

**PROPOSED AMENDMENTS TO
HOUSE BILL 2382**

1 On page 1 of the printed bill, delete lines 13 through 30 and delete pages
2 2 through 4 and insert:

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

4 “161.370. (1) When the defendant’s fitness to proceed is drawn in question,
5 the issue shall be determined by the court. If neither the prosecuting attor-
6 ney nor counsel for the defendant contests the finding of the report filed
7 under ORS 161.365, the court may make the determination on the basis of the
8 report. If the finding is contested, the court shall hold a hearing on the issue.
9 If the report is received in evidence in the hearing, the party who contests
10 the finding has the right to summon and to cross-examine any psychiatrist
11 or psychologist who submitted the report and to offer evidence upon the is-
12 sue. Other evidence regarding the defendant’s fitness to proceed may be in-
13 troduced by either party.

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

17 “(a) If the court finds that the defendant is dangerous to self or others
18 as a result of mental disease or defect, or that the services and supervision
19 necessary to restore the defendant’s fitness to proceed are not available in
20 the community, the court shall commit the defendant to the custody of the
21 superintendent of a state mental hospital or director of a facility, designated
22 by the Oregon Health Authority, if the defendant is at least 18 years of age,

1 or to the custody of the director of a secure intensive community inpatient
2 facility designated by the authority if the defendant is under 18 years of age;
3 or

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

9 “**(3) If the court determines that the defendant lacks fitness to**
10 **proceed before or during a probation violation proceeding, the pro-**
11 **ceeding shall be suspended and:**

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

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

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

29 “[~~(3)~~] **(4)** When a defendant is released on supervision under this section,
30 the court may place conditions that the court deems appropriate on the re-

1 lease, including the requirement that the defendant regularly report to the
2 authority or a community mental health program for examination to deter-
3 mine if the defendant has **gained or** regained capacity to [*stand trial*] **pro-**
4 **ceed.**

5 “[~~(4)~~] (5) When the court, on its own motion or upon the application of
6 the superintendent of the hospital or director of the facility in which the
7 defendant is committed, a person examining the defendant as a condition of
8 release on supervision, or either party, determines, after a hearing, if a
9 hearing is requested, that the defendant has **gained or** regained fitness to
10 proceed, the [*criminal*] proceeding shall be resumed. If, however, the court
11 is of the view that so much time has elapsed since the commitment or release
12 of the defendant on supervision that it would be unjust to resume the
13 [*criminal*] proceeding, the court on motion of either party may dismiss the
14 charge **or probation violation allegation** and may order the defendant to
15 be discharged or cause a proceeding to be commenced forthwith under ORS
16 426.070 to 426.170 or 427.235 to 427.290.

17 “[~~(5)~~] (6) The superintendent of a state hospital or director of a facility
18 to which the defendant is committed shall cause the defendant to be evalu-
19 ated within 60 days from the defendant’s delivery into the superintendent’s
20 or director’s custody, for the purpose of determining whether there is a
21 substantial probability that, in the foreseeable future, the defendant will
22 have the capacity to [*stand trial*] **proceed.** In addition, the superintendent
23 or director shall:

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

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

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

30 “(B) There is no substantial probability that, in the foreseeable future, the

1 defendant will gain or regain the capacity to [*stand trial*] **proceed**; or

2 “(C) There is a substantial probability that, in the foreseeable future, the
3 defendant will gain or regain the capacity to [*stand trial*] **proceed**. If the
4 probability exists, the superintendent or director shall give the court an es-
5 timate of the time in which the defendant, with appropriate treatment, is
6 expected to gain or regain capacity.

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

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

27 “[~~(7)(a)~~] **(8)(a)** A defendant who remains committed under subsection
28 [~~(6)~~] **(7)** of this section shall be discharged within a period of time that is
29 reasonable for making a determination concerning whether or not, and when,
30 the defendant may gain or regain capacity. However, regardless of the num-

1 ber of charges **or probation violation allegations** with which the defendant
2 is accused, in no event shall the defendant be committed for longer than
3 whichever of the following, measured from the defendant's initial custody
4 date, is shorter:

5 “(A) Three years; or

6 “(B) A period of time equal to the maximum sentence the court could have
7 imposed if the defendant had been convicted **or the defendant's probation**
8 **had been revoked.**

9 “(b) For purposes of calculating the maximum period of commitment de-
10 scribed in paragraph (a) of this subsection:

11 “(A) The initial custody date is the date on which the defendant is first
12 committed under this section on any charge alleged in the accusatory in-
13 strument **or probation violation allegation**; and

14 “(B) The defendant shall be given credit against each charge alleged in
15 the accusatory instrument **or probation violation allegation** for each day
16 the defendant is committed under this section, whether the days are consec-
17 utive or are interrupted by a period of time during which the defendant has
18 **gained or** regained fitness to proceed.

19 “[~~(8)~~] **(9)** The superintendent or director shall notify the committing court
20 of the defendant's impending discharge 30 days before the date on which the
21 superintendent or director is required to discharge the defendant under sub-
22 section [~~(7)~~] **(8)** of this section.

23 “[~~(9)~~] **(10)** When the committing court receives a notice from the super-
24 intendent or director under subsection [~~(5)~~] **(6)** or [~~(8)~~] **(9)** of this section
25 concerning the defendant's progress or lack thereof, the committing court
26 shall determine, after a hearing, if a hearing is requested, whether the de-
27 fendant presently has the capacity to [*stand trial*] **proceed.**

28 “[~~(10)~~] **(11)** If at any time the court determines that the defendant lacks
29 the capacity to [*stand trial*] **proceed**, the court shall further determine
30 whether there is a substantial probability that the defendant, in the fore-

1 seeable future, will gain or regain the capacity to [*stand trial*] **proceed** and
2 whether the defendant is entitled to discharge under subsection [(7)] **(8)** of
3 this section. If the court determines that there is no substantial probability
4 that the defendant, in the foreseeable future, will gain or regain the capacity
5 to [*stand trial*] **proceed** or that the defendant is entitled to discharge under
6 subsection [(7)] **(8)** of this section, the court shall dismiss, without prejudice,
7 all charges **or probation violation allegations** against the defendant and:

8 “(a) Order that the defendant be discharged; or

9 “(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to
10 427.290.

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

14 “[*(12)*] **(13)** If the defendant **gains or** regains fitness to proceed, the term
15 of any sentence received by the defendant for conviction of the crime charged
16 **or a finding that the defendant is in violation of probation** shall be re-
17 duced by the amount of time the defendant was committed under this section
18 to the custody of a state mental hospital, or to the custody of a secure in-
19 tensive community inpatient facility, designated by the Oregon Health Au-
20 thority.

21 “[*(13)*] **(14)** Notwithstanding the suspension of the [*criminal*] proceeding
22 under subsection (2) of this section, the fact that the defendant is unfit to
23 proceed does not preclude any objection through counsel and without the
24 personal participation of the defendant on the grounds that the indictment
25 is insufficient, that the statute of limitations has run, that double jeopardy
26 principles apply or upon any other ground at the discretion of the court
27 which the court deems susceptible of fair determination prior to trial.

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

