greatest extent possible, collecting and analyzing data when available, and ascertaining what data gaps.

4.1. Jail Data

Oregon counties operate 31 jail institutions across 36 counties. Multnomah County operates two institutions, Wheeler County contracts with Grant County for use of several jail beds, and Wallowa and Morrow counties contract with Umatilla County for use of jail beds. Additionally, Oregon has one regional jail, the Northern Oregon Regional Correctional Facility (NORCOR), which is jointly operated by Wasco, Hood River, Sherman, and Gilliam counties.

Pursuant to a separate project,[26] the CJC solicited a one-time jail data submission from all 31 county jail institutions during 2019 and successfully obtained data files from 27 jails.[27] Three counties did not submit data. CJC research staff processed data to the greatest extent possible to allow the PSTF to address key questions regarding pretrial incarceration in Oregon.

There is no uniform jail management system in Oregon, meaning that each individual jail facility maintains its own record-keeping system of bookings, releases, and other data points. Even jails using the same jail management system (product or vendor), such as EIS, do not have a way of syncing, conveying information, or communicating between those systems. These systems also categorize, compartmentalize, and store data differently, meaning that asking two jails for exports of a "pretrial population" will likely result in data sets with different definitions and parameters applied.

The ways in which data such as race or ethnicity of persons lodged is collected also varies widely. Some jail management systems do not have a category to track a given defendant as Hispanic or Latinx, resulting in those defendants being categorized as "white" or "other." Additionally, many jail management systems are not designed with data collection for racial and ethnic policy analyses in mind. Rather, these systems are built primarily for tracking who is in a facility, information aimed at maintaining the safety of lodged individuals and staff, and other basic record management priorities.

Oregon jail commanders have resoundingly expressed interest in greater jail data analysis capacity but report challenges in building local data capacity. As examples, even when more detailed information may be collected within a given system, effectively extracting it may be challenging and costly for the institutions. Many counties looking to export data sets from their

[26] *See* House Bill 3289 (2019) Report, published by the Oregon Criminal Justice Commission on 15 September 2020, located at https://www.oregon.gov/cjc/CJC%20Document%20Library/HB3289ReportSept2020.pdf.
[27] A grant from the National Criminal Justice Reform Project aided in paying for staff time required to collect and clean data and made funds available to counties with costs associated with exporting data from management systems. Harney, Jefferson, and Lake counties did not submit jail data

systems must contact vendors and pay fees. The more detailed information collected at booking becomes, the more staff time is required of jail deputies, and jails working with limited staff resources may opt to prioritize entering only the data necessary to perform the core functions of jail management given resource shortages.

To improve pretrial data gaps, the PSTF Data and Evaluation subcommittee has developed a list of pretrial jail data points that every jail would ideally collect. These data points are identified in Table 4.1.2. Importantly, these jail data points must be clearly defined so as to ensure that each jail's data collection practices are consistent and comparable. If feasible, statewide standards should be established for each of these data fields and fixed, close-ended responses required wherever possible. For example, a current jail data systems may record "Bail" under Release reason, but this entry may have multiple meanings and may not appropriately categorize the actual release reason.

Table 4.1.2. PSTF Data and Evaluation Committee Ideal Jail Data Reporting Fields

State ID Number	Felony/Misdemeanor Flag
Booking ID	Offense Code/ORS #
Legal Name	Court Case Number
Date of Birth/Age	Court Name/Identifier
Sex/Gender	Security Amount
Race/Ethnicity	Security Amount Paid
Arresting Agency	Release Date
Booking/Admission Date	Release Reason
Booking Reason/Type	Current Address/Homeless

4.2. Jail Administration

Jails have two ways of measuring capacity: (1) design capacity; and (2) operational capacity. Design capacity is the number of jail beds the facility was designed to accommodate. Operational capacity is the number of jail beds that the jail command staff have in operation, meaning the number of beds that are used to lodge persons at a given time. The American Jail Association categorizes jail size by bed capacity, where mega jails have 1000+ bed capacity, large 250-999, medium 50-249, and small 1-49. Following these guidelines

Table 4.2.1. Jail Categories by Operational Capacity

Jail Category	Jails
Mega 1000+ beds	Multnomah[1]
Large 250-999 beds	Clackamas, Columbia, Deschutes, Douglas, Jackson, Lane, Marion, Washington, Yamhill
Medium 50-249 beds	Clatsop, Coos, Crook, Jefferson, Josephine, Klamath, Lincoln, Linn, Malheur, NORCOR, Polk, Tillamook, Umatilla
Small 1-49 beds	Baker, Benton, Curry, Grant, Harney, Lake, Union

[1]Multnomah County has two detention centers, but data are submitted as a single entity.

and as shown in Table 4.2.1., Oregon's county level jails are categorized based on the 2019 operational capacity of each jail.[28]

Table 4.2.2. Detailed Capacity Breakdown of Oregon Jails for 2019

	Jail Beds		Total Bookings		Forced Releases	
County	**Number**	**Rate‡**	**Number**	**Rate‡**	**Number**	**Rate‡**
Baker	45	2.7	655	38.9	2	0.1
Benton	40	0.4	1,717	18.2	226	2.4
Clackamas	465	1.1	14,464	34.2	1,635	3.9
Clatsop	64	1.6	2,260	57.5	248	6.3
Columbia	258	4.9	2,833	53.7	0	0
Coos	100	1.6	3,264	51.6	--	--
Crook	86	3.7	1,893	80.8	550	23.5
Curry	35	1.5	1,071	46.6	84	3.7
Deschutes	362	1.9	7,504	38.9	0	0
Douglas	283	2.5	6,167	54.9	169	1.5
Grant, Wheeler	41	4.7	426	48.4	0	0
Harney	No data	No data	No data	No data	No data	No data
Jackson	315	1.4	13,109	59.2	4,166	18.8
Jefferson	130	5.5	2,010	84.3	0	0
Josephine	190	2.2	5,362	61.8	5,409	62.4
Klamath	152	2.2	3,277	48.1	25	0.4
Lake	18	2.2	485	60.0	13	1.6
Lane	382	1	13,581	35.8	1,838	4.9
Lincoln	161	3.3	3,424	70.9	458	9.5
Linn	231	1.8	6,531	51.6	--	--
Malheur	104	3.2	2,017	63.0	68	2.1
Marion	415	1.2	15,251	43.9	5,672	16.3
Multnomah	1,192	1.5	31,839	38.7	153	0.2
NORCOR	100	1.8	3410	60.4	22	0.4
Polk	170	2	3,252	39.2	43	0.5
Tillamook	96	3.6	1,652	62.3	0	0
Umatilla†	210	2.1	4,977	49.3	1,297	12.9
Union	37	1.4	1,154	43.0	124	4.6
Washington	572	0.9	18,000	29.3	1,069	1.7
Yamhill	255	2.4	4,218	39.0	0	0
Statewide	**6,509**	**66**	**175,803**	**1,464**	**23,271**	**178**

† Umatilla County also receives inmates from Morrow and Wallowa Counties. Population numbers reflect all three counties combined.

‡ Rate is per 1,000 population

Tables 4.2.2 and 4.2.3 contain data obtained from the annual Oregon State Sheriffs Association Jail Commander Survey. The first, Table 4.2.2, reports information concerning jail size and forced releases (and their corresponding rates) by correctional facility. Table 4.2.3 reports data concerning annual budgets, capacity, and forced releases broken down by jail size.

[28] Oregon Sheriffs' Jail Command Council. Jail Statistics by County (2019).

Table 4.2.3. Summary of Operational Information, OSJCC Surveys, 2018-2019

Jail Category	Average Budget	Average Bookings	Average Operational Capacity	Average Design Capacity	Average Forced Releases
Mega	$102,820,559	32,056	1,192	2,010	170
Large	$18,957,928	10,516	362	420	1,685
Medium	$5,303,787	3,420	137	173	733
Small	$2,109,585	989	36	36	142

Note: All information is a yearly average based on the two surveys (2018-2019) and then averaged within jail category.

4.3. Racial Breakdown of the Oregon Jail Population

Table 4.3.1 presents data on unique bookings during 2019 across Oregon's jails with regards to race/ethnicity. Similar to other areas of the criminal justice system, across the entire jail system, Black individuals are overrepresented in jail bookings compared to their share of the Census population, as 7.6 percent of unique bookings in 2019 were of Black individuals, compared to their Census population of merely 2.8 percent. It is clear, however, that this disparity is most serious in the Mega and Large jails, all of which occupy the I-5 corridor. In Medium jails, the population of uniquely booked individuals is much whiter and the overrepresentation of Black individuals disappears. Among these Medium institutions, however, a new disparity for Native Americans emerges. Lastly, the data providing a breakdown for small jails is incomplete, as a significant share of data points—almost a quarter—lacked data on race/ethnicity.

Table 4.3.1 Race/Ethnicity Breakdown of the 2019 Unique Jail Bookings in Oregon

	Unique Bookings					
Race/Ethnicity	**Overall**	**Mega**	**Large**	**Medium**	**Small‡**	**Census**
Asian	1.3%	2.7%	1.1%	0.7%	0.6%	6.8%
Black	7.6%	21.8%	5.5%	2.2%	1.5%	2.8%
Latinx†	12.7%	12.2%	14.0%	10.4%	12.9%	13.4%
Native Am.	1.9%	2.1%	0.8%	4.4%	0.8%	2.4%
White	74.3%	61.2%	77.8%	79.4%	56.5%	75.1%

† Prior research indicates that Latinx inmates are undercounted in correctional settings in Oregon. To address this issue, BIFSG corrected data are reported.[29]

‡ The remaining percentage is reported as "unknown" race/ethnicity.

Additionally, several Oregon jails did not submit identifying information for Hispanic or Latinx persons. Some jails thoroughly document race and ethnicity in separate data fields, others report a single race/ethnicity data field, still others do not report Hispanic/Latinx in a race field, and others did not report any race/ethnicity information. At time of writing it remains unclear if, for each of these jails, this is an issue in the data submission process or in the data collection process. Further, where this data is reported it remains unclear whether these entries are based on the perception of intake personnel, are self-reported by the jailed individual, or populated by

[29] See https://www.oregon.gov/cjc/CJC%20Document%20Library/RaceCorrectionTechDocFinal-8-6-18.pdf

some other process (e.g., imported from another data system, such as LEDS, which also does not contain a Hispanic/Latinx field).

As a result, these data concerning race/ethnicity should be interpreted with a degree of caution. Prior research examining data from the Oregon Department of Corrections found that Latinx and Native American Oregonians were often recorded in administrative data in a manner that did not correspond with their personal identification. For example, out of 758 incarcerated Latinx individuals, only 53.5 percent were correctly identified in the administrative data. For incarcerated Native American individuals, only 25.9 percent were correctly identified in the administrative data. For both groups, the vast majority of the individuals were misidentified as white. Further, evidence from a substantial research literature estimates that incongruencies between privately reported race on surveys and administrative data (such as public safety, health care, and other datasets) are 1-8 percent for self-identifying whites, 2-13 percent for black individuals, 8-18 percent for Asians, 13-72 percent for Latinos, 19-100 percent for Native Americans, and 43-72 percent for multiracial individuals.[30]

4.4. Pretrial Length of Stay in Oregon Jails for All Lodged

Research both inside and outside of Oregon suggests that there is an association between the length of a defendant's pretrial incarceration and a greater likelihood that the individual may receive a sentence of incarceration. As of this time, jail data systems and court data systems make the calculation of systematic, statewide statistics for jail length of stay for pretrial periods difficult.[31] First, a person may be lodged in jail for any combination of several different reasons. A defendant may be lodged in jail, for instance, based on a new pending charge. This example would represent a person on pretrial status. Alternatively, the same person could also be lodged based on a parole or probation violation due to the pending charge, which results in that individual being both on pretrial status and a supervision violation status. Further, the same individual could have an outstanding warrant and thus be held pending a case in another jurisdiction. As of this time, Oregon jail records management systems track these separate statuses differently across jurisdictions, which makes the systematic construction of pretrial detention periods difficult.

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[30] *See* Saperstein, Aliya. 2006. "Double-checking the race box: Examining inconsistency between survey measures of observed and self-reported race." *Social Forces* 85: 57-74; Campbell, Mary, and Lisa Troyer. 2007. "The Implications of Racial Misclassification by Observers." *American Sociological Review* 72: 750-65; Panter, A.T., Charles Daye, Walter Allen, Linda Wrightman, and Meera Deo. 2009. "It Matters How and When You Ask: Self-Reported Race/Ethnicity of Incoming Law Students." *Cultural Diversity and Ethnic Minority Psychology* 15:51-66; Roth, Wendy D. 2010. "Racial mismatch: the divergence between form and function in data for monitoring racial discrimination of Hispanics." *Social Science Quarterly* 91: 1288-1311; Saperstein, Aliya, and Andrew Penner. 2010. "The race of a criminal record: How incarceration colors racial perceptions." *Social Problems* 57: 92-113; Vargas, Nicholas. 2014. "Off white: colour-blind ideology at the margins of whiteness." *Ethnic and Racial Studies* 37: 2281-2302; Vargas, Nicholas, and Kevin Stainback. 2016. "Documenting Contested Racial Identities Among Self-Identified Latina/os, Asians, Blacks, and Whites." *American Behavioral Scientist* 60: 442-464; Feliciano, Cynthia. 2016. "Shades of Race: How Phenotype and Observer Characteristics Shape Racial Classification." *American Behavioral Scientist* 60: 390-419; Porter, Sonya, Carolyn Leibler, and James Noon. 2016. "An Outside View: What Observers Say About Others' Races and Hispanic Origins." *American Behavioral Scientist* 60: 465-497.

[31] For additional discussion on the limitations of length of stay data sets *see* Criminal Justice Commission. HB 3289 (2019) Report. https://www.oregon.gov/cjc/CJC%20Document%20Library/HB3289ReportSept2020.pdf

Second, jails also house individuals that have been convicted and are serving sentences. These individuals may have stayed in jail during the entire pretrial period, during their trial, and for their sentence. From the jailor's perspective all these periods are easiest to summarize as a single jail stay and some jail data systems track the data in just this way. Indeed, it is also not uncommon for a defendant to spend their pretrial period in jail, including their trial period, and upon the resolution of their case be given a sentence of time served. In this example, what was once a pretrial period may be converted into a "sentence" in a records management system. In either case, identifying the pretrial component of these jail stays is impossible.

Third, individuals may be arrested, booked, and released several times between their initial arrest and final release. The appropriate way to calculate the pretrial length of stay in these situations is unclear. If, for example, a single individual is booked and released after 24 hours at three different times during a period of analysis, does the analyst count the duration of pretrial detention as three days, one day, or some other value? If averaging across individuals, does this count as three one day stays or one three day stay? Because of these uncertainties, it is unclear if these or other figures would be most useful for policy making purposes, especially when comparing jails with high forced release rates and those with low forced release rates.

Finally, there are likely inaccuracies in the arrest, booking, and release date variables in both the jail and pretrial court data. These inaccuracies may result from several factors, including, but not limited to, data entry errors by staff, automated date entries based on entry date rather than event date, and overlapping dates between different cases for the same individual that result in tracking and data linking challenges.

Table 4.4.1. Summary of Operational Information from Submitted Jail Data, 2018-2019

Jail Category	Average Yearly Bookings[1]			Average Length of Stay[4]	Average Daily Population[5]
	All[2]	1-4 days in jail (% of total)	Book & Release[3] (% of total)		
Mega	29,727	11,424 (38%)	9,663 (33%)	10.9	977.8
Large	9,087	3,135 (34%)	2,227 (25%)	14.4	366.3
Medium	3,249	1,007 (31%)	915 (28%)	13.8	130.4
Small	764	227 (30%)	235 (31%)	12.6	26.2

[1] Annual average of two year (2018-2019) of data.
[2] All bookings includes book & releases as well as admissions for any amount of time.
[3] Measured as bookings where the booking date and release date are identical.
[4] Individuals still in custody at the end of 2019 have an indeterminate end date in this data set.
[5] Not all individuals in jail at the beginning of 2018 are included in this estimate since they entered jail prior to 2018.

Despite these shortcomings, Table 4.4.1 presents summary data figures for the Oregon's jails by jail size. For each category of jails more than 30% of bookings involved a jail stay between 1-4 days whereas a close, albeit lower, proportion of bookings were Book & Releases. Thus, roughly speaking, about two thirds of jail bookings are for 4 days or less and the other third are more than 4 days. Despite these short stays, the average length of stay across all jail sizes is more than 10 days due to some much longer jail stays skewing the data.

4.5. Most Commonly Occurring Charges among the Oregon Jail Population

Table 4.5.1 presents the most commonly occurring charges by the frequency of bookings using the jail data submitted to the Criminal Justice Commission.[32] The percentages here represent the proportion of all charges with that charge designation. For example, in the first set of Total column, 5.0% or 1 out of every 20 charges were for methamphetamine possession. Overall, these data show that the most common charges are misdemeanor and tend to be technical violations, public order offenses, drug offenses, or property crimes.

When broken down by booking frequency, there are a few notable patterns (keeping in mind the limitations of the underlying jail data). First, individuals with 5+ bookings generally were much more concentrated within these specific, low-level ORS#, with 47.9% of charges involved not appearing on this most common list, whereas this figure is much higher at 59.9% for those with 1-4 bookings. Second, DUII, Reckless Driving, Assault in the 4th, and Harassment do not appear on the list for 5+ bookings. Conversely, the 5+ bookings group includes: Theft in the 3rd, County Holds, and Parole Violations as well as higher proportions of Probation Violation, Methamphetamine Possession, Trespass in the 2nd, Failure to Appears, Theft in the 2nd, and Disorderly Conduct. In sum, individuals cycling in and out of jail over are doing so on technical violations, drug crimes, property crimes, failure to appears, and warrants and their charging profile fundamentally differs from those individuals with less frequent bookings.

Table 4.5.1. Most Commonly Occurring Charges ORS by Frequency of Bookings, 2018-2019

Total		1-4 Bookings		5+ Bookings	
Charge	**%**	**Charge**	**%**	**Charge**	**%**
[Missing ORS #]*	10.0%	[Missing ORS #]*	9.1%	[Missing ORS #]*	11.0%
Probation Violation	6.7%	Probation Violation	6.1%	Probation Violation	7.4%
Meth. Possession	5.0%	Meth. Possession	4.0%	Meth. Possession	5.9%
FTA (2nd)	3.8%	FTA (2nd)	3.2%	Trespass (2nd)	4.9%
Trespass (2nd)	3.5%	DUII	3.1%	FTA (2nd)	4.4%
Theft (2nd)	3.1%	Reckless Driving	3.1%	Parole Violation	3.7%
Theft (3rd)	2.9%	Assault (4th)	2.6%	Theft (3rd)	3.6%
Parole Violation	2.8%	Theft (2nd)	2.6%	Theft (2nd)	3.5%
FTA (non-specific)	2.4%	Harassment	2.2%	FTA (non-specific)	2.9%
Disorderly Conduct (2nd)	2.2%	Trespass (2nd)	2.1%	Disorderly Conduct (2nd)	2.3%
Reckless Driving	2.0%	Disorderly Conduct (2nd)	2.1%	County Hold	2.3%
All other ORS #s	55.7%	All other ORS #s	59.9%	All other ORS #s	47.9%

*A significant proportion of the reported jail data are missing an ORS #. It remains unclear if these are intentional omissions or a characteristic of the data systems.

Table 4.5.2 presents information for individuals with housing, no housing, or unknown housing information. The patterns found here closely align with those presented in Table 4.5.1, where the Housed-Unhoused comparison parallels the comparison between 1-4 bookings and 5+ bookings. Unhoused individuals have lower a likelihood of being booked for driving crimes and higher likelihoods of bookings for Trespass, Drug, Parole Violation, and Warrant/Hold charge codes. This further confirms anecdotal evidence of unhoused individuals cycling in and out of jail on lower-level drug, property, and technical violation charge codes.

[32] For additional details and descriptions of these data sets *see* Criminal Justice Commission. HB 3289 (2019) Report. https://www.oregon.gov/cjc/CJC%20Document%20Library/HB3289ReportSept2020.pdf

Table 4.5.2. Most Commonly Occurring Charges by ORS, by Housing Status, 2018-2019

Total		Housed		Unhoused	
Charge	**Pct.**	**Charge**	**Pct.**	**Charge**	**Pct.**
[missing ORS #]*	10.0%	[missing ORS #]*	10.6%	[missing ORS #]*	11.2%
Probation Violation	6.7%	Probation Violation	9.1%	Probation Violation	8.8%
Meth. Possession	5.0%	FTA (2nd)	5.6%	FTA (2nd)	6.4%
FTA (2nd)	3.8%	Meth. Possession	4.6%	Parole Violation	5.5%
Trespass (2nd)	3.5%	Theft (2nd)	3.7%	Meth. Possession	5.3%
Theft (2nd)	3.1%	Parole Violation	3.4%	Trespass (2nd)	5.3%
Theft (3rd)	2.9%	FTA (1st)	2.9%	Criminal Trespass (2nd)	3.8%
Parole Violation	2.8%	Theft (3rd)	2.8%	Theft (3rd)	3.2%
FTA (non-specific)	2.4%	Trespass (2nd)	2.4%	FTA (1st)	3.0%
Disorderly Conduct (2nd)	2.2%	Reckless Driving	2.3%	Hold/out of county warrant	2.8%
Reckless Driving	2.0%	Contempt of Court	2.3%	Theft (2nd)	2.8%
All other ORS #s	55.7%	All other ORS #s	50.4%	All other ORS #s	41.9%

Note: A significant proportion of the reported jail data are missing an ORS #. It remains unclear if these are intentional omissions or a characteristic of the data system.

Finally, Table 4.5.3 summarizes the most commonly occurring charge information by sex. The female group has a higher concentration of charges than the male group. Notably, Failure to Appears are much more prominent for the female group than the male group. Females were more likely to have an FTA in the 1st, 2nd, or non-specified severity than males, suggesting that criminal FTA charges disproportionately impact female defendants. Theft and drug possession charges were also more prominent for the female group, whereas disorderly conduct was not common for females. Stakeholders on the HB 3289 Jail Advisory Committee suggested that this pattern was likely to be driven by the fact that women tend to be the primary caretakers of dependents and this may, in some cases, pose insurmountable barriers to making court dates, which leads to FTA charges snowballing into more severe FTA charges.

Table 4.5.3. Most Commonly Occurring Charges by ORS, by Sex, 2018-2019

Total		Female		Male	
Charge	**%**	**Charge**	**%**	**Charge**	**%**
[Missing ORS #]	10.0%	[Missing ORS #]	10.2%	[Missing ORS #]	9.9%
Probation Violation	6.7%	Probation Violation	7.6%	Probation Violation	6.4%
Meth. Possession	5.0%	Meth. Possession	5.4%	Meth. Possession	4.8%
FTA (2nd)	3.8%	FTA (2nd)	4.9%	FTA (2nd)	3.5%
Trespass (2nd)	3.5%	Theft (2nd)	4.7%	Trespass (2nd)	3.5%
Theft (2nd)	3.1%	Theft (3rd)	3.8%	Parole Violation	3.0%
Theft (3rd)	2.9%	Trespass (2nd)	3.5%	Theft (3rd)	2.6%
Parole Violation	2.8%	FTA (non-specific)	3.0%	Theft (2nd)	2.5%
FTA (non-specific)	2.4%	FTA (1st)	3.6%	Disorderly Conduct (2nd)	2.3%
Disorderly Conduct (2nd)	2.2%	Heroin Possession	2.2%	FTA (non-specific)	2.2%
Reckless Driving	2.0%	Parole Violation	2.2%	Assault (4th)	2.0%
All other ORS #s	55.7%	All other ORS #s	49.8%	All other ORS #s	57.2%

*A significant proportion of the reported jail data are missing an ORS #. It remains unclear if these are intentional omissions or a characteristic of the data systems.

Overall, while the jail data submitted to the Criminal Justice Commission pursuant to HB 3289 have a number of shortcomings at the time of writing, the data present a pattern that confirms several patterns discussed by stakeholders and criminal justice professionals. Improvements to

jail data systems are vital to better tracking pretrial populations and identifying patterns and challenges that this population faces.

4.6. Courts and Court Data

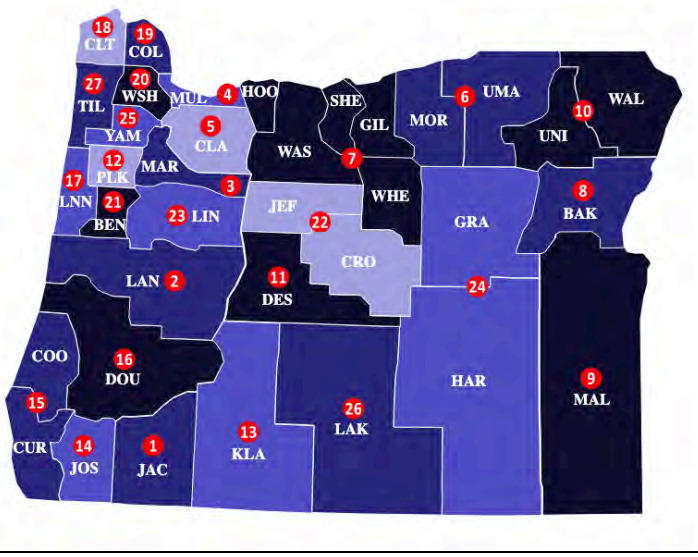


Figure 4.6.1. Map of Oregon Circuit Court Districts

Oregon circuit courts operate by way of 27 judicial districts across the state. Several judicial districts span two or more counties. These districts include: 6th Judicial District, spanning Umatilla and Morrow counties; the 7th Judicial District, spanning Gilliam, Hood River, Sherman, Wasco, and Wheeler counties; the 10th Judicial District, spanning Union and Wallowa counties; the 15th Judicial District, spanning Coos and Curry counties; the 22nd Judicial District, spanning Crook and Jefferson counties; and the 24th Judicial District, spanning Grant and Harney counties. All other Oregon judicial districts cover single county. Oregon circuit courts operate under the judicial branch of Oregon state government, administered by the Oregon Judicial Department (OJD).

Oregon circuit courts operate a court management system called "Odyssey," where they track a plethora of case-specific data points. The Commission has been working with OJD's data team for nearly two years on extracting pretrial-relevant data points to support the PSTF's work. The Commission now has a working pretrial data set that has hearing level information regarding pretrial release, failure to appears, and other case summary and administrative information.

A single, common case management system for the state's circuit courts provides more uniform and reliable information that the current, jail-specific jail data. Nevertheless, local practices, open-ended data entry fields, and non-mandatory data entry fields have led to inconsistencies and some fields with unreliable information. Historically, the data systems were designed and used as a case management tool rather than system-level analysis and were constructed to serve the case processing needs of courts.

The Judicial Department has been working with its trial courts and state data team on encouraging statewide consistency in data inputs. One example of an issue that was identified was the ways in which failure-to-appear (FTA) event information was collected. Until recently, local courts tracked FTA as each court preferred, meaning some clerks would record FTA by clicking the "FTA" tab in the Odyssey program, while others may have used shorthand (e.g., "FTA") in the court events "notes" section. While this practice may work for individual courts, it

makes extracting FTA data on a statewide basis challenging. OJD has remedied much of the FTA tracking consistency issue.

Another example of data that theoretically is tracked, but is problematic to the point of being unreliable is the race/ethnicity data of defendants. Given that there are few, if any, official processes by which a court would ask a defendant to identify what race or ethnicity the defendant identifies as, that leaves clerks or court staff to copy information provided in documents filed by law enforcement or prosecutors, which results in either no data entry or highly problematic data entry criteria.

Finally, an important shortcoming in the data is the lack of jail stay information. This flaw is most salient when trying to derive jail stays duration for individuals who never have a release event. If there was never a jail booking event (e.g., a cite and release) then these individuals never had the chance for a release event. It is impossible to tell, therefore, the subset of individuals who never entered jail from those who were detained in jail for the full duration of the pretrial period.

This section presents some high-level summary information from this pretrial court data set with the persistent caveat that the data continues to be improved and still depends on the reliability of court staff data entry practices. Most notably, an improved jail data system and a case level link to the court data would massively improve the usability of both systems. These and other improvements to these data are expected to continue into the future.

4.7. Failure to Appear

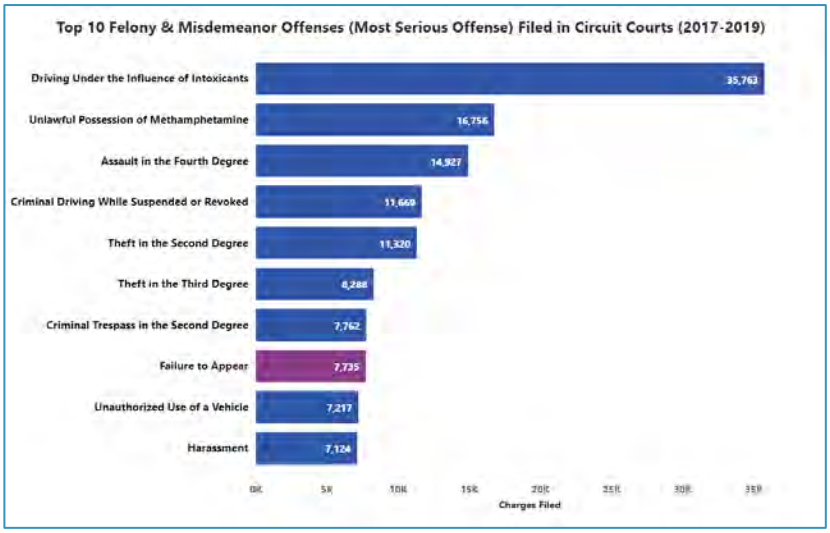


Figure 4.7.1. Top 10 Felony and Misdemeanor Offenses (reprinted, with permission, from the Oregon Judicial Department)

Failure to appear for court appearances is a consistent problem across most Oregon circuit courts. As shown by Figure 4.7.1 and consistent with the jail bookings data presented in Section 4.5, FTA charges are in the top ten of all felony and misdemeanor offenses handled by Oregon's Circuit Courts. It is undeniable that FTA charges and cases take up a substantial amount of time and require a substantial amount of resources from courts, court personnel, prosecutors, defense attorneys, law enforcement, and corrections staff.

To provide additional context, Tables 4.7.1 and 4.7.2 report data regarding annual case numbers as well as annual FTA rates. Across the three years of data presented, FTA rates for felonies

have been consistently lower than those for misdemeanors, with felony FTA rates below 10 percent in recent years while misdemeanor first appearance rates hovering around 17 percent.

Table 4.7.1. Cases Filed with First Appearance and FTA Rates at First Appearance by Year Case Filed and Case Type

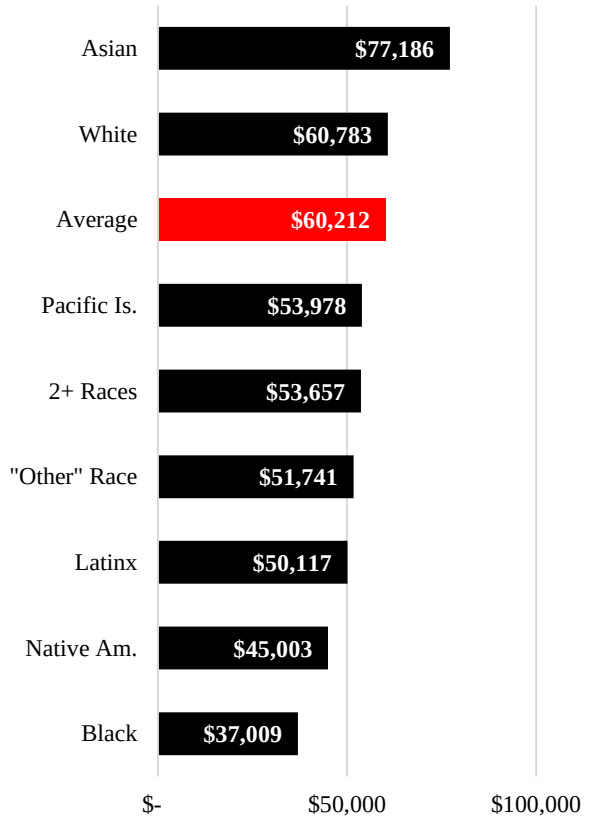
Year/ Case Type	Cases Filed w/ First Appearance	First Appearance Hearings	FTAs at First Appearance	Pct. FTAs at First Appearance
2017	**84,365**	**84,225**	**13,336**	**15.8%**
Felony	32,197	32,142	4,018	12.5%
Misdemeanor	52,168	52,083	9,318	17.9%
2018	**85,231**	**85,086**	**12,592**	**14.8%**
Felony	27,049	27,000	2,420	9.0%
Misdemeanor	58,182	58,086	10,172	17.5%
2019	**82,532**	**82,340**	**11,619**	**14.1%**
Felony	27,050	26,989	2,272	8.4%
Misdemeanor	55,482	55,351	9,347	16.9%
Total	**252,128**	**251,651**	**37,547**	**14.9%**

Table 4.7.2. Cases with First Appearances and FTA Rates at First Appearance by Judicial District, Felony and Misdemeanor Cases Filed (2017-2019)

JD#	Counties in Judicial District	Cases Filed with First Appearance	First Appearance Hearings	FTAs at First Appearance Hearing	Pct. FTAs at First Appearance
8	Baker	1,023	1,022	20	2.0%
21	Benton	4,512	4,508	1,109	24.6%
5	Clackamas	17,560	17,542	3,362	19.2%
18	Clatsop	3,224	3,218	525	16.3%
19	Columbia	2,586	2,581	443	17.2%
15	Coos, Curry	8,302	8,266	3,037	36.7%
22	Crook, Jefferson	5,409	5,399	533	9.9%
11	Deschutes	13,724	13,707	1,687	12.3%
16	Douglas	7,086	7,051	1,129	16.0%
7	Gilliam, Hood River, Sherman, Wasco	5,340	5,310	327	6.2%
24	Grant, Harney	1,051	1,049	103	9.8%
1	Jackson	20,830	20,766	5,398	26.0%
14	Josephine	8,541	8,536	1,044	12.2%
13	Klamath	6,887	6,874	768	11..2%
16	Lake	786	782	21	2.7%
2	Lane	11,173	11,165	1,347	12.1%
17	Lincoln	5,681	5,671	662	11.7%
23	Linn	8,163	8,133	1,856	22.8%
9	Malheur	3,080	3,076	288	9.4%
3	Marion	17,506	17,487	3,027	17.3%
6	Morrow, Umatilla	7,032	7,004	1,655	23.6%
4	Multnomah	53,351	53,338	6,519	12.2%
12	Polk	5,066	5,062	327	6.5%
27	Tillamook	2,651	2,628	127	4.8%
10	Union, Wallowa	2,317	2,311	118	5.1%
20	Washington	24,432	23,369	1,651	7.1%
25	Yamhill	5,815	5,796	464	8.0%

4.8. Oregon Socio-Economic Data

Figure 4.8.1. Oregon Median Household Income by Race



One argument connected to broader efforts to combat wealth-based release inequities is the notion that the unequal distribution of wealth across different groups creates racial disparities in pretrial detention. Unfortunately, systematic data related to security release amounts imposed upon or paid by Oregonians of varying races was not available by the publication deadline of this report. Data regarding the distribution of poverty, wages, and income across Oregon, however, indicates that economic disparities exist amongst Oregonians of different races.

As shown in Figure 4.8.1, median household income ranges from over $77,000 for Asian Oregonians to just over $37,000 for Blacks.[33] This range is considerable, as the top earning racial groups report incomes nearly double in size compared to Black individuals. While this data does not demonstrate a direct link between pretrial detention and the ability to pay security by race, it does show that the resources available to different racial groups varies substantially and that certain groups would be at a collective disadvantage if faced with the requirement to pay security in a criminal case.

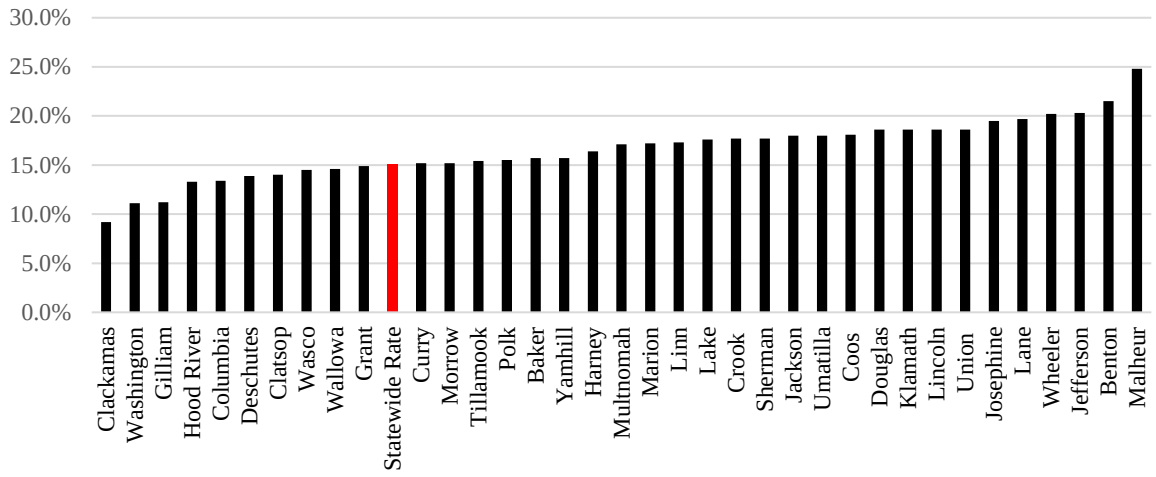
While median household income ($51,243) provides some sense of economic resources of Oregonians, it also does not show the difference in income disparity between homeowners and renters, which stands at $67,070 and $32,513, respectively.[34] Homeownership rates also vary by race, with white and Asian Oregonians being most likely to own homes (65 percent of white and 63 percent of Asian Oregonians are homeowners), and Black and Pacific Islander Oregonians being least likely (35 percent of Black and 26 percent of Pacific Islander Oregonians are homeowners).[35] Further exacerbating this divide is the fact that overall one in three Oregonians

[33] U.S. Census Bureau, American Community Survey 1-Year Estimates (2017).
[34] Oregon Housing and Community Services, Poverty Report 2017, 2 (2017).
[35] Oregon Housing and Community Services, Joint Interim Task Force on Addressing Racial Disparities in Homeownership PowerPoint, 4 (2018).

renting their homes pay more than 50 percent of their income in rent[36] while three in four low income Oregonians pay more than 50 percent of their incomes in rent.[37]

Another means for assessing wealth inequality is to examine poverty rates. Figure 4.8.2 presents poverty rates broken down by county for 2018. The range presented in this figure demonstrates that while the poverty rate was under 10 percent at the low end, among a number of counties the poverty rate doubles to above 20 percent. Similar to the data presented with regards to race, this indicates that the resources available within certain counties varies substantially and that certain populations within the state would be at a disadvantage if faced with the decision to pay security in a criminal case.

Figure 4.8.2. Oregon Poverty Rates by County - 2018[36]



Further, according to the Oregon Housing and Community Services (OHCS) Poverty Report, the overall poverty rate in Oregon is higher than the national average.[39] The OHCS also reports that, relative to white Oregonians, the poverty rate is "much higher for people of color."[40] For example, while poverty among white Oregonians was 15.1 percent, that rate was more than double, 33.8 percent, for Black Oregonians.[41]

[36] Oregon Housing and Community Services, White Paper: Oregon Statewide Housing Data and Demographics, 2 (2017).
[37] OHCS White Paper: https://www.oregon.gov/ohcs/Documents/swhp/oregon-statewide-housing-data-profile.pdf page 2.
[38] Oregon Department of Human Services, Quick Facts 2018, 493 (2018).
[39] Oregon Housing and Community Services, Poverty Report 2017, 1 (2017).
[40] Oregon Housing and Community Services, Poverty Report 2017, 1 (2017).
[41] Oregon Housing and Community Services, Poverty Report 2017, 1 (2017).

5. Pretrial Policy Discussions and Recommendations

5.1. Racial, Ethnic, and Economic Disparity in Pretrial Release

5.1.1. Discussion

The Legislature required the PSTF to study racial and ethnic disparities in pretrial incarceration in HB 2238 (2017). On its own, the PSTF also added studying economic disparity in pretrial incarceration to its list of inquiries. As of the publication of this report, gaps in jail and court data concerning the race and ethnicity of pretrial defendants have made answering disparity questions specific to the pretrial phase of incarceration and case adjudication particularly challenging.

Available jail data indicates that Black persons are incarcerated in Oregon jails at a rate of more than four times higher than the state's Black population, and that this issue is most acute in the state's largest correctional facilities located in the I-5 corridor. Data concerning other races and ethnic groups should be interpreted with caution, although there a disparity is present among Native American Oregonians in medium sized facilities. As of this time, due to incomplete data it is not possible to assess disparities in small jails.

Similarly, specific data related to security release amounts (i.e., cash bail) imposed upon or paid by Oregonians of varying races is not available and could not be studied at this time. Oregon economic data, however, shows that income disparities exist amongst Oregonians of different racial and ethnic groups. Accordingly, while any economic disparity due to the imposition of security release or economic disparity in the payment of security release is unknown, it can be inferred that Oregonians with historically lower incomes will be impacted differently when faced with the decision whether to pay security release in a criminal case.

5.1.2. Recommendations

The following policy changes may assist in addressing racial and ethnic disparity in pretrial release decisions:

- Support robust jail diversion programs as well as other programming and tools for defendants with behavioral health or other conditions, such as housing instability, that contribute to criminal justice system involvement but do not pose public safety risks.
- Encourage the increased use of currently existing "cite-in-lieu of custody" laws by law enforcement to avoid jail bookings for persons who do not pose public safety risks.
- Provide resources and require jails and courts to establish processes to collect and record racial and ethnic demographic data specific to the pretrial phases of case adjudication. Improvements must include remedying gaps in race data collection (i.e., adding Hispanic/Latino and Native American/American Indian to race categories collected) and developing processes that allow defendants to self-identify race and ethnicity, rather than relying on staff perceptions.

5.2. Repeal of Security Release in Favor of Courts or another Entity with Delegated Release Authority Making Release Decisions

5.2.1. General Discussion

The Legislature required that the PSTF study the possible repeal of security release, an inquiry that translates to the study of repealing the cash forms of bail in Oregon. This question is complex and requires a differentiating between "security release" and personal sureties, as well as a consideration of current delegated release authority.

Oregon's security release system is a simple-majority legislative creation that *could* be repealed, should the legislature so choose. However, repealing security release would not likely strike all financial forms of bail from Oregon law as the Oregon Constitution provides defendants with a right to bail by sufficient sureties.[42] Under the sureties system, sureties (persons *other* than the defendant) may put forth money or things of value to obtain release of a defendant. Thus, the Oregon Constitution's providing a right to bail by personal surety does not entitle defendants to deposit his or her own money to obtain release. This is true of the personal surety system both historically, dating back to pre-statehood territorial law, the system at the time the Oregon Constitution was ratified in 1859, and is encapsulated in current Oregon statute. [43] Under Oregon's statutory security release system, defendants *or* third parties may obtain release by depositing cash or other forms of property with the court.

The Legislature has connected the original personal surety system to the more modern security release system by defining surety in statute as "one who executes a security release and binds oneself to pay the security amount if the defendant fails to comply with the release agreement."[44] Thus, in Oregon statute, a defendant may post security release on his/her/their behalf, or a surety may do so. Under the Oregon Constitution, defendants may not, without the aid of sureties (who must be *other* people), obtain pretrial release. This conflation of forms of bail has proven confusing and disentangling the Constitutional form of bail with the statutory forms would be wise.

Should the Legislature seek to entirely abolish all forms of financial bail in favor of more modern pretrial processes, the body would need to repeal security release *and* refer a constitutional amendment to voters or change the form of sureties accepted by courts to be performance-based rather of money-based. The latter option may prove challenging if not impossible, given the practicalities of operating a personal surety-based system in the 21st century. Challenges with working within the confines of constitutional language have prompted other states engaged in pretrial reform to amend their original bail constitutional provisions in favor of modernized and more detailed pretrial language.[45]

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[42] Or Const, Art I, § 14 (1859).
[43] *See* Appendix X for a discussion of Oregon's surety background and statutory deposit in lieu of surety origins.
[44] ORS 135.230(13).
[45] *See, e.g.,* the New Jersey Constitution, Art I, § 11 (2014) ("No person shall, after acquittal, be tried for the same offense. All persons shall, before conviction, be eligible for pretrial release. Pretrial release may be denied to a person if the court finds that no amount of monetary bail, non-monetary conditions of pretrial release, or combination of monetary bail and non-monetary conditions would reasonably assure the person's appearance in court when required, or protect the safety of any other person or the community, or prevent the person from

To address concerns over the potential for inequities in wealth-based pretrial release decisions in Oregon *without* amending the Oregon Constitution, the Legislature could amend Oregon statutes to require surety-based or security forms of bail be very limited and provided by only unsecured bonds, meaning no deposit of funds or property would be required to achieve a defendant's release. Moving to unsecured bonds would also mean that deposit of money or property would only be required if a defendant fails to abide by the conditions of release set by a judge.

If security release is retained as a form of bail in Oregon, consideration should be given to whether statutory minimum-security release amounts should be retained.

Table 5.2.1.1 Current Statutory Minimum Security Amounts by Oregon Statute

ORS Provision	Min Security Amount	Circumstances/Discretion
ORS 135.240(4)(f)(B)	$250,000	For technical violation of conditional release, a judge may hold defendant pending trial or may set security release no less than $250,000
ORS 135.240(5)(a)	$50,000	Except for situations where the amount is deemed unconstitutionally excessive, judge shall set no less than $50,000 security release for defendants charged with offenses listed in ORS 137.700 (Measure 11/mandatory minimums) or ORS 137.707 (mandatory minimums for juveniles waived to adult court)
ORS 135.242	$500,000	For certain meth offenses, judge may not release defendant on any form of release other than security release and shall not set security release less than $500,000 if court makes certain findings.[46] If the judge finds that defendant is eligible for security release less than $500,000 under other provisions of ORS 135.242, the court shall reduce the security release to an amount not less than $50,000.

5.2.2. Preventive Detention if Security Release were Repealed Entirely

If the Legislature were to repeal security release in favor of relying on constitutional sureties, recognizance or conditional release, or preventive detention orders, it is highly likely that at least some defendants who end up detained in Oregon jails awaiting trial would obtain pretrial release who do not presently. Precisely how many persons would obtain pretrial release was not known as of the time of the release of this report. Conversely, it is also likely that some defendants who

obstructing or attempting to obstruct the criminal justice process. It shall be lawful for the Legislature to establish by law procedures, terms, and conditions applicable to pretrial release and the denial thereof authorized under this provision.").

[46] ORS 135.242(1)(a-b) provides, in relevant part, that a court shall set no less than $500,000 security release for meth offenses listed in ORS 135.242(7), if the court finds: (a)Except when the defendant is charged by indictment, that there is probable cause to believe that the defendant committed the crime; and (b)By clear and convincing evidence that there is a danger that the defendant will: (A) Fail to appear in court at all appropriate times; (B) Commit a new criminal offense; or (C) Pose a threat to the reasonable protection of the public.

are currently given security release as a form of bail and are able to pay it—rather than a pretrial detention order—may be detained rather than released if security release were repealed.

Detainable offenses (charges for which, if evidentiary thresholds are met, a defendant is not eligible for pretrial release and must be detained awaiting trial) include murder, treason, and violent felonies. "Violent felonies" is defined in the Oregon Constitution and in Oregon statute, as "a felony in which there was actual or threatened serious physical injury to a victim or a felony sexual offense."[47] Serious physical injury is defined in Oregon statute as "physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ."[48] One relevant issue here is that unless the constitution is amended, preventive detention could not be utilized for defendants accused of misdemeanors including misdemeanor domestic violence and driving under the influence. Tables 5.2.2.1 and 5.2.2.2 provide a list of potentially detainable offenses in Oregon:

Table 5.2.2.1. Offenses that are Murder, Treason, or Meet the Definition of "Violent Felonies"

Aggravated driving while suspended 163.196
Arson incident to the manufacture of a controlled substance, First degree, if conditions in ORS 164.342(c) are present
Arson incident to the manufacture of cannabinoid extract, First degree, if conditions of ORS 475B.359(2)(c) are present
Arson, First degree, if conditions described in ORS 164.325(1)(a)(C) are present
Assault, First degree - ORS 163.185
Assault, Second degree - ORS 163.175
Assault, Third degree - ORS 163.165
Assault, Fourth Degree - *if* defendant causes serious physical injury (ORS 163.160(1)(c)) and if any of the conditions described in ORS 163.160(3)(a-d) are present
Bias crime, First degree, - ORS 166.165 if conditions in ORS 166.165(1)(c) are present
Environmental endangerment if conditions described in ORS 468.951(2) are present
Failure to perform duties of a driver to injured persons if conditions described in ORS 811.705(3)(b) are present
Maintaining a dangerous dog, if conditions in ORS 609.098(a) and ORS 609.990(3)(b) are present
Manslaughter, First degree - ORS 163.118
Manslaughter, Second degree - ORS 163.125
Murder, Aggravated - ORS 163.095
Murder, First degree - ORS 163.107
Murder, Second degree - ORS 163.115
Possession of a hoax destructive device if conditions described in ORS 166.385(3) are present
Robbery, First degree - ORS 164.415
Subjecting another person to involuntary servitude if conditions in ORS 163.264(a) are present
Treason – ORS 166.005
Unlawful tree spiking if conditions in ORS 164.886(3) are present

[47] Art. I sec 42(5)(d); Art. I sec 43(2)(b); ORS 135.240(6). ORS 135.240(4)(a)(B) provides that, when a defendant is charged with a violent felony, release shall be denied if the court finds that there is probable cause to believe the defendant committed the crime and, by clear and convincing evidence, that there is danger of physical injury (not *serious* physical injury) or sexual victimization to the victim or members of the public while the defendant is on release. The internal language of these provisions is not consistent.

[48] ORS 161.015(8).

Table 5.2.2.2. Felony Sex Offenses

Custodial sexual misconduct, First degree - ORS 163.452
Online sexual corruption of a child, First degree - ORS 163.433
Online sexual corruption of a child, Second degree - ORS 163.432
Public indecency *if* defendant also has prior sex offense convictions listed in ORS 163.465(2)(b)
Purchasing sex with a minor – ORS 163.413
Rape, First degree - ORS 163.375
Rape, Second degree - ORS 163.375
Rape, Third degree - ORS 163.355
Sex abuse, First degree - ORS 163.427
Sex abuse, Second degree - ORS 163.425
Sodomy, First degree - ORS 163.405
Sodomy, Second degree - ORS 163.395
Sodomy, Third degree - ORS 163.385
Unlawful contact with a child – ORS 163.479
Unlawful dissemination of an intimate image *if* defendant also has prior conviction for unlawful dissemination of an intimate image – ORS 163.472(2)(b)
Unlawful sexual penetration, First degree - ORS 163.411
Unlawful sexual penetration, Second degree - ORS 163.408

While anecdotal, the primary reasons described by judges, prosecutors, and defense counsel for the reason security release has often become a shortcut to preventive detention in many circuit courts is two-fold. First, a majority of release decisions are made at arraignment rather than a pretrial release hearing,[49] largely because it is less resource intensive on courts to manage a release decision at arraignment than it is to hold a separate hearing a few days later. Second, as reported by some jurisdictions the constitutional bail evidentiary standards within Article I, section 14, and Article I, section 43, are confusing, are too rigorous to litigate at the arraignment stage (which may be, in some cases, mere hours after an arrest was made), or both. A recent Oregon Court of Appeals opinion—*State v. Slight*—has shed some light on what kinds of evidence may satisfy the clear and convincing threshold for Article I, section 43, at arraignment.[50]

5.3. Security Release Funds

An additional consideration for the Legislature is the fact that the security release system generates revenue in two ways. First, each time a defendant, or a third party on the defendant's behalf, posts security to obtain a defendant's release, the circuit court, by statute, retains 15 percent of the security regardless of whether the charges are dropped, the defendant is found not guilty, or the defendant meets all conditions of release. Second, any time a defendant fails to meet all conditions of release they may forfeit their security release paid to the court.[51] Retained security funding is allocated to the state's general fund, applied to any outstanding victim restitution, child support payments, or court fines and fees the defendant owes, and other funds.

[49] ORS 135.240(4)(b) also makes requesting a release hearing the defendant's role, which *may* decrease the number of pretrial release hearings that occur.
[50] *State v. Slight*, 301 Or App 237, 254-255, 456 P3d 366 (2019) (construing ORS 135.240(4), the statutory codification of the evidentiary threshold required for a judge to order preventive detention in Article I, section 43).
[51] ORS 135.265(2).

A reduction or repeal of the use of the security release system would impact the disbursement of security funds and their use for these other purposes.

5.4. Delegated Release Authority

Under ORS 135.235, a presiding judge for a judicial district may delegate release authority to a release assistance officer and release assistance deputies under a personnel plan established by the Chief Justice of the Supreme Court.[52] If this delegation of authority is provided, release assistance officers may make pretrial release decisions consistent with the order of the presiding judge.

ORS 135.235(2) provides that release assistance officers shall, "except when impracticable," interview every person detained pursuant to law and charged with an offense. No definition for "impracticable" is provided. Release assistance officers must verify primary and secondary release criteria and may either submit a timely written report containing an evaluation of release criteria and other relevant information with a recommendation for the form of release.[53] A release assistance officer may also, if the presiding judge has granted release authority, make a release decision.[54]

Presently, there appears to be confusion or at least interpretation differences in what authority may be delegated to whom and for what purposes across the state. Only five judicial districts have any release assistance officers, while twice that many have pretrial staff employed by executive branch agencies under sheriff's offices or departments of community justice (parole and probation). Most Oregon courts do not delegate release decision-making authority, meaning only judges make pretrial release decisions. Of the courts with release assistance officers (employees of the court), most maintain that judges make release decisions, while release assistance officers provide information for judges to make those decisions, while a few courts allow release assistance officers to make release decisions for certain crime types. In at least one jurisdiction, the court has delegated all pretrial release decision-making to the jail commander.

5.5. Recommendations

- Reduce reliance on security release (either repeal security release entirely or restrict use to only when no non-monetary conditions would achieve defendant's appearance in court).
- If security release is retained, repeal presumptive minimum security release amounts in favor of judges determining appropriate security release amounts on a case-by-case basis and to prevent against wealth-based detention.
- Employ preventive detention law (argue at pretrial release hearings whether defendants are releasable vs. detainable) rather than using high security amounts as a proxy for achieving detention for defendants who are legally bailable.
- Support employment of more release assistance officers in judicial districts and empower them to make release decisions in appropriate cases to free up court resources for judges to make individualized pretrial release decisions on more challenging cases.

[52] ORS 135.235(1).
[53] ORS 135.235(a).
[54] ORS 135.235(b).

- Support employment of more pretrial release staff (judicial branch or executive branch) to perform pretrial information gathering, interviews, and assessments so that judges have as much case-specific information as possible at the time of release decision-making.
- Clarify in policy or statute the roles of judicial release assistance officers, with delegated discretionary release authority, and executive branch pretrial staff, with administrative release authority (meaning they may carry out judicial orders but may not use exercise release decision-making discretion).

6. Recommendations Related to Pretrial Risk Assessment Tools

6.1 Overview of Risk Assessment Tools

The Legislature required the PSTF to study the use of pretrial risk assessment tools. Pretrial risk assessment tools are instruments designed to provide information to pretrial release decision makers, primarily judges or any pretrial staff with delegated release authority, regarding a particular defendant's "risk" of (1) a defendant failing to appear for required court hearings; and (2) a defendant's risk of a new charge or re-arrest while on pretrial release.[55] Some tools also predict the additional risk of new violent criminal arrest while on pretrial release.[56] In addition to standard pretrial risk assessment tools, specialty risk assessment tools exist that may be used in concert with pretrial-specific risk tools to predict additional risk of particular offenses, such as domestic violence abuse.[57]

Pretrial risk tools typically classify defendants into risk categories based on a numerical score that puts defendants into categories such as low, medium, high and, sometimes "highest-risk." Two goals of pretrial tools are to (1) standardize the pretrial release recommendation process; and (2) maximize the number of successful pretrial decisions. An oft-repeated benefit stated of pretrial risk assessments is that employing them "may allow law enforcement to better allocate their resources to those offenders with the highest risk."[58]

Stated advantages of incorporating a validated risk assessment tool into the operation of a pretrial services program include the following:

(1) Research suggests that actuarial assessments "predict outcomes better than professional judgement alone" because tools weigh a consistent set of factors uniformly whereas professional judgement, alone, may allow for consideration of disparate factors applied inconsistently.[59]
(2) Virtually all pretrial risk tools have been developed based on research demonstrating factors shown to be predictive of particular pretrial conduct.[60]
(3) Pretrial risk tool use may, depending on the pretrial program operation specifics, increase standardization of pretrial assessment of defendants, which may support greater transparency of how release decisions are calculated for the public's knowledge.[61]

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[55] The Stanford Law School has organized the "Stanford Pretrial Risk Assessment Tool Factsheet Project" with helpful summaries of the most widely used pretrial risk assessment tools on currently used.
[56] *See, e.g.*, the Public Safety Assessment.
[57] *See, e.g.*, the Ontario Domestic Violence Risk Assessment tool.
[58] Summers, C., & Willis, T., BUREAU OF JUSTICE ASSISTANCE, U.S. DEPARTMENT OF JUSTICE, PRETRIAL RISK ASSESSMENT RESEARCH SUMMARY, 3 (2010).
[59] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[60] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[61] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).

(4) Risk assessments may help maximize pretrial release rates by, among other things, identifying defendants "appropriate" for pretrial jail diversion or other early release options.[62]
(5) Pretrial risk tools may help pretrial services staff and courts direct resources to help defendants succeed (based on the assessment) while on pretrial release.[63]
(6) Pretrial risk tools may help "reinforce the ideas of maximized pretrial release and carefully limited pretrial detention" by showing system stakeholders that "pretrial 'risk' is less prevalent than perceived," leading to release decisions based on empirical factors related to pretrial outcomes rather than a decision maker's "perception of risk."[64]
(7) Pretrial risk tools may help jurisdiction move away from cash-based bail systems to a "risk-based bail system."[65]
(8) Pretrial risk tools may help minimize "predictive bias based on an individual's race, gender, or ethnicity."[66]

Pretrial risk assessment tools are considered actuarial tools, meaning they use a statistical analysis of certain factors to determine which factors are predictive of pretrial failure, the degree to which they are predictive, and the relationships between these risk factors.[67] Popular examples of actuarial pretrial tools include the Virginia Pretrial Risk Assessment Instrument (VPRAI) and the Public Safety Assessment (called the PSA or the Arnold tool). The most commonly used pretrial risk assessment tool by Oregon jurisdictions with pretrial programs is the VPRAI.[68]

Over the last few years, the impartiality of pretrial risk assessment tools has been called into question by groups concerned that the information used to calculate a risk score may impart systemic racial bias from other parts of the criminal justice system into the actuarial function that purports to be race-neutral.[69] One example of this is a person's arrest history, as persons concerned with the use of pretrial risk assessment tools worry that arrest records will imbue biases from other parts of the justice system in pretrial risk calculations.[70] There is research showing both support of these concerns[71] as well as research cautioning against abandoning

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[62] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[63] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[64] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[65] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[66] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 30 (2020).
[67] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 5 (2020).
[68] Stanford Pretrial Risk Assessment Tools Factsheet Project, Virginia Pretrial Risk Assessment Instrument, Factsheet (2019) and Training manual.
[69] *See, e.g.*, The Leadership Conference on Civil and Human Rights, The Use of Pretrial 'Risk Assessment' Instruments: A Shared Statement of Civil Rights Concerns, (2019); The Pretrial Justice Institute, Updated Position on Pretrial Risk Assessment Tools (2020).
[70] The Leadership Conference on Civil and Human Rights, The Use of Pretrial 'Risk Assessment' Instruments: A Shared Statement of Civil Rights Concerns, (2019).
[71] *See, e.g.*, Chelsea Barbaras, *et. al.*, Technical Flaws of Pretrial Risk Assessments Raise Grave Concerns (2019); Victoria A. Terranova, Ph.D., and Kyle C. Ward, Ph.D., Colorado Pretrial Assessment Tool Validation Study Final

pretrial tools.[72] Due to growing concerns regarding racial bias, however, some states engaged in pretrial reform have backed away from adopting pretrial risk assessment tools as a mandatory component of reform.

Other concerns about pretrial risk tools include that they "often appear to function as a substitute for broader or more fundamental changes" to pretrial operations and that they do not measure a defendant's actual flight risk but rather "forecast" the "general risk of missing a court appointment," which may be of lesser concern than willful flight.[73] The National Institute of Corrections and the National Association of Pretrial Services still support the use of pretrial risk assessment tools as part of evidence-based pretrial programs, so long as tools are validated and used appropriately, meaning used as additional information for judges to consider when making release decisions but not to supplant a judge's discretion or decision-making authority.[74]

6.2. Validation

In order to determine whether a pretrial risk assessment tool actually works as intended, "validation" studies must be performed. A validation study "tests whether a tool's estimated risk for an individual corresponds to actual behavior."[75] Validation of risk tools requires a comparison of the outcomes the tool predicted with actual outcomes for the individuals who received risk scores to see how often the tool predicted behaviors accurately. Validation studies can also be tailored to check risk tool accuracy across population subgroups, such as race, ethnicity, and gender.[76] High quality data collection and data integrity is critical to validation studies.

6.3. Oregon Jurisdictions using Pretrial Risk Assessment Tools

Presently, nine Oregon counties report using a pretrial risk assessment tool as part of their pretrial release programming.[77] Six use the VPRAI, and three use the Oregon Public Safety Checklist. Of those programs, three have validated the tools used, and one is in the process of validating their tool. As noted, the VPRAI is an established pretrial risk assessment tool. The Oregon Public Safety Checklist (PSC), however, is a recidivism risk assessment tool not specifically designed for pretrial use, though one county has validated the PSC for use as a pretrial risk predictor tool for use in its pretrial program. More than half of Oregon pretrial staff surveyed noted that assistance with pretrial risk tool validation was among their most-sought technical assistance gaps, and virtually all Oregon pretrial program staff without validated

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Report (2020); John Herrick, "Bias against Black people found in Colorado bail reform tool." Colorado Newsline. August 14, 2020; David G. Robinson, and Logan Koepke, Civil Rights and Pretrial Risk Assessment Instruments (2019).

[72] James Austin, and Wendy Naro-Ware, The Value of Pretrial Risk Assessment Instruments: Don't Throw the Baby Out with the Bathwater, (DATE?)

[73] David G. Robinson, and Logan Koepke, Civil Rights and Pretrial Risk Assessment Instruments, 4-6 (2019).

[74] National Association of Pretrial Services Agencies Standards, Standards on Pretrial Release: Revised 2020, 34-35 (2020).

[75] Bureau of Justice Assistance, Risk Validation, last accessed September 14, 2020.

[76] Bureau of Justice Assistance, Risk Validation, last accessed September 14, 2020.

[77] Oregon Criminal Justice Commission, Survey of Oregon Pretrial Programs (2019).

pretrial risk tools have expressed keen interest in local validation if resources were made available to pursue it.

6.4. Oregon Statutory Release Criteria and Risk Assessment Tools

Oregon circuit courts in judicial districts with pretrial release programs employ risk tool scores in addition to Oregon's statutory release criteria when making pretrial release decisions. Oregon's statutory primary[78] and secondary[79] release criterion are set forth in statute and are contained in Table 6.4.1.

Table 6.4.1. List of Primary and Secondary Release Criteria

Primary Release Criteria (ORS 135.230(7))	Secondary Release Criteria (ORS 135.230(11))
(a) The reasonable protection of the victim or public; (b) The nature of the current charge; (c) The defendant's prior criminal record, if any, and, if the defendant previously has been released pending trial, whether the defendant appeared as required; (d) Any facts indicating the possibility of violations of law if the defendant is released without regulations; and (e) Any other facts tending to indicate that the defendant is likely to appear	(a) The defendant's employment status and history and financial condition; (b) The nature and extent of the family relationships of the defendant; (c) The past and present residences of the defendant; (d) Names of persons who agree to assist the defendant in attending court at the proper time; and (e) Any facts tending to indicate that the defendant has strong ties to the community

For Oregon courts not using pretrial risk assessment tools, the statutory release criterion listed in 6.4.1 are the lone criterion employed to assess the form of release most appropriate for bailable defendants. The statutory release criterion have some commonalities with the information used by pretrial risk assessment tools to develop risk scores and may benefit from a review to determine if any amendment is warranted, particularly if the Legislature opts to establish guidelines for the use of pretrial risk assessment tools.

6.5. Possible Means for Reducing Potential for Bias in the Administrative of Risk Assessment Tools

Groups concerned about the use of pretrial risk assessment tools have made suggestions concerning the implementation and use of such tools. First, it is important to requiring meaningful and thorough transparency throughout design, implementation, and validation processes by including disclosures concerning (i) the design and testing process, (ii) the factors utilized by the tool and how those factors are weighted in the algorithm, (iii) the data and process used to determine the categories for the tool, (iv) the outcome data used to develop and validate the tool, including disclosures of the breakdowns of rearrests by charge, severity of charge, failures to appear, age, race, gender, and the like; and (v) clear definitions of what the instrument

[78] *See* ORS 135.230(7).
[79] *See* ORS 135.230(11).

forecasts over a given timeframe. Second, in all of the aforementioned disclosures, it is necessary to ensure the community input and oversight is both sought out, meaningfully considered, and acted upon. Finally, and perhaps most importantly, it is necessary to ensure that detention decisions are not dependent solely on risk assessment instruments. [80]

6.6. Recommendations

- Support and fund the implementation of limited number of tools statewide.
- Require local validation of tools and provide state support for obtaining local tool validation.
- Require public-facing transparency of pretrial risk tool use.

[80] David G. Robinson, and Logan Koepke, Civil Rights and Pretrial Risk Assessment Instruments, 10-12 (2019). *See also*, The Leadership Conference on Civil and Human Rights, The Use of Pretrial 'Risk Assessment' Instruments: A Shared Statement of Civil Rights Concerns, 2-9 (2019).

7. Recommendations Related to Reducing Failure to Appear in Oregon Courts

7.1 Overview of Failure to Appear

The Legislature also tasked the PSTF with studying methods to reduce failure to appear (FTA) during the pretrial phase of case processing. Defendants who obtain pretrial release by any means must appear at all court appearances as required by release agreements.

A defendant's failure to appear as required may be charged as a first- or second-degree offense of Failure to Appear. First-degree failure to appear occurs when a person knowingly fails to appear after release from a jail under a release agreement or security release on a felony charge or having been forced-released[81] with a release agreement from a jail on a felony charge.[82] First-degree failure to appear is a Class C felony.[83] Second-degree failure to appear occurs when a person knowingly fails to appear after release from a jail under a release agreement or security release on a misdemeanor charge or having been forced-released with a release agreement from a jail on a misdemeanor charge.[84] Second-degree failure to appear is a Class A misdemeanor.[85]

Data available regarding FTA rates for Oregon defendants has had persistent challenges, although recent improvements to data for 2017-2019 are promising. In spite of significant progress with regards to tracking, further challenges in obtaining actionable FTA data persist. Whether a defendant who is late to a hearing is counted as a failure to appear can vary depending on whether the lateness required the judge to set-over the hearing to a new date or if the judge found time on the same day to complete the work at hand. FTA charging and conviction rates also do not give us a good picture of actual FTA rates, as whether a defendant is charged for each FTA varies greatly under the discretion of the district attorney's office at issue.

Further, conversations with circuit court judges indicate that there is substantial differences in perspectives on what should constitute a failure to appear. As noted, knowingly failing to appear on a felony charge is already a Class C felony, and knowingly failing to appear on a misdemeanor charge is a Class A misdemeanor. Many judges and practitioners are quick to point out that some defendants, particularly those with behavioral health disorders, housing instability, or other basic living challenges may unintentionally fail to appear. While not necessarily criminally liable, these defendants nevertheless could have these FTAs held against them in future release decisions, not resolve their cases efficiently, and cost the courts, district attorneys, public defenders, and any pretrial staff or victims (if applicable) time, resources, and other intangible costs. Anecdotally, some circuit court judges and stakeholders have expressed interest in additional options for handling defendants who frequently fail to appear but who do not demonstrate willful conduct.

[81] A force-release (sometimes called a matrix release) occurs when the population of a jail exceeds the safe operating capacity, as described in ORS 169.046 (Notice of county jail population emergency).
[82] ORS 162.205.
[83] ORS 162.205.
[84] ORS 162.195.
[85] ORS 162.195.

7.2. Methods for Lowering Failure to Appear Rates

Court Reminders. One method of reducing FTA rates is to implement court reminder systems in pretrial operations. Court reminders can take a number of forms (or a combination), such as postcards or written letters, live calls from staff, automated calls, text messages. The National Institute of Corrections and the National Association of Pretrial Services Agencies both consider using pretrial court reminders a pretrial best-practice standard of any high-functioning pretrial program.[86]

Two studies in particular are instructive. A 2011 study of FTA rates in 14 Nebraska counties found that employing simple court reminders in mailed letters or postcards to misdemeanor defendants "significantly reduced FTA overall," while "more substantive reminders" (reminders of court date with additional information on sanctions for not appearing and information on procedural justice benefits of appearance in mailed letters or postcards) were even more effective than simple reminders.[87] Additionally, survey results showed that defendants with higher trust and confidence in overall procedural justice correlated with better appearance rates. The study also concluded that improving appearance rates may improve system efficiencies and cost-savings through better compliance.[88]

Second, a project by Cooke (2018) and several colleagues examined FTA rates of defendants charged with low-level offenses (e.g., trespassing in parks) and, upon reviewing results, designed "inexpensive, scalable solutions" to reducing the FTA rates of those defendants studied.[89] Researchers employed behavioral science methods to datasets and identified four main "barriers" that most contributed to defendants failing to appear, including (i) immediate financial or psychological costs of attending court, such as taking time off of work to accommodate a hearing, (ii) social norms in communities of not attending court or not understanding consequences for not attending court, and (iii) inattention of defendants who simply forgot that they had been summoned to court at all, among others.

Based on new knowledge of how defendants perceived the court appearance process, altogether, Cooke and his colleagues developed court reminder text messages designed to address the underlying reasons leading many defendants to not appear and found that the most effective court reminder included a combination of information regarding appearance plan-making (reminding defendant of when court was to occur and the court's address) and failure to appear consequences (that failing to appear will result in a warrant for defendant's arrest and make the case more complex to resolve). These messages were sent seven days, three days, and one day before the defendant's court date and resulted in a 26 percent reduction in FTAs.

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[86] National Institute of Corrections, A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency, 48 (2017).
[87] Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neely, Reducing Courts' Failure to Appear Rate: A Procedural Approach, 3 (2011).
[88] Brian H. Bornstein, Alan J. Tomkins, Elizabeth M. Neely, Reducing Courts' Failure to Appear Rate: A Procedural Approach, 31 (2011).
[89] Brice Cooke, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, Anuj Shah, Binta Zahra Diop, Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court (2018).

Additionally, text messages were designed and sent for defendants who continued to fail to appear, including information aimed at consequences of failing to appear and what the defendant could do to avoid being arrested, as well as conveying social norms of appearing in court. The post-FTA text messages resulted in a 32 percent reduction in open fail-to-appear warrants. A cost-benefit analysis performed on existing court processes showed that, using the newly designed form, alone, could avoid 17,100 FTA warrants avoided over one year, while using the combination text message reminders could avoid as many as 14,300 FTA warrants.

It is important to note that text hearing reminders will be rolled out statewide in 2021 by the Oregon Judicial Department.

Court Form Revisions. In the Cooke study, another promising development in improving court attendance was achieved by way of redesigning the court summons forms to make the most important information stand out and more easily understood by defendants reading them.[90] In doing so, the form was reworked to do the following: (1) clearly title (in larger font and in more straightforward language) the purpose of the required action conveying that the form required the defendant to appear in court on a criminal issue; (2) the date, time, and appearance of the action was moved from the bottom of the form to the top; (3) the consequence of missing court was restated to more clearly convey the consequences of not appearing in a way that aimed to "spur loss aversion." When combined with plan-making text messages, these changes in court forms were predicted to avoid as many as 31,300 FTA warrants.

7.3. Recommendations

- Require and provide funding for courts and pretrial staff to employ pretrial court reminders to the greatest extent possible
- Support improvements to FTA data tracking and analysis.
- Consider court form revisions to make court appearance information easier to read, understand, and follow.
- Utilize technology to support more virtual court appearances consistent with constitutional rights.

[90] Brice Cooke, Alissa Fishbane, Jonathan Hayes, Aurelie Ouss, Anuj Shah, Binta Zahra Diop, Using Behavioral Science to Improve Criminal Justice Outcomes: Preventing Failures to Appear in Court, 11 (2018).

8. Recommendations Related to Other Key Issues

Aside from its statutory responsibilities, the PSTF elected to consider three additional topics in this report. First, the Task Force considered the improvement of pretrial data recording and reporting to its list of tasks. Second, the Task Force also recognized that consideration of pivotal changes to pretrial operations statewide necessitated a review of pretrial practices in relation to victim's rights enforcement and the unique risks to victims during the pretrial phase of domestic violence cases. Third, the Task Force received substantial feedback from existing Oregon pretrial staff that consideration of adopting pretrial statewide standards or best-practices would go a long way towards improving consistency and efficacy of pretrial operations statewide.

8.1 Data Improvement Recommendations

The biggest hurdle in answering the Legislature's questions regarding pretrial incarceration in Oregon was data gaps in jail and court information. The PSTF recognized this early in its inquiry and its subcommittees and staff worked to determine which data were available. After reviewing available data and data gaps, the PSTF recommends the following data improvements to Oregon pretrial data collection.

- Support and fund improvements to pretrial data standardization, collection, reporting, and analysis (jail data, court data, pretrial program data), including, but not limited to:
  - Race and ethnicity data; tribal affiliation data
  - Pretrial status data (charges pending vs. other jail statuses), such as pretrial length of stay
  - Time to case disposition data
  - Failure to appear data
  - Violations of release agreement data
- Standardize data definitions and collection requirements for jail and court data elements.
- Require routine joint jail, CJC, and OJD reports on pretrial metrics and program outcomes.

8.2 Victim's Rights and Domestic Violence Safety Issues

8.2.1 Discussion

Though not identified as an area of inquiry by Legislature, changes to the pretrial release system will have implications for Oregon crime victims. To meaningfully consider these implications, the PSTF established a subcommittee to discuss these issues.

One particular area of concern was in cases of domestic violence, given that several unique concerns exist for safety planning during the pretrial phase for domestic violence victims. The time between arrest and arraignment, (when a majority of release decisions are made, is often short, and release decision-makers frequently do not have access to incident-specific information that may provide critical information regarding what safety concerns are present for crime victims. This is particularly true of domestic violence cases, where defendant conduct that may indicate the most serious and imminent safety risks to victims may be past uncharged or otherwise undetectable conduct. Additionally, standard pretrial risk tools are not designed to

evaluate the specific risks present in domestic abuse circumstances. There are actuarial tools that are designed to assess pretrial danger to victims that may aid in filling "risk" information gaps, such as domestic violence-specific pretrial tools and lethality assessments, which some Oregon jurisdictions are presently applying, although this is far from universal.

Additionally, while Oregon crime victims have specific rights to be heard during pretrial release decisions, these rights are not always uniformly enforced, and structural issues in court operations, such as docket planning, may interfere with a victim's exercise of those rights. For example, in a few jurisdictions in Oregon, protective order dockets and arraignment may occur at the same time, meaning that a crime victim seeking a protective order and to exercise rights to be heard at the alleged offender's pretrial release event would have to choose between the two, or delay seeking the protective order.

There have also been concerns raised regarding inadequate training for all court and executive branch pretrial staff (as well as other justice system actors) on how to recognize and respond to the specific risks of domestic abuse in the pretrial phase of a case.

8.2.2. Recommendations

- Allow for adequate time for information regarding domestic violence cases or cases in which there is risk of harm to victims or the public to collect harm-related information to make available to court or delegated release decision maker by the time a release decision is made (use pretrial hearings rather than arraignment).
- Ensure that release assistance officers are following the instructions and guidance they have received from presiding judges.
- To the maximum extent possible, input from the victim shall be sought prior to making a release decision.
- Employ domestic violence-specific safety assessments or risk assessment tools to supplement standard pretrial risk assessment scores or staff reports to ensure danger to victims adequately considered.
- Ensure that protective order dockets are not scheduled at the same time as arraignments so that victims are not forced to choose between exercising their constitutional right to be heard at pretrial hearings and other critical events.
- Ensure victims are notified of pretrial events and rights to be heard (including in culturally competent approaches).
- Ensure victims have opportunities to be heard and include means for options that do not require in-person presence if not preferred.
- Provide judges, court staff, pretrial staff, and other system actors with robust training on domestic violence risks and best-practices for rights enforcement and safety panning in the pretrial phase of cases.

8.3. Professional Development, Best Practices, Standards, and Implementation Guidance

8.3.1. Discussion

While the number of jurisdictions employing or implementing pretrial programs has tripled in the last five years, no practice standards have been formally adopted to guide the operations of pretrial programs in Oregon. The Pretrial Justice Network (PJN), a group of pretrial professionals led by community corrections-based pretrial programs in Oregon offers generous support and learning opportunities for both existing programs and new programs, as well as for persons from Oregon jurisdictions interested in what it would take to launch a pretrial program. However, the information provided by PJN is advisory.

8.3.2. Recommendations

- Employ trainings for pretrial staff, judges and court staff, district attorneys, defense attorneys, and victim services, on pretrial legal requirements and pretrial program practices.
- Establish means for community outreach and education on pretrial processes and program purposes.
- Appoint or create a pretrial services practice advisory council to guide program compliance and implementation.
- Adopt statewide best-practice requirements and data collection standards for pretrial programs.

Appendix A – Legal Background

A1. Pre-statehood and Oregon Constitutional Convention

Oregon's earliest bail statutes date back to the Organic Laws of Oregon of 1845, which included a provision that "all persons shall be bailable, unless for capital offences, where the proof shall be evidence, or the presumption great[.]"[91] Oregon's territorial government held a constitutional drafting convention from August 17, 1857 to September 18, 1857, in present-day Salem.[92] The convention elected Matthew Deady, a territorial legislator, as convention president.[93] The newly drafted Constitution included two original bail provisions, based on virtually identical provisions of the 1851 Indiana Constitution, a copy of which was brought by overland wagon train by convention delegate Chester Terry.[94]

The text of Article I, section 14 (introduced at the convention as section 17), was:

> "Offenses, except murder and treason, shall be bailable by sufficient sureties. Murder and treason shall not be bailable when the proof is evident or the presumption strong."[95]

Any discussion of the article occurred on the mornings of September 9, 1857 and September 11, 1857.[96] No debate was recorded or reported, nor is there any evidence that delegates approved any amendments to the provision.[97] The Convention passed the article on September 12, 1857, during the evening session.[98]

The convention also introduced and ultimately approved, unchanged, without debate, a provision that addressed, in relevant part, excessive bail:

> "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."[99]

This provision, too, was based on an essentially identical provision of the 1851 Indiana Constitution.[100] Following the summer's convention, on November 9, 1857, the Constitution was approved by the vote of the people of the Oregon Territory. The Act of Congress admitting Oregon as a state was approved February 14, 1859, and on that date, Oregon's state constitution went into effect.[101]

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[91] Organic Laws of Oregon, Art. I, § 2, 59 (1845).
[92] Claudia Burton and Andrew Grade, Oregon Constitution's Legislative History, 37 Willamette L Rev 469, 526-527 (2001).
[93] Oregon Secretary of State, An Overview of the Convention Process, https://sos.oregon.gov/archives/exhibits/constitution/Pages/default.aspx (last accessed January 4, 2020); *see also* a Biography of Deady, https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-about-deady.aspx (last accessed April 9, 2020).
[94] Oregon Secretary of State, An Overview of the Convention Process, https://sos.oregon.gov/archives/exhibits/constitution/Pages/during-process.aspx (last accessed May 3, 2020).
[95] Claudia Burton and Andrew Grade, Oregon Constitution's Legislative History, 37 Willamette L Rev 469, 526-527 (2001).
[96] *Id*. at 526.
[97] *Id*. at 526 (observing "no reported comment or debate" at any of the article's readings).
[98] *Id*. at 526-27.
[99] *Id*. at 521-523.
[100] *Id*.
[101] *See* Robert Carey, A History of the Oregon Constitution 27, 496 (1926).

In the year following Oregon's statehood, the Oregon Legislative Assembly of authorized, by joint resolution, a three-man committee, headed again by Deady, to revise the existing statutes of the new state."[102] The revision committee first put forth reports on the State of Oregon's first code of civil procedure in 1862 and later on its first criminal code in 1864.[103]

Deady's new criminal code included bail provisions that recognized a defendant's right to obtain release from jail before trial for offenses that were *bailable* under the newly minted state Constitution and a judge's role[104] in determining whether the defendant's bail is adequate.[105] The statutes codified the Constitution's Art. I, sec. 14 requirement that a defendant "cannot be admitted to bail," i.e., was unbailable, when "the proof or presumption of his guilt is evident or strong," i.e., "the proof evident or presumption strong," when the defendant is charged "with the crime of murder in any degree, or treason[.]"[106] The Deady code defined the offenses constituting murder under the constitution to include any offense involving "the infliction of a person injury upon another, likely to produce death, and under such circumstances as that, if death ensue, the offence would be murder in any degree."[107] For "any other crime" not just discussed as unbailable, "the defendant, before conviction, is entitled to be admitted to bail, as a matter of right."[108]

The purpose of a judge's consideration of whether a defendant's bail was adequate was to determine whether the bail was "sufficient" to ensure "the appearance of the defendant," according to the terms of the undertaking.[109] Bail, per the new statutes, was taken when a defendant, in a written expression before the court, provided an offer of adequate bail to the court that was to be executed by "two sufficient sureties" that must be "acknowledged" by the court.[110]

The "undertaking" of bail, i.e., the writing signifying what the defendant's sureties were willing to put on the line as collateral for the defendant to show up to court, was to be dated and signed by the sureties, in the presence of the judge taking the bail.[111] For a person to be qualified to serve as a defendant's bail, i.e., the requirements for a person to serve as a defendant's surety, included that each surety must "be a resident and a householder or freeholder within the state; but no counselor or attorney, sheriff, clerk of any court or other officer of any court, is qualified to be bail."[112]

To serve as sufficient bail, sureties must "each be worth the sum specified in the undertaking, exclusive of property exempt from execution, and over and above all just debts and

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[102] Beardsley, 23 Or L Rev at 49.
[103] *Id*.
[104] "General Laws of Oregon," § 254, 484 (1864) (providing that "[a]dmission to bail is the order of a competent court or magistrate, that the defendant be discharged from actual custody, upon bail").
[105] "General Laws of Oregon," § 255, 484 (1864) (providing that the "taking of bail consists in the acceptance, by a competent court or magistrate, of the undertaking of sufficient bail for the appearance of the defendant, according to the terms of the undertaking, or that the bail will pay to the state a specified sum of money").
[106] General Laws of Oregon," § 256, 484 (1864).
[107] *Id*.
[108] General Laws of Oregon," § 257, 484-85 (1864).
[109] General Laws of Oregon," § 255, 484-85 (1864).
[110] General Laws of Oregon," § 267, 484-85 (1864).
[111] General Laws of Oregon," § 268, 486-87 (1864).
[112] General Laws of Oregon," § 269, 487 (1864).

liabilities."[113] Additionally, among other bail provisions, the Deady Code provided for an alternative to the surety system described in the constitution – a provision titled, "deposit instead of bail."[114] Under this chapter, the defendant, if admitted to give bail, instead of giving bail, "may deposit with the clerk of the court at which he is held to answer, or in which the action is pending or the judgment appealed from, is given, the sum of money mentioned in the order; and upon delivering to the officer in whose custody he is, the clerk's certificate of such deposit, he must be discharged from custody."[115] If the defendant had already given bail under a surety arrangement and had not forfeited it, the defendant was entitled to deposit an equivalent sum of money, at which point "the bail is exonerated."[116]

A2. The Criminal Law Revision Commission (1970-1972) and the Oregon Legislature's Criminal Code Revisions of 1973

During the 1960s, legal organizations, such as the American Law Institute and the American Bar Association, the federal government through its Bail Reform Act of 1966, and more than 30 states began revisiting their criminal codes, as ideas about criminal offenders expanded and many places recognized a need to revamp criminal codes that had been relatively untouched since statehood was achieved.[117] The Portland City Club convened a study on bail practices in the state and published a comprehensive report urging the state to revise its bail practices in 1968.[118] Conclusions included, among others, that a lack of adequate means for preventive detention of potentially dangerous persons had resulted in bail being "misused for this purpose," that pretrial "[i]ncarceration is not consistent with the presumption of innocence," "[j]ailing the accused results in his separation from his family and employment," which may result in defendants losing jobs and "placing * * * dependents on public welfare," and "[c]onfinement, when * * * conditioned on financial ability, discriminates against the poor."[119]

The Oregon Legislature created the Oregon Criminal Law Revision Commission (CLRC) around the same time.[120] The CLRC was directed to "'prepare a revision of the criminal laws of this state, including but not limited to necessary substantive and topical revisions of the law of crime and of criminal procedure, sentencing, parole and probation of offenders, and treatment of habitual criminals'" and submit the report to the Oregon Legislature.[121] The CLRC recognized that, as at the time, Oregon's criminal code was largely the same 106 years after the commission led by Judge Deady and suffered from "retention of substantive provisions now neither necessary nor desirable" and "replete with overlapping and seemingly inconsistent crimes and penalties[,]" its work was "part of a major criminal law reform movement now occurring in this country."[122]

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[113] *Id*.
[114] General Laws of Oregon," § 280, 488-89 (1864).
[115] *Id*.
[116] General Laws of Oregon," § 281, 485 (1864).
[117] CLRC Final Report July 1970 page XXII, foreward by Sen. Anthony Yturri, Chairman (R-Ontario).
[118] Portland City Club report (1968).
[119] Portland City Club report, pages 117-118.
[120] Oregon Laws Chapter 573 (1967). CLRC Final Report page XXII, "Foreward." *See also* Oregon Secretary of State Oregon Criminal Law Revision Commission Records.
[121] CLRC XXII, quoting Oregon laws Chapter 573 (1967).
[122] *Id*.

Article 8 of the CLRC's second report covered "Release of Defendants" and notably removed the word "bail" from nearly all statutory codification of pretrial release for Oregon defendants.[123] The CLRC's commentary explained that,

> "The term 'bail' is not used in the Article because of the many meanings that have been attached to this one term. In some instances 'bail' is a noun used to connote the amount of money or sureties necessary to free the defendant. In other instances, 'bail' is a verb meaning to free someone from custody. In order to make the release of the defendant clear and understandable and to show the change in the philosophy of the release in defendants, the word 'bail' is retired from active use in Oregon's criminal jurisprudence. The change in philosophy is not a change in the Constitution as the Constitution grants every criminal the right to be released by sufficient sureties. The change is in effecting this right to release by sufficient sureties. The Article creates the presumption of personal recognizance release which can be overcome by a showing that the defendant is not likely to appear without more assurances."[124]

The CLRC recommended, among other statutory changes, these key modifications to Oregon statutory bail laws:

(1) Instatement of three kinds of release available to judges – recognizance release, conditional release, and security release to be deposited with the courts;
(2) Emphasis that release on a defendant's own recognizance should be presumptive; and
(3) Creation of release assistance officer positions to which courts may delegate release decision-making authority.[125]

The legislature had, a few years prior, added a provision for a defendant's release on personal recognizance to reflect a practice of recognizance release[126] that Oregon courts had been employing for decades, but the statute did not define what qualified as a personal recognizance.[127] To fill that gap, the CLRC recommended adoption of the ABA Pretrial Standards' definition of "personal recognizance" as "the release of a defendant upon his promise to appear in court at all appropriate times."[128] The CLRC explained,

> "The new term of security release coupled with the later provisions do not change the idea of pledging assets to guarantee the appearance of the defendant. The posting and depositing of security for an appearance is made simpler and more explicit in the

[123] Bail was left in statutes for driving and wildlife/boating offenses, for some reason I've yet to find.
[124] CLRC 1972, Section 237, page 134.
[125] CLRC 1972, pages 133-147.
[126] *See e.g., Bryant v. State*, 233 Or 459, __, 378 P2d 951, 952 (1963) (discusses a Lake County defendant released on recognizance on January 7, 1953); *State v. Kuhnausen*, 201 Or 478, 272 P2d 225, 261 (1954) (describes defendant being released on own recognizance); *State v. Sieckmann*, 474 P2d 367, 3 Or App 454 (1970) ("the record indicates that defendant was released on his own recognizance on August 22, 1967); *State v. McLean*, 468 P2d 521, 255 Or 464 (1970) (defendant was "later released on his own recognizance, as he was permitted to do,"). Recognizance was first authorized by statute in 1965. Ch. 447 [1965] Or. Laws 889-90.
[127] *See former* 140.710 – 140.750 (1965).
[128] CLRC, section 237, at 133.

proposed draft, by eliminating the antiquated undertaking procedures and replacing it with modern and clear language."[129]

In discussing how the new security release system would operate within Oregon's existing constitutional language, the CLRC relied on an Illinois Supreme Court case interpreting nearly identical constitutional language – in particular, the phrase "bailable by sufficient sureties"— to support its conclusion that the new statutory scheme was not violative of the Oregon's constitution.[130] Importantly, the new security release scheme differed greatly from the prior "deposit in lieu of surety" system insofar as the security release system allows a defendant provide 10 percent of the security amount set in order to obtain release, rather than the existing system, which required deposit in full and, accordingly, incentivized reliance on the bail bonds industry by persons who were unable to post full deposit amounts.[131]

The report also required that the release decision "impose the least onerous condition reasonably likely to assure the person's later appearance."[132] The CLRC intended this provision to require judges "to adopt the attitude that a defendant is entitled to be released with the minimum conditions relevant to assuring his appearance in court."[133] Minutes from the CLRC meetings show discussion of how justice system actors, until that time, had viewed recognizance release as "a last resort type of release."[134]

The conclusions within the CLRC's 1972 report became the basis for Senate Bill 80 during the 1973 Regular Legislative Session. Key focal points of the legislature's bail system revisions were (1) a shifted focus towards presumptive recognizance release; (2) creation of the 10-percent security release system deposited with courts (and obviation of the need for commercial bail bonds services); (3) creation of a new option for Oregon judges to delegate release authority to release assistance officers.

Based on the CLRC's recommendations regarding presumptive recognizance release, the legislature, in drafting Senate Bill 80, included that an individual in custody "'shall be released upon his personal recognizance unless release criteria show to the satisfaction of the magistrate that such a release is unwarranted.'"[135] This provision was intended to establish "that a defendant in custody is presumed entitled to release on personal recognizance."[136] Discussions concerning release assistance officers focused largely on whether they would be full-time, paid

[129] CLRC, section 238, at 136.
[130] *See* PROPOSED CRIM. PRO. CODE, Commentary at 137, explaining that the holding in the case *People ex rel. Gendron v. Ingram, 34 Ill.* 2d 623, 626, 217 N.E.2d 803, 806 (1966), demonstrated that a pretrial release statutory scheme including a means for defendants to deposit 10 percent security release with the court to obtain release did not contravene "constitutional provision that all persons shall be bailable by 'sufficient sureties'." See also William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 280 at n 55 (1974) (so explaining).
[131] CLRC, Sec 244, pages 142-43.
[132] CLRC, Sec 240, page 138.
[133] William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974)
[134] CLRC Sub. Minutes 2 (July 26, 1972); CLRC Minutes 52 (Aug. 29, 1972).
[135] William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974)
[136] William C. Snouffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974) (emphasis added).

employees, who would fund them, and whether any municipal or justice courts would be authorized to employ them.[137]

Perhaps the most significant change discussed and ultimately adopted was the legislature's decision to move away from a bail system that allowed commercial bail bonds companies to operate, accounting for much of monetary bail paid to release defendants at the time. Much of the legislative discussion regarding the 10-percent security release provisions centered around whether it should be the only means of security release. One of the fears expressed concerning of the proposed 10-percent security release system was that the courts would raise bail by ten times to compensate or retaliate.[138] Bail bonds industry associates opposed the bill.[139] Ultimately, it passed, and Oregon's newly revised criminal code (including Chapter 135's pretrial provisions) were enacted.

A3. 1999 Voter Initiatives – Constitutional Amendments Concerning Victim's Rights During Pretrial Phase and Adding Violent Felonies to Potentially Unbailable Offenses

In 1999, Oregon voters considered slate of six constitutional amendments for voter consideration, Measures 69-75, which included two important pretrial provisions to the Oregon Constitution.[140] Measure 69 proposed, in relevant part, adding a victim's right to be present and heard at pretrial release hearings.[141] Measure 71 proposed, in relevant part, expanding the offenses for which a defendant may not be bailable from the existing crimes of murder and treason to include violent felonies where clear and convincing evidence exists that a defendant may harm a victim or the public while on pretrial release.[142]

Measure 69 amended the Constitution to grant victims constitutional rights in criminal prosecutions and juvenile delinquency proceedings.[143] The relevant text of the measure provided that,

> "(1) To preserve and protect the right of crime victims to justice, to ensure crime victims a meaningful role in the criminal and juvenile justice systems, to accord crime victims due dignity and respect and to ensure that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt, and also to ensure that a fair balance is struck between the rights of crime victims and the

[137] *See* Meeting Minutes, 2/12/1973 at page 5. The CLRC discussed the role of a release assistance officer, using Multnomah County, which had begun employing the position, as its primary example. Sen. Burns commented that, "the recognizance officer in Multnomah County was a former parole officer" and "not a lawyer," pointing out the latter to convey that it was not the "intention that this person be a lawyer." 2/12/73 at page 5. It was contemplated that "who ever the person may be * * * would have to be conversant with the criminal justice system." The committees also discussed whether the release assistance officer would be a full time, paid employee. It was suggested that a judge may, "through a law student or the bail projects, would be able to do it without money. If [the judge] wanted to pay [the officer], he would have to get some money from the county." Meeting minutes 5/29/73 at page 5. The committee staff attorney continued that he believed a release assistance officer's salary "would be a county expense, assuming he was paid." 5/29/73 page 5.
[138] Chairman Browne, 2/26/73, page 3.
[139] *See generally*, Senate Bill 80 exhibits.
[140] These initiatives were essentially a reboot of 1996's Measure 40, which, though passed by voters, was overturned by the Oregon Supreme Court because it violated the single subject rule. *See* *Armatta v. Kitzhaber*, 327 Or 250, 254-257, 959 P2d 49 (1998); *see also* 1996 Voter's Pamphlet, page 140 Section 1(a).
[141] 1999 Voter's Pamphlet, page 12.
[142] 1999 Voter's Pamphlet, page 24.
[143] 1999 Voter's Pamphlet, page 12.

> rights of criminal defendants in the course and conduct of criminal and juvenile court delinquency proceedings, the following rights are hereby granted to victims in ail prosecutions for crimes and in juvenile court delinquency proceedings:
>
> "(a) The right to be present at and, upon specific request, to be informed in advance of any critical stage of the proceedings held in open court when the defendant will be present, and to be heard at the pretrial release hearing and the sentencing or juvenile court delinquency disposition[.]"[144]

The explanatory statement of Measure 69 described the proposed constitutional amendment as, in relevant part, giving victims "[t]he right to be informed of and present at certain stages of the proceedings and to speak at pretrial release hearings[.]"[145] Arguments in favor included,

> "This measure preserves and protects the right of crime victims to justice, ensures crime victims a meaningful role in the criminal and juvenile justice systems, accords crime victims due dignity and respect, and ensures that criminal and juvenile court delinquency proceedings are conducted to seek the truth as to the defendant's innocence or guilt. It ensures that a fair balance is struck between the rights of crime victims and the rights of criminal defendants.
>
> "While the rights of crime victims have been placed in some statutes, those rights are not as strong as the ones in this measure. Also, when a crime victim's statutory rights are weighed against a criminal defendant's constitutional rights, the constitutional rights will prevail. This is why it is important to make sure that the crime victim's rights are also in the Constitution."[146]

The explanatory statement of Measure 71, which added, among other things, violent felonies to the categories of offenses that may not be bailable if a certain evidentiary threshold is met, described the proposed constitutional amendment as, in relevant part, as amending the constitution to:

> "pretrial release in criminal cases must be based on reasonable protection of victims and public as well as likelihood accused person will appear for trial. Makes violent felonies not bailable when court finds probable cause to believe accused person committed crime, and danger exists of physical injury or sexual victimization to victims or public if accused person released before trial."

The measure also requires that a court "consider the reasonable protection of the victim and public when deciding whether to release the accused person prior to trial. This measure would prohibit the pretrial release of persons accused of violent felonies if the court determines that:

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[144] *Id.*
[145] *Id.* at 13.
[146] Additional statement in support explained that Measure 69 provided crime victims with, "[t]he right to find out if and when the criminal is going to be released." 1999 Voter's Pamphlet at 14.

"1. It is more likely than not that the person committed the act the person is accused of committing; and

"2. There is clear and convincing evidence that the person poses a danger of physical injury or sexual victimization to others if the person is released.

"Under current constitutional provisions, other than for charges of aggravated murder, murder or treason, the primary consideration in pretrial release decisions is the risk of the accused person not appearing rather than the safety of the victim or the public.

"Except as otherwise specifically provided, this measure supersedes any conflicting section of the Oregon Constitution."[147]

There was considerable public debate over, and news coverage of, these measures.[148] Measure 69 was enacted as Art. I, sec 42, of the Oregon Constitution. Measure 71 was enacted as Art. I, sec 43, of the Oregon Constitution.[149] Art. I, sec. 43's provisions were codified in statute at ORS 135.240.[150]

[147] 1999 Voter's Pamphlet at 24.
[148] The Criminal Justice Commission has copies of many of these news articles and op-eds available in an online archive here.
[149] Both articles were later amended in 2008. Art. I, sec 42 was amended in by Measure 51 (2008), and Art. I, sec 43, was amended by Measure 52 (2008). Both amendments concerned giving crime victims processes to enforce violations of their constitutional rights that were lacking in existing law. 2008 Voter's Pamphlet, pages 70-79.
[150] *See* ORS 135.240(2).

Appendix B – PSTF Member Draft Report Feedback

Date: November 27, 2020

From: Patty Dorroh
To: Ken Sanchagrin

Subj: Draft PSTF Pretrial Report Review and Recommendaitons

Hello Ken,

Here are comments for our conversation on the Public Safety Task Force Pretrial Report. I have consolidated and organized feedback from various counties and officials (law enforcement, elected officials, and DA/courts) who provided me with their advice and recommendations.

I fully realize what an excellent draft Bridget provided us, and with some of these improvements I believe we will be providing a valuable report for Oregon.

General Comment #1: Equity in justice and public safety decisions around pre-trial release must **include or retain a considerable component of local discretion (determined by the judge/court, based on circumstances)**. Reason: Equity may be enhanced for some, but diminished for others, under a strict template or highly prescriptive formula.

General Comment #2: We need to **emphasize that recommendations for data improvement and consistency will require resources to achieve this. It is prohibitive to put these costs on to the counties.** As the state looks to streamline and implement data systems and tools, funding needs to be adequate to ensure this happens throughout the state.

General Comment #3: Use of the term "antiquated:" The word "antiquated" is used liberally in this document in phrases such as "the antiquated personal security system," "remove antiquated language," and "antiquated constitutional language." Inserting this type of opinion-based adjective throughout the report diminishes objectivity and the fact-based nature of our analysis and recommendations. **There are at least three times on page 40 (perhaps other places as well) where the word "antiquated" needs to be edited out.**

Specific Comments: Pages 4, 10, 24, 25 and 39 require corrections and clarifications.

1). Pg. #4 #10 - The Security Release/ Cash Bail & Delegated Release Authority Recommendations (Second Bullet, Page 4): **Delete or revise the ending phrase** about *"prevent against wealth-based detention."* **Revise it in the topic heading on Page 10 as well.**

Why correct this? – Strong comments and reaction from LE: Law enforcement doesn't arrest people based on their income, and while the authors did not intend to infer that, the phrasing does. **Either strike it or change it to read "prevent wealth-based release inequities."** It's a simple fix.

2). Pg. #24 - From the table and the narrative: It is clear "mega" and "large" jails skew the state data overall, which misrepresents the medium, small and municipal jails across Oregon's rural and frontier areas when it comes to jail race and ethnic statistics. **Significant edits and clarification are needed on Page 24 and at the top of Page 39.**

Why correct this? - This wording draws inaccurate conclusions and makes inferences not backed by facts or data. This needs to be corrected and clarified, otherwise the credibility of this important report is likely to be undermined. The "mega" jail data skews the utility of the data. The racial and ethnic makeup of Oregon's metro areas (in comparison to Oregon's suburban and especially rural, and frontier areas) is where, based on this data, the racial and ethnic diversity and inequities seem to exist. *Generalizing and averaging these numbers across the state presents a false narrative: it dilutes data in a way that misrepresents important information.*

Specifically: The current draft language gives the impression there is a ***state-wide*** LE/Jails incarceration rate disparity towards people of color *as supported by the data presented in the table*, yet it is only in the "mega" and "large" jails where data indicates this. In fact, the much higher rates of incarceration of black people in mega jails (19.2%) and large jails (5.9%) when compared to Oregon's overall census data for the black population (2.2%) is significantly understated in the narrative. Concurrently, in the current wording, this averaging and generalizing the data from mega and large jails across all jail categories significantly misrepresents and infers an inflation of the medium, small, and municipal jail rates (which are in line with Oregon's racial and ethnic census data). Such generalizations may lead to "one-size-fits all" recommendations based on skewed data.

3). Pg. 25- Narrative: Portions of the narrative do not adequately distinguish between conclusions, inferences, assumptions, and conventional wisdom, leading to a rationale that reads as potentially biased, pre-determined, and/or opinionated. Specific paragraph is shown below. When discussing preliminary conclusions, inferences, assumptions or conventional wisdom around race and ethnic matters, we need to be clear and include clarifications and disclaimers so as not to mislead the reader. ***Recommend edits and clarifications be made.***

Specifically, statements related to data issues around Hispanic, Latinx, Native American, American Indian, and Alaska Native persons in Oregon indicate that "data on the Hispanic populations in Oregon jails is incomplete," that "it is widely understood" that Native American persons are undercounted, but the degree is not known," and that other racial and ethnic groups "are under-counted or not counted at all." Here is the language from the draft report:

> Thus, the data reported on the Hispanic population in Oregon jails is incomplete. The same data issues are true of Native American, American Indian, or Alaska Native persons in Oregon – it is widely understood that Native American persons are undercounted in Oregon's jails, but the degree to which is unknown. Other racial and ethnic groups are under-counted or not counted at all, due to, among other reasons, jail management system data field limitations and booking practices.

5). Pg. #39 - Recommendations to expand discussion on Behavioral Health-related aspects. This appears to be the only part of the document that addresses Behavioral Health and the impacts it has on pre-trial cases as well as before making any arrest where this could be

observed. LE said that there needs to be more discussion around this and how we address these issues prior to any arrest. Yes, this is somewhat separate from what the report says, but still it is important to note the issues LE faces.

6) -Also on Pg. 39 - There is no economic/income disparity data included to support statements around persons of color, (primarily Black and Native American), and how bail affects them based on economic disparity. It reads as an opinion statement with nothing to back it up. **Add enough data or facts to support this important piece of underlying issues.**

Thank you for the opportunity!
Sincerely,

Patty Dorroh
Harney County Commissioner

TO: **Ken Sanchagrin**
Criminal Justice Commission
Via Email: **Ken.SANCHAGRIN@oregon.gov**

FR: **Paige Clarkson, Marion County District Attorney**
President, Oregon District Attorneys Association
Member, Oregon Public Safety Task Force

RE: **ODAA Comments - DRAFT Oregon Public Safety Task Force Pretrial Report dated October 19, 2020**

November 25, 2020

Thank you for the opportunity to provide the below comments and attached redline to the Oregon Public Safety Task Force Pretrial Report dated October 19, 2020. As a named member of the Task Force, the Oregon District Attorneys Association welcomed the opportunity to engage in the two-plus year process discussing Oregon's pretrial bail system. While we recognize the circumstances were beyond the Task Force's control (COVID worldwide pandemic) we are disappointed that more time was not granted to the discussion of this draft report. Less than three-weeks, in the midst of statewide freezes and ever-changing courtroom demands in response to the COVID pandemic, and holiday timing, proved challenging to ensure this report received the proper vetting and stakeholder feedback it deserves. Nevertheless, we hope the below is able to be considered and incorporated into the final report to more adequately reflect Oregon's current system. We also support several of the opportunities identified to improve Oregon's pretrial system.

First, the report fails to recognize the unique Oregon bail system and policy decisions lawmakers have long taken to ensure that Oregon have one of the progressive systems in the Country. In 1973 Oregon became the first state in the nation to prohibit the use of bail bonds. As a result of this and other modernization efforts over the years, Oregon has avoided many challenges with pretrial release that plague other states.

In Oregon, the overwhelming majority of criminal offenders do not remain in jail pending the disposition of their charges. For offenders who are arrested for criminal charges in Oregon, 91% are released without being required to post bail. Additionally, 100% of persons who are in jail pending charges have the right and opportunity for a full hearing before a judge within 48 hours. At that release hearing, the judge is required to evaluate the circumstances of the offender and the alleged crime and to impose "the least onerous condition reasonably likely to

ensure the safety of the public and the victim and the person's later appearance."[1] No person in an Oregon jail remains in jail simply because of an inability to pay. The Task Force Report fails to recognize this fact.

For decades, Oregon has had one of the most progressive pretrial release programs in the United States. The use of bail in Oregon is extremely limited, perhaps the most limited in the nation. In Oregon, bail most frequently functions as a last resort mechanism of release for defendants in cases where judges have determined that, because a defendant will commit crimes if released or will fail to appear in court, the defendant must be denied release under more lenient conditions.

The Oregon Constitution establishes that, unless charged with murder, treason, or certain violent felonies after court determinations regarding community risk, defendants must be considered for release on the least restrictive terms possible to ensure community safety and appearance at trial.[2] The courts must apply a continuum of release measures, starting with recognizance release, to meet those standards. [3] [4]

Pretrial release policy elsewhere in the United States bears little resemblance to the system that exists in Oregon, and so the demand for bail reform in other states is an understandable reaction to systems with the type of glaring flaws that do not exist in this state. In most of the country, the demand for reform is primarily a response to the grossly apparent abuses of the commercial bail bond system. Beginning in the 1980s, the commercial bail bond industry, in state after state, managed to consolidate and expand an already profitable business by convincing state legislatures to alter pretrial release laws to promote commercial bail bond profits. Effectively, the industry managed to rewrite state statutes to ensure that more and more defendants would require the services of the industry, but because of numerous escape clauses built into state laws, bail bond companies would seldom be required to forfeit bail to the court system if a defendant failed to appear in court.

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[1] ORS 135.245(3)

[2] ORS 135.245(3)

[3] ORS 135.265. Cooper v. Burks, 299 Or. 449, 451 (1985); Gillmore v. Pearce, 302 Or. 572, 589 (1987). In all cases except murder, treason, and Ballot Measure 11 matters, the courts in Oregon must first presumptively release the defendant on recognizance release, then consider conditional release if the court concludes that the defendant cannot be released on personal recognizance due to danger or flight risk, and finally set bail if neither recognizance nor conditional release can guarantee public safety or return to court. While Oregon statutes establish statutory bail limits for Ballot Measure 11 cases and certain methamphetamine trafficking cases, the Oregon Supreme Court has determined that those statutory bail floors cannot require a defendant who is not found to be likely to commit crimes if released or fail to appear for trial to be held in custody only because of an financial inability to post bail. State v. Rodriguez/Buck, 347 Or. 46 (2009)

[4] A separate form of release is also considered in which low-level offenders can be released for jail capacity reasons. Generally called "forced releases" or "emergency population releases," the process is governed by ORS 169.030 -.050. The procedures for forced releases must be established in concert with the local court, sheriff's office, and district attorney.

But the abuses of the commercial bail industry never happened in Oregon because Oregon kicked the bail bond industry out of the state in 1973, the first state in the United States to do so. As a consequence, Oregon has not experienced the significant problems that are associated with that industry in other states.

In addition, Oregon police officers are given some of the most extensive legal discretion in the nation to release offenders by issuing summons to appear in court, without arresting them and taking them to jail.[5] [6] This discretion extends to the vast majority of criminal cases, including most felony matters. Oregon, in fact, is one of only two states that allow officers to issue summons for felonies rather than taking offenders to jail.[7] In 2019, according to data from the Oregon State Police, Oregon police officers used their discretion to release 34,871 criminal offenders on the street with a cite-in-lieu summons instead of taking them to jail.

District Attorney's also have the authority in Oregon to reduce most criminal matters to non-criminal violations at the time they are charged,[8] which releases the offender from custody. Violation policy is determined by the local District Attorney based on the community standards in each jurisdiction.

If defendants are taken into custody, they have the right to a release decision by the court within 48 hours of their first appearance.[9] In virtually all cases except murder, treason and certain violent felony offenses, the court must make a release decision that applies the least restrictive measures of release that will ensure public safety and the appearance of the defendant, starting with recognizance or conditional release. Refusal to release the defendant on any terms except bail only will often only occur if the Judge concludes that the defendant will fail to appear or commit crimes if released.

Oregon has constructed a pretrial release system that has evolved to be more effective and responsive than virtually any other across the United States. While Oregon's pretrial release system is progressive as compared to the majority of systems through the United States, opportunities to reform and improve the system in Oregon exist and should be explored.

Finally, all pretrial release reform must take into account the public safety risk to the victim and to the community. The current systems affords that thoughtful look, any potential reform must do the same.

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[5] ORS 133.055

[6] National Conference of State Legislatures, October 2018, comparative chart of state cite-in-lieu laws. https://www.ncsl.org/Documents/Citation_in_Lieu_of_Arrest2018.pdf

[7] Citation in Lieu of Arrest—Examining Law Enforcement Use of Citation Across the United States, International Association of Chiefs of Police, p. 6 https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf

[8] ORS 161.566

[9] ORS 135.245(2)

Our brief comments on the policy proposals contained in the draft report are reflected below:

Reducing Racial, Ethnic, and Economic Disparity in Pretrial Incarceration Recommendations

- Support jail diversion programs for defendants with behavioral health or other conditions that contribute to criminal justice system involvement but do not pose public safety risks
    - ODAA supports this intent and would like to discuss any specific diversion programs considered. Any realistic proposal of this nature would also require significant financial investment from the State.
- Expand opportunities for police officers to cite-in-lieu of arrest to avoid jail bookings for persons who do not pose public safety risks
    - Oregon Police Officers are already afforded very liberal opportunities for this type of discretion (including many felonies). Very few statutory circumstances limit citation options. Most are domestic violence cases (many of which are misdemeanors) and thus have inherent victim safety concerns. Any expansion would need to be considered in light of the specific crimes included.
- Require jails and courts to establish processes to collect and record racial and ethnic demographic data specific to the pretrial phases of case adjudication, including remedying gaps in race data collection and provide jails and courts the resources to capture this data.
    - Support this effort however recognize the challenge in the collection of consistent, comparable data and the significant financial investment required to do so.

Security Release/Cash Bail & Delegated Release Authority Recommendations

- Reduce reliance on security release to greatest extent possible (either repeal security entirely or release or restrict use to only when no non-monetary conditions would achieve defendant's appearance in court) and require only unsecured payments
    - Disagree with conclusion that amount of security required for in-custody release is not relatively small. In those circumstances where security is relied upon it is for a public safety purpose. This recommendation fails to recognize that.
- If security release is retained, repeal presumptive minimum security release amounts in favor of judges determining appropriate security release amounts on a case-by-case basis and to prevent against wealth-based detention
    - A conversation of the type of crimes covered under presumptive statutory minimum security release amounts need to be discussed in greater detail. These are likely Measure 11 person felony crimes, and often the most violent offenders in our jails.
    - This conclusion suggests that judicial discretionary review and determination is either not allowed or not occurring in Oregon. Neither is true. Judges routinely review the custody status of pre-trial defendants and adjust as circumstances dictate.

- Employ preventive detention law (argue at pretrial release hearings whether defendants are releasable vs. detainable) rather than using bail schedules as a proxy for achieving detention for defendants who are legally bailable
    - It is a misnomer to say that bail schedules are used as a "proxy" for achieving detention under Oregon law. While counties may have "presumptive" amounts, every defendant in Oregon is entitled to a bail hearing based upon their unique circumstances and may argue appropriate release conditions.
    - Many DA's offices may similarly utilize a presumptive warrant amount to be applied upon arrest but each defendant is still afforded a hearing with a judge within 48 hours of arrest to address release.
    - Does this include adopting a new standard to detain?
- Support employment of more release assistance officers in judicial districts and empower them to make release decisions in appropriate cases to free up court resources for judges to make individualized pretrial release decisions on more challenging cases
    - Support the concept of additional release assistance officers as they provide helpful assistance in the process and can more thoroughly assess any dangers to the public as well as evaluate local jail constraints.
    - Requires significant state investment and can't be an unfunded mandate on the counties.
    - Any RAO role must include a balanced review with input from the DA and the victim.
    - Consider a greater return on investment by funding additional Judge positions. The disparate number of judges across Oregon may result in real differences county by county. As Oregon law entitles everyone to a release hearing in 48-hours, challenges with this requirement might be best addressed with more adequate judicial time.
- Support employment of more pretrial release staff (judicial branch or executive branch) to perform pretrial information gathering, interviews, and assessments so that judges have as much case-specific information as possible at the time of release decision-making
    - Support this effort; see above funding concerns
- Clarify in policy or statute the roles of judicial release assistance officers, with delegated discretionary release authority, and executive branch pretrial staff, with administrative release authority (meaning they may carry out judicial orders but may not use exercise release decision-making discretion)

<u>Pretrial Risk Assessment Tool Recommendations</u>

- Support implementation of limited number of tools statewide
    - Concerns that these tools have limited public safety verification

    - Need to address the reliability and racial disparity concerns with these tools that have been raised in other State discussions (see CA Proposition 25; New Jersey racial disparity issues after replacing bail with risk assessment tools; Ohio[10])
- Require local validation of tools and provide state support for local tool validation
    - Difficult to assess this suggestion without knowing specifics regarding these tools.
    - Could pose significant public safety risk
- Require public-facing transparency of pretrial risk tool use

Reducing Failure to Appear Recommendations

- Require courts and pretrial staff to employ pretrial court reminders to the greatest extent possible
    - Support
    - Financial concerns
- Utilize technology to support more virtual court appearances consistent with constitutional rights.
- Support improvements to FTA data tracking and analysis
    - Support
    - Financial concerns
- Consider court form revisions to make court appearance information easier to read, understand, and follow
    - Support

Data Improvement Recommendations

- Support improvements to pretrial data standardization, collection, reporting, and analysis (jail data, court data, pretrial program data), including, but not limited to:
- Race and ethnicity data; tribal affiliation data
    - The challenge here is standardizing data to ensure reliability.
- Pretrial status data (charges pending vs. other jail statuses), such as pretrial length of stay
- Time to case disposition data
- Failure to appear data
- Violations of release agreement data
- Standardize data definitions and collection requirements for jail and court data elements

[10] https://dam-prod.media.mit.edu/x/2019/07/16/TechnicalFlawsOfPretrial_ML%20site.pdf; http://www.safetyandjusticechallenge.org/wp-content/uploads/2019/12/Robinson-Koepke-Civil-Rights-Critical-Issue-Brief.pdf; https://www.cleveland.com/news/2020/01/ohio-supreme-court-proposes-bail-reforms-that-dont-include-risk-assessments.html; https://www.pretrial.org/wp-content/uploads/Risk-Statement-PJI-2020.pdf; https://www.nbcnews.com/specials/bail-reform/; https://njcourts.gov/courts/assets/criminal/cjrannualreport2019.pdf?c=qH4

- Require routine joint jail, CJC, and OJD reports on pretrial metrics and program outcomes

Overall, these recommendations are good ones, but challenges with ensuring consistency and uniformity in both data type and collection methods exist. Convening a task force to plan for this uniformity and determine best practices for both data collection and applicable definitions would be necessary.

Victim's Rights and Domestic Violence Safety Recommendations

- Allow for adequate time for information regarding domestic violence cases or cases in which there is risk of harm to victims or the public to collect harm-related information to make available to court or delegated release decisionmaker by the time a release decision is made (use pretrial hearings rather than arraignment)
    - Strongly support
    - Note: Release hearings for defendants charged with person crimes should be heard by a judge, not a "release decision-maker". This ensures that both the victim and DA are able to be present and available to appropriately inform the court.
- Employ domestic violence-specific safety assessments or risk assessment tools to supplement standard pretrial risk assessment scores or staff reports to ensure danger to victims adequately considered
    - Further exploration could prove beneficial– a supplemental tool makes sense for these crime categories
- Ensure that protective order dockets are not scheduled at the same time as arraignments so that victims are not forced to choose between exercising their constitutional right to be heard at pretrial hearings and other critical events
    - Support
- Ensure victims are notified of pretrial events and rights to be heard (including in culturally competent approaches)
    - Support
- Ensure victims have opportunities to be heard and include means for options that do not require in-person presence if not preferred

Overall, support many of these recommendations, however the Report fails to recognize that real victim concerns exists with certain pretrial release reform recommendations contained in this report. The difference between felony and misdemeanor cases should be clarified and the intention defined. The majority of domestic violence crimes are misdemeanors. With any increased reliance on risk tools or Security Release Officers, greater discussion on the role of the victim in that process should be clarified and prioritized.

Pretrial Professional Development, Best Practices, Standards, and Implementation Guidance

- Employ trainings for pretrial staff, judges and court staff, district attorneys, defense attorneys, and victim services, on pretrial legal requirements and pretrial program practices

- Establish means for community outreach and education on pretrial processes and program purposes
- Appoint or create a pretrial services practice advisory council to guide program compliance and implementation
- Adopt statewide best-practice requirements and data collection standards for pretrial programs
    - Need more time to develop best practices – rely on Oregon experts with experience in our specific system rather than national groups who have no local context for these issues.

From:	Steve Berger
To:	SANCHAGRIN Ken * CJC
Subject:	OACCD Comments for Draft Public Safety Task Force Pretrial Report
Date:	Wednesday, November 25, 2020 11:32:46 AM

As requested, I believe I shared the following points during our meeting on the 18th. I offer the following thoughts on behalf of the OACCD:

In general the report is consistent with current national agency recommendations for pretrial services. Assessment and statewide use of validated risk tools, data, training and the push for an elimination of money bail is clear. One area that could be emphasized more is how best to "supervise" or monitor the defendants while in pretrial. This has much to do with monitoring by risk and not imposing excessive conditions. The main outcome in all national pretrial best practices are 1) The reduction of fail to appear; and 2) The reduction of new crimes while on release. The conditions of pretrial monitoring should only be geared towards those issues and (barring a pretrial Diversion Program) conditions that approach defendant behavior change, or rehabilitation should be saved for post-conviction programs such as parole or probation.

Currently Pretrial Services are not equitable throughout the state as not all jurisdictions fund pretrial.

Data outlining the importance in pretrial release as a determinant factor in a person's sentence coupled with wealth-based detention lawsuits are both driving pretrial reform movements nationally and on the state level. It is imperative that stakeholders take control of this process, to ensure policy that works for Oregon, and is not unduly driven by outside interests.

The state must decide whether pretrial supervision/monitoring is an executive or judicial function. Funding and planning will then follow.

The many different tools, procedures and funding sources largely stem from this divide. The national data shows that this should be a judicial function, when any agency which could have a slight bend toward the outcome of the individual has control of the process, it clouds the impartial nature of the process. If the decision is made to make this an executive model, funding must be adequate to ensure counties can provide appropriate and quality services.

Recommendations for data improvement and consistency will require resources to achieve this. It is prohibitive to put these costs on to the counties.

As the state looks to streamline and implement data systems and tools, funding must be sufficient to ensure this happens throughout the state.

Changes in Oregon's Money Bail laws could take away one tool counties have to manage potential risk in their communities.

If there are changes to the Money Bail laws, there need to be other tools available for counties to manage risk in their communities.

If national trends continue, there will be a push for more pre-trial release, which could potentially infringe on local control as counties look to provide for public safety.

Data, caselaw and strong policy recommendations need to take into account the public safety and specific resources of counties.

In closing I wish to thank you and the CJC staff for a well-coordinated effort and comprehensive review.

Thanks, Steve

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Exploring Person-Centered Justice
for Individuals with Behavioral Health Needs

A NEW MODEL FOR COLLABORATIVE COURT AND COMMUNITY CASEFLOW MANAGEMENT

FINAL REPORT
JUNE 2022

NATIONAL JUDICIAL TASK FORCE
TO EXAMINE STATE COURTS' RESPONSE TO MENTAL ILLNESS

This document was prepared under State Justice Institute (SJI) Grant #SJI-19-P-019. The points of view and opinions expressed in this document are those of the author, and they do not necessarily represent the policy and positions of the State Justice Institute.

BACKGROUND AND OVERVIEW

Traditional criminal case processes are not meeting the needs of the individuals we serve, and a new comprehensive, collaborative approach is necessary to ensure public safety, control costs, and create fair and effective criminal justice and caseflow management systems that meet the challenges of individuals with behavioral health needs. The National Judicial Task Force to Examine State Courts' Response to Mental illness (Task Force) is committed to redesign systems to meet the needs of the estimated 70% of the individuals seen in our criminal courts today, who have mental health, substance use, or co-occurring disorders, rather than the 30% who do not. Currently, most state courts generally do not have systems in place to adequately help those with behavioral health needs.

Our task is made more urgent given the pandemic and crises across the nation with case backlogs resulting in individuals incarcerated for long periods of time without access to treatment and the lack of access to community-based treatment and inpatient facilities. The Centers for Disease Control and Prevention (CDC) has estimated at least a 36% increase in the demand for mental disorders (i.e., anxiety and depression) during the pandemic, resulting in increased substance use and other harms. Moreover suicidal ideation doubled from 2018 (10.7% in 2020 from 4.3% in 2018). Reducing barriers to access care within community-based clinics for mental health and substance use will prevent further negative interactions with law enforcement that lead to cases filed with the courts.

NEW MODEL DEVELOPED

This NEW MODEL was developed to strengthen the collaborative court and community response to individuals with behavioral health needs, thereby strengthening public safety. The NEW MODEL strengthens community responses and minimizes criminal justice system involvement, promotes early intervention and effective management of court cases, institutionalizes alternative pathways to treatment and recovery, and improves outcomes and manages post-adjudication events and transitions effectively. This work is informed by extensive research, including the Effective Criminal Case Management (ECCM) project. The ECCM project set forth the key elements of effective criminal caseflow management addressing leadership and governance, predictable and productive court events, goals and information and communication and collaboration. ECCM collected data on over 1.2 million criminal

cases from 136 courts in 91 jurisdictions in 21 states. The national Model Time Standards for State Trial Courts adopted by CCJ, COSCA, and others in 2011 suggest that 75% of felony cases should be resolved in 90 days yet only 30% were resolved in that time period during the ECCM study. The standards also provide that 90% should be resolved in 180 days, yet only 57% were resolved in that time period; and further, 98% should be resolved in 365 days, and only 83% were resolved in 365 days.[1] While the ECCM project did not specifically study cases involving those with behavioral health conditions, the collective experience of the Task Force is that behavioral health cases often take even longer than the study found, and individuals are detained longer in jails, with no data available on improved treatment outcomes or public safety. Research has also shown significant cost savings for effective treatment and recovery programs over the use of jails.[2, 3,4]

This NEW MODEL is also informed by the American Bar Association Criminal Justice Standards on Mental Health which were adopted August 8, 2016 to supplant the Third Edition (August 1984) of the ABA Criminal Justice Mental Health Standards. These Standards provide guidance for responding to individuals with mental health disorders in the criminal justice system, including the role of mental health professionals, role of the attorney representing a defendant with a mental health disorder, role of the judge and prosecutor in cases involving defendants with mental health disorders, joint professional obligations for improving the administration of justice in criminal cases involving individuals with mental health disorders, education and training, and many other standards of relevance to effective collaborative court and community caseflow management.

Learning Communities and Focus Groups were used to gather additional input from prosecutors, defense counsel, and those with lived experience. These focus groups helped to identify barriers, challenges, and opportunities for a shift to a much needed "end user" focused justice system design for courts to implement. The many individuals who participated in these focus groups, and for which we owe deep gratitude, are noted in the Acknowledgements section at the end of this document.

GUIDING PRINCIPLES TO EXPLORE PERSON-CENTERED JUSTICE:
A New Model of Collaborative Court and Community Caseflow Management

GUIDING PRINCIPLES TO EXPLORE PERSON-CENTERED JUSTICE

Guiding Principles were developed to direct efforts to strengthen community responses and minimize criminal justice involvement, to promote early intervention and effective management of court cases, to institutionalize alternative pathways to treatment and recovery, and to manage post adjudication events and transitions effectively, thereby ensuring public safety, reducing costs, and improving outcomes.

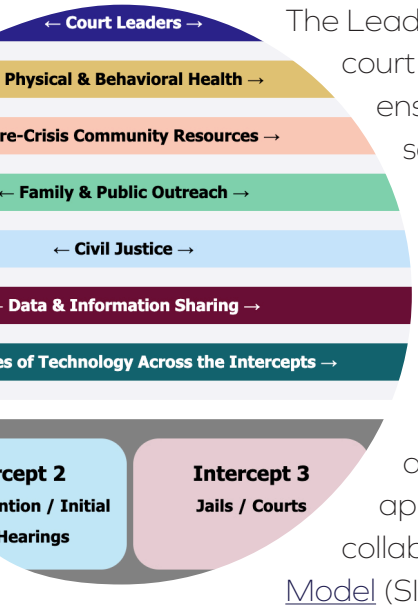
A NEW MODEL OF
Collaborative Court and Community Caseflow Management

The following Guiding Principles serve as the foundation of our ongoing work to re-examine and redefine caseflow management practices for individuals with behavioral health needs.

In all of our work, we intend to:

1. **Encourage all judges** to use their leadership role as convenors to foster collaborative community and court strategies to promote community safety and improve outcomes for individuals with behavioral health needs.[5]
2. **Promote early intervention** consistent with legal and mental health professional standards. Screening, assessment, deflection, diversion, and intervention strategies should be employed at the initial stages of the process to minimize criminal justice system involvement.
3. **Develop new caseflow management systems** through a multidisciplinary, non-adversarial team approach to address the complex social and behavioral health issues presented to the courts and communities.
4. **Facilitate evidence-based practices** across community, court, and behavioral health systems.
5. **Identify, measure, and proactively address issues** of explicit and implicit bias, disproportionate access to resources, and systemic inequities.
6. **Adhere to the principles** of due process, procedural fairness, transparency, and equal access to justice.
7. **Develop trauma-informed, person-centered, responsive practices** that focus on individuals with behavioral health needs for all case types and provide multiple pathways to treatment and recovery and diversion.
8. **Promote individual attention to each case and each person**, and treat all cases and individuals proportionally, demonstrated by judicial control of the process and procedural justice.
9. **Treat all individuals with respect and neutrality** and grant all individuals a voice, engendering trust in the justice system.
10. **Listen to and gather input** from individuals with lived experience, and their families.
11. **Ensure that the new model** of collaborative court and community caseflow management provides for accountability, public safety, reduced costs, and improved treatment outcomes by adhering to defined performance measures.
12. **Design and foster timely and efficient court and community procedures** to improve the justice experience of individuals with behavioral health needs.
13. **Expand leverage, and share resources** across community, court, and behavioral health systems.

The Leading Change Model and Behavioral Health Resources Hub



The Leading Change Model serves as the foundation for developing a coordinated court and community response to caseflow management that will better ensure public safety and more holistically meet the needs of the individuals served. Additional information can be found in the Leading Change Guide for Trial Court Leaders, Leading Change Guide for State Court Leaders, and on the Behavioral Health Resource Hub. "The Hub" is a repository of continually updated resource links and information highlighting best practices to help courts and communities provide effective responses and supports for individuals with behavioral health disorders.

To address behavioral health needs in each community, certain court and community responses must be developed early on. The most effective approach is to design responses that are regularly engaged in by community collaborators. The resources on "the Hub" build on the Sequential Intercept Model (SIM), which identifies appropriate responses at particular intercepts that can keep an individual from continuing to penetrate the criminal justice system.

Meaningful system change requires leadership. Courts and judges in particular are in a unique position to convene stakeholders and to lead these groups to consensus and action. Of course, each community will be at a different place in implementing these practices.

Exploring person-centered justice for individuals with behavioral health needs and managing more effective caseflow management for these individuals requires not only judicial leadership and the collaborative approach addressed in the Guiding Principles but also requires a renewed commitment to enhanced public safety, reduced costs, fair and timely justice, and improved outcomes.

The 4 Pillars of the New Model of Collaborative Court and Community Caseflow Management

Four Pillars have been identified as critical to an effective collaborative court and community effort to promote person-centered justice for individuals with behavioral health needs. Each of the Four Pillars include a number of essential elements that must also be addressed as part of this NEW MODEL. The Four Pillars address how to:

1. **Strengthen community responses and minimize criminal justice system involvement;**
2. **Promote early intervention and effective management of court cases;**
3. **Institutionalize alternative pathways to treatment and recovery and improve outcomes; and**
4. **Manage post-adjudication events and transitions effectively.**

The following summarizes each of the pillars and essential elements.

PILLAR I

ESSENTIAL ELEMENTS

1. Comprehensive Behavioral Health Crisis Systems
2. Deflection
3. Stop the "Revolving Door" into the Justice System
4. Prosecution Alternatives

Strengthen Community Responses and Minimize Criminal Justice System Involvement

Fragmentation often exists across systems, which can lead to duplication of resources and a lack of continuity, gaps in services, and a disjointed response in meeting the behavioral health needs of individuals within a community. Structured ongoing collaboration among community stakeholders is required to build sustainable community-based responses for individuals with behavioral health needs and to minimize justice system involvement. The courts can either convene these efforts or ensure they are "at the table" and are promoting ideal behavioral health crisis systems, deflection and diversion systems, the identification of individuals who are entering and reentering the justice system and courts, as well as promoting prosecution alternatives.

A robust community behavioral health system with the key elements as identified below should be examined and implemented, as appropriate, to meet the needs of communities across the states as well as the individuals who need these services.[6] Every community is different, and the approach taken should be tailored to each specific environment. For example, the challenges in a rural community in terms of available services and how those services are delivered will be very different than what is found in an urban environment. Courts must lead and can influence the strengthening of community responses.

1. Comprehensive Behavioral Health Crisis Systems

Court leaders should be knowledgeable about what constitutes an effective behavioral health crisis system and encourage community stakeholders to strive for improvements. Crises that involve behavioral health issues represent the widest point of the funnel that potentially leads a person to the criminal justice system. The earliest contact with a person in crisis often represents the first opportunity to divert the person to care and treatment rather than to jail and punishment. Appropriate interventions at this point lead to better outcomes for the individual, more efficient use of justice system resources, and increased public safety. Moving to the 988 mental health crisis line effective July 2022 provides a tremendous opportunity for courts and communities to provide a continuum of more effective responses to individuals experiencing a mental health crisis. The Roadmap to a Comprehensive Behavioral Health Crisis System includes essential elements, measurable standards, and best practices for behavioral health crisis response, and the SAMHSA publication Crisis Services: Meeting Needs, Saving Lives serve as foundational resources. A public health response rather than a criminal justice response will save criminal justice costs and promote public safety, while at the same time, connect individuals with treatment and promote recovery.

2. Deflection

Court leaders should be knowledgeable about opportunities for deflection from law enforcement engagement and deflection from the criminal justice system to help shape effective court and community responses for people with behavioral health needs. Keeping people who should not be in the justice system out, and redirecting them to treatment, leads to increased public safety, better outcomes, and cost savings for those with behavioral health needs and for the justice system.

Law enforcement plays a gatekeeper role to the criminal justice system; contacts with law enforcement provide opportunities for deflection and a response that more effectively addresses mental health crises.[7] First responder training, mobile crisis teams, wrap-around services, and pre-arrest and pre-booking deflection programs are highlighted in the Behavioral Health Resource Hub and provide numerous approaches to consider. Diversion opportunities should also exist once a case enters the criminal justice system. They may include deferred prosecution programs where the charges are dismissed subject to engagement in a prescribed treatment program, successful completion of the requirements tied to diversion options or satisfaction with some other intervention strategy.

3. Stop the "Revolving Door" Into the Justice System

Cross-system collaboration is critical to identify "high utilizers" and will create more effective responses. Individuals with behavioral health needs cycling through justice and behavioral health systems place a strain on limited system resources. Specifying criteria to identify those who cycle through justice and behavioral health systems can help target and inform responses tailored to these individuals and their needs. A national healthcare model called Certified Community Behavioral Health Clinics (CCBHCs) allows for health care staff to be embedded into courts at little to no cost to the justice system with the ability to immediately screen and begin to treat those with behavioral health conditions. This model and other strategies[8] can not only interrupt the cycle for individuals and affected families but can lead to significant resource savings across systems and minimize repeating court filings.

New Model for Collaborative Court and Community Caseflow Management

1.3

Strengthen Community Responses and Minimize Criminal Justice Involvement

ESSENTIAL ELEMENT 3: Stop the "Revolving Door" Into the Justice System

POLICY

All courts should strive to identify and cultivate relationships to develop alternate resources for persons with behavioral health needs who cycle through the justice and behavioral health systems, including law enforcement, crisis stabilization units, emergency rooms, hospitals, behavioral health providers, jails, and the courts.

EVIDENCE-BASED PRACTICES

1. Improve identification of persons with behavioral health needs through:
   - Early, pro-active identification
   - Validated risk-need and behavioral health screening and assessment tools
   - Information-sharing agreements across agencies and justice partners
   - Protocols to adequately protect individual rights and privacy while proactively screening for needs
   - Identification of persons as they touch the entire justice system (family, civil, criminal, other) to provide individualized assessment of justice system interactions that one person has had across multiple cases
2. Develop shared goals across justice and behavioral health systems to divert individuals with behavioral health needs away from the justice system and toward treatment in order to effectively use resources and improve outcomes.
3. Empower collaborative change in communities using judicial leadership to identify effective responses for individuals with behavioral health needs and to stop the revolving door of continual justice involvement.
4. Engage with local behavioral health agencies and justice partners to use cross-system identification of persons with behavioral health needs in a pro-active way, ideally before court involvement.

GETTING STARTED

Assess the current state of data-sharing between the court, jails, justice partners, and community providers.

Identify gaps in needed data and assess whether there is a place to capture these data in the current case management systems.

Look to the National Court Data Standards to develop new data elements not currently captured.

ROLES AND RESPONSIBILITIES

Establish an information-sharing agreement among system stakeholders.

Share data between systems to identify and respond to frequent utilization.

Protect individual rights and privacy throughout sharing process.

Screen for behavioral health needs at the earliest contact within each system. In the justice system, this would likely be with law enforcement or the jail.

NATIONAL JUDICIAL TASK FORCE TO EXAMINE STATE COURTS' RESPONSE TO MENTAL ILLNESS

4. Prosecution Alternatives

Prosecutors' offices function as public safety agencies, and part of their core mission should involve reducing recidivism and its root causes. Identification of the historic drivers to criminality, including mental health and substance use disorders and the co-occurrence of these issues is critical, as is acknowledgement of poverty related factors including housing and food insecurity, and the impact of trauma on parties in criminal cases. Prosecutors must also understand that mental health and substance use disorders, and other needs should contribute to prosecutor decision-making, including filing and charging decisions, diversion, and sentencing recommendations. Collaboration with defense counsel is an important component to identifying appropriate solutions and treatment. Many prosecutors recognize that individuals with behavioral health needs are over-represented in the criminal justice system. Understanding this, and understanding behavioral health generally, can help inform prosecutor decision making. Filing and charging decisions as well as deflection and diversion programs can be informed by this knowledge and understanding.

PILLAR II

ESSENTIAL ELEMENTS

1. Screening and Assessment
2. Behavioral Health Triage
3. Jail Practices
4. First Appearance and Pretrial Practices
5. Prosecution Practices
6. Effective Defense Representation
7. Effective Court Caseflow Management

Promote Early Intervention and Effective Management of Court Cases

Early screening and identification of behavioral health needs and criminogenic risks coupled with timely criminal justice and court response to identify needed treatment and responses are essential to the new model of collaborative court and community caseflow management.

1. Screening and Assessment

From an individual's first contact with the justice system and throughout the process, screening and assessments must be conducted early on, and then updated periodically to ensure the system's response is tailored to the individual's needs, including criminogenic risks and needs. Regardless of custody status, all individuals should be screened for mental health and substance use disorders, criminogenic risk, and trauma using an evidence-based tool validated for the population that is screened. If indicated, an appropriate assessment should follow to ensure that appropriate diversion and deflection alternatives are explored. Collaboration and cooperation between justice and behavioral health providers is necessary to ensure individualized decision making. Particular attention should be focused on practices and systems that adversely affect marginalized communities and impact racial justice.

2. Behavioral Health Triage

By definition, triage is a process of determining the priority of "patient" treatments needed by the severity of their condition or likelihood of recovery, with and without treatment. Its application to court processes has already been embraced in civil[9] and family law[10] cases based upon the complexity of the case and should now be applied to criminal cases, to include cases where the individual has behavioral health needs. Community behavioral health providers can be embedded into jails and courts to conduct screening and assessments, including criminogenic risk and needs, and can identify appropriate diversion to treatment and recovery pathways at the earliest possible stage. Ideally, a court-led triage team will collect and share the appropriate information with community or other providers for early decision making.

3. Jail Practices

Best practices in jails include universal screening using validated tools and information sharing platforms and agreements with courts, prosecutors, defense counsel, and others. All courts should reach out to their county officials and jail administrators and learn more about the Stepping Up Initiative and/or other county efforts to develop and implement systems-level, data-driven plans that can lead to measurable reductions in the number of people with mental illnesses in local jails. Courts and counties can partner on the important goal of reducing the number of individuals with mental illnesses in jail by focusing on a range of strategies to reduce arrests, shorten jail length of stay, increase connections to treatment, and lower recidivism rates. Collaborative court and community case management for individuals with serious mental illness is recommended to take a person-centered approach to reducing the number of individuals with mental illnesses in jails. Continuity of care also includes ensuring a smooth transition back to the community upon discharge. One element in ensuring successful reentry is providing an adequate supply of prescribed medication and the transition of documentation listing all medications currently being prescribed for presentation to medical professionals as needed. Medications should only be given for a clear clinical purpose.

4. First Appearance and Pretrial Practices

First appearance before a judge is an important first event where the individual is arraigned on the charges, indigency and release decisions are made, counsel is assigned, and early discovery is exchanged. First appearance may also provide an opportunity for the prosecution, defense, behavioral health provider, and court to identify next steps for an individual with behavioral health needs. Pretrial release decisions regarding those with behavioral health needs must be timely. Incarceration, even for a short period of time can have

disproportionately negative impacts on individuals with behavioral health needs. Pretrial Risk assessment tools are an important component of decision making.

Courts should make use of pretrial risk and needs assessments to expedite pretrial release decisions and conditions of release within 24-48 hours of justice system contact. They should also provide proactive case management to ensure individuals are screened for risk and needs as early as possible in the case process, including monitoring for people in frequent contact with the justice system, and divert when possible. First appearances must be meaningful events and early efforts need to be made to connect individuals with community services providers and available services.

5. Prosecution Practices

Prosecutors should ensure that their practices, in the community and in the courthouse, consider the needs of those with behavioral health issues to be addressed. Prosecutors should promote training about mental illness within their offices, familiarize themselves with best practices for working with individuals with mental illness (including ensuring that their practices are trauma-informed for all involved in the criminal justice system), promote restorative justice, minimize misdemeanors, and end the criminalization of mental illness, among other practices. Courts should support the efforts of all justice partners and behavioral health providers to consider the specialized needs of those with behavioral health needs.

While prosecutors are encouraged to practice early intervention and consider diversion opportunities wherever possible. Individuals with behavioral health issues may have difficulty understanding legal matters and can benefit from the assistance of defense counsel.

6. Effective Defense Representation

Defense counsel have an important role in understanding the behavioral health needs of clients and advocating effectively for their clients. Courts have an inherent responsibility to support defense counsel in this role. Early contact between defense counsel and the defendant is beneficial in identifying competency issues or other behavioral health indicators. The sooner that contact can be made, the more effective counsel can be in exploring diversion options, engaging family support systems, and marshalling other resources to support the client. Defense counsel also have the opportunity to provide leadership in the community and in the courthouse to address the needs of those with behavioral health issues. Defense attorneys and defender offices should have training and expertise in identifying mental illness, working with clients with mental illness, and in developing diverse and client-centered treatment plans for clients. To the extent possible, these offices should strive to develop specialized units or training on mental health and/or involve social workers who work alongside the attorneys to connect clients to appropriate treatment.

7. Effective Court Caseflow Management

Courts must control case progress and court events through judicial leadership and control of their dockets. Courts should be accountable and hold attorneys and community providers accountable in ensuring that the court process meet the specific needs of the individual. Individuals with behavioral health needs are best served through the availability of multiple pathways to treatment and recovery.

Other key elements of effective court caseflow management include monitoring the progress of criminal cases, tracking the time between intermediate case events, and ensuring each court event is meaningful. The ECCM project found that the primary drivers of case processing time are the number of continuances per case and the number of hearings per case with the amount of time between hearings.

PILLAR III

ESSENTIAL ELEMENTS

1. Diversion – A Pathways Approach
2. Civil Responses
3. Competency Dockets
4. Specialized Behavioral Health Dockets
5. Courtroom Practices
6. Treatment Courts
7. Other Pathways and Strategies to Treatment and Recovery

Institutionalize Alternative Pathways to Treatment and Recovery and Improve Outcomes

Implementation of court-led, team-based, problem-solving approaches to address individuals with behavioral health needs must effectively divert these individuals away from traditional case management processes and toward treatment and recovery interventions. Diversion is an essential pillar of this new collaborative model. The information about the individual obtained during the early intervention, including screening and assessment, as well as effective management of the court case in the initial phase, must be used to make informed decisions about the most appropriate pathway to treatment and recovery. The criminogenic risk and needs, coupled with behavioral health screens and assessments, and court case characteristics and history, will inform the decisions about the alternative pathway to use to improve outcomes.

1. Diversion – A Pathways Approach

A continuum of diversion options and access to treatment and recovery must be developed and available in every jurisdiction. These options must consider expanded access to treatment and supportive services. The preferred approach is early deflection before a case is filed. However, if a criminal charge is filed, all judges must have access to a continuum of diversion options, programs and practices which

address the defendant's clinical needs and criminogenic risk and needs. Crucial to this effort are the resources to conduct screenings and assessments.

2. Civil Responses

The civil system provides an alternative to the criminal justice system for many individuals depending upon their clinical and criminogenic needs. Individuals who require little or no criminal justice oversight should be redirected to the civil system for assisted outpatient treatment, a civil commitment proceeding, or other civil alternatives and responses. Whenever possible, consent of the affected individual should be sought. Voluntary participation fosters a higher level of participation and can foster engagement by obviating the civil due process steps that must be taken to bring about a compulsory action. However, while voluntary is always better, court-ordered treatment has proven to be effective and should be used as necessary.

3. Competency Dockets

Numerous recommendations have been adopted to reform all aspects of the competency to stand trial process. If the court is proceeding with competency evaluations, restoration, and trial, the court must, to the extent possible, manage the progress of the case to avoid an individual languishing in jail and decompensating at any point in the process. Creating specialized dockets that facilitate access to appropriate diversion and restoration resources for these complex cases is one approach to consider.

4. Specialized Behavioral Health Dockets

Specialized Behavioral Health Dockets and Calendars are another tool for the effective management of cases involving individuals with behavioral health needs. Judges can manage cases in diversion programs and when the defendant successfully completes the program requirements, the case can be dismissed, or an alternate disposition can be made depending on the case. Specialized dockets can also consolidate other cases involving the same individual and may segregate individuals by criminogenic risk. The frequency of court appearances should be based upon the criminogenic needs of the individual.

5. Courtroom Practices

Judges and court personnel must be trained and educated on effective practices for interacting with individuals with behavioral health needs. All individuals should be treated in a dignified and compassionate manner. Bench cards have been produced by the Judges and Psychiatrists Leadership Initiative (JPLI) and others[11] to guide these interactions. Key components of procedural fairness are also important and include Voice (allowing litigants to be heard), Neutrality, Respectful Treatment, and Trust (the perception the judge is sincere). Research confirms that implementing procedural fairness techniques leads to better compliance with court orders and reduces recidivism, including for individuals with behavioral health needs.[12]

6. Treatment Courts

All court systems should have access to a full continuum of behavioral health treatment and supervision options. Treatment duration and dosage needs to be matched to an assessed level of clinical need, and the intensity of supervision should correlate to the assessed criminogenic needs of the individual. Treatment (or problem-solving) courts are an essential component of this continuum and are the most effective intervention for high risk/high need individuals already engaged with the criminal justice system.

7. Other Pathways and Strategies to Treatment and Recovery

Courts are employing a number of pathways and strategies to improve access to treatment and recovery. These strategies include court employees or embedded community behavioral health providers who serve as Navigators or Court Liaisons to identify and connect individuals to treatment and supports. Court and Community teams, similar to problem-solving court or treatment teams, can also promote treatment and recovery for individuals who are not high risk, high need but would benefit from alternative pathways and strategies to promote treatment and recovery. The use of tele-health and remote hearings that have expanded during the pandemic are also proving effective to promote person-centered justice. Another option is moving away from high volume dockets to a more individualized appointment process tailored to the individual needs of an individual. Courts should work with state agency partners and community-based providers to create and maintain alternative and sustainable pathways to evidence-based treatment and recovery support.

PILLAR IV

ESSENTIAL ELEMENTS

1. Community Supervision and Violations
2. Transition and Aftercare Plans
3. Reentry Practices

Manage Post-Adjudication Events and Transitions Effectively

Providing the resources and services for individuals with behavioral health needs as they transition back into the community is necessary to ensure public safety. It is the essential fourth pillar upon which this model is able to stand. Proactive caseflow management and community-based responses to promote positive behavioral health outcomes continue to be essential during this phase of collaborative caseflow management. Essential elements of this stage include the development of effective practices regarding Community Supervision and Violations, Transition Plans and Aftercare, and Reentry. The Court's responsibility to manage the progress of the case and role in ensuring positive outcomes for the individual also remains paramount.


4.2

New Model for Collaborative Court and Community Caseflow Management

Expedite Resolutions and Improve Outcomes

ESSENTIAL ELEMENT 2: Transition and Aftercare Plans

POLICY

Transitions from programs, treatment levels of care, and between systems are often the point when relapse or setbacks in recovery occur. When an individual with behavioral health needs is making progress and having success, courts should take every effort to ensure continuity of treatment such that progress can continue. To ensure successful transitions, transition and aftercare plans which promote recovery need to be developed which are based on the individual's strengths and needs. Necessary services and supports must be in place and individuals should be actively involved in developing the plan. In addition, the transition planning process should start as early as possible and at least several months in advance to ensure a smooth transition. Discussions should occur with the individual to ensure that they are ready to leave a program or system and, if not, what will it take for them to be ready. The court should review the plan prior to any transition to make sure it is complete and includes the services and support necessary for continued success and recovery.

EVIDENCE-BASED PRACTICES

The recovery model is an approach to mental health and substance use disorders that emphasizes and supports a person's potential for recovery. Recovery is generally seen in this model as a personal journey rather than a set outcome, and one that may involve developing hope, a secure base and sense of self, supportive relationships, empowerment, social inclusion, coping skills, and meaning.

A mental health recovery plan is a way for an individual to be active and take control of their own mental health so they can work toward achieving treatment and recovery goals. It also allows an individual to make sure that any plan reflects their experiences and what matters to them.[1]

GETTING STARTED

- Start planning months prior to any transition
- Include the individual in the planning
- Discuss the impending transition to make sure the individual is ready
- Each plan should be individualized to the person's strengths and needs
- Develop the plan with a team approach
- Ensure enrollment or reenrollment in insurance for a smooth transition
- Include robust supports and services are in place including housing, treatment, social supports, healthcare, medication, case management, peer supports, meaningful daily activities, transportation, financial support, etc.

NATIONAL JUDICIAL TASK FORCE TO EXAMINE STATE COURTS' RESPONSE TO MENTAL ILLNESS

1. Community Supervision and Violations

Community supervision must include effectively assessing persons under supervision for criminogenic risk and need and individual strengths; employ smart tailored supervision strategies; use incentives and graduated sanctions to respond promptly to behaviors; and ensure training and accountability of community supervision providers in using evidence-based practices which reduce recidivism. In determining a response to a violation, assessment of criminogenic risk, needs, and strengths should be considered, and smart, tailored supervision strategies should be employed towards the end of breaking the cycle of violating, or reoffending, that results in incarceration.

2. Transition and Aftercare Plans

Transitions from programs, treatment levels of care, and between systems are often the point when relapse or setbacks in recovery occur. When an individual with behavioral health needs is making progress and having success, courts should take every effort to ensure continuity of treatment so that progress can continue. To ensure successful transitions, transition and aftercare plans which promote recovery need to be developed which are based on the individual's strengths and needs. Necessary services and supports must be in place and individuals should be actively involved in developing the plan. In addition, the transition planning process should start as early as possible and at least several months in advance of a change to ensure a smooth transition. Discussions should occur with the individual to ensure that they are ready to leave a program or system and, if not, what will it take for them to be ready. The court should review the plan prior to any transition to make sure it is complete and includes the services and support necessary for continued success and recovery.

3. Reentry Practices

People who are leaving incarceration face a significantly higher risk of relapse, overdose, or exacerbation of their mental health condition. Effective reentry practices are critical to improving public safety, reducing costs, and providing rapid access to pre and post release treatment. Those who provide supervision are trained and informed in evidenced-based practices. The challenges for individuals with behavioral health needs who are reentering the community can often have dangerous and life altering consequences. In addition to health and personal safety risks, there can also be public safety concerns as individuals without appropriate services are more likely to relapse and engage in criminal activity than those without behavior health challenges. Collaboration between the court and community partners is essential.

FINAL THOUGHTS

Implementation of this model is more than a mechanical exercise. Knowing one's political environment and tailoring a communication strategy that suits the needs of the particular community is as import as understanding the model. The perspectives of internal and external constituencies must be understood, and any points of resistance should be addressed before proceeding. Please note the reference links throughout this document and the essential elements documents which can be used to support how adoption of this model leads to reductions in recidivism; longer periods of time between rearrest; and better outcomes for the affected individuals, their families, and the community at large.

Throughout the Covid-19 pandemic period many courts came to embrace innovative communication technologies, especially videoconferencing platforms, to conduct routine hearings. These technologies provide an effective solution for managing cases; however, courts must make procedural fairness (also called procedural justice) for litigants the highest priority, regardless of where proceedings take place, as litigant perceptions of how they are treated have a greater impact on their acceptance of and compliance with court orders than the actual outcome of hearings. These issues take on additional importance when dealing with individuals experiencing behavioral health issues. A bench guide has been developed by the National Center for State Courts, which offers practical tips for adapting judicial techniques to ensure procedural fairness in remote hearings. We recommend its consideration.

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Others too numerous to mention were invited to contribute to the work of the Subcommittee, and we are grateful for all who participated.

Endnotes

1. The ECCM timeliness data was calculated using total time to disposition, as there were significant data quality issues around counts of inactive days across sites.
2. https://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201200406. See Criminal justice involvement and service system costs section.
3. https://www.nami.org/Blogs/NAMI-Blog/March-2021/The-Cost-of-Criminalizing-Serious-Mental-Illness
4. Miami-Dade County 11th Judicial Circuit Criminal Mental Health Project Criminal Justice/Mental Health Statistics and Project Outcomes, https://perma.cc/BT65-A2GX
5. CCJ COSCA Resolution 11 (2006): In Support of the Judicial Criminal Justice/Mental Health Leadership Initiative. https://www.ncsc.org/__data/assets/pdf_file/0015/23721/01182006-in-support-of-the-judicial-criminal-justice-mental-health-leadership-initiative.pdf
6. https://wellbeingtrust.org/news/unifiedvision/
7. https://bja.ojp.gov/program/pmhc
8. https://csgjusticecenter.org/publications/how-to-reduce-repeat-encounters/
9. The Civil Justice Initiative: https://www.ncsc.org/cji
10. The Cady Initiative for Family Justice Reform: https://www.ncsc.org/fji
11. The American Psychiatric Association; The Council of State Governments Justice Center; The National Judicial College; Policy Research Associates
12. http://www.amjudges.org/publications/courtrv/cr53-4/PJ-Bench-Card-Full-Final.pdf

www.ncsc.org/behavioralhealth

NCSC National Center for State Courts
Conference of Chief Justices 1949
COSCA Conference of State Court Administrators
SJI State Justice Institute