

Senate Bill 184

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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**.

Authorizes court to initiate commitment proceedings for extremely dangerous person with mental illness if court determines that there is no substantial probability that defendant will gain or regain fitness to proceed.

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 161.365 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) The report of an examination described in this section must include, but is not necessarily
20 limited to, the following:

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

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

23 (c) If the defendant suffers from a qualifying mental disorder, an opinion as to whether the de-
24 fendant is incapacitated within the description set out in ORS 161.360; and

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

27 (3) Except when the defendant and the court both request to the contrary, the report may not
28 contain any findings or conclusions as to whether the defendant as a result of a qualifying mental

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 disorder was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act
2 charged.

3 (4) If the examination by the [*psychiatrist or psychologist*] **certified evaluator** cannot be con-
4 ducted by reason of the unwillingness of the defendant to participate in the examination, the report
5 must so state and must include, if possible, an opinion as to whether the unwillingness of the de-
6 fendant was the result of a qualifying mental disorder affecting capacity to proceed.

7 (5) The report must be filed with the clerk of the court, who shall cause copies to be delivered
8 to the district attorney and to counsel for defendant.

9 (6)(a) When upon motion of the court or a financially eligible defendant, the court has ordered
10 a psychiatric or psychological examination of the defendant, a county or justice court shall order
11 the county to pay, and a circuit court shall order the public defense services executive director to
12 pay from funds available for the purpose:

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

15 (B) All costs including transportation of the defendant if the examination is conducted by a
16 [*psychiatrist or psychologist*] **certified evaluator** in the employ of the Oregon Health Authority or
17 a community mental health program established under ORS 430.610 to 430.670.

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

22 (7) The Oregon Health Authority shall establish by rule standards for the consultation described
23 in subsection (1) of this section.

24 **(8) As used in this section and ORS 161.370, "certified evaluator" has the meaning given**
25 **that term in ORS 161.309.**

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

27 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-
28 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the
29 finding of the report filed under ORS 161.365, the court may make the determination on the basis
30 of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report
31 is received in evidence in the hearing, the party who contests the finding has the right to summon
32 and to cross-examine any [*psychiatrist or psychologist*] **certified evaluator** who submitted the report
33 and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed
34 may be introduced by either party.

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

37 (a) If the court finds that the defendant is dangerous to self or others as a result of a qualifying
38 mental disorder, or that, based on the findings resulting from the consultation described in ORS
39 161.365 (1), the services and supervision necessary to restore the defendant's fitness to proceed are
40 not available in the community, the court shall commit the defendant to the custody of the super-
41 intendent of a state mental hospital or director of a facility, designated by the Oregon Health Au-
42 thority, if the defendant is at least 18 years of age, or to the custody of the director of a secure
43 intensive community inpatient facility designated by the authority if the defendant is under 18 years
44 of age; or

45 (b) If the court does not make a finding described in paragraph (a) of this subsection, or if the

1 court determines that care other than commitment for incapacity to stand trial would better serve
2 the defendant and the community, the court shall release the defendant on supervision for as long
3 as the unfitness endures.

4 (3) When a defendant is released on supervision under subsection (2)(b) of this section, the court
5 may place conditions that the court deems appropriate on the release, including the requirement
6 that the defendant regularly report to the authority or a community mental health program for ex-
7 amination to determine if the defendant has gained or regained capacity to stand trial.

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

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

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

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

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

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

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

33 **(c) Notify the court if court-ordered involuntary medication is necessary for the defend-**
34 **ant to gain or regain the capacity to proceed and, if appropriate, submit a report to the court**
35 **under section 4 of this 2019 Act.**

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

45 (b) Notwithstanding paragraph (a) of this subsection, if the superintendent or director deter-

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

6 (c) A progress report described in paragraph (a) of this subsection may consist of an update to:

7 (A) The original examination report conducted under ORS 161.365; or

8 (B) An evaluation conducted under subsection (5) of this section, if the defendant did not receive
9 an examination under ORS 161.365.

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

16 (A) Three years; or

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

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; and

23 (B) The defendant shall be given credit against each charge alleged in the accusatory instru-
24 ment:

25 (i) For each day the defendant is committed under this section, whether the days are consecutive
26 or are interrupted by a period of time during which the defendant has gained or regained fitness to
27 proceed; and

28 (ii) Unless the defendant is charged with aggravated murder or a crime listed in ORS 137.700
29 (2), for each day the defendant is held in jail, whether the days are consecutive or are interrupted
30 by a period of time during which the defendant lacks fitness to proceed.

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

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

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

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

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

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

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

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

14 (14) At the time that the court determines that the defendant lacks fitness to proceed under
 15 subsection (2) of this section, the court shall notify the defendant that federal law prohibits the de-
 16 fendant from purchasing or possessing a firearm unless the person obtains relief from the prohibition
 17 under federal law. The court shall again notify the defendant of the prohibition if the court finds
 18 that the defendant has gained or regained fitness to proceed under subsection (4) of this section.

19 **SECTION 3. Section 4 of this 2019 Act is added to and made a part of ORS 161.290 to**
 20 **161.370.**

21 **SECTION 4. (1) If, at any point while the defendant is in the custody of the superinten-**
 22 **dent of the state mental hospital under ORS 161.370, the superintendent determines that**
 23 **medication is the recommended treatment in order to allow the defendant to gain or regain**
 24 **fitness to proceed, the defendant is refusing to take the recommended medication and the**
 25 **defendant cannot be involuntarily medicated without a court order, the superintendent shall**
 26 **submit a report of the determination to the court.**

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

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

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

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

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

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

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

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

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

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

1 **because:**

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

3 **and**

4 (ii) It is substantially unlikely that the medication will cause side effects that will impair
5 the fairness of the criminal proceeding;

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

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

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

13 (A) The specific medication or type of medications permitted to be administered to the
14 defendant;

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

16 (C) The duration of time that the state mental hospital may involuntarily medicate the
17 defendant before reporting back to the court on the defendant's mental condition and
18 progress towards gaining or regaining fitness to proceed. The duration of time shall not ex-
19 ceed the maximum period of the defendant's commitment to the state mental hospital, or
20 180 calendar days, whichever is shorter.

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