

Senate Bill 132

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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**.

Provides that procedures applicable to determining fitness to proceed of criminal defendants prior to trial are applicable to defendants alleged to have violated probation or committed contempt of court.

Authorizes superintendent of state mental hospital to enter into agreement with director of other facility as to location of fitness to proceed examination if court orders defendant committed to state mental hospital.

Authorizes superintendent of state mental hospital to enter into agreement with director of other facility to transfer location of defendant's treatment if defendant is committed to custody of superintendent for purposes of treatment to gain or regain fitness to proceed.

Prohibits commitment of defendant for purpose of examination or treatment to gain or regain fitness to proceed if defendant not charged with at least Class A misdemeanor or alleged to have violated probation sentence for Class A misdemeanor.

Authorizes further commitment, during criminal proceeding, of defendant charged with murder who has been found fit to proceed after prior commitment if certain findings are made.

Establishes procedures for court to order involuntary administration of medication for purpose of defendant gaining or regaining fitness to proceed.

A BILL FOR AN ACT

1
2 Relating to fitness to proceed; creating new provisions; and amending ORS 161.360, 161.365 and
3 161.370.

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

5 **SECTION 1.** ORS 161.360 is amended to read:

6 161.360. (1) If, *[before or]* during *[the trial in any]* a criminal *[case]* **proceeding**, the court has
7 reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an
8 examination in the manner provided in ORS 161.365.

9 (2) A defendant may be found incapacitated if, as a result of mental disease or defect, the de-
10 fendant is unable:

11 (a) To understand the nature of the proceedings against the defendant; or

12 (b) To assist and cooperate with the counsel of the defendant; or

13 (c) To participate in the defense of the defendant.

14 (3) **As used in this section and ORS 161.365 and 161.370, unless the context requires oth-**
15 **erwise:**

16 (a) **"Criminal proceeding" means a proceeding in which a defendant is responding to:**

17 (A) **A criminal charge, including an alleged violation of a municipal ordinance;**

18 (B) **An alleged probation violation; or**

19 (C) **An allegation of contempt of court.**

20 (b) **"Defendant" means a person who is before a court to respond to:**

21 (A) **A criminal charge, including an alleged violation of a municipal ordinance;**

22 (B) **An alleged probation violation; 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 **(C) An allegation of contempt of court.**

2 **SECTION 2.** ORS 161.365 is amended to read:

3 161.365. (1)(a) When the court has reason to doubt the defendant's fitness to proceed by reason
4 of incapacity as described in ORS 161.360, the court may call any witness to its assistance in
5 reaching its decision and shall order that a community mental health program director or the
6 director's designee consult with the defendant to determine whether services and supervision nec-
7 essary to safely restore the defendant's fitness to proceed are available in the community. After the
8 consultation, the program director or the director's designee shall provide to the court a copy of the
9 findings resulting from the consultation. If the court determines the assistance of a psychiatrist or
10 psychologist would be helpful, the court [*may*] **shall**:

11 [(a)] **(A)** Order that a psychiatric or psychological examination of the defendant be conducted
12 by a certified evaluator, as defined in ORS 161.309, **in a community practice** [*and a report of the*
13 *examination be prepared*]; or

14 [(b)] **(B)** Order the defendant to be committed for the purpose of an examination for a period
15 not exceeding 30 days to a state mental hospital or other facility designated by the Oregon Health
16 Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient
17 facility designated by the authority if the defendant is under 18 years of age.

18 **(b) Notwithstanding paragraph (a) of this subsection, the court may not order the de-**
19 **fendant to be committed for the purpose of an examination unless:**

20 **(A) The defendant is charged with a Class A misdemeanor or a more serious offense or,**
21 **if the defendant is alleged to have violated a municipal ordinance, the defendant is charged**
22 **with an offense equivalent to a Class A misdemeanor or a more serious offense; or**

23 **(B) The defendant is alleged to have violated a probation sentence imposed on a Class A**
24 **misdemeanor or a more serious offense.**

25 **(2)(a) If the court orders a defendant who is at least 18 years of age to be committed for**
26 **the purpose of an examination under subsection (1)(a) of this section, during the period of**
27 **commitment the superintendent of the state mental hospital may:**

28 **(A) Keep the defendant at the state mental hospital for a period of observation and have**
29 **the defendant examined at the state mental hospital;**

30 **(B) Have the defendant examined at the state mental hospital as an outpatient exam-**
31 **ination; or**

32 **(C) Have the defendant examined at another facility, by agreement with the authority**
33 **responsible for that facility, if the superintendent determines that examination at another**
34 **facility is medically appropriate for the defendant and is necessary to protect the safety and**
35 **welfare of the defendant or others.**

36 **(b) As used in this subsection, "another facility" includes but is not limited to a hospital,**
37 **a correctional facility or a state or local institution.**

38 [(2)] **(3) After examining the defendant under subsection (1) of this section, the certified**
39 **evaluator shall prepare a** [*The*] **report** [*of an examination described in this section must include*]
40 **that includes**, but is not necessarily limited to, the following:

41 (a) A description of the nature of the examination;

42 (b) A statement of the mental condition of the defendant;

43 (c) If the defendant suffers from a mental disease or defect, an opinion as to whether the de-
44 fendant is incapacitated within the description set out in ORS 161.360; and

45 (d) If the defendant is incapacitated within the description set out in ORS 161.360, a recom-

1 mendment of treatment and services necessary to restore capacity.

2 [(3)] (4) Except when the defendant and the court both request to the contrary, the report may
3 not contain any findings or conclusions as to whether the defendant as a result of mental disease
4 or defect was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act
5 charged.

6 [(4)] (5) If the examination by the [*psychiatrist or psychologist*] **certified evaluator** cannot be
7 conducted by reason of the unwillingness of the defendant to participate in the examination, the
8 report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the
9 defendant was the result of mental disease or defect affecting capacity to proceed.

10 [(5)] (6) The report shall be filed in triplicate with the clerk of the court, who shall cause copies
11 to be delivered to the [*district*] **prosecuting** attorney and to counsel for defendant.

12 [(6)(a)] (7)(a) When upon motion of the court or a financially eligible defendant, the court has
13 ordered a psychiatric or psychological examination of the defendant, a county or justice court shall
14 order the county to pay, and a circuit court shall order the public defense services executive di-
15 rector to pay from funds available for the purpose:

16 (A) A reasonable fee if the examination of the defendant is conducted by a [*psychiatrist or psy-*
17 *chologist*] **certified evaluator** in [*private*] **community** practice; and

18 (B) All costs including transportation of the defendant if the examination is conducted by a
19 [*psychiatrist or psychologist*] **certified evaluator** in the employ of the Oregon Health Authority,
20 [*or*] a community mental health program established under ORS 430.610 to 430.670 **or a secure in-**
21 **tensive community inpatient facility if the defendant is under 18 years of age.**

22 (b) When an examination is ordered at the request or with the acquiescence of a defendant who
23 is determined not to be financially eligible, the examination shall be performed at the defendant's
24 expense. When an examination is ordered at the request of the prosecution, the county shall pay for
25 the expense of the examination.

26 [(7)] (8) The Oregon Health Authority shall establish by rule standards for the consultation de-
27 scribed in subsection (1) of this section.

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

29 161.370. (1) [*When the defendant's fitness to proceed is drawn in question,*] **After the report of**
30 **a certified evaluator has been filed with the court as described in ORS 161.365,** the issue of
31 **the defendant's fitness to proceed** shall be determined by the court. If neither the prosecuting
32 attorney nor counsel for the defendant contests the finding of the report [*filed under ORS 161.365*],
33 the court may make the determination on the basis of the report. If the finding is contested, the
34 court shall hold a hearing on the issue. If the report is received in evidence in the hearing, the party
35 who contests the finding has the right to summon and to cross-examine any [*psychiatrist or psy-*
36 *chologist*] **certified evaluator** who submitted the report and to offer evidence upon the issue. Other
37 evidence regarding the defendant's fitness to proceed may be introduced by either party.

38 (2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal proceed-
39 ing against the defendant shall be suspended and:

40 [(a)] (A) If, **based on the evidence before the court and the consultation described in ORS**
41 **161.365 (1) concerning services and supervision available in the community,** the court finds that
42 the defendant is dangerous to self or others as a result of mental disease or defect, or that[, *based*
43 *on the findings resulting from the consultation described in ORS 161.365 (1),*] the services and super-
44 vision necessary to restore the defendant's fitness to proceed are not available in the community,
45 the court shall commit the defendant to the custody of the superintendent of [*a*] **the** state mental

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

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

8 **(b) If the court commits the defendant to the custody of the superintendent of a state
 9 mental hospital under paragraph (a) of this subsection, the superintendent may:**

10 **(A) Admit the defendant to the state mental hospital; or**

11 **(B) Treat the defendant at another facility, by agreement with the authority responsible
 12 for that facility, if the superintendent determines that treatment at another facility is med-
 13 ically appropriate for the defendant and is necessary to protect the safety and welfare of the
 14 defendant or others.**

15 **(c) As used in this subsection, “another facility” includes but is not limited to a hospital,
 16 a correctional facility or a state or local institution.**

17 **(d) Notwithstanding paragraph (a) of this subsection, the court may not order the de-
 18 fendant to be committed under this section unless:**

19 **(A) The defendant is charged with a Class A misdemeanor or a more serious offense or,
 20 if the defendant is alleged to have violated a municipal ordinance, the defendant is charged
 21 with an offense equivalent to a Class A misdemeanor or a more serious offense; or**

22 **(B) The defendant is alleged to have violated a probation sentence imposed on a Class A
 23 misdemeanor or a more serious offense.**

24 (3) When a defendant is released on supervision under subsection [(2)(b)] **(2)(a)(B)** of this sec-
 25 tion, the court may place conditions that the court deems appropriate on the release, including the
 26 requirement that the defendant regularly report to [the authority or a community mental health pro-
 27 gram for examination to determine if the defendant has gained or regained capacity to stand trial.] **a
 28 community mental health provider for examination to determine if the defendant has gained
 29 or regained fitness to proceed. The court may further order, as a condition of release, that
 30 the defendant cooperate with and accept treatment necessary to gain or regain fitness to
 31 proceed.**

32 **(4)(a)** When the court, on its own motion or upon the application of the superintendent of the
 33 hospital or director of the facility in which the defendant is committed, a person examining the de-
 34 fendant as a condition of release on supervision, or either party, determines, after a hearing, if a
 35 hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal
 36 proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed
 37 since the commitment or release of the defendant on supervision that it would be unjust to resume
 38 the criminal proceeding, the court on motion of either party may dismiss the [charge] **criminal
 39 proceeding** and may order the defendant to be discharged or cause a proceeding to be commenced
 40 forthwith under ORS 426.070 to 426.170, **426.701** or 427.235 to 427.290.

41 **(b) If the criminal proceeding resumes under paragraph (a) of this subsection and the
 42 defendant is charged with murder, the court may order that the defendant be further com-
 43 mitted to the custody of the superintendent of the state mental hospital or the director of
 44 a facility designated by the Oregon Health Authority during the criminal proceeding in order
 45 to maintain the defendant’s fitness to proceed if the court finds that:**

1 (A) The defendant has a history of losing fitness to proceed upon discharge from com-
2 mitment to a state mental hospital or other facility; and

3 (B) The defendant is likely to lose fitness to proceed during the criminal proceeding
4 without continuing care from the state mental hospital or other facility.

5 (c) If the court orders further commitment to the custody of the superintendent of a
6 state mental hospital under paragraph (b) of this subsection, the superintendent may:

7 (A) Admit the defendant to the state mental hospital; or

8 (B) Treat the defendant at another facility, by agreement with the authority responsible
9 for that facility, if the superintendent determines that treatment at another facility is med-
10 ically appropriate for the defendant and is necessary to protect the safety and welfare of the
11 defendant or others.

12 (d) If the court orders further commitment under paragraph (b) of this subsection, the
13 superintendent or director shall submit a status report to the court concerning the
14 defendant's fitness to proceed within 180 days of the commitment order and within every 180
15 days thereafter.

16 (e) A defendant further committed under paragraph (b) of this subsection shall be dis-
17 charged from commitment at the conclusion of the criminal proceeding.

18 (f) As used in this subsection, "another facility" includes but is not limited to a hospital,
19 a correctional facility or a state or local institution.

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

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

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

29 (A) The defendant has the present capacity to [*stand trial*] **proceed**;

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

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

36 (c) **Notify the court if court-ordered involuntary medication is necessary for the defend-**
37 **ant to gain or regain the capacity to proceed and, if appropriate, submit a report to the court**
38 **under section 5 of this 2017 Act.**

39 (6)(a) If the superintendent or director determines that there is a substantial probability that,
40 in the foreseeable future, the defendant will gain or regain the capacity to [*stand trial*] **proceed**,
41 unless the court otherwise orders, the defendant shall remain in the superintendent's or director's
42 custody where the defendant shall receive treatment designed for the purpose of enabling the de-
43 fendant to gain or regain capacity. In keeping with the notice requirement under subsection (5)(b)
44 of this section, the superintendent or director shall, for the duration of the defendant's period of
45 commitment, submit a progress report to the committing court, concerning the defendant's capacity

1 or incapacity, at least once every 180 days as measured from the date of the defendant's delivery
2 into the superintendent's or director's custody.

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

9 (7)(a) A defendant [*who remains*] committed under [*subsection*] **subsections (2) or (6)** of this
10 section shall be discharged within a period of time that is reasonable for making a determination
11 concerning whether or not, and when, the defendant may gain or regain capacity. However, re-
12 gardless of the number of charges **or alleged offenses** with which the defendant is accused, in no
13 event shall the defendant be committed for longer than whichever of the following, measured from
14 the defendant's initial custody date, is shorter:

15 (A) Three years; or

16 (B) A period of time equal to the **total** maximum sentence the court could have imposed if the
17 defendant had been convicted **of the crime or crimes charged, found in violation of probation**
18 **or otherwise incarcerated as a result of the criminal proceeding.**

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

21 (A) The initial custody date is the date on which the defendant is first committed under this
22 section [*on any charge alleged in the accusatory instrument*] **in the criminal proceeding; [and]**

23 **(B) The period of commitment includes any time when a defendant is being treated at**
24 **another facility under subsection (2)(b) of this section; and**

25 [*(B)*] (C) The defendant shall be given credit [*against each charge alleged in the accusatory in-*
26 *strument*] for each day the defendant is committed under this section, whether the days are consec-
27 utive or are interrupted by a period of time during which the defendant has gained or regained
28 fitness to proceed **or during which the defendant is being treated at another facility under**
29 **subsection (2)(b) or (4)(b) of this section.**

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

33 (9) When the committing court receives a notice from the superintendent or director under
34 subsection (5) or (8) of this section concerning the defendant's progress or lack thereof, the com-
35 mitting court shall determine, after a hearing, if a hearing is requested, whether the defendant
36 presently has the capacity to [*stand trial*] **proceed.**

37 (10) If at any time the court determines that the defendant lacks the capacity to [*stand trial*]
38 **proceed**, the court shall further determine whether there is a substantial probability that the de-
39 fendant, in the foreseeable future, will gain or regain the capacity to [*stand trial*] **proceed** and
40 whether the defendant is entitled to discharge under subsection (7) of this section. If the court de-
41 termines that there is no substantial probability that the defendant, in the foreseeable future, will
42 gain or regain the capacity to [*stand trial*] **proceed** or that the defendant is entitled to discharge
43 under subsection (7) of this section, the court shall dismiss, without prejudice, [*all charges*] **the**
44 **criminal proceeding** against the defendant and:

45 (a) Order that the defendant be discharged; or

(b) Initiate commitment proceedings under ORS 426.070, **426.701** or 427.235 to 427.290.

(11) All notices **and reports** required under this section shall be filed with the clerk of the court and delivered to both the [*district*] **prosecuting** attorney and the counsel for the defendant.

(12) If the defendant gains or 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 to the custody of a secure intensive community inpatient*] **or other** facility [, *designated by the Oregon Health Authority*].

(13) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this section, 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 **or similar legal instrument** is insufficient, that the statute of limitations has run[,], **or** that double jeopardy principles apply, or upon any other ground at the discretion of the court [*which*] **that** the court deems susceptible of fair determination prior to [*trial*] **the criminal proceeding**.

SECTION 4. Section 5 of this 2017 Act is added to and made a part of ORS 161.290 to 161.370.

SECTION 5. (1) If, at any point while the defendant is in the custody under ORS 161.370 of the superintendent of the state mental hospital, the superintendent determines that medication is the recommended treatment in order to allow the defendant to gain or regain fitness to proceed, the defendant is refusing to take the recommended medication and the defendant cannot be involuntarily medicated without a court order, the superintendent shall submit a report of the determination to the court.

(2) The report described in subsection (1) of this section shall include:

(a) Information regarding the benefits and side effects of each recommended medication;

(b) Information concerning the defendant’s refusal to take the recommended medication;
and

(c) The likelihood that the medication will allow the defendant to gain or regain fitness to proceed.

(3)(a) Based upon the report described in subsection (1) of this section, the prosecuting attorney may request in writing that the court authorize the involuntary administration of medication to the defendant. The prosecuting attorney shall provide a copy of the request to the defendant.

(b) Upon receiving a request described in paragraph (a) of this subsection, the court shall hold a hearing if either the prosecuting attorney or the defendant requests a hearing. At the hearing, the court shall determine whether to issue an order authorizing the involuntary administration of medication to the defendant.

(c) In order to enter an order authorizing the involuntary administration of medication to the defendant, the court must find that:

(A) Involuntary medication of the defendant is not otherwise authorized by law;

(B) There are important state interests at stake in the prosecution of the defendant;

(C) The recommended medication will significantly further the important state interests because:

(i) It is substantially likely that the medication will render the defendant fit to proceed;
and

(ii) It is substantially unlikely that the medication will cause side effects that will impair

1 **the fairness of the criminal proceeding;**

2 **(D) Involuntary administration of medication is necessary to further the important state**
3 **interests because there are no alternative, less intrusive treatments that would produce the**
4 **same result as the medication; and**

5 **(E) Administration of the medication is medically appropriate because it is in the**
6 **defendant's best medical interest in light of the defendant's medical condition.**

7 **(d) A court order authorizing the involuntary administration of medication to a defendant**
8 **under this section must specify:**

9 **(A) The specific medication or type of medications permitted to be administered to the**
10 **defendant;**

11 **(B) The maximum dosage that may be administered; and**

12 **(C) The duration of time that the state mental hospital may involuntarily medicate the**
13 **defendant before reporting back to the court on the defendant's mental condition and**
14 **progress towards gaining or regaining fitness to proceed. The duration of time shall not ex-**
15 **ceed the maximum period of the defendant's commitment to the state mental hospital, or**
16 **180 calendar days, whichever is shorter.**

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