Chapter 161

TITLE 16

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Chapter 161

1999 EDITION

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161.010 [Repealed by 1971 c.743 s.432]

161.015 General definitions. As used in chapter 743, Oregon Laws 1971, and ORS 166.635, unless the context

requires otherwise:

(1) “Dangerous weapon” means any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury.

(2) “Deadly weapon” means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.

(3) “Deadly physical force” means physical force that under the circumstances in which it is used is readily capable of causing death or serious physical injury.

(4) “Peace officer” means a sheriff, constable, marshal, municipal police officer, member of the Oregon State Police, investigator of the Criminal Justice Division of the Department of Justice or investigator of a district attorney's office and such other persons as may be designated by law.

(5) “Person” means a human being and, where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.

(6) “Physical force” includes, but is not limited to, the use of an electrical stun gun, tear gas or mace.

(7) “Physical injury” means impairment of physical condition or substantial pain.

(8) “Serious physical injury” means physical injury which creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.

(9) “Possess” means to have physical possession or otherwise to exercise dominion or control over property.

(10) “Public place” means a place to which the general public has access and includes, but is not limited to, hallways, lobbies and other parts of apartment houses and hotels not constituting rooms or apartments designed for actual residence, and highways, streets, schools, places of amusement, parks, playgrounds and premises used in connection with public passenger transportation. [1971 c.743 s.3; 1973 c.139 s.1; 1979 c.656 s.3; 1991 c.67 s.33; 1993 c.625 s.4; 1995 c.651 s.5]

Note: Legislative Counsel has substituted “chapter 743, Oregon Laws 1971,” for the words “this Act” in sections 2, 3, 4, 5, 6, 7, 19, 20, 21 and 36, chapter 743, Oregon Laws 1971, compiled as 161.015, 161.025, 161.035, 161.045, 161.055, 161.085, 161.195, 161.200, 161.205 and 161.295. Specific ORS references have not been substituted, pursuant to 173.160. These sections may be determined by referring to the 1971 Comparative Section Table located in Volume 18 of ORS.

161.020 [Amended by 1967 c.372 s.9; repealed by 1971 c.743 s.432]

161.025 Purposes; principles of construction. (1) The general purposes of chapter 743, Oregon Laws 1971, are:

(a) To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the correction and rehabilitation of those convicted, and their confinement when required in the interests of public protection.

(b) To forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests.

(c) To give fair warning of the nature of the conduct declared to constitute an offense and of the sentences authorized upon conviction.

(d) To define the act or omission and the accompanying mental state that constitute each offense and limit the condemnation of conduct as criminal when it is without fault.

(e) To differentiate on reasonable grounds between serious and minor offenses.

(f) To prescribe penalties which are proportionate to the seriousness of offenses and which permit recognition of differences in rehabilitation possibilities among individual offenders.

(g) To safeguard offenders against excessive, disproportionate or arbitrary punishment.

(2) The rule that a penal statute is to be strictly construed shall not apply to chapter 743, Oregon Laws 1971, or any of its provisions. Chapter 743, Oregon Laws 1971, shall be construed according to the fair import of its terms, to promote justice and to effect the purposes stated in subsection (1) of this section. [1971 c.743 s.2]

Note: See note under 161.015.

161.030 [Amended by 1955 c.660 s.20; 1967 c.372 s.10; repealed by 1971 c.743 s.432]

161.035 Application of Criminal Code. (1) Chapter 743, Oregon Laws 1971, shall govern the construction of and punishment for any offense defined in chapter 743, Oregon Laws 1971, and committed after January 1, 1972, as well as the construction and application of any defense to a prosecution for such an offense.

(2) Except as otherwise expressly provided, or unless the context requires otherwise, the provisions of chapter 743, Oregon Laws 1971, shall govern the construction of and punishment for any offense defined outside chapter 743, Oregon Laws 1971, and committed after January 1, 1972, as well as the construction and application of any defense to a prosecution for such an offense.

(3) Chapter 743, Oregon Laws 1971, shall not apply to or govern the construction of and punishment for any offense committed before January 1, 1972, or the construction and application of any defense to a prosecution for such an offense. Such an offense shall be construed and punished according to the law existing at the time of the commission of the offense in the same manner as if chapter 743, Oregon Laws 1971, had not been enacted.

(4) When all or part of a criminal statute is amended or repealed, the criminal statute or part thereof so amended or repealed remains in force for the purpose of authorizing the accusation, prosecution, conviction and punishment of a person who violated the statute or part thereof before the effective date of the amending or repealing Act. [1971 c.743 s.5]

Note: See note under 161.015.

161.040 [Repealed by 1971 c.743 s.432]

161.045 Limits on application. (1) Except as otherwise expressly provided, the procedure governing the accusation, prosecution, conviction and punishment of offenders and offenses is not regulated by chapter 743, Oregon Laws 1971, but by the criminal procedure statutes.

(2) Chapter 743, Oregon Laws 1971, does not affect any power conferred by law upon a court-martial or other military authority or officer to prosecute and punish conduct and offenders violating military codes or laws.

(3) Chapter 743, Oregon Laws 1971, does not bar, suspend or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in the proceeding constitutes an offense defined in chapter 743, Oregon Laws 1971.

(4) No conviction of a person for an offense works a forfeiture of the property of the person, except in cases where a forfeiture is expressly provided by law. [1971 c.743 s.6]

Note: See note under 161.015.

161.050 [Repealed by 1971 c.743 s.432]

161.055 Burden of proof as to defenses. (1) When a “defense,” other than an “affirmative defense” as defined in subsection (2) of this section, is raised at a trial, the state has the burden of disproving the defense beyond a reasonable doubt.

(2) When a defense, declared to be an “affirmative defense” by chapter 743, Oregon Laws 1971, is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence.

(3) The state is not required to negate a defense as defined in subsection (1) of this section unless it is raised by the defendant. “Raised by the defendant” means either notice in writing to the state before commencement of trial or affirmative evidence by a defense witness in the defendant's case in chief. [1971 c.743 s.4]

Note: See note under 161.015.

161.060 [Repealed by 1971 c.743 s.432]

161.062 [1985 c.722 s.4; 1991 c.386 s.8; repealed by 1999 c.136 s.1]

161.067 Determining punishable offenses for violation of multiple statutory provisions, multiple victims or repeated violations. (1) When the same conduct or criminal episode violates two or more statutory provisions and each provision requires proof of an element that the others do not, there are as many separately punishable offenses as

there are separate statutory violations.

(2) When the same conduct or criminal episode, though violating only one statutory provision involves two or more victims, there are as many separately punishable offenses as there are victims. However, two or more persons owning joint interests in real or personal property shall be considered a single victim for purposes of determining the number of separately punishable offenses if the property is the subject of one of the following crimes:

(a) Theft as defined in ORS 164.015.

(b) Unauthorized use of a vehicle as defined in ORS 164.135.

(c) Criminal possession of rented or leased personal property as defined in ORS 164.140.

(d) Burglary as defined in ORS 164.215 or 164.225.

(e) Criminal trespass as defined in ORS 164.243, 164.245, 164.255 or 164.265.

(f) Arson and related offenses as defined in ORS 164.315, 164.325 or 164.335.

(g) Forgery and related offenses as defined in ORS 165.002 to 165.070.

(3) When the same conduct or criminal episode violates only one statutory provision and involves only one victim, but nevertheless involves repeated violations of the same statutory provision against the same victim, there are as many separately punishable offenses as there are violations, except that each violation, to be separately punishable under this subsection, must be separated from other such violations by a sufficient pause in the defendant's criminal conduct to afford the defendant an opportunity to renounce the criminal intent. Each method of engaging in deviate sexual intercourse as defined in ORS 163.305, and each method of engaging in unlawful sexual penetration as defined in ORS 163.408 and 163.411 shall constitute separate violations of their respective statutory provisions for purposes of determining the number of statutory violations. [1987 c.2 s.13; 1991 c.386 s.9]

161.070 [Repealed by 1971 c.743 s.432]

161.075 [1965 c.516 s.1; repealed by 1971 c.743 s.432]

161.080 [Repealed by 1971 c.743 s.432]

CRIMINAL LIABILITY

161.085 Definitions with respect to culpability. As used in chapter 743, Oregon Laws 1971, and ORS 166.635, unless the context requires otherwise:

(1) “Act” means a bodily movement.

(2) “Voluntary act” means a bodily movement performed consciously and includes the conscious possession or control of property.

(3) “Omission” means a failure to perform an act the performance of which is required by law.

(4) “Conduct” means an act or omission and its accompanying mental state.

(5) “To act” means either to perform an act or to omit to perform an act.

(6) “Culpable mental state” means intentionally, knowingly, recklessly or with criminal negligence as these terms are defined in subsections (7), (8), (9) and (10) of this section.

(7) “Intentionally” or “with intent,” when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

(8) “Knowingly” or “with knowledge,” when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists.

(9) “Recklessly,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(10) “Criminal negligence” or “criminally negligent,” when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. [1971 c.743 s.7; 1973 c.139 s.2]

Note: See note under 161.015.

161.090 [Amended by 1967 c.372 s.11; repealed by 1971 c.743 s.432]

161.095 Requirements of culpability. (1) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.

(2) Except as provided in ORS 161.105, a person is not guilty of an offense unless the person acts with a culpable mental state with respect to each material element of the offense that necessarily requires a culpable mental state. [1971 c.743 s.8]

161.100 [Repealed by 1971 c.743 s.432]

161.105 Culpability requirements inapplicable to certain violations and offenses. (1) Notwithstanding ORS 161.095, a culpable mental state is not required if:

(a) The offense constitutes a violation, unless a culpable mental state is expressly included in the definition of the offense; or

(b) An offense defined by a statute outside the Oregon Criminal Code clearly indicates a legislative intent to dispense with any culpable mental state requirement for the offense or for any material element thereof.

(2) Notwithstanding any other existing law, and unless a statute enacted after January 1, 1972, otherwise provides, an offense defined by a statute outside the Oregon Criminal Code that requires no culpable mental state constitutes a violation.

(3) Although an offense defined by a statute outside the Oregon Criminal Code requires no culpable mental state with respect to one or more of its material elements, the culpable commission of the offense may be alleged and proved, in which case criminal negligence constitutes sufficient culpability, and the classification of the offense and the authorized sentence shall be determined by ORS 161.505 to 161.605 and 161.615 to 161.655. [1971 c.743 s.9]

161.110 [Repealed by 1971 c.743 s.432]

161.115 Construction of statutes with respect to culpability. (1) If a statute defining an offense prescribes a culpable mental state but does not specify the element to which it applies, the prescribed culpable mental state applies to each material element of the offense that necessarily requires a culpable mental state.

(2) Except as provided in ORS 161.105, if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly, recklessly or with criminal negligence.

(3) If the definition of an offense prescribes criminal negligence as the culpable mental state, it is also established if a person acts intentionally, knowingly or recklessly. When recklessness suffices to establish a culpable mental state, it is also established if a person acts intentionally or knowingly. When acting knowingly suffices to establish a culpable mental state, it is also established if a person acts intentionally.

(4) Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense, is not an element of an offense unless the statute clearly so provides. [1971 c.743 s.10]

161.120 [Repealed by 1971 c.743 s.432]

161.125 Intoxication as defense; drug or controlled substance use or dependence as defense. (1) The use of drugs or controlled substances, dependence on drugs or controlled substances or voluntary intoxication shall not, as such, constitute a defense to a criminal charge, but in any prosecution for an offense, evidence that the defendant used drugs or controlled substances, or was dependent on drugs or controlled substances, or was intoxicated may be offered by the defendant whenever it is relevant to negative an element of the crime charged.

(2) When recklessness establishes an element of the offense, if the defendant, due to the use of drugs or controlled substances, dependence on drugs or controlled substances or voluntary intoxication, is unaware of a risk of which the defendant would have been aware had the defendant been not intoxicated, not using drugs or controlled substances, or not dependent on drugs or controlled substances, such unawareness is immaterial. [1971 c.743 s.11; 1973 c.697 s.13;

1979 c.744 s.6]

PARTIES TO CRIME

161.150 Criminal liability described. A person is guilty of a crime if it is committed by the person's own conduct or by the conduct of another for which the person is criminally liable, or both. [1971 c.743 s.12]

161.155 Criminal liability for conduct of another. A person is criminally liable for the conduct of another person constituting a crime if:

(1) The person is made criminally liable by the statute defining the crime; or

(2) With the intent to promote or facilitate the commission of the crime the person:

(a) Solicits or commands such other person to commit the crime; or

(b) Aids or abets or agrees or attempts to aid or abet such other person in planning or committing the crime; or

(c) Having a legal duty to prevent the commission of the crime, fails to make an effort the person is legally required to make. [1971 c.743 s.13]

161.160 Exclusion of defenses to criminal liability for conduct of another. In any prosecution for a crime in which criminal liability is based upon the conduct of another person pursuant to ORS 161.155, it is no defense that:

(1) Such other person has not been prosecuted for or convicted of any crime based upon the conduct in question or has been convicted of a different crime or degree of crime; or

(2) The crime, as defined, can be committed only by a particular class or classes of persons to which the defendant does not belong, and the defendant is for that reason legally incapable of committing the crime in an individual capacity. [1971 c.743 s.14]

161.165 Exemptions to criminal liability for conduct of another. Except as otherwise provided by the statute defining the crime, a person is not criminally liable for conduct of another constituting a crime if:

(1) The person is a victim of that crime; or

(2) The crime is so defined that the conduct of the person is necessarily incidental thereto. [1971 c.743 s.15]

161.170 Criminal liability of corporations. (1) A corporation is guilty of an offense if:

(a) The conduct constituting the offense is engaged in by an agent of the corporation while acting within the scope of employment and in behalf of the corporation and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose criminal liability on a corporation; or

(b) The conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) The conduct constituting the offense is engaged in, authorized, solicited, requested, commanded or knowingly tolerated by the board of directors or by a high managerial agent acting within the scope of employment and in behalf of the corporation.

(2) As used in this section:

(a) “Agent” means any director, officer or employee of a corporation, or any other person who is authorized to act in behalf of the corporation.

(b) “High managerial agent” means an officer of a corporation who exercises authority with respect to the formulation of corporate policy or the supervision in a managerial capacity of subordinate employees, or any other agent in a position of comparable authority. [1971 c.743 s.16]

161.175 Criminal liability of an individual for corporate conduct. A person is criminally liable for conduct constituting an offense which the person performs or causes to be performed in the name of or in behalf of a corporation to the same extent as if such conduct were performed in the person's own name or behalf. [1971 c.743 s.17]

JUSTIFICATION

161.190 Justification as a defense. In any prosecution for an offense, justification, as defined in ORS 161.195 to 161.275, is a defense. [1971 c.743 s.18]

161.195 "Justification" described. (1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is required or authorized by law or by a judicial decree or is performed by a public servant in the reasonable exercise of official powers, duties or functions.

(2) As used in subsection (1) of this section, "laws and judicial decrees" include but are not limited to:

(a) Laws defining duties and functions of public servants;

(b) Laws defining duties of private citizens to assist public servants in the performance of certain of their functions;

(c) Laws governing the execution of legal process;

(d) Laws governing the military services and conduct of war; and

(e) Judgments and orders of courts. [1971 c.743 s.19]

Note: See note under 161.015.

161.200 Choice of evils. (1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. [1971 c.743 s.20]

Note: See note under 161.015.

161.205 Use of physical force generally. The use of physical force upon another person that would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

(1) A parent, guardian or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable physical force upon such minor or incompetent person when and to the extent the person reasonably believes it necessary to maintain discipline or to promote the welfare of the minor or incompetent person. A teacher may use reasonable physical force upon a student when and to the extent the teacher reasonably believes it necessary to maintain order in the school or classroom or at a school activity or event, whether or not it is held on school property.

(2) An authorized official of a jail, prison or correctional facility may use physical force when and to the extent that the official reasonably believes it necessary to maintain order and discipline or as is authorized by law.

(3) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under the direction of the person, may use physical force when and to the extent that the person reasonably believes it necessary to maintain order, but the person may use deadly physical force only when the person reasonably believes it necessary to prevent death or serious physical injury.

(4) A person acting under a reasonable belief that another person is about to commit suicide or to inflict serious physical self-injury may use physical force upon that person to the extent that the person reasonably believes it necessary to thwart the result.

(5) A person may use physical force upon another person in self-defense or in defending a third person, in defending property, in making an arrest or in preventing an escape, as hereafter prescribed in chapter 743, Oregon Laws 1971. [1971 c.743 s.21; 1981 c.246 s.1]

Note: See note under 161.015.

161.209 Use of physical force in defense of a person. Except as provided in ORS 161.215 and 161.219, a person is justified in using physical force upon another person for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of unlawful physical force, and the person may use a degree of force which the person reasonably believes to be necessary for the purpose. [1971 c.743 s.22]

161.210 [Repealed by 1971 c.743 s.432]

161.215 Limitations on use of physical force in defense of a person. Notwithstanding ORS 161.209, a person is not justified in using physical force upon another person if:

(1) With intent to cause physical injury or death to another person, the person provokes the use of unlawful physical force by that person; or

(2) The person is the initial aggressor, except that the use of physical force upon another person under such circumstances is justifiable if the person withdraws from the encounter and effectively communicates to the other person the intent to do so, but the latter nevertheless continues or threatens to continue the use of unlawful physical force; or

(3) The physical force involved is the product of a combat by agreement not specifically authorized by law. [1971 c.743 s.24]

161.219 Limitations on use of deadly physical force in defense of a person. Notwithstanding the provisions of ORS 161.209, a person is not justified in using deadly physical force upon another person unless the person reasonably believes that the other person is:

(1) Committing or attempting to commit a felony involving the use or threatened imminent use of physical force against a person; or

(2) Committing or attempting to commit a burglary in a dwelling; or

(3) Using or about to use unlawful deadly physical force against a person. [1971 c.743 s.23]

161.220 [Repealed by 1971 c.743 s.432]

161.225 Use of physical force in defense of premises. (1) A person in lawful possession or control of premises is justified in using physical force upon another person when and to the extent that the person reasonably believes it necessary to prevent or terminate what the person reasonably believes to be the commission or attempted commission of a criminal trespass by the other person in or upon the premises.

(2) A person may use deadly physical force under the circumstances set forth in subsection (1) of this section only:

(a) In defense of a person as provided in ORS 161.219; or

(b) When the person reasonably believes it necessary to prevent the commission of arson or a felony by force and violence by the trespasser.

(3) As used in subsection (1) and subsection (2)(a) of this section, “premises” includes any building as defined in ORS 164.205 and any real property. As used in subsection (2)(b) of this section, “premises” includes any building. [1971 c.743 s.25]

161.229 Use of physical force in defense of property. A person is justified in using physical force, other than deadly physical force, upon another person when and to the extent that the person reasonably believes it to be necessary to prevent or terminate the commission or attempted commission by the other person of theft or criminal mischief of property. [1971 c.743 s.26]

161.230 [Repealed by 1971 c.743 s.432]

161.235 Use of physical force in making an arrest or in preventing an escape. Except as provided in ORS 161.239, a peace officer is justified in using physical force upon another person only when and to the extent that the peace officer reasonably believes it necessary:

(1) To make an arrest or to prevent the escape from custody of an arrested person unless the peace officer knows that the arrest is unlawful; or

(2) For self-defense or to defend a third person from what the peace officer reasonably believes to be the use or imminent use of physical force while making or attempting to make an arrest or while preventing or attempting to prevent an escape. [1971 c.743 s.27]

161.239 Use of deadly physical force in making an arrest or in preventing an escape. (1) Notwithstanding the provisions of ORS 161.235, a peace officer may use deadly physical force only when the peace officer reasonably

believes that:

(a) The crime committed by the person was a felony or an attempt to commit a felony involving the use or threatened imminent use of physical force against a person; or

(b) The crime committed by the person was kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or

(c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from the use or threatened imminent use of deadly physical force; or

(d) The crime committed by the person was a felony or an attempt to commit a felony and under the totality of the circumstances existing at the time and place, the use of such force is necessary; or

(e) The officer's life or personal safety is endangered in the particular circumstances involved.

(2) Nothing in subsection (1) of this section constitutes justification for reckless or criminally negligent conduct by a peace officer amounting to an offense against or with respect to innocent persons whom the peace officer is not seeking to arrest or retain in custody. [1971 c.743 s.28]

161.240 [Repealed by 1971 c.743 s.432]

161.245 “Reasonable belief” described; status of unlawful arrest. (1) For the purposes of ORS 161.235 and 161.239, a reasonable belief that a person has committed an offense means a reasonable belief in facts or circumstances which if true would in law constitute an offense. If the believed facts or circumstances would not in law constitute an offense, an erroneous though not unreasonable belief that the law is otherwise does not render justifiable the use of force to make an arrest or to prevent an escape from custody.

(2) A peace officer who is making an arrest is justified in using the physical force prescribed in ORS 161.235 and 161.239 unless the arrest is unlawful and is known by the officer to be unlawful. [1971 c.743 s.29]

161.249 Use of physical force by private person assisting an arrest. (1) Except as provided in subsection (2) of this section, a person who has been directed by a peace officer to assist the peace officer to make an arrest or to prevent an escape from custody is justified in using physical force when and to the extent that the person reasonably believes that force to be necessary to carry out the peace officer's direction.

(2) A person who has been directed to assist a peace officer under circumstances specified in subsection (1) of this section may use deadly physical force to make an arrest or to prevent an escape only when:

(a) The person reasonably believes that force to be necessary for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of deadly physical force; or

(b) The person is directed or authorized by the peace officer to use deadly physical force unless the person knows that the peace officer is not authorized to use deadly physical force under the circumstances. [1971 c.743 s.30]

161.250 [Repealed by 1971 c.743 s.432]

161.255 Use of physical force by private person making citizen's arrest. (1) Except as provided in subsection (2) of this section, a private person acting on the person's own account is justified in using physical force upon another person when and to the extent that the person reasonably believes it necessary to make an arrest or to prevent the escape from custody of an arrested person whom the person has arrested under ORS 133.225.

(2) A private person acting under the circumstances prescribed in subsection (1) of this section is justified in using deadly physical force only when the person reasonably believes it necessary for self-defense or to defend a third person from what the person reasonably believes to be the use or imminent use of deadly physical force. [1971 c.743 s.31; 1973 c.836 s.339]

161.260 Use of physical force in resisting arrest prohibited. A person may not use physical force to resist an arrest by a peace officer who is known or reasonably appears to be a peace officer, whether the arrest is lawful or unlawful. [1971 c.743 s.32]

161.265 Use of physical force to prevent escape. A guard or other peace officer employed in a correctional facility, as that term is defined in ORS 162.135, is justified in using physical force including deadly physical force, when and to the extent that the guard or peace officer reasonably believes it necessary to prevent the escape of a

prisoner from a correctional facility. [1971 c.743 s.33]

161.270 Duress. (1) The commission of acts which would otherwise constitute an offense, other than murder, is not criminal if the actor engaged in the proscribed conduct because the actor was coerced to do so by the use or threatened use of unlawful physical force upon the actor or a third person, which force or threatened force was of such nature or degree to overcome earnest resistance.

(2) Duress is not a defense for one who intentionally or recklessly places oneself in a situation in which it is probable that one will be subjected to duress.

(3) It is not a defense that a spouse acted on the command of the other spouse, unless the spouse acted under such coercion as would establish a defense under subsection (1) of this section. [1971 c.743 s.34; 1987 c.158 s.22]

161.275 Entrapment. (1) The commission of acts which would otherwise constitute an offense is not criminal if the actor engaged in the proscribed conduct because the actor was induced to do so by a law enforcement official, or by a person acting in cooperation with a law enforcement official, for the purpose of obtaining evidence to be used against the actor in a criminal prosecution.

(2) As used in this section, “induced” means that the actor did not contemplate and would not otherwise have engaged in the proscribed conduct. Merely affording the actor an opportunity to commit an offense does not constitute entrapment. [1971 c.743 s.35]

RESPONSIBILITY

161.290 Incapacity due to immaturity. (1) A person who is tried as an adult in a court of criminal jurisdiction is not criminally responsible for any conduct which occurred when the person was under 12 years of age.

(2) Incapacity due to immaturity, as defined in subsection (1) of this section, is a defense. [Formerly 161.380; 1995 c.422 s.58]

161.295 Effect of mental disease or defect; guilty except for insanity. (1) A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.

(2) As used in chapter 743, Oregon Laws 1971, the terms “mental disease or defect” do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor do they include any abnormality constituting solely a personality disorder. [1971 c.743 s.36; 1983 c.800 s.1]

Note: See note under 161.015.

161.300 Evidence of disease or defect admissible as to intent. Evidence that the actor suffered from a mental disease or defect is admissible whenever it is relevant to the issue of whether the actor did or did not have the intent which is an element of the crime. [1971 c.743 s.37]

161.305 Disease or defect as affirmative defense. Mental disease or defect constituting insanity under ORS 161.295 is an affirmative defense. [1971 c.743 s.38; 1983 c.800 s.2]

161.309 Notice prerequisite to defense; content. (1) No evidence may be introduced by the defendant on the issue of insanity under ORS 161.295, unless the defendant gives notice of intent to do so in the manner provided in subsection (3) of this section.

(2) The defendant may not introduce in the case in chief expert testimony regarding partial responsibility under ORS 161.300 unless the defendant gives notice of intent to do so in the manner provided in subsection (3) of this section.

(3) A defendant who is required under subsection (1) or (2) of this section to give notice shall file a written notice of purpose at the time the defendant pleads not guilty. The defendant may file such notice at any time after the plea but before trial when just cause for failure to file the notice at the time of making the plea is made to appear to the satisfaction of the court. If the defendant fails to file notice, the defendant shall not be entitled to introduce evidence for the establishment of a defense under ORS 161.295 or 161.300 unless the court, in its discretion, permits such evidence to be introduced where just cause for failure to file the notice is made to appear. [1971 c.743 ss.39,40,41;

1983 c.800 s.3]

161.310 [Repealed by 1971 c.743 s.432]

161.313 Jury instructions; insanity. When the issue of insanity under ORS 161.295 is submitted to be determined by a jury in the trial court, the court shall instruct the jury in accordance with ORS 161.327. [1983 c.800 s.16]

161.315 Right of state to obtain mental examination of defendant; limitations. Upon filing of notice or the introduction of evidence by the defendant as provided in ORS 161.309 (3), the state shall have the right to have at least one psychiatrist or licensed psychologist of its selection examine the defendant. The state shall file notice with the court of its intention to have the defendant examined. Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state institution or any other suitable facility for observation and examination as it may designate for a period not to exceed 30 days. If the defendant objects to the examiner chosen by the state, the court for good cause shown may direct the state to select a different examiner. [1971 c.743 s.42; 1977 c.380 s.3]

161.319 Form of verdict on guilty except for insanity. When the defendant is found guilty except for insanity under ORS 161.295, the verdict and judgment shall so state. [1971 c.743 s.43; 1977 c.380 s.4; 1983 c.800 s.4]

161.320 [Repealed by 1971 c.743 s.432]

161.325 Entry of judgment of guilty except for insanity; order to include whether victim wants notice of hearings or release of defendant; blood or buccal testing upon judgment. (1) After entry of judgment of guilty except for insanity, the court shall, on the basis of the evidence given at the trial or at a separate hearing, if requested by either party, make an order as provided in ORS 161.327 or 161.329, whichever is appropriate.

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

(a) Determine on the record the offense of which the person otherwise would have been convicted; and

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

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

(4) Except under circumstances described in ORS 137.076 (4), whenever a defendant charged with any offense listed in ORS 137.076 (1) has been found guilty of that offense except for insanity, the court shall, in any order entered under ORS 161.327 or 161.329, direct the defendant to submit to the obtaining of a blood or buccal sample in the manner provided in ORS 137.076. [1971 c.743 s.44; 1977 c.380 s.5; 1979 c.885 s.1; 1981 c.711 s.1; 1983 c.800 s.5; 1991 c.669 s.8; 1999 c.97 s.2]

161.326 Commission of crime by person under board jurisdiction; notice to victim. (1) Whenever a person already under the board's jurisdiction commits a new crime, the court or the board shall make the findings described in ORS 161.325 (2).

(2) If the trial court or the board determines that a victim desires notification as described in ORS 161.325 (2), the board shall make a reasonable effort to notify the victim of board hearings, conditional release, discharge or escape. [1981 c.711 s.9]

Note: 161.326 and 161.387 were added to and made a part of ORS chapter 161 by legislative action but were not added to any smaller series therein. See Preface to Oregon Revised Statutes for further explanation.

161.327 Order giving jurisdiction to Psychiatric Security Review Board; court to commit or conditionally release defendant; notice to board; appeal. (1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a felony, or of a misdemeanor during a criminal episode in the course of which the person caused physical injury or risk of physical injury to another, and if the court finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others requiring commitment to a state mental hospital designated by the Mental Health and Developmental Disability Services Division or conditional release, the court shall

order the person placed under the jurisdiction of the Psychiatric Security Review Board for care and treatment. The period of jurisdiction of the board shall be equal to the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity.

(2) The court shall determine whether the person should be committed to a state hospital designated by the Mental Health and Developmental Disability Services Division or conditionally released pending any hearing before the board as follows:

(a) If the court finds that the person presents a substantial danger to others and is not a proper subject for conditional release, the court shall order the person committed to a state hospital designated by the Mental Health and Developmental Disability Services Division for custody, care and treatment pending hearing before the board in accordance with ORS 161.341 to 161.351.

(b) If the court finds that the person presents a substantial danger to others but that the person can be adequately controlled with supervision and treatment if conditionally released and that necessary supervision and treatment are available, the court may order the person conditionally released, subject to those supervisory orders of the court as are in the best interests of justice, the protection of society and the welfare of the person. The court shall designate a person or state, county or local agency to supervise the person upon release, subject to those conditions as the court directs in the order for conditional release. Prior to the designation, the court shall notify the person or agency to whom conditional release is contemplated and provide the person or agency an opportunity to be heard before the court. After receiving an order entered under this paragraph, the person or agency designated shall assume supervision of the person pursuant to the direction of the Psychiatric Security Review Board. The person or agency designated as supervisor shall be required to report in writing no less than once per month to the board concerning the supervised person's compliance with the conditions of release.

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

(4) In determining whether a person should be conditionally released, the court may order evaluations, examinations and compliance as provided in ORS 161.336 (4) and 161.346 (2).

(5) In determining whether a person should be committed to a state hospital or conditionally released, the court shall have as its primary concern the protection of society.

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

(7) An order of the court under this section is a final order appealable by the person found guilty except for insanity in accordance with ORS 19.205 (4). Notwithstanding ORS 19.255, notice of an appeal under this section shall be served and filed within 90 days after the order appealed from is entered in the register. The person shall be entitled on appeal to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed in the manner provided in ORS 138.500 (1), and the compensation for counsel and costs and expenses of the person necessary to the appeal shall be determined, allowed and paid as provided in ORS 138.500.

(8) Upon placing a person under the jurisdiction of the board, the court shall notify the person of the right to appeal and the right to a hearing before the board in accordance with ORS 161.336 (7) and 161.341 (4). [1979 c.867 s.5; 1979 c.885 s.2; 1981 c.711 s.2; 1981 s.s. c.3 s.129; 1983 c.800 s.6; 1989 c.790 s.48; 1995 c.208 s.1]

Note: 161.327 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 161 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

161.328 Initiation of civil commitment proceedings. Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person would have been guilty of a misdemeanor during a criminal episode in the course of which the person did not cause physical injury or risk of physical injury to another, and if the court has probable cause to believe that the person is dangerous to self or others as a result of a mental disorder, the court may initiate civil commitment proceedings under ORS 426.070 to 426.130. [1981 c.711 s.3; 1983 c.800 s.7; 1987 c.903 s.36; 1995 c.529 s.1]

161.329 Order of discharge. Following the entry of a judgment pursuant to ORS 161.319 and the dispositional determination under ORS 161.325, if the court finds that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others and is not in need of care, supervision or treatment, the court shall order the person discharged from custody. [1971 c.743 s.45; 1977 c.380 s.6; 1981 c.711 s.4]

161.330 [Repealed by 1971 c.743 s.432]

161.332 "Conditional release" defined. As used in ORS 161.315 to 161.351 and 161.385 to 161.395, "conditional release" includes, but is not limited to, the monitoring of mental and physical health treatment. [1977 c.380 s.1; 1983 c.800 s.8]

161.335 [1971 c.743 s.46; 1973 c.137 s.1; 1975 c.380 s.1; repealed by 1977 c.380 s.10 (161.336 enacted in lieu of 161.335)]

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

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

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

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

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

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

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

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

(5) If at any time while the person is under the jurisdiction of the board it appears to the board or its chairperson that the person has violated the terms of the conditional release or that the mental health of the individual has changed, the board or its chairperson may order the person returned to a state hospital designated by the Mental Health and Developmental Disability Services Division for evaluation or treatment. A written order of the board, or its chairperson on behalf of the board, is sufficient warrant for any law enforcement officer to take into custody such person and transport the person accordingly. A sheriff, municipal police officer, constable, parole or probation officer, prison official or other peace officer shall execute the order, and the person shall be returned as soon as practicable to the custody of the Mental Health and Developmental Disability Services Division. Within 20 days following the return of the person to the custody of the Mental Health and Developmental Disability Services Division, the board shall conduct a hearing. Notice of the time and place of the hearing shall be given to the person, the attorney representing the person and the Attorney General. The board may continue the person on conditional release or, if it finds by a preponderance of the evidence that the person is affected by mental disease or defect and presents a substantial danger to others and cannot be adequately controlled if conditional release is continued, it may order the person committed to

a state hospital designated by the Mental Health and Developmental Disability Services Division. The state must prove by a preponderance of the evidence the person's unfitness for conditional release. A person in custody pursuant to this subsection shall have the same rights as any person appearing before the board pursuant to ORS 161.346.

(6) The community mental health and developmental disabilities program director, the director of the facility providing treatment to a person on conditional release, any peace officer or any person responsible for the supervision of a person on conditional release may take a person on conditional release into custody or request that the person be taken into custody if there is reasonable cause to believe the person is a substantial danger to others because of mental disease or defect and that the person is in need of immediate care, custody or treatment. Any person taken into custody pursuant to this subsection shall immediately be transported to a state hospital designated by the Mental Health and Developmental Disability Services Division. A person taken into custody under this subsection shall have the same rights as any person appearing before the board pursuant to ORS 161.346.

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

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

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

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

(10) In determining whether a person should be committed to a state hospital, conditionally released or discharged, the board shall have as its primary concern the protection of society. [1977 c.380 s.11 (enacted in lieu of 161.335); 1979 c.885 s.3; 1981 c.711 s.5; 1983 c.800 s.9; 1987 c.140 s.1; 1989 c.790 s.49]

161.340 [1971 c.743 s.47; 1975 c.380 s.2; repealed by 1977 c.380 s.12 (161.341 enacted in lieu of 161.340)]

161.341 Order of commitment; application for discharge or conditional release; release plan. (1) If the board finds, upon its initial hearing, that the person presents a substantial danger to others and is not a proper subject for conditional release, the board shall order the person committed to, or retained in, a state hospital designated by the Mental Health and Developmental Disability Services Division for custody, care and treatment. The period of commitment ordered by the board shall not exceed the maximum sentence provided by statute for the crime for which the person was found guilty except for insanity.

(2) If at any time after the commitment of a person to a state hospital designated by the Mental Health and Developmental Disability Services Division under this section, the superintendent of the hospital is of the opinion that the person is no longer affected by mental disease or defect, or, if so affected, no longer presents a substantial danger to others or that the person continues to be affected by mental disease or defect and continues to be a danger to others, but that the person can be controlled with proper care, medication, supervision and treatment if conditionally released, the superintendent shall apply to the board for an order of discharge or conditional release. The application shall be accompanied by a report setting forth the facts supporting the opinion of the superintendent. If the application is for conditional release, the application must also be accompanied by a verified conditional release plan. The board shall hold a hearing on the application within 60 days of its receipt. Not less than 20 days prior to the hearing before the board, copies of the report shall be sent to the Attorney General.

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

adequately controlled with treatment as a condition of release.

(4) Any person who has been committed to a state hospital designated by the Mental Health and Developmental Disability Services Division for custody, care and treatment or another person acting on the person's behalf may apply to the board for an order of discharge or conditional release upon the grounds:

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

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

(c) That the person continues to be affected by a mental disease or defect and would continue to be a danger to others without treatment, but that the person can be adequately controlled and given proper care and treatment if placed on conditional release.

(5) When application is made under subsection (4) of this section, the board shall require a report from the superintendent of the hospital which shall be prepared and transmitted as provided in subsection (2) of this section. The applicant must prove by a preponderance of the evidence the applicant's fitness for discharge or conditional release under the standards of subsection (4) of this section, unless more than two years has passed since the state had the burden of proof on that issue, in which case the state shall have the burden of proving by a preponderance of the evidence the applicant's lack of fitness for discharge or conditional release. Applications for discharge or conditional release under subsection (4) of this section shall not be filed more often than once every six months commencing with the date of the initial board hearing.

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

(7)(a) In no case shall any person committed by the court under ORS 161.327 to a state hospital designated by the Mental Health and Developmental Disability Services Division be held in the hospital for more than 90 days from the date of the court's commitment order without an initial hearing before the board to determine whether the person should be conditionally released or discharged.

(b) In no case shall a person be held pursuant to this section for a period of time exceeding two years without a hearing before the board to determine whether the person should be conditionally released or discharged. [1977 c.380 s.13 (enacted in lieu of 161.340); 1979 c.885 s.4; 1981 c.711 s.6; 1983 c.800 s.10; 1985 c.192 s.3; 1989 c.790 s.50; 1991 c.244 s.1]

161.345 [1971 c.743 s.48; repealed by 1977 c.380 s.14 (161.346 enacted in lieu of 161.345)]

161.346 Hearings on discharge, conditional release, commitment or modification; psychiatric reports; notice of hearing. (1) The board shall conduct hearings upon any application for discharge, conditional release, commitment or modification filed pursuant to ORS 161.336, 161.341 or 161.351 and as otherwise required by ORS 161.336 to 161.351 and shall make findings on the issues before it which may include:

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

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

(c) If the board finds that the person has not recovered from the mental disease or defect and is a substantial danger to others and cannot adequately be controlled if conditionally released on supervision, the board shall order the person committed to, or retained in, a state hospital designated by the Mental Health and Developmental Disability Services Division for care, custody and treatment.

(2) At any time, the board may appoint a psychiatrist or licensed psychologist to examine the person and to submit a report to the board. Reports filed with the board pursuant to the examination shall include, but need not be limited to, an opinion as to the mental condition of the person and whether the person presents a substantial danger to others, and whether the person could be adequately controlled with treatment as a condition of release. To facilitate the examination of the person, the board may order the person placed in the temporary custody of any state hospital or other suitable facility.

(3) The board may make the determination regarding discharge or conditional release based upon the written reports submitted pursuant to this section. If any member of the board desires further information from the examining psychiatrist or licensed psychologist who submitted the report, these persons shall be summoned by the board to give

testimony. The board shall consider all evidence available to it which is material, relevant and reliable regarding the issues before the board. Such evidence may include but is not limited to the record of trial, the information supplied by the attorney representing the state or by any other interested party, including the person, and information concerning the person's mental condition and the entire psychiatric and criminal history of the person. All evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible at hearings. Testimony shall be taken upon oath or affirmation of the witness from whom received. The officer presiding at the hearing shall administer oaths or affirmations to witnesses.

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

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

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

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

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

(5) Prior to the commencement of a hearing, the board or presiding officer shall inform each party as provided in ORS 183.413 (2).

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

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

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

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

(d) To be represented by suitable legal counsel possessing skills and experience commensurate with the nature and complexity of the case, to consult with counsel prior to the hearing and, if indigent, to have suitable counsel provided without cost.

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

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

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

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

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

(11) If the board determines that the person about whom the hearing is being held is indigent, the board shall appoint suitable counsel to represent the person. Counsel so appointed shall be an attorney who satisfies the standards of eligibility established by the State Court Administrator under ORS 151.430. The State Court Administrator shall determine and allow fair compensation for counsel appointed under this subsection and the reasonable expenses of the person in respect to the hearing. Compensation payable to appointed counsel shall not be less than $30 an hour. The compensation and expenses so allowed shall be paid by the administrator from funds available for the purpose. If appointed counsel is under contract to provide services for the proceeding under ORS 151.460, compensation shall be as provided by the contract.

(12) The Attorney General may represent the state at contested hearings before the board unless the district attorney of the county from which the person was committed elects to represent the state. The district attorney of the county from which the person was committed shall cooperate with the Attorney General in securing the material necessary for presenting a contested hearing before the board. If the district attorney elects to represent the state, the district attorney shall give timely written notice of such election to the Attorney General, the board and the attorney representing the person. [1977 c.380 s.15 (enacted in lieu of 161.345); 1979 c.867 s.6; 1979 c.885 s.5; 1981 c.711 s.7; 1981 s.s c.3 s.130; 1983 c.430 s.1; 1985 c.502 s.23; 1987 c.803 s.19; 1991 c.827 s.3]

161.350 [1971 c.743 s.49; 1975 c.380 s.3; repealed by 1977 c.380 s.16 (161.351 enacted in lieu of 161.350)]

161.351 Discharge of person under jurisdiction of board; periodic review of status. (1) Any person placed under the jurisdiction of the Psychiatric Security Review Board pursuant to ORS 161.336 or 161.341 shall be

discharged at such time as the board, upon a hearing, shall find by a preponderance of the evidence that the person is no longer affected by mental disease or defect or, if so affected, no longer presents a substantial danger to others which requires regular medical care, medication, supervision or treatment.

(2) For purposes of this section, a person affected by a mental disease or defect in a state of remission is considered to have a mental disease or defect. A person whose mental disease or defect may, with reasonable medical probability, occasionally become active and when it becomes active will render the person a danger to others, shall not be discharged. The person shall continue under such supervision and treatment as the board deems necessary to protect the person and others.

(3) Any person who has been placed under the jurisdiction of the board and who has spent five years on conditional release shall be brought before the board for hearing within 30 days of the expiration of the five-year period. The board shall review the person's status and determine whether the person should be discharged from the jurisdiction of the board. [1977 c.380 s.17 (enacted in lieu of 161.350); 1981 c.711 s.13; 1985 c.192 s.4; 1989 c.49 s.1]

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 s.50; 1993 c.238 s.1]

161.365 Procedure for determining issue of fitness to proceed. (1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as defined in ORS 161.360, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist or psychologist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist or psychologist would be helpful, the court may order the defendant to be committed to a state mental hospital designated by the Mental Health and Developmental Disability Services Division for the purpose of an examination for a period not exceeding 30 days. The report of each examination shall 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; and

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

(3) Except where the defendant and the court both request to the contrary, the report shall 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 therein, the report shall so state and shall include, if possible, an opinion as to whether such unwillingness of the defendant was the result of mental disease or defect affecting capacity to proceed.

(5) The report of the examination 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) When upon motion of the court or indigent defendant, the court has ordered a psychiatric or psychological examination of the indigent defendant, a justice court shall order the county to pay, and a circuit court shall order the State Court Administrator 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 Mental Health and Developmental Disability Services Division or a community mental health and developmental disabilities program established under ORS 430.610 to 430.670.

(7) When such an examination is ordered at the request or with the acquiescence of a defendant who is determined not to be indigent, the examination shall be performed at the defendant's expense. When such an examination is ordered at the request of the prosecution, the county shall pay for the expense of the examination. [1971 c.743 s.51; 1975 c.380 s.4; 1981 s.s. c.3 s.131; 1983 c.800 s.11; 1987 c.803 s.18; 1993 c.238 s.2]

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 by a psychiatrist or psychologist under ORS 161.365, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have 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 proceeding against the defendant shall be suspended, except as provided in subsection (13) of this section, and the court shall commit the defendant to the custody of the superintendent of a state mental hospital or other treatment facility designated by the Mental Health and Developmental Disability Services Division or shall release the defendant on supervision for so long as such unfitness shall endure. The court may release the defendant on supervision if it determines that care other than commitment for incapacity to stand trial would better serve the defendant and the community. It may place conditions which it deems appropriate on the release, including the requirement that the defendant regularly report to the Mental Health and Developmental Disability Services Division or a community mental health and developmental disabilities program for examination to determine if the defendant has regained capacity to stand trial. When the court, on its own motion or upon the application of the superintendent of the hospital or other treatment 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 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.

(3) When a court determines that a defendant lacks fitness to proceed and commits the defendant to the custody of the superintendent of a state mental hospital or other treatment facility under subsection (2) of this section, the defendant shall be transported to the hospital or treatment facility as soon as practicable. Transport shall be completed within seven days after the court's determination unless doing so would jeopardize the health or safety of the defendant or others. While awaiting transport, the defendant shall receive the custody, care and treatment necessary to ensure the defendant's health and safety.

(4) The superintendent shall cause the defendant to be evaluated within 60 days from the defendant's delivery into the superintendent'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.

(5) In addition, the superintendent 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 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 such a probability exists, the superintendent shall give the court an estimate of the time in which the defendant, with appropriate treatment, is expected to gain or regain capacity.

(6) If the superintendent 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 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 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 custody.

(7) 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.

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

(9) When the committing court receives a notice from the superintendent under either 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 under subsection (9) of this section 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 other treatment facility designated by the Mental Health and Developmental Disability Services Division.

(13) 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.

(14) As used in this section, “superintendent” means the superintendent of a state mental hospital or other treatment facility designated by the Mental Health and Developmental Disability Services Division to which the defendant has been committed. [1971 c.743 s.52; 1975 c.380 s.5; 1993 c.238 s.3; 1999 c.931 s.1]

Note: The amendments to 161.370 by section 2, chapter 931, Oregon Laws 1999, become operative January 1, 2002. See section 3, chapter 931, Oregon Laws 1999. The text that is operative on and after January 1, 2002, is set forth for the user's convenience.

161.370. (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 by a psychiatrist or psychologist under ORS 161.365, the court may make the determination on the basis of such report. If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence upon such hearing, the party who contests the finding thereof shall have 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 proceeding against the defendant shall be suspended, except as provided in subsection (12) of this section, and the court shall commit the defendant to the custody of the superintendent of a state mental hospital designated by the Mental Health and Developmental Disability Services Division or shall release the defendant on supervision for so long as such unfitness shall endure. The court may release the defendant on supervision if it determines that care other than commitment for incapacity to stand trial would better serve the defendant and the community. It may place conditions which it deems appropriate on the release, including the requirement that the defendant regularly report to the Mental Health and Developmental Disability Services Division or a community mental health and developmental disabilities program for examination to determine if the defendant has regained capacity to stand trial. When the court, on its own motion or upon the application of the superintendent of the hospital 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 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.

(3) The superintendent shall cause the defendant to be evaluated within 60 days from the defendant's delivery into the superintendent'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.

(4) In addition, the superintendent 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 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 such a probability exists, the superintendent shall give the court an estimate of the time in which the defendant, with appropriate treatment, is expected to gain or regain capacity.

(5) If the superintendent 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 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 (4)(b) of this section, the superintendent 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 custody.

(6) A defendant who remains committed under subsection (5) 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.

(7) The superintendent shall notify the committing court of the defendant's impending discharge 30 days before the date on which the superintendent is required to discharge the defendant under subsection (6) of this section.

(8) When the committing court receives a notice from the superintendent under either subsection (4) or (7) 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.

(9) If under subsection (8) of this section 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 (6) 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 (6) 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.

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

(11) 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 designated by the Mental Health and Developmental Disability Services Division.

(12) 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.

(13) As used in this section, “superintendent” means the superintendent of the state mental hospital of the Mental Health and Developmental Disability Services Division to which the defendant has been committed.

161.375 Escape of person placed at Oregon State Hospital; authority of superintendent to order arrest. (1) When a patient, who has been placed at the Oregon State Hospital for evaluation, care, custody and treatment under the jurisdiction of the Psychiatric Security Review Board or by court order under ORS 161.315, 161.365 or 161.370, has escaped or is absent without authorization from the Oregon State 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) The superintendent may issue an order under this section based upon a reasonable belief that grounds exist for issuing the order. When reasonable, the superintendent shall investigate to ascertain whether such grounds exist.

(3) Any order issued by the superintendent 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 under this section expires 72 hours after being signed by the superintendent.

(4) As used in this section, “superintendent” means the superintendent of the Oregon State Hospital or the superintendent's authorized representative. [1997 c.423 s.1]

Note: 161.375 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 161 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

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

161.385 Psychiatric Security Review Board; composition, term, qualifications, compensation, appointment, confirmation and meetings; judicial review of orders. (1) There is hereby created a Psychiatric Security Review Board consisting of five 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 shall not include any district attorney, deputy district attorney or public defender, but, the membership shall be composed of:

(a) A psychiatrist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Mental Health and Developmental Disability Services Division or a community mental health and developmental disabilities program;

(b) A licensed psychologist experienced in the criminal justice system and not otherwise employed on a full-time basis by the Mental Health and Developmental Disability Services Division or a community mental health and developmental disabilities program;

(c) A member with substantial experience in the processes of parole and probation;

(d) A member of the general public; and

(e) A lawyer with substantial experience in criminal trial practice.

(3) The term of office of each member is four years. The Governor at any time may remove any member for inefficiency, neglect of duty or malfeasance in office. Before the expiration of the term of a member, the Governor shall appoint a successor whose term begins on July 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make an appointment to become immediately effective for the unexpired term.

(4) A member of the board not otherwise employed full time by the state, shall be paid on a per diem basis an amount equal to $212, adjusted according to the executive pay plan for the biennium, for each day during which the member is engaged in the performance of official duties, including necessary travel time. In addition, subject to ORS 292.220 to 292.250 regulating travel and other expenses of state officers and employees, the member shall be reimbursed for actual and necessary travel and other expenses incurred in the performance of official duties.

(5) Subject to any applicable provision of the State Personnel Relations Law, the board may hire employees to aid it in performing its duties.

(6)(a) The board shall select one of its members as chairperson to serve for a one-year term with such duties and powers as the board determines.

(b) A majority of the voting members of the board constitutes a quorum for the transaction of business.

(7) The board shall meet at least twice every month, unless the chairperson determines that there is not sufficient business before the board to warrant a meeting at the scheduled time. The board shall also meet at other times and

places specified by the call of the chairperson or of a majority of the members of the board.

(8)(a) When a person over whom the board exercises its jurisdiction is adversely affected or aggrieved by a final order of the board, the person is entitled to judicial review of the final order. The person shall be entitled on judicial review to suitable counsel possessing skills and experience commensurate with the nature and complexity of the case. If the person is indigent, suitable counsel shall be appointed by the reviewing court in the manner provided in ORS 138.500 (1). If the person is indigent, the reviewing court shall determine and allow, as provided in ORS 138.500, the cost of briefs, any other expenses of the person necessary to the review and compensation for counsel appointed for the person. The costs, expenses and compensation so allowed shall be paid as provided in ORS 138.500.

(b) The order and the proceedings underlying the order are subject to review by the Court of Appeals upon petition to that court filed within 60 days of the order for which review is sought. The board shall submit to the court the record of the proceeding or, if the person agrees, a shortened record. The record may include a certified true copy of a tape recording of the proceedings at a hearing in accordance with ORS 161.346. A copy of the record transmitted shall be delivered to the person by the board.

(c) The court may affirm, reverse or remand the order on the same basis as provided in ORS 183.482 (8).

(d) The filing of the petition shall not stay the board's order, but the board or the Court of Appeals may order a stay upon application on such terms as are deemed proper. [1977 c.380 s.8; 1979 c.867 s.7; 1979 c.885 s.6; 1981 c.711 s.15; 1981 s.s. c.3 s.132; 1983 c.740 s.26; 1983 c.800 s.12; 1987 c.133 s.1]

161.387 Board to implement policies; rulemaking; meetings not deliberative under public meeting requirements. (1) The Psychiatric Security Review Board, by rule pursuant to ORS 183.325 to 183.410 and not inconsistent with law, may implement its policies and set out its procedure and practice requirements and may promulgate such interpretive rules as the board deems necessary or appropriate to carry out its statutory responsibilities.

(2) Administrative meetings of the board and the evidentiary phase of board hearings are not deliberations for the purposes of ORS 192.690. [1981 c.711 ss.10,11]

Note: See note under 161.326.

161.390 Rules for assignment of persons to state mental hospitals; release plan prepared by division. (1) The Mental Health and Developmental Disability Services Division shall promulgate rules for the assignment of persons to state mental hospitals under ORS 161.341, 161.365 and 161.370 and for establishing standards for evaluation and treatment of persons committed to a state hospital designated by the division or ordered to a community mental health and developmental disabilities program under ORS 161.315 to 161.351, 192.690 and 428.210.

(2) Whenever the Psychiatric Security Review Board requires the preparation of a predischarge or preconditional release plan before a hearing or as a condition of granting discharge or conditional release for a person committed under ORS 161.327 or 161.341 to a state hospital for custody, care and treatment, the Mental Health and Developmental Disability Services Division is responsible for and shall prepare the plan.

(3) In carrying out a conditional release plan prepared under subsection (2) of this section, the Mental Health and Developmental Disability Services Division may contract with a community mental health and developmental disabilities program, other public agency or private corporation or an individual to provide supervision and treatment for the conditionally released person. [1975 c.380 s.7; 1977 c.380 s.18; 1981 c.711 s.14; 1993 c.680 s.18]

161.395 Subpoena power of board. (1) Upon request of any party to a hearing before the board, the board or its designated representatives shall issue, or the board on its own motion may issue, subpoenas requiring the attendance and testimony of witnesses.

(2) Upon request of any party to the hearing before the board and upon a proper showing of the general relevance and reasonable scope of the documentary or physical evidence sought, the board or its designated representative shall issue, or the board on its own motion may issue, subpoenas duces tecum.

(3) Witnesses appearing under subpoenas, other than the parties or state officers or employees, shall receive fees and mileage as prescribed by law for witnesses in ORS 44.415 (2). If the board or its designated representative certifies that the testimony of a witness was relevant and material, any person who has paid fees and mileage to that witness shall be reimbursed by the board.

(4) If any person fails to comply with a subpoena issued under subsections (1) or (2) of this section or any party or witness refuses to testify regarding any matter on which the party or witness may be lawfully interrogated, the judge of

the circuit court of any county, on the application of the board or its designated representative or of the party requesting the issuance of the subpoena, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of a subpoena issued by the court.

(5) If any person, agency or facility fails to comply with an order of the board issued pursuant to subsection (2) of this section, the judge of a circuit court of any county, on application of the board or its designated representative, shall compel obedience by proceedings for contempt as in the case of disobedience of the requirements of an order issued by the court. Contempt for disobedience of an order of the board shall be punishable by a fine of $100. [1977 c.380 s.9; 1989 c.980 s.8]

Note: 161.395 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 161 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

161.400 Leave of absence; notice to board. If, at any time after the commitment of a person to a state hospital under ORS 161.341 (1), the superintendent of the hospital is of the opinion that a leave of absence from the hospital would be therapeutic for the person and that such leave would pose no substantial danger to others, the superintendent may authorize such leave for up to 48 hours in accordance with rules adopted by the Psychiatric Security Review Board. However, the superintendent, before authorizing the leave of absence, shall first notify the board for the purposes of ORS 161.326 (2). [1981 c.711 s.12]

161.403 [1983 c.800 s.14; repealed by 1993 c.77 s.1]

INCHOATE CRIMES

161.405 "Attempt" described. (1) A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime.

(2) An attempt is a:

(a) Class A felony if the offense attempted is murder or treason.

(b) Class B felony if the offense attempted is a Class A felony.

(c) Class C felony if the offense attempted is a Class B felony.

(d) Class A misdemeanor if the offense attempted is a Class C felony or an unclassified felony.

(e) Class B misdemeanor if the offense attempted is a Class A misdemeanor.

(f) Class C misdemeanor if the offense attempted is a Class B misdemeanor.

(g) Violation if the offense attempted is a Class C misdemeanor or an unclassified misdemeanor. [1971 c.743 s.54]

161.425 Impossibility not a defense. In a prosecution for an attempt, it is no defense that it was impossible to commit the crime which was the object of the attempt where the conduct engaged in by the actor would be a crime if the circumstances were as the actor believed them to be. [1971 c.743 s.55]

161.430 Renunciation as a defense to attempt. (1) A person is not liable under ORS 161.405 if, under circumstances manifesting a voluntary and complete renunciation of the criminal intent of the person, the person avoids the commission of the crime attempted by abandoning the criminal effort and, if mere abandonment is insufficient to accomplish this avoidance, doing everything necessary to prevent the commission of the attempted crime.

(2) The defense of renunciation is an affirmative defense. [1971 c.743 s.56]

161.435 "Solicitation" described. (1) A person commits the crime of solicitation if with the intent of causing another to engage in specific conduct constituting a crime punishable as a felony or as a Class A misdemeanor or an attempt to commit such felony or Class A misdemeanor the person commands or solicits such other person to engage in that conduct.

(2) Solicitation is a:

(a) Class A felony if the offense solicited is murder or treason.

(b) Class B felony if the offense solicited is a Class A felony.

(c) Class C felony if the offense solicited is a Class B felony.

(d) Class A misdemeanor if the offense solicited is a Class C felony.

(e) Class B misdemeanor if the offense solicited is a Class A misdemeanor. [1971 c.743 s.57]

161.440 Renunciation as defense to solicitation. (1) It is a defense to the crime of solicitation that the person soliciting the crime, after soliciting another person to commit a crime, persuaded the person solicited not to commit the crime or otherwise prevented the commission of the crime, under circumstances manifesting a complete and voluntary renunciation of the criminal intent.

(2) The defense of renunciation is an affirmative defense. [1971 c.743 s.58]

161.450 "Conspiracy" described. (1) A person is guilty of criminal conspiracy if with the intent that conduct constituting a crime punishable as a felony or a Class A misdemeanor be performed, the person agrees with one or more persons to engage in or cause the performance of such conduct.

(2) Criminal conspiracy is a:

(a) Class A felony if an object of the conspiracy is commission of murder, treason or a Class A felony.

(b) Class B felony if an object of the conspiracy is commission of a Class B felony.

(c) Class C felony if an object of the conspiracy is commission of a Class C felony.

(d) Class A misdemeanor if an object of the conspiracy is commission of a Class A misdemeanor. [1971 c.743 s.59]

161.455 Conspiratorial relationship. If a person is guilty of conspiracy, as defined in ORS 161.450, and knows that a person with whom the person conspires to commit a crime has conspired or will conspire with another person or persons to commit the same crime, the person is guilty of conspiring with such other person or persons, whether or not the person knows their identity, to commit such crime. [1971 c.743 s.60]

161.460 Renunciation as defense to conspiracy. (1) It is a defense to a charge of conspiracy that the actor, after conspiring to commit a crime, thwarted commission of the crime which was the object of the conspiracy, under circumstances manifesting a complete and voluntary renunciation of the criminal purpose of the actor. Renunciation by one conspirator does not, however, affect the liability of another conspirator who does not join in the renunciation of the conspiratorial objective.

(2) The defense of renunciation is an affirmative defense. [1971 c.743 s.61]

161.465 Duration of conspiracy. For the purpose of application of ORS 131.125:

(1) Conspiracy is a continuing course of conduct which terminates when the crime or crimes which are its object are completed or the agreement that they be committed is abandoned by the defendant and by those with whom the defendant conspired.

(2) Abandonment is presumed if neither the defendant nor anyone with whom the defendant conspired does any overt act in pursuance of the conspiracy during the applicable period of limitation.

(3) If an individual abandons the agreement, the conspiracy is terminated as to the individual only if and when the individual advises those with whom the individual conspired of the abandonment or the individual informs the law enforcement authorities of the existence of the conspiracy and of the participation of the individual therein. [1971 c.743 s.62; 1973 c.836 s.340]

161.475 Defenses to solicitation and conspiracy. (1) Except as provided in subsection (2) of this section, it is immaterial to the liability of a person who solicits or conspires with another to commit a crime that:

(a) The person or the person whom the person solicits or with whom the person conspires does not occupy a particular position or have a particular characteristic which is an element of such crime, if the person believes that one of them does; or

(b) The person whom the person solicits or with whom the person conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime, or, in the case of conspiracy, has feigned the agreement; or

(c) The person with whom the person conspires has not been prosecuted for or convicted of the conspiracy or a crime based upon the conduct in question, or has previously been acquitted.

(2) It is a defense to a charge of solicitation or conspiracy to commit a crime that if the criminal object were achieved, the actor would not be guilty of a crime under the law defining the offense or as an accomplice under ORS 161.150 to 161.165. [1971 c.743 s.63]

161.485 Multiple convictions barred in inchoate crimes. (1) It is no defense to a prosecution under ORS 161.405, 161.435 or 161.450 that the offense the defendant either attempted to commit, solicited to commit or conspired to commit was actually committed pursuant to such attempt, solicitation or conspiracy.

(2) A person shall not be convicted of more than one offense defined by ORS 161.405, 161.435 and 161.450 for conduct designed to commit or to culminate in commission of the same crime.

(3) A person shall not be convicted on the basis of the same course of conduct of both the actual commission of an offense and an attempt to commit that offense or solicitation of that offense or conspiracy to commit that offense.

(4) Nothing in this section shall be construed to bar inclusion of multiple counts charging violation of the substantive crime and ORS 161.405, 161.435 and 161.450 in a single indictment or information, provided the penal conviction is consistent with subsections (2) and (3) of this section. [1971 c.743 s.64]

CLASSES OF OFFENSES

161.505 "Offense" described. An offense is conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. An offense is either a crime, as described in ORS 161.515, or a violation, as described in ORS 153.008. [1971 c.743 s.65; 1975 c.451 s.173; 1981 c.626 s.2; 1981 c.692 s.7; 1999 c.1051 s.43]

161.515 "Crime" described. (1) A crime is an offense for which a sentence of imprisonment is authorized.

(2) A crime is either a felony or a misdemeanor. [1971 c.743 s.66]

161.525 "Felony" described. Except as provided in ORS 161.585 and 161.705, a crime is a felony if it is so designated in any statute of this state or if a person convicted under a statute of this state may be sentenced to a maximum term of imprisonment of more than one year. [1971 c.743 s.67]

161.535 Classification of felonies. (1) Felonies are classified for the purpose of sentence into the following categories:

(a) Class A felonies;

(b) Class B felonies;

(c) Class C felonies; and

(d) Unclassified felonies.

(2) The particular classification of each felony defined in the Oregon Criminal Code, except murder under ORS 163.115 and treason under ORS 166.005, is expressly designated in the section defining the crime. An offense defined outside this code which, because of the express sentence provided is within the definition of ORS 161.525, shall be considered an unclassified felony. [1971 c.743 s.68]

161.545 "Misdemeanor" described. A crime is a misdemeanor if it is so designated in any statute of this state or if a person convicted thereof may be sentenced to a maximum term of imprisonment of not more than one year. [1971 c.743 s.69]

161.555 Classification of misdemeanors. (1) Misdemeanors are classified for the purpose of sentence into the following categories:

(a) Class A misdemeanors;

(b) Class B misdemeanors;

(c) Class C misdemeanors; and

(d) Unclassified misdemeanors.

(2) The particular classification of each misdemeanor defined in the Oregon Criminal Code is expressly designated in the section defining the crime. An offense defined outside this code which, because of the express sentence provided is within the definition of ORS 161.545, shall be considered an unclassified misdemeanor.

(3) An offense defined by a statute of this state, but without specification as to its classification or as to the penalty authorized upon conviction, shall be considered a Class A misdemeanor. [1971 c.743 s.70]

161.565 [1971 c.743 s.71; 1987 c.783 s.1; 1989 c.1053 s.17; 1991 c.111 s.17; 1993 c.533 s.4; 1997 c.852 s.12; repealed by 1999 c.1051 s.49]

161.566 Misdemeanor treated as violation; prosecuting attorney's election. (1) Except as provided in subsection (4) of this section, a prosecuting attorney may elect to treat any misdemeanor as a Class A violation. The election must be made by the prosecuting attorney orally at the time of the first appearance of the defendant or in writing filed on or before the time scheduled for the first appearance of the defendant. If no election is made within the time allowed, the case shall proceed as a misdemeanor.

(2) If a prosecuting attorney elects to treat a misdemeanor as a Class A violation under this section, the court shall amend the accusatory instrument to reflect the charged offense as a Class A violation and clearly denominate the offense as a Class A violation in any judgment entered in the matter.

(3) If a prosecuting attorney elects to treat a misdemeanor as a Class A violation under this section, and the defendant fails to make any required appearance in the matter, the court may enter a default judgment against the defendant in the manner provided by ORS 153.102. The maximum fine that the court may impose under a default judgment entered pursuant to ORS 153.102 is the maximum fine for a Class A violation, as provided in ORS 153.018.

(4) A prosecuting attorney may not elect to treat misdemeanors created under ORS 811.540 or 813.010 as violations under the provisions of this section.

(5) The election provided for in this section may be made by a city attorney acting as prosecuting attorney in the case of municipal ordinance offenses, a county counsel acting as prosecuting attorney under a county charter in the case of county ordinance offenses, and the Attorney General acting as prosecuting attorney in those criminal actions or proceedings within the jurisdiction of the Attorney General. [1999 c.1051 s.47]

161.568 Misdemeanor treated as violation; court's election. (1) Except as provided in subsection (4) of this section, a court may elect to treat any misdemeanor as a Class A violation for the purpose of entering a default judgment under ORS 153.102 if:

(a) A complaint or information has been filed with the court for the misdemeanor;

(b) The defendant has failed to make an appearance in the proceedings required by the court or by law; and

(c) The court has given notice to the district attorney for the county and the district attorney has informed the court that the district attorney does not object to treating the misdemeanor as a Class A violation.

(2) If the court treats a misdemeanor as a Class A violation under this section, the court shall amend the accusatory instrument to reflect the charged offense as a Class A violation and clearly denominate the offense as a Class A violation in the judgment entered in the matter.

(3) If the court treats a misdemeanor as a Class A violation under this section, the maximum fine that the court may impose under a default judgment entered pursuant to ORS 153.102 is the maximum fine for a Class A violation, as provided in ORS 153.018.

(4) A court may not treat misdemeanors created under ORS 811.540 or 813.010 as violations under the provisions of this section. [1999 c.1051 s.48]

161.575 [1971 c.743 s.72; repealed by 1999 c.1051 s.49]

161.585 Classification of certain crimes determined by punishment. (1) When a crime punishable as a felony is also punishable by imprisonment for a maximum term of one year or by a fine, the crime shall be classed as a misdemeanor if the court imposes a punishment other than imprisonment under ORS 137.124 (1).

(2) Notwithstanding the provisions of ORS 161.525, upon conviction of a crime punishable as described in subsection (1) of this section, the crime is a felony for all purposes until one of the following events occurs, after which occurrence the crime is a misdemeanor for all purposes:

(a) Without imposing a sentence of probation, the court imposes a sentence of imprisonment other than to the legal and physical custody of the Department of Corrections.

(b) Without imposing a sentence of probation, the court imposes a fine.

(c) Upon revocation of probation, the court imposes a sentence of imprisonment other than to the legal and physical custody of the Department of Corrections.

(d) Upon revocation of probation, the court imposes a fine.

(e) The court declares the offense to be a misdemeanor, either at the time of imposing a sentence of probation, upon suspension of imposition of a part of a sentence, or on application of defendant or the probation officer of the defendant thereafter.

(f) The court imposes a sentence of probation on the defendant without imposition of any other sentence upon

conviction and defendant is thereafter discharged without any other sentence.

(g) Without imposing a sentence of probation and without imposing any other sentence, the court declares the offense to be a misdemeanor and discharges the defendant.

(3) The provisions of this section shall apply only to persons convicted of a felony committed prior to November 1, 1989. [1971 c.743 s.73; 1987 c.320 s.85; 1989 c.790 s.52; 1993 c.14 s.18]

DISPOSITION OF OFFENDERS

161.605 Maximum prison terms for felonies. The maximum term of an indeterminate sentence of imprisonment for a felony is as follows:

(1) For a Class A felony, 20 years.

(2) For a Class B felony, 10 years.

(3) For a Class C felony, 5 years.

(4) For an unclassified felony as provided in the statute defining the crime. [1971 c.743 s.74]

161.610 Enhanced penalty for use of firearm during commission of felony; pleading; minimum penalties; suspension or reduction of penalty. (1) As used in this section, “firearm” means a weapon which is designed to expel a projectile by the action of black powder or smokeless powder.

(2) The use or threatened use of a firearm, whether operable or inoperable, by a defendant during the commission of a felony may be pleaded in the accusatory instrument and proved at trial as an element in aggravation of the crime as provided in this section. When a crime is so pleaded, the aggravated nature of the crime may be indicated by adding the words “with a firearm” to the title of the offense. The unaggravated crime shall be considered a lesser included offense.

(3) Notwithstanding the provisions of ORS 161.605 or 137.010 (3) and except as otherwise provided in subsection (6) of this section, if a defendant is convicted of a felony having as an element the defendant's use or threatened use of a firearm during the commission of the crime, the court shall impose at least the minimum term of imprisonment as provided in subsection (4) of this section. Except as provided in ORS 144.122 and 144.126 and subsection (5) of this section, in no case shall any person punishable under this section become eligible for work release, parole, temporary leave or terminal leave until the minimum term of imprisonment is served, less a period of time equivalent to any reduction of imprisonment granted for good time served or time credits earned under ORS 421.121, nor shall the execution of the sentence imposed upon such person be suspended by the court.

(4) The minimum terms of imprisonment for felonies having as an element the defendant's use or threatened use of a firearm in the commission of the crime shall be as follows:

(a) Except as provided in subsection (5) of this section, upon the first conviction for such felony, five years, except that if the firearm is a machine gun, short-barreled rifle, short-barreled shotgun or is equipped with a firearms silencer, the term of imprisonment shall be 10 years.

(b) Upon conviction for such felony committed after punishment pursuant to paragraph (a) of this subsection, 10 years, except that if the firearm is a machine gun, short-barreled rifle, short-barreled shotgun or is equipped with a firearms silencer, the term of imprisonment shall be 20 years.

(c) Upon conviction for such felony committed after imprisonment pursuant to paragraph (b) of this subsection, 30 years.

(5) If it is the first time that the defendant is subject to punishment under this section, rather than impose the sentence otherwise required by subsection (4)(a) of this section, the court may:

(a) For felonies committed prior to November 1, 1989, suspend the execution of the sentence or impose a lesser term of imprisonment, when the court expressly finds mitigating circumstances justifying such lesser sentence and sets forth those circumstances in its statement on sentencing; or

(b) For felonies committed on or after November 1, 1989, impose a lesser sentence in accordance with the rules of the Oregon Criminal Justice Commission.

(6) When a defendant who is convicted of a felony having as an element the defendant's use or threatened use of a firearm during the commission of the crime is a person who was waived from juvenile court under ORS 137.707 (5)(b)(A), 419C.349, 419C.352, 419C.364 or 419C.370, the court is not required to impose a minimum term of imprisonment under this section. [1979 c.779 s.2; 1985 c.552 s.1; 1989 c.790 s.72; 1989 c.839 s.18; 1991 c.133 s.3; 1993 c.692 s.9; 1999 c.951 s.3]

161.615 Prison terms for misdemeanors. Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following maximum limitations:

(1) For a Class A misdemeanor, 1 year.

(2) For a Class B misdemeanor, 6 months.

(3) For a Class C misdemeanor, 30 days.

(4) For an unclassified misdemeanor, as provided in the statute defining the crime. [1971 c.743 s.75]

161.620 Sentences imposed upon waiver from juvenile court. Notwithstanding any other provision of law, a sentence imposed upon any person waived from the juvenile court under ORS 419C.349, 419C.352, 419C.364 or 419C.370 shall not include any sentence of death or life imprisonment without the possibility of release or parole nor imposition of any mandatory minimum sentence except that a mandatory minimum sentence under:

(1) ORS 163.105 (1)(c) shall be imposed; and

(2) ORS 161.610 may be imposed. [1985 c.631 s.9; 1989 c.720 s.3; 1993 c.33 s.306; 1993 c.546 s.119; 1995 c.422 s.131y; 1999 c.951 s.2]

Note: 161.620 was added to and made a part of ORS 161.615 to 166.685 by legislative action but was not added to any smaller series in that series. See Preface to Oregon Revised Statutes for further explanation.

161.625 Fines for felonies. (1) A sentence to pay a fine for a felony shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) $300,000 for a Class A felony.

(b) $200,000 for a Class B felony.

(c) $100,000 for a Class C felony.

(2) A sentence to pay a fine for an unclassified felony shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the crime.

(3)(a) If a person has gained money or property through the commission of a felony, then upon conviction thereof the court, in lieu of imposing the fine authorized for the crime under subsection (1) or (2) of this section, may sentence the defendant to pay an amount, fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the crime.

(b) The provisions of paragraph (a) of this subsection do not apply to the felony theft of a companion animal, as defined in ORS 164.055, or a captive wild animal.

(4) As used in this section, “gain” means the amount of money or the value of property derived from the commission of the felony, less the amount of money or the value of property returned to the victim of the crime or seized by or surrendered to lawful authority before the time sentence is imposed. “Value” shall be determined by the standards established in ORS 164.115.

(5) When the court imposes a fine for a felony the court shall make a finding as to the amount of the defendant's gain from the crime. If the record does not contain sufficient evidence to support a finding the court may conduct a hearing upon the issue.

(6) Except as provided in ORS 161.655, this section shall not apply to a corporation. [1971 c.743 s.76; 1981 c.390 s.1; 1991 c.837 s.11; 1993 c.680 s.36]

161.635 Fines for misdemeanors. (1) A sentence to pay a fine for a misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) $5,000 for a Class A misdemeanor.

(b) $2,000 for a Class B misdemeanor.

(c) $1,000 for a Class C misdemeanor.

(2) A sentence to pay a fine for an unclassified misdemeanor shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the crime.

(3) If a person has gained money or property through the commission of a misdemeanor, then upon conviction thereof the court, instead of imposing the fine authorized for the offense under this section, may sentence the defendant to pay an amount fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the offense. In that event, ORS 161.625 (4) and (5) apply.

(4) This section shall not apply to corporations. [1971 c.743 s.77; 1981 c.390 s.2; 1993 c.680 s.30; 1995 c.545 s.2; 1999 c.1051 s.44]

161.645 Standards for imposing fines. In determining whether to impose a fine and its amount, the court shall consider:

(1) The financial resources of the defendant and the burden that payment of a fine will impose, with due regard to the other obligations of the defendant; and

(2) The ability of the defendant to pay a fine on an installment basis or on other conditions to be fixed by the court. [1971 c.743 s.78]

161.655 Fines for corporations. (1) A sentence to pay a fine when imposed on a corporation for an offense defined in the Oregon Criminal Code or for an offense defined outside this code for which no special corporate fine is specified, shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) $50,000 when the conviction is of a felony.

(b) $5,000 when the conviction is of a Class A misdemeanor or of an unclassified misdemeanor for which a term of imprisonment of more than six months is authorized.

(c) $2,500 when the conviction is of a Class B misdemeanor or of an unclassified misdemeanor for which the authorized term of imprisonment is not more than six months.

(d) $1,000 when the conviction is of a Class C misdemeanor or an unclassified misdemeanor for which the authorized term of imprisonment is not more than 30 days.

(2) A sentence to pay a fine, when imposed on a corporation for an offense defined outside the Oregon Criminal Code, if a special fine for a corporation is provided in the statute defining the offense, shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the offense.

(3) If a corporation has gained money or property through the commission of an offense, then upon conviction thereof the court, in lieu of imposing the fine authorized for the offense under subsection (1) or (2) of this section, may sentence the corporation to pay an amount, fixed by the court, not exceeding double the amount of the corporation's gain from the commission of the offense. In that event, ORS 161.625 (4) and (5) apply. [1971 c.743 s.79; 1999 c.1051 s.45]

161.665 Costs. (1) Except as provided in ORS 151.505, the court, only in the case of a defendant for whom it enters a judgment of conviction, may include in its sentence thereunder a provision that the convicted defendant shall pay as costs expenses specially incurred by the state in prosecuting the defendant. Costs include a reasonable attorney fee for counsel appointed pursuant to ORS 135.045 or 135.050 and a reasonable amount for expenses approved under ORS 135.055. A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the State Court Administrator under ORS 151.430. Costs shall not include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

(2) Except as provided in ORS 151.505, the court, after the conclusion of an appeal of its initial judgment of conviction, may include in its final judgment or modify the judgment to include a requirement that a convicted defendant pay as costs a reasonable attorney fee for counsel appointed pursuant to ORS 138.500, including counsel who is the Public Defender established by ORS 151.280 or counsel who is under contract to provide services for the appeal pursuant to ORS 151.460, and other costs and expenses allowed by the appellate court under ORS 138.500 (4). A reasonable attorney fee is presumed to be a reasonable number of hours at the hourly rate authorized by the State Court Administrator under ORS 151.430.

(3) The court shall not sentence a defendant to pay costs under this section unless the defendant is or may be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

(4) A defendant who has been sentenced to pay costs under this section and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced the defendant for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will impose manifest hardship on the defendant or the immediate family of the defendant, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675.

(5) All moneys collected or paid under this section shall be paid into the General Fund and credited to the Criminal Fine and Assessment Account. [1971 c.743 s.80; 1981 s.s. c.3 s.120; 1983 c.763 s.12; 1985 c.710 s.3; 1987 c.803 s.26; 1989 c.1053 s.11; 1991 c.460 s.12; 1991 c.840 s.1; 1997 c.761 s.1]

161.675 Time and method of payment of fines, restitution and costs. (1) When a defendant, as a part of a sentence or as condition of probation or suspension of sentence, is required to pay a sum of money for any purpose, the court may order payment to be made immediately or within a specified period of time or in specified installments. If a defendant is sentenced to a term of imprisonment, any part of the sentence that requires the payment of a sum of money for any purpose is enforceable during the period of imprisonment if the court expressly finds that the defendant has assets to pay all or part of the amounts ordered.

(2) When a defendant whose sentence requires the payment of a sum of money for any purpose is also sentenced to probation or imposition or execution of sentence is suspended, the court may make payment of the sum of money a condition of probation or suspension of sentence.

(3) When a defendant is sentenced to probation or imposition or execution of sentence is suspended and the court requires as a part of the sentence or as a condition of the probation or suspension of sentence that the defendant pay a sum of money in installments, the court, or the court clerk or probation officer if so ordered by the court, shall establish a schedule of payments to satisfy the obligation. A schedule of payments shall be reviewed by the court upon motion of the defendant at any time, so long as the obligation remains unsatisfied. [1971 c.743 s.81; 1977 c.371 s.4; 1985 c.46 s.1; 1993 c.14 s.19; 1995 c.512 s.3]

161.685 Effect of nonpayment of fines, restitution or costs; report to consumer reporting agency; rules. (1) When a defendant who has been sentenced or ordered to pay a fine, or to make restitution as defined in ORS 137.103, defaults on a payment or installment ordered by the court, the court on motion of the district attorney or upon its own motion may require the defendant to show cause why the default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for the appearance of the defendant.

(2) If the court finds that the default constitutes contempt, the court may impose one or more of the sanctions authorized by ORS 33.105.

(3) When a fine or an order of restitution is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine or make the restitution from those assets, and if that person fails to do so, the court may hold that person in contempt.

(4) Notwithstanding ORS 33.105, the term of confinement for contempt for nonpayment of fines or failure to make restitution shall be set forth in the commitment order, and shall not exceed one day for each $25 of the fine or restitution, 30 days if the fine or order of restitution was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period.

(5) If it appears to the satisfaction of the court that the default in the payment of a fine or restitution is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount of the payment or installments due on the payment, or revoking the fine or order of restitution in whole or in part.

(6) A default in the payment of a fine or costs or failure to make restitution or a default on an installment on a fine, costs or restitution may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution or garnishment for the collection of a fine or restitution shall not discharge a defendant confined for contempt until the amount of the fine or restitution has actually been collected.

(7) The court, or the court clerk if ordered by the court, may report a default on a court ordered payment to a consumer reporting agency.

(8) The Chief Justice of the Supreme Court shall adopt rules under ORS 1.002 establishing policies and procedures for reporting a default under subsection (7) of this section to a consumer reporting agency that may include, but are not limited to, limitations on reporting a default to a consumer reporting agency.

(9) Except as otherwise provided in this section, proceedings under this section shall be conducted:

(a) As provided in ORS 33.055, if the court seeks to impose remedial sanctions as described in ORS 33.015 to 33.155; and

(b) As provided in ORS 33.065, if the court seeks to impose punitive sanctions as described in ORS 33.015 to 33.155.

(10) Confinement under this section may be custody or incarceration, whether actual or constructive.

(11) As used in this section, “consumer reporting agency” means any person that regularly engages for fees, dues, or on a nonprofit basis, in whole or in part, in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. [1971 c.743 s.82; 1977 c.371 s.5; 1987 c.709 s.3; 1987 c.873 s.28; 1991 c.724 s.27a; 1995 c.79 s.50; 1995 c.512 s.4]

AUTHORITY OF SENTENCING COURT

161.705 Reduction of certain felonies to misdemeanors. (1) Notwithstanding ORS 161.525, the court may enter judgment of conviction for a Class A misdemeanor and make disposition accordingly when:

(a) A person is convicted of any Class C felony; or

(b) A person is convicted of a Class B felony pursuant to ORS 475.992 (2)(a); or

(c) A person is convicted of the Class B felony of possession of marijuana pursuant to ORS 475.992 (4)(a); or

(d) A person convicted of any of the felonies described in paragraphs (a) to (c) of this subsection, or of a Class A felony pursuant to ORS 166.720, has successfully completed a sentence of probation; and

(e) The court, considering the nature and circumstances of the crime and the history and character of the defendant, believes that it would be unduly harsh to sentence the defendant for a felony.

(2) This section does not apply, however, in cases subject to ORS 475.995. [1971 c.743 s.83; 1977 c.745 s.31; 1979 c.124 s.1; 1981 c.769 s.8]

161.715 Standards for discharge of defendant. (1) Any court empowered to suspend imposition or execution of sentence or to sentence a defendant to probation may discharge the defendant if:

(a) The conviction is for an offense other than murder, treason or a Class A or B felony; and

(b) The court is of the opinion that no proper purpose would be served by imposing any condition upon the defendant's release.

(2) If a sentence of discharge is imposed for a felony, the court shall set forth in the record the reasons for its action.

(3) If the court imposes a sentence of discharge, the defendant shall be released with respect to the conviction for which the sentence is imposed without imprisonment, fine, probationary supervision or conditions.

(4) If a defendant pleads not guilty and is tried and found guilty, a sentence of discharge is a final judgment on a conviction for all purposes, including an appeal by the defendant.

(5) If a defendant pleads guilty, a sentence of discharge is not appealable, but for all other purposes is a final judgment on a conviction. [1971 c.743 s.84; 1993 c.14 s.20]

161.725 Standards for sentencing of dangerous offenders. (1) Subject to the provisions of ORS 161.737, the maximum term of an indeterminate sentence of imprisonment for a dangerous offender is 30 years, if the court finds that because of the dangerousness of the defendant an extended period of confined correctional treatment or custody is required for the protection of the public and if it further finds, as provided in ORS 161.735, that one or more of the following grounds exist:

(a) The defendant is being sentenced for a Class A felony, and the court finds that the defendant is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

(b) The defendant is being sentenced for a felony that seriously endangered the life or safety of another, the defendant has been previously convicted of a felony not related to the instant crime as a single criminal episode and the court finds that the defendant is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

(c) The defendant is being sentenced for a felony that seriously endangered the life or safety of another, the defendant has previously engaged in unlawful conduct not related to the instant crime as a single criminal episode that seriously endangered the life or safety of another and the court finds that the defendant is suffering from a severe personality disorder indicating a propensity toward crimes that seriously endanger the life or safety of another.

(2) Unless the parties stipulate otherwise, the state has the burden of proving beyond a reasonable doubt that the felonies or unlawful conduct referred to in subsection (1)(b) and (c) of this section seriously endangered the life and safety of another.

(3) As used in this section, “previously convicted of a felony” means:

(a) Previous conviction of a felony in a court of this state;

(b) Previous conviction in a court of the United States, other than a court-martial, of an offense which at the time of conviction of the offense was and at the time of conviction of the instant crime is punishable under the laws of the United States by death or by imprisonment in a penitentiary, prison or similar institution for a term of one year or more; or

(c) Previous conviction by a general court-martial of the United States or in a court of any other state or territory of the United States, or of the Commonwealth of Puerto Rico, of an offense which at the time of conviction of the offense was punishable by death or by imprisonment in a penitentiary, prison or similar institution for a term of one

year or more and which offense also at the time of conviction of the instant crime would have been a felony if committed in this state.

(4) As used in this section, “previous conviction of a felony” does not include:

(a) An offense committed when the defendant was less than 16 years of age;

(b) A conviction rendered after the commission of the instant crime;

(c) A conviction that is the defendant's most recent conviction described in subsection (3) of this section, and the defendant was finally and unconditionally discharged from all resulting imprisonment, probation or parole more than seven years before the commission of the instant crime; or

(d) A conviction that was by court-martial of an offense denounced only by military law and triable only by court-martial.

(5) As used in this section, “conviction” means an adjudication of guilt upon a plea, verdict or finding in a criminal proceeding in a court of competent jurisdiction, but does not include an adjudication which has been expunged by pardon, reversed, set aside or otherwise rendered nugatory. [1971 c.743 s.85; 1989 c.790 s.75; 1993 c.334 s.5]

161.735 Procedure for determining whether defendant dangerous. (1) Upon motion of the district attorney, and if, in the opinion of the court, there is reason to believe that the defendant falls within ORS 161.725, the court shall order a presentence investigation and an examination by a psychiatrist or psychologist. The court may appoint one or more qualified psychiatrists or psychologists to examine the defendant in the local correctional facility.

(2) All costs connected with the examination shall be paid by the state.

(3) The examination performed pursuant to this section shall be completed within 30 days, subject to additional extensions not exceeding 30 days on order of the court. Each psychiatrist and psychologist appointed to examine a defendant under this section shall file with the court a written report of findings and conclusions, including an evaluation of whether the defendant is suffering from a severe personality disorder indicating a propensity toward criminal activity.

(4) No statement made by a defendant under this section or ORS 137.124 or 423.090 shall be used against the defendant in any civil proceeding or in any other criminal proceeding.

(5) Upon receipt of the examination and presentence reports the court shall set a time for a presentence hearing, unless the district attorney and the defendant waive the hearing. At the presentence hearing the district attorney and the defendant may question any psychiatrist or psychologist who examined the defendant pursuant to this section.

(6) If, after considering the presentence report, the examination reports and the evidence in the case or on the presentence hearing, the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant as a dangerous offender.

(7) In determining whether a defendant has been previously convicted of a felony for purposes of ORS 161.725, the court shall consider as prima facie evidence of the previous conviction:

(a) A copy of the judicial record of the conviction which copy is authenticated under ORS 40.510;

(b) A copy of the fingerprints of the subject of that conviction which copy is authenticated under ORS 40.510; and

(c) Testimony that the fingerprints of the subject of that conviction are those of the defendant.

(8) Subsection (7) of this section does not prohibit proof of the previous conviction by any other procedure. [1971 c.743 s.86; 1973 c.836 s.341; 1981 c.892 s.89a; 1983 c.740 s.27; 1987 c.248 s.1; 1999 c.163 s.9]

161.737 Sentence imposed on dangerous offender as departure from sentencing guidelines. (1) A sentence imposed under ORS 161.725 and 161.735 for felonies committed on or after November 1, 1989, shall constitute a departure from the sentencing guidelines created by rules of the Oregon Criminal Justice Commission. The findings made to classify the defendant as a dangerous offender under ORS 161.725 and 161.735 shall constitute substantial and compelling reasons to depart from the presumptive sentence as provided by rules of the Oregon Criminal Justice Commission.

(2) When the sentence is imposed, the sentencing judge shall indicate on the record the reasons for the departure and shall impose, in addition to the indeterminate sentence imposed under ORS 161.725, a required incarceration term that the offender must serve before release to post-prison supervision. If the presumptive sentence that would have been imposed if the court had not imposed the sentence under ORS 161.725 and 161.735 as a departure is a prison sentence, the required incarceration term shall be no less than the presumptive incarceration term and no more than twice the maximum presumptive incarceration term. If the presumptive sentence for the offense is probation, the required incarceration term shall be no less than the maximum incarceration term provided by the rule of the Oregon Criminal Justice Commission that establishes incarceration terms for dispositional departures and no more than twice

that amount. However, the indeterminate sentence imposed under this section and ORS 161.725 is not subject to any guideline rule establishing limitations on the duration of departures. [1989 c.790 s.77; 1993 c.334 s.6]