

# House Bill 2701

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Judiciary for Disability Rights Oregon)

## 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 process for commitment of persons found guilty except for insanity or found to be incapacitated. Authorizes court or Psychiatric Security Review Board to commit person to custody of Oregon Health Authority.

Requires court to conditionally release person found guilty except for insanity of misdemeanor.

Directs Oregon Health Authority to certify psychiatrists and psychologists for purposes of certain evaluations of persons found guilty except for insanity or found to be incapacitated.

Requires that certain court-ordered evaluations of defendant be conducted by certified psychiatrist or psychologist.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to crime; creating new provisions; amending ORS 161.315, 161.327, 161.328, 161.329, 161.332,  
3 161.336, 161.341, 161.346, 161.365, 161.370, 161.375, 161.390 and 421.633; and declaring an emer-  
4 gency.

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

6 **SECTION 1.** ORS 161.315 is amended to read:

7 161.315. Upon filing of notice or the introduction of evidence by the defendant as provided in  
8 ORS 161.309 (3), the state [*shall have*] **has** the right to have at least one psychiatrist or licensed  
9 psychologist of its selection examine the defendant. The state shall file notice with the court of its  
10 intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may  
11 order the defendant committed to [*a state institution or any other suitable facility, if the defendant is*  
12 *18 years of age or older,*] **the Oregon Health Authority or a suitable private facility** for obser-  
13 vation and examination as the court may designate for a period not to exceed 30 days. [*If the de-*  
14 *fendant is under 18 years of age, upon filing of the notice, the court, in its discretion, may order the*  
15 *defendant committed to a secure intensive community inpatient facility designated by the Oregon Health*  
16 *Authority for observation and examination as the court may designate for a period not to exceed 30*  
17 *days.*] If the defendant objects to the examiner chosen by the state, the court for good cause shown  
18 may direct the state to select a different examiner.

19 **SECTION 2.** ORS 161.332 is amended to read:

20 161.332. As used in ORS 161.315 to 161.351 and 161.385 to 161.395[,]:

21 (1) **“Certified psychiatrist or psychologist” means a psychiatrist or psychologist who**  
22 **holds a valid certification under section 15 of this 2011 Act.**

23 (2) **“Conditional release”** includes, but is not limited to, the monitoring of mental and physical  
24 health treatment.

25 (3) **“Substantial danger to others” means a serious risk to cause serious physical injury**  
26 **to another person as the result of a mental disease or defect.**

27 **SECTION 3.** (1) ORS 161.327 is added to and made a part of ORS 161.315 to 161.351.

**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       **(2) ORS 161.400 is added to and made a part of ORS 161.385 to 161.395.**

2       **SECTION 4.** ORS 161.327 is amended to read:

3       161.327. (1)[(a)] Following the entry of a judgment pursuant to ORS 161.319, [*and the disposi-*  
4       *tional determination under ORS 161.325, if the court finds that the person would have been guilty of*  
5       *a felony, or of a misdemeanor during a criminal episode in the course of which the person caused*  
6       *physical injury or risk of physical injury to another, the court shall order that a psychiatric or psy-*  
7       *chological evaluation be performed and a report of the evaluation be provided to the court if an eval-*  
8       *uation was not performed or a report was not provided to the court prior to trial. Upon receipt of the*  
9       *evaluation,*] the court shall order that [*the*] a person be placed under the jurisdiction of the Psychi-  
10       atric Security Review Board for care and treatment if:

11       **(a) The person is found guilty except for insanity of a felony; and**

12       **(b)** The court finds by a preponderance of the evidence that the person is affected by mental  
13       disease or defect and presents a substantial danger to others requiring commitment [*to*] **or condi-**  
14       **tional release.**[.]

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

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

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

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

24       (2) The court shall determine whether the person should be committed to [*a state hospital, or to*  
25       *a secure intensive community inpatient facility, designated by*] the **Oregon Health** Authority or con-  
26       ditionally released pending any hearing before the board as follows:

27       (a) If the court finds that the person presents a substantial danger to others and is not a proper  
28       subject for conditional release, the court shall order the person committed to [*a state hospital des-*  
29       *ignated by the authority if the person is at least 18 years of age, or to a secure intensive community*  
30       *inpatient facility designated by the authority if the person is under 18 years of age,*] **the authority** for  
31       custody, care and treatment pending hearing before the board in accordance with ORS 161.341 to  
32       161.351.

33       (b) If the court finds that the person presents a substantial danger to others but that the person  
34       can be adequately controlled with supervision and treatment if conditionally released and that nec-  
35       essary supervision and treatment are available, the court may order the person conditionally  
36       released[.].

37       **(3) When a person is conditionally released under subsection (2)(b) of this section, the**  
38       **person is** subject to those supervisory orders of the court as are in the best interests of justice, the  
39       protection of society and the welfare of the person. The court shall designate a person or state,  
40       county or local agency to supervise the person upon release, subject to those conditions as the court  
41       directs in the order for conditional release. Prior to the designation, the court shall notify the per-  
42       son or agency to whom conditional release is contemplated and provide the person or agency an  
43       opportunity to be heard before the court. After receiving an order entered under [*this paragraph*]  
44       **subsection (2)(b) of this section,** the person or agency designated shall assume supervision of the  
45       person pursuant to the direction of the Psychiatric Security Review Board. The person or agency

1 designated as supervisor shall be required to report in writing no less than once per month to the  
 2 board concerning the supervised person's compliance with the conditions of release.

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

7 [(4)] (5) In determining whether a person should be conditionally released, the court:

8 (a) May order evaluations, examinations and compliance as provided in ORS 161.336 (4) and  
 9 161.346 (2), **provided that the evaluation or examination is conducted by a certified psychia-**  
 10 **trist or psychologist.**

11 (b) **Shall order that the person be evaluated by a certified psychiatrist or psychologist**  
 12 **and a report of the examination be provided to the court if an evaluation was not performed**  
 13 **or a report was not provided to the court prior to trial. When the court orders an evaluation**  
 14 **of a financially eligible person under this paragraph, the court shall order the public defense**  
 15 **services executive director to pay a reasonable fee for the evaluation from funds available**  
 16 **for that purpose.**

17 [(5)] (6) In determining whether a person should be committed to [*a state hospital or to a secure*  
 18 *intensive community inpatient facility or conditionally released*] **the authority under subsection**  
 19 **(2)(a) of this section**, the court shall have as its primary concern the protection of society.

20 [(6)] (7) Upon placing a person on conditional release, the court shall notify the board in writing  
 21 of the court's conditional release order, the supervisor appointed, and all other conditions of release,  
 22 and the person shall be on conditional release pending hearing before the board in accordance with  
 23 ORS 161.336 to 161.351. Upon compliance with [*this subsection and subsections (1) and (2) of*] this  
 24 section, the court's jurisdiction over the person is terminated and the board assumes jurisdiction  
 25 over the person.

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

28 [(7)] (9) An order of the court under this section is a final order appealable by the person found  
 29 guilty except for insanity in accordance with ORS 19.205 (5). Notwithstanding ORS 19.255, notice  
 30 of an appeal under this section shall be served and filed within 90 days after the order appealed from  
 31 is entered in the register. The person shall be entitled on appeal to suitable counsel possessing  
 32 skills and experience commensurate with the nature and complexity of the case. If the person is fi-  
 33 nancially eligible, suitable counsel shall be appointed in the manner provided in ORS 138.500 (1), and  
 34 the compensation for counsel and costs and expenses of the person necessary to the appeal shall be  
 35 determined and paid as provided in ORS 138.500.

36 [(8)] (10) Upon placing a person under the jurisdiction of the board, the court shall notify the  
 37 person of the right to appeal and the right to a hearing before the board in accordance with ORS  
 38 161.336 (7) and 161.341 (4).

39 **SECTION 5.** ORS 161.329 is amended to read:

40 161.329. Following the entry of a judgment pursuant to ORS 161.319 [*and the dispositional de-*  
 41 *termination under ORS 161.325*], **the court shall order a person found guilty except for insanity**  
 42 **of a crime discharged from custody** if the court finds that:

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

1       **(2) Each offense for which the person was found guilty except for insanity is a**  
 2 **misdemeanor.**

3       **SECTION 6.** ORS 161.328 is amended to read:

4       161.328. *[Following the entry of a judgment pursuant to ORS 161.319 and the dispositional deter-*  
 5 *mination under ORS 161.325, if the court finds that the person would have been guilty of a*  
 6 *misdemeanor during a criminal episode in the course of which the person did not cause physical injury*  
 7 *or risk of physical injury to another, and if]* **When the court enters an order described in ORS**  
 8 **161.329 and** the court has probable cause to believe that the person is dangerous to self or others  
 9 as a result of a mental disorder, the court may initiate civil commitment proceedings under ORS  
 10 426.070 to 426.130.

11       **SECTION 7.** ORS 161.336 is amended to read:

12       161.336. (1) If the Psychiatric Security Review Board determines that the person presents a  
 13 substantial danger to others but can be adequately controlled with supervision and treatment if  
 14 conditionally released and that necessary supervision and treatment are available, the board may  
 15 order the person conditionally released, subject to those supervisory orders of the board as are in  
 16 the best interests of justice, the protection of society and the welfare of the person. The board may  
 17 designate any person or state, county or local agency the board considers capable of supervising the  
 18 person upon release, subject to those conditions as the board directs in the order for conditional  
 19 release. Prior to the designation, the board shall notify the person or agency to whom conditional  
 20 release is contemplated and provide the person or agency an opportunity to be heard before the  
 21 board. After receiving an order entered under this section, the person or agency designated shall  
 22 assume supervision of the person pursuant to the direction of the board.

23       (2) Conditions of release contained in orders entered under this section may be modified from  
 24 time to time and conditional releases may be terminated by order of the board as provided in ORS  
 25 161.351.

26       (3) For purposes of this section, a person affected by a mental disease or defect in a state of  
 27 remission is considered to have a mental disease or defect requiring supervision when the disease  
 28 may, with reasonable medical probability, occasionally become active and, when active, render the  
 29 person a danger to others. The person may be continued on conditional release by the board as  
 30 provided in this section.

31       (4)(a) As a condition of release, the board may require the person to report to any state or local  
 32 mental health facility for evaluation. Whenever medical, psychiatric or psychological treatment is  
 33 recommended, the board may order the person, as a condition of release, to cooperate with and ac-  
 34 cept the treatment from the facility.

35       (b) The facility to which the person has been referred for evaluation shall perform the evalu-  
 36 ation and submit a written report of its findings to the board. If the facility finds that treatment of  
 37 the person is appropriate, it shall include its recommendations for treatment in the report to the  
 38 board.

39       (c) Whenever treatment is provided by the facility, it shall furnish reports to the board on a  
 40 regular basis concerning the progress of the person.

41       (d) Copies of all reports submitted to the board pursuant to this section shall be furnished to the  
 42 person and the person's counsel. The confidentiality of these reports is determined pursuant to ORS  
 43 192.501 to 192.505.

44       (e) The facility shall comply with any other conditions of release prescribed by order of the  
 45 board.

1 (5) If at any time while the person is under the jurisdiction of the board it appears to the board  
2 or its chairperson that the person has violated the terms of the conditional release or that the  
3 mental health of the individual has changed, the board or its chairperson may order the person re-  
4 turned for evaluation or treatment to [*a state hospital designated by*] **the custody of** the Oregon  
5 Health Authority [*if the person is at least 18 years of age, or to a secure intensive community inpatient*  
6 *facility designated by the authority if the person is under 18 years of age*]. A written order of the  
7 board, or its chairperson on behalf of the board, is sufficient warrant for any law enforcement officer  
8 to take into custody such person and transport the person accordingly. A sheriff, municipal police  
9 officer, constable, parole and probation officer, prison official or other peace officer shall execute  
10 the order, and the person shall be returned as soon as practicable to the custody of the authority.  
11 Within 20 days following the return of the person to the custody of the authority, the board shall  
12 conduct a hearing. Notice of the time and place of the hearing shall be given to the person, the  
13 attorney representing the person and the Attorney General. The board may continue the person on  
14 conditional release or, if it finds by a preponderance of the evidence that the person is affected by  
15 mental disease or defect and presents a substantial danger to others and cannot be adequately  
16 controlled if conditional release is continued, it may order the person committed to [*a state hospital*  
17 *designated by the authority if the person is at least 18 years of age, or to a secure intensive community*  
18 *inpatient facility designated by the authority if the person is under 18 years of age*] **the authority**.  
19 The state must prove by a preponderance of the evidence the person's unfitness for conditional re-  
20 lease. A person in custody pursuant to this subsection has the same rights as any person appearing  
21 before the board pursuant to ORS 161.346.

22 (6) The community mental health program director, the director of the facility providing treat-  
23 ment to a person on conditional release, any peace officer or any person responsible for the super-  
24 vision of a person on conditional release may take a person on conditional release into custody or  
25 request that the person be taken into custody if there is reasonable cause to believe the person is  
26 a substantial danger to others because of mental disease or defect and that the person is in need  
27 of immediate care, custody or treatment. Any person taken into custody pursuant to this subsection  
28 shall be transported as soon as practicable to a [*state hospital designated by the authority if the*  
29 *person is at least 18 years of age, or to a secure intensive community inpatient facility designated by*  
30 *the authority if the person is under 18 years of age*] **facility designated by the authority**. A person  
31 taken into custody under this subsection has the same rights as any person appearing before the  
32 board pursuant to ORS 161.346.

33 (7)(a) Any person conditionally released under this section may apply to the board for discharge  
34 from or modification of an order of conditional release on the ground that the person is no longer  
35 affected by mental disease or defect or, if still so affected, no longer presents a substantial danger  
36 to others and no longer requires supervision, medication, care or treatment. Notice of the hearing  
37 on an application for discharge or modification of an order of conditional release shall be made to  
38 the Attorney General. The applicant, at the hearing pursuant to this subsection, must prove by a  
39 preponderance of the evidence the applicant's fitness for discharge or modification of the order of  
40 conditional release. Applications by the person for discharge or modification of conditional release  
41 shall not be filed more often than once every six months.

42 (b) Upon application by any person or agency responsible for supervision or treatment pursuant  
43 to an order of conditional release, the board shall conduct a hearing to determine if the conditions  
44 of release shall be continued, modified or terminated. The application shall be accompanied by a  
45 report setting forth the facts supporting the application.

1 (8) The total period of commitment and conditional release ordered pursuant to this section may  
 2 not exceed the maximum sentence provided by statute for the crime for which the person was found  
 3 guilty except for insanity.

4 (9) The board shall maintain and keep current the medical, social and criminal history of all  
 5 persons committed to its jurisdiction. The confidentiality of records maintained by the board shall  
 6 be determined pursuant to ORS 192.501 to 192.505.

7 (10) In determining whether a person should be committed to *[a state hospital or to a secure in-*  
 8 *tensive community inpatient facility, conditionally released or discharged]* **the authority**, the board  
 9 shall have as its primary concern the protection of society.

10 **SECTION 8.** ORS 161.341 is amended to read:

11 161.341. (1) If the Psychiatric Security Review Board finds, upon its initial hearing, that the  
 12 person presents a substantial danger to others and is not a proper subject for conditional release,  
 13 the board shall order the person committed to, *or retained in, a state hospital designated by the*  
 14 *Oregon Health Authority if the person is at least 18 years of age, or to a secure intensive community*  
 15 *inpatient facility designated by the authority if the person is under 18 years of age,]* **the Oregon**  
 16 **Health Authority** for custody, care and treatment. The period of commitment ordered by the board  
 17 may not exceed the maximum sentence provided by statute for the crime for which the person was  
 18 found guilty except for insanity.

19 (2) If at any time after the commitment of a person to *[a state hospital, or to a secure intensive*  
 20 *community inpatient facility, designated by]* the authority under this section, *[the superintendent of the*  
 21 *hospital or the director of the secure intensive community inpatient facility]* **the authority** is of the  
 22 opinion that the person is no longer affected by mental disease or defect, or, if so affected, no longer  
 23 presents a substantial danger to others or that the person continues to be affected by mental disease  
 24 or defect and continues to be a danger to others, but that the person can be controlled with proper  
 25 care, medication, supervision and treatment if conditionally released, the *[superintendent or*  
 26 *director]* **authority** shall apply to the board for an order of discharge or conditional release. The  
 27 application shall be accompanied by a report setting forth the facts supporting the opinion of the  
 28 *[superintendent or director]* **authority**. If the application is for conditional release, the application  
 29 must also be accompanied by a verified conditional release plan. The board shall hold a hearing on  
 30 the application within 60 days of its receipt. Not less than 20 days prior to the hearing before the  
 31 board, copies of the report shall be sent to the Attorney General.

32 (3) The attorney representing the state may choose a psychiatrist or licensed psychologist to  
 33 examine the person prior to the initial or any later decision by the board on discharge or condi-  
 34 tional release. The results of the examination shall be in writing and filed with the board, and shall  
 35 include, but need not be limited to, an opinion as to the mental condition of the person, whether the  
 36 person presents a substantial danger to others and whether the person could be adequately con-  
 37 trolled with treatment as a condition of release.

38 (4) Any person who has been committed to *[a state hospital, or to a secure intensive community*  
 39 *inpatient facility, designated by]* the authority for custody, care and treatment or another person  
 40 acting on the person's behalf may apply to the board for an order of discharge or conditional release  
 41 upon the grounds:

42 (a) That the person is no longer affected by mental disease or defect;

43 (b) If so affected, that the person no longer presents a substantial danger to others; or

44 (c) That the person continues to be affected by a mental disease or defect and would continue  
 45 to be a danger to others without treatment, but that the person can be adequately controlled and

1 given proper care and treatment if placed on conditional release.

2 (5) When application is made under subsection (4) of this section, the board shall require that  
 3 a report from [*the superintendent of the hospital or the director of the secure intensive community in-*  
 4 *patient facility*] **the authority** be prepared and transmitted as provided in subsection (2) of this  
 5 section. The applicant must prove by a preponderance of the evidence the applicant's fitness for  
 6 discharge or conditional release under the standards of subsection (4) of this section, unless more  
 7 than two years has passed since the state had the burden of proof on that issue, in which case the  
 8 state shall have the burden of proving by a preponderance of the evidence the applicant's lack of  
 9 fitness for discharge or conditional release. Applications for discharge or conditional release under  
 10 subsection (4) of this section [*shall*] **may** not be filed more often than once every six months com-  
 11 mencing with the date of the initial board hearing.

12 (6) The board is not required to hold a hearing on a first application under subsection (4) of this  
 13 section any sooner than 90 days after the initial hearing. However, hearings resulting from any  
 14 subsequent requests shall be held within 60 days of the filing of the application.

15 (7)(a) In no case shall any person committed by the court under ORS 161.327 to [*a state hospital,*  
 16 *or to a secure intensive community inpatient facility, designated by*] the authority be held in [*the hos-*  
 17 *pital or facility*] **custody** for more than 90 days from the date of the court's commitment order  
 18 without an initial hearing before the board to determine whether the person should be conditionally  
 19 released or discharged.

20 (b) In no case shall a person be held pursuant to this section for a period of time exceeding two  
 21 years without a hearing before the board to determine whether the person should be conditionally  
 22 released or discharged.

23 **SECTION 9.** ORS 161.346 is amended to read:

24 161.346. (1) The Psychiatric Security Review Board shall conduct hearings upon any application  
 25 for discharge, conditional release, commitment or modification filed pursuant to ORS 161.336, 161.341  
 26 or 161.351 and as otherwise required by ORS 161.336 to 161.351 and shall make findings on the is-  
 27 sues before it which may include:

28 (a) If the board finds that the person is no longer affected by mental disease or defect, or, if so  
 29 affected, no longer presents a substantial danger to others, the board shall order the person dis-  
 30 charged from commitment or from conditional release.

31 (b) If the board finds that the person is still affected by a mental disease or defect and is a  
 32 substantial danger to others, but can be controlled adequately if conditionally released with treat-  
 33 ment as a condition of release, the board shall order the person conditionally released as provided  
 34 in ORS 161.336.

35 (c) If the board finds that the person has not recovered from the mental disease or defect and  
 36 is a substantial danger to others and cannot adequately be controlled if conditionally released on  
 37 supervision, the board shall order the person committed to [, *or retained in, a state hospital desig-*  
 38 *nated by the Oregon Health Authority if the person is at least 18 years of age, or a secure intensive*  
 39 *community inpatient facility designated by the authority if the person is under 18 years of age,] **the**  
 40 **Oregon Health Authority** for care, custody and treatment.*

41 (2) At any time, the board may appoint a psychiatrist or licensed psychologist to examine the  
 42 person and to submit a report to the board. Reports filed with the board pursuant to the examination  
 43 shall include, but need not be limited to, an opinion as to the mental condition of the person and  
 44 whether the person presents a substantial danger to others, and whether the person could be ade-  
 45 quately controlled with treatment as a condition of release. To facilitate the examination of the

1 person, the board may order the person placed in the temporary custody of [*any state hospital or*  
2 *other suitable*] **the authority or a suitable private** facility.

3 (3) The board may make the determination regarding discharge or conditional release based  
4 upon the written reports submitted pursuant to this section. If any member of the board desires  
5 further information from the examining psychiatrist or licensed psychologist who submitted the re-  
6 port, these persons shall be summoned by the board to give testimony. The board shall consider all  
7 evidence available to it which is material, relevant and reliable regarding the issues before the  
8 board. Such evidence may include but is not limited to the record of trial, the information supplied  
9 by the attorney representing the state or by any other interested party, including the person, and  
10 information concerning the person's mental condition and the entire psychiatric and criminal history  
11 of the person. All evidence of a type commonly relied upon by reasonably prudent persons in the  
12 conduct of their serious affairs shall be admissible at hearings. Testimony shall be taken upon oath  
13 or affirmation of the witness from whom received. The officer presiding at the hearing shall admin-  
14 ister oaths or affirmations to witnesses.

15 (4) The board shall furnish to the person about whom the hearing is being conducted, the at-  
16 torney representing the person, the Attorney General, the district attorney and the court or de-  
17 partment of the county from which the person was committed written notice of any hearing pending  
18 under this section within a reasonable time prior to the hearing. The notice shall include:

19 (a) The time, place and location of the hearing.

20 (b) The nature of the hearing and the specific action for which a hearing has been requested,  
21 the issues to be considered at the hearing and a reference to the particular sections of the statutes  
22 and rules involved.

23 (c) A statement of the authority and jurisdiction under which the hearing is to be held.

24 (d) A statement of all rights under subsection (6) of this section.

25 (5) Prior to the commencement of a hearing, the board or presiding officer shall serve personally  
26 or by mail a written notice to each party as provided in ORS 183.413 (2).

27 (6) At the hearing, the person about whom the hearing is being held shall have the right:

28 (a) To appear at all proceedings held pursuant to this section, except board deliberations.

29 (b) To cross-examine all witnesses appearing to testify at the hearing.

30 (c) To subpoena witnesses and documents as provided in ORS 161.395.

31 (d) To be represented by suitable legal counsel possessing skills and experience commensurate  
32 with the nature and complexity of the case, to consult with counsel prior to the hearing and, if fi-  
33 nancially eligible, to have suitable counsel appointed at state expense.

34 (e) To examine all information, documents and reports which the board considers. If then avail-  
35 able to the board, the information, documents and reports shall be disclosed to the person so as to  
36 allow examination prior to the hearing.

37 (7) A record shall be kept of all hearings before the board, except board deliberations.

38 (8) Upon request of any party before the board, or on its own motion, the board may continue  
39 a hearing for a reasonable period not to exceed 60 days to obtain additional information or testi-  
40 mony or for other good cause shown.

41 (9) Within 15 days following the conclusion of the hearing, the board shall provide to the person,  
42 the attorney representing the person, the Attorney General or other attorney representing the state,  
43 if any, written notice of the board's decision.

44 (10) The burden of proof on all issues at hearings of the board shall be by a preponderance of  
45 the evidence.

1 (11) If the board determines that the person about whom the hearing is being held is financially  
 2 eligible, the board shall appoint suitable counsel to represent the person. Counsel so appointed shall  
 3 be an attorney who satisfies the professional qualifications established by the Public Defense Ser-  
 4 vices Commission under ORS 151.216. The public defense services executive director shall determine  
 5 and allow fair compensation for counsel appointed under this subsection and the reasonable ex-  
 6 penses of the person in respect to the hearing. Compensation payable to appointed counsel shall not  
 7 be less than the applicable compensation level established under ORS 151.216. The compensation and  
 8 expenses so allowed shall be paid by the public defense services executive director from funds  
 9 available for the purpose.

10 (12) The Attorney General may represent the state at contested hearings before the board unless  
 11 the district attorney of the county from which the person was committed elects to represent the  
 12 state. The district attorney of the county from which the person was committed shall cooperate with  
 13 the Attorney General in securing the material necessary for presenting a contested hearing before  
 14 the board. If the district attorney elects to represent the state, the district attorney shall give timely  
 15 written notice of such election to the Attorney General, the board and the attorney representing the  
 16 person.

17 **SECTION 10.** ORS 161.365 is amended to read:

18 161.365. (1) [*Whenever*] **When** the court has reason to doubt the defendant’s fitness to proceed  
 19 by reason of incapacity as [*defined*] **described** in ORS 161.360, the court may call **any witness** to  
 20 its assistance in reaching its decision [*any witness and may appoint a psychiatrist or psychologist to*  
 21 *examine the defendant and advise the court*].

22 (2) If the court determines the assistance of a psychiatrist or psychologist would be helpful, the  
 23 court may order the defendant to be [*committed for the purpose of an examination for a period not*  
 24 *exceeding 30 days to a state mental hospital designated by the Oregon Health Authority if the defend-*  
 25 *ant is at least 18 years of age, or to a secure intensive community inpatient facility designated by the*  
 26 *authority if the defendant is under 18 years of age*] **examined by a certified psychiatrist or psy-**  
 27 **chologist**. The report of [*each*] **the** examination shall include, but is not necessarily limited to, the  
 28 following:

- 29 (a) A description of the nature of the examination;
- 30 (b) A statement of the mental condition of the defendant; and
- 31 (c) If the defendant suffers from a mental disease or defect, an opinion as to whether:

32 **(A)** The defendant is incapacitated within the [*definition*] **description** set out in ORS 161.360;  
 33 **and**

34 **(B) There is a substantial probability that, in the foreseeable future, the defendant will**  
 35 **gain or regain capacity to stand trial.**

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

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

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

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

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

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

10 [(7)] (b) When such an examination is ordered at the request or with the acquiescence of a de-  
 11 fendant who is determined not to be financially eligible, the examination shall be performed at the  
 12 defendant's expense. When such an examination is ordered at the request of the prosecution, the  
 13 county shall pay for the expense of the examination.

14 (7) As used in this section, "certified psychiatrist or psychologist" has the meaning given  
 15 that term in ORS 161.332.

16 **SECTION 11.** ORS 161.370 is amended to read:

17 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-  
 18 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the  
 19 finding of the report filed [*by a psychiatrist or psychologist*] under ORS 161.365, the court may make  
 20 the determination on the basis of [*such*] **the** report. If the finding is contested, the court shall hold  
 21 a hearing on the issue. If the report is received in evidence [*upon such*] **in the** hearing, the party  
 22 who contests the finding [*thereof shall have*] **has** the right to summon and to cross-examine any  
 23 psychiatrist or psychologist who submitted the report and to offer evidence upon the issue. Other  
 24 evidence regarding the defendant's fitness to proceed may be introduced by either party.

25 (2) [*If the court determines that the defendant lacks fitness to proceed, the proceeding against the*  
 26 *defendant shall be suspended, except as provided in subsection (12) of this section, and the court*] **The**  
 27 **court shall suspend the criminal proceeding against the defendant if the court determines**  
 28 **that:**

29 (a) **The defendant lacks fitness to proceed and there is a substantial probability that, in**  
 30 **the foreseeable future, the defendant will gain or regain the capacity to stand trial; or**

31 (b) **An additional period of treatment and observation is necessary before the court can**  
 32 **make the determination described in paragraph (a) of this subsection.**

33 (3) **Upon suspension of the criminal proceeding under subsection (2) of this section, the**  
 34 **court** shall commit the defendant to the custody of the [*superintendent of a state mental hospital*  
 35 *designated by the*] Oregon Health Authority [*if the defendant is at least 18 years of age, or to the*  
 36 *custody of the director of a secure intensive community inpatient facility designated by the authority if*  
 37 *the defendant is under 18 years of age,*] or shall release the defendant on supervision for as long as  
 38 [*such*] **the** unfitness [*shall endure*] **endures.** The court may release the defendant on supervision if  
 39 [*it*] **the court** determines that care other than commitment for incapacity to stand trial would better  
 40 serve the defendant and the community. [*It*] **The court** may place conditions [*which it*] **that the**  
 41 **court** deems appropriate on the release, including the requirement that the defendant regularly re-  
 42 port to the authority or a community mental health program for examination to determine if the  
 43 defendant has regained capacity to stand trial. When the court, on its own motion or upon the ap-  
 44 plication of the [*superintendent of the hospital or director of the secure intensive community inpatient*  
 45 *facility in which the defendant is committed*] **authority,** a person examining the defendant as a con-

1 dition of release on supervision, or either party, determines, after a hearing, if a hearing is re-  
 2 quested, that the defendant has regained fitness to proceed, the **criminal** proceeding shall be  
 3 resumed. If, however, the court is of the view that so much time has elapsed since the commitment  
 4 or release of the defendant on supervision that it would be unjust to resume the criminal proceeding,  
 5 the court on motion of either party may dismiss the charge and may order the defendant to be dis-  
 6 charged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170 or 427.235  
 7 to 427.290.

8 [(3)] (4) The [*superintendent of a state hospital or director of a secure intensive community inpa-*  
 9 *tient facility*] **authority** shall cause the defendant to be evaluated within 60 days from the  
 10 defendant's delivery into the [*superintendent's or director's*] custody **of the authority**, for the pur-  
 11 pose of determining whether there is a substantial probability that, in the foreseeable future, the  
 12 defendant will have the capacity to stand trial.

13 [(4)] (5) In addition, the [*superintendent or director*] **authority** shall:

14 (a) Immediately notify the committing court if the defendant, at any time, gains or regains the  
 15 capacity to stand trial or **if the authority determines that the defendant** will never have the  
 16 capacity to stand trial.

17 (b) Within 90 days of the defendant's delivery into the [*superintendent's or director's*] custody  
 18 **of the authority**, notify the committing court that:

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

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

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

26 [(5)] (6) If the [*superintendent or director*] **authority** determines that there is a substantial  
 27 probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand  
 28 trial, unless the court otherwise orders, the defendant shall remain in the [*superintendent's or*  
 29 *director's*] custody **of the authority** where the defendant shall receive treatment designed for the  
 30 purpose of enabling the defendant to gain or regain capacity. In keeping with the notice requirement  
 31 under subsection [(4)(b)] (5)(b) of this section, the [*superintendent or director*] **authority** shall, for  
 32 the duration of the defendant's period of commitment, submit a progress report to the committing  
 33 court, concerning the defendant's capacity or incapacity, at least once every 180 days as measured  
 34 from the date of the defendant's delivery into the [*superintendent's or director's*] custody **of the au-**  
 35 **thority**.

36 [(6)] (7)(a) A defendant who remains committed under subsection [(5)] (6) of this section shall  
 37 be discharged within a period of time that is reasonable for making a determination concerning  
 38 whether or not, and when, the defendant may gain or regain capacity. However, regardless of the  
 39 number of charges with which the defendant is accused, in no event shall the defendant be com-  
 40 mitted for longer than whichever of the following, measured from the defendant's initial custody  
 41 date, is shorter:

42 [(a)] (A) Three years; or

43 [(b)] (B) A period of time equal to the maximum sentence the court could have imposed if the  
 44 defendant had been convicted.

45 (b) **For purposes of calculating the maximum period of commitment described in para-**

1 **graph (a) of this subsection:**

2 (A) **The initial custody date is the date on which the defendant is first committed under**  
 3 **this section on any charge alleged in the accusatory instrument; and**

4 (B) **The defendant shall be given credit against each charge alleged in the accusatory**  
 5 **instrument for each day the defendant is committed under this section, whether the days**  
 6 **are consecutive to one another or are interrupted by a period of time during which the de-**  
 7 **fendant has regained fitness to proceed.**

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

11 [(8)] (9) When the committing court receives a notice from the [superintendent or director] **au-**  
 12 **thority** under either subsection [(4) or (7)] (5) or (8) of this section concerning the defendant's  
 13 progress or lack thereof, the committing court shall determine after a hearing, if a hearing is re-  
 14 quested, whether the defendant presently has the capacity to stand trial.

15 [(9)] (10) If [under subsection (8) of this section] the court determines that the defendant lacks  
 16 the capacity to stand trial, the court shall further determine whether there is a substantial proba-  
 17 bility that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial  
 18 and whether the defendant is entitled to discharge under subsection [(6)] (7) of this section. If, **at**  
 19 **any time**, the court determines that there is no substantial probability that the defendant, in the  
 20 foreseeable future, will gain or regain the capacity to stand trial or that the defendant is entitled  
 21 to discharge under subsection [(6)] (7) of this section, the court shall dismiss, without prejudice, all  
 22 charges against the defendant and:

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

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

25 [(10)] (11) All notices required under this section shall be filed with the clerk of the court and  
 26 delivered to both the district attorney and the counsel for the defendant.

27 [(11)] (12) If the defendant regains fitness to proceed, the term of any sentence received by the  
 28 defendant for conviction of the crime charged shall be reduced by the amount of time the defendant  
 29 was committed under this section to the custody of [a state mental hospital, or to the custody of a  
 30 secure intensive community inpatient facility, designated by] the Oregon Health Authority.

31 [(12)] (13) **Notwithstanding that the criminal proceeding against the defendant has been**  
 32 **suspended under subsection (2) of this section**, the fact that the defendant is unfit to proceed  
 33 does not preclude any objection through counsel and without the personal participation of the de-  
 34 fendant on the grounds that the indictment is insufficient, that the statute of limitations has run,  
 35 that double jeopardy principles apply or upon any other ground at the discretion of the court which  
 36 the court deems susceptible of fair determination prior to trial.

37 **SECTION 12.** ORS 161.375 is amended to read:

38 161.375. [(1) When a patient, who has been placed at the Oregon State Hospital for evaluation, care,  
 39 custody and treatment under the jurisdiction of the Psychiatric Security Review Board or by court or-  
 40 der under ORS 161.315, 161.365 or 161.370, has escaped or is absent without authorization from the  
 41 Oregon State Hospital or from the custody of any person in whose charge the superintendent has placed  
 42 the patient, the superintendent may order the arrest and detention of the patient.]

43 [(2)] (1) When a patient, who has been placed at a [secure intensive community inpatient] facility  
 44 for evaluation, care, custody and treatment under the jurisdiction of the Psychiatric Security Review  
 45 Board or by court order under ORS 161.315, 161.365, 161.370 or 419C.527, has escaped or is absent

1 without authorization from the facility or from the custody of any person in whose charge the di-  
 2 rector of the facility has placed the patient, the director of the facility shall notify the Director of  
 3 the Oregon Health Authority. The Director of the Oregon Health Authority may order the arrest  
 4 and detention of the patient.

5 [(3)] (2) The [*superintendent or the*] Director of the Oregon Health Authority may issue an order  
 6 under this section based upon a reasonable belief that grounds exist for issuing the order. When  
 7 reasonable, [*the superintendent or*] the Director of the Oregon Health Authority shall investigate to  
 8 ascertain whether such grounds exist.

9 [(4)] (3) Any order issued by [*the superintendent or*] the Director of the Oregon Health Authority  
 10 as authorized by this section constitutes full authority for the arrest and detention of the patient  
 11 and all laws applicable to warrant or arrest apply to the order. An order issued by [*the superinten-*  
 12 *dent or*] the Director of the Oregon Health Authority under this section expires 72 hours after being  
 13 signed by [*the superintendent or*] the Director of the Oregon Health Authority.

14 [(5)] (4) As used in this section, [*“superintendent” means the superintendent of the Oregon State*  
 15 *Hospital or*] **“Director of the Oregon Health Authority” includes** the [*superintendent’s*] **director’s**  
 16 authorized representative.

17 **SECTION 13.** ORS 161.390 is amended to read:

18 161.390. (1) The Oregon Health Authority shall promulgate rules for the assignment of persons  
 19 [*to state mental hospitals or secure intensive community inpatient facilities*] **committed to the cus-**  
 20 **tody of the authority** under ORS 161.341, 161.365 and 161.370 and for establishing standards for  
 21 evaluation and treatment of persons committed to [*a state hospital or a secure intensive community*  
 22 *inpatient facility, designated by*] the authority, or ordered to a community mental health program  
 23 under ORS 161.315 to 161.351.

24 (2) Whenever the Psychiatric Security Review Board requires the preparation of a predischarge  
 25 or preconditional release plan before a hearing or as a condition of granting discharge or condi-  
 26 tional release for a person committed under ORS 161.327 or 161.341 to [*a state hospital or a secure*  
 27 *intensive community inpatient facility*] **the authority** for custody, care and treatment, the authority  
 28 is responsible for and shall prepare the plan.

29 (3) In carrying out a conditional release plan prepared under subsection (2) of this section, the  
 30 authority may contract with a community mental health program, other public agency or private  
 31 corporation or an individual to provide supervision and treatment for the conditionally released  
 32 person.

33 **SECTION 14.** ORS 421.633 is amended to read:

34 421.633. (1) Notwithstanding ORS 421.611 to 421.630 or any actions taken under ORS 421.611 to  
 35 421.630, the Department of Corrections may lease all or part of the real property and any improve-  
 36 ments to the real property known as the Milliron Road Site south of Junction City, Lane County,  
 37 to the Oregon Health Authority for a period of years agreed upon by the department and the au-  
 38 thority.

39 (2) The authority may build, own and operate, on the real property leased from the department  
 40 under subsection (1) of this section, a hospital to provide diagnosis and evaluation, medical care,  
 41 detoxification, social services, rehabilitation or other services for individuals committed to the au-  
 42 thority under ORS **161.327, 161.370 or** 426.130 [*and individuals committed to a state hospital under*  
 43 *ORS 161.327 or 161.370*].

44 (3) The department and the authority are authorized to negotiate and enter into a written  
 45 agreement transferring ownership of the hospital described in subsection (2) of this section from the

1 authority to the department, under terms and conditions acceptable to the agencies.

2 **SECTION 15.** The Oregon Health Authority shall adopt rules necessary to certify psy-  
3 chiatrists and licensed psychologists for the purpose of performing evaluations and exam-  
4 inations described in ORS 161.327 and 161.365. The rules must include a description of the  
5 standards and qualifications necessary for certification.

6 **SECTION 16.** (1) Section 15 of this 2011 Act and the amendments to ORS 161.315, 161.327,  
7 161.328, 161.329, 161.332, 161.336, 161.341, 161.346, 161.365, 161.370, 161.375, 161.390 and 421.633  
8 by sections 1, 2 and 4 to 14 of this 2011 Act become operative on January 1, 2012.

9 (2) The Oregon Health Authority may adopt rules or take any other action before the  
10 operative date specified in subsection (1) of this section that is necessary to enable the au-  
11 thority to exercise, on or after the operative date specified in subsection (1) of this section,  
12 all the duties, functions and powers conferred on the authority by this 2011 Act.

13 (3) Any person who, on January 1, 2012, is subject to an order under ORS 161.315 to  
14 161.351, 161.365 or 161.370 committing the person to a state hospital or secure intensive  
15 community inpatient facility shall be, by operation of law on January 1, 2012, thereafter  
16 committed to the Oregon Health Authority. Nothing in this subsection requires a change in  
17 the terms of the person's commitment or modifies the circumstances under which the per-  
18 son may be released from commitment.

19 **SECTION 17.** This 2011 Act being necessary for the immediate preservation of the public  
20 peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect  
21 on its passage.  
22