11.

The youth/relator has no plain, speedy, or adequate remedy in the ordinary course of law, because there is no appellate remedy that can undo the damage to him, both now and for the rest of his life, if he is adjudicated while incompetent. A writ of mandamus is his only remedy.

12.

Given the grave nature of the trial court's error, and the potential damage to the youth/relator, both immediately and in the future, this court should issue a writ of mandamus.

13.

This petition is timely as the motion to modify probation was denied by Judge Butterfield in a written order entered September 5, 2012. This petition is being filed October 4, 2012.

The written order is attached to this petition, and is in the excerpt of record.

14.

This petition is made to this court rather than to the Circuit Court because the Honorable Eric E. Butterfield is a judge of the Circuit Court of the State of Oregon.

THEREFORE, Relator prays:

1. That this court exercise its original jurisdiction in this matter.

2. That this court issue an alternative writ of mandamus, commanding

Judge Butterfield, then and there to return the writ, with his certificate annexed, of having done as he was commanded, or the cause of omission thereof.

3. That this court award relator such other and further relief as the court deems just.

October 4, 2012.

Respectfully submitted,

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Attachments: Order

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) MEMORANDUM IN SUPPORT OF 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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Question Presented

When the youth's counsel told the court that counsel had reason to doubt the youth's fitness to proceed by reason of incapacity, and counsel asked for a hearing to determine whether the youth had the capacity to proceed, may the court deny the youth a hearing to determine the youth's capacity?

To put the question in another way, may a youth be subject to the adjudicative stage of a juvenile delinquency proceedings during a time when the youth is incapacitated, that is, while he does not have 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?

Proposed Rule of Law

No youth can be adjudicated for acts which would be a crime if done by an adult, during a period when the youth lacks the fitness to proceed by reason of incapacity. This is true notwithstanding that Oregon does not have a statute that specifically applies to a youth's capacity. Federal Due Process, and the federal and Oregon right to counsel, require that a youth be competent to proceed during the adjudicative stage of a juvenile proceedings. The Dusky standard requires that when he is adjudicated, the youth must have 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."

When a youth's capacity is in question during a delinquency proceeding, the trial court must hold a hearing to determine if the youth is fit to proceed.

Statement of facts, including the procedural posture in the juvenile court of Washington County.

On March 2, 2012, the juvenile department of Washington County filed a petition, alleging that the youth, who is 13, had committed acts which are violations of the law, or which, if done by an adult, would constitute Sodomy in the First Degree and Sexual Abuse in the First Degree. ER-1.

There was a hearing on June 4, 2012, where the youth's counsel mentioned the youth's inability to aid and assist, but there was no resolution of the matter then. 9/4/12 Tr 10.

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 requested "that the court determine that [the youth] is unable to proceed at this time." Counsel submitted Dr. Bolstad's report to the trial court. (The report is not before this court.)

A hearing for a ruling on the motion to determine competency occurred on September 4, 2012, in the juvenile court of Washington County, through the

Honorable Eric E. Butterfield. The transcript is in the excerpt of record.

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

The parties discussed the nature of the evidence that would be presented two days later, at the time of trial.

The state did not seek to offer any evidence regarding the youth's competency.

The youth's counsel urged the court to find that the youth was unable to proceed, based on Dr. Bolstad's report alone. Counsel added her impressions of the youth, including that he 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.

The state noted, and the youth did not dispute, that Oregon's juvenile code contains nothing that addresses youths who cannot aid and assist. The state asked that if the court were to apply the criminal code competency provisions (ORS 161.360 - .370) to the youth's case, the state would request an opportunity to have its expert evaluate the youth. Tr 6. The state made an argument on the facts from Dr. Bolstad's report, but made no further legal argument. Tr 7-9. It requested that the trial, set in two days, occur then. Tr 10.

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 youth's counsel asked to make a record about the youth's inability to aid and assist, because the "youth is not able to communicate with me in any way, shape or form about what happened. And it is cruel to put him through a trial under those circumstances."

The court replied, "I understand your position, [youth's counsel], * * * can't you appeal my decision today?"

The youth's counsel said, "I suppose I can."

The court said, "I think that's maybe what you'd want to think about doing." With that comment, the hearing ended. Tr 14.

The court's ruling was memorialized in an order, "Youth's motion for determination of fitness to proceed denied." ER-23.

After this hearing, the September 6 trial was postponed until November 8, 2012.

Argument

1. Due Process requires that all accused, including youths in the juvenile justice system, be competent to proceed.

The law is clear that adult criminal defendants have a substantive Due Process right not to be tried while incompetent, under the Fourteenth Amendment to the United States Constitution.[1] *See* Pate v. Robinson, 383 US 375, 378 (1966).

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1. * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; * * *.

The U.S. Supreme Court has declared that, "a person whose mental condition is such that he lacks the capacity to understand the nature and the object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial." Drope v. Missouri, 420 US 162, 171 (1975). "The [Due Process] test [for competency] must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 US 402 (1960)(per curium)(internal citations omitted); *see also* Odle v. Woodford, 238 F3d 1084, 1089 (9th Cir), *cert denied,* 534 US 888 (2001) ("[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense.")

The "rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." Medina v. California, 505 US 437, 446 (1992).

Competency disputes give rise to two types of Due Process claims -- substantive and procedural. *See, e.g.,* Lounsbury v. Thompson, 374 F3d 785, 788 (9th Cir 2004). It order to assure the substantive Due Process right to be tried only if competent, a party has a procedural Due Process right to a fair evidentiary hearing.

In this case, the question before this court is whether this Due Process right applies to youths in the juvenile justice system.

2. Federal law strongly implies that youths have a Due Process, and a Sixth Amendment, right to be competent when adjudicated.

The leading federal cases about an adult's Due Process right to proceed only when competent were described above.

The United States Supreme Court has long recognized that, although juvenile delinquency proceedings must not conform to all of the requirements of a criminal trial, delinquency proceedings, "must measure up to the essentials of due process and fair treatment." Kent v. United States, 383 US 541, 562 (1966).

The youth is both young and mentally retarded or disabled. In recent years, the United States Supreme Court has increased the protection for juveniles, and for the mentally limited. The following examples are to illustrate that trend.

In 1988, the Court held that a juvenile who murders when under the age of 16 may not be sentenced to death. Thompson v. Oklahoma, 487 US 815 (1988) (plurality opinion). In 2005, the Court applied the same rule to juveniles who are under 18. Roper v. Simmons, 543 US 551 (2005) (under the Eighth Amendment).

The Court ruled that a juvenile may not be subjected to a mandatory life sentence, with no chance of parole, for a non-homicide case, Graham v. Florida, 130 S Ct 1211 (2010), and then extended that prohibition to include murder cases. Miller v. Alabama, 132 S Ct 2455 (2012) (Eighth Amendment).

Further, the United States Supreme Court has become increasingly protective of the mentally disabled. In 1986, the court held that mentally incompetent people cannot be executed. Ford v. Wainwright, 477 US 399 (1986). In 2002, it held that the mentally retarded cannot be executed. Atkins v. Virginia, 536 U S 304 (2002). This term the Court, in two cases, will examine whether an

inmate must be competent while his federal habeas corpus case is pending. The first case is Tibbals v. Carter, 11-218 (OT 2012). The case below was Carter v. Bradshaw, 644 F3d 329 (6th Cir 2010), which held that if a petitioner in a habeas case is incompetent, it is appropriate to stay the petition until the petitioner is competent. The Sixth Circuit found this right was derived from a federal statute, not the constitution. The second case is Ryan v. Gonzales, 10-930 (OT 2012). The case below held that a habeas petitioner is entitled to a stay until he is competent. 623 F3d 1242 (9th Cir 2010).

It is noteworthy that in 1966, the U.S. Supreme Court granted a stay to a petitioner, sentenced to death, who moved to dismiss his petition for certiorari. The Court directed the district court to evaluate the petitioner's competence to dismiss his petition. The Court never ruled thereafter. The petitioner died in prison, and his case was dismissed in 1995. Rees v. Peyton, 384 US 312 (1966); Rohan ex rel. Gates v. Woodford, 334 F3d 803, 815 (9th Cir), *cert denied*, 540 US 1069 (2003) (describing Rees's death).

The Sixth Amendment right to counsel[2] is directly affected when a person facing adjudication does not have the capacity to communicate with his lawyer. "Competence was more than just the ability to understand what was going on - it was the capacity to communicate exonerating information to others." Rohan, *supra,* 334 F3d 808 (citing the right to be competent in 17th and 18th Century common law). To further quote Judge Kozinski, an incompetent person's counsel cannot be required to identify "precisely what the [person] would tell him were he

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2. In all criminal prosecutions, the accused shall enjoy the right * * * to have the Assistance of Counsel for his defense.

able, [because that] seems more likely to elicit the response, 'Well, if I knew that, I wouldn't have to ask!'" 334 F3d 818.

3. Oregon Law.

Youth acknowledges that the juvenile code contains no statute addressing a youth's ability to aid and assist, nor is there any controlling case law. There is one case from the Court of Appeals that reversed an adjudication because the adjudication was held immediately after the youth's counsel had met the youth. The court reasoned that counsel had not been able to investigate, for example, the youth's mental status or the youth's ability to aid and assist counsel. State ex rel Juvenile Dept. of Malheur County v. Garcia, 180 Or App 279, 287-88, 44 P3d 591, 595-96 (2002).

The Oregon State Bar's handbook, while stating strongly that the right to be competent exists under Due Process, cites no direct Oregon authority. Juvenile Law (Oregon CLE 2007) (Chapter 26, Michael J. Clancy). An author's comment observes:

> The unfortunate reality is that incompetent youths are adjudicated in Oregon courts every day. This practice arises both because of the inadequate level of motion practice in many Oregon delinquency courts and because of the resistance of many in the system who cling to an outdated notion of a paternalistic juvenile court in which the best interests of the youth are of paramount concern and adversarial processes are discouraged.
>
> The increasing stakes in delinquency cases, however, demand that youths must be competent to stand trial before they are subjected to adjudication. Although this is true for all youths, the argument for those 15 and under is even more compelling in light of current understanding of their developmental capacities.

Id. at §26.12.

Although the Oregon Constitution contains no Due Process clause, our Constitution guarantees the right to counsel. Article I, section 11.[3] The Oregon right to counsel includes the right to communicate to counsel, just as the Sixth Amendment does. Yet, in our case, the trial court declined to determine whether the youth's counsel's statement, that "youth is not able to communicate with me in any way, shape or form about what happened," was accurate. This determination violated the youth's Oregon right to counsel.

4. Cases from other states.

Every out-of-state case that youth found squarely holds that youths have a right to be tried only when competent.

In re Carey, 241 Mich App 222, 228-31, 615 NW2d 742 (2000) involved a state, like Oregon, that had neither a statute nor state case law guidance. The court relied directly on Dusky and the federal Due Process clause, holding: "We conclude, as have many other jurisdictions, that the right not to be tried while incompetent is as fundamental in juvenile proceedings as it is in the criminal context. 241 Mich App 231. The court directed the trial court to apply the existing adult statute to the juvenile, "to the extent possible, recognizing that its provisions may sometimes need to be liberally construed or modified for application in this context." 241 Mich App 233 n3.

The Michigan court cited cases in California (1978), Louisiana (1978), Nevada (1979), Minnesota (1979), Arizona (1980), the District of Columbia (1990), Georgia (1996), Washington (1996), and Ohio (1997) as having come to

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3. In all criminal prosecutions, the accused shall have the right * * * to be heard by himself and counsel; * * *

the same conclusion. It observed, "It appears that all courts that have spoken on this issue have recognized the right of juveniles to a competency determination." 241 Mich App 229-30. None of the cases the Carey court cited have been overruled, as of September 2012.

Since Carey was decided in 2000, a number of other states have also held that a juvenile is entitled to a competency hearing before being adjudicated delinquent: Arkansas (Golden v. State, 341 Ark 656, 21 SW3d 801, *cert denied,* 531 US 1022 (2000)); Vermont (In re J.M., 172 Vt 61, 769 A2d 656 (2001) (applying a court rule); Indiana (In re R.L.H., 831 NE2d 250 (Ind Ct App 2005) (relying on a statute); Maryland (In re Lakeshia M., 398 Md 551, 921 A2d 258 (2007) (relying on a new statute); Connecticut (State v. Juan L., 291 Conn 556, 969 A2d 698 (2009) (interpreting adult statute to apply to juveniles); New Hampshire (In re Kotey M.,158 NH 358, 965 A2d 1146 (2009) (a child is not entitled to be competent to be adjudged a "child in need of services" -- his mental state may be why the child needs services, but a child is entitled to be competent during a delinquency proceeding); North Dakota (In re T.S., 2011 ND 118, 798 NW2d 649 (2011)).

Of the 17 cases that the youth has found on the subject of a juvenile's right to be adjudicated only when competent, all cases find such a right. The youth found no case to the contrary.

5. A writ of mandamus is the only remedy that will afford relief.

A writ of mandamus is the youth's only adequate remedy. ORS 34.110 - .120. There is no remedy on appeal. A appellate court cannot review for harmless error by speculating what the defendant might have said to his lawyer had he been able to communicate. The error contaminates the entire proceeding. *See* Rohan ex rel. Gates v. Woodford, *supra,* 334 F3d 818.

The situation is analogous to the Double Jeopardy/Former Jeopardy right.[4] After an acquittal, those rights protect an accused not just from a conviction, but from having to endure a second trial. An appeal would be too late to vindicate that right. State ex rel Turner v. Frankel, 322 Or 363, 376, 908 P2d 293 (1995). *See also,* State v. Sawatzky, 339 Or 689, 693 n.4, 125 P3d 722 (2005) ("significant former and double jeopardy issue presented," so writ issued).

Here, relator, a youth, has the right not to endure a trial while incompetent. As his trial counsel put it, when she described youth's inability to communicate with her, "it is cruel to put him through a trial under those circumstances."

Further, the consequences of being adjudicated of the alleged sexual offenses are dire. He would be required to register as a sexual offender, for his lifetime. ORS 181.592 - .594. While, in time, he could seek relief from registration, given his deficits, he probably could not qualify. Once he has registered as a sexual offender, his ability to receive treatment will be greatly

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4. The Oregon Constitution provides, "No person shall be put in jeopardy twice for the same offence (sic) * * *." Article I, section 12. The United States Constitution, Amendment V (incorporated by Amendment XIV) provides, "No person * * * shall * * * be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

limited, and if he is not able to receive extensive treatment, no one will be able to say that he "rehabilitated" himself to qualify for relief. ORS 181.823. As a registered sexual offender it will be difficult for him to access services as he gets older.

A writ of mandamus is his only remedy.

6. The writ requested from this court.

The youth, relator, asks this court to issue an alternative writ of mandamus, directing the circuit court to hold a hearing to determine the youth's competency to proceed. If the youth is competent, the adjudication can proceed. If he is not, the circuit court should take appropriate action, which may include dismissing the case, and converting the matter to a dependency case. ORS 419C.261. The exact form of the competency hearing is not before this court. The youth is only asking this court to order that there be a competency hearing.

Conclusion

This court should direct the Circuit Court of Washington County, through the Honorable Eric E Butterfield, to hold a hearing to determine the youth's ability to aid and assist in the proceeding, or to show cause why it should not do so, making a showing before this court.

Respectfully submitted,

/s/Laura Graser, OSB 792463
Attorney for Relator, M.R., a youth

October 4, 2012

FILED November 1, 2012 10:30 AM
Appellate Court Records

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 No. J120235 Supreme Court No. S060771 ADVERSE PARTY'S MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS **MANDAMUS PROCEEDING**

This court requested that the state, as adverse party, respond to relator's petition for alternative writ of mandamus. In that petition, relator asks this court to compel the juvenile court to hold a hearing to determine his competency to stand trial, arguing that he is entitled to the hearing as a matter of due process and to effectuate his right to counsel.

The juvenile court failed to consider whether to hold a hearing to determine relator's competence, explaining only that it was "irrelevant." The state acknowledges that competency is relevant in a juvenile delinquency proceeding under Supreme Court case law, which suggests that a trial court must exercise its discretion to determine whether there is cause to doubt a juvenile's competency so as to require a hearing. *See In re Gault*, 387 US 1, 36, 87 S Ct 1428, 18 L Ed 2d 527 (1967) (due process applies in juvenile delinquency proceeding, which is "comparable in seriousness to a felony

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prosecution"); *Pate v. Robinson*, 383 US 375, 385, 86 S Ct 836, 15 L Ed 2d 836 (1966) (in criminal proceeding, trial court's failure to inquire into the defendant's competence "deprived [the defendant] of his constitutional right to a fair trial"). The state does not necessarily concede, however, that the trial court in this case erred in failing to order an examination or conduct a hearing. *Cf.* ORS 161.360 (in adult criminal context, when "the court has reason to doubt" a defendant's fitness to proceed, it "may order an examination"); *State v. Taylor*, 224 Or 106, 335 P2d 603 (1960) (reviewing denial of aid-and-assist hearing in adult criminal context for abuse of discretion).

In any event, this court need not consider any of those issues because mandamus is not the proper vehicle for relator's claims. As explained below, this court should decline to issue a writ because relator has a "plain, speedy and adequate" remedy by way of a direct appeal if he is adjudicated delinquent.

A. Mandamus is available only when a relator has no "plain, speedy and adequate remedy in the ordinary course of law."

Mandamus is an extraordinary remedy, available when a relator has no "plain, speedy and adequate remedy in the ordinary course of law." ORS 34.110. To be "adequate," a "law remedy must afford all relief to which the relator is entitled." *State ex rel. Bathke v. Bain*, 193 Or 688, 705, 240 P2d 958).

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Generally, the right of direct appeal in a criminal case is a speedy and adequate remedy, even when a person claims that his constitutional rights have been violated. *State ex rel. LeVasseur v. Merten*, 297 Or 577, 580, 686 P2d 366 (1984); *see also State ex rel. Maizels v. Juba*, 254 Or 323, 332-33, 460 P2d 850 (1969) (direct appeal sufficient remedy to review claimed First Amendment violation). The time required for an appeal "is not a factor" in evaluating "speediness" – instead, the relevant inquiry is whether the ordinary remedy "can be expedited as readily as can the proceeding in mandamus." *State ex rel. Sajo v. Paulus*, 297 Or 246, 649, 688 P2d 367 (1984).

Direct appeal is not an adequate remedy, however, when the standard procedures of trial and appeal would cause "the relator [to] suffer a special loss beyond the burden of litigation." *LeVasseur*, 397 Or at 580 (concluding that no "special loss" would result for relator seeking paternity determination in filiation action).

B. Relator has a "plain, speedy and adequate" remedy in the form of a direct appeal if he is adjudicated delinquent.

Applying those principles here, this court should decline to issue a writ because relator has a plain, speedy and adequate remedy in the ordinary course of law in the form of a direct appeal from the juvenile court's order, should the

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juvenile court adjudicate him delinquent. That order is appealable under ORS 419A.200, which provides for appellate review of "any interlocutory order that "necessarily affects the judgment or final order appealed from[.]" ORS 419A.200(8)(a). The juvenile court's refusal to consider relator's competency to stand trial would "necessarily affect" a judgment of jurisdiction.[1]

If relator is found within the court's delinquency jurisdiction, a direct appeal would fully vindicate his right not to be adjudicated while incompetent. He would suffer no irreparable harm to his rights by having to endure the adjudication and appeal process; despite his insistence to the contrary, the Supreme Court has never held that a person's right to due process is violated by causing him to "endure" trial while incompetent. Rather, due process is violated when an incompetent person is *convicted*.[2] *See Pate v. Robinson*, 383

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[1] The Court of Appeals has addressed claims of trial court error in failing to hold competency hearings in the criminal-law context. *See State v. Cunningham*, 164 Or App 680, 682, 995 P2d 561 (2000) (trial court erred by failing to order mental status examination to determine the defendant's fitness to stand trial, but error harmless given defendant's trial testimony); *see also State v. Gilmore*, 102 Or App 102, 792 P2d 1242 (1990) (trial court failed to "discharge its duty to assess defendant's fitness to proceed").

[2] Relator argues that "[t]he Sixth Amendment right to counsel is directly affected when a person facing adjudication does not have the capacity to communicate with his lawyer." (Memo in Support 18). However, the state is aware of no cases addressing whether a person's Sixth Amendment right to counsel is violated when he is tried while incompetent. The case that relator cites, *Rohan ex rel. Gates v. Woodford*, does not address that question. 334 F3d

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US 375, 378, 86 S Ct 836, 15 L Ed 2d 815 (1966) (noting state's concession "that the *conviction* of a person while he is legally incompetent violates due process" (emphasis added)). *See also Riggins v. Nevada*, 504 US 127, 139, 112 S Ct 1810, 118 L Ed 2d 479 (1992) (Kennedy, J., concurring in judgment) (agreeing with majority that "*conviction* of an incompetent defendant violates due process," citing *Pate* (emphasis added)). *But see Drope v. Missouri*, 420 US 162, 171, 95 S Ct 896, 43 L Ed 2d 103 (1975) (incompetent person "may not be subjected to a trial") and *Dusky v. United States*, 362 US 402, 403, 80 S Ct 788, 4 L Ed 2d 824 (1960) (remanded for determination of "present competency to stand trial").

That difference—having to "endure" a trial proceeding, versus being convicted after such a proceeding, with all of the consequences of that conviction—reveals the flaw in relator's attempt to analogize his situation to a double-jeopardy violation. (Memo in Support of Pet 12). Double jeopardy prevents a person being put "*in jeopardy* twice for the same offence." *See* Or Const Art I, § 12 (emphasis added); *see also State ex rel. Turner v. Frankel*, 322

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803 (9th Cir 2003). There, the Ninth Circuit held that a habeas petitioner "has a *statutory* right to competence in his federal habeas proceedings[.]" *Id.* at 817(emphasis added). In reaching that conclusion, the court acknowledged that "the constitutional right to counsel [at trial] * * * do[es] not apply to habeas." *Id.*

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Or 363, 376, 908 P2d 293 (1995). Thus, merely having to endure a second trial violates a person's double-jeopardy right, and an appeal after a second trial is inadequate to vindicate that right. Here, petitioner will suffer no irreparable harm by virtue of having to sit through his adjudication hearing. *See generally State ex rel. OHSU v. Haas*, 325 Or 492, 497, 942 P2d 261 (1997) (appeal not adequate remedy to challenge trial court order to disclose privileged communication because "[o]nce a privileged communication has been disclosed, the harm cannot be undone").

Nor will relator suffer a "special loss" by having to endure the adjudication process. A "special loss" is a loss suffered "*beyond* the burden of litigation." *LeVasseur*, 397 Or at 580 (emphasis added). Relator's sole claim of harm is having to endure the litigation process itself – a type of harm that does not render a direct-appeal remedy "inadequate."

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To summarize, relator has a plain, speedy, and adequate remedy in the form of a direct appeal in the event that the juvenile court finds him within its delinquency jurisdiction. Mandamus is therefore not an available remedy, and this court should decline to issue a writ.

Respectfully submitted,

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Mental Health of Youth– needs to be truly addressed

It is necessary to adopt a procedure for juveniles to raise the issue of competency to stand trial in order to evaluate juveniles and provide appropriate and timely mental health treatment. Juveniles can be found incompetent to assist in their defense for a variety of reasons – they may not understand the court system, they may be under the influence of a drug, or more commonly – they have a mental disease or defect that requires treatment. Treating and restoring juveniles with mental health issues benefits both the juvenile and society as a whole. Timely treatment is a much better solution than doing nothing and letting a problem become worse. It is also necessary to prevent juveniles from cycling in and out of the juvenile justice system and reoffending.

The first of the attached articles tells the story of Jordan and other youth who "cycle in and out" of detention for several years to the point where detention centers become a place a "dumping ground" for juveniles with mental health issues to "catch up on lost sleep." Improving mental health treatment has also been in the news lately with the recent mass shootings; the need for improvement has been recognized both in Oregon and nationally. Many commentators emphasize the need to provide treatment to young people as early as possible. Senate President Peter Courtney has also called for a "game-changing investment" in mental health care. In addition, Oregon's own case involving Kip Kinkel continues to highlight the mental health gap in Oregon law. Kip Kinkel's lawyers are still arguing that Kinkel should have been given a mental health evaluation before he was sentenced. In short, codifying juvenile competency standards and procedures will help ensure timely evaluations, improve mental health care, and provide earlier treatment.

Northwest Mentally Ill Juveniles Cycle In And Out Of Detention

Northwest News Network | Nov. 20, 2011 11:44 p.m. | Updated: July 17, 2012 1:03 a.m.

SEATTLE – Every year in the Northwest, thousands of mentally ill teenagers get caught up in the juvenile justice system. In fact, some counties estimate more than half of the kids they place behind bars have a diagnosable mental health condition like schizophrenia, bi-polar or personality disorder. Yet many of these teens do not get the treatment they need. Instead, they cycle in and out of detention.

This week we're reporting on failures in how the Northwest treats youth with serious mental health issues.

The first thing you notice about 16-year-old Jordan — we're just using his first name — are his ears. Actually his earlobes. They've got big holes in them — tribal style. He's stretching them to fit large decorative rings.

"I'm going to an inch," Jordan says.

It looks painful. And I ask him why he's doing this.

"It's the thing about being different," he responds. "I like being different."

When he was younger, Jordan says being different meant he got picked on and bullied at school. One day he'd had enough.

"So I brought a knife to school and I pulled a knife on two different kids."

He was charged with assault and put on probation. But the trouble didn't stop there. Jordan says back then he was full of rage.

"You know I grew up and I got bigger, so I became the bully," he says.

He committed another assault and another. He also drank and took drugs. Jordan cycled in and out of juvenile detention. A place called Martin Hall near Spokane.

He says it was a "cake walk."

"Martin Hall is nothing to me. It's just somewhere to catch up on some lost sleep," Jordan says. "And they just kept sending me there. It was like they didn't even care."

Now there's something you need to know about Jordan. At an early age, he was diagnosed with clinical depression. Later, he experienced drug induced psychosis. This doesn't excuse his criminal behavior. But here's the thing, at Martin Hall he says he didn't get any treatment for his mental health issues.

"Not really. You know they gave you your meds in the morning that you were taking on the outside," he explains.

I ask, "Did you have mental health counseling sessions, did you have group therapy? Anything like that?"

"Not that I can remember."

Officials at Martin Hall confirm they do not have a mental health professional on staff. Most county juvenile lock ups don't.

"This is not a place for kids who have serious mental illnesses," says Mark Tips who runs the juvenile detention center in Thurston County — in the shadow of Washington's state capitol. As he gives me a tour, he's blunt.

"There are not treatment options here. It's a jail, it was built as a jail and not as a treatment facility," he says.

And yet, says Tips, county lock ups like his have become "dumping grounds" for mentally ill youth. Sometimes, he says, juveniles show up here who just the week before were declared not competent to stand trial.

"Kids with substantial problems who we can maintain here safely, maintain securely, but who cannot and will not get better from anything that will happen here."

Tips says the problem is simple: mental health services in the community are inadequate.

Mark Freedman wouldn't disagree. He runs Thurston County's mental health program for the poor.

"Without a doubt if we had more funding and more clinicians and lower caseloads we could improve on the system," he says.

But Freedman says there are other barriers to getting a kid help before he ends up cycling through juvenile detention. For one, usually only Medicaid eligible youth qualify for services. And then it's purely voluntary.

"Even if they are referred, if the child and the family does not want to participate in treatment, we can't make them," Freedman explains.

Freedman says ideally you start treatment when the kid is in jail because you're more likely to get buy in.

But there's a problem. Medicaid doesn't cover kids who are locked-up. That means sometimes these youth don't get the help they need until after they're convicted of a crime and either sent up to a state juvenile facility or put on probation.

Probation officer Jen Herbert supervises about 40 youth offenders in Thurston County. Some, she says, are clear examples of the mental health system failing.

"I think that we all have cases on our caseload where clearly if the right services were made available to that youth before they started acting out that they would not be involved in the criminal justice system," Herbert says.

Herbert tells me about a teenager girl who was sent to live in a group home. There she repeatedly assaulted staff or damaged property. Each time the cops were called and the girl cycled in and out of juvenile hall.

Herbert says, "It was at least eight times."

But it wasn't until she tried to commit suicide that she finally got help.

"Unfortunately it was after many, many months of accumulating criminal history, of frustration I'm sure on her part as well as the community's part in trying to protect her, in trying to protect others," she says.

That teenager is currently getting in-patient psychiatric care. But that's a last resort and those beds are few and far between.

Eric Trupin is a child psychologist at the University of Washington. He says the system should be catching these kids before there's a crisis. He's an evangelist for evidence-based intervention programs that involve all the adults in a kid's life who then come up with an individualized care plan for the youth.

The term is wrap-around services.

"Sort of thinking about what's going on in that youth's environment that could be modified or changed to really improve the outcome," Trupin says.

Trupin runs something called Family Integrated Transitions or FIT. It's a combination of several evidence-based programs for kids like Jordan with both mental health and drug or alcohol problems. Studies show FIT and other intensive wrap-around programs for juveniles could actually save Washington from having to build a prison in the future.

But these services are not widely available. In fact, state figures show last year evidence-based programs served just one-quarter of the Washington youth who were eligible. Trupin calls it "outrageous."

He says he's watched kids who cycle in and out of detention become "hardened individuals with despair and misery and little hope that they're going to have effective lives."

The issue, of course, is funding. Traditional one-on-one counseling is cheaper than evidence-based wrap-around programs. As for Jordan, he's been in both.

Now he's in Trupin's FIT program. There are no guarantees. But for the first time since he was 11, he's stayed out of trouble long enough to get off juvenile probation.

"It's my mindset," he says. "I've changed my way of thinking. I don't have to be that, pardon my language, 'Billy Bad Ass' any more, I don't have to be that guy."

This January, Washington State Representative Marylou Dickerson, a Seattle Democrat, will introduce legislation to expand the availability of evidence-based programs in Washington. She'll make the case that it makes sense in a tight budget to invest in what's been proven to work.

THE REGISTER-GUARD

A mental health challenge

Courtney proposes a "game-changing" investment

Published: *Midnight,* Feb. 10, 2013

The national push for expanded mental health services after the massacre of schoolchildren in Newtown, Conn., has surfaced in Oregon, where Senate President Peter Courtney has called on state lawmakers to make a "game-changing" investment in mental health care.

Until now, the debate over the shooting at Sandy Hook Elementary has focused largely on gun control, with legislative proposals introduced in Congress and state legislatures across the nation. Less attention has been paid to mental health care, despite agreement by Democrats and Republicans alike about the need to address gaping holes in the nation's mental health system.

Courtney proposes raising an additional $330 million per biennium through new taxes and fees. That money would pay for an broad range of programs aimed at improving mental health care for both adults and juveniles.

For adults, the services would include crisis hot lines, assistance with rental housing and supported employment programs and jail diversion programs, along with increases in both outpatient care and acute, facility-based mental health care.

For young people, they would include early intervention: more mental health care professionals in schools; training for teachers and pediatricians to identify early signs of illness; treatment for children with psychotic disorders and less severe illnesses; and community-based facilities for mentally ill youth, including those who have committed crimes.

It's an impressively long list of services that was best summarized by Linda Hammond, interim director of the Oregon Health Authority's Addictions and Mental Health Division. She said it "would help people cope with daily life and maximize their ability" in terms of pursuing "jobs and education they couldn't otherwise achieve."

It's hard to think of a better use for state budget dollars, but those dollars don't exist yet. Raising new revenue will be a daunting challenge at a time when every aspect of state government — from schools to public safety — is squeezed for funding.

But it can be done. Courtney has produced a plan that, while substantial in size, can be accomplished with relatively small increases in taxes or fees.

While Courtney proposed no specific revenue sources, he cited a new tax on beer and wine as one possibility. That won't be an easy fight. Few industries are more politically influential in

Oregon, and beverage lobbyists probably were deploying in Salem within minutes after Courtney's announcement.

But the need for Courtney's proposal is beyond debate. As he reminded lawmakers last week, only 35 percent of youth and 45 percent of adults with mental illness are getting the treatment they need.

At a time when other states have been slashing spending for mental health care, Oregon has taken important steps in recent years to bolster its system. The state replaced the Oregon State Hospital, built in 1883 and the site for the filming of "One Flew Over the Cuckoo's Nest." In its place, legislators approved funding for a new 620-bed hospital in Salem, and plans remain in place, despite funding uncertainties, for a proposed 174-bed psychiatric hospital in Junction City. Meanwhile, Gov. John Kitzhaber's proposed budget includes $28 million for new community-based mental health and addiction services.

But the need remains great, and Courtney's proposal for a significant new investment in mental health care could truly be, as the Senate president says, a "game changer."

Kinkel's Lawyer Says He Belongs In Mental Health Hospital

AP | Aug. 12, 2011 2:54 a.m. | Updated: July 17, 2012 1:04 a.m. | Portland, OR

AP

A lawyer for Springfield school shooter Kip Kinkel has filed a federal court challenge to Kinkel's prison sentence of more than 111 years for the 1998 shooting spree that killed his parents and two fellow Thurston High School students and wounded 25 others.

Kinkel's state court appeals are exhausted but his arguments remain much the same. His lawyer says Kinkel was mentally ill and the trial court should not have accepted his guilty plea without ordering a mental health exam. The petition also says he had inadequate legal representation.

Kinkel's lawyer Dennis Balske says his client should be in the state mental hospital rather than state prison.

Kinkel turns 29 this month. He was 15 when he killed his parents in their rural home, then opened fire in Thurston's cafeteria the next morning.

Oregon attorney general's spokesman Tony Green says his office has argued successfully so far that Kinkel is not entitled to a new trial.

Public Safety—will be improved with this bill

Enacting a juvenile aid and assist procedure is in the interest of public safety because it will allow youth to be adjudicated and held responsible when constitutionally possible. Sometimes this means simply delaying a trial or plea until restorative services are provided, but a procedure is necessary to make this happen. While a juvenile may be able to raise the issue of fitness to proceed in some counties, the state is still unable to provide restorative services as such services are not authorized in statutes or state budgets. A juvenile who is taken into custody for committing a crime, who is also unable to aid and assist, thus is often released back into his or her community without any treatment or supervision. Without proper accountability, the youth may engage in a pattern of reoffending – creating a drain on police resources and creating more victims. Markus Fant, a Juvenile Counselor for the Clackamas County Juvenile Department, gave an example of a juvenile who was brought into the Juvenile Department Intake and Assessment Center three times in a single day. This juvenile has been referred to the juvenile Department over two dozen times, 13 of which were for criminal allegations. Each time the juvenile was released because he could not aid and assist and thus could not be adjudiciated. The Juvenile Department's hands are tied as they can provide no restorative services under the present law; a revolving door problem exists. Instead, is it essentially left to the juvenile to voluntarily seek mental health treatment in these delinquency cases. If the state were able to provide restorative services, a juvenile would often be able to stand trial later and receive the appropriate consequences if found guilty. In addition, the youth would be supervised while restorative services are completed. In short, providing a procedure to allow a juvenile to become competent to stand trial will provide appropriate treatment and supervision, and curb revolving door occurrences in the public safety system.

CLACKAMAS COUNTY

Note: This letter was submitted as written testimony in support of SB 411 during the 2011 legislative session. HB 2836 is identical to SB 411.

Ellen Crawford
Director

JUVENILE DEPARTMENT

Juvenile Intake and Assessment Center
2121 Kaen Road | Oregon City, OR 97045

February 17, 2011

The Honorable Chair Floyd Prozanski and Vice-Chair Jeff Kruse
Senate Judiciary Committee
900 Court St. NE, Room 343
Salem, OR 97301

RE: SB 411

Dear Chair Prozanski, Vice-Chair Kruse, and members of the Senate Judiciary Committee:

Please consider this letter as my official testimony regarding SB 411. As Director of Clackamas County's Juvenile Department, I would like to express my support of SB 411.

"Aid and assist" language does not exist in the juvenile code of the Oregon Revised Statutes. This right is important for both youth and community protections. Without aid and assist statutes, and the complementary restorative services provisions, youth offenders are not supervised, provided treatment services, or held accountable by county juvenile departments. The juvenile justice system becomes a "revolving door," and youth are in and out of police and juvenile department attention with no ability to intervene. This creates new victims and new costs to our communities. Some of these youth receive services from Developmental Disabilities, mental health, and special education services, but all of these services are voluntary, and neither the youth nor parents have to comply. These agencies are eager to work with the juvenile department to ensure treatment compliance and provide youth services.

With an aid and assist statute in the juvenile code, these youth may receive juvenile justice intervention, the safety of the public is addressed, and other treatment services will be more effective. Thank you for the opportunity to share our support of SB 411. Please do not hesitate to contact me if you have any questions.

Sincerely,

Ellen Crawford

Ellen Crawford
Director, Clackamas County Juvenile Department

Legal Ethical Standards—require an aid and assist procedure for juveniles

The ethical standards for lawyers representing juveniles in delinquency cases support the creation of procedures and standards expressly allowing a juvenile to raise the issue of competency. Indeed, a lawyer has an ethical duty to determine whether a client is able to aid and assist in the client's defense before proceeding, and to try to maintain a normal client-lawyer relationship.[3] A juvenile client's inability to aid and assist can be due to immaturity, mental incompetence, mental disability, etc. If a lawyer has a doubt as to the ability of the client to aid and assist, the lawyer should consult with the client and make a motion to the court for an evaluation of the client subject to the client's agreement.[4] The lawyer for the youth and the prosecutor can also stipulate that the youth is unable to aid and assist when they agree.[5] The lawyer should advocate for the youth's rights during the hearing to determine ability to aid and assist.[6] If the youth is found to be unable to aid and assist, the lawyer should make a motion to dismiss the case or to have the case converted to a dependency petition.[7] If the youth is found able to aid and assist, the lawyer should continue to raise concerns about the youth's inability to aid and assist.[8] However, it is the client who must make the ultimate decision about obtaining a mental health evaluation as it is the client who bears the consequences of the consequences of the outcome.[9] Lawyer ethics rules and guidelines have long recognized this aid and assist issue but Oregon's juvenile law is out of sync because it still does not provide lawyers with appropriate statutory tools to do their job in representing juveniles.

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[3] Or. R. Prof. Conduct 1.14.
[4] *See* Bar Guidelines 2.8(2)(a).
[5] *See* Bar Guidelines 2.8(2)(b).
[6] *See* Bar Guidelines 2.8(2)(c).
[7] *See* Bar Guidelines 2.8(2)(d), (f).
[8] *See* Bar Guidelines 2.8(2)(e).
[9] Or. R. Prof. Conduct 1.2.

OREGON RULES OF PROFESSIONAL CONDUCT (LEGAL ETHICS RULE)

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Adopted 01/01/05

OREGON STATE BAR

Principles and Standards for Counsel in Criminal, Delinquency, Dependency, and Civil Commitment Cases

In September 1996, the Oregon State Bar Board of Governors approved Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Commitment Cases. In May 2006, the Oregon State Bar Board of Governors accepted revisions to the 1996 standards, including the following excerpts:

STANDARD 2.3
Role of Counsel

A lawyer should follow Oregon Rule of Professional Conduct 1.2 in determining the scope of the lawyer's representation and the allocation of authority between a client and a lawyer. A lawyer should not substitute the lawyer's judgment for that of the client in decisions that are the responsibility of the client. A lawyer should follow ORPC 1.14 in representing clients with diminished capacity, whether because of minority or mental impairment, or for some other reason. It is the lawyer's duty to determine whether a client is unable to aid and assist in the

client's defense because of immaturity or mental incompetence. *See* Standard 2.8. If the client is immature or mentally disabled the lawyer should, as far as reasonably possible, maintain a normal attorney-client relationship.

Implementation

1. A lawyer should follow Standard 1.3, Implementations 1 and 2.
2. Decisions whether to enter an admission, accept diversion or other pretrial early disposition, testify, or waive any right with respect to jurisdiction, trial, waiver, rehearing, or appeal are ultimately for the client to determine.
3. In juvenile delinquency proceedings as in adult criminal matters, a lawyer is ordinarily bound by the client's definition of his or her interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation. If the client is unable to aid and assist in the client's own defense, see Standard 2.8.

* * *

STANDARD 2.8
Pretrial Motions and Notices; Hearings Regarding Ability to Aid and Assist and Waiver of Juvenile Court Jurisdiction

A lawyer should research, prepare, file, and argue appropriate pretrial motions and notices whenever there is reason to believe the client is entitled to relief. A lawyer should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist and waiver of juvenile court jurisdiction.

Implementation

1. A lawyer should research, prepare, file, and argue pretrial motions and notices, if appropriate, to address issues such as:
    a. constitutionality of relevant statutes;
    b. defects in the charging process or instrument;
    c. severance of charges and/or co-defendants for trial;
    d. change of venue;
    e. request to recuse or affidavit of prejudice;
    f. *Brady v. Maryland* motions;
    g. motions to compel discovery;
    h. motions for sanctions because of discovery violations;

i. violations of federal and state constitutional and statutory provisions, including but not limited to:

(1) illegal searches and/or seizures;

(2) statements obtained in violation of the client's right to counsel or privilege against self-incrimination;

(3) unreliable identification evidence;

(4) speedy trial; and

(5) double jeopardy.

j. motions or requests for nonroutine expenses, such as:

(1) interpreters;

(2) mental health experts to assess the client's mental capacity and ability to form the requisite mental states, to make recommendations regarding waiver and disposition, and a plea of guilty but insane;

(3) forensic services; and

(4) investigative services.

k. matters of trial evidence that may be appropriately litigated by means of a motion in limine.

l. notices of affirmative defenses and notice of intent to present particular evidence if required;

m. motions to dismiss based on civil compromise, "best interests of the youth," "in the furtherance of justice," and "general equitable powers of the court."

2. A lawyer should take the following steps with regard to seeking a determination of the client's ability to aid and assist:

a. Whenever a lawyer has a good-faith doubt about the client's ability to aid and assist in the proceedings, the lawyer should fully advise the client concerning the consequences of a determination that the client unable to aid and assist and should move for an evaluation of the client, if the client so agrees. If the client opposes such an evaluation, the lawyer should inform the court that the lawyer has a good-faith doubt about the client's ability to aid and assist in the matter, but should not divulge the client's confidences and secrets.

b. If the client agrees, the lawyer should obtain an independent evaluation of the client or should advocate that evaluators appointed by the court are qualified by training and experience to testify concerning the client's ability to aid and assist. If the client and prosecutor concur, the lawyer may stipulate that the client is unable to aid and assist the lawyer in the proceedings.

c. At the hearing to determine whether the client is able to aid and assist, a lawyer should protect and exercise the client's constitutional and statutory rights, including cross-examining the state's witnesses, calling witnesses on behalf of the client such as independent experts, and making appropriate evidentiary objections.

d. If an adult client is found to be unable to aid and assist, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment. If a child, adolescent, or young adult client is found to be unable to aid and assist in a juvenile court proceeding, a lawyer should seek to resolve the delinquency matter by having the petition converted to a dependency petition. An appropriate disposition should be sought as in a dependency case.

e. If the client is found able to aid and assist, a lawyer should recognize a continuing obligation during the course of the proceedings to raise good-faith concerns about the client's ability to aid and assist.

f. A lawyer for children, adolescents, and young adults should also consider a motion to dismiss or amend to a dependency petition based on the youth's lack of considered judgment that does not rise to the level of inability to aid and assist.

3. A lawyer should do the following with regard to opposing waiver of juvenile court jurisdiction in juvenile proceedings:

   a. A lawyer should investigate and become knowledgeable about the consequences of waiver of juvenile court jurisdiction in the particular client's case and should thoroughly explain the consequences to the client.

   b. If the client decides to oppose waiver of the juvenile court's jurisdiction, a lawyer should be fully prepared to present evidence and argument against the waiver

   c. At the waiver hearing, a lawyer should address all the requirements of ORS 419C.349. To make an "amenability" argument, a lawyer should:

      (1) describe the youth's background, including attachment to family and positive statements from persons who believe the youth has potential;

      (2) show that the youth was not thinking as an adult at the time of the offense;

      (3) describe the youth's moral development and remorse if possible to do so without jeopardizing the youth's right to remain silent at a trial;

      (4) document successful juvenile interventions that have been used for similar youth; and

      (5) describe how the youth's delinquent behavior could change if services met his or her needs.

   d. If juvenile court jurisdiction is waived, a lawyer should make every effort to have the client released pending trial or held in a juvenile facility. If the client is transferred to an adult facility, a lawyer should advocate for measures that will protect the client and provide age-appropriate services, including mental health and educational or special education services if the client so desires.

Cost – a codified procedure will be cost-effective in the long term

In 2011, the estimated financial impact of this bill was $787,582 for 2013-2015. This includes what it would cost the Oregon Health Authority to hire a policy analyst and provide restorative services for 40-45 youth. The bill would have an indeterminate or minimal financial impact on other agencies involved. Despite this cost, it is believed that adopting standards and procedures for fitness to proceed will result in unquantifiable savings now and in the future. Providing proper evaluation and treatment for youth who are unable to aid and assist will save money for the state in a reduction of youth who reoffend and it will also likely lessen future mental health costs. It also allows the possibility of enabling the youth to become a productive citizen, which provides enormous benefits for the youth and society generally. More obviously, in many counties these cases are now often changed from delinquency cases to dependency cases. In such circumstances, juveniles often are placed in more expensive facilities for longer periods of times when they are transferred to dependency jurisdiction. Placement at the children's farm home is very common. When counties must make up a solution in each case, it also takes more staffing time – with courts, defense attorneys, juvenile departments, DHS caseworkers and district attorneys – not to mention increased litigation costs. Having to retry a couple of cases due to the gap in the law or having to litigate an appeal, can quickly equate to large legal bills, not to mention the toll on families and victims. In counties that recognize aid and assist issues, the cost can be more expensive than necessary because there are not accepted time lines in place like the bill would require. In short, this new proposed law has a fiscal impact but it is shortsighted to not fund it due to the savings embedded within it for the long term.

FISCAL IMPACT OF PROPOSED LEGISLATION
Seventy-Sixth Oregon Legislative Assembly – 2011 Regular Session
Legislative Fiscal Office

Note: HB 2836 is identical to SB 411 (2011). This is the 2011 Fiscal Statement as the 2013 Fiscal Statement has not been issued.

Prepared by: Kim To
Reviewed by: Linda Ames, Sheila Baker, John Borden, Laurie Byerly
Date: 3/30/2011

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

Government Unit(s) Affected:
Oregon Health Authority (OHA), Department of Human Services (DHS) Public Defense Services Commission (PDSC), Department of Justice, District Attorneys and Counties, Oregon Judicial Department (OJD), Oregon Youth Authority (OYA)

Expenditure Impact:
See Analysis

Local Government Mandate:
This bill does not affect local governments' service levels or shared revenues sufficient to trigger Section 15, Article XI of the Oregon Constitution.

Analysis:
Senate Bill 411 codifies the conditions, standards and procedures for determining if individuals under 18 years of age in a delinquency petition are fit to proceed (able to aid and assist in their defense). The bill [1] outlines procedures for filing in raising the issue of fitness and fitness evaluations; [2] modifies procedures for written objections; [3] specifies that the Oregon Health Authority will consult with the Department of Human Services in the placement of youths undergoing court-ordered placement for restorative services; [4] defines the conditions and procedures for removing a youth from current placement for the purposes of a fitness to proceed evaluation and restorative services; and [4] clarifies conditions for extending the detention of youths undergoing fitness to proceed evaluations and restorative services. Certain sections of the bill become operative on January 1, 2012. The bill declares an emergency and is effective on passage.

Currently, Oregon law has no uniform procedure for determining fitness in juvenile proceedings and does not specify options for the court when a youth is found unfit to proceed. This bill outlines a definition of unfit, and provides the statutory structure and timelines for raising the issue of fitness, obtaining fitness evaluations, challenging evaluations and administrating restorative services in cases involving a person who is under 18 years in a delinquency petition. The bill also specifies qualifications for evaluators and reporting requirements for evaluations.

This bill has an expenditure impact on the Oregon Health Authority. The fiscal impact of this bill on the Department of Human Services is indeterminate depending on the number of youths entering the children's residential program as a mandatory client as a result of this bill. The fiscal impact of this bill on the Public Defense Services Commission, Department of Justice, District Attorneys and counties is indeterminate dependant on whether or not this bill would result in an increase in requests for fitness evaluations and/or challenges to fitness evaluations including appeals.

Oregon Health Authority (OHA)
OHA estimates the fiscal impact of this bill to be about $787,126 General Funds and 0.75 FTE for the 2011-13 biennium and $787,582 General Funds and 1.00 FTE for the 2013-15 biennium. This amount includes personal services and contract costs to provide restorative services as detailed below:

The bill requires OHA to:

1. formalize and administer the fitness to proceed evaluation process including (a) developing training standards for psychiatrists, licensed psychologists and licensed clinical social workers conducting fitness evaluations; (b) developing guidelines for conducting evaluations; and (c) providing courts with a list of qualified evaluators.
2. oversee a program to provide restorative services to youths who have been determined unfit to proceed and have been determined by the courts to have the potential to gain or regain fitness to proceed in the foreseeable future. OHA is directed to provide or arrange for the provision of restorative services within 30 days after receiving a court order. OHA is required to develop qualifications and standards for persons providing restorative services.

To carry out these provisions, OHA anticipates establishing one Operations Policy Analyst 2 position [0.75 FTE, $157,046 General Fund for the 18 months of the 2011-13 biennium / 1.00 FTE, $185,142 General Fund for the full 2013-15 biennium] to coordinate both the evaluation and the restorative services components of this bill.

Restorative services typically consist of educational type services to teach youths about the nature of the alleged offense and the juvenile process. In some instances, restorative services could include medication or other treatment to address a mental health issues. OHA estimates the contract cost of the restorative services program to be approximately $630,080 General Fund for the 2011-13 biennium and $602,440 for the 2013-15 biennium. This amount is based on the following assumptions: Using the Juvenile Code Revision Work Group review of profiles of youth who passed through the Oregon system in the last two years and statistics from comparable states including Michigan, Connecticut and Virginia, OHA speculates that approximately 40 to 45 youths would require restorative services each year. Again, based on expenditures from comparable states, OHA infers the cost of restorative services to be $7,168 per year per youth served for contracted time and materials. OHA reports that restorative services are not eligible for federal matching funds because they are not considered treatment services but psycho-educational services for the court process. In current practice, restorative services are not available to youths. Because restorative services are limited to helping a youth regain fitness to proceed in court proceedings, they are not considered mental health treatment medically driven by a diagnosis. Therefore they are not covered under the Oregon Health Plan or Healthy Kids.

Costs for the actual fitness to proceed evaluations are not included in the OHA portion of the fiscal because in current practice these costs are typically incurred by the Public Defense Services Commission or counties, and the bill specifies that these costs continue to be the responsibility of the Public Defense Services Commission or counties. See analysis below.

Department of Human Services (DHS)

SB 411 has an indeterminate impact on the Department of Human Services' Developmental Disabilities Services (DD) budget. Section 10 (8) of the bill states 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. The authority, in consultation with DHS, may place the youth in any facility authorized to accept the youth and provide the necessary services and care. Passage of this bill could result in either a decrease or increase in placement of youths in the secure children/adolescent residential program as mandatory clients. According to DHS, this is the most restrictive and costly level of care with an average monthly rate of $15,318 per client. Although at this time, the number of youths diverted from this program, or entering this program as a mandatory client, as a result of this bill is indeterminate, note that one additional youth would have a fiscal impact of about $367,632 (37% General Fund / 63% Federal Funds) per biennium on the DHS budget.

Public Defense Services Commission (PDSC)
SB 411 has an indeterminate fiscal impact on PDSC. The bill stipulates that if a circuit court determines that a youth is financially eligible, the public defense services executive director is required to pay all fees and costs associated with the court ordered fitness evaluation. Under current practice, attorneys may request that PDSC approve the expenditure of funds for a fitness to proceed examination (also known as Aid and Assist hearings) as being reasonable and necessary for adequate representation of a youth in a delinquency proceeding. PDSC reports that the Commission is currently expending funds for fitness to proceed examinations in delinquency matters. PDSC estimates the cost for a fitness to proceed evaluation at about $1,500 per examination. PDSC cannot estimate the number of additional fitness to proceed evaluations, if any, that might result from the enactment of this bill.

Department of Justice (DOJ)
SB 411 has a minimal impact on the Department of Justice. DOJ does not expect passage of this bill to result in additional workload. The department anticipates that with passage of this bill, DOJ would provide routine legal advice for OHA in its development of rules and contracts necessary to carry out OHA obligations.

District Attorneys and Counties
SB 411 has an indeterminate impact on District Attorneys and counties. The bill specifies that if a county court determines that a youth is financially eligible, the county is required to pay all fees and costs associated with the court ordered fitness evaluation. Counties anticipate minimal fiscal impact based on the assumption that county involvement in delinquency petitions as outlined in the bill would be rare. However, the bill also states the county is required to pay all fees and costs associated with the court ordered fitness evaluation if an evaluation is ordered at the request of a district attorney or juvenile department. In addition, the bill stipulates that after an evaluation is conducted at the request of the youth, the state shall have the right to seek an independent evaluation at its own expense. It is not known whether this bill would result in an increase in requests for fitness evaluations and/or challenges to fitness evaluations.

The bill clarifies conditions for extending the detention of youths undergoing fitness to proceed evaluations and restorative services. If the length of stay in a juvenile detention facility is extended under the amendments to ORS 419C.150 made by section 12 of this bill, the costs of the extended stay will be the responsibility of the county. At this time, the fiscal impact of this provision is indeterminate depending on the number of cases and the amount of time the length of stay is extended in each case, if any. Note that juvenile detention is a very expensive resource, and most counties must contract with another county to obtain them. In rare instances, a bed may not be available at all or only in a distant location, adding transportation and other related costs.

Oregon Judicial Department (OJD)
SB 411 has an indeterminate, but minimal impact on the Oregon Judicial Department. This bill requires the circuit court to determine financial eligibility to pay the fees and costs of fitness to proceed evaluations, enter orders for payment if a youth is found financially eligible, and appeals. The bill also requires the court to make written findings if a youth must be removed from the youth's current placement for the purpose of an evaluation. These requirements will require modifications of forms and processes, as well as additional training, and may increase workload for staff and judges.

Oregon Youth Authority (OYA)
SB 411 has no fiscal impact on the Oregon Youth Authority. The bill specifies that OHA, PDSC and counties have the financial responsibility for fitness to proceed evaluations and restorative services.

HB 2108 is similar to this measure.

Other States—Oregon is behind and out of step with practice in other states

Oregon is the only western state without a procedure allowing juveniles to raise the issue of fitness to proceed. Within the last three years California, Idaho, and Utah have enacted a statute providing a procedure for juveniles. Arizona has been following a statutory procedure since 1996. Washington, Montana, and Nevada have relied on both the US Constitution and state law to find a due process right requiring juveniles to be competent before facing a trial. The attached chart explains in more detail what these other states have done. Oregon needs an aid and assist procedure specifically designed for juveniles in order to catch up with its neighboring states and meet the requirements of the US Constitution.

Western States Chart –Juvenile Aid and Assist (Competency)

	Statutory procedure or judicial direction	
Oregon	**No**	**No juvenile competency statute or directive case law guiding juvenile court determinations.**
Washington	**Yes**	**The Washington Court of Appeals held that adult competency determinations apply to juveniles. *State v. E.C.*, 83 Wash. App. 523, 528, 922 P.2d 152, 155 (1996).**
California	**Yes**	**The juvenile's counsel or the court can challenge a juvenile's competency. Proceedings are suspended if the juvenile's competency is in doubt. California Welfare and Institutions Code §709 (enacted 2010).**
Idaho	**Yes**	**A party can request in writing that a juvenile be evaluated to determine competency to proceed, or the court can order an evaluation on its own. The proceedings are stayed if there is good cause to believe the juvenile is incompetent to proceed. Idaho Code Ann. § 20-519A (enacted 2011).**
Nevada	**Yes**	**In relying on the U.S. Constitution, the Nevada Supreme Court found that juveniles have a due process right to be competent to aid and assist as part of the right to counsel. *Matter of Two Minor Children*, 95 Nev. 225, 231, 592 P.2d 166, 169 (Nev. 1979).**
Montana	**Yes**	**The Montana Supreme Court relied on the U.S. and Montana Constitutions in finding that a juvenile has a due process right to be competent to stand trial. Incompetence can be based on a mental disease or defect, but not on immaturity. *In re G.T.M.*, 354 Mont. 197, 203, 222 P.3d 626, 630 (Mt. 2009).**
Utah	**Yes**	**Counsel can make a motion to inquire into a juvenile's competency or the court can do so on its own. The proceedings are stayed upon the filing of the motion. Utah Code § 78A-6-1301 (enacted 2012).**
Arizona	**Yes**	**A party or the court can make a motion to require an evaluation to determine competency. If the juvenile is incompetent to proceed, the juvenile shall not participate in the proceeding. Ariz. Rev. Stat. § 8-291.01 (enacted 1996).**