

# Senate Bill 263

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## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Changes certain mandatory minimum sentences into presumptive sentences. Allows departure from presumptive sentences on specified bases.

### A BILL FOR AN ACT

Relating to sentencing; creating new provisions; amending ORS 137.124, 137.700, 137.707, 138.060, 138.222, 161.610, 163.150, 165.072, 420.011 and 420A.203; repealing ORS 137.712 and sections 5, 6, 7 and 7a, chapter 852, Oregon Laws 1997; and providing for criminal sentence reduction that requires approval by a two-thirds majority.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** ORS 137.700 is amended to read:

137.700. (1) When **a court sentences** a person [is] convicted of one of the **following** offenses, **the presumptive sentence is:** [*listed in subsection (2)(a) of this section and the offense was committed on or after April 1, 1995, or of one of the offenses listed in subsection (2)(b) of this section and the offense was committed on or after October 4, 1997, the court shall impose, and the person shall serve, at least the entire term of imprisonment listed in subsection (2) of this section. The person is not, during the service of the term of imprisonment, eligible for release on post-prison supervision or any form of temporary leave from custody. The person is not eligible for any reduction in, or based on, the minimum sentence for any reason whatsoever under ORS 421.121 or any other statute. The court may impose a greater sentence if otherwise permitted by law, but may not impose a lower sentence than the sentence specified in subsection (2) of this section.*]

[(2) *The offenses to which subsection (1) of this section applies and the applicable mandatory minimum sentences are:*]

- 
- [(a)(A)] **(a)** Murder, as defined in  
ORS 163.115. ....300 months
  - [(B)] **(b)** Attempt or conspiracy  
to commit aggravated  
murder, as defined  
in ORS 163.095. ....120 months
  - [(C)] **(c)** Attempt or conspiracy  
to commit murder, as

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1		defined in ORS 163.115. ....90 months
2	[(D)]	(d) Manslaughter in the
3		first degree, as defined
4		in ORS 163.118. ....120 months
5	[(E)]	(e) Manslaughter in the
6		second degree, as defined
7		in ORS 163.125. ....75 months
8	[(F)]	(f) Assault in the first
9		degree, as defined in
10		ORS 163.185. ....90 months
11	[(G)]	(g) Assault in the second
12		degree, as defined in
13		ORS 163.175. ....70 months
14	[(H)]	(h) Kidnapping in the first
15		degree, as defined
16		in ORS 163.235. ....90 months
17	[(I)]	(i) Kidnapping in the second
18		degree, as defined in
19		ORS 163.225. ....70 months
20	[(J)]	(j) Rape in the first degree,
21		as defined in ORS 163.375. 100 months
22	[(K)]	(k) Rape in the second degree,
23		as defined in ORS 163.365. ....75 months
24	(L)	Sodomy in the first degree,
25		as defined in
26		ORS 163.405. ....100 months
27	[(M)]	(m) Sodomy in the second
28		degree, as defined in
29		ORS 163.395. ....75 months
30	[(N)]	(n) Unlawful sexual penetration
31		in the first degree, as
32		defined in ORS 163.411. ....100 months
33	[(O)]	(o) Unlawful sexual penetration
34		in the second degree, as
35		defined in ORS 163.408. ....75 months
36	[(P)]	(p) Sexual abuse in the first
37		degree, as defined in
38		ORS 163.427. ....75 months
39	[(Q)]	(q) Robbery in the first degree,
40		as defined in ORS 164.415. ....90 months
41	[(R)]	(r) Robbery in the second
42		degree, as defined in
43		ORS 164.405. ....70 months
44	[(b)(A)]	(s) Arson in the first degree,
45		as defined in ORS 164.325,

- 1           when the offense represented
- 2           a threat of serious
- 3           physical injury. ....90 months
- 4    [(B)] (t) Using a child in a display
- 5           of sexually explicit
- 6           conduct, as defined in
- 7           ORS 163.670. ....70 months
- 8    [(C)] (u) Compelling prostitution,
- 9           as defined in ORS 167.017....70 months

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12           **(2) The court may impose a sentence other than the sentence provided by subsection (1)**  
13 **of this section if the court imposes:**

- 14           **(a) A longer term of incarceration that is otherwise required or authorized by law; or**
- 15           **(b) A departure sentence authorized by the rules of the Oregon Criminal Justice Com-**
- 16 **mission and based upon findings of substantial and compelling reasons.**

17           **SECTION 2.** ORS 137.707 is amended to read:

18           137.707. (1)(a) Notwithstanding any other provision of law, when a person charged with aggra-  
19 vated murder, as defined in ORS 163.095, or an offense listed in subsection [(4)(a)] **(2)(a)** of this  
20 section is 15, 16 or 17 years of age at the time the offense is committed, and the offense is committed  
21 on or after April 1, 1995, or when a person charged with an offense listed in subsection [(4)(b)] **(2)(b)**  
22 of this section is 15, 16 or 17 years of age at the time the offense is committed, and the offense is  
23 committed on or after October 4, 1997, the person shall be prosecuted as an adult in criminal court.

24           (b) A district attorney, the Attorney General or a juvenile department counselor may not file in  
25 juvenile court a petition alleging that a person has committed an act that, if committed by an adult,  
26 would constitute aggravated murder or an offense listed in subsection [(4)] **(2)** of this section if the  
27 person was 15, 16 or 17 years of age at the time the act was committed.

28           (2) When **the court sentences** a person [charged] **prosecuted** under this section [is] **and** con-  
29 victed of an offense listed in **this** subsection, **the presumptive sentence is:** [(4) of this section, the  
30 court shall impose at least the presumptive term of imprisonment provided for the offense in subsection  
31 (4) of this section. The court may impose a greater presumptive term if otherwise permitted by law, but  
32 may not impose a lesser term. The person is not, during the service of the term of imprisonment, eligible  
33 for release on post-prison supervision or any form of temporary leave from custody. The person is not  
34 eligible for any reduction in, or based on, the minimum sentence for any reason under ORS 421.121  
35 or any other provision of law. ORS 138.012, 163.105 and 163.150 apply to sentencing a person prose-  
36 cuted under this section and convicted of aggravated murder under ORS 163.095 except that a person  
37 who was under 18 years of age at the time the offense was committed is not subject to a sentence of  
38 death.]

39           [(3) The court shall commit the person to the legal and physical custody of the Department of  
40 Corrections.]

41           [(4) The offenses to which this section applies and the presumptive sentences are:]

42  
43

- 44           (a)(A) Murder, as defined in
- 45           ORS 163.115 .....300 months

- 1 (B) Attempt or conspiracy
- 2 to commit aggravated
- 3 murder, as defined
- 4 in ORS 163.095 .....120 months
- 5 (C) Attempt or conspiracy
- 6 to commit murder, as
- 7 defined in ORS 163.115 .....90 months
- 8 (D) Manslaughter in the
- 9 first degree, as defined
- 10 in ORS 163.118 .....120 months
- 11 (E) Manslaughter in the
- 12 second degree, as defined
- 13 in ORS 163.125 .....75 months
- 14 (F) Assault in the first
- 15 degree, as defined
- 16 in ORS 163.185 .....90 months
- 17 (G) Assault in the second
- 18 degree, as defined
- 19 in ORS 163.175 .....70 months
- 20 (H) Kidnapping in the first
- 21 degree, as defined in
- 22 ORS 163.235 .....90 months
- 23 (I) Kidnapping in the second
- 24 degree, as defined in
- 25 ORS 163.225 .....70 months
- 26 (J) Rape in the first degree,
- 27 as defined in ORS 163.375..100 months
- 28 (K) Rape in the second
- 29 degree, as defined in
- 30 ORS 163.365 .....75 months
- 31 (L) Sodomy in the first
- 32 degree, as defined in
- 33 ORS 163.405 .....100 months
- 34 (M) Sodomy in the second
- 35 degree, as defined in
- 36 ORS 163.395 .....75 months
- 37 (N) Unlawful sexual
- 38 penetration in the first
- 39 degree, as defined
- 40 in ORS 163.411 .....100 months
- 41 (O) Unlawful sexual
- 42 penetration in the
- 43 second degree, as
- 44 defined in ORS 163.408 .....75 months
- 45 (P) Sexual abuse in the first

- 1 degree, as defined in
- 2 ORS 163.427 .....75 months
- 3 (Q) Robbery in the first
- 4 degree, as defined in
- 5 ORS 164.415 .....90 months
- 6 (R) Robbery in the second
- 7 degree, as defined in
- 8 ORS 164.405 .....70 months
- 9 (b)(A) Arson in the first degree,
- 10 as defined in
- 11 ORS 164.325, when
- 12 the offense represented
- 13 a threat of serious
- 14 physical injury. ....90 months
- 15 (B) Using a child in a display
- 16 of sexually explicit
- 17 conduct, as defined in
- 18 ORS 163.670. ....70 months
- 19 (C) Compelling prostitution,
- 20 as defined in ORS 167.017....70 months

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23 **(3) The court may impose a sentence other than the sentence provided by subsection (2)**

24 **of this section if the court imposes:**

25 **(a) A longer term of incarceration that is otherwise required or authorized by law; or**

26 **(b) A departure sentence authorized by the rules of the Oregon Criminal Justice Com-**

27 **mission and based upon findings of substantial and compelling reasons.**

28 **(4) ORS 138.012, 163.105 and 163.150 apply to sentencing a person prosecuted under this**

29 **section and convicted of aggravated murder under ORS 163.095 except that a person who was**

30 **under 18 years of age at the time the offense was committed is not subject to a sentence of**

31 **death.**

32 **(5) The court shall commit the person to the legal and physical custody of the Depart-**

33 **ment of Corrections.**

34 [(5)] **(6) If a person charged with an offense under this section is found guilty of a lesser in-**

35 **cluded offense and the lesser included offense is:**

36 (a) An offense listed in subsection [(4)] **(2)** of this section, the court shall sentence the person

37 as provided in [subsection (2)] **subsections (2) to (4)** of this section.

38 (b) Not an offense listed in subsection [(4)] **(2)** of this section:

39 (A) But constitutes an offense for which waiver is authorized under ORS 419C.349, the court,

40 upon motion of the district attorney, shall hold a hearing to determine whether to retain jurisdiction

41 or to transfer the case to juvenile court for disposition. In determining whether to retain jurisdic-

42 tion, the court shall consider the criteria for waiver in ORS 419C.349. If the court retains jurisdic-

43 tion, the court shall sentence the person as an adult under sentencing guidelines. If the court does

44 not retain jurisdiction, the court shall:

45 (i) Order that a presentence report be prepared;

1 (ii) Set forth in a memorandum any observations and recommendations that the court deems  
2 appropriate; and

3 (iii) Enter an order transferring the case to the juvenile court for disposition under ORS  
4 419C.067 and 419C.411.

5 (B) And is not an offense for which waiver is authorized under ORS 419C.349, the court may not  
6 sentence the person. The court shall:

7 (i) Order that a presentence report be prepared;

8 (ii) Set forth in a memorandum any observations and recommendations that the court deems  
9 appropriate; and

10 (iii) Enter an order transferring the case to the juvenile court for disposition under ORS  
11 419C.067 and 419C.411.

12 [(6)] (7) When a person is charged under this section, other offenses based on the same act or  
13 transaction shall be charged as separate counts in the same accusatory instrument and consolidated  
14 for trial, whether or not the other offenses are aggravated murder or offenses listed in subsection  
15 [(4)] (2) of this section. If it appears, upon motion, that the state or the person charged is prejudiced  
16 by the joinder and consolidation of offenses, the court may order an election or separate trials of  
17 counts or provide whatever other relief justice requires.

18 [(7)(a)] (8)(a) If a person charged and tried as provided in subsection [(6)] (7) of this section is  
19 found guilty of aggravated murder or an offense listed in subsection [(4)] (2) of this section and one  
20 or more other offenses, the court shall impose the sentence for aggravated murder or the offense  
21 listed in subsection [(4)] (2) of this section as provided in [subsection (2)] **subsections (2) to (4)** of  
22 this section and shall impose sentences for the other offenses as otherwise provided by law.

23 (b) If a person charged and tried as provided in subsection [(6)] (7) of this section is not found  
24 guilty of aggravated murder or an offense listed in subsection [(4)] (2) of this section, but is found  
25 guilty of one of the other charges that constitutes an offense for which waiver is authorized under  
26 ORS 419C.349, the court, upon motion of the district attorney, shall hold a hearing to determine  
27 whether to retain jurisdiction or to transfer the case to juvenile court for disposition. In determining  
28 whether to retain jurisdiction, the court shall consider the criteria for waiver in ORS 419C.349. If  
29 the court retains jurisdiction, the court shall sentence the person as an adult under sentencing  
30 guidelines. If the court does not retain jurisdiction, the court shall:

31 (A) Order that a presentence report be prepared;

32 (B) Set forth in a memorandum any observations and recommendations that the court deems  
33 appropriate; and

34 (C) Enter an order transferring the case to the juvenile court for disposition under ORS  
35 419C.067 and 419C.411.

36 **SECTION 3.** ORS 165.072 is amended to read:

37 165.072. As used in this section and ORS 165.074, unless the context requires otherwise:

38 (1) "Cardholder" means a person to whom a payment card is issued or a person who is author-  
39 ized to use the payment card.

40 (2) "Credit card" means a card, plate, booklet, credit card number, credit card account number  
41 or other identifying symbol, instrument or device that can be used to pay for, or to obtain on credit,  
42 goods or services.

43 (3) "Financial institution" means a financial institution as that term is defined in ORS 706.008.

44 (4) "Merchant" means:

45 (a) An owner or operator of a retail mercantile establishment;

1 (b) An agent, employee, lessee, consignee, franchisee, officer, director or independent contractor  
2 of an owner or operator of a retail mercantile establishment; and

3 (c) A person who receives what the person believes to be a payment card or information from  
4 a payment card from a cardholder as the instrument for obtaining something of value from the per-  
5 son.

6 (5) "Payment card" means a credit card, charge card, debit card, stored value card or any card  
7 that is issued to a person and allows the user to obtain something of value from a merchant.

8 (6) "Payment card transaction" means a sale or other transaction or act in which a payment  
9 card is used to pay for, or to obtain on credit, goods or services.

10 (7) "Payment card transaction record" means any record or evidence of a payment card trans-  
11 action, including, without limitation, any paper, sales draft, instrument or other writing and any  
12 electronic or magnetic transmission or record.

13 (8) "Person" does not include a financial institution or its authorized employee, representative  
14 or agent.

15 (9) "Previous conviction" *[has the meaning given that term in ORS 137.712]* **means a conviction**  
16 **that was entered prior to imposing sentence on the current crime, provided that the prior**  
17 **conviction is based on a crime committed in a separate criminal episode. "Previous con-**  
18 **conviction" does not include a conviction for a Class C felony, including an attempt or sollicita-**  
19 **tion to commit a Class B felony, or a misdemeanor, unless the conviction was entered within**  
20 **the 10-year period immediately preceding the date on which the current crime was commit-**  
21 **ted.**

22 (10) "Reencoder" means an electronic device that places encoded information from one payment  
23 card onto another payment card.

24 (11) "Scanning device" means an electronic device that is used to access, read, scan, obtain,  
25 memorize or store, temporarily or permanently, information encoded on a payment card.

26 **SECTION 4.** ORS 137.124 is amended to read:

27 137.124. (1) If the court imposes a sentence upon conviction of a felony that includes a term of  
28 incarceration that exceeds 12 months:

29 (a) The court shall not designate the correctional facility in which the defendant is to be con-  
30 fined but shall commit the defendant to the legal and physical custody of the Department of Cor-  
31 rections; and

32 (b) If the judgment provides that the term of incarceration be served consecutively to a term  
33 of incarceration of 12 months or less that was imposed in a previous proceeding by a court of this  
34 state upon conviction of a felony, the defendant shall serve any remaining part of the previously  
35 imposed term of incarceration in the legal and physical custody of the Department of Corrections.

36 (2)(a) If the court imposes a sentence upon conviction of a felony that includes a term of  
37 incarceration that is 12 months or less, the court shall commit the defendant to the legal and  
38 physical custody of the supervisory authority of the county in which the crime of conviction oc-  
39 curred.

40 (b) Notwithstanding paragraph (a) of this subsection, when the court imposes a sentence upon  
41 conviction of a felony that includes a term of incarceration that is 12 months or less, the court shall  
42 commit the defendant to the legal and physical custody of the Department of Corrections if the court  
43 orders that the term of incarceration be served consecutively to a term of incarceration that ex-  
44 ceeds 12 months that was imposed in a previous proceeding or in the same proceeding by a court  
45 of this state upon conviction of a felony.

1 (3) After assuming custody of the convicted person the Department of Corrections may transfer  
2 inmates from one correctional facility to another such facility for the purposes of diagnosis and  
3 study, rehabilitation and treatment, as best seems to fit the needs of the inmate and for the pro-  
4 tection and welfare of the community and the inmate.

5 (4) If the court imposes a sentence of imprisonment upon conviction of a misdemeanor, it shall  
6 commit the defendant to the custody of the supervisory authority of the county in which the crime  
7 of conviction occurred.

8 (5)(a) When a person under 18 years of age at the time of committing the offense and under 20  
9 years of age at the time of sentencing is committed to the Department of Corrections under ORS  
10 137.707, the Department of Corrections shall transfer the physical custody of the person to the  
11 Oregon Youth Authority as provided in ORS 420.011 if:

12 (A) The person will complete the sentence imposed before the person attains 25 years of age;  
13 or

14 (B) The Department of Corrections and the Oregon Youth Authority determine that, because of  
15 the person's age, immaturity, mental or emotional condition or risk of physical harm to the person,  
16 the person should not be incarcerated initially in a Department of Corrections institution.

17 (b) A person placed in the custody of the Oregon Youth Authority under this subsection shall  
18 be returned to the physical custody of the Department of Corrections whenever the Director of the  
19 Oregon Youth Authority, after consultation with the Department of Corrections, determines that the  
20 conditions or circumstances that warranted the transfer of custody under this subsection are no  
21 longer present.

22 (6)(a) When a person under 18 years of age at the time of committing the offense and under 20  
23 years of age at the time of sentencing is committed to the legal and physical custody of the De-  
24 partment of Corrections or the supervisory authority of a county following waiver under ORS  
25 419C.349, 419C.352, 419C.364 or 419C.370 or sentencing under ORS 137.707 [(5)(b)(A) or (7)(b) or  
26 137.712] **(6)(b)(A) or (8)(b)**, the Department of Corrections or the supervisory authority of a county  
27 shall transfer the person to the physical custody of the Oregon Youth Authority for placement as  
28 provided in ORS 420.011 (3). The terms and conditions of the person's incarceration and custody are  
29 governed by ORS 420A.200 to 420A.206.

30 (b) When a person under 16 years of age is waived under ORS 419C.349, 419C.352, 419C.364 or  
31 419C.370 and subsequently is sentenced to a term of imprisonment in the county jail, the sheriff shall  
32 transfer the person to a youth correction facility for physical custody as provided in ORS 420.011  
33 (3).

34 (7) If the Director of the Oregon Youth Authority concurs in the decision, the Department of  
35 Corrections or the supervisory authority of a county shall transfer the physical custody of a person  
36 committed to the Department of Corrections or the supervisory authority of the county under sub-  
37 section (1) or (2) of this section to the Oregon Youth Authority as provided in ORS 420.011 (2) if:

38 (a) The person was at least 18 years of age but under 20 years of age at the time of committing  
39 the felony for which the person is being sentenced to a term of incarceration;

40 (b) The person is under 20 years of age at the time of commitment to the Department of Cor-  
41 rections or the supervisory authority of the county;

42 (c) The person has not been committed previously to the legal and physical custody of the De-  
43 partment of Corrections or the supervisory authority of a county;

44 (d) The person has not been convicted and sentenced to a term of incarceration for the com-  
45 mission of a felony in any other state;



1 (e) The person will complete the term of incarceration imposed before the person attains 25  
 2 years of age;

3 (f) The person is likely in the foreseeable future to benefit from the rehabilitative and treatment  
 4 programs administered by the Oregon Youth Authority;

5 (g) The person does not pose a substantial danger to Oregon Youth Authority staff or persons  
 6 in the custody of the Oregon Youth Authority; and

7 (h) At the time of the proposed transfer, no more than 50 persons are in the physical custody  
 8 of the Oregon Youth Authority under this subsection.

9 (8) Notwithstanding the provisions of subsections (5)(a)(A) or (7) of this section, the department  
 10 or the supervisory authority of a county may not transfer the physical custody of the person under  
 11 subsection (5)(a)(A) or (7) of this section if the Director of the Oregon Youth Authority, after con-  
 12 sultation with the Department of Corrections or the supervisory authority of a county, determines  
 13 that, because of the person's age, mental or emotional condition or risk of physical harm to other  
 14 persons, the person should not be incarcerated in a youth correction facility.

15 **SECTION 5.** ORS 138.060 is amended to read:

16 138.060. (1) The state may take an appeal from the circuit court to the Court of Appeals from:

17 (a) An order made prior to trial dismissing or setting aside the accusatory instrument;

18 (b) An order arresting the judgment;

19 (c) An order made prior to trial suppressing evidence;

20 (d) An order made prior to trial for the return or restoration of things seized;

21 (e) A judgment of conviction based on the sentence as provided in ORS 138.222;

22 *[(f) An order in a probation revocation hearing finding that a defendant who was sentenced to*  
 23 *probation under ORS 137.712 has not violated a condition of probation by committing a new crime;]*

24 *[(g)]* (f) An order made after a guilty finding dismissing or setting aside the accusatory instru-  
 25 ment;

26 *[(h)]* (g) An order granting a new trial; or

27 *[(i)]* (h) An order dismissing an accusatory instrument under ORS 136.130.

28 (2) Notwithstanding subsection (1) of this section, when the state chooses to appeal from an or-  
 29 der listed in paragraph (a) or (b) of this subsection, the state shall take the appeal from the circuit  
 30 court to the Supreme Court if the defendant is charged with murder or aggravated murder. The or-  
 31 ders to which this subsection applies are:

32 (a) An order made prior to trial suppressing evidence; and

33 (b) An order made prior to trial dismissing or setting aside the accusatory instrument.

34 (3) In an appeal by the state under subsection (2) of this section, the Supreme Court shall issue  
 35 its decision no later than one year after the date of oral argument or, if the appeal is not orally  
 36 argued, the date that the State Court Administrator delivers the briefs to the Supreme Court for  
 37 decision. Failure of the Supreme Court to issue a decision within one year is not a ground for dis-  
 38 missal of the appeal.

39 **SECTION 6.** ORS 138.222 is amended to read:

40 138.222. (1) Notwithstanding the provisions of ORS 138.040 and 138.050, a sentence imposed for  
 41 a judgment of conviction entered for a felony committed on or after November 1, 1989, may be re-  
 42 viewed only as provided by this section.

43 (2) Except as otherwise provided in subsection (4)(c) of this section, on appeal from a judgment  
 44 of conviction entered for a felony committed on or after November 1, 1989, the appellate court may  
 45 not review:

1 (a) Any sentence that is within the presumptive sentence prescribed by the rules of the Oregon  
2 Criminal Justice Commission.

3 (b) A sentence of probation when the rules of the Oregon Criminal Justice Commission prescribe  
4 a presumptive sentence of imprisonment but allow a sentence of probation without departure.

5 (c) A sentence of imprisonment when the rules of the Oregon Criminal Justice Commission pre-  
6 scribe a presumptive sentence of imprisonment but allow a sentence of probation without departure.

7 (d) Any sentence resulting from a stipulated sentencing agreement between the state and the  
8 defendant which the sentencing court approves on the record.

9 (e) Except as authorized in subsections (3) and (4) of this section, any other issue related to  
10 sentencing.

11 (3) In any appeal from a judgment of conviction imposing a sentence that departs from the  
12 presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission, sentence  
13 review is limited to whether the sentencing court's findings of fact and reasons justifying a depart-  
14 ture from the sentence prescribed by the rules of the Oregon Criminal Justice Commission:

15 (a) Are supported by the evidence in the record; and

16 (b) Constitute substantial and compelling reasons for departure.

17 (4) In any appeal, the appellate court may review a claim that:

18 (a) The sentencing court failed to comply with requirements of law in imposing or failing to  
19 impose a sentence;

20 (b) The sentencing court erred in ranking the crime seriousness classification of the current  
21 crime or in determining the appropriate classification of a prior conviction or juvenile adjudication  
22 for criminal history purposes; or

23 (c) The sentencing court erred in failing to impose a [*minimum*] **presumptive** sentence that is  
24 prescribed by ORS 137.700 or 137.707.

25 (5) The appellate court may reverse or affirm the sentence. If the appellate court concludes that  
26 the trial court's factual findings are not supported by evidence in the record or do not establish  
27 substantial and compelling reasons for a departure, it shall remand the case to the trial court for  
28 resentencing. If the appellate court determines that the sentencing court, in imposing a sentence in  
29 the case, committed an error that requires resentencing, the appellate court shall remand the entire  
30 case for resentencing. The sentencing court may impose a new sentence for any conviction in the  
31 remanded case.

32 (6) The appellate court shall issue a written opinion whenever the judgment of the sentencing  
33 court is reversed and may issue a written opinion in any other case when the appellate court be-  
34 lieves that a written opinion will provide guidance to sentencing judges and others in implementing  
35 the sentencing guidelines adopted by the Oregon Criminal Justice Commission provided that the  
36 appellate courts may provide by rule for summary disposition of cases arising under this section  
37 when no substantial question is presented by the appeal.

38 (7) Either the state or the defendant may appeal a judgment of conviction based on the sentence  
39 for a felony committed on or after November 1, 1989, to the Court of Appeals subject to the limita-  
40 tions of chapter 790, Oregon Laws 1989. The defendant may appeal under this subsection only upon  
41 showing a colorable claim of error in a proceeding if the appeal is from a proceeding in which:

42 (a) A sentence was entered subsequent to a plea of guilty or no contest;

43 (b) Probation was revoked, the period of probation was extended, a new condition of probation  
44 was imposed, an existing condition of probation was modified or a sentence suspension was revoked;

45 or

1 (c) A sentence was entered subsequent to a resentencing ordered by an appellate court or a  
 2 post-conviction relief court.

3 **SECTION 7.** ORS 161.610 is amended to read:

4 161.610. (1) As used in this section, “firearm” means a weapon which is designed to expel a  
 5 projectile by the action of black powder or smokeless powder.

6 (2) The use or threatened use of a firearm, whether operable or inoperable, by a defendant  
 7 during the commission of a felony may be pleaded in the accusatory instrument and proved at trial  
 8 as an element in aggravation of the crime as provided in this section. When a crime is so pleaded,  
 9 the aggravated nature of the crime may be indicated by adding the words “with a firearm” to the  
 10 title of the offense. The unaggravated crime shall be considered a lesser included offense.

11 (3) Notwithstanding the provisions of ORS 161.605 or 137.010 (3) and except as otherwise pro-  
 12 vided in subsection (6) of this section, if a defendant is convicted of a felony having as an element  
 13 the defendant’s use or threatened use of a firearm during the commission of the crime, the court  
 14 shall impose at least the minimum term of imprisonment as provided in subsection (4) of this section.  
 15 Except as provided in ORS 144.122 and 144.126 and subsection (5) of this section, in no case shall  
 16 any person punishable under this section become eligible for work release, parole, temporary leave  
 17 or terminal leave until the minimum term of imprisonment is served, less a period of time equivalent  
 18 to any reduction of imprisonment granted for good time served or time credits earned under ORS  
 19 421.121, nor shall the execution of the sentence imposed upon such person be suspended by the  
 20 court.

21 (4) The minimum terms of imprisonment for felonies having as an element the defendant’s use  
 22 or threatened use of a firearm in the commission of the crime shall be as follows:

23 (a) Except as provided in subsection (5) of this section, upon the first conviction for such felony,  
 24 five years, except that if the firearm is a machine gun, short-barreled rifle, short-barreled shotgun  
 25 or is equipped with a firearms silencer, the term of imprisonment shall be 10 years.

26 (b) Upon conviction for such felony committed after punishment pursuant to paragraph (a) of  
 27 this subsection, 10 years, except that if the firearm is a machine gun, short-barreled rifle, short-  
 28 barreled shotgun or is equipped with a firearms silencer, the term of imprisonment shall be 20 years.

29 (c) Upon conviction for such felony committed after imprisonment pursuant to paragraph (b) of  
 30 this subsection, 30 years.

31 (5) If it is the first time that the defendant is subject to punishment under this section, rather  
 32 than impose the sentence otherwise required by subsection (4)(a) of this section, the court may:

33 (a) For felonies committed prior to November 1, 1989, suspend the execution of the sentence or  
 34 impose a lesser term of imprisonment, when the court expressly finds mitigating circumstances jus-  
 35 tifying such lesser sentence and sets forth those circumstances in its statement on sentencing; or

36 (b) For felonies committed on or after November 1, 1989, impose a lesser sentence in accordance  
 37 with the rules of the Oregon Criminal Justice Commission.

38 (6) When a defendant who is convicted of a felony having as an element the defendant’s use or  
 39 threatened use of a firearm during the commission of the crime is a person who was waived from  
 40 juvenile court under ORS 137.707 [(5)(b)(A)] **(6)(b)(A)**, 419C.349, 419C.352, 419C.364 or 419C.370, the  
 41 court is not required to impose a minimum term of imprisonment under this section.

42 **SECTION 8.** ORS 420.011 is amended to read:

43 420.011. (1) Except as provided in subsections (2) and (3) of this section, admissions to the youth  
 44 correction facilities are limited to youth offenders who are at least 12 but less than 19 years of age,  
 45 found by the juvenile court to have committed an act that if committed by an adult would constitute

1 aggravated murder, murder, a felony or a Class A misdemeanor and placed in the legal custody of  
2 the Oregon Youth Authority. A youth offender admitted to a youth correction facility may not be  
3 transferred by administrative process to any penal or correctional institution.

4 (2)(a) In addition to the persons placed in the legal custody of the youth authority under ORS  
5 419C.478 (1) or 419C.481, and with the concurrence of the Director of the Oregon Youth Authority  
6 or the director's designee, persons who are committed to the Department of Corrections under ORS  
7 137.124 and meet the requirements of ORS 137.124 (5) or (7) may be temporarily assigned to a youth  
8 correction facility as provided by ORS 137.124 (5) or (7). A person assigned on such a temporary  
9 basis remains within the legal custody of the Department of Corrections and such reassignment is  
10 subject to termination by the Director of the Oregon Youth Authority by referring the person back  
11 to the Department of Corrections as provided in paragraph (b) of this subsection.

12 (b) After a person is transferred to the physical custody of the youth authority under ORS  
13 137.124 (5) or (7), the Director of the Oregon Youth Authority may refer the person back to the  
14 Department of Corrections for physical custody and placement if the director, after consulting with  
15 the Department of Corrections, determines that the person:

16 (A) Poses a substantial danger to youth authority staff or persons in the custody of the youth  
17 authority; or

18 (B) Is not likely, in the foreseeable future, to benefit from the rehabilitation and treatment pro-  
19 grams administered by the youth authority and is appropriate for placement in a Department of  
20 Corrections institution.

21 (3) Any person under 18 years of age at the time of committing the crime and under 20 years  
22 of age at the time of sentencing and commitment who, after waiver under ORS 419C.349, 419C.352,  
23 419C.364 or 419C.370 or sentencing under ORS 137.707 [(5)(b)(A) or (7)(b) or 137.712] **(6)(b)(A) or**  
24 **(8)(b)**, is sentenced to a term of imprisonment in the custody of the Department of Corrections, and  
25 any person under 16 years of age who after waiver under ORS 419C.349, 419C.352, 419C.364 or  
26 419C.370 or sentencing under ORS 137.707 [(5)(b)(A) or (7)(b) or 137.712] **(6)(b)(A) or (8)(b)** is sen-  
27 tenced to a term of imprisonment in the county jail, shall be temporarily assigned to a youth cor-  
28 rection facility by the Department of Corrections, or by the sheriff to whose custody the person has  
29 been committed, pursuant to ORS 137.124 (6). The director shall designate the appropriate youth  
30 correction facility or schools for such assignment. A person assigned to a youth correction facility  
31 under ORS 137.124 (6) and this subsection remains within the legal custody of the Department of  
32 Corrections or sheriff to whose custody the person was committed. The assignment of such a person  
33 to the youth correction facility is subject, when the person is 16 years of age or older, to termi-  
34 nation by the director by referring the person back to the Department of Corrections or the sheriff  
35 to serve the balance of the person's sentence. Assignment to a youth correction facility pursuant to  
36 ORS 137.124 (6) and this subsection, if not terminated earlier by the director, shall terminate upon  
37 the person's attaining the age specified in ORS 420A.010 (5) setting the age limits for which the  
38 Oregon Youth Authority may retain legal and physical custody of the person, and the person shall  
39 be referred to the Department of Corrections or the sheriff having legal custody of the person to  
40 serve the balance of the person's sentence.

41 (4) Whenever a person committed to the custody of the Department of Corrections is temporarily  
42 assigned to a youth correction facility pursuant to this section, the youth authority may provide  
43 programs and treatment for the person, and may adopt rules relating to conditions of confinement  
44 at the youth correction facility, as the youth authority determines are appropriate. However, the  
45 person remains subject to laws and rules of the State Board of Parole and Post-Prison Supervision

1 relating to parole.

2 **SECTION 9.** ORS 420A.203 is amended to read:

3 420A.203. (1)(a) This section and ORS 420A.206 apply only to persons who were under 18 years  
4 of age at the time of the commission of the offense for which the persons were sentenced to a term  
5 of imprisonment, who committed the offense on or after June 30, 1995, and who were:

6 (A) Sentenced to a term of imprisonment of at least 24 months following waiver under ORS  
7 419C.349, 419C.352, 419C.364 or 419C.370; or

8 (B) Sentenced to a term of imprisonment of at least 24 months under ORS 137.707 [(5)(b)(A) or  
9 (7)(b)] **(6)(b)(A) or (8)(b)**.

10 (b) When a person described in paragraph (a) of this subsection has served one-half of the sen-  
11 tence imposed, the sentencing court shall determine what further commitment or disposition is ap-  
12 propriate as provided in this section. As used in this subsection and subsection (2) of this section,  
13 "sentence imposed" means the total period of mandatory incarceration imposed for all convictions  
14 resulting from a single prosecution or criminal proceeding not including any reduction in the sen-  
15 tence under ORS 421.121 or any other statute.

16 (2)(a) No more than 120 days and not less than 60 days before the date on which a person has  
17 served one-half of the sentence imposed, the Oregon Youth Authority or the Department of Cor-  
18 rections, whichever has physical custody of the person, shall file in the sentencing court a notice  
19 and request that the court set a time and place for the hearing required under this section. The  
20 youth authority or department shall serve the person with a copy of the notice and request for  
21 hearing on or before the date of filing.

22 (b) Upon receiving the notice and request for a hearing under paragraph (a) of this subsection,  
23 the sentencing court shall schedule a hearing for a date not more than 30 days after the date on  
24 which the person will have served one-half of the sentence imposed or such later date as is agreed  
25 upon by the parties.

26 (c) The court shall notify the following of the time and place of the hearing:

27 (A) The person and the person's parents;

28 (B) The records supervisor of the correctional institution in which the person is incarcerated;  
29 and

30 (C) The district attorney who prosecuted the case.

31 (d) The court shall make reasonable efforts to notify the following of the time and place of the  
32 hearing:

33 (A) The victim and the victim's parents or legal guardian; and

34 (B) Any other person who has filed a written request with the court to be notified of any hear-  
35 ing concerning the transfer, discharge or release of the person.

36 (3) In a hearing under this section:

37 (a) The person and the state are parties to the proceeding.

38 (b) The person has the right to appear with counsel. If the person requests that the court ap-  
39 point counsel and the court determines that the person is financially eligible for appointed counsel  
40 at state expense, the court shall order that counsel be appointed.

41 (c) The district attorney represents the state.

42 (d) The court shall determine admissibility of evidence as if the hearing were a sentencing pro-  
43 ceeding.

44 (e) The court may consider, when relevant, written reports of the Oregon Youth Authority, the  
45 Department of Corrections and qualified experts, in addition to the testimony of witnesses. Within

1 a reasonable time before the hearing, as determined by the court, the person must be given the op-  
2 portunity to examine all reports and other documents concerning the person that the state, the  
3 Oregon Youth Authority or the Department of Corrections intends to submit for consideration by  
4 the court at the hearing.

5 (f) Except as otherwise provided by law or by order of the court based on good cause, the person  
6 must be given access to the records maintained in the person's case by the Oregon Youth Authority  
7 and the Department of Corrections.

8 (g) The person may examine all of the witnesses called by the state, may subpoena and call  
9 witnesses to testify on the person's behalf and may present evidence and argument. The court may  
10 permit witnesses to appear by telephone or other two-way electronic communication device.

11 (h) The hearing must be recorded.

12 (i) The hearing and the record of the hearing are open to the public.

13 (j) The question to be decided is which of the dispositions provided in subsection (4) of this  
14 section should be ordered in the case.

15 (k) The person has the burden of proving by clear and convincing evidence that the person has  
16 been rehabilitated and reformed, and if conditionally released, the person would not be a threat to  
17 the safety of the victim, the victim's family or the community and that the person would comply with  
18 the release conditions.

19 (4)(a) At the conclusion of the hearing and after considering and making findings regarding each  
20 of the factors in paragraph (b) of this subsection, the court shall order one of the following dispo-  
21 sitions:

22 (A) Order that the person serve the entire remainder of the sentence of imprisonment imposed,  
23 taking into account any reduction in the sentence under ORS 421.121 or any other statute, with the  
24 person's physical custody determined under ORS 137.124, 420.011 and 420A.200.

25 (B) Order that the person be conditionally released under ORS 420A.206 at such time as the  
26 court may order, if the court finds that the person:

27 (i) Has been rehabilitated and reformed;

28 (ii) Is not a threat to the safety of the victim, the victim's family or the community; and

29 (iii) Will comply with the conditions of release.

30 (b) In making the determination under this section, the court shall consider:

31 (A) The experiences and character of the person before and after commitment to the Oregon  
32 Youth Authority or the Department of Corrections;

33 (B) The person's juvenile and criminal records;

34 (C) The person's mental, emotional and physical health;

35 (D) The gravity of the loss, damage or injury caused or attempted, during or as part of the  
36 criminal act for which the person was convicted and sentenced;

37 (E) The manner in which the person committed the criminal act for which the person was con-  
38 victed and sentenced;

39 (F) The person's efforts, participation and progress in rehabilitation programs since the person's  
40 conviction;

41 (G) The results of any mental health or substance abuse treatment;

42 (H) Whether the person demonstrates accountability and responsibility for past and future con-  
43 duct;

44 (I) Whether the person has made and will continue to make restitution to the victim and the  
45 community;

1 (J) Whether the person will comply with and benefit from all conditions that will be imposed if  
2 the person is conditionally released;

3 (K) The safety of the victim, the victim's family and the community;

4 (L) The recommendations of the district attorney, the Oregon Youth Authority and the Depart-  
5 ment of Corrections; and

6 (M) Any other relevant factors or circumstances raised by the state, the Oregon Youth Au-  
7 thority, the Department of Corrections or the person.

8 (5) The court shall provide copies of its disposition order under subsection (4) of this section to  
9 the parties, to the records supervisor of the correctional institution in which the person is  
10 incarcerated and to the manager of the institution-based records office of the Department of Cor-  
11 rections.

12 (6) The person or the state may appeal an order entered under this section. On appeal, the ap-  
13 pellate court's review is limited to claims that:

14 (a) The disposition is not authorized under this section;

15 (b) The court failed to comply with the requirements of this section in imposing the disposition;  
16 or

17 (c) The findings of the court are not supported by substantial evidence in the record.

18 **SECTION 10.** ORS 163.150 is amended to read:

19 163.150. (1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, ex-  
20 cept as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing  
21 proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described  
22 in ORS 163.105 (1)(c), life imprisonment without the possibility of release or parole, as described in  
23 ORS 163.105 (1)(b), or death. The proceeding shall be conducted in the trial court before the trial  
24 jury as soon as practicable. If a juror for any reason is unable to perform the function of a juror,  
25 the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the  
26 name of one of the alternate jurors, who shall then become a member of the jury for the sentencing  
27 proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt.  
28 The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate  
29 on the issue of the sentence. If the defendant has pleaded guilty, the sentencing proceeding shall  
30 be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented  
31 as to any matter that the court deems relevant to sentence including, but not limited to, victim im-  
32 pact evidence relating to the personal characteristics of the victim or the impact of the crime on  
33 the victim's family and any aggravating or mitigating evidence relevant to the issue in paragraph  
34 (b)(D) of this subsection; however, neither the state nor the defendant shall be allowed to introduce  
35 repetitive evidence that has previously been offered and received during the trial on the issue of  
36 guilt. The court shall instruct the jury that all evidence previously offered and received may be  
37 considered for purposes of the sentencing hearing. This subsection shall not be construed to au-  
38 thorize the introduction of any evidence secured in violation of the Constitution of the United States  
39 or of the State of Oregon. The state and the defendant or the counsel of the defendant shall be  
40 permitted to present arguments for or against a sentence of death and for or against a sentence of  
41 life imprisonment with or without the possibility of release or parole.

42 (b) Upon the conclusion of the presentation of the evidence, the court shall submit the following  
43 issues to the jury:

44 (A) Whether the conduct of the defendant that caused the death of the deceased was committed  
45 deliberately and with the reasonable expectation that death of the deceased or another would result;

1 (B) Whether there is a probability that the defendant would commit criminal acts of violence  
2 that would constitute a continuing threat to society;

3 (C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was  
4 unreasonable in response to the provocation, if any, by the deceased; and

5 (D) Whether the defendant should receive a death sentence.

6 (c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b)  
7 of this subsection, any mitigating circumstances offered in evidence, including but not limited to the  
8 defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of  
9 the mental and emotional pressure under which the defendant was acting at the time the offense  
10 was committed.

11 (B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this sub-  
12 section "no" if, after considering any aggravating evidence and any mitigating evidence concerning  
13 any aspect of the defendant's character or background, or any circumstances of the offense and any  
14 victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors  
15 believe that the defendant should not receive a death sentence.

16 (d) The state must prove each issue submitted under paragraph (b)(A) to (C) of this subsection  
17 beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue  
18 considered.

19 (e) The court shall charge the jury that it may not answer any issue "yes," under paragraph (b)  
20 of this subsection unless it agrees unanimously.

21 (f) If the jury returns an affirmative finding on each issue considered under paragraph (b) of this  
22 subsection, the trial judge shall sentence the defendant to death.

23 (2)(a) Upon the conclusion of the presentation of the evidence, the court shall also instruct the  
24 jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, the trial  
25 court shall sentence the defendant to life imprisonment without the possibility of release or parole,  
26 as described in ORS 163.105 (1)(b), unless 10 or more members of the jury further find that there are  
27 sufficient mitigating circumstances to warrant life imprisonment, in which case the trial court shall  
28 sentence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

29 (b) If the jury returns a negative finding on any issue under subsection (1)(b) of this section and  
30 further finds that there are sufficient mitigating circumstances to warrant life imprisonment, the  
31 trial court shall sentence the defendant to life imprisonment in the custody of the Department of  
32 Corrections as provided in ORS 163.105 (1)(c).

33 (3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707 (2) **to** (4) ap-  
34 plies or the state advises the court on the record that the state declines to present evidence for  
35 purposes of sentencing the defendant to death, the court:

36 (A) Shall not conduct a sentencing proceeding as described in subsection (1) of this section, and  
37 a sentence of death shall not be ordered.

38 (B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sen-  
39 tenced to life imprisonment without the possibility of release or parole as described in ORS 163.105  
40 (1)(b) or life imprisonment as described in ORS 163.105 (1)(c). If the defendant waives all rights to  
41 a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact.  
42 The procedure for the sentencing proceeding, whether before a court or a jury, shall follow the  
43 procedure of subsection (1)(a) of this section, as modified by this subsection.

44 (b) Following the presentation of evidence and argument under paragraph (a) of this subsection,  
45 the court shall instruct the jury that the trial court shall sentence the defendant to life



1 imprisonment without the possibility of release or parole as described in ORS 163.105 (1)(b), unless  
2 after considering all of the evidence submitted, 10 or more members of the jury find there are suf-  
3 ficient mitigating circumstances to warrant life imprisonment with the possibility of parole as de-  
4 scribed in ORS 163.105 (1)(c). If 10 or more members of the jury find there are sufficient mitigating  
5 circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sen-  
6 tence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

7 (c) Nothing in this subsection shall preclude the court from sentencing the defendant to life  
8 imprisonment, as described in ORS 163.105 (1)(c), or life imprisonment without the possibility of re-  
9 lease or parole, as described in ORS 163.105 (1)(b), pursuant to a stipulation of sentence or stipu-  
10 lation of sentencing facts agreed to and offered by both parties if the defendant waives all rights to  
11 a jury sentencing proceeding.

12 (4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant  
13 who has been sentenced to life imprisonment without possibility of release or parole will instead be  
14 sentenced to life imprisonment in the custody of the Department of Corrections as provided in ORS  
15 163.105 (2), the defendant shall be confined for a minimum of 30 years without possibility of parole,  
16 release on work release or any form of temporary leave or employment at a forest or work camp.  
17 Subsection (2) of this section shall apply only to trials commencing on or after July 19, 1989.

18 (5) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial during  
19 the sentencing proceeding, the trial court, at the election of the state, shall either:

20 (a) Sentence the defendant to imprisonment for life in the custody of the Department of Cor-  
21 rections as provided in ORS 163.105 (1)(c); or

22 (b) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding  
23 to determine if the defendant should be sentenced to:

24 (A) Death;

25 (B) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105  
26 (1)(b); or

27 (C) Imprisonment for life in the custody of the Department of Corrections as provided in ORS  
28 163.105 (1)(c).

29 **SECTION 11. ORS 137.712 and sections 5, 6, 7 and 7a, chapter 852, Oregon Laws 1997, are**  
30 **repealed.**

31 **SECTION 12. The amendments to ORS 137.124, 137.700, 137.707, 138.060, 138.222, 161.610,**  
32 **163.150, 165.072, 420.011 and 420A.203 by sections 1 to 10 of this 2005 Act and the repeal of**  
33 **ORS 137.712 and sections 5, 6, 7 and 7a, chapter 852, Oregon Laws 1997, by section 11 of this**  
34 **2005 Act apply to offenses committed on or after the effective date of this 2005 Act.**

35