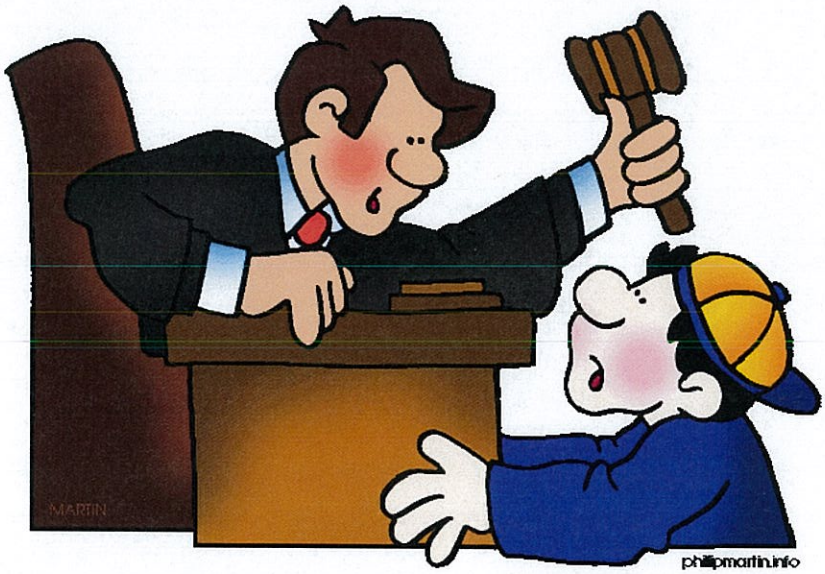
REASONS TO PASS AND FUND THIS BILL

HB 2836 (2013)

Juvenile Aid and Assist

(Juvenile Fitness to Proceed)



Prepared by the Oregon Law Commission

House Bill 2836

Sponsored by COMMITTEE ON JUDICIARY (at the request of Oregon Law Commission)

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.**

Establishes standards and procedures for determining fitness of youth to proceed on delinquency petition.

Requires Oregon Health Authority to develop guidelines for conduct of evaluation of fitness of youth to proceed and to administer program to provide restorative services to youths who are determined unfit to proceed and who present substantial probability of gaining or regaining fitness to proceed.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to fitness of youth to proceed on delinquency petition; creating new provisions; amending ORS 419C.150; and declaring an emergency.

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

SECTION 1. (1) A court may find that a youth is unfit to proceed in a proceeding initiated by a petition alleging jurisdiction under ORS 419C.005 if, as a result of mental disease or defect or another condition, the youth is unable:

(a) To understand the nature of the proceedings against the youth;

(b) To assist and cooperate with the counsel for the youth; or

(c) To participate in the defense of the youth.

(2) A court may not find that a youth is unfit to proceed in a proceeding solely because:

(a) Of the age of the youth;

(b) Of the current inability of the youth to remember the acts alleged in the petition; or

(c) Evidence exists that the youth committed the acts alleged in the petition while the youth was under the influence of intoxicants or medication.

(3) The issue of fitness to proceed must be raised by written motion filed by a party to the proceeding or by the court on its own motion. The motion may be made at any time after the filing of the petition. The court shall stay the proceedings on the petition after the motion is made and may order the youth to participate in an evaluation under section 2 of this 2013 Act to determine the youth's fitness to proceed if the court determines that:

(a) There is reason to doubt the youth's fitness to proceed; and

(b) There is probable cause to believe that the factual allegations contained in the petition are true.

(4) The fact that the youth is unfit to proceed does not preclude any objection through counsel and without the personal participation of the youth on the grounds that the petition 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 that the court deems susceptible of fair determination prior to trial.

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.

SECTION 2. (1) An evaluation ordered under section 1 of this 2013 Act must be conducted by a psychiatrist, a licensed psychologist or a regulated social worker. If an evaluation is requested, the party at whose request the evaluation was ordered shall notify the court and other parties of the date, time and location of the evaluation and the name of the evaluator chosen by the party. A party or the court may submit written information to the evaluator for consideration. When written information that has not been provided to the court or an opposing party is submitted to the evaluator, the party submitting the written information to the evaluator shall provide the written information to the court and the opposing party.

(2)(a) Upon motion of the youth, or upon the court's own motion, a court shall determine whether the youth is financially eligible under the policies, procedures, standards and guidelines of the Public Defense Services Commission.

(b) If a county court or justice court determines that the youth is financially eligible, the court shall order the county to pay the fees and costs described in subsection (3) of this section from funds available for that purpose.

(c) If a circuit court determines that the youth is financially eligible, the court shall order the public defense services executive director to pay the fees and costs described in subsection (3) of this section from funds available for that purpose.

(3) If a court determines that a youth is financially eligible under subsection (2) of this section, the court shall order that:

(a) A reasonable fee be paid to a psychiatrist, licensed psychologist or regulated social worker in private practice who conducts the evaluation; and

(b) All costs, including transportation of the youth, be paid if the evaluation is conducted by a psychiatrist, licensed psychologist or regulated social worker employed by the Department of Human Services or is conducted by a community mental health program or community developmental disabilities program established under ORS 430.610 to 430.695.

(4) If an evaluation is ordered under section 1 of this 2013 Act at the request of or with the acquiescence of a youth, and the youth is determined not to be financially eligible under subsection (2) of this section, the evaluation shall be performed at the youth's expense.

(5) If an evaluation is ordered under section 1 of this 2013 Act at the request of the district attorney or juvenile department, the county shall pay for the expense of the evaluation.

(6) After a motion is made by the court or the youth under section 1 (3) of this 2013 Act, the state shall have the right to seek an independent evaluation at its own expense.

SECTION 3. (1) The Oregon Health Authority shall:

(a) Develop training standards for psychiatrists, licensed psychologists and regulated social workers conducting evaluations under section 2 of this 2013 Act;

(b) Develop guidelines for the conduct of evaluations; and

(c) Provide courts with a current list of qualified evaluators from which an evaluator may be selected. Neither the parties nor the court is required to choose an evaluator from the list provided by the authority, provided that the evaluator chosen is otherwise qualified.

(2) The authority shall adopt rules necessary to implement this section.

SECTION 4. (1) A youth may not be removed from the youth's current placement for the purpose of an evaluation under section 2 of this 2013 Act unless the court finds:

(a) That removal is necessary for the evaluation;

(b) That removal is in the best interest of the youth; and

(c) If the Department of Human Services has custody of the youth, that:

(A) The department made reasonable efforts to prevent or eliminate the need for removal and make it possible for the youth to safely return to the youth's current placement; or

(B) Reasonable efforts have not been made by the department but reasonable efforts would not have eliminated the need for removal under paragraphs (a) and (b) of this subsection.

(2) A youth may not be removed from the youth's current placement to a hospital or residential facility solely for the purpose of an evaluation.

(3) If the court finds that the youth must be removed from the youth's current placement for the purpose of an evaluation under section 2 of this 2013 Act, the court must make written findings that the requirements of this section have been met.

(4) Unless ordered by the court upon a finding of good cause, a removal under this section may not exceed 10 days.

(5) If a youth is removed for the purpose of an evaluation under section 2 of this 2013 Act, the youth shall be returned to the youth's current placement immediately upon conclusion of the evaluation.

SECTION 5. (1)(a) If a party to a proceeding under section 1 of this 2013 Act raises the issue of fitness to proceed, the party shall file the original report on the evaluation conducted under section 2 of this 2013 Act with the clerk of the court and deliver copies of the report to all parties to the proceeding.

(b) If the court raises the issue of fitness to proceed under section 1 of this 2013 Act, the person conducting the evaluation under section 2 of this 2013 Act shall file with the clerk of the court the original report on the evaluation and two copies of the report. The clerk of the court shall deliver the copies to the district attorney and to counsel for the youth.

(c) The report must be filed with the clerk of the court within 30 days after the order for evaluation is issued, unless the deadline is extended by written court order for good cause. An extension under this paragraph may not exceed 30 days.

(2) A report filed under this section must include:

(a) A description of the evaluation;

(b) A list of information that the evaluator reviewed as part of the evaluation;

(c) The evaluator's opinion as to whether the youth is unfit to proceed as described in section 1 of this 2013 Act, including the evaluator's opinion as to whether the youth suffers from a mental disease or defect or another condition; and

(d) If the evaluator is of the opinion that the youth is unfit to proceed, the evaluator's opinion regarding whether there is a substantial probability that the youth will gain or regain fitness to proceed and, if there is a substantial probability that the youth will gain or regain fitness to proceed, the specific restorative services under section 10 of this 2013 Act that are needed and the anticipated duration of those services.

(3) A report filed under this section may not include statements made by the youth about the acts alleged in the petition alleging jurisdiction under ORS 419C.005.

(4) Statements made to an evaluator by a youth during an evaluation, or made to persons involved in the evaluation, about the acts alleged in the petition are not admissible against the youth in any proceeding relating to the petition.

(5) Notwithstanding ORS 419A.255, the clerk of the court shall provide the Oregon Health Authority with copies of the petition and the report on the evaluation upon request of the authority.

SECTION 6. (1) Any party to a proceeding initiated by a petition alleging jurisdiction under ORS 419C.005 may file written objection to an evaluation report filed under section 5 of this 2013 Act within 14 days after the report is received by the party. The objection must state whether the party seeks another evaluation. If a party files an objection, the court shall hold a hearing within 21 days after the objection is filed with the court.

(2) If a written objection is not filed under this section, and the court does not adopt the evaluator's opinion regarding the youth's fitness to proceed, the court shall hold a hearing within 21 days after the report is filed with the court. The court may postpone the hearing for good cause shown.

(3) The court shall decide whether a youth is unfit to proceed by a preponderance of the competent evidence introduced at a hearing under this section. The order must set forth findings on the youth's fitness to proceed.

SECTION 7. (1) If a written objection is not filed under section 6 of this 2013 Act and the court adopts the evaluator's opinion regarding the youth's fitness to proceed, the court shall issue a written order within 24 days after the report is filed with the court. The order must set forth the findings on the youth's fitness to proceed.

(2) If a hearing is held under section 6 of this 2013 Act, the court shall make a decision and issue a written order within 10 days after the hearing. The order must set forth the findings on the youth's fitness to proceed.

SECTION 8. (1) If the court finds that the youth is fit to proceed, the court shall vacate the stay under section 1 of this 2013 Act.

(2) If the court finds that the youth is unfit to proceed and that there is not a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future if provided restorative services under section 10 of this 2013 Act, the court shall:

(a) Immediately enter a judgment that dismisses the petition alleging jurisdiction under ORS 419C.005 without prejudice; or

(b) If necessary for planning or instituting an alternative proceeding, then not more than five days after the findings are made enter a judgment that dismisses the petition without prejudice.

(3)(a) If the court finds that the youth is unfit to proceed and that there is a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future if provided restorative services under section 10 of this 2013 Act, the court shall continue the order under section 1 of this 2013 Act staying the proceedings and order that the youth receive restorative services under section 10 of this 2013 Act.

(b) The court shall forward the order for restorative services to the Oregon Health Authority.

SECTION 9. (1) The Oregon Health Authority shall administer a program to provide restorative services under section 10 of this 2013 Act to youths who:

(a) Are determined unfit to proceed as described in section 1 of this 2013 Act; and

(b) Present a substantial probability of gaining or regaining fitness to proceed in the foreseeable future.

(2) The authority shall develop qualifications and standards for persons who provide restorative services under section 10 of this 2013 Act and shall solicit qualified applicants to provide those services.

SECTION 10. (1) The Oregon Health Authority shall arrange for the provision of or begin

providing restorative services within 30 days after receiving a court order under section 8 (3) of this 2013 Act. The authority shall send a report to the court, with copies to the parties to the proceeding initiated by a petition alleging jurisdiction under ORS 419C.005, no later than 90 days after receipt of the order. The report must describe the nature and duration of restorative services provided, indicate whether the youth is fit to proceed or presents a substantial probability of gaining or regaining fitness to proceed and recommend whether restorative services should be continued and, if so, the type and duration of the services.

(2) Within 14 days after receiving a report under subsection (1) of this section, the court shall determine the youth's fitness to proceed.

(3) Upon the recommendation of the authority, the request of a party or the court's own motion, the court may hold a review hearing concerning the evaluation of the youth's fitness to proceed at any time during which restorative services are provided pursuant to an order under section 8 (3) of this 2013 Act. After a review hearing, the court shall determine the youth's fitness to proceed.

(4) If the court finds that a youth is fit to proceed, the court shall vacate the stay under section 1 of this 2013 Act.

(5) If the court finds that the youth remains unfit to proceed and that there is not a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future, the court shall:

(a) Immediately enter a judgment that dismisses the petition alleging jurisdiction under ORS 419C.005 without prejudice; or

(b) If necessary for planning or instituting an alternative proceeding, then not more than five days after the findings are made enter a judgment that dismisses the petition without prejudice.

(6) If the court finds under subsection (2) or (3) of this section that the youth remains unfit to proceed, but that the youth presents a substantial probability of gaining or regaining fitness to proceed, the court shall order that restorative services be continued. The court shall order the authority to send a report to the court, with copies to the parties, within a specified time, not to exceed 90 days from the time the order is filed.

(7) If the court finds under subsection (2) or (3) of this section that a youth remains unfit to proceed, the youth shall be discharged within a period of time that is reasonable for making a determination whether the youth presents a substantial probability of gaining or regaining fitness to proceed. Regardless of the number of acts the petition alleging jurisdiction under ORS 419C.005 alleges that the youth committed, the youth may not be continued in restorative services for longer than whichever of the following, measured from the date the petition is filed, is shorter:

(a) Three years; or

(b) The period of time that is equal to the maximum commitment the court could have imposed if the petition had been adjudicated.

(8) If the court orders placement for restorative services, the court may specify the type of care, supervision, security or services to be provided by the authority to any youth placed in the custody of the Department of Human Services and to the parents or guardians of the youth. The authority, in consultation with the department, may place the youth in any facility authorized to accept the youth and provide the necessary services and care.

SECTION 11. (1) A youth may not be removed from the youth's current placement solely

for the purpose of receiving restorative services pursuant to a court order under section 8 of this 2013 Act unless the court finds:

(a) That removal is necessary to provide restorative services under section 10 of this 2013 Act;

(b) That removal is in the best interest of the youth; and

(c) If the Department of Human Services has custody of the youth, that:

(A) The department made reasonable efforts to prevent or eliminate the need for removal and make it possible for the youth to safely return to the youth's current placement; or

(B) Reasonable efforts have not been made by the department but reasonable efforts would not have eliminated the need for removal under paragraphs (a) and (b) of this subsection.

(2) If a youth is removed for the purpose of receiving restorative services, the youth shall be returned to the youth's current placement immediately upon conclusion of the provision of the restorative services.

SECTION 12. ORS 419C.150 is amended to read:

419C.150. (1) **Except as provided in subsection (3) of this section,** a youth may be held in detention under this section and ORS 419C.145, 419C.153 and 419C.156 for a maximum of 28 days except for good cause shown prior to the expiration of the 28-day period. If good cause for continued detention is shown, the period of detention may be extended for no more than an additional 28 days unless the adjudication is continued with the express consent of the youth.

(2) Subsection (1) of this section does not apply to a youth alleged to be within the jurisdiction of the juvenile court for having committed an act that would be murder, attempted murder, conspiracy to commit murder or treason if committed by an adult and if proof of the act is evident or the presumption strong that the youth committed the act. The juvenile court may conduct such hearing as the court considers necessary to determine whether the proof is evident or the presumption strong.

(3)(a) The time limits described in subsection (1) of this section do not apply if:

(A) The court has stayed the proceedings on the petition alleging jurisdiction under ORS 419C.005 pursuant to section 1 of this 2013 Act;

(B) The court has not entered an order determining the youth's fitness to proceed pursuant to a motion made under section 1 of this 2013 Act or the motion has not otherwise been resolved; and

(C) The court holds the review hearings required by ORS 419C.153 and determines that detention of the youth under ORS 419C.145 should continue.

(b)(A) Except as provided in subparagraph (B) of this paragraph, the detention of the youth whose detention has been continued under subsection (3)(a) of this section may be extended for no more than 28 days upon entry of an order determining the youth's fitness to proceed pursuant to a motion made under section 1 of this 2013 Act or upon other resolution of the motion, and if the court holds the review hearings required by ORS 419C.153 and determines that detention of the youth under ORS 419C.145 should continue.

(B) The detention of the youth may be extended for more than 28 days under this paragraph if expressly agreed to by the youth, and if the court holds the review hearings required by ORS 419C.153 and determines that detention of the youth under ORS 419C.145 should continue.

SECTION 13. Sections 1, 2, 4 to 8, 10 and 11 of this 2013 Act and the amendments to ORS

419C.150 by section 12 of this 2013 Act become operative on January 1, 2014.

SECTION 14. This 2013 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect on its passage.

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The Oregon Law Commission is housed at the Willamette University College of Law, which also provides executive, administrative and research support for the Commission.

Juvenile Code Revision Work Group:

Juvenile Aid and Assist Report

HB 2836

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director and General Counsel

From the Offices of the Executive Director
Jeffrey C. Dobbins

Approved by the
Oregon Law Commission on
December 12, 2012

I. Introductory Summary

Like an adult criminal defendant, a youth in a delinquency proceeding has a constitutional right to raise the issue of fitness to proceed and to stand trial before he or she can be adjudicated in juvenile court. The Oregon Juvenile Code, however, is silent on the subject of fitness. No procedure is set out in the Code for the determination of fitness, and no options for the court are specified when a youth is found unfit. As a result, courts are left to fashion an outcome for the youth with no guidance in the law. Clear options are needed to help ensure that both the best interests of the youth and the best interests of victims and the community are protected. This draft provides a statutory structure that best fits juvenile court delinquency proceedings when youth may be unfit to proceed.

In order for a criminal defendant to stand trial he or she must be "fit to proceed" (i.e. able to aid and assist in his or her defense). This means that the defendant must be able to understand the nature of the proceeding and assist and cooperate with his or her counsel. If a defendant is not able to aid and assist, the defendant undergoes restorative services until the defendant regains fitness. Restorative services are generally instructional with a focus on educating defendants about the nature of their crimes and the process and results of the trial or proceeding. These services, however, may also include medication or treatment for mental disabilities. Currently, there are statutory provisions codifying fitness to proceed requirements and procedures that govern adult aid and assist proceedings, but there are no similar statutes for juveniles.

Generally, when counsel raises issues regarding fitness to proceed in juvenile court, the courts proceed similarly to how they would proceed in adult court. This, however, is not preferable because in some instances there are specific reasons that juvenile cases should be handled differently. In addition, with no statutory guidance, courts deal with aid and assist proceedings inconsistently. Significantly, some judges have not allowed counsel to raise the issue in juvenile proceedings because it is not provided for in statute. The Oregon Law Commission's Aid and Assist Sub Work Group was convened to develop a statutory framework to govern fitness proceedings in order to provide guidance to the courts, ensure consistent application for the litigants, and account for differences between the juvenile and adult system.

II. History of the Project

In December 2003, the Oregon Law Commission's Juvenile Code Revision Work Group proposed and the Oregon Law Commission approved the juvenile aid and assist project. The project was deferred to the 2007 Legislative Session. The Aid and Assist Sub Work Group first met on April 14, 2006. The members of the Sub Work Group included judges, district attorneys, defense attorneys, and other stakeholders who represent or work with juveniles.[1] The group

[1] **Juvenile Aid and Assist Sub Work Group members:** Julie McFarlane, Juvenile Rights Project (co-chair); Thomas Cleary, Multnomah County District Attorney's Office (co-chair); Karen Andall, Oregon Youth Authority; Bill Bouska, Office of Mental Health & Addiction Services; Mary Claire Buckley, Psychiatric Security Review Board; Michael Clancy, Clancy & Slininger; Daniel Cross, Law Office of Daniel Cross; Judge Deanne Darling,

conducted work in monthly meetings until October, 2006 where it met five times between October 3 and November 9 in order to complete its work and present a final draft to the Law Commission's Juvenile Code Revision Work Group. The Juvenile Code Revision Work Group approved the draft with some minor amendments and forwarded the recommended bill to the Oregon Law Commission for consideration and approval. The Oregon Law Commission approved the draft for recommendation to the 2007 Legislative Assembly during its meeting on December 4, 2006.

The Work Group's proposal was introduced to the Legislative Assembly as Senate Bill 320 on January 12, 2007. Following a hearing on February 19, 2007 in the Senate Judiciary Committee, the bill was referred to the Senate Ways and Means Committee where it remained until the legislature adjourned in June.

The Juvenile Code Revision Work Group voted at its meeting on January 16, 2009 to reintroduce the bill during the 2009 Legislative Session. The original intention of the Work Group was to reintroduce the bill in the same form as it appeared during the 2007 session; however, during the interim, Legislative Counsel made a considerable number of organizational changes as well as some amendments to conform to Legislative Counsel's style and form guidelines. The Work Group felt that more careful review was needed before forwarding the proposal to the Commission and voted to reconvene the Aid and Assist Sub Work Group to examine the new draft, HB 3220. The Aid and Assist Sub Work Group met on January 28, 2009 and proposed several minor changes to HB 3220. Further amendments were agreed to by email. The Oregon Law Commission approved the draft for recommendation to the Legislative Assembly at its meeting on February 11, 2009. HB 3220 passed out of the House Judiciary Committee, but died in the Ways and Means Committee during the 2009 legislative session.

On February 25, 2010, Linn County Judge Carl Brumund issued a written letter opinion relating to the issue of whether youths may raise an aid and assist issue at all in a juvenile delinquency proceeding in Oregon. The opinion addressed motions filed on behalf of several youths in Linn County as Judge Brumund had requested that the motions be consolidated for argument purposes. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths. The parties agreed that the concept of "aid and assist" is not addressed in the Oregon juvenile code nor the Oregon Constitution. The court looked to the U.S. Constitution as the only relevant source of law for the issue. The court cited a line of U.S. Supreme Court cases that held that a criminal defendant is protected by the Due Process Clause of the 14th Amendment and as such cannot be compelled to stand trial if the defendant lacks the capacity to understand the nature and object of the proceedings against him, lacks the capacity to consult with counsel, or lacks the

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Clackamas County; Summer Gleason, Clackamas County District Attorney's Office; Judge Kip Leonard, Lane County; Tim Loewen, Yamhill County Juvenile Department; Bob Joondeph, Oregon Advocacy Center; Patricia O'Sullivan, Department of Human Services; Andrea Poole, Marion County District Attorney's Office; Mickey Serice, Department of Human Services; Karen Stenard Sabitt, Attorney in private practice; Ingrid Swenson, Office of Public Defense Services; Timothy Travis, State Court Administrator's Office; Janette Williams, Department of Human Services; Dr. Laura Zorich, Licensed Clinical Psychologist. Throughout the years additional people reviewed and provided edits, including but not limited to, Markus Fant, Clackamas County Juvenile Dept.; Leah Craft, Oregon Health Authority; Michael Livingston, Oregon Judicial Dept.; Christina McMann, Douglas Co. Juvenile Dept.; Kurt Miller, Marion Co. DA's Office.

capacity to assist counsel in preparing a defense. (Citing Dusky v. United States, 362 US 402 (1960); Drope v. Missouri, 420 US 162 (1975), and Godingey v. Moran, 509 US 389 (1993)). Judge Brumund's opinion goes on to explain that the 14th Amendment protections associated with adult criminal prosecutions do extend to juvenile delinquency proceedings. The opinion concludes that a youth must meet the Dusky standards of competency before the youth can be compelled to be adjudicated in an Oregon juvenile delinquency proceeding for conduct which, if the youth were an adult, would constitute a crime. Judge Brumund relied also on the Oregon Court of Appeals decision of State v. LJ, 26 Or App 461 (1976), to bolster the conclusion that fundamental fairness rooted in the 14th Amendment's Due Process Clause requires applicability of the Dusky competency test to juvenile delinquency proceedings. In LJ, the Oregon Court of Appeals concluded that the defense of mental disease or defect (i.e. insanity defense) made available by statute to adults, was also available to juveniles under essentially a fairness theory. At the end of the opinion, Judge Brumund states that the adult "aid and assist" statutes, ORS 161.360-161.370, are applicable to juveniles. The opinion is not binding on other Oregon courts and there was no appeal.

The Juvenile Code Revision Work Group submitted the bill again to the Commission for recommendation to the 2011 Legislative Assembly, and the Commission recommended the bill on November 29, 2010. The Commission noted that the recent Linn County opinion points out further the immediate need for a juvenile "aid and assist" law because application of the adult standards and procedures for "aid and assist" is inappropriate for juvenile court. This bill is identical to the 2009 bill except for references made to the Department of Human Services (department) which underwent a re-organization recently. The legislature created a new agency, the Oregon Health Authority (authority) and some of the duties in this bill belong with the authority and not the department. LC has made these changes throughout the new bill draft. SB 411(2011) passed out of the Senate Judiciary Committee and made progress in the Ways and Means Committee, but it too remained in the Committee upon adjournment.

III. Statement of Problem Area

Although parties currently raise fitness to proceed issues in juvenile delinquency proceedings, the Oregon statutes provide no guidance for courts or parties. This has led to confusion and inconsistency. In fact, some Oregon circuit court judges have denied a fitness to proceed challenge due to lack of statutory authority, while others courts have allowed a challenge and found that it is indeed the responsibility of the court to ascertain the capacity of the youth to aid an assist once that capacity is placed in doubt. Some Oregon courts have found that if the youth lacks capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense, the youth may not be subject to trial. Some courts are creating their own process while other courts are applying the adult procedures from ORS 161.360 to 161.370. Some defense attorneys are reluctant to raise or may be ignorant of the defense because there are no juvenile aid and assist statutes. Some counties take custody of youth when they are alleged to have committed a crime and wait to adjudicate until the youth can assist, while other counties simply dismiss cases when the youth cannot assist. Routine dismissal of such cases in some counties has led to repeat offenses, frustration, and a general public safety problem. In some counties, the Oregon Health Authority also has been required to provide restorative in cases where aid and assist issues are raised despite a statutory procedure. A

consistent structure for the state to follow is simply not in place. Not only does this raise issues of fairness, but it implicates constitutional due process rights. In short, Oregon's gap in the law makes it necessary to establish statutory procedures and guidelines for aid and assist challenges in order to provide direction, ensure consistency, guarantee that constitutional rights are not violated, ensure public safety and develop a procedure to administer restorative services.

IV. Objective of the Proposal

The objective of this proposal is to establish substantive and procedural guidelines for juvenile aid and assist cases. The draft defines when a youth is unfit to proceed and sets out procedures and substantive rules regarding raising the issue of fitness to proceed, obtaining evaluations, challenging evaluations, and administering restorative services. Setting out statutory standards will protect youths by ensuring that they will not be adjudicated without being able to assist and cooperate with counsel. In addition, it will protect the public by ensuring that youths who are capable of being restored to fitness will be properly adjudicated and held accountable for their actions. Other states, such as Virginia and Connecticut, have developed juvenile aid and assist statutes. The Aid and Assist Sub Work Group used statutes from these and other states as well as Oregon's own adult aid and assist statutes to develop this bill.

Typically, aid and assist challenges are made by the youth, but the draft provides that any party or the court may raise the issue of fitness. If a party raises the issue, the court is required to order an evaluation to determine whether the youth is able to aid and assist. The evaluation is to be administered by a medical professional and consists of questions and tests to determine whether the youth understands the nature and consequences of the delinquency proceedings and to determine whether the youth suffers from a mental disease or defect. After the evaluation is provided to the parties and the court, the court makes a fitness determination and, if necessary, orders restorative services. The non-moving party may object to any part of the evaluation and have another evaluation administered. The delinquency proceedings continue once the youth is restored. If the youth is incapable of restoration – that is, cannot be treated so that the youth is able to aid and assist – the delinquency proceedings are dismissed and, most likely, the district attorney will initiate dependency proceedings.

Under the provisions of this proposal, the Oregon Health Authority (OHA) is required to administer restorative services to youths who are unfit to proceed. Usually, that will consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services will include medication or other treatment to address a mental disease or defect. Accordingly, this proposal will have a fiscal impact. The cost to OHA for 2011-2013 has not yet been determined, but if Oregon is consistent with other states, there will be about 35 to 40 youths per year who require restorative services.[2]

The draft is silent on the issue of involuntary medication. In some instances, a youth will be unfit to proceed, but able to achieve fitness with the administration of psychiatric medication. The work group was unable to agree as to whether or under what circumstances a court should order involuntary medication to an unwilling youth. Some work group members proposed a

[2] This prediction is based on the number of youths who are provided restorative services in Virginia and recent records of fitness to proceed cases from Oregon counties.

section that would allow courts to order medication upon clear and convincing findings that: 1) the medication would render the youth fit to proceed; 2) there are no less intrusive means; 3) the medication is narrowly tailored to minimize intrusion on the youth's liberty and privacy interests; 4) it is not an unnecessary risk to the youth's health; and 5) the seriousness of the allegations are such that the state's interests outweigh the youth's interest in self-determination. Ultimately, the work group voted not to include that section on involuntary medication arguing that it would not sufficiently protect the interests of youths, there are no similar provisions in the adult aid and assist statute, and the section would be unconstitutional. Proponents argued that the section would be constitutional, could provide sufficient safeguards to protect youths, and is necessary because courts currently order involuntary medication so there should be statutory procedure in place. This is an issue that is not essential to the workability of the bill and thus the work group recommends that it not be addressed in statute.

V. Section Analysis

Section 1

This section sets out the standards for courts to determine whether a youth is fit to proceed. It largely mirrors the adult statute except that it provides that a youth may raise the issue of fitness based on other conditions such as severe immaturity. The adult statute provides that a defendant may be unfit to proceed if as a result of *mental disease or defect* the defendant is unable to aid and assist in his or her defense. This proposal is broader because it allows a youth to raise the issue of fitness if he or she is unable to assist as a result of a "*mental disease or defect or another condition.*"

In addition, this section provides that a court may not base a finding of unfitness solely on the inability of the youth to remember the acts alleged in the petition, evidence that the youth was under the influence of intoxicants, or the age of the youth (as distinguished from the youth's maturity level).

Section 1 also provides that any party or the court can raise the issue of fitness any time after the filing of the petition. It requires the court to stay the delinquency proceedings and order the youth to participate in an evaluation to determine whether the youth is fit to proceed if the court finds: 1) there is reason to doubt the youth's fitness to proceed; and 2) there is probable cause to believe that the factual allegations contained in the petition are true. Section 1(3) states that the issue of fitness to proceed must be raised either in writing by a party to the proceedings or upon the court's own motion.

Finally, section 1 imports language from the adult criminal code[3], which states that the fact that the youth is unfit to proceed does not preclude the youth's attorney from raising additional defenses that do not require the participation of the youth. These include challenging the sufficiency of the petition, alleging that the statute of limitations has run, and other similar defenses.

[3] See ORS 161.370(12)

Section 2

Section 2 provides that only licensed psychiatrists, psychologists, or clinical social workers may conduct evaluations to determine a youth's fitness to proceed. In addition, this subsection requires the party who requested the evaluation to provide information regarding the evaluation to the other parties and the court. It authorizes any party to submit written information to the evaluator.

Section 2 also lays out who must pay for an evaluation. If the youth does not meet eligibility guidelines of the Public Defense Services Commission (i.e. they do not qualify for public defense services) the youth must pay for his or her own evaluation. If eligible, the county must pay for the evaluation, costs, and a reasonable fee to the person conducting the evaluation. If the evaluation is requested by either the district attorney or juvenile department, the county must pay for the expense of the evaluation. Furthermore, if the court or youth requests an evaluation and the state (district attorney) would like an independent evaluation, it may obtain one at its own expense. District attorney representatives reported that this was an important provision to include.

Section 3

This section directs OHA to develop training standards for persons providing evaluation services, develop guidelines for conducting evaluations, and provide the court with a list of evaluators. Although the court and parties may use that list to find qualified evaluators, they are not required to do so and may use other evaluators as long as the evaluators meet the training standards. Finally, this section provides OHA with rulemaking authority.

Section 4

This section sets out when a court may remove a youth from his or her current placement for an evaluation. Removal for evaluations should be rare and happen only in extreme circumstances. For the stability and well-being of the youth, it is important not to disrupt or change the youth's environment. In order for a youth to be removed from his or her placement, the court must find that removal is necessary for the evaluation; removal is in best interest of the youth; and, if DHS has custody of the youth, that DHS made reasonable efforts to conduct the evaluation at the youth's current placement. Usually, the youth will raise the issue of fitness and willingly participate in an evaluation. However, for example, removal may happen if the district attorney or the court raises the issue of fitness – something that is very uncommon – and the youth will not participate in the evaluation. In any case, removal must not exceed 10 days. This section also makes it clear that these statutes are not to be manipulated to move youth to hospitals or residential facilities; the purpose of these statutes is to provide an aid and assist defense, not placement.

Section 5

Section 5 sets out the requirements for filing reports and what must be contained in the evaluator's report. The report must include the information the evaluator reviewed, the evaluator's opinion regarding the fitness of the child, and whether the child would benefit from restorative services. The section provides that statements made by the youth about facts alleged in the petition may not be used against the youth in proceedings related to the petition. Additionally, this subsection provides that the OHA may obtain copies of the evaluation report and petition.

Section 6

Section 6 sets out procedures the court must follow after receiving the evaluator's report. This subsection was drafted with the purpose of ensuring efficient and timely proceedings without compromising a party's right to object to and obtain their own evaluation. Accordingly, a party may object to a report within 14 days of receipt of the report. The objecting party may obtain its own report and the court is required to hold a hearing within 21 days of the objection. If there are no written objections and the court does not adopt the findings and recommendations of the evaluator, the court must hold a hearing within 21 days after the report is filed. The court determines whether a youth is fit to proceed based on a preponderance of the competent evidence and the order issued by the court must set forth its findings.

Section 7

Section 7 is another provision relating to procedures the court must follow after receiving a report. This section states that when a written objection is not filed and the court *does* adopt the findings and determinations contained within the evaluator's report, the court must issue a written order within 24 days after the report is filed. The court must file a written order within 10 days after the hearing is held if a written objection is filed under section 6. In either case the order must set forth the findings on the youth's fitness to proceed.

Section 8

This section sets out how a court must proceed after it makes a finding as to whether the youth is fit to proceed. If the court finds that the youth is unfit to proceed and there is not a substantial probability that the youth will gain or regain fitness to proceed, the court must either immediately dismiss the petition or, within five days, arrange for an alternative proceeding (e.g. dependency proceedings) and then dismiss the petition without prejudice. If the court finds the youth fit to proceed, the court is required to vacate the stay and continue the proceedings. If the court finds the youth unfit to proceed but is likely to gain or regain fitness if provided restorative services, the court shall continue the order staying the proceedings and forward the order for restorative services to OHA.

Section 9

This section requires OHA to administer a program to provide restorative services and develop qualification standards for persons who provide restorative services. This section was included based on the concerns of some sub work group members that a court may not have authority to

order a non-party (OHA) to provide restorative services. The sub work group agreed that a specific provision providing statutory requirements of OHA would address those concerns.

Section 10

Section 10 requires OHA to implement restorative services within 30 days of receipt of the court's order. No later than 90 days after receipt of the court's order, OHA must send a report to the court describing the nature and duration of services provided and recommend whether services should be continued. After the court receives the report from OHA, the court is required to make a fitness finding and either vacate the stay, dismiss the petition, or order further restorative services. If services are continued, OHA is required to issue another report no later than 90 days after the receipt of the order from the court. This section provides for a review hearing and also limits the length of time for which restorative services may be ordered to the lesser of three years or the maximum commitment time had the youth been adjudicated.

Section 11

If the youth is cooperative and when possible, restorative services will take place at the youth's current placement. When necessary, however, the court may remove a youth in order for OHA to administer restorative services. Section 11 states that a youth may not be removed from the youth's current placement solely for the purpose of receiving restorative services unless removal is in the youth's best interest and necessary for the provision of services. The section also provides that if a youth is removed from their placement, the youth is to be returned immediately upon conclusion of the restorative services.

Section 12

This section amends existing ORS 419C.150 and allows pre-adjudication detention of the youth for an additional 28 days under certain limited circumstances when a motion regarding fitness to proceed is pending. The amendment allows for an extension for more than an additional 28 days if expressly agreed to by the youth and the court determines that detention before adjudication on the merits should continue.

Sections 13 and 14

These sections provide that sections 3 and 9 of this bill become operative immediately, while the others will not become operative until January 1, 2014. This allows OHA some time to establish standards for both conducting evaluations and providing restorative services before the other elements of this bill become operative.

Appendices:

1) February 25, 2010, Linn County Circuit Court Letter Opinion, Judge Carl Brumund
2) Adult aid and assist statutes (ORS 161.360-161.370)

FREQUENTLY ASKED QUESTIONS (FAQs)

1. **Why is this bill, which creates statutes that establish standards and procedures to determine whether a juvenile is fit to proceed, necessary?**

   There is not a procedure in the juvenile code for juveniles to raise the issue of fitness to proceed (competency) in Oregon, even though they have a constitutional right to raise the issue. The Supreme Court held in *Dusky v. U.S.*[1] that a person has a due process right not to go through a trial unless competent. This requires that a person must have the ability to consult with a lawyer with a reasonable degree of rational understanding and also have a rational as well as factual understanding of the proceedings before them. This principle has been recognized as essential to our justice system in this country for over 100 years. In addition, the U.S. Supreme Court specifically held in *In re Gault*[2] that these due process protections apply in juvenile delinquency proceedings and include the right to fair treatment as wells as the right to counsel. In short, Oregon needs to have a statutory procedure to ensure juveniles have a process to raise the issue of inability to aid and assist and meet constitutional requirements.

2. **Why not use Oregon's adult fitness to proceed procedures for juveniles?**

   The statutes providing procedures for adult defendants to raise the issue of fitness to proceed is inadequate for juveniles because it is not tailored to juvenile court procedures and it has the potential for long delays. The adult procedures (ORS 161.360-161.370) contain relatively few deadlines for the filing of reports and evaluations, and no time frame in which to start restorative services. The bill's proposed juvenile procedures provide strict deadlines for the initial filing of reports and evaluations as well as time limits on objections. The proposed juvenile statutes also require a court order to remove the juvenile from his or her placement for an evaluation, as opposed to the adult statute which allows removal for up to 30 days. Lack of time lines can lead to placement at more expensive facilities and failure to meet state requirements of timely adjudications of juveniles. In short, the bill's proposed procedures are tailored to better serve the needs of juveniles.

3. **Currently, what options are available to juveniles seeking to raise the issue of fitness to proceed in Oregon's juvenile courts?**

   Without a statutory procedure, each county generally addresses the issue on a case by case basis, in effect creating its own practice. In counties that recognize a due process right to be competent before being adjudicated, adult procedures are often adapted and used in juvenile delinquency proceedings since nothing else is available. Some counties, like Linn County for example, require an evaluation and provide the juvenile with restorative services despite explicit authority or funding to do so. Other counties, including Clackamas County, routinely dismiss the delinquency case because of the juvenile's inability to aid and assist and therefore release the

[1] *Dusky v. U.S.*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L.Ed. 2d 8241 (1960).
[2] *In re Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 1445, 18 L.Ed. 2d 527 (1967).

juvenile back into the community. Another procedure used is to request that the court convert a delinquency petition to a dependency petition. Finally, we have heard that some counties prosecute delinquency cases despite aid and assist issues being raised, reasoning that there is no process. In short, it is necessary to create a statewide procedure to create consistency among counties and ensure protection of juveniles' constitutional rights.

4. **How will an aid and assist procedure help ensure timely mental health treatment?**

Without an aid and assist procedure, it is unlikely that juveniles are receiving appropriate restorative treatment, including needed mental health treatment when they are charged with committing a delinquent act. Currently, each county decides whether to provide such services or dismiss the delinquency case. Since the state is not required to provide restorative services, it is often up to the juvenile to voluntarily undergo mental health treatment at their own expense. Under the bill's procedures, treatment plans and attendance at treatment can be mandated and effectively delivered. The proposed procedures provide a statewide mechanism whereby restorative services must begin within 30 days of a court order finding the youth unfit to proceed on a delinquency petition. In addition, the Oregon Health Authority is required to provide such services. Adopting a procedure for allowing juveniles to raise the issue of fitness to proceed will help provide timely mental health treatment and permit rehabilitation of delinquent youth.

5. **How will adopting the aid and assist procedure benefit public safety?**

The current practice in Oregon is for each county to craft its own procedures for dealing with fitness to proceed issues. In some counties, the procedure is to release the juvenile when unable to aid and assist. When this happens, a youth accused of an action that would be a crime if committed by an adult goes back out into the community. The youth is untreated, unpunished, and not rehabilitated. The youth is free to make the same choices that led to the youth's arrest in the first place. If there was a statewide procedure permitting a youth to exercise his or her constitutional right to be competent to stand trial, that youth would receive restorative treatment after a finding that the youth is unfit to proceed. During the restoration, the youth would be supervised. If the youth is later determined to be fit to proceed, the delinquency proceeding can move forward and the youth can be adjudicated. The bill's procedures stop the problem of using the Juvenile Department as a revolving door that puts youth back into the community without accountability.

6. **Why is adopting the aid and assist procedure worth the expense?**

Without statewide procedures, a youth who is unable to aid and assist must often litigate the issue in order to be able to raise the issue. Oregon is seeing a number of cases litigating this issue at the juvenile court and on appeal or on mandamus. Providing a procedure would save the money spent on each youth forced to litigate this issue individually, as demonstrated in the attached mandamus case. In addition, if juveniles are able to get the treatment they need in a timely manner, there will be savings in future mental health costs as problems can be caught at an early stage. Treating juveniles rather than releasing them back into the community will

provide a savings in the reduction of recidivism as well. This will save money for both the juvenile delinquency and adult criminal justice systems in that there will be lesser costs for prosecution, incarceration, and supervision later. In addition, the bill's procedure ensures both placement at appropriate facilities, which generally translates to placement at less costly facilities, and strict timelines that provide fiscal efficiency. For example, converting a delinquency case to a dependency case may be done to ensure treatment, but it also can translate to exorbitant costs at the Children's Farm Home. Most importantly, there are unquantifiable savings for the juvenile who receives treatment at a young age and is able to go on to live a productive life. Adopting a statewide procedure to raise the issue of inability to aid and assist will provide savings and benefits that will greatly outweigh its cost.

7. **How are other states handing this issue?**

Oregon is out of step with other states and is susceptible to further litigation if the current procedures do not change. Oregon is the only western state without procedures allowing a juvenile to challenge fitness to proceed. California, Idaho, and Utah have statutory procedures providing juveniles with a mechanism to exercise their constitutional right to be competent to stand trial. California enacted its statute in 2010, Idaho in 2011, and Utah in 2012. Washington, Montana, and Nevada have court cases providing juveniles the right to raise competency issues. These cases rely on both the U.S. Constitution and state law. In short, Oregon has a gap in the law that needs to be addressed.

Constitutional Rights -- of juveniles must be protected

Juveniles have a constitutional right to be competent to stand trial. That is, they should not be adjudicated until they are mentally fit to proceed. The United States Supreme Court issued two opinions in the 1960s which established that juveniles have a due process right to assist in their own defense. In *Dusky v. United States,*[1] the Supreme Court held that a defendant cannot be made to stand trial unless competent, which requires an ability to have a reasonable understanding of the proceedings and an ability to reasonably consult with an attorney. The opinion affirmed a defendant's right to have a competency evaluation before standing trial (Dusky was suffering from schizophrenia when he was tried for statutory rape and kidnapping.). The Supreme Court later held in *In re Gault,*[2] that juveniles also have a due process right to fair treatment in juvenile delinquency proceedings.

In Oregon, a Linn County circuit court judge wrote an opinion that addressed this issue in 2010. See attached. After reviewing and explaining several U.S. Supreme Court and Oregon cases, the opinion came to the conclusion that before an Oregon youth can be compelled to go through an adjudicative proceeding in a delinquency case, the youth must be able to consult with his or her attorney with a reasonable degree of understanding as well as have a rational and factual understanding of the proceedings. Without any juvenile procedures available in the Oregon juvenile code (ORS 419A, 419B, and 491C) the Court decided to apply the adult ORS provisions regarding competency. The opinion explains that while any party can raise the issue of competency, defense counsel has the responsibility to obtain an independent judgment prior to bringing the issue to the court. Very recently, in *In the Matter of M.R.*, the Oregon Supreme Court also recognized the right to raise the issue of fitness to proceed, reversing a juvenile court in Washington County.

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[1] *Dusky v. U.S.*, 362 U.S. 402, 402, 80 S. Ct. 788, 789, 4 L.Ed. 2d 8241 (1960).
[2] *In re Gault*, 387 U.S. 1, 30-31, 87 S. Ct. 1428, 1445, 18 L.Ed. 2d 527 (1967).

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February 25, 2010

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RE: Aid and Assist

Dear Parties:

Through their attorneys, several youths have filed motions relating to their ability to "aid and assist" counsel in the preparation and conduct of their defense. Those individual cases will be addressed, as necessary, in a separate letter specific to that youth, but this letter opinion addresses the generic issue of whether such a defense exists at all in a juvenile delinquency proceeding. Brandan Kane of the Linn County District Attorney's Office argued the matter on behalf of the state, and Jody Meeker and Mark Taleff argued the matter on behalf of the youths.

The parties agreed that the concept of "aid and assist" is not addressed anywhere in the juvenile code, even though it is addressed in the adult criminal code at ORS 161.360.[1] It has been a part of the adult criminal code since at least 1971. A major revision of the criminal code was done in 1973. Nearly 40 years have passed since that time and the legislature has not placed a provision similar to ORS 161.360 within the juvenile code in spite of revising it multiple times in that intervening time, including some major revisions. With that history, one can only conclude that the legislature's failure to include a similar provision in the juvenile code is not an oversight but a deliberate choice. If such a concept exists in Oregon's juvenile law, it would appear it must be found in constitutional law.

No party has indentified any relevant Oregon constitutional provision. The only potential provision advanced as relevant to this court is the Due Process Clause of the 14th Amendment to the U.S. Constitution.

In *Dusky v United States*, 362 US 402, 80 S Ct 788, 4 LEd2d 8241 (1960), the U.S. Supreme Court held a criminal defendant cannot be compelled to stand trial unless he is competent. The Court determined the test for competency was that the defendant must have:

> 1) A sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and
> 2) A rational as well as factual understanding of the proceedings against him.

Clearly, the test requires an ability of the party to have some reasonable understanding of the proceedings themselves and an ability to reasonably consult with their attorney. The *Dusky* ruling was expressed again by the Court in 1966 in *Pate v Robinson*, 383 US 375, 378, 86 S Ct 836, 838, 15 LEd2d 815 (1966), and reaffirmed again in 1975 in *Drope v Missouri*, 420 US 162, 171, 95 S Ct 896, 903, 43 LEd2d 103 (1975), when it said:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, **to consult with counsel, and to assist in preparing his defense** may not be subjected to trial. Thus, Blackstone wrote that one who became 'mad' after the

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[1] ORS 161.360 **Mental disease or defect excluding fitness to proceed**

(1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incapacitated if, as a result of mental disease or defect, the defendant is unable:

a. To understand the nature of the proceedings against the defendant; or

b. *To assist and cooperate with the counsel of the defendant*; or

c. To participate in the defense of the defendant.

(Italic emphasis added by current court.)

> commission of an offense should not be arraigned for it 'because he is not able to plead to it with that advice and caution that he ought.' Similarly, if he became 'mad' after pleading, he should not be tried,' for how can he make his defense?' 4 W Blackstone Commentaries, 24. *See Youtsey v United States*, 97 F 937, 940-946 (CA 6 1899). Some have viewed the common-law prohibition 'as a by-product of the law against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself.' Foote, *A Comment on Pre-Trial Commitment of Criminal Defendant*, 108 U. Pa. L. Rev. 832, 834 (1960). *See Thomas v Cunningham*, 313 F2d 934, 938 (Ca 4 1963). **For our purposes it suffices to note that the prohibition is fundamental to an adversary system of justice.**
> (Bold emphasis added.)

In *Godingey v Moran*, 509 US 389, 402, 113 S Ct 2680, 125 LEd2d 321 (1993), the Court said:

> Requiring that a criminal defendant be competent has a modest aim: **It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel.** While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while states are free to adapt competency standards that are more elaborate than the *Dusky* formation, the Due Process Clause does not impose these additional requirements.
> (Bold emphasis added.)

About three months after the *Drope* decision, the Court rendered its decision in *Breed v Jones*, 421 US 519, 529, 95 S.Ct. 1779, 44 LEd2d 346 (1975), where it held the double jeopardy prohibition is relevant to juvenile court proceedings and further affirmed its earlier statements that the distinction of juvenile proceedings being "civil" as opposed to "criminal" is to be disregarded as it relates to constitutional rights. As the Court said[2]:

> Although the juvenile-court system had its genesis in the desire to provide a distinctive procedure and setting to deal with the problems of youth, including those manifested by antisocial conduct, our decisions in recent years have recognized that there is a gap between the originally benign conception of the system and its realities. With the exception of *McKeiver v. Pennsylvania*, 403 US 528, 91 SCt 1976, 29 L.Ed.2d 647 (1971), the Court's response to that perception has been to make applicable in juvenile proceedings constitutional guarantees associated with traditional criminal prosecutions. *In re Gault*, 387 US 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967); *In re Winship*, 397 US 358. 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

In the process of finding a juvenile is entitled to the privilege against self-incrimination (5th Amendment, U.S. Constitution), the Court held in *Gault* that the Due Process Clause of the 14th Amendment to the U.S. Constitution was applicable to juvenile delinquency proceedings, and that " . . . the hearing must measure up to the essentials of due process and fair treatment."[3] It also required advance and adequate notice to the parents and the child of the pending issues[4] and

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[2] *Breed v. Jones*, p 528.
[3] *Gault*, page 30.
[4] *Gault*, pages 33-34.

the right to counsel, including court appointed counsel if the family qualified.[5] In holding the privilege of self-incrimination was applicable to a juvenile[6] it stated, "It would indeed be surprising if the privilege against self-incrimination was available to hardened criminals but not children.[7]"

In making its ruling, the court simply dismissed the concept that a juvenile court proceeding was classified as a "civil" proceeding as opposed to a "criminal" proceeding because such a classification simply overlooked the fact that the juvenile proceedings could result in deprivation of the juvenile's liberty (regardless of whether the juvenile was committed to an adult penal institution or a separate institution for juveniles).[8]

In *McKeiver v Pennsylvania*, 403 US 578, 91 S Ct 1976, 29 LEd2nd 647 (1971), the Court held juveniles had no federal constitutional right to a jury trial. In making its decision, the Court did not give a great deal of weight to consideration of whether juvenile court delinquency proceedings were either "criminal" or "civil" in nature. Rather, it expressed that, under the Due Process Clause, the issue was one of "fundamental fairness." It found a jury trial in juvenile court was not an essential ingredient to "fundamental fairness" and noted:

> . . . one cannot say that in our legal system the jury is a necessary component of accurate fact finding. There is much to be said for it, to be sure, but we have been content to pursue other ways for determining facts. Juries are not required, and have not been, for example, in equity cases, in workmen's compensation, in probate, or in deportation cases. Neither have they been generally used in military trials. *McKeiver*, page 543.

The Court also indicated[9] simply equating the adjudicative process of the juvenile proceeding with a criminal trial ignores aspects of fairness, concern, sympathy, and paternal attention inherent in the juvenile court system.

The Oregon Supreme Court in *State v Turner*, 253 Or 235, 453 P2d 910 (1969), also found no federal right to a jury trial in juvenile court nor a right to a jury trial under Oregon's constitution, *State v Reynolds*, 317 Or 560 (1993). Those decisions were reached even though the right to a jury trial in a criminal proceeding is clearly written into both the federal and state constitutions. In *State v McMaster*, 259 Or 291, 298, 486 P2d 567 (1970), the Oregon Supreme Court, in making reference to the U.S. Supreme Court, said the latter court ". . . has not held that all the substantive due process requirements of the criminal law were applicable to juvenile proceeding . . ."

From the foregoing, it is clear the Due Process Clause of the 14th Amendment to the U.S. Constitution is applicable to juvenile court and its procedures. There must be fundamental fairness. It is also abundantly clear that by the time of Blackstone it was well established in common law that a person whose mental condition was such that the person ". . . lacked capacity to understand the nature and object of the proceedings against him, to consult with counsel, and

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[5] *Gault*, page 41.
[6] *Gault*, page 55.
[7] *Gault*, page 47.
[8] *Gault*, page 49.
[9] *McKiever*, pgs. 529, 550.

to assist in preparing his defense may not be subjected to trial." (*See Drope* quoted earlier on page 2 of this document). That concept evolved as being basic to a person accused of a criminal act also being treated with basic fairness. That is the concept embodied in due process and expressed by the U.S. Supreme Court in *Dusky*. It is applicable in juvenile court proceedings. The Court concluded that Federal Constitutional law, by means of the 14th Amendment's Due Process Clause, requires a youth to meet the *Dusky* standards of competency (including the ability to aid and assist their attorney in their defense) before the youth can be compelled to go through an adjudication concerning conduct which, if the youth were an adult, would constitute a crime. If a youth is charged with a violation rather than conduct which, if the youth were an adult would constitute a crime, due process considerations would not necessarily mandate the same result. That is not the issue before this court now.

In the case of *State v L J*, 26 Or App 461, 522 P2d 1322 (1976), the Oregon Court of Appeals was presented with the issue of whether the defense of mental disease or defect[10], as then found in the criminal code at then ORS 161.295, could be raised as a defense in juvenile court in a delinquency proceeding.

At that time, ORS 161.295 (1) provided:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

The court in *L J* noted that persons similarly situated except for a slight difference in their respective ages (for example: one being one day under 17 years of age and the other being 18 years old) could very well encounter dramatically different outcomes in their cases. The adult could potentially avail himself of an insanity defense, while the juvenile, if limited to the strict wording of the juvenile code, had no such recourse and therefore would be faced with commitment to a youth correctional facility. The court said:

> We cannot believe the legislature intended that one individual could go free while another in an identical situation could be sent to MacLaren School based on the fortuity that the former was over 18 while the latter was under 18. We hold the reference in ORS 419.476 (1)(a)[11] to matters that would be violations if

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[10] In footnote 2, the court said,: The defense in question, previously called 'insanity,' is now labeled 'mental disease or defect.' For brevity, we nevertheless continue to refer to the defense as 'insanity.'"

[11] The then current provision, in relevant part, of ORS 419.476 is as follows:

419.476 Children within jurisdiction of juvenile court.

(1) The Juvenile Court has exclusive jurisdiction in any case involving a person who is under 18 years of age and:

(a) Who has committed an act which is a violation, or which if done by an adult would constitute a violation, of law or ordinance of the United States or a state, county or city; or

(b) Who is beyond the control of his parents, guardian or other person having his custody; or

(c) Whose behavior, or condition or circumstances are such as to endanger his own welfare or the welfare of others; or

committed by adults includes a cross-reference to all of the affirmative defenses that would be available to adults.

Therefore, the defense was then made available to the juvenile as well as an adult.

The court did not otherwise identify any other legal authority for its decision. No participant has pointed out any case which overrules *L J*, and this court suggests it is rooted in the principal of "fundamental fairness" which is central to the federal due process clause. At the time of that decision, the statutory scheme for evaluation set out in ORS 161.360-161.370 was already a part of the statutory scheme. This court, therefore, interprets the ruling in *L J* to also include the references to those statutes as well. Case law, as well as ORS 161.360 and 161.365(1), make it a responsibility of the court to ascertain the capacity of the defendant (or youth, if in juvenile court) to aid and assist once that capacity is placed in doubt and to schedule a hearing to allow parties to present evidence on that issue. Any information on that topic would be relevant evidence which the court would anticipate would be placed into evidence. This court anticipates the Juvenile Department, as well as a youth's attorney, would likely be the first to learn of a potential issue of "aid and assist" and, therefore, bring the matter to the court's attention. In essence, that is what is occurring at the present time. The state, however, will have the benefit of the statutory procedure to follow, if it determines to do so.

In summary, this court concludes:

1. The due process clause of the 14th Amendment requires that the test enunciated in *Dusky* is applicable to delinquency proceedings. For a youth to be compelled to go through an adjudicative hearing to establish jurisdiction over that youth, the youth must have all of the following:
   a. A sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding; and
   b. Have a rational as well as a factual understanding of the proceedings against him or her.

   This is stated in slightly different terms in *Drope v Missouri*, *supra*, page 171, when the Court stated "[A] person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel,

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(d) Who is dependent for care and support on a public or private child-caring agency that needs the services of the court in planning for his best interests; or
(e) Either his parents or any other person having his custody have abandoned him, failed to provide him with the support or education required by law, subjected him to cruelty or depravity or to unexplained physical injury or failed to provide him with the care, guidance and protection necessary for his physical, mental or emotional well-being; or
(f) Who has run away from home
..."

The last modifications made to this statute prior to the court's opinion in *State v L J*, 26 Or App 461, 522 P2d 1322 (1976) were made in 1971, See relevant Session Laws c 451, s 17.

Section 1(a) of that former statute is nearly identical to current ORS 419C.005 (1) which provides: "Except as otherwise provided in ORS 137.707, the juvenile court has exclusive original jurisdiction in any case involving a person who is under 18 years of age and who has committed an act that is a violation, or that if done by an adult would constitute a violation, of a law or ordinance of the United States or a State, county or city."

and to assist in preparing his defense may not be subjected to trial."

2. The provisions of ORS 161.360-161.370 are applicable to juvenile proceedings.
3. Any party who doubts a youth's competency to proceed must notify the court and provide the court with any documentation of that concern. That information is subject to disclosure to the other party. The appropriate procedure would be for defense counsel to obtain an independent opinion before bringing the matter to the court and the attention of the state and juvenile department.
4. If the matter is not resolved, the court will set an evidentiary hearing on the issue.

Sincerely,

Carl H. Brumund
Judge Pro Tem

CHB:gh

Adult Practice and Procedure--is not Appropriate for Juvenile Court

While juveniles have the same constitutional right as adults to be competent to stand trial, the differences between trying and treating juveniles and adults require the use of separate procedures to challenge fitness to proceed. This has long been recognized, most notably by the creation of a separate justice system for juveniles. The adult competency procedures (found at ORS 161.360 to 161.370) are inadequate for juveniles because the time lines are too long, the evaluation and treatment facility needs are different, the competency standards are different and the juvenile court process and entities involved are different. The adult procedures create the potential for long delays that are unacceptable to the needs of juveniles. The attached chart contains a timeline outlining the differences between the existing adult procedures and proposed juvenile procedures. In short, the Oregon juvenile code needs competency standards and procedures that are tailored to the needs of juveniles and juvenile court.

Adult Aid and Assist Timeline (ORS 161.360 to 161.370) Compared with Proposed Juvenile Aid and Assist Codification Time Line (HB 2836)

	Adult Timeline ↓	Proposed Juvenile Timeline ↓
Removal from placement for evaluation to determine if fit to proceed	Court may order removal for up to 30 days. ORS 161.365(1)(b).	No removal solely for evaluation; need court order for removal. If court approves removal, up to 10 days to conduct evaluation. (Section 4)
Evaluation report due to court	No deadline.	Report must be filed within 30 days after order for evaluation unless extension for good cause. Maximum extension of 30 days. (Section 5.)
Objection to evaluation report by parties due	No deadline.	Within 14 days after report is received by the party. (Section 6.)
Court hearing when there is an objection to the evaluation report	No deadline.	Within 21 days after the objection is filed with the court. (Section 6.)
Court order setting forth the findings on the fitness to proceed (when there has been a hearing)	No deadline.	Within 10 days after the hearing. (Section 7.)
State to start providing restorative services	No deadline.	Within 30 days after receiving a court order finding that youth is unfit to proceed and there is a substantial probability that the youth will gain or regain fitness to proceed in the foreseeable future. (Section 10.)
Initial report to court after restorative services ordered	60 days to conduct the evaluation, 90 days to notify the court after delivery of defendant to custody of superintendent of state hospital or director of a facility. ORS 161.370(5).	90 days after receipt of order to provide services (Section 10.)
Court to review report and make determination re fitness to proceed	No deadline.	14 days after receiving report. (Section 10.)
Review hearing	No deadline.	Up recommendation of OHA, request of party, or court's own motion, court may hold a review hearing at any time. (Section 10)
If remain unfit to proceed, regular reports to court	Every 180 days. ORS 161.370 (6)(a).	Every 90 days. (Section 10.)

The following are the adult fitness to proceed statutes:

161.360 Mental disease or defect excluding fitness to proceed. (1) If, before or during the trial in any criminal case, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant may be found incapacitated if, as a result of mental disease or defect, the defendant is unable:

(a) To understand the nature of the proceedings against the defendant; or

(b) To assist and cooperate with the counsel of the defendant; or

(c) To participate in the defense of the defendant. [1971 c.743 §50; 1993 c.238 §1]

161.365 Procedure for determining issue of fitness to proceed. (1) When the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching its decision. If the court determines the assistance of a psychiatrist or psychologist would be helpful, the court may:

(a) Order that a psychiatric or psychological examination of the defendant be conducted by a certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or

(b) Order the defendant to be committed for the purpose of an examination for a period not exceeding 30 days to a state mental hospital or other facility designated by the

Oregon Health Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age.

(2) The report of an examination described in this section must include, but is not necessarily limited to, the following:

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

(b) A statement of the mental condition of the defendant;

(c) If the defendant suffers from a mental disease or defect, an opinion as to whether the defendant is incapacitated within the description set out in ORS 161.360; and

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

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

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

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

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

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

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

(b) When an examination is ordered at the request or with the acquiescence of a defendant who is determined not to be financially eligible, the examination shall be performed at the defendant's expense. When an examination is ordered at the request of the prosecution, the county shall pay for the expense of the examination. [1971 c.743 §51; 1975 c.380 §4; 1981 s.s. c.3 §131; 1983 c.800 §11; 1987 c.803 §18; 1993 c.238 §2; 2001 c.962 §90; 2005 c.685 §5; 2009 c.595 §106; 2011 c.724 §7]

161.370 Determination of fitness; effect of finding of unfitness; proceedings if fitness regained; pretrial objections by defense counsel. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed under ORS 161.365, the court may make the determination on the basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence in the hearing, the party who contests the finding has the right to summon and to cross-examine any psychiatrist or psychologist who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding against the defendant shall be suspended and:

(a) If the court finds that the defendant is dangerous to self or others as a result of mental disease or defect, or that the services and supervision necessary to restore the defendant's fitness to proceed are not available in the community, the court shall commit the defendant to the custody of the superintendent of a state mental hospital or director of a facility, designated by the Oregon Health Authority, if the defendant is at least 18 years of age, or to the custody of the director of a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age; or

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

(3) When a defendant is released on supervision under this section, the court may place conditions that the court deems appropriate on the release, including the requirement that the defendant regularly report to the authority or a community mental health program for examination to determine if the defendant has regained capacity to stand trial.

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

(5) The superintendent of a state hospital or director of a facility to which the defendant is committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery into the superintendent's or director's custody, for the purpose of determining whether there is a substantial probability that, in the foreseeable future, the defendant will have the capacity to stand trial. In addition, the superintendent or director shall:

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

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

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

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

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

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

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

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

(A) Three years; or

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

(b) For purposes of calculating the maximum period of commitment described in paragraph (a) of this subsection:

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

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

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

(9) When the committing court receives a notice from the superintendent or director under subsection (5) or (8) of this section concerning the defendant's progress or lack

thereof, the committing court shall determine, after a hearing, if a hearing is requested, whether the defendant presently has the capacity to stand trial.

(10) If at any time the court determines that the defendant lacks the capacity to stand trial, the court shall further determine whether there is a substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial and whether the defendant is entitled to discharge under subsection (7) of this section. If the court determines that there is no substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial or that the defendant is entitled to discharge under subsection (7) of this section, the court shall dismiss, without prejudice, all charges against the defendant and:

(a) Order that the defendant be discharged; or

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

(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.

(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.

(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. [1971 c.743 §52; 1975 c.380 §5; 1993 c.238 §3; 1999 c.931 §§1,2; 2005 c.685 §6; 2009 c.595 §107; 2011 c.508 §1; 2011 c.724 §8]

161.375 Escape of person placed at hospital or facility; authority to order arrest. (1) When a patient, who has been placed at a state hospital for evaluation, care, custody and treatment under ORS 161.315 to 161.351 or by court order under ORS 161.315, 161.365 or 161.370, has escaped or is absent without authorization from the hospital or from the custody of any person in whose charge the superintendent has placed the patient, the superintendent may order the arrest and detention of the patient.

(2) When a patient, who has been placed at a secure intensive community inpatient facility for evaluation, care, custody and treatment under ORS 161.315 to 161.351 or by court order under ORS 161.315, 161.365, 161.370 or 419C.527, has escaped or is absent without authorization from the facility or from the custody of any person in whose charge the director of the facility has placed the patient, the director of the facility shall notify the Director of the Oregon Health Authority. The Director of the Oregon Health Authority may order the arrest and detention of the patient.

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

(4) Any order issued by the superintendent or the Director of the Oregon Health Authority as authorized by this section constitutes full authority for the arrest and detention of the patient and all laws applicable to warrant or arrest apply to the order. An order issued by the superintendent or the Director of the Oregon Health Authority under this section expires 72 hours after being signed by the superintendent or the Director of the Oregon Health Authority.

(5) As used in this section, "superintendent" means the superintendent of the state hospital to which the person was committed or the superintendent's authorized representative. [1997 c.423 §1; 2005 c.685 §7; 2005 c.843 §24a; 2009 c.595 §108; 2011 c.708 §7]

161.380 [1971 c.743 §53; renumbered 161.290]

161.385 Psychiatric Security Review Board; composition, term, qualifications, compensation, appointment, confirmation and meetings. (1) There is hereby created a Psychiatric Security Review Board consisting of 10 members appointed by the Governor and subject to confirmation by the Senate under section 4, Article III of the Oregon Constitution.

(2) The membership of the board may not include any district attorney, deputy district attorney or public defender. The Governor shall appoint:

(a) A psychiatrist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Oregon Health Authority or a community mental health program;

Consistency—in practice and procedure is needed throughout the State of Oregon

The creation of a procedure allowing juveniles to raise the issue of inability to aid and assist is needed for consistency among Oregon counties. Without a statewide procedure, each county is free to decide individually how to proceed. Linn County has decided to use the adult aid and assist procedures. (See attached opinion.) In other counties, delinquency cases involving a juvenile found unable to aid and assist are routinely dismissed and juveniles are not held responsible. Some counties convert juvenile delinquency petitions to juvenile dependency petitions. Still in other Oregon counties, juveniles are adjudicated despite having competency issues—in violation of their constitutional rights.

In a juvenile court case in Washington County last fall, the attorney for the youth filed a motion requesting a hearing to determine whether the youth was fit to proceed. The attorney for the youth based her argument on a psychologist's report which found that the youth was unable to aid and assist and not likely to become able to aid and assist. In that case, the youth was in a special education class and was not able to read or retain information. The youth did not understand his Miranda rights or basic legal terminology. In addition, he was not able to recall the acts he was alleged to have committed and was not able to have a meaningful conversation with his attorney. The state did not provide any evidence to the contrary, and acknowledged that the court could apply the adult competency procedures. However, the trial court issued a conclusory ruling denying the motion. The trial court did not allow any witnesses to testify as to the youth's competency, believing it to be "irrelevant." The youth appealed and the Oregon Supreme Court granted a writ of mandamus ordering the trial court to hold a hearing to determine whether the youth was able to aid and assist.

Although the Supreme Court did not issue a written opinion but a simple order issuing the writ, the briefs on behalf of the youth and the state shed light on the decision. The youth argued that an adult defendant has a due process right to consult with his or her lawyer and have a rational and factual understanding of the proceeding, which includes more than just passive observance. The youth argued that this right should be extended to juveniles given the due process rights given to juveniles in other situations. The state did not contest that competency is a relevant issue in a juvenile delinquency proceeding. Instead of arguing against a hearing to determine competency, the state argued that mandamus was not proper in this case. The Supreme Court granted the writ,

In short, providing a statewide procedure for juveniles to exercise their right to be competent to stand trial would alleviate the need to litigate this issue on a case by case basis and provide consistency among counties. Judges, district attorneys, and defense attorneys need consistent standards and procedures to apply in juvenile court.

SUPREME COURT

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On November 27, 2012, the Supreme Court:

1. Directed the issuance of a peremptory writ of mandamus commanding the Washington County Circuit Court to vacate the September 5, 2012, order denying the motion for determination of youth's fitness to proceed, and to hold a hearing to determine youth's fitness to proceed, in *State of Oregon v. M. R.* (S060771).

IN THE SUPREME COURT OF THE STATE OF OREGON

In the Matter of M. R., a Youth,

STATE OF OREGON,
Adverse Party,

v.

M. R.,
Relator.

Washington County Circuit Court
J120235

S060771

ORDER ALLOWING PETITION FOR PEREMPTORY WRIT OF MANDAMUS AND GRANTING MOTION TO WAIVE FILING FEE

Upon consideration by the court.

The petition for peremptory writ of mandamus is allowed. The motion to waive the filing fee is granted.

11/27/2012
2:36:54 PM
MARTHA L. WALTERS
PRESIDING JUSTICE, SUPREME COURT

c: Anna Marie Joyce
Jeremy Rice
Laura Graser
Roger R. Wong
Hon. Eric E Butterfield

kag

IN THE SUPREME COURT OF THE STATE OF OREGON

Relating to: In the Circuit of the State of Oregon for the County of Washington, Juvenile Department. In the Matter of M.R., a Youth.	
THE STATE OF OREGON, Adverse Party, vs. M.R., a Youth, Relator.	SC NO. _____ Relating to Case No. 01-J12-0235 (Washington County) INITIATING DOCUMENT – PETITION FOR WRIT – PETITION FOR AN ALTERNATIVE WRIT OF MANDAMUS

MANDAMUS PROCEEDING

A trial is currently set for November 8, 2012. While no stay is currently in place, relator will seek one in the trial court on November 1, if this court has not yet ruled. The petition was filed in juvenile court on March 2, 2012.

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The trial judge:

Hon Eric E Butterfield, 925170
Washington Co Circuit Court
150 N 1st Ave
Hillsboro OR 97124
503 846-6344
[no email listed in OSB directory]

Relator alleges:

1.

Relator M.R. is a youth, age 13 (DOB 1998).

On March 2, 2012, the juvenile department of Washington County filed a petition alleging that the youth is within the jurisdiction of the court because the youth has committed acts which if done by an adult would constitute Sodomy in the First Degree and Sexual Abuse in the First Degree, involving the same victim, between May 2010 and August 2011. ER-1 [redacted petition].

2.

The trial judge below whose ruling is at issue is the Honorable Eric E. Butterfield, Judge of the Circuit Court of Washington County.

The state below supported of Judge Butterfield's ruling and thus is an adverse party.

3.

The delinquency adjudication is currently set for November 8, 2012.

If this matter is still pending before this court on November 1, 2012, the youth will seek a stay in the trial court. As the trial court itself noted that the youth could "appeal" its ruling (Tr 14), the youth/relator anticipates that the trial court would issue a stay if this matter were pending before this court at that time. However, in the event that the trial court does not issue a stay, the youth will seek a stay of the adjudication before this court.

4.

On August 8, 2012, the youth's counsel filed a "motion for determination of youth's fitness to proceed under Dusky v. US, 362 US 402 (1960)." Counsel also filed an affidavit that asserted that the youth had been in a special education program, and had been receiving treatment from a social worker. The youth had been evaluated by Orin Bolstad, a psychologist, and Dr. Bolstad found that the youth was unable to aid and assist in the proceedings.

In the affidavit, counsel claimed that the youth could not be required to proceed unless he had a "sufficient present ability to consult with his attorney with a reasonable degree of rational understanding, and a rational as well as factual understanding of the proceedings against him" (quoting Dusky v. US). Counsel submitted Dr. Bolstad's report to the trial court. (The report is not before this court.) Counsel then requested "that the court determine that [the youth] is unable to proceed at this time."

5.

A hearing on that motion was held on September 4, 2012, in the juvenile court of Washington County, through the Honorable Eric E. Butterfield. A redacted copy of the transcript is in the excerpt of record.

The trial court had Dr. Bolstad's report. During the hearing, the youth's counsel observed that the youth had already received extensive services from the state, but in counsel's opinion, the youth does not understand basic legal

terminology, he cannot retain information, and he cannot remember the past. The youth cannot read, despite repeated attempts to teach him to read. Counsel stated, "I'm not able to have a meaningful discussion with my client." Tr 3-4.

6.

During the hearing, the state did not ask to offer any evidence about the youth, but asked that trial occur when it was set, in two days.

7.

During the September 4, 2012, hearing, the court ruled,

> So the Court is denying the youth's motion for determination on the issue of whether or not he's able to proceed -- fitness to proceed. And we'll just start up with our trial Thursday morning [in two days].

The youth's counsel asked for clarification, asking, "So the Court's not allowing me to call witnesses?" and the court ruled:

> No. I think it's -- I think it's irrelevant.

The record does not reflect whether or not the trial court had read Dr. Bolstad's report. The court made no findings of fact.

8.

The court's ruling was memorialized in an order, "Youth's motion for determination of fitness to proceed denied." The order was signed on September 4, 2012, and entered on September 5, 2012. ER-23 (and attached to the petition).

9.

The trial court's ruling consisted only of its conclusion that the youth was not entitled to a hearing, as a matter of law. The trial court made no comment, nor expressed any opinion, either about Dr. Bolstad's report, or about the youth's attorney's comments about the youth's condition.

10.

The youth/relator will be irremediably damaged, both in the present and in the future, if he is adjudicated while incompetent.

First, the youth/relator's trial counsel stated her opinion that, given youth's mental condition, it would be "cruel" to subject him to an adjudication now. Tr 14.

Second, if the youth/relator is found to have done the acts charged in the petition, he will face dire consequences, which will affect the rest of his life. These consequences will include lifetime registration as a sexual offender. ORS 181.592 - .594. He could later ask for relief from registration, but given his deficits, he probably would not qualify. Once he has registered as a sexual offender, his ability to receive treatment will be greatly limited. If he is not able to receive extensive treatment, no one will be able to say that he "rehabilitated" himself. ORS 181.823. Therefore, the juvenile adjudication, leading to sexual offender registration, will make it difficult for him to access services as he gets older.