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DATE: March 28, 2019

TO: Honorable Jennifer Williamson, Chair

FROM: Aaron Knott, Legislative Director

SUBJECT: HB 2399 – "Relating to crime" omnibus bill

HB 2399 is the annual "omnibus" bill of the Department of Justice. This bill is meant to make a number of technical fixes of a largely procedural nature throughout the criminal justice system. Because these fixes are meant to be uncontroversial and consensus in nature, a special effort is made to furnish the text of the proposal to all criminal justice stakeholders well in advance of the legislative session and, if consensus cannot be reached on any of the individual provisions contained in the bill, it is the policy of the Department of Justice to remove those provisions.

-1 amendments will bring the text of HB 2399 into accord with this policy by removing several sections around which consensus could not be reached and adding additional sections which developed during stakeholder discussions after the start of session. The below guide refers to the -1 amendments.

SECTION 1 – Compensatory Fines

Removed by the -1 Amendment.

SECTION 2 – Appeals from Confession Rulings

Removed by the -1 Amendment.

SECTION 3 – Demurrer Appeals

Problem: ORS 138.261 provides that certain state's appeals in criminal cases (felonies where the defendant is in custody) are expedited in the Court of Appeals or the Supreme Court. Not included in that list is a state's appeal from the grant of a pre-trial demurrer. This appears to be a drafting error on the part of the workgroup that recently amended the appellate jurisdiction statutes.

Solution: This section corrects that scriber's error by adding a reference to the missing "(b)" in the text of ORS 138.261as follows:

(1) When a defendant is charged with a felony and is in custody pending an appeal under ORS 138.045(1) (a), **(b),** or (d), the Court of Appeals or the Supreme Court shall decide the appeal within the time limits prescribed by this section.

SECTION 4 – PCR/Post-Prison Supervision

Problem: ORS 138.570 currently provides that the district attorney (DA) handles defense of post-conviction release (PCR) actions when the petitioner is out of custody (so, either the petitioner never went to prison, or they have served all of their prison time and have been released). The Department of Justice handles all PCR actions when the petitioner is in Department of Corrections' custody or has been released on parole or conditional pardon. However, if the petitioner is releases on post-prison supervision (PPS) the DA handles the defense of the PCR action. This sometimes leads to inconsistent handling of PCR issues between petitioners who are on parole versus those on PPS.

Solution: The Department of Justice (DOJ) will assume responsibility for cases where the petitioner has been released from prison and is now on post-prison supervision (PPS). This is a small universe of cases, but it would be consistent with how DOJ already handles PCR cases from petitioners who are out on parole or conditional pardon (i.e., DOJ handles them, the DA does not).

SECTION 5 – Contact with Victims in PCR

Problem: ORS 138.625(5) effectuates a crime victim's right not to talk to representatives of the "defendant" once the case moves into the PCR stage. As a practical matter, the "defendant" is often the State of Oregon, so a literal reading of the statute is that the victim does not have to talk to the State, which is not the outcome desired by the statute. This means that petitioner's counsel (the actual defendant) might be free to try to talk to the victim even when the victim does not want the contact, and that the State cannot do so.

Solution: This proposal changes references to "defense" and "defendant" to the "petitioner" to effectuate the intent of the ORS 138.625.

SECTION 6(1) – PCR Cross-Appeal

Problem: In most cases, when one party files an appeal, the other party has 10 extra days to file a notice of cross appeal. See, e.g., ORS 138.071 (permitting a defendant to file a cross appeal 10 days after the 30 days allowed for the state to file an appeal in a criminal case). In post-conviction appeals, there is no provision made for filing a cross-appeal, much less for giving the cross-appellant 10 extra days. This can create some challenges, especially for the state, because sometimes we only want to file an appeal if the petitioner first files an appeal. But if petitioner waits until the 30th day to file their appeal, we often do not have enough time to file our cross-appeal. So, we end up playing a game of chicken with petitioner about who files an appeal and then each feeling the need to file a precautionary appeal.

Solution: This section requires the party cross-appealing to serve and file the notice of cross-appeal within 10 days.

SECTION 6(2) – PCR AG Representation

Problem: ORS 138.570 identifies who the named defendant in PCR actions is, and who represents that named defendant. If the named defendant is the superintendent of a prison, the Attorney General represents him or her. If the named defendant is the State of Oregon (because the petitioner is not in prison), the DA represents the State in Circuit court. This statute leaves ambiguity about what happens when a DA PCR case moves to the appellate court.

Solution: This proposal adds a statement at the end of ORS 138.570 providing that, in all appeals in state or federal courts, the Attorney General will represent the post-conviction defendant.

SECTION 7 – Theft Values Threshold

Problem: ORS 164.115 provides that, for purposes of the theft statutes, if the value of stolen property cannot be reasonably ascertained, it shall be presumed to be "less than $50." That made sense when the dollar value threshold for Theft III was $50. But, that threshold has since increased to $100.

Solution: This section changes the dollar amount in ORS 164.115 from $50 to $100.

REMOVE: SECTION 8 – Racketeering Fix

Removed by the -1 Amendment.

ADD NEW SECTION: Remote Filing of Affidavit

Problem: Judges have noted difficulty with ORS 133.545(8), which allows for a remote warrant procedure if the officer delivers a "complete printable image of the signed affidavit" and proposed warrant. This has been interpreted by trial judges as requiring that the procedure is only allowed if the judge can see an image of the officer's physical signature. It's not uncommon for officers to lack the technology to send the pdfs with a printable image of their signature. At least one judge has interpreted that to take a telephonic oath in the absence of a signature, the call must be recorded. This also runs into logistical limitations.

The claim is that there used to be a process in which a judge could do a telephonic oath and then include a declaration on the affidavit in the absence of a signed affidavit, and then the judge could instruct the officer to sign and serve the duplicate warrant mentioned in ORS 133.555(3) if the judge cannot affix the electronic signature to the warrant, but this process was removed.

Solution: Update the technology to reflect e-signing methodologies in this instance only. The working group recognized larger problems with a failure to adequately implement new

technologies within this section and committed to advance a narrow fix now and address the larger issue in the interim.

ADD NEW SECTION: Encrypted Law Enforcement Communication with Banks

Problem: ORS 192.603 outlines the procedure for financial institutions to disclose certain information to law enforcement, but the statute lacks clarity with regard to the manner in which institutions should respond to requests to locate financial accounts for criminal investigations. Presently there is no central method to query financial institutions about whether an account exists or not, although most institutions do voluntarily receive and respond to encrypted emails from the Department in the course of active criminal investigations.

Solution: Require encrypted communications whenever law enforcement requests customer account information from the bank.

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