



**DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL**

**MEMORANDUM**

DATE: March 17, 2015

TO: Honorable Jeff Barker, Chair  
House Committee on Judiciary

FROM: Aaron Knott, Legislative Director

SUBJECT: HB 2382 – Probation Violations and Aid and Assist Orders

This testimony supports HB 2382.

**BACKGROUND**

ORS 161.360-370 describe the circumstances under which a person may be sent to the state hospital upon a finding of incapacitation due to reason of mental disease or defect for the purpose of being restored to the ability to aid and assist their attorney in their defense. ORS 161-360 provides that a person may be sent to the hospital only “before or during the trial in any criminal case.” ORS 161.360(1). This excludes all proceedings which follow from trial. This is especially problematic for defendants on probation.

When a defendant commits an alleged probation violation, they face sanctions very similar to those which follow from a trial, including additional probation requirements like community service or treatment obligations, in-patient treatment and terms of incarceration. If a probation violation results in the termination of probation, this can result in significant terms of incarceration. But a defendant cannot be found guilty of the commission of a probation violation without the meaningful assistance of counsel. This is often true even when the sanction pursued by the prosecution is nothing more than a rereferral to drug or mental health treatment, as these are considered “punishments” when imposed over the defendant’s objection. Because a judge may not send a defendant who is unable to aid and assist in their defense to the state hospital under those circumstances, they become in effect unsupervisable unless and until they either regain capacity on their own or commit a new crime which can be used as the justification to send them to the state hospital.

The current system not only abandons probationers by providing no remedy for managing moments of acute mental illness, it hazards that defendants with severe mental illness will not be given an opportunity at probation to begin with. The presence of certain mental illnesses are judicially recognized as a basis to impose a downward departure from a presumptive prison sentence (See OAR 213-008-0002(1)(a)(C)). Also relevant to this determination is whether a defendant is amenable to treatment and an appropriate treatment program is available which will

address an offender's particular needs. (OAR 213-008-0002(1)(a)(I). As a practical matter, this calls upon a court to inquire not just whether a defendant's criminality may have been impacted by mental disease or defect, but whether the defendant can be effectively supervised if granted a downward departure.

The inability to send a person suffering from an acute mental disease or defect to the state hospital for a probation violation provides a tragic disincentive against offering an opportunity at a downward departure in presumptive prison cases by calling into question whether a person with severe mental disease or defect can be effectively supervised.

**HB 2382 ALLOWS A PROBATIONER SUFFERING FROM MENTAL DISEASE OR DEFECT TO BE RESTORED TO CAPACITY TO AID AND ASSIST**

HB 2382 would allow a judge to order a probationer to be sent to the state hospital for the purpose of restoring capacity to aid and assist in their own defense. The bill would apply evenly to probationers across all levels of crime seriousness. This bill can be expected to trigger a significant fiscal impact, although this could be significantly offset by pairing the passage of this bill with HB 2420, offered by the Oregon Health Authority as part of an initiative to increase community treatment options for persons unable to aid and assist. Regardless, this bill will help assure that individuals with serious mental illness are provided with the full opportunity to succeed throughout their probation and can have their needs addressed by the court.

The Department of Justice supports the passage of HB 2382.

**Contact:** Aaron Knott, Legislative Director, 503-798-0987 or [aaron.d.knott@doj.state.or.us](mailto:aaron.d.knott@doj.state.or.us)