



Psychiatric Security Review Board

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To: PSRB Interested Parties
From: Alison Bort, PSRB Executive Director
Date: July 2, 2025
Subject: Permanent Rulemaking Notice to Interested Parties: OAR 859-030-0010(3)

The Psychiatric Security Review Board (PSRB) intends to retain the language in its temporary rule and permanently adopt OAR 859-030-0010(3) regarding jurisdictional criteria, which reads:

(3) The Board will maintain jurisdiction over persons who are legally placed under its jurisdiction by any court of the State of Oregon and who continue to meet the following jurisdictional criteria:

(a) The person is affected by a qualifying mental disorder, which may include one that is not currently active, but with reasonable medical probability, may occasionally become active.

(b) The person's qualifying mental disorder, when active, renders them a substantial danger to others.

(A) A qualifying mental disorder may be the sole factor that renders a person a substantial danger to others; or

(B) A qualifying mental disorder may combine with another condition to render the person a substantial danger to others and need not be sufficient on its own to render the person a substantial danger to others.

The Board conducted a Rules Advisory Committee on June 4, 2025, and July 1, 2025, and has received and considered significant resources and input. The following provides clarification on why the Board believes that retaining this language is necessary, justified, and in alignment with both the Board's statutory duties, legislative intent, longstanding practice, and the law.

Understanding the "Front Door" vs. "Back Door"

A central source of confusion and concern has been the assumption that the legal criteria for *entering* PSRB jurisdiction (the "front door") should be similar or identical to those for *remaining* under jurisdiction (the "back door"). These are and always have been fundamentally different legal questions.

- At the front door, the question is one of criminal responsibility. A person is asserting the affirmative defense of "guilty except for insanity" (GEI), and must prove by a preponderance of the evidence that a qualifying mental disorder caused them to be incapable of appreciating the criminality of their conduct or conforming their behavior to the law. This is a threshold issue that determines whether a person is criminally culpable and therefore subject to punishment.
- At the back door, the question is public safety and treatment need. Once a person is under the PSRB's jurisdiction, the Board does not relitigate criminal responsibility. Its role is to oversee the individual's treatment, supervision, and community integration—ensuring public safety as the person recovers. The Board's jurisdiction continues only if the individual has a qualifying mental disorder that, when active, renders them a substantial danger to others.

This difference in focus—criminal responsibility vs. future dangerousness—justifies distinctions in statutory language and clinical interpretation. The idea that both doors should be governed by identical standards is inconsistent with both Oregon law and the PSRB’s mandate.

Alignment with HB 2471 and Forward Path

The passage of House Bill 2471 reinforces this distinction. The bill tightens the standard for asserting the GEI defense at the front door by requiring:

1. That the qualifying mental disorder is the “but for” cause of the person’s lack of capacity;
2. That a non-qualifying disorder is not the primary cause of the incapacity; and
3. That voluntary intoxication, alone or in combination with other disorders, cannot serve as the basis for a GEI finding.

This is an important correction to the overbreadth created by *State v. Meiser*, 372 Or 438 (2024), and reinforces that not all disorders or circumstances should open the GEI door.

However, the back door remains a different question. Opponents of the Board’s rule may argue that, since HB 2471 narrowed who can enter the PSRB system, the Board should also narrow who it retains. But that misunderstands the role of the Board. The clinical reality at the back end is more complex: individuals evolve, conditions interact, and patterns emerge that weren’t apparent at the time of adjudication. The Board’s duty is not to reapply a front-end legal test, but to ensure safety, treatment continuity, and a fair, evidence-based pathway to discharge.

The temporary rule remains necessary to preserve the Board’s ability to address real-world clinical complexity while maintaining public confidence in the integrity of the system. It aligns with the spirit of HB 2471, placing appropriate limits on the misuse of mental health defenses, while also fulfilling the Board’s ongoing duty to ensure that people who remain under its jurisdiction pose no substantial danger to others as a result of their qualifying mental disorder.

Clarifying the Purpose of the Rule

This rule reflects how the Board has been interpreting and applying the law for years. Its codification:

1. Provides transparency about the Board’s established practice;
2. Clarifies that a qualifying mental disorder need not be the sole cause of dangerousness—as long as it is part of the causal equation; and
3. Prevents manipulation of statutory language to allow a person to assert a GEI defense (based on a qualifying disorder) but later seek discharge by recharacterizing their risk as influenced by something else (e.g., substance use, personality disorder, situational stress).

Absent the new rule, this legal inconsistency creates a loophole that threatens the integrity of the GEI process. A person could enter the PSRB system claiming their qualifying mental disorder caused the crime, then later argue it is no longer relevant to their dangerousness in order to be released early. The rule helps close that gap by reinforcing a consistent standard for continued jurisdiction.

Relevant U.S. Supreme Court Precedent

The U.S. Supreme Court has emphasized that continued civil or quasi-civil confinement must be justified by both the presence of mental illness and dangerousness. In *Foucha v. Louisiana*, 504 U.S. 71 (1992),

the Court held that a person who has been found not guilty by reason of insanity may not be indefinitely confined unless they are both mentally ill and dangerous. In that case, the individual was no longer mentally ill but was still considered dangerous. Yet, the Court found that was insufficient to justify continued confinement.

Importantly, the Court did not require that the mental illness be the sole or even primary cause of the person's dangerousness. Rather, it held that mental illness must be ongoing and clinically relevant to the risk posed. The Court also warned against the use of mental illness as a post-hoc justification or pretext to extend confinement indefinitely. This means that a mental disorder cannot be used merely as a label from the past to justify ongoing confinement when it no longer contributes meaningfully to current risk. The PSRB's rule is carefully crafted to avoid this concern. It permits jurisdiction only when the qualifying disorder is actively contributing to risk, whether alone or in combination with other conditions.

This precedent supports the importance of the PSRB's rule: it ensures that jurisdiction is retained only when a person's substantial danger to others remains meaningfully connected to a qualifying mental disorder. The rule explicitly allows for situations where that disorder interacts with other conditions or behaviors to elevate risk, reflecting clinical complexity rather than excluding it. At the same time, it guards against retaining jurisdiction when the qualifying disorder is no longer active or relevant, striking the necessary constitutional balance between public safety and individual liberty.

Challenges in Disentangling Conditions

Over the course of years under PSRB supervision, individuals often present with a complex mix of symptoms, diagnoses, and behaviors. Even highly experienced clinicians have testified that it is difficult, if not impossible, to fully separate the effects of co-occurring conditions.

Clinical reality is not neat. Human behavior, especially in the context of severe mental illness, often arises from interacting causes, not single diagnostic categories. The rule acknowledges this complexity by allowing for continued jurisdiction in cases where a qualifying mental disorder combines with other factors to render a person dangerous. It does not say the qualifying disorder can be irrelevant; it says it does not have to operate in isolation.

The Spirit of the PSRB: Recovery-Oriented, Risk-Based, and Stepwise

One of the most common concerns raised is that individuals under PSRB jurisdiction may remain under supervision longer than necessary. But this view often overlooks the foundational principle of how and why the PSRB discharges individuals: demonstrated stability and safety in the face of ongoing clinical complexity.

Under PSRB jurisdiction, the goal is not to "prove" the absence of a qualifying mental disorder, nor is it to expect lifelong perfect mental health. Instead, the Board looks for evidence that a person can live safely and responsibly—even if their symptoms return. This approach reflects a core value of the PSRB: mental illness alone does not equal dangerousness, and recovery is both possible and expected.

A Stepwise, Individualized Path Toward Discharge

Discharge from PSRB jurisdiction is not a one-time decision—it is a stepwise process, grounded in actual behavioral evidence. Over time, individuals may:

- Move from hospital-level care to secure residential treatment;
- Then to community-based placements with structured supports;
- Then to more independent living situations with outpatient services;

- And finally, to unconditional discharge once they have shown they can manage their mental illness and avoid dangerous behaviors.

This process is customized to each person's clinical needs, risk profile, and progress. It allows the Board to evaluate not just the presence of a mental disorder, but how a person functions with it—especially under stress or relapse conditions.

Demonstrated Safety Over Time

This model is rooted in the understanding that relapse or symptom recurrence is not failure—it's frequently part of a person's journey with serious mental illness. The key is whether the person can identify early warning signs, use coping skills, maintain treatment engagement, and stay safe. Examples of individual factors the Board considers to evaluate patient safety include:

- Response to stress and triggers;
- Willingness to engage in treatment;
- Track record of compliance with conditions;
- Support network and insight into illness.
- Evidence-based risk assessment.

Over time, this builds a rich evidentiary picture that allows the Board to make well-informed, fair, consistent and clinically sound decisions.

Discharge Data Reflects Clinical Caution, Not Overreach

It is true that full discharges are relatively rare in any given year. But this is not evidence of systemic over-retention. Rather, it reflects:

- The severity and complexity of many individuals' conditions;
- The need to build evidence across multiple transitions;
- The reality that recovery from mental illness and public safety are both high-stakes concerns.

The PSRB does not retain jurisdiction arbitrarily or indefinitely. It follows a data- and behavior-driven process, anchored in the principle that people can recover, improve, and move on—but that must be proven safely, not assumed quickly.

Conclusion

The rule aligns with the PSRB's statutory mandates and affirms a clinically grounded, recovery-oriented framework for discharge. Retaining this rule offers clarity, transparency, and continuity—without removing the individualized review and public safety considerations that have always guided the PSRB's work. We welcome continued dialogue on these issues and appreciate the feedback from our community, practitioners, and legal partners.

The PSRB will hold a remote public hearing on July 7, 2025 from 3:00 p.m. – 4:00 p.m. via Microsoft TEAMS. Please visit our [rulemaking page](#) on our website for more information. The public comment period ends on July 8, 2025 at 5:00 p.m. Written public comments can be submitted to alison.bort@psrb.oregon.gov and will be posted on our website for transparency.