

# Senate Bill 1006

Sponsored by COMMITTEE ON JUDICIARY (at the request of Randall Vogt)

## 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**.

Modifies determination of incapacity for criminal defendants. Excludes statements made by defendant during incapacity evaluation.

### A BILL FOR AN ACT

1  
2 Relating to incapacity; creating new provisions; and amending ORS 40.015, 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, the court has reason to doubt the  
6 defendant's fitness to proceed by reason of incapacity, the court may order an examination in the  
7 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[.]; **or**

13 **(d) To make rational decisions in the defendant's self-interest.**

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

15 161.370. (1) **Upon motion of the prosecuting attorney or counsel for the defendant, or if**  
16 **an examination has been ordered under ORS 161.365, the court shall set a time for a hearing**  
17 **on the issue of incapacity.** [*When the defendant's fitness to proceed is drawn in question, the issue*  
18 *shall be determined by the court. If neither the prosecuting attorney nor counsel for the defendant*  
19 *contests the finding of the report filed by a psychiatrist or psychologist under ORS 161.365, the court*  
20 *may make the determination on the basis of such report. If the finding is contested, the court shall hold*  
21 *a hearing on the issue.*]

22 **(2) At the hearing, the defendant shall have the burden of proving incapacity, as de-**  
23 **scribed in ORS 161.360, by a preponderance of the evidence. The defendant shall have the**  
24 **right to a jury in accordance with ORS 136.210, which counsel for the defendant may waive.**

25 **(3) If the report described in ORS 161.365 is received in evidence upon such hearing, [*the ei-***  
26 **ther party** [*who contests the finding thereof*] shall have the right to summon and to cross-examine  
27 any psychiatrist or psychologist who submitted the report and to offer evidence upon the issue.  
28 Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

29 [(2)] **(4) If the jury, or the court if a jury is waived, determines that the defendant lacks fitness**  
30 **to proceed, the proceeding against the defendant shall be suspended, except as provided in sub-**  
31 **section [(12)] (14) of this section, and the court shall commit the defendant to the custody of the**

**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 superintendent of a state mental hospital designated by the Department of Human Services if the  
2 defendant is at least 18 years of age, or to the custody of the director of a secure intensive com-  
3 munity inpatient facility designated by the Department of Human Services if the defendant is under  
4 18 years of age, or shall release the defendant on supervision for as long as such unfitness shall  
5 endure. The court may release the defendant on supervision if it determines that care other than  
6 commitment for incapacity to stand trial would better serve the defendant and the community. It  
7 may place conditions which it deems appropriate on the release, including the requirement that the  
8 defendant regularly report to the Department of Human Services or a community mental health and  
9 developmental disabilities program for examination to determine if the defendant has regained ca-  
10 pacity to stand trial. When the court, on its own motion or upon the application of the superinten-  
11 dent of the hospital or director of the secure intensive community inpatient facility in which the  
12 defendant is committed, a person examining the defendant as a condition of release on supervision,  
13 or either party, determines, after a hearing, if a hearing is requested, that the defendant has re-  
14 gained fitness to proceed, the proceeding shall be resumed. If, however, the court is of the view that  
15 so much time has elapsed since the commitment or release of the defendant on supervision that it  
16 would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss  
17 the charge and may order the defendant to be discharged or cause a proceeding to be commenced  
18 forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

19 [(3)] (5) The superintendent of a state hospital or director of a secure intensive community in-  
20 patient facility shall cause the defendant to be evaluated within 60 days from the defendant's deliv-  
21 ery into the superintendent's or director's custody, for the purpose of determining whether there is  
22 a substantial probability that, in the foreseeable future, the defendant will have the capacity to  
23 stand trial.

24 [(4)] (6) In addition, the superintendent or director shall:

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

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

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

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

32 (C) There is a substantial probability that, in the foreseeable future, the defendant will gain or  
33 regain the capacity to stand trial. If such a probability exists, the superintendent or director shall  
34 give the court an estimate of the time in which the defendant, with appropriate treatment, is ex-  
35 pected to gain or regain capacity.

36 [(5)] (7) 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 [(4)(b)] (6)(b) of  
41 this section, the superintendent or director shall, for the duration of the defendant's period of com-  
42 mitment, submit a progress report to the committing court, concerning the defendant's capacity or  
43 incapacity, at least once every 180 days as measured from the date of the defendant's delivery into  
44 the superintendent's or director's custody.

45 [(6)] (8) A defendant who remains committed under subsection [(5)] (7) of this section shall be

1 discharged within a period of time that is reasonable for making a determination concerning  
 2 whether or not, and when, the defendant may gain or regain capacity. However, regardless of the  
 3 number of charges with which the defendant is accused, in no event shall the defendant be com-  
 4 mitted for longer than whichever of the following, measured from the defendant's initial custody  
 5 date, is shorter:

6 (a) Three years; or

7 (b) A period of time equal to the maximum sentence the court could have imposed if the de-  
 8 fendant had been convicted.

9 [(7)] (9) The superintendent or director shall notify the committing court of the defendant's im-  
 10 pending discharge 30 days before the date on which the superintendent or director is required to  
 11 discharge the defendant under subsection [(6)] (8) of this section.

12 [(8)] (10) When the committing court receives a notice from the superintendent or director under  
 13 either subsection [(4)] (6) or [(7)] (9) of this section concerning the defendant's progress or lack  
 14 thereof, the committing court shall determine after a hearing, if a hearing is requested, whether the  
 15 defendant presently has the capacity to stand trial.

16 [(9)] (11) If under subsection [(8)] (10) of this section the court determines that the defendant  
 17 lacks the capacity to stand trial, the court shall further determine whether there is a substantial  
 18 probability that the defendant, in the foreseeable future, will gain or regain the capacity to stand  
 19 trial and whether the defendant is entitled to discharge under subsection [(6)] (8) of this section. If  
 20 the court determines that there is no substantial probability that the defendant, in the foreseeable  
 21 future, will gain or regain the capacity to stand trial or that the defendant is entitled to discharge  
 22 under subsection [(6)] (8) of this section, the court shall dismiss, without prejudice, all charges  
 23 against the defendant and:

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

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

26 [(10)] (12) All notices required under this section shall be filed with the clerk of the court and  
 27 delivered to both the district attorney and the counsel for the defendant.

28 [(11)] (13) If the defendant regains fitness to proceed, the term of any sentence received by the  
 29 defendant for conviction of the crime charged shall be reduced by the amount of time the defendant  
 30 was committed under this section to the custody of a state mental hospital, or to the custody of a  
 31 secure intensive community inpatient facility, designated by the Department of Human Services.

32 [(12)] (14) The fact that the defendant is unfit to proceed does not preclude any objection  
 33 through counsel and without the personal participation of the defendant on the grounds that the  
 34 indictment is insufficient, that the statute of limitations has run, that double jeopardy principles  
 35 apply or upon any other ground at the discretion of the court which the court deems susceptible  
 36 of fair determination prior to trial.

37 **SECTION 3. No statement made by the defendant about the offense with which the de-**  
 38 **fendant is charged shall be offered or received in evidence in any criminal or civil action or**  
 39 **proceeding arising out of the same conduct which is the basis of the charge, if the statement**  
 40 **was made during the course of a court ordered examination or evaluation under ORS 161.365**  
 41 **or 161.370.**

42 **SECTION 4.** ORS 40.015 is amended to read:

43 40.015. (1) The Oregon Evidence Code applies to all courts in this state except for:

44 (a) A hearing or mediation before a magistrate of the Oregon Tax Court as provided by ORS  
 45 305.501;

1 (b) The small claims department of a circuit court as provided by ORS 46.415; and

2 (c) The small claims department of a justice court as provided by ORS 55.080.

3 (2) The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal  
4 actions and proceedings and to contempt proceedings except those in which the court may act  
5 summarily.

6 (3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and pro-  
7 ceedings.

8 (4) ORS 40.010 to 40.210 and 40.310 to 40.585 do not apply in the following situations:

9 (a) The determination of questions of fact preliminary to admissibility of evidence when the issue  
10 is to be determined by the court under ORS 40.030.

11 (b) Proceedings before grand juries, except as required by ORS 132.320.

12 (c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

13 (d) Sentencing proceedings, except proceedings under ORS 138.012 and 163.150, as required by  
14 ORS 137.090 or proceedings under sections 2 to 7, chapter 463, Oregon Laws 2005.

15 (e) Proceedings to revoke probation, except as required by ORS 137.090.

16 (f) Issuance of warrants of arrest, bench warrants or search warrants.

17 (g) Proceedings under ORS chapter 135 relating to conditional release, security release, release  
18 on personal recognizance, or preliminary hearings, subject to ORS 135.173.

19 (h) Proceedings to determine proper disposition of a child in accordance with ORS 419B.325 (2)  
20 and 419C.400 (3).

21 (i) Proceedings under ORS 813.210, 813.215, 813.220, 813.230, 813.250 and 813.255 to determine  
22 whether a driving while under the influence of intoxicants diversion agreement should be allowed  
23 or terminated.

24 **(j) Proceedings to determine if a defendant is incapacitated under ORS 161.370.**

25 **SECTION 5.** ORS 40.015, as amended by section 25, chapter 843, Oregon Laws 2005, is amended  
26 to read:

27 40.015. (1) The Oregon Evidence Code applies to all courts in this state except for:

28 (a) A hearing or mediation before a magistrate of the Oregon Tax Court as provided by ORS  
29 305.501;

30 (b) The small claims department of a circuit court as provided by ORS 46.415; and

31 (c) The small claims department of a justice court as provided by ORS 55.080.

32 (2) The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal  
33 actions and proceedings and to contempt proceedings except those in which the court may act  
34 summarily.

35 (3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and pro-  
36 ceedings.

37 (4) ORS 40.010 to 40.210 and 40.310 to 40.585 do not apply in the following situations:

38 (a) The determination of questions of fact preliminary to admissibility of evidence when the issue  
39 is to be determined by the court under ORS 40.030.

40 (b) Proceedings before grand juries, except as required by ORS 132.320.

41 (c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

42 (d) Sentencing proceedings, except proceedings under ORS 138.012 and 163.150, as required by  
43 ORS 137.090 or proceedings under sections 2 to 7, chapter 463, Oregon Laws 2005.

44 (e) Proceedings to revoke probation, except as required by ORS 137.090.

45 (f) Issuance of warrants of arrest, bench warrants or search warrants.

1 (g) Proceedings under ORS chapter 135 relating to conditional release, security release, release  
2 on personal recognizance, or preliminary hearings, subject to ORS 135.173.

3 (h) Proceedings to determine proper disposition of a child in accordance with ORS 419B.325 (2)  
4 and 419C.400 (4).

5 (i) Proceedings under ORS 813.210, 813.215, 813.220, 813.230, 813.250 and 813.255 to determine  
6 whether a driving while under the influence of intoxicants diversion agreement should be allowed  
7 or terminated.

8 **(j) Proceedings to determine if a defendant is incapacitated under ORS 161.370.**

9 **SECTION 6.** ORS 40.015, as amended by section 13, chapter 463, Oregon Laws 2005, and section  
10 25, chapter 843, Oregon Laws 2005, is amended to read:

11 40.015. (1) The Oregon Evidence Code applies to all courts in this state except for:

12 (a) A hearing or mediation before a magistrate of the Oregon Tax Court as provided by ORS  
13 305.501;

14 (b) The small claims department of a circuit court as provided by ORS 46.415; and

15 (c) The small claims department of a justice court as provided by ORS 55.080.

16 (2) The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal  
17 actions and proceedings and to contempt proceedings except those in which the court may act  
18 summarily.

19 (3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and pro-  
20 ceedings.

21 (4) ORS 40.010 to 40.210 and 40.310 to 40.585 do not apply in the following situations:

22 (a) The determination of questions of fact preliminary to admissibility of evidence when the issue  
23 is to be determined by the court under ORS 40.030.

24 (b) Proceedings before grand juries, except as required by ORS 132.320.

25 (c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

26 (d) Sentencing proceedings, except proceedings under ORS 138.012 and 163.150 or as required  
27 by ORS 137.090.

28 (e) Proceedings to revoke probation, except as required by ORS 137.090.

29 (f) Issuance of warrants of arrest, bench warrants or search warrants.

30 (g) Proceedings under ORS chapter 135 relating to conditional release, security release, release  
31 on personal recognizance, or preliminary hearings, subject to ORS 135.173.

32 (h) Proceedings to determine proper disposition of a child in accordance with ORS 419B.325 (2)  
33 and 419C.400 (4).

34 (i) Proceedings under ORS 813.210, 813.215, 813.220, 813.230, 813.250 and 813.255 to determine  
35 whether a driving while under the influence of intoxicants diversion agreement should be allowed  
36 or terminated.

37 **(j) Proceedings to determine if a defendant is incapacitated under ORS 161.370.**

38