

# House Bill 3336

Sponsored by Representative GELSER; Representatives BARKER, BARNHART, BONAMICI, BUCKLEY, CANNON, GREENLICK, HOLVEY, HUNT, KOTEK, MERKLEY, NATHANSON, NOLAN, READ, ROBLAN, ROSENBAUM, TOMEI, WITT

## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Establishes that person is not subject to death penalty if determination is made that person has mental retardation. Provides procedure for such determination. Authorizes state to appeal from order finding defendant to have mental retardation.

## A BILL FOR AN ACT

1  
2 Relating to death penalty; creating new provisions; and amending ORS 138.060 and 163.150.

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

4 **SECTION 1.** ORS 163.150 is amended to read:

5 163.150. (1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, ex-  
6 cept as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing  
7 proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described  
8 in ORS 163.105 (1)(c), life imprisonment without the possibility of release or parole, as described in  
9 ORS 163.105 (1)(b), or death. The proceeding shall be conducted in the trial court before the trial  
10 jury as soon as practicable. If a juror for any reason is unable to perform the function of a juror,  
11 the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the  
12 name of one of the alternate jurors, who shall then become a member of the jury for the sentencing  
13 proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt.  
14 The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate  
15 on the issue of the sentence. If the defendant has pleaded guilty, the sentencing proceeding shall  
16 be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented  
17 as to any matter that the court deems relevant to sentence including, but not limited to, victim im-  
18 pact evidence relating to the personal characteristics of the victim or the impact of the crime on  
19 the victim's family and any aggravating or mitigating evidence relevant to the issue in paragraph  
20 (b)(D) of this subsection. [.] However, neither the state nor the defendant shall be allowed to intro-  
21 duce [*repetitive*] evidence that has previously been offered and received during the trial on the issue  
22 of guilt. The court shall instruct the jury that all evidence previously offered and received may be  
23 considered for purposes of the sentencing hearing. This paragraph shall not be construed to au-  
24 thorize the introduction of any evidence secured in violation of the Constitution of the United States  
25 or of the State of Oregon. The state and the defendant or the counsel of the defendant shall be  
26 permitted to present arguments for or against a sentence of death and for or against a sentence of  
27 life imprisonment with or without the possibility of release or parole.

28 (b) Upon the conclusion of the presentation of the evidence, the court shall submit the following  
29 issues to the jury:

30 (A) Whether the conduct of the defendant that caused the death of the deceased was committed

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 deliberately and with the reasonable expectation that death of the deceased or another would result;

2 (B) Whether there is a probability that the defendant would commit criminal acts of violence  
3 that would constitute a continuing threat to society;

4 (C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was  
5 unreasonable in response to the provocation, if any, by the deceased; and

6 (D) Whether the defendant should receive a death sentence.

7 (c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b)  
8 of this subsection, any mitigating circumstances offered in evidence, including but not limited to the  
9 defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of  
10 the mental and emotional pressure under which the defendant was acting at the time the offense  
11 was committed.

12 (B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this sub-  
13 section "no" if, after considering any aggravating evidence and any mitigating evidence concerning  
14 any aspect of the defendant's character or background, or any circumstances of the offense and any  
15 victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors  
16 believe that the defendant should not receive a death sentence.

17 (d) The state must prove each issue submitted under paragraph (b)(A) to (C) of this subsection  
18 beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue  
19 considered.

20 (e) The court shall charge the jury that it may not answer any issue "yes," under paragraph (b)  
21 of this subsection unless it agrees unanimously.

22 (f) If the jury returns an affirmative finding on each issue considered under paragraph (b) of this  
23 subsection, the trial judge shall sentence the defendant to death.

24 (2)(a) Upon the conclusion of the presentation of the evidence, the court shall also instruct the  
25 jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, the trial  
26 court shall sentence the defendant to life imprisonment without the possibility of release or parole,  
27 as described in ORS 163.105 (1)(b), unless 10 or more members of the jury further find that there are  
28 sufficient mitigating circumstances to warrant life imprisonment, in which case the trial court shall  
29 sentence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

30 (b) If the jury returns a negative finding on any issue under subsection (1)(b) of this section and  
31 further finds that there are sufficient mitigating circumstances to warrant life imprisonment, the  
32 trial court shall sentence the defendant to life imprisonment in the custody of the Department of  
33 Corrections as provided in ORS 163.105 (1)(c).

34 (3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707 (2) applies or  
35 the state advises the court on the record that the state declines to present evidence for purposes  
36 of sentencing the defendant to death **or the defendant has been found under section 2 of this**  
37 **2007 Act to be a person with mental retardation**, the court:

38 (A) [Shall] **May** not conduct a sentencing proceeding as described in subsection (1) of this sec-  
39 tion, and a sentence of death [shall] **may** not be ordered.

40 (B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sen-  
41 tenced to life imprisonment without the possibility of release or parole as described in ORS 163.105  
42 (1)(b) or life imprisonment as described in ORS 163.105 (1)(c). If the defendant waives all rights to  
43 a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact.  
44 The procedure for the sentencing proceeding, whether before a court or a jury, shall follow the  
45 procedure of subsection (1)(a) of this section, as modified by this subsection. In the proceeding, ev-

1 idence may be presented as to any matter that the court deems relevant to sentence, including, but  
 2 not limited to, victim impact evidence relating to the personal characteristics of the victim or the  
 3 impact of the crime on the victim's family.

4 (b) Following the presentation of evidence and argument under paragraph (a) of this subsection,  
 5 the court shall instruct the jury that the trial court shall sentence the defendant to life  
 6 imprisonment without the possibility of release or parole as described in ORS 163.105 (1)(b), unless  
 7 after considering all of the evidence submitted, 10 or more members of the jury find there are suf-  
 8 ficient mitigating circumstances to warrant life imprisonment with the possibility of parole as de-  
 9 scribed in ORS 163.105 (1)(c). If 10 or more members of the jury find there are sufficient mitigating  
 10 circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sen-  
 11 tence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

12 (c) Nothing in this subsection [*shall preclude*] **precludes** the court from sentencing the defendant  
 13 to life imprisonment, as described in ORS 163.105 (1)(c), or life imprisonment without the possibility  
 14 of release or parole, as described in ORS 163.105 (1)(b), pursuant to a stipulation of sentence or  
 15 stipulation of sentencing facts agreed to and offered by both parties if the defendant waives all  
 16 rights to a jury sentencing proceeding.

17 (4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant  
 18 who has been sentenced to life imprisonment without possibility of release or parole will instead be  
 19 sentenced to life imprisonment in the custody of the Department of Corrections as provided in ORS  
 20 163.105 [(2)] (1)(c), the defendant shall be confined for a minimum of 30 years without possibility of  
 21 parole, release on work release or any form of temporary leave or employment at a forest or work  
 22 camp. Subsection (2) of this section [*shall apply*] **applies** only to trials commencing on or after July  
 23 19, 1989.

24 (5) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial during  
 25 the sentencing proceeding, the trial court, at the election of the state, shall either:

26 (a) Sentence the defendant to **life** imprisonment [*for life*] in the custody of the Department of  
 27 Corrections as provided in ORS 163.105 (1)(c); or

28 (b) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding  
 29 to determine if the defendant should be sentenced to:

30 (A) Death;

31 (B) **Life** imprisonment [*for life*] without the possibility of release or parole as provided in ORS  
 32 163.105 (1)(b); or

33 (C) **Life** imprisonment [*for life*] in the custody of the Department of Corrections as provided in  
 34 ORS 163.105 (1)(c).

35 **SECTION 2. (1) No person with mental retardation is eligible for the death penalty.**

36 **(2) When a defendant intends to assert mental retardation as a bar to the imposition of**  
 37 **the death penalty, the defendant shall file notice with the court of that intention at least 90**  
 38 **days prior to trial, unless just cause for a later filing date is shown.**

39 **(3) Upon receipt of the notice described in subsection (2) of this section, the court shall**  
 40 **consult with the Department of Human Services and shall appoint at least two mental health**  
 41 **professionals with expertise in mental retardation assessment to examine the defendant. A**  
 42 **person involved in the current treatment of the defendant may not be appointed.**

43 **(4) Within 30 days of examining the defendant, the mental health professionals shall in-**  
 44 **dividually prepare and deliver to the court a written report that includes an opinion on**  
 45 **whether the defendant is a person with mental retardation.**

1 (5) Upon receipt of the reports described in subsection (4) of this section, the court shall  
2 set a time for a pretrial hearing and provide copies of the reports to the state and counsel  
3 for the defendant.

4 (6) At the hearing, the state and counsel for the defendant may examine the mental  
5 health professionals and introduce any evidence relevant to the issue of whether the de-  
6 fendant is a person with mental retardation. The defendant has the burden of proving mental  
7 retardation by a preponderance of the evidence.

8 (7) If the court finds that the defendant is a person with mental retardation, the court  
9 shall enter an order to that effect.

10 (8) As used in this section, “mental retardation” has the meaning given that term in ORS  
11 427.005.

12 **SECTION 3.** ORS 138.060 is amended to read:

13 138.060. (1) The state may take an appeal from the circuit court to the Court of Appeals from:

14 (a) An order made prior to trial dismissing or setting aside the accusatory instrument;

15 (b) An order arresting the judgment;

16 (c) An order made prior to trial suppressing evidence;

17 (d) An order made prior to trial for the return or restoration of things seized;

18 (e) A judgment of conviction based on the sentence as provided in ORS 138.222;

19 (f) An order in a probation revocation hearing finding that a defendant who was sentenced to  
20 probation under ORS 137.712 has not violated a condition of probation by committing a new crime;

21 (g) An order made after a guilty finding dismissing or setting aside the accusatory instrument;

22 (h) An order granting a new trial; [or]

23 (i) An order dismissing an accusatory instrument under ORS 136.130; or

24 (j) **An order finding a defendant to be a person with mental retardation under section 2**  
25 **of this 2007 Act.**

26 (2) Notwithstanding subsection (1) of this section, when the state chooses to appeal from an or-  
27 der listed in paragraph (a) or (b) of this subsection, the state shall take the appeal from the circuit  
28 court to the Supreme Court if the defendant is charged with murder or aggravated murder. The or-  
29 ders to which this subsection applies are:

30 (a) An order made prior to trial suppressing evidence; and

31 (b) An order made prior to trial dismissing or setting aside the accusatory instrument.

32 (3) In an appeal by the state under subsection (2) of this section, the Supreme Court shall issue  
33 its decision no later than one year after the date of oral argument or, if the appeal is not orally  
34 argued, the date that the State Court Administrator delivers the briefs to the Supreme Court for  
35 decision. Failure of the Supreme Court to issue a decision within one year is not a ground for dis-  
36 missal of the appeal.

37

\_\_\_\_\_