

# Senate Bill 421

Sponsored by Senator PROZANSKI (at the request of Kristie Kilcullen and John Kilcullen) (Pre-session filed.)

## 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**.

Authorizes district attorney to initiate commitment proceeding when person charged with certain crimes lacks capacity to stand trial and is dangerous and in need of commitment. Authorizes court to establish commitment period of up to five years.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to civil commitments; creating new provisions; amending ORS 3.408, 161.370, 426.250 and  
3 426.300; and declaring an emergency.

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

5 **SECTION 1. Section 2 of this 2013 Act is added to and made a part of ORS chapter 426.**

6 **SECTION 2. (1) A district attorney may petition the court to initiate commitment pro-**  
7 **ceedings described in this section if:**

8 (a) A court has determined that an individual who is charged with a crime listed in ORS  
9 137.700 lacks the capacity to stand trial under ORS 161.370; and

10 (b)(A) The period of time described in ORS 161.370 (7) has expired; or

11 (B) A court has determined that there is no substantial probability that the individual,  
12 in the foreseeable future, will gain or regain the capacity to stand trial.

13 (2)(a) Upon receipt of a petition filed under subsection (1) of this section, the court shall  
14 schedule a hearing. Following the hearing, the court shall order that the individual be com-  
15 mitted to the custody of the Oregon Health Authority if the court determines by clear and  
16 convincing evidence that, because of a mental disease or defect, the individual is dangerous  
17 and in need of commitment.

18 (b) As a component of the determination described in paragraph (a) of this subsection,  
19 the court may enter an order finding that the individual committed the acts alleged in the  
20 criminal prosecution. The findings may not be admitted in a criminal prosecution.

21 (3) When the court enters an order under subsection (2)(a) of this section, the court shall  
22 establish a commitment period of not less than one year and not more than five years. The  
23 court may not establish a commitment period that exceeds two years unless the court finds  
24 to a reasonable degree of medical certainty that, as a result of a mental disease or defect,  
25 the individual is likely to remain dangerous and in need of commitment.

26 (4) An individual committed under this section shall be committed to a state hospital or,  
27 if the individual is under 18 years of age, to a secure intensive community inpatient facility  
28 for custody, care and treatment. The individual shall remain committed in a hospital or fa-  
29 cility for the duration of the commitment unless the court, after a hearing, enters an order:

30 (a) Initiating commitment proceedings under ORS 426.070 or 427.235 to 427.290; or

**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       **(b) Discharging the individual from the commitment described in this section.**

2       **(5)(a) If the court establishes a commitment period under subsection (3) of this section**  
 3 **that exceeds two years, an individual committed under this section may petition the court**  
 4 **for an order described in subsection (4) of this section at any time more than two years after**  
 5 **the date the court’s order is entered in the register and at intervals of not less than two**  
 6 **years thereafter.**

7       **(b) The superintendent of the state hospital, or the director of the secure intensive**  
 8 **community inpatient facility, to which an individual is committed under this section shall**  
 9 **petition the court for an order described in subsection (4)(b) of this section if the super-**  
 10 **intendent or director determines that:**

11       **(A) The individual no longer suffers from a mental disease or defect; or**

12       **(B) The individual suffers from a mental disease or defect but is no longer dangerous and**  
 13 **in need of commitment.**

14       **(6) If, on the date that is 60 days before the expiration of the commitment period estab-**  
 15 **lished in subsection (3) of this section, the individual remains committed, the court shall**  
 16 **schedule a hearing and give notice to the district attorney and counsel for the individual.**  
 17 **Following the hearing, the court may enter an order described in subsection (3) or (4) of this**  
 18 **section.**

19       **(7)(a) An individual subject to a petition described in this section has the right to obtain**  
 20 **suitable legal counsel possessing skills and experience commensurate with the complexity of**  
 21 **the case.**

22       **(b) If the individual is determined to be financially eligible, the court shall appoint legal**  
 23 **counsel to represent the individual. If the court has previously appointed counsel to repre-**  
 24 **sent the individual in the criminal proceeding for which the individual was found to lack the**  
 25 **capacity to stand trial, the court may continue the appointment.**

26       **(8) The district attorney shall represent the state at hearings conducted under this sec-**  
 27 **tion.**

28       **(9) The court shall dismiss criminal charges pending against an individual committed**  
 29 **under this section only on motion of the district attorney or if the statute of limitations has**  
 30 **expired.**

31       **SECTION 3.** ORS 161.370 is amended to read:

32       161.370. (1) When the defendant’s fitness to proceed is drawn in question, the issue shall be de-  
 33 **termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the**  
 34 **finding of the report filed under ORS 161.365, the court may make the determination on the basis**  
 35 **of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report**  
 36 **is received in evidence in the hearing, the party who contests the finding has the right to summon**  
 37 **and to cross-examine any psychiatrist or psychologist who submitted the report and to offer evidence**  
 38 **upon the issue. Other evidence regarding the defendant’s fitness to proceed may be introduced by**  
 39 **either party.**

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

42       **(a) If the court finds that the defendant is dangerous to self or others as a result of mental**  
 43 **disease or defect, or that the services and supervision necessary to restore the defendant’s fitness**  
 44 **to proceed are not available in the community, the court shall commit the defendant to the custody**  
 45 **of the superintendent of a state mental hospital or director of a facility, designated by the Oregon**

1 Health Authority, if the defendant is at least 18 years of age, or to the custody of the director of  
2 a secure intensive community inpatient facility designated by the authority if the defendant is under  
3 18 years of age; or

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

8 (3) When a defendant is released on supervision under this section, the court may place condi-  
9 tions that the court deems appropriate on the release, including the requirement that the defendant  
10 regularly report to the authority or a community mental health program for examination to deter-  
11 mine if the defendant has regained capacity to stand trial.

12 (4) When the court, on its own motion or upon the application of the superintendent of the  
13 hospital or director of the facility in which the defendant is committed, a person examining the de-  
14 fendant as a condition of release on supervision, or either party, determines, after a hearing, if a  
15 hearing is requested, that the defendant has regained fitness to proceed, the criminal proceeding  
16 shall be resumed. If, however, the court is of the view that so much time has elapsed since the  
17 commitment or release of the defendant on supervision that it would be unjust to resume the crim-  
18 inal proceeding, the court on motion of either party may dismiss the charge and may order the de-  
19 fendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to  
20 426.170 or 427.235 to 427.290.

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

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

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

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

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

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

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

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

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

13 (A) Three years; or

14 (B) A period of time equal to the maximum sentence the court could have imposed if the de-  
 15 fendant had been convicted.

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

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

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

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

26 (9) When the committing court receives a notice from the superintendent or director under  
 27 subsection (5) or (8) of this section concerning the defendant's progress or lack thereof, the com-  
 28 mitting court shall determine, after a hearing, if a hearing is requested, whether the defendant  
 29 presently has the capacity to stand trial.

30 (10) If at any time the court determines that the defendant lacks the capacity to stand trial, the  
 31 court shall further determine whether there is a substantial probability that the defendant, in the  
 32 foreseeable future, will gain or regain the capacity to stand trial and whether the defendant is en-  
 33 titled to discharge under subsection (7) of this section. If the court determines that there is no  
 34 substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity  
 35 to stand trial or that the defendant is entitled to discharge under subsection (7) of this section, the  
 36 court shall:

37 (a) Dismiss, without prejudice, all charges against the defendant and:

38 [(a)] (A) Order that the defendant be discharged; or

39 [(b)] (B) Initiate commitment proceedings under ORS 426.070 or 427.235 to 427.290; or

40 (b) **If petitioned by the district attorney, initiate commitment proceedings under section**  
 41 **2 of this 2013 Act.**

42 (11) All notices required under this section shall be filed with the clerk of the court and deliv-  
 43 ered to both the district attorney and the counsel for the defendant.

44 (12) If the defendant regains fitness to proceed, the term of any sentence received by the de-  
 45 fendant for conviction of the crime charged shall be reduced by the amount of time the defendant

1 was committed under this section to the custody of a state mental hospital, or to the custody of a  
 2 secure intensive community inpatient facility, designated by the Oregon Health Authority.

3 (13) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this  
 4 section, the fact that the defendant is unfit to proceed does not preclude any objection through  
 5 counsel and without the personal participation of the defendant on the grounds that the indictment  
 6 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon  
 7 any other ground at the discretion of the court which the court deems susceptible of fair determi-  
 8 nation prior to trial.

9 **SECTION 4.** ORS 426.300 is amended to read:

10 426.300. (1) The Oregon Health Authority shall, by filing a written certificate with the last  
 11 committing court and the court of residence, discharge any patient from court commitment[, *except*  
 12 *one held upon an order of a court or judge having criminal jurisdiction in an action or proceeding*  
 13 *arising out of criminal offense when in its opinion*] **when the authority determines that:**

14 (a) The individual is no longer a mentally ill person; or [*when in its opinion*]

15 (b) The transfer of the individual to a voluntary status is in the best interest of the treatment  
 16 of the patient.

17 **(2) Subsection (1) of this section does not apply to persons held upon an order of a court**  
 18 **or judge having criminal jurisdiction in an action or proceeding arising out of criminal of-**  
 19 **fense.**

20 [(2)] (3) The authority may sign applications for public assistance on behalf of those patients  
 21 who may be eligible for public assistance.

22 **SECTION 5.** ORS 3.408 is amended to read:

23 3.408. (1) The presiding judge of the judicial district may assign to a family court department  
 24 established under ORS 3.405 all of the following matters:

25 (a) Proceedings under the provisions of ORS chapters 107, 108, 109 and 110;

26 (b) Proceedings under the provisions of ORS chapter 25;

27 (c) Guardianship proceedings for minors under the provisions of ORS chapter 125;

28 (d) Juvenile court proceedings under ORS chapters 419A, 419B and 419C;

29 (e) Proceedings to commit a person with a mental illness **or with a mental disease or defect,**  
 30 under the provisions of ORS chapter 426;

31 (f) Probate proceedings under ORS chapters 111, 112, 113, 114, 115, 116 and 117; and

32 (g) Any other proceeding in which a family is involved.

33 (2) In addition to the matters specified in subsection (1) of this section, the presiding judge of  
 34 the judicial district may assign to a family court department any criminal proceeding that involves  
 35 domestic violence or other crime between family members.

36 **SECTION 6.** ORS 426.250, as amended by section 4, chapter 25, Oregon Laws 2012, is amended  
 37 to read:

38 426.250. The following is a nonexclusive list of responsibilities for payment of various costs re-  
 39 lated to commitment proceedings under this chapter as described:

40 (1) Any physician or qualified person recommended by the Oregon Health Authority who is  
 41 employed under ORS 426.110 to make an examination as to the mental condition of a person alleged  
 42 to be mentally ill shall be allowed a fee as the court in its discretion determines reasonable for the  
 43 examination.

44 (2) Witnesses subpoenaed to give testimony shall receive the same fees as are paid in criminal  
 45 cases, and are subject to compulsory attendance in the same manner as provided in ORS 136.567 to

1 136.603. The attendance of out-of-state witnesses may be secured in the same manner as provided in  
2 ORS 136.623 to 136.637. The party who subpoenas the witness or requests the court to subpoena the  
3 witness is responsible for payment of the cost of the subpoena and payment for the attendance of  
4 the witness at a hearing. When the witness has been subpoenaed on behalf of an allegedly mentally  
5 ill person who is represented by appointed counsel, the fees and costs allowed for that witness shall  
6 be paid pursuant to ORS 135.055. If the costs of witnesses subpoenaed by the allegedly mentally ill  
7 person are paid as provided under this subsection, the procedure for subpoenaing witnesses shall  
8 comply with ORS 136.570.

9 (3) If a person with a right to a counsel under ORS 426.100 **or section 2 of this 2013 Act** is  
10 determined to be financially eligible for appointed counsel at state expense, the public defense ser-  
11 vices executive director shall determine and pay, as provided in ORS 135.055, the reasonable ex-  
12 penses related to the representation of the person and compensation for legal counsel. The expenses  
13 and compensation so allowed shall be paid by the public defense services executive director from  
14 funds available for the purpose.

15 (4) The authority shall pay the costs of expenses incurred under ORS 426.100 by the Attorney  
16 General's office. Any costs for district attorneys or other counsel appointed to assume responsibility  
17 for presenting the state's case shall be paid by the county where the commitment hearing is held,  
18 subject to reimbursement under ORS 426.310.

19 (5) All costs incurred in connection with a proceeding under ORS 426.180 **or section 2 of this**  
20 **2013 Act**, including the costs of transportation, commitment and delivery of the person, shall be paid  
21 by the county of which the person is a resident. If the person is not a resident of this state, then  
22 the costs incurred in connection with the proceeding shall be paid by the county from which the  
23 emergency admission was made.

24 (6) All costs incurred in connection with a proceeding under ORS 426.180 for the commitment  
25 of a person from a reservation, including the cost of transportation, commitment and delivery of the  
26 person, shall be paid by the governing body of the reservation of which the person is a resident.

27 **SECTION 7. This 2013 Act being necessary for the immediate preservation of the public**  
28 **peace, health and safety, an emergency is declared to exist, and this 2013 Act takes effect**  
29 **on its passage.**

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