

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 additional 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.

Racial, Ethnic, and Economic Disparity in Pretrial Release Recommendations

- 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 planning 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
Patty Dorroh, Harney County Commissioner
Joe Kast, Marion County Sheriff
Chief Curtis Whipple, Rogue River Police Department
Hon. Debra Vogt, Circuit Court Judge (2nd Judicial District, Lane County)

Acknowledgements

The Criminal Justice Commission (CJC) staff and the Public Safety Task Force members would like to thank the Oregon Judicial Department's data team, the Oregon Sheriff's Association Jail Command Council members, the Oregon Pretrial Justice Network's members, and former task force members Beth Heckert, Jackson County District Attorney, John Teague, City of Keizer Police Chief, Karen Joplin, Hood River County Commissioner, and the late Jackie Winters, State Senator, for their time and contributions towards this report over the last two years.

Authors

Staff at the Criminal Justice Commission authored this report:

Bridget Budbill	Pretrial Program Analyst
Michael Weirnerman	Senior Research Analyst

Table of Contents

Executive Summary	i
Public Safety Task Membership	iv
Table of Contents	v
1. Introduction	1
1.1. Public Safety Task Force Origins	1
1.2. Preliminary Task Force Report 2018	1
2. Oregon Pretrial Processes and Operations	3
2.1. What is “Bail” in Oregon?	3
2.2. Oregon Constitutional Provisions Related to Bail	3
2.3. Oregon Statutory Provisions Related to Release during the Pretrial Period	4
Table 2.3.1. Types of Release Events by Case (2017-2019)	5
Figure 2.3.1. Percent of Cases with Release Agreements by Crime Type Felony & Misdemeanor Cases with Hearings Held 2017-2019	6
Table 2.3.2. Cases Processed by Judicial District and Share of Cases with Release Agreements	6
2.4. Security Release	7
Table 2.4.2. Security Release Amounts Posted (2018-2019)	7
Table 2.4.3. Security Release Amounts Dispersed (2018-2019)	7
2.5. Other Aspects of Pretrial Release in Oregon	7
2.6. Existing Pretrial Operations	8
Table 2.6.1. Oregon Pretrial Operations Overview	9
3. The Impetus for Pretrial Reform	10
3.1. Wealth-Based Release Lawsuits	10
3.2. Sentencing Outcomes and Pretrial Detention	10
Figure 3.2.1. Effects of Fully Detaining Defendants on Sentence Type, by Risk Level	11
3.3. Cost Benefit Study of the Expansion of Pretrial Release in Oregon	11
4. Oregon Data Relevant to Pretrial Policy Discussions	13
4.1. Jail Data	13
Table 4.1.2. PSTF Data and Evaluation Committee Ideal Jail Data Reporting Fields	14
4.2. Jail Administration	14
Table 4.2.1. Jail Categories by Operational Capacity	14
Table 4.2.2. Detailed Capacity Breakdown of Oregon Jails for 2019	15
Table 4.2.3. Summary of Operational Information, OSJCC Surveys, 2018-2019	16
4.3. Racial Breakdown of the Oregon Jail Population	16
Table 4.3.1. Race/Ethnicity Breakdown of 2019 Unique Jail Bookings in Oregon	16
4.4. Pretrial Length of Stay in Oregon Jails for All Lodged	17
Table 4.4.1. Summary of Operational Information from Submitted Jail Data, 2018-2019	18
4.5. Most Commonly Occurring Charges among the Oregon Jail Population	19
Table 4.5.1. Most Commonly Occurring Charges by ORS, by Frequency of Bookings, 2018-2019	19

	Table 4.5.2. Most Commonly Occurring Charges by ORS, by Housing Status, 2018-2019	20
	Table 4.5.2. Most Commonly Occurring Charges by ORS, by Sex, 2018-2019	20
4.6.	Courts and Court Data	21
	Figure 4.6.1. Map of Oregon Circuit Court Districts.....	21
4.7.	Failure to Appear	22
	Figure 4.7.1. Top 10 Felony and Misdemeanor Offenses.....	22
	Table 4.7.1. Cases Filed with First Appearances and FTA Rates at First Appearance by Year Case Filed and Case Type.....	23
	Table 4.7.2. Cases with First Appearances and FTA Rates at First Appearance by Judicial District, Felony and Misdemeanor Cases Filed (2017-2019).....	23
4.8.	Oregon Socio-Economic Data	24
	Figure 4.8.1. Oregon Median Household Income by Race.....	24
	Figure 4.8.2. Oregon Poverty Rates by County – 2018.....	25
5.	Pretrial Policy Discussions and Recommendations.....	26
5.1.	Racial, Ethnic, and Economic Disparity in Pretrial Release.....	26
	5.1.1. Discussion.....	26
	5.1.2. Recommendations.....	26
5.2.	Repeal of Security Release in Favor of Courts or another Entity with Delegated Release Authority Making Release Decisions.....	27
	5.2.1. General Discussion	27
	Table 5.2.1.1. Current Statutory Minimum Security Amounts by Oregon Statute	28
	5.2.2. Preventative Detention if Security Release were Repealed Entirely	28
	Table 5.2.2.1. Offenses that are Murder, Treason, or Meet the Definition Of “Violent Felonies”	29
	Table 5.2.2.2. Felony Sex Offenses	30
5.3.	Security Release Funds.....	30
5.4.	Delegated Release Authority	31
5.5.	Recommendations.....	31
6.	Recommendations Related to Pretrial Risk Assessment Tools	33
6.1.	Overview of Risk Assessment Tools	33
6.2.	Validation.....	35
6.3.	Oregon Jurisdictions using Pretrial Risk Assessment Tools.....	35
6.4.	Oregon Statutory Release Criteria and Risk Assessment Tools.....	36
	Table 6.4.1. List of Primary and Secondary Release Criteria.....	36
6.5.	Possible Means for Reducing Potential Bias in the Administration of Risk Assessment Tools	36
6.6.	Recommendations.....	37
7.	Recommendations Related to Reducing Failure to Appear in Oregon Courts	38
7.1.	Overview of Failure to Appear	38
7.2.	Methods for Lowering Failure to Appear Rates	39
7.3.	Recommendations.....	40
8.	Recommendations Related to Other Key Issues	41
8.1.	Data Improvement Recommendations.....	41
8.2.	Victim’s Rights and Domestic Violence Safety Issues.....	41
	8.2.1. Discussion.....	41

8.2.2. Recommendations.....	42
8.3. Professional Development, Best Practices, Standards, and Implementation	
Guidance	43
8.3.1. Discussion.....	43
8.3.2. Recommendations.....	43
Appendix A – Legal Background	44
Appendix B – PSTF Member Draft Report Feedback.....	52

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

¹ [H.B. 2238](#), 79th Legislative Session (2017), at (2)(a)(A-C).

² [H.B. 3194](#), 77th Legislative 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

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.

Release Type	Percent	
Agreement - Conditional Release	29.13%	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
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”		

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. Snuffer, An Article of Faith Abolishes Bail in Oregon, 53 Or. L. Rev. 273, 287 (1974). See also 135.245(3).

Figure 2.3.1. Percent of Cases with Release Agreements by Crime Type
Felony & Misdemeanor Cases with Hearings Held 2017-2019

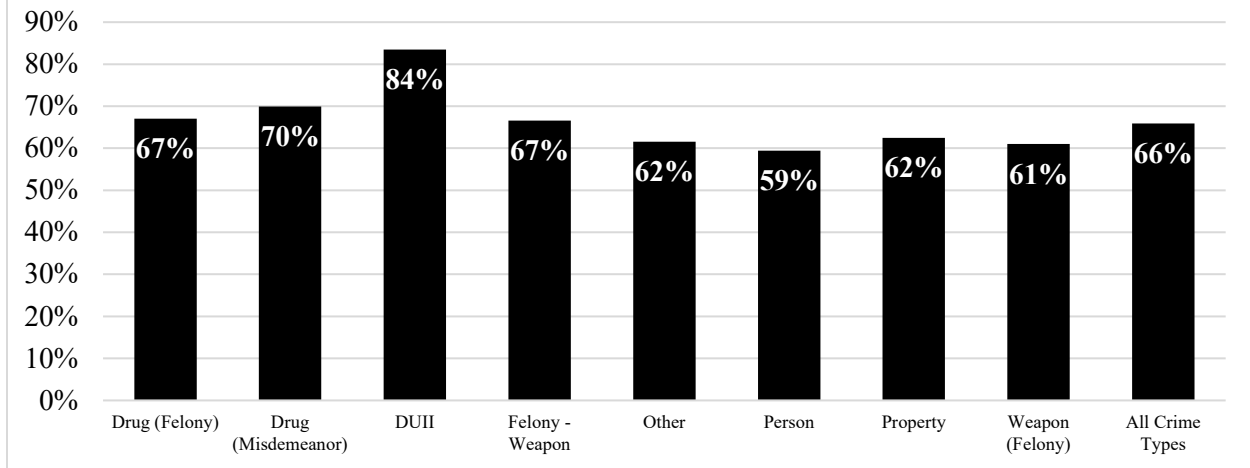


Table 2.3.2 Cases Processed by Judicial District and Share of Cases with Release Agreements

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 (PJNI) 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 PJNI 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
<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none"> • Benton (BCSO) • Deschutes (DCSO/OJD) • Jackson (Community Justice) • Marion (MCSO)
Judicial Districts w/ Release Assistance Officers
<ul style="list-style-type: none"> • Josephine (14th JD) - 1 • Union/Wallowa (10th JD) - 1 • Washington (20th JD) – 2
Counties without pretrial programming or RAOs
<ul style="list-style-type: none"> • 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
<ul style="list-style-type: none"> • 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 is 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 inability 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 *Rasmussen 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); *O'Donnell 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).

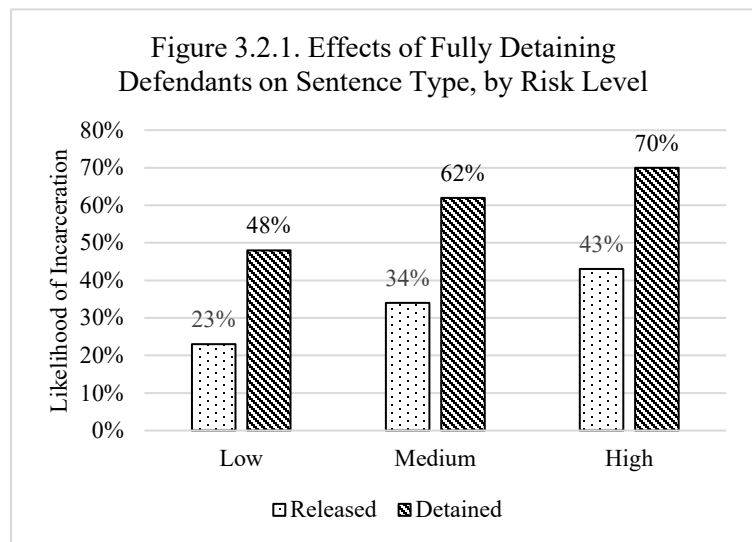
²² *Ibid*, p. 46.

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 detained 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.



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

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

Following these guidelines

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

County	Jail Beds		Total Bookings		Forced Releases	
	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	3,410	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

Race/Ethnicity	Unique Bookings					Census
	Overall	Mega	Large	Medium	Small‡	
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.

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 Appear, 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 appear, 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 (2 nd)	3.8%	FTA (2 nd)	3.2%	Trespass (2 nd)	4.9%
Trespass (2 nd)	3.5%	DUII	3.1%	FTA (2 nd)	4.4%
Theft (2 nd)	3.1%	Reckless Driving	3.1%	Parole Violation	3.7%
Theft (3 rd)	2.9%	Assault (4 th)	2.6%	Theft (3 rd)	3.6%
Parole Violation	2.8%	Theft (2 nd)	2.6%	Theft (2 nd)	3.5%
FTA (non-specific)	2.4%	Harassment	2.2%	FTA (non-specific)	2.9%
Disorderly Conduct (2 nd)	2.2%	Trespass (2 nd)	2.1%	Disorderly Conduct (2 nd)	2.3%
Reckless Driving	2.0%	Disorderly Conduct (2 nd)	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 Appear 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 (2 nd)	3.8%	FTA (2 nd)	4.9%	FTA (2 nd)	3.5%
Trespass (2 nd)	3.5%	Theft (2 nd)	4.7%	Trespass (2 nd)	3.5%
Theft (2 nd)	3.1%	Theft (3 rd)	3.8%	Parole Violation	3.0%
Theft (3 rd)	2.9%	Trespass (2 nd)	3.5%	Theft (3 rd)	2.6%
Parole Violation	2.8%	FTA (non-specific)	3.0%	Theft (2 nd)	2.5%
FTA (non-specific)	2.4%	FTA (1 st)	3.6%	Disorderly Conduct (2 nd)	2.3%
Disorderly Conduct (2 nd)	2.2%	Heroin Possession	2.2%	FTA (non-specific)	2.2%
Reckless Driving	2.0%	Parole Violation	2.2%	Assault (4 th)	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

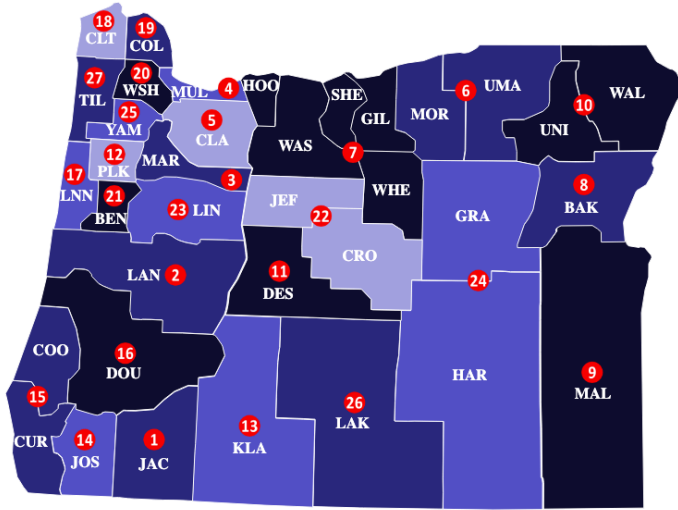


Figure 4.6.1. Map of Oregon Circuit Court Districts

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 than 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

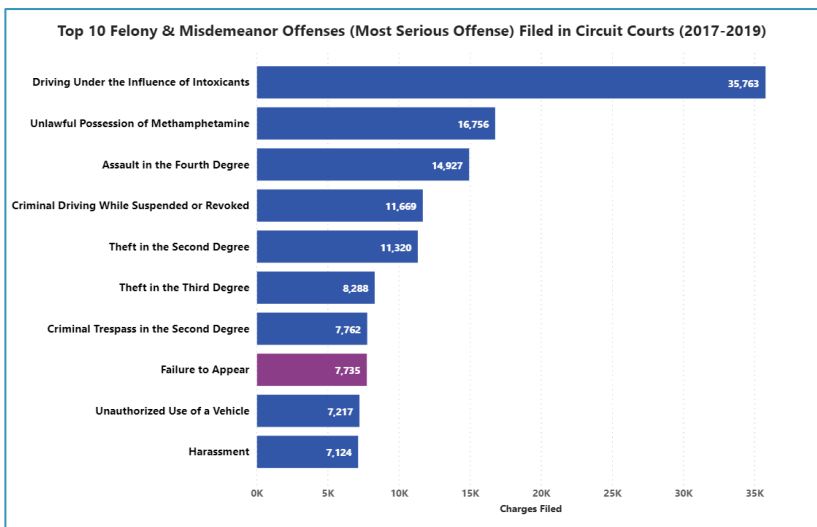


Figure 4.7.1. Top 10 Felony and Misdemeanor Offenses (reprinted, with permission, from the Oregon Judicial Department)

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.

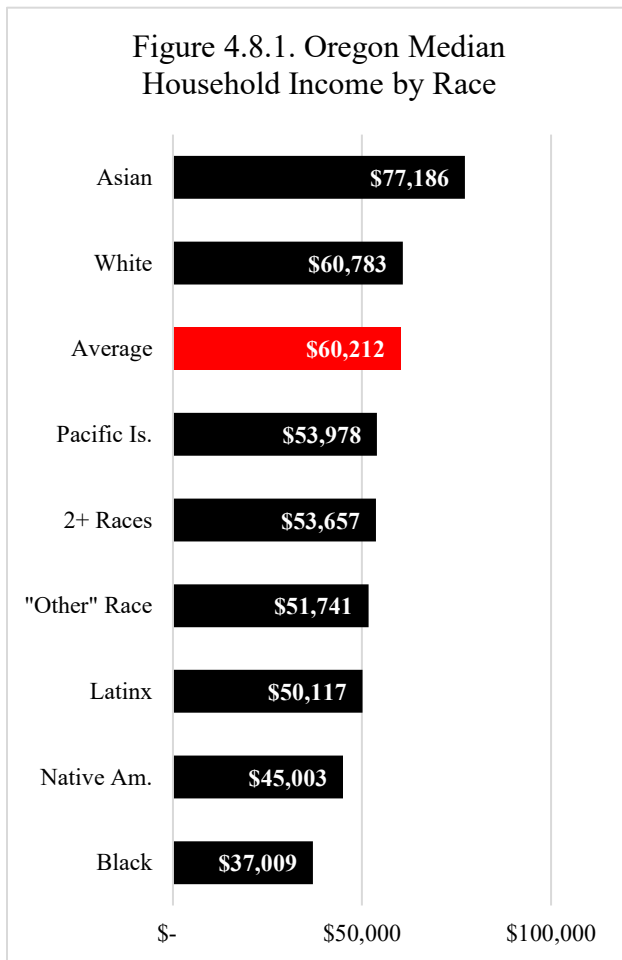
Table 4.7.1. Cases Filed with First Appearance and FTA Rates at First Appearance by Year Case Filed and Case Type

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



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

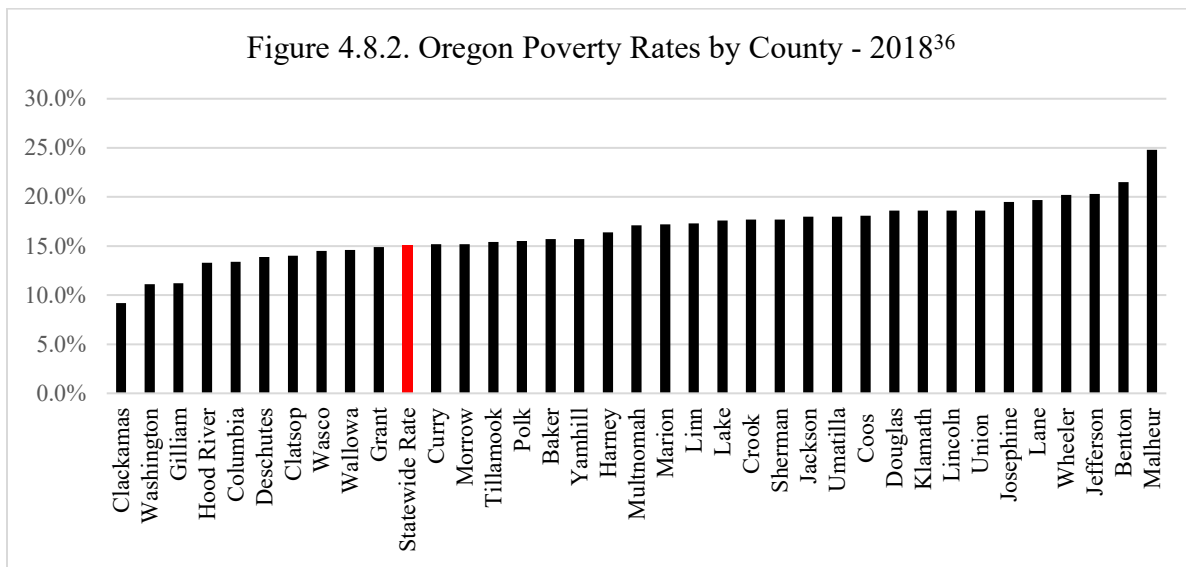
³³ U.S. Census Bureau, American Community Survey 1-Year Estimates (2017).

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 rent³⁶ 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.



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

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 <i>if</i> 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 <i>if</i> 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

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 concerns⁷¹ as well as research cautioning against abandoning

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

[Report](#) (2020); John Herrick, “Bias against Black people found in Colorado bail reform tool.” Colorado Newswire. 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 primary⁷⁸ and secondary⁷⁹ 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;	(a) The defendant’s employment status and history and financial condition;
(b) The nature of the current charge;	(b) The nature and extent of the family relationships of the defendant;
(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;	(c) The past and present residences of the defendant;
(d) Any facts indicating the possibility of violations of law if the defendant is released without regulations; and	(d) Names of persons who agree to assist the defendant in attending court at the proper time; and
(e) Any other facts tending to indicate that the defendant is likely to appear	(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-released⁸¹ 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.

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 planning 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 beailable, 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 beailable by sufficient sureties. Murder and treason shall not beailable 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

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 role¹⁰⁴ 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

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

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, foreword 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, “Foreword.” 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 release¹²⁶ 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 all 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:

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 Recommendations

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.

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.

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
 - ODAAs 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)

Pretrial Risk Assessment Tool Recommendations

- 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; Ohio¹⁰)
- 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 exist 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