

House Bill 2631

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Judiciary)

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**.

Requires that court-ordered fitness to proceed examination, filing of examination report and fitness to proceed determination all occur within 14 days of examination order if defendant is in custody, unless court grants extension.

Requires defendant found by court to lack fitness to proceed to be transported to state mental hospital or other facility for treatment, or released, as according to court order, within seven days of court order.

A BILL FOR AN ACT

1
2 Relating to fitness to proceed; amending ORS 161.365 and 161.370.

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

4 **SECTION 1.** ORS 161.365 is amended to read:

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

13 (a) Order that a psychiatric or psychological examination of the defendant be conducted by a
14 certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or

15 (b) Order the defendant to be committed for the purpose of an examination for a period not ex-
16 ceeding 30 days to a state mental hospital or other facility designated by the Oregon Health Au-
17 thority if the defendant is at least 18 years of age, or to a secure intensive community inpatient
18 facility designated by the authority if the defendant is under 18 years of age.

19 **(2)(a) If the defendant is in custody at the time that the court orders an examination**
20 **under subsection (1) of this section, and remains in custody or is committed for the exam-**
21 **ination, the examination must occur, and the report described in subsection (6) of this sec-**
22 **tion must be completed and filed, within 14 days of the court order for the examination.**

23 **(b) The court may extend the time period described in paragraph (a) of this subsection**
24 **by up to seven days, on motion by the defendant or the prosecuting attorney, if the court**
25 **finds that there are unusual or exigent circumstances justifying the extension.**

26 [(2)] (3) The report of an examination described in this section must include, but is not neces-
27 sarily limited to, the following:

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

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) A statement of the mental condition of the defendant;

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

4 (d) If the defendant is incapacitated within the description set out in ORS 161.360, a recom-
5 mendation of treatment and services necessary to restore capacity.

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

10 [(4)] (5) If the examination by the psychiatrist or psychologist cannot be conducted by reason
11 of the unwillingness of the defendant to participate in the examination, the report shall so state and
12 shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result
13 of mental disease or defect affecting capacity to proceed.

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

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

20 (A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or psy-
21 chologist in private practice; and

22 (B) All costs including transportation of the defendant if the examination is conducted by a
23 psychiatrist or psychologist in the employ of the Oregon Health Authority or a community mental
24 health program established under ORS 430.610 to 430.670.

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

29 [(7)] (8) The Oregon Health Authority shall establish by rule standards for the consultation de-
30 scribed in subsection (1) of this section.

31 **SECTION 2.** ORS 161.370 is amended to read:

32 161.370. (1)(a) When the defendant's fitness to proceed is drawn in question, the issue shall be
33 determined by the court.

34 (b) **If the defendant is in custody and the court ordered an examination under ORS**
35 **161.365, the court shall make the fitness to proceed determination within 14 days of the ex-**
36 **amination order. The court may extend the time period by up to seven days, on motion by**
37 **the defendant or the prosecuting attorney, if the court finds that there are unusual or**
38 **exigent circumstances justifying the extension.**

39 (c) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the
40 report filed under ORS 161.365, the court may make the **fitness to proceed** determination on the
41 basis of the report. If the finding is contested, the court shall hold a hearing on the issue. If the
42 report is received in evidence in the hearing, the party who contests the finding has the right to
43 summon and to cross-examine any psychiatrist or psychologist who submitted the report and to offer
44 evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be intro-
45 duced by either party.

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

3 (a) If the court finds that the defendant is dangerous to self or others as a result of mental
 4 disease or defect, or that, based on the findings resulting from the consultation described in ORS
 5 161.365 (1), the services and supervision necessary to restore the defendant's fitness to proceed are
 6 not available in the community, the court shall commit the defendant to the custody of the super-
 7 intendent of a state mental hospital or director of a facility, designated by the Oregon Health Au-
 8 thority, if the defendant is at least 18 years of age, or to the custody of the director of a secure
 9 intensive community inpatient facility designated by the authority if the defendant is under 18 years
 10 of age; or

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

15 **(3)(a) When a defendant is committed under subsection (2)(a) of this section, the defend-**
 16 **ant shall be transported to the state mental hospital or other facility within seven days of**
 17 **the commitment order.**

18 (b) When a defendant is released on supervision under subsection (2)(b) of this section, **the re-**
 19 **lease must occur within seven days of the court order.** The court may place conditions that the
 20 court deems appropriate on the release, including the requirement that the defendant regularly re-
 21 port to the authority or a community mental health program for examination to determine if the
 22 defendant has gained or regained capacity to stand trial.

23 (4) When the court, on its own motion or upon the application of the superintendent of the
 24 hospital or director of the facility in which the defendant is committed, a person examining the de-
 25 fendant as a condition of release on supervision, or either party, determines, after a hearing, if a
 26 hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal
 27 proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed
 28 since the commitment or release of the defendant on supervision that it would be unjust to resume
 29 the criminal proceeding, the court on motion of either party may dismiss the charge and may order
 30 the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070
 31 to 426.170 or 427.235 to 427.290.

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

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

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

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

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

44 (C) There is a substantial probability that, in the foreseeable future, the defendant will gain or
 45 regain the capacity to stand trial. If the probability exists, the superintendent or director shall give

1 the court an estimate of the time in which the defendant, with appropriate treatment, is expected
 2 to gain or regain capacity.

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

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

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

24 (A) Three years; or

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

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

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

31 (B) The defendant shall be given credit against each charge alleged in the accusatory instrument
 32 for each day the defendant is committed under this section, whether the days are consecutive or are
 33 interrupted by a period of time during which the defendant has gained or regained fitness to pro-
 34 ceed.

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

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

42 (10) If at any time the court determines that the defendant lacks the capacity to stand trial, the
 43 court shall further determine whether there is a substantial probability that the defendant, in the
 44 foreseeable future, will gain or regain the capacity to stand trial and whether the defendant is en-
 45 titled to discharge under subsection (7) of this section. If the court determines that there is no

1 substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity
2 to stand trial or that the defendant is entitled to discharge under subsection (7) of this section, the
3 court shall dismiss, without prejudice, all charges against the defendant and:

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

5 (b) Initiate commitment proceedings under ORS 426.070 or 427.235 to 427.290.

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

8 (12) If the defendant gains or regains fitness to proceed, the term of any sentence received by
9 the defendant for conviction of the crime charged shall be reduced by the amount of time the de-
10 fendant was committed under this section to the custody of a state mental hospital, or to the custody
11 of a secure intensive community inpatient facility, designated by the Oregon Health Authority.

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

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