

Requested by SENATE COMMITTEE ON JUDICIARY

**PROPOSED AMENDMENTS TO
SENATE BILL 132**

1 On page 1 of the printed bill, line 2, delete “161.360,”.

2 Delete lines 5 through 22 and delete pages 2 through 8 and insert:

3 **“SECTION 1. ORS 161.365 is amended to read:**

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

14 “(a) Order that a psychiatric or psychological examination of the defend-
15 ant be conducted by a certified evaluator, as defined in ORS 161.309, **in a**
16 **community practice** [*and a report of the examination be prepared*]; or

17 “(b) Order the defendant to be committed for the purpose of an examina-
18 tion for a period not exceeding 30 days to a state mental hospital or other
19 facility designated by the Oregon Health Authority if the defendant is at
20 least 18 years of age, or to a secure intensive community inpatient facility
21 designated by the authority if the defendant is under 18 years of age.

1 **“(2)(a) If the court orders a defendant who is at least 18 years of**
2 **age to be committed for the purpose of an examination under sub-**
3 **section (1) of this section, during the period of commitment the su-**
4 **perintendent of the state mental hospital may:**

5 **“(A) Keep the defendant at the state mental hospital for a period**
6 **of observation and have the defendant examined at the state mental**
7 **hospital; or**

8 **“(B) Allow the defendant to remain at the facility in which the de-**
9 **fendant is housed during the period of commitment and:**

10 **“(i) Have the defendant transported to the state mental hospital for**
11 **an examination without admitting the defendant to the state mental**
12 **hospital; or**

13 **“(ii) Have the defendant examined at the facility in which the de-**
14 **fendant is housed, if the authority responsible for the facility agrees**
15 **and a psychiatrist designated by the superintendent determines that**
16 **examination at the facility in which the defendant is housed is med-**
17 **ically appropriate for the defendant.**

18 **“(b) As used in this subsection, ‘facility’ includes but is not limited**
19 **to a hospital, a correctional facility or a state or local institution.**

20 **“[(2)] (3) After examining the defendant under subsection (1) of this**
21 **section, the certified evaluator shall prepare a [The] report [of an exam-**
22 **ination described in this section must include] that includes, but is not**
23 **necessarily limited to, the following:**

24 **“(a) A description of the nature of the examination;**

25 **“(b) A statement of the mental condition of the defendant;**

26 **“(c) If the defendant suffers from a mental disease or defect, an opinion**
27 **as to whether the defendant is incapacitated within the description set out**
28 **in ORS 161.360; and**

29 **“(d) If the defendant is incapacitated within the description set out in**
30 **ORS 161.360, a recommendation of treatment and services necessary to re-**

1 store capacity.

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

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

13 “[5] (6) The report shall be filed in triplicate with the clerk of the court,
14 who shall cause copies to be delivered to the [*district*] **prosecuting** attorney
15 and to counsel for defendant.

16 “[6](a) (7)(a) When upon motion of the court or a financially eligible
17 defendant, the court has ordered a psychiatric or psychological examination
18 of the defendant, a county or justice court shall order the county to pay, and
19 a circuit court shall order the public defense services executive director to
20 pay from funds available for the purpose:

21 “(A) A reasonable fee if the examination of the defendant is conducted
22 by a [*psychiatrist or psychologist*] **certified evaluator** in [*private*] **commu-**
23 **nity** practice; and

24 “(B) All costs including transportation of the defendant if the examina-
25 tion is conducted by a [*psychiatrist or psychologist*] **certified evaluator** in
26 the employ of the Oregon Health Authority, [*or*] a community mental health
27 program established under ORS 430.610 to 430.670 **or a secure intensive**
28 **community inpatient facility if the defendant is under 18 years of**
29 **age.**

30 “(b) When an examination is ordered at the request or with the

1 acquiescence of a defendant who is determined not to be financially eligible,
2 the examination shall be performed at the defendant's expense. When an ex-
3 amination is ordered at the request of the prosecution, the county shall pay
4 for the expense of the examination.

5 “[7] (8) The Oregon Health Authority shall establish by rule standards
6 for the consultation described in subsection (1) of this section.

7 **“SECTION 2.** ORS 161.370 is amended to read:

8 “161.370. (1) When the defendant's fitness to proceed is drawn in question,
9 the issue shall be determined by the court. If neither the prosecuting attor-
10 ney nor counsel for the defendant contests the finding of [*the*] **a** report filed
11 under ORS 161.365, the court may make the determination on the basis of the
12 report. If the finding is contested, the court shall hold a hearing on the is-
13 sue. If the report is received in evidence in the hearing, the party who con-
14 tests the finding has the right to summon and to cross-examine any
15 [*psychiatrist or psychologist*] **certified evaluator** who submitted the report
16 and to offer evidence upon the issue. Other evidence regarding the
17 defendant's fitness to proceed may be introduced by either party.

18 “(2)(a) If the court determines that the defendant lacks fitness to proceed,
19 the criminal proceeding against the defendant shall be suspended and:

20 “[a] (A) If, **based on the evidence before the court and the consul-**
21 **tation described in ORS 161.365 (1) concerning services and supervision**
22 **available in the community**, the court finds that the defendant is danger-
23 ous to self or others as a result of mental disease or defect, or that[, *based*
24 *on the findings resulting from the consultation described in ORS 161.365 (1),*]
25 the services and supervision necessary to restore the defendant's fitness to
26 proceed are not available in the community, the court shall commit the de-
27 fendant to the custody of the superintendent of [a] **the** state mental hospital
28 or director of a facility, designated by the Oregon Health Authority, if the
29 defendant is at least 18 years of age, or to the custody of the director of a
30 secure intensive community inpatient facility designated by the authority if

1 the defendant is under 18 years of age; or

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

7 “**(b) If the court commits a defendant who is serving a sentence in**
8 **a Department of Corrections facility to the custody of the superinten-**
9 **dent of a state mental hospital under paragraph (a) of this subsection,**
10 **the superintendent may:**

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

12 “**(B) Treat the defendant at a Department of Corrections facility,**
13 **if the authority responsible for the facility agrees and a psychiatrist**
14 **designated by the superintendent determines that treatment in the**
15 **Department of Corrections facility is medically appropriate for the**
16 **defendant and is necessary to protect the safety and welfare of the**
17 **defendant or others.**

18 “(3) When a defendant is released on supervision under subsection
19 [*(2)(b)*] **(2)(a)(B)** of this section, the court may place conditions that the
20 court deems appropriate on the release, including the requirement that the
21 defendant regularly report to [*the authority or a community mental health*
22 *program for examination to determine if the defendant has gained or regained*
23 *capacity to stand trial.*] **a community mental health provider for exam-**
24 **ination to determine if the defendant has gained or regained fitness**
25 **to proceed. The court may further order, as a condition of release, that**
26 **the defendant cooperate with and accept treatment necessary to gain**
27 **or regain fitness to proceed.**

28 “(4)(a) When the court, on its own motion or upon the application of the
29 superintendent of the hospital or director of the facility in which the de-
30 fendant is committed, a person examining the defendant as a condition of

1 release on supervision, or either party, determines, after a hearing, if a
2 hearing is requested, that the defendant has gained or regained fitness to
3 proceed, the criminal proceeding shall be resumed. If, however, the court is
4 of the view that so much time has elapsed since the commitment or release
5 of the defendant on supervision that it would be unjust to resume the crim-
6 inal proceeding, the court on motion of either party may dismiss the charge
7 and may order the defendant to be discharged or cause a proceeding to be
8 commenced forthwith under ORS 426.070 to 426.170, **426.701** or 427.235 to
9 427.290.

10 **“(b) If the criminal proceeding resumes under paragraph (a) of this**
11 **subsection and the defendant is in custody and charged with murder,**
12 **the court may order that the defendant be further committed to the**
13 **custody of the superintendent of the state mental hospital or the di-**
14 **rector of a facility designated by the Oregon Health Authority during**
15 **the criminal proceeding, for a period of up to one year, in order to**
16 **maintain the defendant’s fitness to proceed if the court finds that:**

17 **“(A) The defendant has a history of losing fitness to proceed upon**
18 **discharge from commitment to a state mental hospital or other facil-**
19 **ity; and**

20 **“(B) The defendant is likely to lose fitness to proceed during the**
21 **criminal proceeding without continuing care from the state mental**
22 **hospital or other facility.**

23 **“(c) If the court orders further commitment to the custody of the**
24 **superintendent of a state mental hospital under paragraph (b) of this**
25 **subsection, the superintendent may:**

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

27 **“(B) Treat the defendant at a correctional facility, if the authority**
28 **responsible for the facility agrees and a psychiatrist designated by the**
29 **superintendent determines that treatment in the correctional facility**
30 **is medically appropriate for the defendant and is necessary to protect**

1 **the safety and welfare of the defendant or others.**

2 **“(d) If the court orders further commitment under paragraph (b)**
3 **of this subsection, the superintendent or director shall submit an ini-**
4 **tial status report to the court concerning the defendant’s fitness to**
5 **proceed within 180 days of the commitment order, and shall submit**
6 **an updated status report to the court within 180 days of the date of**
7 **the initial status report.**

8 **“(e) A defendant further committed under paragraph (b) of this**
9 **subsection shall be discharged from commitment at the end of the one**
10 **year commitment period or the conclusion of the criminal proceeding,**
11 **whichever occurs first.**

12 **“(5) The superintendent of [a] the state mental hospital or director of a**
13 **facility to which the defendant is committed shall cause the defendant to be**
14 **evaluated within 60 days from the defendant’s delivery into the**
15 **superintendent’s or director’s custody, for the purpose of determining**
16 **whether there is a substantial probability that, in the foreseeable future, the**
17 **defendant will have the capacity to [stand trial] proceed. In addition, the**
18 **superintendent or director shall:**

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

22 **“(b) Within 90 days of the defendant’s delivery into the superintendent’s**
23 **or director’s custody, notify the committing court that:**

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

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

27 **“(C) There is a substantial probability that, in the foreseeable future, the**
28 **defendant will gain or regain the capacity to [stand trial] proceed. If the**
29 **probability exists, the superintendent or director shall give the court an es-**
30 **timate of the time in which the defendant, with appropriate treatment, is**

1 expected to gain or regain capacity.

2 “(c) **Notify the court if court-ordered involuntary medication is**
3 **necessary for the defendant to gain or regain the capacity to proceed**
4 **and, if appropriate, submit a report to the court under section 4 of this**
5 **2017 Act.**

6 “(6)(a) If the superintendent or director determines that there is a sub-
7 stantial probability that, in the foreseeable future, the defendant will gain
8 or regain the capacity to [*stand trial*] **proceed**, unless the court otherwise
9 orders, the defendant shall remain in the superintendent’s or director’s cus-
10 tody where the defendant shall receive treatment designed for the purpose
11 of enabling the defendant to gain or regain capacity. In keeping with the
12 notice requirement under subsection (5)(b) of this section, the superintendent
13 or director shall, for the duration of the defendant’s period of commitment,
14 submit a progress report to the committing court, concerning the defendant’s
15 capacity or incapacity, at least once every 180 days as measured from the
16 date of the defendant’s delivery into the superintendent’s or director’s cus-
17 tody.

18 “(b) Notwithstanding paragraph (a) of this subsection, if the superinten-
19 dent or director determines that a defendant committed under this section
20 is no longer dangerous to self or others as a result of mental disease or de-
21 fect, or that the services and supervision necessary to restore the defendant’s
22 fitness to proceed are available in the community, the superintendent or di-
23 rector shall file notice of that determination with the court. Upon receipt
24 of the notice, the court shall order the person released on supervision as
25 described in subsection (3) of this section.

26 “(7)(a) A defendant [*who remains*] committed under [*subsection*] **sub-**
27 **sections (2) or (6)** of this section shall be discharged within a period of time
28 that is reasonable for making a determination concerning whether or not,
29 and when, the defendant may gain or regain capacity. However, regardless
30 of the number of charges with which the defendant is accused, in no event

1 shall the defendant be committed for longer than whichever of the following,
2 measured from the defendant's initial custody date, is shorter:

3 “(A) Three years; or

4 “(B) A period of time equal to the **total** maximum sentence the court
5 could have imposed if the defendant had been convicted **of the crime or**
6 **crimes charged.**

7 “(b) For purposes of calculating the maximum period of commitment de-
8 scribed in paragraph (a) of this subsection:

9 “(A) The initial custody date is the date on which the defendant is first
10 committed under this section on any charge alleged in the accusatory in-
11 strument; *[and]*

12 “(B) **The period of commitment includes any time when a defendant**
13 **is being treated at another facility under subsection (2)(b) of this sec-**
14 **tion;**

15 “[*(B)*] (C) The defendant shall be given credit *[against each charge alleged*
16 *in the accusatory instrument]* for each day the defendant is committed under
17 this section, whether the days are consecutive or are interrupted by a period
18 of time during which the defendant has gained or regained fitness to proceed
19 **or during which the defendant is being treated at another facility un-**
20 **der subsection (2)(b) of this section; and**

21 “(D) **The period of commitment does not include the time in which**
22 **the defendant is further committed for the purpose of maintaining**
23 **fitness to proceed as described in subsection (4)(b) of this section.**

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

28 “(9) When the committing court receives a notice from the superintendent
29 or director under subsection (5) or (8) of this section concerning the
30 defendant's progress or lack thereof, the committing court shall determine,

1 after a hearing, if a hearing is requested, whether the defendant presently
2 has the capacity to [*stand trial*] **proceed**.

3 “(10) If at any time the court determines that the defendant lacks the
4 capacity to [*stand trial*] **proceed**, the court shall further determine whether
5 there is a substantial probability that the defendant, in the foreseeable fu-
6 ture, will gain or regain the capacity to [*stand trial*] **proceed** and whether
7 the defendant is entitled to discharge under subsection (7) of this section. If
8 the court determines that there is no substantial probability that the de-
9 fendant, in the foreseeable future, will gain or regain the capacity to [*stand*
10 *trial*] **proceed** or that the defendant is entitled to discharge under subsection
11 (7) of this section, the court shall dismiss, without prejudice, all charges
12 against the defendant and:

13 “(a) Order that the defendant be discharged; or

14 “(b) Initiate commitment proceedings under ORS 426.070, **426.701** or
15 427.235 to 427.290.

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

19 “(12) If the defendant gains or regains fitness to proceed, the term of any
20 sentence received by the defendant for conviction of the crime charged shall
21 be reduced by the amount of time the defendant was committed under this
22 section to [*the custody of*] a state mental hospital[, *or to the custody of a se-*
23 *cure intensive community inpatient*] **or any other** facility[, *designated by the*
24 *Oregon Health Authority*].

25 “(13) Notwithstanding the suspension of the criminal proceeding under
26 subsection (2) of this section, the fact that the defendant is unfit to proceed
27 does not preclude any objection through counsel and without the personal
28 participation of the defendant on the grounds that the indictment is insuffi-
29 cient, that the statute of limitations has run[,] **or** that double jeopardy
30 principles apply, or upon any other ground at the discretion of the court

1 [which] that the court deems susceptible of fair determination prior to trial.

2 **“SECTION 3. Section 4 of this 2017 Act is added to and made a part**
3 **of ORS 161.290 to 161.370.**

4 **“SECTION 4. (1) If, at any point while the defendant is in the cus-**
5 **tody under ORS 161.370 of the superintendent of the state mental**
6 **hospital, the superintendent determines that medication is the re-**
7 **commended treatment in order to allow the defendant to gain or re-**
8 **gain fitness to proceed, the defendant is refusing to take the**
9 **recommended medication and the defendant cannot be involuntarily**
10 **medicated without a court order, the superintendent shall submit a**
11 **report of the determination to the court.**

12 **“(2) The report described in subsection (1) of this section shall in-**
13 **clude:**

14 **“(a) Information regarding the benefits and side effects of each re-**
15 **commended medication;**

16 **“(b) Information concerning the defendant’s refusal to take the re-**
17 **commended medication; and**

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

20 **“(3)(a) Based upon the report described in subsection (1) of this**
21 **section, the prosecuting attorney may request in writing that the**
22 **court authorize the involuntary administration of medication to the**
23 **defendant. The prosecuting attorney shall provide a copy of the re-**
24 **quest to the defendant.**

25 **“(b) Upon receiving a request described in paragraph (a) of this**
26 **subsection, the court shall hold a hearing if either the prosecuting**
27 **attorney or the defendant requests a hearing. At the hearing, the**
28 **court shall determine whether to issue an order authorizing the in-**
29 **voluntary administration of medication to the defendant.**

30 **“(c) In order to enter an order authorizing the involuntary admin-**

1 **istration of medication to the defendant, the court must find that:**

2 **“(A) Involuntary medication of the defendant is not otherwise au-**
3 **thorized by law;**

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

6 **“(C) The recommended medication will significantly further the**
7 **important state interests because:**

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

10 **“(ii) It is substantially unlikely that the medication will cause side**
11 **effects that will impair the fairness of the criminal proceeding;**

12 **“(D) Involuntary administration of medication is necessary to fur-**
13 **ther the important state interests because there are no alternative,**
14 **less intrusive treatments that would produce the same result as the**
15 **medication; and**

16 **“(E) Administration of the medication is medically appropriate be-**
17 **cause it is in the defendant’s best medical interest in light of the**
18 **defendant’s medical condition.**

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

21 **“(A) The specific medication or type of medications permitted to**
22 **be administered to the defendant;**

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

24 **“(C) The duration of time that the state mental hospital may in-**
25 **voluntarily medicate the defendant before reporting back to the court**
26 **on the defendant’s mental condition and progress towards gaining or**
27 **regaining fitness to proceed. The duration of time shall not exceed the**
28 **maximum period of the defendant’s commitment to the state mental**
29 **hospital, or 180 calendar days, whichever is shorter.”.**

30