

**OREGON STATE BAR**  
**Legislative Proposal**  
**Part I – Legislative Summary**

**RE:** **SB 242** Codifying existing case law to create a clear procedure that governs the pleading and proof of all previous-conviction elements.

**Submitted by:** Criminal Law Section

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**1. Does this amend current law or program? Yes.**

This proposal will amend ORS 132.540(2) and enact two new statutes to prescribe an express procedural mechanism for the proof and stipulation to previous convictions.

**2. PROBLEM PRESENTED** (including level of severity):

An increasing number of criminal offenses are elevated by statute to a more serious crime if the defendant previously was convicted of the same or a similar offense. For example, the offense of assault in the fourth degree is elevated from a Class A misdemeanor to a Class C felony if the defendant previously was convicted of the same or a similar offense. ORS 163.160(3)(a), (b). The Oregon appellate courts have issued several opinions, that address a variety of pleading-and-proof issues for such previous-conviction elements.

Codifying these rulings will make the procedure more clear and understandable.

**3. SOLUTION:**

Codify these rulings to prescribe a clear procedure in statute that governs the pleading and proof of all previous-conviction elements. This will make the process more clear for the parties and the courts. This legislative proposal sets out specific statutes that govern the pleading and proof of all previous-conviction elements and would:

- codify *State v. Reynolds*, 183 Or App 245 (2002), which allows a previous conviction to be alleged specially in the indictment—notwithstanding ORS 132.540(2)—if the previous conviction constitutes a “material element” of the charged offense;
- codify *State v. Hess*, 342 Or 647 (2007), which allows a defendant to stipulate to a previous-conviction element and, in some circumstances, to have that element removed from the jury’s consideration;

- codify *State v. Probst*, 339 Or 612 (2005), which imposes the burden on the defendant to prove a challenge to the validity of a previous conviction; and
- codify *Bailey v. Lampert*, 342 Or 321 (2007), which limits the scope of a collateral challenge to a previous conviction.

To that end, this proposal would enact: (1) a clarifying amendment to ORS 132.540 that codifies *Reynolds*; (2) a new statute (modeled on ORS 163.103 and 813.326) to codify *Hess* for all previous-conviction offenses; and (3) a new statute that codifies *Probst* (starting with ORS 813.328) and *Bailey*. The goal is to enact provisions that are even-handed and merely codify those various holdings.

This proposal attempts to be careful with the distinction between a previous conviction that is used as a material element of a stand-alone offense (e.g., felon in possession) and a previous conviction that either elevates the seriousness of an existing offense (e.g., felony public indecency) or provides a basis for a minimum sentence for an existing offense (e.g., firearm minimum or three-strikes law). If the previous conviction is a material element of a stand-alone offense, then a defendant's stipulation does not remove that issue from the jury's consideration but does preclude the state from presenting extrinsic evidence to prove that element. If the previous conviction merely enhances the seriousness of the conviction or triggers a minimum sentence, then the stipulation removes that issue entirely from the jury's consideration in accordance with *Hess*.

This proposal excludes from the new pleading-and-stipulation rules the use of a previous conviction merely to determine a defendant's criminal-history score under the sentencing guidelines or for purposes of the Repeat Property Offenders statute (ORS 137.717) and ORS 137.635. The use of a previous conviction to determine criminal history would fall into new exception in ORS 132.540(2) and hence would be excluded from the new pleading-and-stipulation statutes.

Finally, the last proposed statute, which codifies *Probst*, is drafted broadly enough to cover a prior conviction that is used for general sentence-enhancement purposes.

#### 4. **PUBLIC POLICY IMPLICATION** of this proposed legislative change:

There is no independent "public policy" implication to this proposal—the public-policy issues were resolved in the court decisions (cited above) that this proposal seeks to codify. The sole purpose of this proposal is to enact a series of statutes that expressly prescribe a procedure to follow, in order to avoid confusion and make the system operate more efficiently.

#### 5. Could the problem be addressed through a **NON-LEGISLATIVE SOLUTION**, such as administrative rule or education? No.

6. **COULD ANOTHER SECTION OR GROUP MORE APPROPRIATELY INTRODUCE THE BILL?** No.
7. **IDENTIFY THE GROUP OR CONSTITUENCIES THAT WOULD BE MOST IMPACTED** or interested in this change. Who would support it and who would oppose it?

The Oregon District Attorneys' Association and the Oregon Criminal Defense Lawyers' Association.

8. **Has this been introduced in a prior session?** No.