

House Bill 2668

Sponsored by COMMITTEE ON JUDICIARY

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**.

Creates procedure for defendant convicted of aggravated murder to assert that defendant is person with mental retardation and may not be sentenced to death.

A BILL FOR AN ACT

1
2 Relating to the death penalty; creating new provisions; and amending ORS 137.463, 138.012, 138.060,
3 138.530 and 163.150.

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

5 **SECTION 1. (1) A person with mental retardation is not eligible for the death penalty.**

6 **(2) A defendant who intends to assert that the defendant is not eligible for the death**
7 **penalty because the defendant is a person with mental retardation shall file notice with the**
8 **court of that intention at least 90 days before trial, or if the defendant has pleaded guilty,**
9 **at least 90 days before the sentencing proceeding described in ORS 163.150, unless the court**
10 **allows a later filing date for good cause. Upon the filing of the notice:**

11 **(a) The state has the right to obtain an independent medical, psychiatric or psychological**
12 **examination of the defendant; and**

13 **(b) The defendant waives any claim of confidentiality or privilege applicable to medical,**
14 **psychiatric, psychological, correctional, educational, employment, military or other records**
15 **that are relevant to the determination of whether the defendant is a person with mental**
16 **retardation and that were in existence on the date the offense is alleged to have been com-**
17 **mitted. The waiver described in this paragraph applies only to a sentencing proceeding con-**
18 **ducted under ORS 163.150, a death warrant hearing described in ORS 137.463, a**
19 **post-conviction relief hearing conducted under ORS 138.510 to 135.680 and any hearing on an**
20 **application for a writ of habeas corpus.**

21 **(3)(a) Any medical, psychiatric or psychological examination of the defendant under this**
22 **section that is conducted by a person who will testify on the issue of mental retardation**
23 **must be recorded. The recording must contain both audio and video.**

24 **(b) The provisions of ORS 135.805 to 135.873 apply to material and information pertaining**
25 **to the issue of mental retardation. The obligations to disclose imposed by this paragraph**
26 **shall be performed as soon as practicable following the filing of the notice described in sub-**
27 **section (2) of this section.**

28 **(4) As used in this section:**

29 **(a) "Class of adaptive functioning" means:**

30 **(A) Conceptual skills;**

31 **(B) Social skills; and**

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 **(C) Practical adaptive skills.**

2 **(b) “Mental retardation” means significantly subaverage intellectual functioning existing**
 3 **concurrently with substantial impairment in each class of adaptive functioning, that origi-**
 4 **nates before a person reaches 18 years of age.**

5 **(c) “Significantly subaverage intellectual functioning” means an intelligence quotient that**
 6 **is at least two standard deviations below the mean on a standardized intelligence test.**

7 **SECTION 2.** ORS 163.150 is amended to read:

8 163.150. (1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, ex-
 9 cept as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing
 10 proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described
 11 in ORS 163.105 (1)(c), life imprisonment without the possibility of release or parole, as described in
 12 ORS 163.105 (1)(b), or death. The proceeding shall be conducted in the trial court before the trial
 13 jury as soon as practicable. If a juror for any reason is unable to perform the function of a juror,
 14 the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the
 15 name of one of the alternate jurors, who shall then become a member of the jury for the sentencing
 16 proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt.
 17 The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate
 18 on the issue of the sentence. If the defendant has pleaded guilty, the sentencing proceeding shall
 19 be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented
 20 as to any matter that the court deems relevant to sentence including, but not limited to, victim im-
 21 pact evidence relating to the personal characteristics of the victim or the impact of the crime on
 22 the victim’s family, [*and*] any aggravating or mitigating evidence relevant to the issue in paragraph
 23 [(b)(D)] **(b)(E) of this subsection and, if the defendant has filed the notice described in section**
 24 **1 of this 2009 Act, any evidence relevant to whether the defendant is a person with mental**
 25 **retardation.**[.] However, neither the state nor the defendant shall be allowed to introduce
 26 [*repetitive*] evidence that has previously been offered and received during the trial on the issue of
 27 guilt. The court shall instruct the jury that all evidence previously offered and received may be
 28 considered for purposes of the sentencing [*hearing*] **proceeding.** This paragraph shall not be con-
 29 strued to authorize the introduction of any evidence secured in violation of the Constitution of the
 30 United States or of the State of Oregon. The state and the defendant or the counsel of the defendant
 31 shall be permitted to present arguments for or against a sentence of death and for or against a
 32 sentence of life imprisonment with or without the possibility of release or parole.

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

35 **(A) If evidence relevant to whether the defendant is a person with mental retardation**
 36 **has been admitted in the sentencing proceeding, whether the defendant is eligible for the**
 37 **death penalty under section 1 of this 2009 Act;**

38 [(A)] **(B) Whether the conduct of the defendant that caused the death of the deceased was**
 39 **committed deliberately and with the reasonable expectation that death of the deceased or another**
 40 **would result;**

41 [(B)] **(C) Whether there is a probability that the defendant would commit criminal acts of vi-**
 42 **olence that would constitute a continuing threat to society;**

43 [(C)] **(D) If raised by the evidence, whether the conduct of the defendant in killing the deceased**
 44 **was unreasonable in response to the provocation, if any, by the deceased; and**

45 [(D)] **(E) Whether the defendant should receive a death sentence.**

1 (c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph
 2 (b)(B) to (E) of this subsection, any mitigating circumstances offered in evidence, including but not
 3 limited to the defendant’s age, the extent and severity of the defendant’s prior criminal conduct and
 4 the extent of the mental and emotional pressure under which the defendant was acting at the time
 5 the offense was committed.

6 (B) The court shall instruct the jury to answer the question in paragraph [(b)(D)] (b)(E) of this
 7 subsection “no” if, after considering any aggravating evidence and any mitigating evidence con-
 8 cerning any aspect of the defendant’s character or background, or any circumstances of the offense
 9 and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the
 10 jurors believe that the defendant should not receive a death sentence.

11 (d)(A) **The defendant must prove the issue submitted under paragraph (b)(A) of this sub-**
 12 **section by a preponderance of the evidence.**

13 (B) The state must prove each issue submitted under paragraph [(b)(A) to (C)] (b)(B) to (D) of
 14 this subsection beyond a reasonable doubt[, and].

15 (C) The jury shall return a special verdict of “yes” or “no” on each issue considered.

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

18 (f) **Except as provided in subsection (5) of this section,** if the jury returns an affirmative
 19 finding on each issue considered under paragraph (b) of this subsection, the trial judge shall sen-
 20 tence the defendant to death.

21 (2)(a) Upon the conclusion of the presentation of the evidence[, *the court shall also instruct the*
 22 *jury that*]:

23 (A) **If the court has submitted the issue described in subsection (1)(b)(A) of this section**
 24 **to the jury, the court shall instruct the jury that if the jury reaches a negative finding on**
 25 **the issue, the jury may not consider the issues described in subsection (1)(b)(B) to (E) of this**
 26 **section.**

27 (B) **The court shall instruct the jury that** if [it] the jury reaches a negative finding on any
 28 issue under subsection (1)(b) of this section, the trial court shall sentence the defendant to life
 29 imprisonment without the possibility of release or parole, as described in ORS 163.105 (1)(b), unless
 30 10 or more members of the jury further find that there are sufficient mitigating circumstances to
 31 warrant life imprisonment, in which case the trial court shall sentence the defendant to life
 32 imprisonment as described in ORS 163.105 (1)(c).

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

37 (3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707 (2) applies or
 38 the state advises the court on the record that the state declines to present evidence for purposes
 39 of sentencing the defendant to death, the court:

40 (A) [Shall] **May** not conduct a sentencing proceeding as described in subsection (1) of this sec-
 41 tion, and a sentence of death [shall] **may** not be ordered.

42 (B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sen-
 43 tenced to life imprisonment without the possibility of release or parole as described in ORS 163.105
 44 (1)(b) or life imprisonment as described in ORS 163.105 (1)(c). If the defendant waives all rights to
 45 a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact.

1 The procedure for the sentencing proceeding, whether before a court or a jury, shall follow the
 2 procedure of subsection (1)(a) of this section, as modified by this subsection. In the proceeding, ev-
 3 idence may be presented as to any matter that the court deems relevant to sentence, including, but
 4 not limited to, victim impact evidence relating to the personal characteristics of the victim or the
 5 impact of the crime on the victim's family.

6 (b) Following the presentation of evidence and argument under paragraph (a) of this subsection,
 7 the court shall instruct the jury that the trial court shall sentence the defendant to life
 8 imprisonment without the possibility of release or parole as described in ORS 163.105 (1)(b), unless
 9 after considering all of the evidence submitted, 10 or more members of the jury find there are suf-
 10 ficient mitigating circumstances to warrant life imprisonment with the possibility of parole as de-
 11 scribed in ORS 163.105 (1)(c). If 10 or more members of the jury find there are sufficient mitigating
 12 circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sen-
 13 tence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

14 (c) Nothing in this subsection [*shall preclude*] **precludes** the court from sentencing the defendant
 15 to life imprisonment, as described in ORS 163.105 (1)(c), or life imprisonment without the possibility
 16 of release or parole, as described in ORS 163.105 (1)(b), pursuant to a stipulation of sentence or
 17 stipulation of sentencing facts agreed to and offered by both parties if the defendant waives all
 18 rights to a jury sentencing proceeding.

19 (4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant
 20 who has been sentenced to life imprisonment without possibility of release or parole will instead be
 21 sentenced to life imprisonment in the custody of the Department of Corrections as provided in ORS
 22 163.105 [(2)] (1)(c), the defendant shall be confined for a minimum of 30 years without possibility of
 23 parole, release on work release or any form of temporary leave or employment at a forest or work
 24 camp. Subsection (2) of this section [*shall apply*] **applies** only to trials commencing on or after July
 25 19, 1989.

26 (5) **If the jury returns an affirmative finding on each issue described in subsection (1)(b)**
 27 **of this section, the defendant may move the court for an order sentencing the defendant to**
 28 **life imprisonment without the possibility of release or parole as provided in ORS 163.105**
 29 **(1)(b). The court shall grant the motion if the evidence introduced in the sentencing hearing**
 30 **would not support an affirmative finding on the issue considered under subsection (1)(b)(A)**
 31 **of this section.**

32 [(5)] (6) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial
 33 during the sentencing proceeding, the trial court, at the election of the state, shall either:

34 (a) Sentence the defendant to **life** imprisonment [*for life*] in the custody of the Department of
 35 Corrections as provided in ORS 163.105 (1)(c); or

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

38 (A) Death;

39 (B) **Life** imprisonment [*for life*] without the possibility of release or parole as provided in ORS
 40 163.105 (1)(b); or

41 (C) **Life** imprisonment [*for life*] in the custody of the Department of Corrections as provided in
 42 ORS 163.105 (1)(c).

43 **SECTION 3.** ORS 137.463 is amended to read:

44 137.463. (1) When a sentence of death is pronounced, the clerk of the court shall deliver a copy
 45 of the judgment of conviction and sentence of death to the sheriff of the county. The sheriff shall

1 deliver the defendant within 20 days from the date the judgment is entered to the correctional in-
 2 stitution designated by the Director of the Department of Corrections pending the determination of
 3 the automatic and direct review by the Supreme Court under ORS 138.012.

4 (2) If the Supreme Court affirms the sentence of death, a death warrant hearing shall take place
 5 in the court in which the judgment was rendered within 30 days after the effective date of the ap-
 6 pellate judgment or, upon motion of the state, on a later date. The following apply to a death war-
 7 rant hearing under this subsection:

8 (a) The defendant must be present; and

9 (b) The defendant may be represented by counsel. If the defendant was represented by appointed
 10 counsel on automatic and direct review, that counsel's appointment continues for purposes of the
 11 death warrant hearing and any related matters. If that counsel is unavailable, the court shall ap-
 12 point counsel pursuant to the procedure in ORS 135.050 and 135.055.

13 (3)(a) If the defendant indicates the wish to waive the right to counsel for the purpose of the
 14 death warrant hearing, the court shall inquire of the defendant on the record to ensure that the
 15 waiver is competent, knowing and voluntary.

16 (b) If the court finds that the waiver is competent, knowing and voluntary, the court shall dis-
 17 charge counsel.

18 (c) If the court finds on the record that the waiver of the right to counsel granted by this sec-
 19 tion is not competent, knowing or voluntary, the court shall continue the appointment of counsel.

20 (d) Notwithstanding the fact that the court finds on the record that the defendant competently,
 21 knowingly and voluntarily waives the right to counsel, the court may continue the appointment of
 22 counsel as advisor only for the purposes of the death warrant hearing.

23 (4) At the death warrant hearing, the court:

24 (a) After appropriate inquiry **in accordance with subsection (5) of this section**, shall make
 25 *[findings] a finding* on the record whether *[the defendant suffers from a mental condition that prevents*
 26 *the defendant from comprehending the reasons for the death sentence or its implication. The defendant*
 27 *has the burden of proving by a preponderance of the evidence that the defendant suffers from a mental*
 28 *condition that prevents the defendant from comprehending the reasons for the death sentence or its*
 29 *implication.] any condition or circumstance exists that would render the execution of the de-*
 30 **fendant's sentence of death unconstitutionally cruel and unusual.**

31 (b) Shall advise the defendant that the defendant is entitled to counsel in any post-conviction
 32 proceeding and that counsel will be appointed if the defendant is financially eligible for appointed
 33 counsel at state expense.

34 (c) Shall determine whether the defendant intends to pursue any challenges to the sentence or
 35 conviction. If the defendant states on the record that the defendant does not intend to challenge the
 36 sentence or conviction, the court after advising the defendant of the consequences shall make a
 37 finding on the record whether the defendant competently, knowingly and voluntarily waives the
 38 right to pursue:

39 (A) A petition for certiorari to the United States Supreme Court;

40 (B) Post-conviction relief under ORS 138.510 to 138.680; and

41 (C) Federal habeas corpus review under 28 U.S.C. 2254.

42 (5)(a) **A defendant who intends to assert that a condition or circumstance exists that**
 43 **would render the execution of the defendant's sentence of death unconstitutionally cruel and**
 44 **unusual shall file a notice with the court of that intention at least 14 days before the**
 45 **scheduled death warrant hearing. Notwithstanding the failure of the defendant to file the**

1 **notice, on motion of the state or the court's own motion, the court may order an inquiry into**
 2 **whether a condition or circumstance exists that would render the execution of the defend-**
 3 **ant's sentence of death unconstitutionally cruel and unusual if there is a substantial reason**
 4 **to believe that the condition or circumstance exists.**

5 **(b) Notwithstanding paragraph (a) of this subsection, if a court or a jury has previously**
 6 **found that the condition or circumstance at issue does not exist or does not render the ex-**
 7 **ecution of the defendant's sentence of death unconstitutionally cruel and unusual, the court**
 8 **may not inquire as to the existence of the condition or circumstance unless the court finds**
 9 **by clear and convincing evidence that a material change in the condition or circumstance**
 10 **has occurred since the previous finding became final.**

11 **(c) In an inquiry conducted under this subsection:**

12 **(A) The state and the defendant each have the right to obtain an independent medical,**
 13 **psychiatric or psychological examination of the defendant for purposes of the hearing;**

14 **(B) Section 1 (2)(b) and (3) of this 2009 Act apply; and**

15 **(C) The defendant has the burden of proving by a preponderance of the evidence that the**
 16 **condition or circumstance exists.**

17 *[(5) Following the death warrant hearing, a death warrant, signed by the trial judge of the court*
 18 *in which the judgment was rendered and attested by the clerk of that court, shall be drawn and de-*
 19 *livered to the superintendent of the correctional institution designated by the Director of the Department*
 20 *of Corrections. The death warrant shall specify a day on which the sentence of death is to be executed*
 21 *and shall authorize and command the superintendent to execute the judgment of the court. The trial*
 22 *court shall specify the date of execution of the sentence, taking into consideration the needs of the De-*
 23 *partment of Corrections. The trial court shall specify a date not less than 90 days nor more than 120*
 24 *days following the effective date of the appellate judgment.]*

25 *[(6)(a) Notwithstanding any other provision in this section, if the court finds that the defendant*
 26 *suffers from a mental condition that prevents the defendant from comprehending the reasons for the*
 27 *sentence of death or its implications]*

28 **(6)(a) If the court finds that a condition or circumstance exists that would render the**
 29 **execution of the defendant's sentence of death unconstitutionally cruel and unusual,** the court
 30 may not issue a death warrant until such time as the court, after appropriate inquiries, finds that
 31 the *[defendant is able to comprehend the reasons for the sentence of death and its implications.]*

32 *[(b)(A) If the court does not issue a death warrant because it finds that the defendant suffers from*
 33 *a mental condition that prevents the defendant from comprehending the reasons for the sentence of*
 34 *death or its implications,]* **condition or circumstance no longer exists.** The court shall conduct
 35 subsequent hearings on the issue on motion of the district attorney or the defendant's counsel or
 36 on the court's own motion, upon a showing *[that there is substantial reason to believe that the de-*
 37 *fendant's]* **by clear and convincing evidence that there has been a material change in the**
 38 **condition or circumstance** *[has changed].*

39 *[(B)]* **(b)** The court may hold a hearing under this *[paragraph]* **subsection** no more frequently
 40 than once every six months.

41 *[(C)]* **(c)** The state and the defendant may obtain an independent medical, psychiatric or psy-
 42 chological examination of the defendant in connection with a hearing under this *[paragraph]* **sub-**
 43 **section.**

44 *[(D)]* **(d)** In a hearing under this *[paragraph]* **subsection,** the defendant has the burden of prov-
 45 ing by a preponderance of the evidence that *[the defendant continues to suffer from a mental condition*

1 *that prevents the defendant from comprehending the reasons for the sentence of death or its*
 2 *implications]* **a condition or circumstance exists that renders the execution of the defendant's**
 3 **sentence of death unconstitutionally cruel and unusual.**

4 **(e) Section 1 (3) of this 2009 Act applies to a hearing under this subsection.**

5 **(7) Except as provided in subsection (6) of this section, following the death warrant**
 6 **hearing, a death warrant, signed by the trial judge of the court in which the judgment was**
 7 **rendered and attested by the clerk of that court, shall be drawn and delivered to the super-**
 8 **intendent of the correctional institution designated by the Director of the Department of**
 9 **Corrections. The death warrant shall specify a day on which the sentence of death is to be**
 10 **executed and shall authorize and command the superintendent to execute the judgment of**
 11 **the court. The trial court shall specify the date of execution of the sentence, taking into**
 12 **consideration the needs of the Department of Corrections. The trial court shall specify a date**
 13 **not less than 90 days nor more than 120 days following the effective date of the appellate**
 14 **judgment.**

15 [(7)] **(8) If for any reason a sentence of death is not executed on the date appointed in the death**
 16 **warrant, and the sentence of death remains in force and is not stayed under ORS 138.686 or other-**
 17 **wise by a court of competent jurisdiction, the court that issued the initial death warrant, on motion**
 18 **of the state and without further hearing, shall issue a new death warrant specifying a new date on**
 19 **which the sentence is to be executed. The court shall specify a date for execution of the sentence,**
 20 **taking into consideration the needs of the Department of Corrections. The court shall specify a date**
 21 **not more than 20 days after the date on which the state's motion was filed.**

22 [(8)] **(9) No appeal may be taken from an order issued pursuant to this section.**

23 **SECTION 4.** ORS 138.060 is amended to read:

24 138.060. (1) The state may take an appeal from the circuit court to the Court of Appeals from:

- 25 (a) An order made prior to trial dismissing or setting aside the accusatory instrument;
- 26 (b) An order arresting the judgment;
- 27 (c) An order made prior to trial suppressing evidence;
- 28 (d) An order made prior to trial for the return or restoration of things seized;
- 29 (e) A judgment of conviction based on the sentence as provided in ORS 138.222;
- 30 (f) An order in a probation revocation hearing finding that a defendant who was sentenced to
- 31 probation under ORS 137.712 has not violated a condition of probation by committing a new crime;
- 32 (g) An order made after a guilty finding dismissing or setting aside the accusatory instrument;
- 33 (h) An order granting a new trial; or
- 34 (i) An order dismissing an accusatory instrument under ORS 136.130.

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

- 39 (a) An order made prior to trial suppressing evidence; [*and*]
- 40 (b) An order made prior to trial dismissing or setting aside the accusatory instrument; **and**
- 41 **(c) An order entered under ORS 163.150 (5) sentencing the defendant to life imprisonment**
 42 **without the possibility of release or parole. An appeal under this paragraph does not consti-**
 43 **tute delay attributable to the state under ORS 135.747 or 135.750.**

44 (3) In an appeal by the state under subsection (2) of this section, the Supreme Court shall issue
 45 its decision no later than one year after the date of oral argument or, if the appeal is not orally

1 argued, the date that the State Court Administrator delivers the briefs to the Supreme Court for
 2 decision. Failure of the Supreme Court to issue a decision within one year is not a ground for dis-
 3 missal of the appeal.

4 **SECTION 5.** ORS 138.530 is amended to read:

5 138.530. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the
 6 court when one or more of the following grounds is established by the petitioner:

7 (a) A substantial denial in the proceedings resulting in petitioner’s conviction, or in the appel-
 8 late review thereof, of petitioner’s rights under the Constitution of the United States, or under the
 9 Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

10 (b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner’s con-
 11 viction.

12 (c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law
 13 for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

14 (d) Unconstitutionality of the statute making criminal the acts for which petitioner was con-
 15 victed.

16 **(e) Unconstitutionality of a sentence of death under section 1 of this 2009 Act.**

17 (2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680
 18 shall not be construed to deny relief where such relief would have been available prior to May 26,
 19 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive
 20 clemency or pardon provided by law.

21 (3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Su-
 22 preme Court in habeas corpus as provided in the Constitution of this state.

23 **SECTION 6.** ORS 138.012 is amended to read:

24 138.012. (1) The judgment of conviction and sentence of death entered under ORS 163.150 (1)(f)
 25 is subject to automatic and direct review by the Supreme Court. The review by the Supreme Court
 26 has priority over all other cases and shall be heard in accordance with rules adopted by the Su-
 27 preme Court.

28 (2) Notwithstanding ORS 163.150 (1)(a), after automatic and direct review of a conviction and
 29 sentence of death the following apply:

30 (a) If a reviewing court finds prejudicial error in the sentencing proceeding only, the court may
 31 set aside the sentence of death and remand the case to the trial court. No error in the sentencing
 32 proceeding results in reversal of the defendant’s conviction for aggravated murder. Upon remand
 33 and at the election of the state, the trial court shall either:

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

36 (B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding
 37 to determine if the defendant should be sentenced to:

38 (i) Death;

39 (ii) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105
 40 (1)(b); or

41 (iii) Imprisonment for life in the custody of the Department of Corrections as provided in ORS
 42 163.105 (1)(c).

43 (b) The new sentencing proceeding is governed by the provisions of ORS 163.150 (1), (2), (3),
 44 [and] (5) **and (6)**. A transcript of all testimony and all exhibits and other evidence properly admitted
 45 in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either

1 party may recall any witness who testified at the prior trial or sentencing proceeding and may
2 present additional relevant evidence.

3 (c) The provisions of this subsection are procedural and apply to any defendant sentenced to
4 death after December 6, 1984.

5 **SECTION 7.** (1) **The amendments to ORS 163.150 by section 2 of this 2009 Act apply to**
6 **sentencing proceedings conducted on or after the effective date of this 2009 Act.**

7 (2) **The amendments to ORS 137.463 by section 3 of this 2009 Act apply to death warrant**
8 **hearings conducted on or after the effective date of this 2009 Act.**

9
