

Senate Bill 376

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary for Oregon Criminal Defense Lawyers Association)

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 trial court to consider defendant's fitness to proceed by reason of incapacity at any stage of criminal proceeding.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to crime; amending ORS 161.360, 161.365 and 161.370; and declaring an emergency.

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

SECTION 1. ORS 161.360 is amended to read:

161.360. (1) If, *[before or during the trial in any criminal case]* **at any stage of a criminal proceeding**, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity, the court may order an examination in the manner provided in ORS 161.365.

(2) A defendant *[may be found incapacitated]* **lacks fitness to proceed by reason of incapacity** if, as a result of mental disease or defect, the defendant is unable:

- (a) To understand the nature of the proceedings against the defendant; or
- (b) To assist and cooperate with the counsel of the defendant; or
- (c) To participate in the defense of the defendant.

SECTION 2. ORS 161.365 is amended to read:

161.365. (1) Whenever the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as *[defined]* **described** in ORS 161.360, the court may call to its assistance in reaching its decision any witness and may appoint a psychiatrist or psychologist to examine the defendant and advise the court.

(2) If the court determines the assistance of a psychiatrist or psychologist would be helpful, the court may order the defendant to be committed for the purpose of an examination for a period not exceeding 30 days to a state mental hospital designated by the Oregon Health Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age. The report of each examination shall include, but is not necessarily limited to, the following:

- (a) A description of the nature of the examination;
- (b) A statement of the mental condition of the defendant; and
- (c) If the defendant suffers from a mental disease or defect, an opinion as to whether the defendant *[is incapacitated]* **lacks fitness to proceed by reason of incapacity** within the *[definition]* **description** set out in ORS 161.360.

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

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 defect 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 cannot be conducted by reason of the
4 unwillingness of the defendant to participate therein, the report shall so state and shall include, if
5 possible, an opinion as to whether such unwillingness of the defendant was the result of mental
6 disease or defect affecting [*capacity*] **fitness** to proceed.

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

9 (6) When upon motion of the court or a financially eligible defendant, the court has ordered a
10 psychiatric or psychological examination of the defendant, a county or justice court shall order the
11 county to pay, and a circuit court shall order the public defense services executive director to pay
12 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 in private practice; and

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

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

22 **SECTION 3.** ORS 161.370 is amended to read:

23 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-
24 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the
25 finding of the report filed by a psychiatrist or psychologist under ORS 161.365, the court may make
26 the determination on the basis of such report. If the finding is contested, the court shall hold a
27 hearing on the issue. If the report is received in evidence upon such hearing, the party who contests
28 the finding thereof shall have the right to summon and to cross-examine any psychiatrist or psy-
29 chologist who submitted the report and to offer evidence upon the issue. Other evidence regarding
30 the defendant's fitness to proceed may be introduced by either party.

31 (2) If the court determines that the defendant lacks fitness to proceed, the proceeding against
32 the defendant shall be suspended, except as provided in subsection (12) of this section, and the court
33 shall commit the defendant to the custody of the superintendent of a state mental hospital desig-
34 nated by the Oregon Health Authority if the defendant is at least 18 years of age, or to the custody
35 of the director of a secure intensive community inpatient facility designated by the authority if the
36 defendant is under 18 years of age, or shall release the defendant on supervision for as long as such
37 unfitness shall endure. The court may release the defendant on supervision if it determines that care
38 other than commitment [*for incapacity to stand trial*] would better serve the defendant and the
39 community. It may place conditions [*which*] **that** it deems appropriate on the release, including the
40 requirement that the defendant regularly report to the authority or a community mental health
41 program for examination to determine if the defendant has **gained or** regained [*capacity to stand*
42 *trial*] **fitness to proceed**. When the court, on its own motion or upon the application of the super-
43 intendent of the hospital or director of the secure intensive community inpatient facility in which
44 the defendant is committed, a person examining the defendant as a condition of release on super-
45 vision, or either party, determines, after a hearing, if a hearing is requested, that the defendant has

1 **gained or** regained fitness to proceed, the proceeding shall be resumed. If, however, the court is of
 2 the view that so much time has elapsed since the commitment or release of the defendant on
 3 supervision that it would be unjust to resume the criminal proceeding, the court on motion of either
 4 party may dismiss the charge and may order the defendant to be discharged or cause a proceeding
 5 to be commenced forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

6 (3) The superintendent of a state hospital or director of a secure intensive community inpatient
 7 facility shall cause the defendant to be evaluated within 60 days from the defendant's delivery into
 8 the superintendent's or director's custody, for the purpose of determining whether there is a sub-
 9 stantial probability that, in the foreseeable future, the defendant will [*have the capacity to stand*
 10 *trial*] **gain or regain fitness to proceed.**

11 (4) In addition, the superintendent or director shall:

12 (a) Immediately notify the committing court if the defendant[, *at any time,*] gains or regains [*the*
 13 *capacity to stand trial or will never have the capacity to stand trial*] **fitness to proceed or if the**
 14 **superintendent or director determines that the defendant will never gain or regain fitness**
 15 **to proceed.**

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

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

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

21 [(C)] (B) There is a substantial probability that, in the foreseeable future, the defendant will
 22 gain or regain [*the capacity to stand trial*] **fitness to proceed.** If such a probability exists, the su-
 23 perintendent or director shall give the court an estimate of the time in which the defendant, with
 24 appropriate treatment, is expected to gain or regain [*capacity*] **fitness to proceed.**

25 (5) If the superintendent or director determines that there is a substantial probability that, in
 26 the foreseeable future, the defendant will gain or regain [*the capacity to stand trial*] **fitness to**
 27 **proceed,** unless the court otherwise orders, the defendant shall remain in the superintendent's or
 28 director's custody where the defendant shall receive treatment designed for the purpose of enabling
 29 the defendant to gain or regain [*capacity*] **fitness to proceed.** In keeping with the notice require-
 30 ment under subsection (4)(b) of this section, the superintendent or director shall, for the duration
 31 of the defendant's period of commitment, submit a progress report to the committing court, con-
 32 cerning the defendant's [*capacity or incapacity*] **fitness to proceed,** at least once every 180 days as
 33 measured from the date of the defendant's delivery into the superintendent's or director's custody.

34 (6) A defendant who remains committed under subsection (5) of this section shall be discharged
 35 within a period of time that is reasonable for making a determination concerning whether or not,
 36 and when, the defendant may gain or regain [*capacity*] **fitness to proceed.** However, regardless of
 37 the number of charges with which the defendant is accused, in no event shall the defendant be
 38 committed for longer than whichever of the following, measured from the defendant's initial custody
 39 date, is shorter:

40 (a) Three years; or

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

43 (7) The superintendent or director shall notify the committing court of the defendant's impending
 44 discharge 30 days before the date on which the superintendent or director is required to discharge
 45 the defendant under subsection (6) of this section.

1 (8) When the committing court receives a notice from the superintendent or director under ei-
 2 ther subsection (4) or (7) of this section concerning the defendant's progress or lack thereof, the
 3 committing court shall determine after a hearing, if a hearing is requested, whether the defendant
 4 [*presently has the capacity to stand trial*] **is fit to proceed.**

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

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

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

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

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

21 (12) The fact that the defendant is unfit to proceed does not preclude any objection through
 22 counsel and without the personal participation of the defendant on the grounds that the indictment
 23 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon
 24 any other ground at the discretion of the court [*which*] **that** the court deems susceptible of fair de-
 25 termination prior to trial.

26 **SECTION 4. This 2011 Act being necessary for the immediate preservation of the public**
 27 **peace, health and safety, an emergency is declared to exist, and this 2011 Act takes effect**
 28 **on its passage.**