

House Bill 2106

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Governor John A. Kitzhaber for Oregon Health Authority)

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**.

Modifies jurisdiction of Psychiatric Security Review Board. Authorizes court to commit persons not under board jurisdiction who present substantial danger to others.

Requires defendant or youth to file report of psychiatric or psychological evaluation, conducted by certified evaluator, with court before defendant or youth may introduce evidence related to insanity defense.

Prohibits court from accepting guilty except for insanity plea to certain offenses unless court is provided with report of psychiatric or psychological evaluation of defendant.

Requires that psychiatric or psychological evaluation of defendant be conducted by certified evaluator when court orders certain evaluations of defendant to determine whether defendant is fit to proceed. Authorizes court to commit defendant who is unfit to proceed if defendant is dangerous to self or others or if community treatment and supervision are not available.

Requires Oregon Health Authority to adopt rules necessary to certify psychiatrists and psychologists for purposes of certain evaluations reported to court.

Declares emergency, effective on passage.

A BILL FOR AN ACT

1
2 Relating to crime; creating new provisions; amending ORS 161.309, 161.315, 161.325, 161.327, 161.328,
3 161.329, 161.365, 161.370 and 419C.524; and declaring an emergency.

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

5 **SECTION 1.** ORS 161.309 is amended to read:

6 161.309. (1) [*No evidence may be introduced by*] The defendant **may not introduce evidence** on
7 the issue of insanity under ORS 161.295, unless the defendant:

8 (a) Gives notice of intent to do so in the manner provided in subsection (3) of this section[.];

9 **and**

10 (b) **Files with the court a report of a psychiatric or psychological evaluation, conducted**
11 **by a certified evaluator, in the manner provided in subsection (4) of this section.**

12 (2) The defendant may not introduce in the case in chief expert testimony regarding partial re-
13 sponsibility or diminished capacity under ORS 161.300 unless the defendant gives notice of intent to
14 do so in the manner provided in subsection (3) of this section.

15 (3) A defendant who is required under subsection (1) or (2) of this section to give notice shall
16 file a written notice of purpose at the time the defendant pleads not guilty. The defendant may file
17 [*such*] **the** notice at any time after the plea but before trial when just cause for failure to file the
18 notice at the time of making the plea is [*made to appear to the satisfaction of the court*] **shown**. If
19 the defendant fails to file notice, the defendant [*shall not be entitled to*] **may not** introduce evidence
20 for the establishment of a defense under ORS 161.295 or 161.300 unless the court, in its discretion,
21 permits [*such*] **the** evidence to be introduced where just cause for failure to file the notice is [*made*
22 *to appear*] **shown**.

23 (4) **A defendant who is required under subsection (1) of this section to file a report of a**
24 **psychiatric or psychological evaluation shall file the report before trial. The report must be**

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 based on an evaluation conducted after the date of the alleged offense and must address the
 2 issue of insanity under ORS 161.295 and the dispositional determination described in ORS
 3 161.325. If the defendant fails to file a complete report before trial, the defendant may not
 4 introduce evidence for the establishment of a defense under ORS 161.295 unless:

5 (a) The court, in its discretion, permits the evidence to be introduced when just cause
 6 for failure to file the report is shown; and

7 (b) If the defendant is charged with a crime described in ORS 161.327 (1)(a), the defendant
 8 is tried by a jury.

9 (5)(a) A court may not accept a plea of guilty except for insanity to a crime described in
 10 ORS 161.327 (1)(a) unless a report described in subsection (4) of this section is filed with the
 11 court. If the report has not been filed, the court may order that a psychiatric or psycholog-
 12 ical evaluation of the defendant be conducted by a certified evaluator and a report of the
 13 evaluation be filed with the court.

14 (b) When the court orders an evaluation of a financially eligible person under this sub-
 15 section, the court shall order the public defense services executive director to pay a rea-
 16 sonable fee for the evaluation from funds available for that purpose.

17 (6) As used in this section, "certified evaluator" means a psychiatrist or psychologist who
 18 holds a valid certification under the provisions of section 9 of this 2011 Act.

19 **SECTION 2.** ORS 161.325, as amended by section 9, chapter 89, Oregon Laws 2010, is amended
 20 to read:

21 161.325. (1) After entry of judgment of guilty except for insanity, the court shall, on the basis
 22 of the evidence given at the trial or at a separate hearing, if requested by either party, make an
 23 order as provided in ORS 161.327, **161.328** or 161.329, whichever is appropriate.

24 (2) If the court makes an order as provided in ORS 161.327, it shall also:

25 (a) Determine on the record the offense of which the person otherwise would have been con-
 26 victed;

27 (b) State on the record the mental disease or defect on which the defendant relied for the guilty
 28 except for insanity defense; and

29 (c) Make specific findings on whether there is a victim of the crime for which the defendant has
 30 been found guilty except for insanity and, if so, whether the victim wishes to be notified, under ORS
 31 161.326 (2), of any Psychiatric Security Review Board hearings and orders concerning the defendant
 32 and of any conditional release, discharge or escape of the defendant.

33 (3) The court shall include any such findings in its order.

34 (4) Except under circumstances described in ORS 137.076 (4), whenever a defendant charged
 35 with any offense listed in ORS 137.076 (1) has been found guilty of that offense except for insanity,
 36 the court shall, in any order entered under ORS 161.327 or 161.329, direct the defendant to submit
 37 to the obtaining of a blood or buccal sample in the manner provided in ORS 137.076.

38 **SECTION 3.** ORS 161.327 is amended to read:

39 161.327. [(1)(a)] (1) Following the entry of a judgment pursuant to ORS 161.319 [*and the disposi-*
 40 *tional determination under ORS 161.325, if the court finds that the person would have been guilty of*
 41 *a felony, or of a misdemeanor during a criminal episode in the course of which the person caused*
 42 *physical injury or risk of physical injury to another, the court shall order that a psychiatric or psy-*
 43 *chological evaluation be performed and a report of the evaluation be provided to the court if an eval-*
 44 *uation was not performed or a report was not provided to the court prior to trial. Upon receipt of the*
 45 *evaluation, the court shall order that the*], **the court shall order that a person be placed under the**

1 jurisdiction of the Psychiatric Security Review Board for care and treatment if:

2 (a) **The person was found guilty except for insanity of a felony committed during a**
3 **criminal episode in the course of which the person caused physical injury or risk of physical**
4 **injury to another; and**

5 (b) The court finds by a preponderance of the evidence that the person is affected by mental
6 disease or defect and presents a substantial danger to others [*requiring commitment to:*] **that re-**
7 **quires commitment or conditional release.**

8 [(A) *A state hospital designated by the Oregon Health Authority if the person is at least 18 years*
9 *of age; or]*

10 [(B) *A secure intensive community inpatient facility designated by the authority if the person is*
11 *under 18 years of age.*]

12 [(b) *The period of jurisdiction of the board is equal to the maximum sentence provided by statute*
13 *for the crime for which the person was found guilty except for insanity.*]

14 [(c) *When a court orders a psychiatric or psychological evaluation of a financially eligible person*
15 *under this subsection, the court shall order the public defense services executive director to pay a rea-*
16 *sonable fee for the evaluation from funds available for the purpose.*]

17 (2) The court shall determine whether the person should be committed [*to a state hospital, or to*
18 *a secure intensive community inpatient facility, designated by the authority*] or conditionally released
19 pending any hearing before the board as follows:

20 (a) If the court finds that the person presents a substantial danger to others and is not a proper
21 subject for conditional release, the court shall order the person committed to a state hospital des-
22 ignated by the **Oregon Health** Authority if the person is at least 18 years of age, or to a secure
23 intensive community inpatient facility designated by the authority **or the Department of Human**
24 **Services** if the person is under 18 years of age, for custody, care and treatment pending hearing
25 before the board in accordance with ORS 161.341 to 161.351.

26 (b) If the court finds that the person presents a substantial danger to others but that the person
27 can be adequately controlled with supervision and treatment if conditionally released and that nec-
28 essary supervision and treatment are available, the court may order the person conditionally re-
29 leased.

30 (3) **When a person is conditionally released under this section, the person is** subject to
31 those supervisory orders of the court as are in the best interests of justice, the protection of society
32 and the welfare of the person. The court shall designate a person or state, county or local agency
33 to supervise the person upon release, subject to those conditions as the court directs in the order
34 for conditional release. Prior to the designation, the court shall notify the person or agency to whom
35 conditional release is contemplated and provide the person or agency an opportunity to be heard
36 before the court. After receiving an order entered under [*this paragraph*] **subsection (2)(b) of this**
37 **section**, the person or agency designated shall assume supervision of the person pursuant to the
38 direction of the Psychiatric Security Review Board. The person or agency designated as supervisor
39 shall be required to report in writing no less than once per month to the board concerning the
40 supervised person's compliance with the conditions of release.

41 [(3)] (4) For purposes of this section, a person affected by a mental disease or defect in a state
42 of remission is considered to have a mental disease or defect requiring supervision when the disease
43 may, with reasonable medical probability, occasionally become active and, when active, render the
44 person a danger to others.

45 [(4)] (5) In determining whether a person should be conditionally released, the court may order

1 evaluations, examinations and compliance as provided in ORS 161.336 (4) and 161.346 (2).

2 [(5)] (6) In determining whether a person should be committed to a state hospital or to a secure
 3 intensive community inpatient facility or conditionally released, the court shall have as its primary
 4 concern the protection of society.

5 [(6)] (7) Upon placing a person on conditional release, the court shall notify the board in writing
 6 of the court's conditional release order, the supervisor appointed, and all other conditions of release,
 7 and the person shall be on conditional release pending hearing before the board in accordance with
 8 ORS 161.336 to 161.351. Upon compliance with [*this subsection and subsections (1) and (2) of*] this
 9 section, the court's jurisdiction over the person is terminated and the board assumes jurisdiction
 10 over the person.

11 **(8) The period of jurisdiction of the board is equal to the maximum sentence provided by**
 12 **statute for the crime for which the person was found guilty except for insanity.**

13 [(7)] (9) An order of the court under this section is a final order appealable by the person found
 14 guilty except for insanity in accordance with ORS 19.205 (5). Notwithstanding ORS 19.255, notice
 15 of an appeal under this section shall be served and filed within 90 days after the order appealed from
 16 is entered in the register. The person shall be entitled on appeal to suitable counsel possessing
 17 skills and experience commensurate with the nature and complexity of the case. If the person is fi-
 18 nancially eligible, suitable counsel shall be appointed in the manner provided in ORS 138.500 (1), and
 19 the compensation for counsel and costs and expenses of the person necessary to the appeal shall be
 20 determined and paid as provided in ORS 138.500.

21 [(8)] (10) Upon placing a person under the jurisdiction of the board, the court shall notify the
 22 person of the right to appeal and the right to a hearing before the board in accordance with ORS
 23 161.336 (7) and 161.341 (4).

24 **SECTION 4.** ORS 161.328 is amended to read:

25 161.328. (1) Following the entry of a judgment pursuant to ORS 161.319 [*and the dispositional*
 26 *determination under ORS 161.325, if the court finds that the person would have been guilty of a*
 27 *misdemeanor during a criminal episode in the course of which the person did not cause physical injury*
 28 *or risk of physical injury to another, and if the court has probable cause to believe that the person is*
 29 *dangerous to self or others as a result of a mental disorder, the court may initiate civil commitment*
 30 *proceedings under ORS 426.070 to 426.130.], **the court may order a person committed to a state***
 31 **mental hospital or other facility designated by the Oregon Health Authority if:**

32 (a) **Each offense for which the person is found guilty except for insanity is a felony**
 33 **committed during a criminal episode in the course of which the person did not cause physical**
 34 **injury or risk of physical injury to another or is a misdemeanor; and**

35 (b) **The court finds that the person is affected by mental disease or defect and presents**
 36 **a substantial danger to others that requires commitment.**

37 (2) **The total period of commitment under this section may not exceed the maximum**
 38 **sentence provided by statute for the crime for which the person was found guilty except for**
 39 **insanity.**

40 (3) **If the superintendent of the state mental hospital or the director of the facility to**
 41 **which the person is committed determines that a person committed under this section is no**
 42 **longer affected by mental disease or defect or, if so affected, no longer presents a substantial**
 43 **danger to others that requires commitment, the superintendent or director shall file notice**
 44 **of that determination with the committing court. Upon filing of the notice, the superinten-**
 45 **dent or director shall discharge the person from custody.**

SECTION 5. ORS 161.329 is amended to read:

161.329. Following the entry of a judgment pursuant to ORS 161.319 [*and the dispositional determination under ORS 161.325*], **the court shall order that the person be discharged from custody** if:

(1) The court finds that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others and is not in need of care, supervision or treatment[, *the court shall order the person discharged from custody.*]; **or**

(2)(a) **Each offense for which the person is found guilty except for insanity is a felony during a criminal episode in the course of which the person did not cause physical injury or risk of physical injury to another or is a misdemeanor; and**

(b) **The court finds that the person does not present a substantial danger to others that requires commitment.**

SECTION 6. ORS 419C.524 is amended to read:

419C.524. (1) A youth may not introduce evidence on the issue of the defense set forth in ORS 419C.522 unless the youth:

(a) Gives notice of intent to do so in the manner provided in subsection (2) of this section[.]; **and**

(b) **Files with the court a report of a psychiatric or psychological evaluation, conducted by a certified evaluator, in the manner provided in subsection (5) of this section.**

(2) A youth who is required under subsection (1) of this section to give notice must do so by filing a written notice of intent. A youth who is not in detention must file the notice of intent no later than 60 days after the petition is filed unless the court finds good cause to extend the time. If the youth fails to file notice timely, the youth may not introduce evidence for the establishment of the defense set forth in ORS 419C.522 unless the court permits the evidence to be introduced when just cause for failure to file the notice is shown.

(3) Just cause for failure to file notice timely exists if the youth was not represented by counsel until after the filing period.

(4) The filing of a notice of intent under this section by a youth in detention constitutes express consent of the youth for continued detention under ORS 419C.150.

(5) **A youth who is required under subsection (1) of this section to file a report of a psychiatric or psychological evaluation shall file the report before trial. The report must be based on an evaluation conducted after the date of the alleged act and must address the issue of insanity under ORS 419C.411 (2) and the dispositional determinations described in ORS 419C.411 (7) and 419C.529. If the youth fails to file a complete report before trial, the youth may not introduce evidence for the establishment of the defense set forth in ORS 419C.522 unless the court permits the evidence to be introduced when just cause for failure to file the report is shown.**

(6) **As used in this section, “certified evaluator” means a psychiatrist or psychologist who holds a valid certification under the provisions of section 9 of this 2011 Act.**

SECTION 7. ORS 161.365 is amended to read:

161.365. (1) [*Whenever*] **When** the court has reason to doubt the defendant’s fitness to proceed by reason of incapacity as [*defined*] **described** in ORS 161.360, the court may call **any witness** to its assistance in reaching its decision [*any witness and may appoint a psychiatrist or psychologist to examine the defendant and advise the court*].

[(2)] If the court determines the assistance of a psychiatrist or psychologist would be helpful, the

1 court may:

2 (a) **Order that a psychiatric or psychological examination of the defendant be conducted**
 3 **by a certified evaluator as defined in ORS 161.309 and a report of the examination be pre-**
 4 **pared; or**

5 (b) Order the defendant to be committed for the purpose of an examination for a period not
 6 exceeding 30 days to a state mental hospital **or other facility** designated by the Oregon Health
 7 Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient
 8 facility designated by the authority if the defendant is under 18 years of age.

9 (2) The report of *[each]* **an** examination *[shall]* **described in this section must** include, but is
 10 not necessarily limited to, the following:

11 (a) A description of the nature of the examination;

12 (b) A statement of the mental condition of the defendant; *[and]*

13 (c) If the defendant suffers from a mental disease or defect, an opinion as to whether the de-
 14 fendant is incapacitated within the *[definition]* **description** set out in ORS 161.360; **and**

15 **(d) If the defendant is incapacitated within the description set out in ORS 161.360, a**
 16 **recommendation of treatment and services necessary to restore capacity.**

17 (3) Except when the defendant and the court both request to the contrary, the report may not
 18 contain any findings or conclusions as to whether the defendant as a result of mental disease or
 19 defect was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act
 20 charged.

21 (4) If the examination by the psychiatrist or psychologist cannot be conducted by reason of the
 22 unwillingness of the defendant to participate *[therein]* **in the examination**, the report shall so state
 23 and shall include, if possible, an opinion as to whether *[such]* **the** unwillingness of the defendant
 24 was the result of mental disease or defect affecting capacity to proceed.

25 (5) The report *[of the examination]* shall be filed in triplicate with the clerk of the court, who
 26 shall cause copies to be delivered to the district attorney and to counsel for defendant.

27 (6)(a) When upon motion of the court or a financially eligible defendant, the court has ordered
 28 a psychiatric or psychological examination of the defendant, a county or justice court shall order
 29 the county to pay, and a circuit court shall order the public defense services executive director to
 30 pay from funds available for the purpose:

31 *[(a)]* **(A)** A reasonable fee if the examination of the defendant is conducted by a psychiatrist or
 32 psychologist in private practice; and

33 *[(b)]* **(B)** All costs including transportation of the defendant if the examination is conducted by
 34 a psychiatrist or psychologist in the employ of the Oregon Health Authority or a community mental
 35 health program established under ORS 430.610 to 430.670.

36 *[(7)]* **(b)** When *[such]* an examination is ordered at the request or with the acquiescence of a
 37 defendant who is determined not to be financially eligible, the examination shall be performed at the
 38 defendant's expense. When *[such]* an examination is ordered at the request of the prosecution, the
 39 county shall pay for the expense of the examination.

40 **SECTION 8.** ORS 161.370 is amended to read:

41 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-
 42 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the
 43 finding of the report filed *[by a psychiatrist or psychologist]* under ORS 161.365, the court may make
 44 the determination on the basis of *[such]* **the** report. If the finding is contested, the court shall hold
 45 a hearing on the issue. If the report is received in evidence *[upon such]* **in the** hearing, the party

1 who contests the finding [*thereof shall have*] **has** the right to summon and to cross-examine any
 2 psychiatrist or psychologist who submitted the report and to offer evidence upon the issue. Other
 3 evidence regarding the defendant's fitness to proceed may be introduced by either party.

4 (2) If the court determines that the defendant lacks fitness to proceed, the **criminal** proceeding
 5 against the defendant shall be suspended[, *except as provided in subsection (12) of this section, and*
 6 *the court shall*] **and:**

7 **(a) If the court finds that the defendant is dangerous to self or others as a result of**
 8 **mental disease or defect, or that the services and supervision necessary to restore the**
 9 **defendant's fitness to proceed are not available in the community, the court shall** commit the
 10 defendant to the custody of the superintendent of a state mental hospital **or director of a facility,**
 11 designated by the Oregon Health Authority, if the defendant is at least 18 years of age, or to the
 12 custody of the director of a secure intensive community inpatient facility designated by the author-
 13 ity if the defendant is under 18 years of age[, *or shall release the defendant on supervision for as long*
 14 *as such unfitness shall endure.*]; **or**

15 **(b) If the court does not make a finding described in paragraph (a) of this subsection, or**
 16 **if the court** [*The court may release the defendant on supervision if it*] determines that care other
 17 than commitment for incapacity to stand trial would better serve the defendant and the
 18 community, **the court shall release the defendant on supervision for as long as the unfitness**
 19 **endures.**

20 **(3) [It] When a defendant is released on supervision under this section, the court** may
 21 place conditions [*which it*] **that the court** deems appropriate on the release, including the require-
 22 ment that the defendant regularly report to the authority or a community mental health program for
 23 examination to determine if the defendant has regained capacity to stand trial.

24 **(4)** When the court, on its own motion or upon the application of the superintendent of the
 25 hospital or director of the [*secure intensive community inpatient*] facility in which the defendant is
 26 committed, a person examining the defendant as a condition of release on supervision, or either
 27 party, determines, after a hearing, if a hearing is requested, that the defendant has regained fitness
 28 to proceed, the **criminal** proceeding shall be resumed. If, however, the court is of the view that so
 29 much time has elapsed since the commitment or release of the defendant on supervision that it
 30 would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss
 31 the charge and may order the defendant to be discharged or cause a proceeding to be commenced
 32 forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

33 [(3)] **(5)** The superintendent of a state hospital or director of a [*secure intensive community in-*
 34 *patient*] facility **to which the defendant is committed** shall cause the defendant to be evaluated
 35 within 60 days from the defendant's delivery into the superintendent's or director's custody, for the
 36 purpose of determining whether there is a substantial probability that, in the foreseeable future, the
 37 defendant will have the capacity to stand trial.

38 [(4)] In addition, the superintendent or director shall:

39 (a) Immediately notify the committing court if the defendant, at any time, gains or regains the
 40 capacity to stand trial or will never have the capacity to stand trial.

41 (b) Within 90 days of the defendant's delivery into the superintendent's or director's custody,
 42 notify the committing court that:

43 (A) The defendant has the present capacity to stand trial;

44 (B) There is no substantial probability that, in the foreseeable future, the defendant will gain
 45 or regain the capacity to stand trial; or

1 (C) There is a substantial probability that, in the foreseeable future, the defendant will gain or
 2 regain the capacity to stand trial. If [such a] **the** probability exists, the superintendent or director
 3 shall give the court an estimate of the time in which the defendant, with appropriate treatment, is
 4 expected to gain or regain capacity.

5 [(5)] **(6)(a)** If the superintendent or director determines that there is a substantial probability
 6 that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless
 7 the court otherwise orders, the defendant shall remain in the superintendent's or director's custody
 8 where the defendant shall receive treatment designed for the purpose of enabling the defendant to
 9 gain or regain capacity. In keeping with the notice requirement under subsection [(4)(b)] **(5)(b)** of
 10 this section, the superintendent or director shall, for the duration of the defendant's period of com-
 11 mitment, submit a progress report to the committing court, concerning the defendant's capacity or
 12 incapacity, at least once every 180 days as measured from the date of the defendant's delivery into
 13 the superintendent's or director's custody.

14 **(b) Notwithstanding paragraph (a) of this subsection, if the superintendent or director**
 15 **determines that a defendant committed under this section is no longer dangerous to self or**
 16 **others as a result of mental disease or defect, or that the services and supervision necessary**
 17 **to restore the defendant's fitness to proceed are available in the community, the super-**
 18 **intendent or director shall file notice of that determination with the court. Upon receipt of**
 19 **the notice, the court shall order the person released on supervision as described in sub-**
 20 **section (3) of this section.**

21 [(6)] **(7)** A defendant who remains committed under subsection [(5)] **(6)** of this section shall be
 22 discharged within a period of time that is reasonable for making a determination concerning
 23 whether or not, and when, the defendant may gain or regain capacity. However, regardless of the
 24 number of charges with which the defendant is accused, in no event shall the defendant be com-
 25 mitted for longer than whichever of the following, measured from the defendant's initial custody
 26 date, is shorter:

27 (a) Three years; or

28 (b) A period of time equal to the maximum sentence the court could have imposed if the de-
 29 fendant had been convicted.

30 [(7)] **(8)** The superintendent or director shall notify the committing court of the defendant's im-
 31 pending discharge 30 days before the date on which the superintendent or director is required to
 32 discharge the defendant under subsection [(6)] **(7)** of this section.

33 [(8)] **(9)** When the committing court receives a notice from the superintendent or director under
 34 [either] subsection [(4) or (7)] **(5) or (8)** of this section concerning the defendant's progress or lack
 35 thereof, the committing court shall determine, after a hearing, if a hearing is requested, whether the
 36 defendant presently has the capacity to stand trial.

37 [(9)] **(10)** If [under subsection (8) of this section] **at any time** the court determines that the de-
 38 fendant lacks the capacity to stand trial, the court shall further determine whether there is a sub-
 39 stantial probability that the defendant, in the foreseeable future, will gain or regain the capacity to
 40 stand trial and whether the defendant is entitled to discharge under subsection [(6)] **(7)** of this sec-
 41 tion. If the court determines that there is no substantial probability that the defendant, in the fore-
 42 seeable future, will gain or regain the capacity to stand trial or that the defendant is entitled to
 43 discharge under subsection [(6)] **(7)** of this section, the court shall dismiss, without prejudice, all
 44 charges against the defendant and:

45 (a) Order that the defendant be discharged; or

(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to 427.290.

[(10)] (11) All notices required under this section shall be filed with the clerk of the court and delivered to both the district attorney and the counsel for the defendant.

[(11)] (12) If the defendant regains fitness to proceed, the term of any sentence received by the defendant for conviction of the crime charged shall be reduced by the amount of time the defendant was committed under this section to the custody of a state mental hospital, or to the custody of a secure intensive community inpatient facility, designated by the Oregon Health Authority.

[(12)] (13) **Notwithstanding the suspension of the criminal proceeding under subsection (2) of this section**, the fact that the defendant is unfit to proceed does not preclude any objection through counsel and without the personal participation of the defendant on the grounds that the indictment is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon any other ground at the discretion of the court which the court deems susceptible of fair determination prior to trial.

SECTION 9. (1) The Oregon Health Authority shall adopt rules necessary to certify psychiatrists and licensed psychologists for the purpose of performing evaluations and examinations described in ORS 161.309, 161.365 and 419C.524. The rules must include a description of the standards and qualifications necessary for certification. The authority may charge a fee for certification under this section in an amount determined by rule.

(2) The authority shall consult with the Psychiatric Security Review Board about proposed rules described in subsection (1) of this section before issuing the proposed rules for public comment and before adopting the rules.

SECTION 10. ORS 161.315 is amended to read:

161.315. Upon filing of notice or the introduction of evidence by the defendant as provided in ORS 161.309 [(3)], the state shall have the right to have at least one psychiatrist or licensed psychologist of its selection examine the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility, if the defendant is 18 years of age or older, for observation and examination as the court may designate for a period not to exceed 30 days. If the defendant is under 18 years of age, upon filing of the notice, the court, in its discretion, may order the defendant committed to a secure intensive community inpatient facility designated by the Oregon Health Authority for observation and examination as the court may designate for a period not to exceed 30 days. If the defendant objects to the examiner chosen by the state, the court for good cause shown may direct the state to select a different examiner.

SECTION 11. (1) Section 9 of this 2011 Act and the amendments to ORS 161.309, 161.315, 161.325, 161.327, 161.328, 161.329, 161.365, 161.370 and 419C.524 by sections 1 to 8 and 10 of this 2011 Act become operative on January 1, 2012.

(2) The Oregon Health Authority and the Psychiatric Security Review Board may adopt rules or take any other action before the operative date specified in subsection (1) of this section that is necessary to enable the authority or the board to exercise, on and after the operative date specified in subsection (1) of this section, all the duties, functions and powers conferred on the authority or the board by this 2011 Act.

SECTION 12. (1) The amendments to ORS 161.309, 161.315, 161.325, 161.327, 161.328, 161.329, 161.365 and 161.370 by sections 1 to 5, 7, 8 and 10 of this 2011 Act apply to prosecutions for conduct occurring on or after January 1, 2012.

(2) The amendments to ORS 419C.524 by section 6 of this 2011 Act apply to juvenile ad-

1 **judications for conduct occurring on or after January 1, 2012.**

2 **SECTION 13. This 2011 Act being necessary for the immediate preservation of the public**
3 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
4 **on its passage.**

5
