

Understanding why people accused but not yet convicted of crimes may not be held in jail or mental health facilities or may be released

There's been a lot of discussion, media coverage, and public concern recently about people accused of crimes not being detained/jailed before trial (before or after appearing before a judge) or being released after some period of detention in jail or at the Oregon State Hospital.

Scope of Media Briefing:

- Brief review of included materials to address key questions reporters and members of the public have about release, terms, stages of a case, law, processes, and roles.
- Judicial ethics preclude judges from talking about cases that are pending or impending in their courts if it could impact perception of their impartiality on the case. So, the focus of the briefing is not on specific cases or answers to questions about specific cases, but on the types of cases that raise questions related to release and the types of questions to consider when covering a case that involves release.
- Change/improvement efforts underway.

Types of cases that might raise questions from the public

The overarching question often is: How did a person in this circumstance get released (e.g., from jail pending trial, or from a mental health facility, or have their charges dismissed)?

Possible circumstances that could lead to release

Pretrial Release

- Prior to appearance before a judge
- After an appearance before a judge

Dismissals (or potential dismissals)

Mental Health – Related Issues

- **Aid and assist**
- **Civil commitment** (requirements and limitations)
 - defendants who are judged competent to aid and assist in their own defense, have continuing/unresolved mental health issues, but cannot be forced to receive treatment (civil commitment)
- **Individuals released after time limits at the Oregon State Hospital** (statutory or dictated by the US District Court Mink/Bowman case; they may or may not have been restored to competency and may have serious continuing/unresolved mental health issues).

Shortage of Public Defenders

- individuals released due to lack of public defenders (cases dismissed at some point for lack of a public defender)

We will explain more about each of these scenarios below. **The most recent version of this information will also be posted at <https://www.courts.oregon.gov/news/>**

Some general points

Courts are following the law when they make release decisions.

Courts follow the law as set out in statute, the state and federal constitutions, and related case law. Those laws often require, or preclude, certain actions.

It's important to clarify *why* someone was released.

Sometimes multiple factors are in play (those above and others) and the reason behind the release, or the status of the case (e.g., continuation or dismissal), can be hard for the public to identify and understand. Two or more circumstances may be in play, but only one may be the *reason* for the action.

Courts are not the only influencers of release decisions.

It's also important to note that judges are not the only influencers of release decisions. Other individuals, organizations, institutions, and considerations also play a role. Some of those include: Release Assistance Officers (OJD or other), district attorney, county sheriffs/detention facility staff, public defenders/defense attorneys, the Oregon State Hospital, Judge Mosman (US District Court Mink/Bowman case), mental health providers, the Oregon Health Authority, Coordinated Care Organizations (CCO's), the legislature, and the governor.

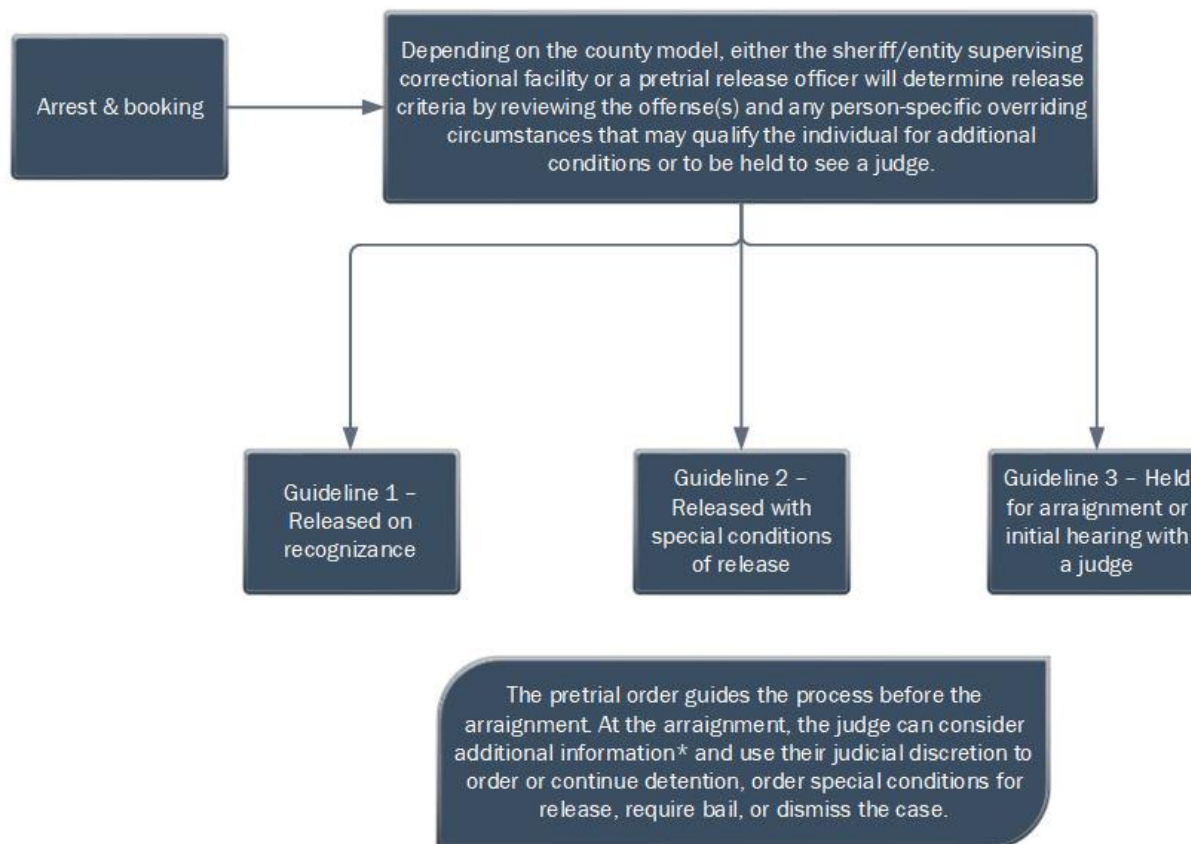
The following pages explain the various circumstances noted above, including the laws, legal processes, and decisions involved:

- **Pretrial Release – Page 3**
- **Release of People with Mental Health Issues – Page 6**
 - **Key Terms – Page 7**
 - **Aid and Assist – Page 7**
 - **Mink/Bowman Time Limits (Mosman federal court order) – Page 11**
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- **Dismissals Due to Lack of Public Defenders (including related questions) – Page 17**
 - **Judicial actions being taken to address the issue – Page 19**

Pretrial Release

For more information on pretrial release and 2021 Senate Bill 48, see OJD's [Pretrial fact sheet](#).

In Oregon, [Chief Justice Order 22-010](#) and related Presiding Judge Orders (PJOs) in each judicial district spell out the guidelines for pretrial release.



Note: Overriding circumstances must be consistent with the Americans With Disabilities Act (ADA) prohibition against discrimination based on disability, including mental illness.

What does “pretrial” mean in this context?

- The period between arrest/booking and the first appearance before a judge. This is the period affected by 2021 SB 48 and related release guidelines.
- The period from first appearance before a judge until the case has been resolved (through trial, plea agreement, or dismissal).
- **For more information on SB 48, see OJD's [Pretrial fact sheet](#).**

Presumption of innocence and pretrial release

The US Supreme Court has ruled that because a person is presumed innocent until proven guilty:

- **pretrial release should be the norm and pretrial detention the rare exception**
- terms of release should be the least onerous possible to ensure community and victim safety and return to court

- those are the only reasons for pretrial detention; it cannot be used as a form of punishment for a person who has not yet been proven guilty

Brief explanation of the pretrial process since the implementation of SB 48

- SB 48 and the updated pretrial release guidelines (set in [Chief Justice Order 22-010](#) and related Pretrial Release Orders (PROs) in each circuit court/judicial district) only affect the period between arrest/booking and arraignment. At arraignment, the judge can consider additional information and has judicial discretion to make appropriate decisions related to release or detention (e.g., additional investigational information provided by the police or District Attorney – obtained after initial arrest, additional charges, any victim statements made at arraignment, answers to questions directly to the defendant or their attorney at arraignment, etc.).
- Individuals are assessed for release based on the offenses charged and the application of any person-specific overriding circumstances that may indicate a higher risk of failing to appear or reoffending while on pretrial release.
- Different counties employ different pretrial program models. Depending on staffing, either the sheriff or entity supervising the correctional facility, or a Release Assistance Officer (RAO), will apply the pretrial release order criteria in determining release.

How do the guidelines deal with people charged with serious or violent crimes?

The Chief Justice’s guidelines provide that persons charged with more serious offenses – including violent felonies (see statutory definition below), sex crimes, and domestic violence felonies or misdemeanors – as well as offenses that indicate a person may not comply with court imposed conditions of release, be held for arraignment, first appearance, or a release decision by a judge. A risk-based approach, including consideration of offender-based criteria in addition to offense-based guidelines, helps ensure community and victim safety. The guidelines also encourage courts to establish or expand the use of pretrial assessments to inform decision-making.

Is a felony that includes a violent act always classified as a “violent felony” when release decisions are made?

No. The legislature defined “violent felony”¹, as well as the term “serious physical injury.”² “Violent felony” must include actual or threatened serious physical injury to the victim or be a felony sexual offense (also defined by statute).

Can the District Attorney object to the release of a specific individual (make a motion for preventative detention)?

Yes. They can present evidence that the specific offense was a violent felony. OJD can provide additional information to reporters on preventative detention and recent changes linked to SB 48 on request.

¹ [ORS 147.500 \(14\)](#) “Violent felony” means a felony in which there was actual or threatened serious physical injury to a victim or a felony sexual offense. [2009 c.178 §1; 2013 c.708 §15a]

² “Serious physical injury” is defined in [ORS 161.015\(8\)](#) 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.”

A note about failure to appear (FTA)

FTA often is not about a person leaving the jurisdiction or purposefully missing a court date. Court dates are often set far in advance, court processes and timelines are unfamiliar, life circumstances (family, job, etc.) can intervene, some defendants have additional challenges related to being unhoused or having mental health issues, or the person could simply forget.

Following studies showing the significant improvement in appearance with notifications, OJD has implemented text reminders to help with the latter; some hearings are also held remotely to make it easier for people to attend. Though it is important for people to show up for court, detention based on a single FTA is a costly and disruptive solution (costly for the state/county, and disruptive for the individual and their ability to meet their work and family obligations). Often an individual understanding the potential consequences of detention after an initial FTA is enough to achieve attendance at future hearings. Pretrial detention is the carefully limited exception, since everyone is considered innocent until proven guilty, and all potential options for release that balance FTA and public safety should be considered.

A note about jail space

Even if it were constitutionally allowable and consistent with state law – which it is not – there is not enough jail space to detain everyone accused of a crime before trial. According to the Oregon State Sheriffs' Association, total budgeted jail bed capacity in 2022 was 7,289. [One study](#) noted that Oregon's total jail population in 2019 (latest available) was 7,100 (so most beds were already full). There were 59,000 felony and misdemeanor cases filed in 2021 (22,096 of those were felonies). Based on a [2015 study](#), approximately one-third of beds were for people serving sentences and two-thirds were for pretrial detention (e.g., two-thirds of 7,289 beds would leave 4,811 beds for pretrial detention).

Can the pretrial release guidelines be updated?

Yes. The Chief Justice's Criminal Justice Advisory Committee (CJAC) Pretrial Subcommittee is actively monitoring implementation of SB 48 and the new pretrial release guidelines. The subcommittee can refer recommendations for change to the full CJAC. Upon approval, the full CJAC submits recommendations to the Chief Justice for consideration. The Chief Justice generally seeks additional feedback on any recommendations and can direct changes to the release categories in the Chief Justice Order (CJO). Once the amendment is adopted, every local PRO must be modified to comply with the amended CJO release guidelines.

For example, the subcommittee reviewed the placement of bias crimes in the CJO 22-010 release guidelines. In November 2022, it made a recommendation to move Bias Crime I (https://oregon.public.law/statutes/ors_166.165) and Bias Crime II (https://oregon.public.law/statutes/ors_166.155) to Guideline 3, which would always require detention until appearance before a judge. (The individual would be held until arraignment, when a judge would make a release decision considering conditions that will ensure return to court and public/victim safety.) Further review is underway, but there is no specific timeline for the decision-making process.

For more information on SB 48, purposes, changes, and implementation, see:
<https://www.courts.oregon.gov/programs/pretrial/Documents/PretrialInfo-Media.docx>

Release of people with mental health issues

People often ask why a court dismissed criminal charges and released a particular individual from jail or the state's mental hospital after determining that the individual has a mental disorder.

When judges work at the intersection of behavioral health and the law, options are often limited. They must follow the law, which is intended to protect both community safety and the rights of the individual, and work with available resources.

A person charged with a crime who is unable to “aid and assist” in their own defense because of a qualifying mental disorder cannot proceed to trial unless their competence is restored. Once a judge finds a defendant incompetent, the U.S. Constitution requires that the case be put on hold. The charges cannot be adjudicated until the defendant is found competent following restoration services that enable the individual to understand the process, work with their lawyers, and make decisions.

The judge is required to ensure that the defendant receives treatment to restore competency in the least restrictive option that is appropriate for the defendant and in the interests of justice. After considering the level of clinical care and safety precautions necessary to provide restoration services, the judge may determine that the most appropriate placement for restoration services is at the Oregon State Hospital or in a community-based treatment program. If an appropriate placement is available, and the individual gains competence as a result of restoration services, then the trial may proceed. However, appropriate community-based services are frequently unavailable, and Oregon has a statutory limit on the length of time an individual can be committed to the Oregon State Hospital before the judge must dismiss charges and release the individual.

If an appropriate placement is not available at the time the judge determines that an individual is unfit to proceed, whether that is admission to the Oregon State Hospital or to a community-based program, the judge may order the individual to remain in jail until it becomes available. The time that an individual with a severe and persistent mental illness (SPMI) spends waiting in jail can be destabilizing and cause their condition to worsen. A judge may opt to dismiss the charges and either initiate civil commitment proceedings if warranted or release the individual to the community, leaving it to the individual to seek treatment voluntarily.

We will cover a few common scenarios here.

Types of criminal cases involving a person that lacks competence to stand trial due to a qualifying mental health disorder that may be dismissed without requiring treatment:

- Defendant is not eligible for admission to the Oregon State Hospital, and either the community lacks appropriate treatment resources for community restoration or the individual refuses to participate in treatment
- Defendant was committed to the Oregon State Hospital but did not gain competency to stand trial within the maximum time limit for commitment, and either the individual is not suitable for continuing restoration services in the community or appropriate services are not available in the community

Key terms

Aid and Assist

A person accused of a crime must be able to “aid and assist” in their own defense. Sometimes other words are used to talk about the aid and assist process:

- 370 (ORS 161.370)
- Competency to stand trial
- Fitness to proceed
- Competency restoration

To aid and assist, a person must be able to:

- Understand the criminal charges against them
- Understand the decisions they will need to make in their case
- Help their defense attorney
- Participate in the court process

Civil Commitment

Civil commitment is a process in which a judge decides whether a person alleged to be mentally ill should be required to accept mental health treatment.³

Guardianship

A guardian is someone who is appointed by a court to protect and care for the health and well-being of an individual at risk of physical neglect or financial fraud, or a minor child. A petition must be filed with the appropriate court, and notice given to all interested persons.⁴

Understanding Aid and Assist

Initiation of Aid and Assist Assessment

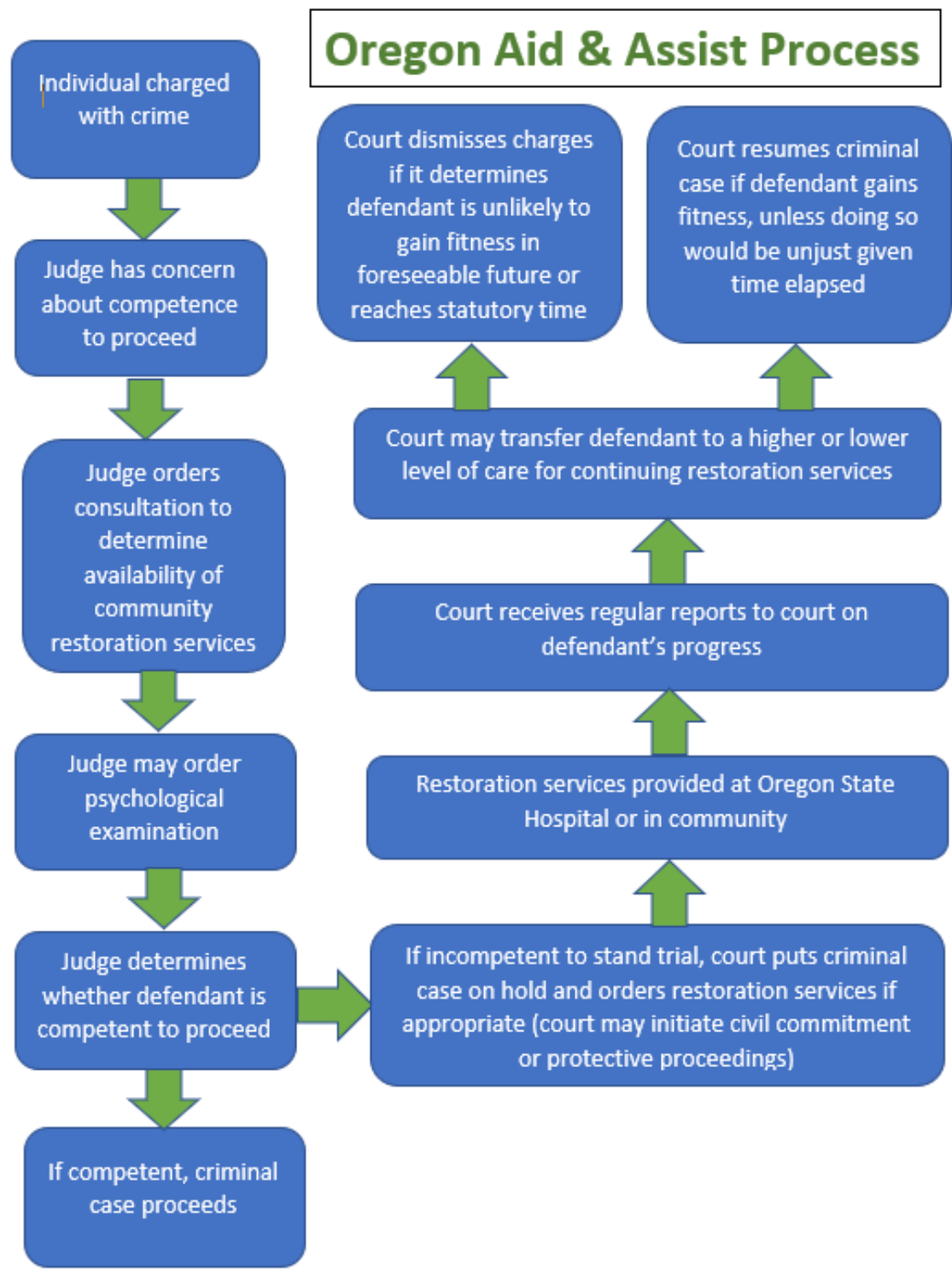
- There is typically information provided to the court (often from the defense counsel, but also including observation of the individual in the courtroom, information shared by law enforcement or detention staff, or information from other sources) to indicate that an individual may be unable to aid and assist in their own defense.
- If presented with such information, the court is required by law to take action to determine fitness to proceed.⁵

³ <https://www.oregon.gov/oha/hsd/amh/Pages/civil-commitment.aspx> (accessed 10/12/2022)

⁴ <https://www.courts.oregon.gov/programs/family/guardianship-conservatorship/pages/default.aspx> (accessed 10/12/2022)

⁵ The court has obligations under statute when it has “reason to doubt the defendant’s fitness to proceed,” so there is an element of discretion, but generally if defense counsel, law enforcement, or other credible source told the court they thought the defendant may be unfit, that would likely trigger the following requirement: “When the court has reason to doubt the defendant’s fitness to proceed by reason of incapacity as described in ORS 161.360, the court may call any witness to assist it in reaching its decision and, except as provided in paragraph (b) of this subsection, shall order that a community mental health program director, or the director’s designee, consult with the defendant and with any local entity that would be responsible for providing community restoration services to the defendant if the defendant were to be released in the community, to determine whether appropriate community restoration services are present and available in the community. After the consultation, the program director or the director’s designee shall provide to the court a copy of the findings resulting from the consultation.” ORS 161.365(1)(a)

The following chart and explanation illustrate the process.



Aid & Assist Process – Additional Detail

- Individual is charged with a crime, and judge has concern that, due to a qualifying mental disorder, defendant is unable to aid and assist the lawyer in the defense.
- Judge orders consultation with a community mental health program (CMHP); CMHP files a report within 5 judicial days informing court whether an appropriate community placement is available and present in the community if defendant is ordered to participate in community restoration.
- Judge may order a psychological examination if judge thinks it will be helpful; if necessary, the judge may commit defendant to the Oregon State Hospital (OSH) for up to 30 days for observation for the evaluation; evaluator files an evaluation report with the court that includes a diagnosis and recommended level of care needed for competency restoration.
- Judge makes a determination of whether individual is fit to proceed; the court will hold a hearing before making that determination if requested by the parties.
- If judge finds defendant is fit, the criminal case continues.
- If judge finds the defendant is unfit, the judge:
 - places the criminal proceeding on hold;
 - notifies the defendant that federal law prohibits the defendant from purchasing or possessing a firearm unless the person obtains relief from the prohibition under federal law; and
 - determines an appropriate action for the case (the court will hold a hearing before making that determination unless the parties agree on the appropriate action).
- Whenever possible the judge will order an action that ensures that the defendant receives treatment to restore competency in the least restrictive option that is appropriate for the defendant and in the interests of justice.
- If restoration is not possible, the judge may initiate civil commitment proceedings, protective proceedings (guardianship), dismiss the case, or order another appropriate action.
- If the judge determines restoration services are appropriate, judge will commit defendant to the Oregon State Hospital or order defendant to participate in community restoration services.
- Oregon statute provides when a judge must and may commit a defendant to OSH depending on the most serious criminal charge:
 - If the most serious charge is a felony, court must commit the defendant to OSH for restoration services if it finds defendant requires a hospital level of care due to public safety concerns or the acuity of symptoms of defendant's qualifying mental disorder, and appropriate community restoration services are not present and available in the community.
 - If the most serious charge is a misdemeanor, court may commit defendant to OSH if either of the two sets of conditions are met:
 - Court receives a recommendation from a certified evaluator that defendant requires hospital level of care due to the acuity of symptoms of defendant's qualifying mental disorder and a recommendation from a CMHP that the appropriate community restoration services are not present and available in the community; or

- The court determines that defendant requires a hospital level of care after making written findings that the defendant needs a hospital level of care due to the acuity of the symptoms of defendant’s qualifying mental disorder; there are public safety concerns; and the appropriate community restoration services are not present and available in the community.
- If the judge determines commitment to OSH is necessary:
 - Judge may commit defendant for up to the maximum time allowed by Oregon law or an overriding federal court order; Oregon law allows commitment for up to three years or the maximum time the defendant could have been sentenced if convicted; an overriding federal court order currently (Nov. 2022) limits commitment based on the most serious charge – 90 days for a misdemeanor and 180 days for most felonies (1 year for a Measure 11 crime).
 - If the defendant remains in custody (jail) and has not been admitted to OSH within 7 days of the court order, court must hold a hearing to consider an appropriate action that is consistent with the defendant’s constitutional right not to be held in jail without appropriate restoration services.
 - OSH must notify the court immediately if at any time it determines that defendant has gained competence to proceed or that they will not gain competence to proceed in the foreseeable future (considered “never able” for purposes of the criminal case).
 - OSH must evaluate defendant within 60 days of admission to determine defendant’s present competence and to determine whether defendant is likely to gain competence within the foreseeable future, and must notify the court within 90 days of its findings.
 - After the first 90 days of commitment, OSH must notify the court at least every 180 days of the defendant’s present competence and likelihood of gaining competence within the foreseeable future.
 - If at any time during the commitment OSH determines that defendant no longer needs a hospital level of care due to present public safety concerns or the acuity of symptoms of defendant’s qualifying mental disorder, OSH must file a “ready to place” (RTP) notice with the court recommending that court discharge defendant from commitment and determine the next appropriate action.
 - If the court receives an RTP notice from OSH, it must hold a hearing within 10 judicial days to determine the next appropriate action, which may include continuing the commitment, ordering the defendant to participate in community restoration, or another appropriate action.
 - If at any time the court determines that the defendant is entitled to discharge from OSH, either because the court determined the defendant’s competence to stand trial could not be restored in the foreseeable future (“never able”) or the defendant reached the maximum time limit for treatment at OSH, the court must dismiss all charges without prejudice (allowing district attorney to file the charges again at a later date within the statute of limitations for the charge) and order that defendant be discharged or initiate commitment proceedings.
- If the judge determines community restoration is appropriate:
 - The court may place conditions that the court deems appropriate on the release of the defendant from custody to participate in community restoration services, including the

- requirement that the defendant regularly report to an evaluator for examination to determine if the defendant has gained fitness to proceed.
- The CMHP provides community restoration services and care coordination to defendant.
 - The court may order the CMHP coordinating the defendant's treatment in the community to provide the court with status reports on the defendant's progress in gaining fitness to proceed.
 - The CMHP must provide a status report if defendant is not complying with court-ordered restoration services.
 - The CMHP must notify the court if the defendant gains fitness to proceed
 - If the court determines that the defendant has gained fitness to proceed, the court must resume the criminal proceeding unless the court determines that so much time has elapsed since the commitment or release of defendant to community restoration services that it would be unjust to resume the criminal proceeding.
 - If the court determines that it would be unjust to resume the criminal proceeding, the court may dismiss the charge and may order the defendant to be discharged or may initiate commitment proceedings.
 - If the court continues the criminal proceeding, the defendant receives credit against each charge for each day the defendant was committed to OSH or to the custody of a secure intensive community inpatient facility.

Federal Court – Mink/Bowman Case Rulings by Judge Mosman

Rulings by Judge Mosman in the Mink/Bowman case, maximum stay at the Oregon State Hospital:

- **Most serious charge is a misdemeanor** - Maximum permissible sentence for the underlying offense or 90 days – whichever is shorter.
- **Most serious charge is a felony** - 6 months, or 1 year if the felony meets the definition of a “violent felony” under ORS 137.700(2).
- **Prior to Mink/Bowman, state law limited duration of OSH commitment to the maximum sentence length if the person had been convicted or 3 years, whichever is shorter.**
- OSH may still discharge aid and assist patients sooner when they are determined to be either “able” or “never able” to aid and assist in their own defense, or if the court places them on community restoration.
- **For the Oregon State Hospital's latest information the Mink/Bowman orders currently in effect, see: <https://www.oregon.gov/oha/OSH/Pages/mink.aspx>.**

If a person is evaluated and determined unable to aid and assist, what may occur to help “restore” their ability?

Some of the elements of restoration include:

- stabilization and achieving a level of capacity so they can cooperate with attorneys and participate in their own defense
- psychiatric and psychological assessments and treatment, including diagnoses, medications and therapy
- legal skills, teaching basic legal terminology and ideas that will help most people become able to aid and assist⁶

Alternatives to the Criminal Process

At any point, rather than engaging in the criminal justice process, the judge may:

- Start the process for a civil commitment
- Consider a guardianship
- Consider other appropriate options

Additional Resources

[Oregon Health Authority Legal Skills Workbook \(for Aid and Assist\)](#)

[Oregon Health Authority/Oregon State Hospital Mink Order Compliance information site](#)

[State Courts Leading Change – Report and Recommendations – National Judicial Task Force to Examine State Courts’ Response to Mental Illness](#) (October 2022) – Summary of challenges and current initiatives to drive improvement. Oregon State Court Administrator Nancy Cozine co-chairs the Criminal Justice Work Group that contributed to this report. Multnomah County Circuit Court Judge Nan Waller is also a member of the work group.

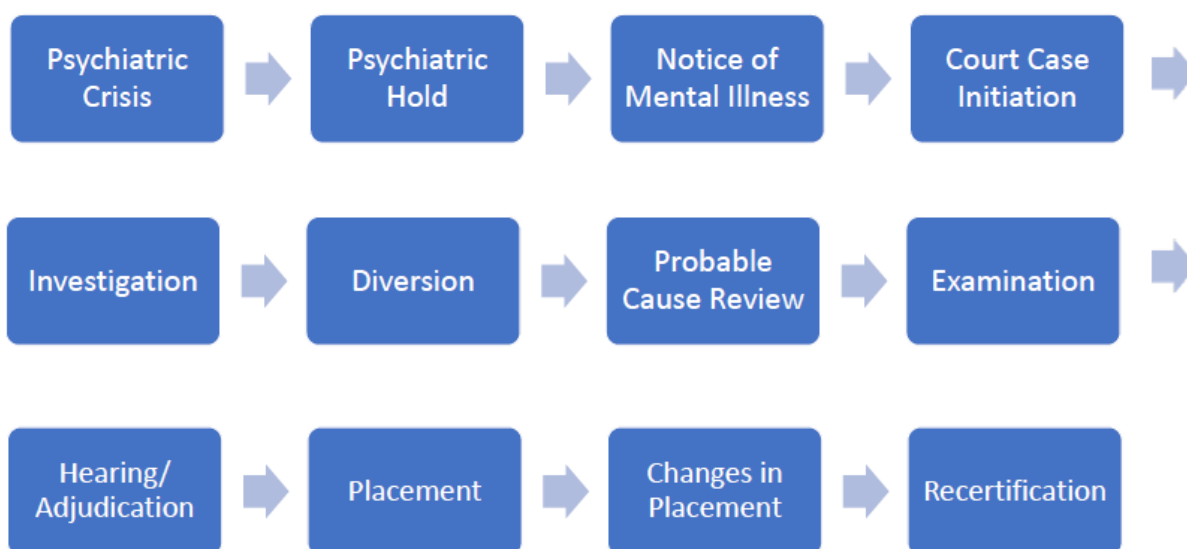
⁶ OSH Aid and Assist Fact Sheet: <https://www.oregon.gov/oha/Documents/Aid-and-Assist-Fact-Sheet.pdf>

Civil Commitment and Guardianship

Civil Commitment – Civil commitment is a process in which the state asks a judge to decide whether a person alleged to be mentally ill should be required to accept mental health treatment.⁷

Oregon law allows a person to be treated for a mental illness against their will if they are experiencing an emotional disturbance and are imminently dangerous to themselves or others or are unable to care for their basic needs. To be committed, a person must meet the above standards in a court hearing where critical information is presented in the form of testimony in front of a judge and the person considered for commitment. If an individual is committed, he or she may receive involuntary treatment for up to 180 days.⁸

Oregon Civil Commitment Process



Note: a “psychiatric crisis” is an umbrella term for circumstances that prompt a psychiatric hold. That could include a person checking themselves into ER (or a family member or friend checking them in). Or a peace officer may take a person into custody as directed by a Community Mental Health Program (CMHP) or if the officer has probable cause to believe individual is dangerous to self or others and needs immediate care, custody, or treatment for mental illness, and transports the person to the nearest hospital or nonhospital facility approved by OHA.

When can a person be committed? ORS 426.005(1)(f)

A person can be committed if the judge finds by clear and convincing evidence that the person has a mental disorder and, because of that mental disorder, is:

- Dangerous to self or others, or
- Unable to provide for basic personal needs like health and safety.

⁷ Adapted from <https://www.oregon.gov/oha/hsd/amh/Pages/civil-commitment.aspx> (accessed 10/12/2022)

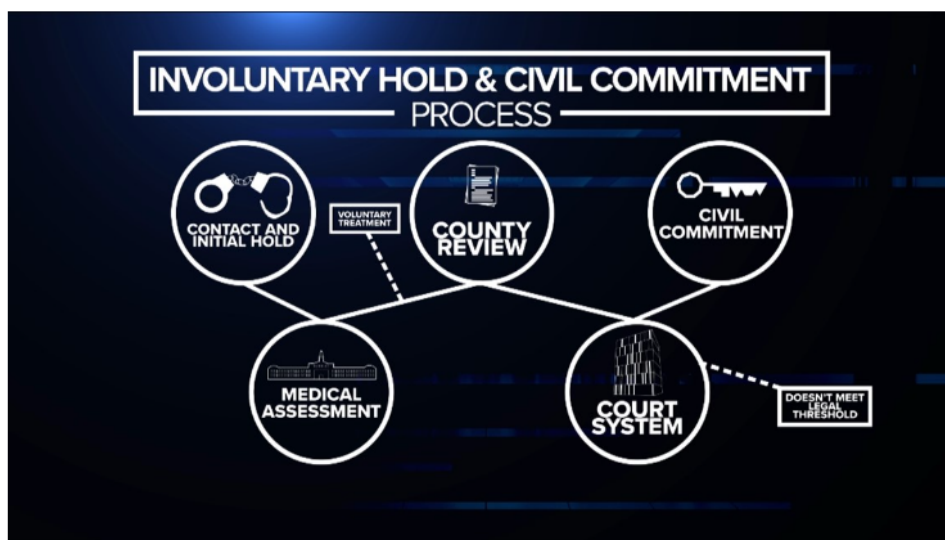
⁸ Excerpt from <https://www.clackamas.us/behavioralhealth/commitment.html> (accessed 10/12/2022)

The state must prove by clear and convincing evidence that the Person with Alleged Mental Illness (PAMI) is mentally ill, which requires a finding that the truth of the facts asserted is highly probable.

- “The determination as to whether a person is dangerous . . . must focus on [the person’s] condition at the time of the hearing.” *State v. Lucas*, [31 Or App 947](#), 950, [571 P2d 1275](#) (1977).
- The dangerous-to-self test does not require a showing of a threat of immediate harm, just a threat of harm in the near future. *Jacobson*, 142 Or App at 375–76.
- “A person may be committed if the person is unable to provide for the person’s basic personal needs in a way that leaves the person at nonspeculative risk of ‘serious physical harm’—meaning that the person’s safe survival will be compromised—in the near future, even though that risk is not imminent.” *State v. M.A.E.*, [299 Or App 231](#), 240, [448 P3d 656](#) (2019) (interpreting ORS 426.005(1)(f)(B)).

A person can also be committed if the judge finds that the person is:

- Diagnosed as having a major mental illness such as schizophrenia or manic-depression, and
- Has been committed and hospitalized twice in the last three years, is showing symptoms or behavior similar to those that preceded and led to a prior hospitalization and,
- Unless treated, will continue, to a reasonable medical probability, to deteriorate to become a danger to self or others or unable to provide for basic needs.⁹



Credit: KGW

The basic steps towards a civil commitment for a person with severe mental illness that is deemed dangerous to themselves or others.

Note: The KGW [Uncommitted series](#) did a good job of explaining the issues, history, current status, and individual stories that illustrate the challenges of civil commitment (for people with mental illness and the people who encounter and support them). **It provides a good foundation for reporters covering this issue.**

⁹ <https://www.oregon.gov/oha/hsd/amh/Pages/civil-commitment.aspx> (accessed 10/12/2022)

What happens at a civil commitment hearing?

If a hearing is held, the person has a lawyer and witnesses testify. The judge then makes a decision whether the person should be committed.¹⁰

What happens if a person is committed?

If the person is committed, the person may be hospitalized or may be required to undergo treatment in some other setting.¹¹

How long is civil commitment Oregon?

An initial commitment can last **no longer than 180 days**. A person can be released from the hospital at any time before 180 days passes if the treating doctor or director of the facility believes the person no longer is mentally ill.¹² The court can order recommitments of an additional 180 days indefinitely.

What role does mental health court play?

Mental health court is a voluntary program that requires a significant commitment from participants over an extended period (a year or more). The program provides access to a range of services, regular monitoring, support, and accountability. Not all offenses and defendants qualify for mental health court. It cannot serve as a substitute for civil commitment or appropriate mental health care and treatment (though it can help participants be successful in their treatment). In order to participate in mental health court, the individual must be able to aid and assist in their case. They may also be required to participate in mental health treatment as a condition of their probation.

Where does guardianship come in?

A guardian is someone who is appointed by a court to protect and care for the health and well-being of an individual at risk of physical neglect or financial fraud, or a minor child. A petition must be filed with the appropriate court, and notice given to all interested persons.¹³ A guardianship may provide an alternative to civil commitment if the guardian can help ensure that the individual under their care complies with treatment.

Additional Resources

Involuntary Commitment Rules (OAR Chapter 309)

https://secure.sos.state.or.us/oard/displayDivisionRules.action%3BJSESSIONID_OARD=FBnd3bo34wq3gP1LABNCNhlxdQyjItenmTt76m3LO0H2g9102V67%212024649768?selectedDivision=1027

¹⁰ <https://www.oregon.gov/oha/hsd/amh/Pages/civil-commitment.aspx> (accessed 10/12/22)

¹¹ <https://www.oregon.gov/oha/hsd/amh/Pages/civil-commitment.aspx> (accessed 10/12/2022)

¹² <https://www.mcda.us/index.php/community-initiatives-special-programs/civil-commitments> (accessed 10/12/2022)

¹³ <https://www.courts.oregon.gov/programs/family/guardianship-conservatorship/pages/default.aspx> (accessed 10/12/2022)

Making improvements in Civil Commitment

Balancing the rights of the individual with their own safety and the safety of others

Chief Justice Walters has convened a multidisciplinary stakeholder work group on civil commitment, including bipartisan legislative representation, broad stakeholder representation, and professional facilitation. The objective is to do a comprehensive review of the civil commitment statutes and processes and recommend changes that are more consistent with current science, law, and treatment philosophy. OJD staff have developed a list of more specific topics for the workgroup that comes from a comprehensive outline of the statute and BHAC (Chief Justice's Behavioral Health Advisory Committee) review to add questions that should be discussed for each. (If it would be helpful to provide that list, we can do that.) Judge Waller co-chairs the BHAC.

In addition, OJD regularly engages in other policy groups on this topic including the legislature's Behavioral Health Transformation Workgroup (and subcommittees), the Aid and Assist Workgroup (not specific to civil commitment), the GAINS* Workgroup (not specific to civil commitment), the OCBHJI Steering Committee (not specific to civil commitment), and the OHA Behavioral Health Metrics Committee.

The judicial branch is engaged and ready to do all that it can to advocate and innovate to improve services and access for individuals experiencing mental health needs.

* GAINS - Gather, Assess, Integrate, Network, and Stimulate – a model for coordinating with justice systems to provide behavioral health services. <https://www.samhsa.gov/gains-center>

Additional Resources

[Leading Change – Report and Recommendations: National Judicial Task Force to Examine State Courts' Response to Mental Illness](#) (October 2022) – Summary of challenges and current initiatives to drive improvement. Oregon State Court Administrator Nancy Cozine co-chairs the Criminal Justice Work Group that contributed to this report. Multnomah County Circuit Court Judge Nan Waller is also a member of the work group.

Dismissals Due to Lack of Public Defenders

Who has primary responsibility for providing public defenders?

The Office of Public Defense Services (OPDS), under the direction of the Public Defense Services Commission (PDSC).

How many people in Oregon are currently facing criminal charges and qualify for a public defender, but do not have one?

See [Public Defense Data Dashboard](#). The dashboard is updated each business day. **Note:** Though we track the number of people in warrant status, some already have a lawyer and others do not currently qualify for a public defender because they are at-large and not under the control of the court. Therefore, when you are looking at the total number of unrepresented individuals (people who qualify for a public defender but don't have one), it is most accurate to exclude people in warrant status. OJD has updated its dashboard to reflect that.

If a person is on the list, does it mean that they never had an attorney representing them at any stage since their arrest?

No. All of these accused individuals had a temporary attorney at their initial appearance before a judge (arraignment). The right to counsel begins at the arraignment stage when the state presents an accusatory instrument, and the individual accused of a crime is entitled to the presence of counsel during any critical stage of the case. Arraignments on charging instruments are required to occur within 36 hours of arrest unless good cause is shown, and in all cases within 96 hours of arrest. At arraignment, an attorney is present to represent every person, advise them of their rights, and advocate for their release from custody as appropriate. Under typical procedures, the attorney appointed at arraignment will represent the individual throughout their court case. Currently while there is not capacity for the contracted public defense firms to provide appointed attorneys for all defendants facing new criminal charges, the assignment of a public defense attorney is prioritized for individuals who remain in custody, for those who have been unrepresented the longest, and for those who are facing more serious charges. In the Multnomah County Circuit Court, individuals who cannot be assigned an attorney at arraignment to advise them for the remainder of their case are ordered to return to court at a future date approximately three weeks out to determine if there is an attorney available.

In addition, finding substitute attorneys is particularly complicated. Sometimes appointed defense attorneys need to be replaced due to a breakdown in communication with the defendant, and some need to be replaced due to conflicts, such as when it is determined that the appointed defense attorney has represented others who are connected to the case. Initially a Motion for Substitution of Attorney is filed; in the current climate, when a Motion for Substitution is granted it can sometimes take weeks or longer to identify another public defender who can take the case.

Have some people had their cases dismissed because the state cannot provide them with a public defender?

Yes. The Sixth Amendment to the US Constitution guarantees the right to an attorney. Ultimately, the case cannot proceed if one is not available. Counsel must be appointed within a reasonable amount of time however neither the Oregon constitution nor the Oregon statutes define what amount of time is

reasonable. In Multnomah County, defendants return to court three weeks after arraignment to determine if counsel is available. If attorneys are still not available for all defendants who need them, some cases will be rescheduled to appear in three more weeks. After multiple appearances with no attorney available, a judge will consider the nature of the charges, the length of time the charges have been pending with the defendant unrepresented by counsel, and any motions for dismissal.

The Multnomah County District Attorney has reported some data related to releases attributed to lack of a public defender. The Oregon Judicial Department is currently working to develop additional and more detailed data on this topic as well, to further inform decision-making going forward.

Is there a limit for the number of times a criminal case can be “set over” when there is no court-appointed attorney available?

There is not a statute or procedural rule that sets a specific limit.

Though there are no specific numbers for set overs, there are statutory and constitutional standards for speedy trials that might come into play. Judges are required to uphold the Constitution of the State of Oregon and to abide by the Oregon Code of Judicial Conduct, and thus have both a legal and ethical obligation to appoint attorneys for individuals charged with crimes. The individual judge presiding over a hearing makes a judicial decision based on the information available to them at the time of the hearing.

If someone had their charges dismissed due to lack of a public defender, could new charges be filed, and the person be re-arrested, later on the same charge?

Possibly. The District Attorney’s Office would make that decision, depending on the facts of the case, the nature of the dismissal, and the applicable statute of limitations.

Could any of these dismissals include an individual who is currently being held in jail pretrial?

Potentially, however the vast majority of people who do not currently have an assigned public defender are out of custody. This means that the nature of their alleged crimes made them eligible for release on recognizance, release with additional conditions (such as electronic monitoring), or release with payment of security (money bail).

Courts communicate regularly with the Office of Public Defense Services (OPDS), the state agency responsible for providing public defense attorneys, and OPDS prioritizes these in-custody defendants for available counsel.

In Multnomah County, individuals are not being held in custody after arraignment unless they have had an attorney appointed. The people being held in custody in Multnomah County without counsel are awaiting appointment of replacement attorneys, such as when a new attorney is requested due to a breakdown in communications or if there is a conflict that prevents a previously appointed attorney from representing them.

Could current pending lawsuits (state and federal) regarding alleged Sixth Amendment violations (right to counsel) potentially lead to dismissal of charges?

Possibly. Those cases are still pending in state and federal courts.

How are the Multnomah County Circuit Court and other circuit courts prioritizing public defender assignments to uphold the rights of the accused and minimize risk to the community? What else are they doing to resolve cases and help reduce public defender caseloads?

Actions taken by trial courts

- Generally:
 - Courts are working closely with staff from the Office of the State Court Administrator (OSCA) to ensure data collection on unrepresented persons is as accurate as feasible.
- Courts most impacted by the public defense system challenges:
 - Intensive daily evaluation of misdemeanor and felony arraignment dockets and jail custody lists (pre- and post- arraignment/release decision), as well as working closely with defense providers to understand provider capacity for that day/week to allocate appointments accordingly.
 - Continued efforts to increase current defense provider capacity by reaching out to private bar attorneys who are qualified to work with OPDS and take cases.
 - Closely evaluating defense provider capacity in the immediate, mid-, and long-term to forecast future representation issues.
 - Developed or in the process of developing protocols to prioritize public defender assignments.
- For courts that are not currently impacted by the public defense system burdens:
 - Work collaboratively with stakeholders to anticipate and prepare for potential public defense provider shortages.

Multnomah County:

- Actively monitoring defendant/public defender status (daily) – total days without attorney, number of set overs, approaching statutory timelines.
- Developed protocols to prioritize limited public defender resources to ensure representation for defendants in custody and those charged with domestic violence and person crimes, maximize assignments to higher risk cases, and minimize cases with no public defender assigned.
- Expanded scope of specialized Resolution Dockets to increase opportunities for case closure by plea or trial.
- Assigned Senior (retired) Judges for specialized settlement dockets focusing on serious crime types.
- Compiled detailed spreadsheets of oldest custody cases and worked with court data, sheriff's office data, and lists from prosecution and defense to identify priority cases for trial or settlement.
- Court-issued email reminders to lawyers regarding call and trial dates.
- Issued temporary 30-day grace period from court appearances for new attorneys and newly felony-qualified attorneys.
- Consolidated felony morning call dockets to reduce number of appearances.
- Cross-trained OJD staff to allow for early resolution of cases in the Justice Center.

- Worked with district attorney’s office to improve discovery practices (DA developed new reminder system to ensure timely discovery).
- Modified judge assignments to place judicial officers in felony arraignments for three-week assignments (instead of the normal weekly rotation) for consistency in handling attorney appointment issues.
- Created new analyst position at the Multnomah County Circuit Court to focus on criminal case data analysis and implementation of procedural changes.
- Restructuring misdemeanor docket to reduce the number of required appearances.
- Expanding omnibus motions beyond dispositive motions to be heard in advance of trial.
- Working with Sheriff’s Department to address available staffing for court hearings to minimize transport delays for hearings and trials.
- Exploring and implementing increased use of remote appearances to reduce in-person court appearances.
- Working with justice system stakeholders to implement a two-week pilot to restructure the felony arraignment docket to allow more time for attorney-client communications and evaluate feasibility.
- Working to develop a process to consolidate cases as early as possible—preferably at arraignment—to reduce the appointment of multiple attorneys to a single individual.

Additional Multnomah County Circuit Court Case Resolution Efforts

- “To continue to hold jury trials and keep cases moving during the pandemic, the Multnomah County Circuit Court pioneered the development of a business process for fully-remote jury selection to ensure that the court has enough jurors available for trials when social distancing limits the number of jurors we can have onsite. For that reason, we continue to conduct grand jury selection remotely to ensure that there are enough trial jurors onsite.” **(Multnomah County)**
- “Worked with stakeholders to modify the Multnomah County Justice Reinvestment program procedures to assist in getting LS/CMI assessments scheduled and identifying priority cases in need of a judicial settlement conference.” **(Multnomah County)**
 - * LS/CMI – Level of Service/Case Management Inventory is a tool to help assess the likelihood of repeat offenses and/or success on pretrial release.
- “Extended the first court date setting for misdemeanors to allow attorneys additional time to catch up on their existing caseload.” **(Multnomah County)**

What are the Chief Justice and the Oregon Judicial Department doing?

Actions taken by Chief Justice Martha Walters

- Worked with the Oregon State Bar (OSB) to expedite admission of out-of-state lawyers to practice in Oregon (comity rule).
- Contacted the Professional Liability Fund to allow retired attorneys to practice on a limited basis.

- Encouraged all judges and courts to convene local meetings and implement improvements.
- Wrote articles highlighting the value and importance of public defense providers and need for additional providers.
- Hosted and/or engaged in conversations at all levels of state government – from local jurisdictions to state workgroups and three-branch leadership discussions.
- Supported Oregon law schools' efforts to increase opportunities for engagement and awareness of public defense, including discussions with the Dean of the University of Oregon School of Law regarding actions the school could take to encourage law students to pursue careers in public defense and providing support for a request from the Willamette University College of Law to establish a public defense clinic.
- Encouraged all system stakeholders to identify potential solutions to address the public defense shortage.
- Directed collaborative effort between Uniform Trial Court Rules (UTCRC) Committee and Chief Justice's Criminal Justice Advisory Committee (CJAC) to review UTCRC proposals from Oregon Criminal Defense Lawyers Association (OCDLA).
- Encouraged local courts to identify and support efforts to improve system efficiencies, as well as efforts to resolve cases whether by plea or trial.
- Invited and welcome stakeholder proposed solutions and, where appropriate, offer support and resources.

Actions taken by Office of the State Court Administrator (OSCA)

- Added full-time criminal analyst position to evaluate and develop data and identify opportunities for statewide improvements.
- Committed significant senior judge resources to support case resolution efforts and to meet counsel's requests for Judicial Settlement Conferences.
- Worked with OPDS to develop consistent data collection on unrepresented persons in each judicial district and developed public dashboard to show location and status of unrepresented persons.
- Worked with OSB to create temporary Bar numbers in the Odyssey case management system to identify attorneys admitted through comity. Working with OSB to evaluate changes in conflict rules to increase representation opportunities.
- Assigned OSCA staff members to engage in state-level workgroups, subgroups, and local court meetings with stakeholders.
- Evaluating feasibility of stakeholder proposals relating to system efficiencies (e.g., OCDLA UTCRC proposals, ACLU, systemwide proposals including the use of remote proceedings, statewide e-discovery, etc.).
- Responded to requests for data, information relating to court processes, and other requests from legislators, legislator and legislative professional staff, and other interested parties.
- Continue working collaboratively with OPDS to improve and refine data collection efforts, as well as continue to provide opportunities for OPDS involvement on OJD-led stakeholder committee(s).
- Working with jails to create automated data exchanges reflecting accurate, updated information about the custody status of individuals with pending cases.
- In collaboration with OPDS, develop additional needed data reports.

Information was current as of December 12, 2022. Additional actions have likely occurred since and data will have changed. Please check with the relevant sources for updated information.