

**A-Engrossed**  
**Senate Bill 931**

Ordered by the Senate April 25  
Including Senate Amendments dated April 25

Sponsored by Senator PROZANSKI

**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.

**Provides that court has discretion over selection of alternate jurors and when alternate jurors are informed of alternate status.** Authorizes court, **with prior agreement of parties**, to replace discharged juror with alternate juror in either guilt or sentencing phase of criminal case after jury begins deliberations.

**A BILL FOR AN ACT**

1  
2 Relating to alternate jurors; amending ORS 136.260, 136.280, 136.773 and 163.150.

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

4 **SECTION 1.** ORS 136.260 is amended to read:

5 136.260. (1)(a) In the trial of a person charged with a crime, the court may in its discretion[, *after*  
6 *the jury is impaneled and sworn,*] direct the calling of additional jurors, to be known as "alternate  
7 jurors." The court may call:

8 (A) One to six additional jurors if the person is charged with a felony; and

9 (B) One to three additional jurors if the person is charged with a misdemeanor.

10 (b) Jurors called under paragraph (a) of this subsection:

11 (A) Must be drawn from the same source and in the same manner and must have the same  
12 qualifications as other jurors in the case.

13 (B) Are subject to the same examination and may be challenged in the same manner as other  
14 jurors.

15 (c) In the drawing of alternate jurors, the names of jurors excused for cause or on peremptory  
16 challenges in the selection of the jury to which the jurors shall serve as alternates must be excluded  
17 from the names from which the drawing is made.

18 (2) Each side is entitled to the following peremptory challenges in addition to those otherwise  
19 allowed by statute:

20 (a) If one or two alternate jurors are to be impaneled, each side is entitled to one peremptory  
21 challenge.

22 (b) If three or four alternate jurors are to be impaneled, each side is entitled to two peremptory  
23 challenges.

24 (c) If five or six alternate jurors are to be impaneled, each side is entitled to three peremptory  
25 challenges.

26 (3) [*The additional peremptory challenges may be used against an alternate juror only, and the*  
27 *other peremptory challenges allowed by statute may not be used against an alternate juror.*] **The court**

**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 **has discretion to decide:**

2 (a) **When and in what manner the alternate jurors are selected;**

3 (b) **When and in what manner the additional peremptory challenges described in sub-**  
4 **section (2) of this section may be used; and**

5 (c) **When and in what manner the alternate jurors are informed of their status as alter-**  
6 **nate jurors.**

7 **SECTION 2.** ORS 136.280 is amended to read:

8 136.280. (1) If, before the final submission of the case, any juror dies or is unable to perform the  
9 duty because of illness or other [*cause which the court deems sufficient, the juror shall be dismissed*]  
10 **sufficient cause, the court shall discharge the juror** from the case. [*Except as provided by ORS*  
11 *163.150,*] The court shall [*cause to be drawn*] **draw** the name of an alternate juror, who shall then  
12 become a member of the jury, **replacing the discharged juror** as though the alternate juror had  
13 been selected as one of the original jurors. [*Except as provided in ORS 136.773 (5), any alternate*  
14 *juror not selected to become a member of the jury shall be dismissed from the case upon its final sub-*  
15 *mission to the jury.*]

16 (2) **If, after the jury has begun deliberations, any juror dies or is unable to perform the**  
17 **duty because of illness or other sufficient cause, the court shall discharge the juror from the**  
18 **case and may draw the name of an alternate juror to replace the discharged juror if:**

19 (a) **An alternate juror is available and has not yet been discharged; and**

20 (b) **Both parties agreed to the substitution after the jury was selected but prior to the**  
21 **beginning of the trial.**

22 (3) **If an alternate juror replaces a juror under this section after deliberations have be-**  
23 **gun, the court shall instruct the jury to begin deliberations anew.**

24 (4) **The court may retain alternate jurors after the case is submitted to the jury to re-**  
25 **place jurors as provided in subsection (2) of this section. An alternate juror retained under**  
26 **this subsection shall not attend or otherwise participate in deliberations unless the alternate**  
27 **juror is selected to replace a juror.**

28 (5) **An alternate juror who does not replace a juror as provided in subsection (1) or (2)**  
29 **of this section and who is not retained as provided in subsection (4) of this section shall be**  
30 **discharged after deliberations have begun.**

31 **SECTION 3.** ORS 136.773 is amended to read:

32 136.773. (1) When an enhancement fact relates to the defendant, the court shall submit the en-  
33 hancement fact to the jury during the sentencing phase of the criminal proceeding if the defendant  
34 is found guilty of an offense to which the enhancement fact applies unless the defendant makes a  
35 written waiver of the right to a jury trial on the enhancement fact and:

36 (a) Admits to the enhancement fact; or

37 (b) Elects to have the enhancement fact tried to the court.

38 (2) If the defendant makes the election under subsection (1)(b) of this section and is found guilty  
39 during the trial phase of the criminal proceeding, the enhancement fact shall be tried during the  
40 sentencing phase of the proceeding.

41 (3) If there is more than one enhancement fact relating to the defendant and the defendant does  
42 not admit to all of them, the defendant shall elect to try to the jury or to the court all enhancement  
43 facts relating to the defendant to which the defendant does not admit.

44 (4) If two or more defendants are being tried in the same criminal proceeding, each defendant  
45 shall make the elections required by this section.

1 (5) Unless the defendant waives the right to a jury trial on enhancement facts related to the  
 2 defendant, the sentencing phase shall be conducted in the trial court before the jury following a  
 3 finding of guilt by the jury. If for any reason a juror is unable to perform the function of a juror,  
 4 the court shall dismiss the juror from the sentencing phase and draw the name of one of the alter-  
 5 nate jurors. The alternate juror then becomes a member of the jury for the sentencing phase  
 6 notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt. The court  
 7 may [*allow the substitution of an alternate juror only if the jury has not begun to deliberate on the*  
 8 *issue of an enhancement fact*] **retain alternate jurors and may allow the substitution of an al-**  
 9 **ternate juror after the jury has begun deliberations in accordance with ORS 136.280.**

10 **SECTION 4.** ORS 163.150 is amended to read:

11 163.150. (1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, ex-  
 12 cept as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing  
 13 proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described  
 14 in ORS 163.105 (1)(c), life imprisonment without the possibility of release or parole, as described in  
 15 ORS 163.105 (1)(b), or death. The proceeding shall be conducted in the trial court before the trial  
 16 jury as soon as practicable. If a juror for any reason is unable to perform the function of a juror,  
 17 the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the  
 18 name of one of the alternate jurors, who shall then become a member of the jury for the sentencing  
 19 proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt.  
 20 [*The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate on*  
 21 *the issue of the sentence.*] If the defendant has pleaded guilty, the sentencing proceeding shall be  
 22 conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented  
 23 as to any matter that the court deems relevant to sentence including, but not limited to, victim im-  
 24 pact evidence relating to the personal characteristics of the victim or the impact of the crime on  
 25 the victim's family and any aggravating or mitigating evidence relevant to the issue in paragraph  
 26 (b)(D) of this subsection; however, neither the state nor the defendant shall be allowed to introduce  
 27 repetitive evidence that has previously been offered and received during the trial on the issue of  
 28 guilt. The court shall instruct the jury that all evidence previously offered and received may be  
 29 considered for purposes of the sentencing hearing. This paragraph shall not be construed to au-  
 30 thorize the introduction of any evidence secured in violation of the Constitution of the United States  
 31 or of the State of Oregon. The state and the defendant or the counsel of the defendant shall be  
 32 permitted to present arguments for or against a sentence of death and for or against a sentence of  
 33 life imprisonment with or without the possibility of release or parole.

34 (b) Upon the conclusion of the presentation of the evidence, the court shall submit the following  
 35 issues to the jury:

36 (A) Whether the conduct of the defendant that caused the death of the deceased was committed  
 37 deliberately and with the reasonable expectation that death of the deceased or another would result;

38 (B) Whether there is a probability that the defendant would commit criminal acts of violence  
 39 that would constitute a continuing threat to society;

40 (C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was  
 41 unreasonable in response to the provocation, if any, by the deceased; and

42 (D) Whether the defendant should receive a death sentence.

43 (c)(A) The court shall instruct the jury to consider, in determining the issues in paragraph (b)  
 44 of this subsection, any mitigating circumstances offered in evidence, including but not limited to the  
 45 defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of

1 the mental and emotional pressure under which the defendant was acting at the time the offense  
2 was committed.

3 (B) The court shall instruct the jury to answer the question in paragraph (b)(D) of this sub-  
4 section “no” if, after considering any aggravating evidence and any mitigating evidence concerning  
5 any aspect of the defendant’s character or background, or any circumstances of the offense and any  
6 victim impact evidence as described in paragraph (a) of this subsection, one or more of the jurors  
7 believe that the defendant should not receive a death sentence.

8 (d) The state must prove each issue submitted under paragraph (b)(A) to (C) of this subsection  
9 beyond a reasonable doubt, and the jury shall return a special verdict of “yes” or “no” on each issue  
10 considered.

11 (e) The court shall charge the jury that it may not answer any issue “yes,” under paragraph (b)  
12 of this subsection unless it agrees unanimously.

13 (f) If the jury returns an affirmative finding on each issue considered under paragraph (b) of this  
14 subsection, the trial judge shall sentence the defendant to death.

15 (2)(a) Upon the conclusion of the presentation of the evidence, the court shall also instruct the  
16 jury that if it reaches a negative finding on any issue under subsection (1)(b) of this section, the trial  
17 court shall sentence the defendant to life imprisonment without the possibility of release or parole,  
18 as described in ORS 163.105 (1)(b), unless 10 or more members of the jury further find that there are  
19 sufficient mitigating circumstances to warrant life imprisonment, in which case the trial court shall  
20 sentence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

21 (b) If the jury returns a negative finding on any issue under subsection (1)(b) of this section and  
22 further finds that there are sufficient mitigating circumstances to warrant life imprisonment, the  
23 trial court shall sentence the defendant to life imprisonment in the custody of the Department of  
24 Corrections as provided in ORS 163.105 (1)(c).

25 (3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707 (2) applies or  
26 the state advises the court on the record that the state declines to present evidence for purposes  
27 of sentencing the defendant to death, the court:

28 (A) Shall not conduct a sentencing proceeding as described in subsection (1) of this section, and  
29 a sentence of death shall not be ordered.

30 (B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sen-  
31 tenced to life imprisonment without the possibility of release or parole as described in ORS 163.105  
32 (1)(b) or life imprisonment as described in ORS 163.105 (1)(c). If the defendant waives all rights to  
33 a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact.  
34 The procedure for the sentencing proceeding, whether before a court or a jury, shall follow the  
35 procedure of subsection (1)(a) of this section, as modified by this subsection. In the proceeding, ev-  
36 idence may be presented as to any matter that the court deems relevant to sentence, including, but  
37 not limited to, victim impact evidence relating to the personal characteristics of the victim or the  
38 impact of the crime on the victim’s family.

39 (b) Following the presentation of evidence and argument under paragraph (a) of this subsection,  
40 the court shall instruct the jury that the trial court shall sentence the defendant to life  
41 imprisonment without the possibility of release or parole as described in ORS 163.105 (1)(b), unless  
42 after considering all of the evidence submitted, 10 or more members of the jury find there are suf-  
43 ficient mitigating circumstances to warrant life imprisonment with the possibility of parole as de-  
44 scribed in ORS 163.105 (1)(c). If 10 or more members of the jury find there are sufficient mitigating  
45 circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sen-

1 tence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

2 (c) Nothing in this subsection shall preclude the court from sentencing the defendant to life  
3 imprisonment, as described in ORS 163.105 (1)(c), or life imprisonment without the possibility of re-  
4 lease or parole, as described in ORS 163.105 (1)(b), pursuant to a stipulation of sentence or stipu-  
5 lation of sentencing facts agreed to and offered by both parties if the defendant waives all rights to  
6 a jury sentencing proceeding.

7 (4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant  
8 who has been sentenced to life imprisonment without possibility of release or parole will instead be  
9 sentenced to life imprisonment in the custody of the Department of Corrections as provided in ORS  
10 163.105 (2), the defendant shall be confined for a minimum of 30 years without possibility of parole,  
11 release on work release or any form of temporary leave or employment at a forest or work camp.  
12 Subsection (2) of this section shall apply only to trials commencing on or after July 19, 1989.

13 (5) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial during  
14 the sentencing proceeding, the trial court, at the election of the state, shall either:

15 (a) Sentence the defendant to imprisonment for life in the custody of the Department of Cor-  
16 rections as provided in ORS 163.105 (1)(c); or

17 (b) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding  
18 to determine if the defendant should be sentenced to:

19 (A) Death;

20 (B) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105  
21 (1)(b); or

22 (C) Imprisonment for life in the custody of the Department of Corrections as provided in ORS  
23 163.105 (1)(c).

24