

A-Engrossed
House Bill 2382

Ordered by the House March 31
Including House Amendments dated March 31

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of Attorney General Ellen F. Rosenblum)

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.

Authorizes court to determine fitness to proceed in probation violation proceedings. [*Provides for evaluation, treatment and commitment of defendant to gain or regain capacity to proceed in probation violation proceedings.*]

Requires court to order mental health consultation for certain felony probation cases to determine whether treatment necessary for defendant to gain or regain fitness to proceed is available in community. Authorizes commitment for treatment of defendant in certain circumstances.

Requires court to release defendant for treatment in misdemeanor and certain felony probation cases.

A BILL FOR AN ACT

1
2 Relating to fitness to proceed; amending ORS 161.360 and 161.370.

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

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

5 161.360. (1) If, before or during the trial in any criminal case **or before or during any pro-**
6 **bation violation proceeding**, the court has reason to doubt the defendant's fitness to proceed by
7 reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

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

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

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

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

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

14 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-
15 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the
16 finding of the report filed under ORS 161.365, the court may make the determination on the basis
17 of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report
18 is received in evidence in the hearing, the party who contests the finding has the right to summon
19 and to cross-examine any psychiatrist or psychologist who submitted the report and to offer evidence
20 upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by
21 either party.

22 (2) If the court determines that the defendant lacks fitness to proceed **before or during the**
23 **trial**, the criminal proceeding against the defendant shall be suspended and:

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 (a) If the court finds that the defendant is dangerous to self or others as a result of mental
2 disease or defect, or that the services and supervision necessary to restore the defendant's fitness
3 to proceed are not available in the community, the court shall commit the defendant to the custody
4 of the superintendent of a state mental hospital or director of a facility, designated by the Oregon
5 Health Authority, if the defendant is at least 18 years of age, or to the custody of the director of
6 a secure intensive community inpatient facility designated by the authority if the defendant is under
7 18 years of age; or

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

12 **(3) If the court determines that the defendant lacks fitness to proceed before or during**
13 **a probation violation proceeding, the proceeding shall be suspended and:**

14 **(a)(A) If the defendant's sentence of probation was imposed as an optional probationary**
15 **sentence or a downward dispositional departure under the rules of the Oregon Criminal**
16 **Justice Commission, the court shall order that a community mental health program director**
17 **or the director's designee consult with the defendant to determine whether services and**
18 **supervision necessary to safely restore the defendant's fitness to proceed are available in the**
19 **community.**

20 **(B) A copy of the findings resulting from the consultation described in this paragraph**
21 **shall be provided to the court upon completion. After obtaining a copy of the findings, the**
22 **court shall proceed as described in subsection (2)(a) or (b) of this section.**

23 **(b) If the defendant's sentence of probation was imposed for a misdemeanor offense, or**
24 **as a presumptive sentence under the rules of the Oregon Criminal Justice Commission, the**
25 **court shall release the defendant on supervision for as long as the unfitness endures and**
26 **may order the defendant to participate in services necessary to restore the defendant's fit-**
27 **ness to proceed.**

28 [(3)] **(4) When a defendant is released on supervision under this section, the court may place**
29 **conditions that the court deems appropriate on the release, including the requirement that the de-**
30 **fendant regularly report to the authority or a community mental health program for examination to**
31 **determine if the defendant has **gained or** regained capacity to *[stand trial]* **proceed.****

32 [(4)] **(5) 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 **or probation****
39 **violation allegation and may order the defendant to be discharged or cause a proceeding to be**
40 **commenced forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.**

41 [(5)] **(6) The superintendent of a state hospital or director of a facility to which the defendant**
42 **is committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery**
43 **into the superintendent's or director's custody, for the purpose of determining whether there is a**
44 **substantial probability that, in the foreseeable future, the defendant will have the capacity to *[stand***
45 ***trial]* **proceed. In addition, the superintendent or director shall:****

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

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

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

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

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

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

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

27 [(7)(a)] (8)(a) A defendant who remains committed under subsection [(6)] (7) of this section shall
28 be discharged within a period of time that is reasonable for making a determination concerning
29 whether or not, and when, the defendant may gain or regain capacity. However, regardless of the
30 number of charges **or probation violation allegations** with which the defendant is accused, in no
31 event shall the defendant be committed for longer than whichever of the following, measured from
32 the defendant's initial custody date, is shorter:

33 (A) Three years; or

34 (B) A period of time equal to the maximum sentence the court could have imposed if the de-
35 fendant had been convicted **or the defendant's probation had been revoked**.

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

38 (A) The initial custody date is the date on which the defendant is first committed under this
39 section on any charge alleged in the accusatory instrument **or probation violation allegation**; and

40 (B) The defendant shall be given credit against each charge alleged in the accusatory instrument
41 **or probation violation allegation** for each day the defendant is committed under this section,
42 whether the days are consecutive or are interrupted by a period of time during which the defendant
43 has **gained or** regained fitness to proceed.

44 [(8)] (9) The superintendent or director shall notify the committing court of the defendant's im-
45 pending discharge 30 days before the date on which the superintendent or director is required to

1 discharge the defendant under subsection [(7)] **(8)** of this section.

2 [(9)] **(10)** When the committing court receives a notice from the superintendent or director under
3 subsection [(5)] **(6)** or [(8)] **(9)** of this section concerning the defendant's progress or lack thereof,
4 the committing court shall determine, after a hearing, if a hearing is requested, whether the de-
5 fendant presently has the capacity to [*stand trial*] **proceed**.

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

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

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

16 [(11)] **(12)** All notices required under this section shall be filed with the clerk of the court and
17 delivered to both the district attorney and the counsel for the defendant.

18 [(12)] **(13)** If the defendant **gains or** regains fitness to proceed, the term of any sentence received
19 by the defendant for conviction of the crime charged **or a finding that the defendant is in vio-**
20 **lation of probation** shall be reduced by the amount of time the defendant was committed under this
21 section to the custody of a state mental hospital, or to the custody of a secure intensive community
22 inpatient facility, designated by the Oregon Health Authority.

23 [(13)] **(14)** Notwithstanding the suspension of the [*criminal*] proceeding under subsection (2) of
24 this section, the fact that the defendant is unfit to proceed does not preclude any objection through
25 counsel and without the personal participation of the defendant on the grounds that the indictment
26 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon
27 any other ground at the discretion of the court which the court deems susceptible of fair determi-
28 nation prior to trial.

29 **(15) A determination by the court that a defendant lacks fitness to proceed constitutes**
30 **good cause to not conduct a revocation hearing within 14 days as required by ORS 137.545**
31 **(6).**

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