

**A-Engrossed**  
**House Bill 2309**

Ordered by the House March 21  
Including House Amendments dated March 21

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of Governor Kate Brown for Oregon Health Authority)

**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 Oregon Health Authority to establish by rule requirements for reports of examinations of criminal defendants whose fitness to proceed is in doubt.]*

*[Authorizes Oregon Health Authority to establish by rule requirements for]* **Provides that** progress reports of defendants lacking fitness to proceed who have been committed to state mental hospital or facility for treatment **may consist of updates to original examination reports or evaluations.**

**A BILL FOR AN ACT**

1  
2 Relating to forensic evaluations of criminal defendants; amending ORS 161.370.

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

4 **SECTION 1.** ORS 161.370 is amended to read:

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

13 (2) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding  
14 against the defendant shall be suspended and:

15 (a) If the court finds that the defendant is dangerous to self or others as a result of mental  
16 disease or defect, or that, based on the findings resulting from the consultation described in ORS  
17 161.365 (1), the services and supervision necessary to restore the defendant's fitness to proceed are  
18 not available in the community, the court shall commit the defendant to the custody of the super-  
19 intendent of a state mental hospital or director of a facility, designated by the Oregon Health Au-  
20 thority, if the defendant is at least 18 years of age, or to the custody of the director of a secure  
21 intensive community inpatient facility designated by the authority if the defendant is under 18 years  
22 of age; or

23 (b) If the court does not make a finding described in paragraph (a) of this subsection, or if the  
24 court determines that care other than commitment for incapacity to stand trial would better serve  
25 the defendant and the community, the court shall release the defendant on supervision for as long

**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 as the unfitness endures.

2 (3) When a defendant is released on supervision under subsection (2)(b) of this section, the court  
3 may place conditions that the court deems appropriate on the release, including the requirement  
4 that the defendant regularly report to the authority or a community mental health program for ex-  
5 amination to determine if the defendant has gained or regained capacity to stand trial.

6 (4) When the court, on its own motion or upon the application of the superintendent of the  
7 hospital or director of the facility in which the defendant is committed, a person examining the de-  
8 fendant as a condition of 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 proceed, the criminal  
10 proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed  
11 since the commitment or release of the defendant on supervision that it would be unjust to resume  
12 the criminal proceeding, the court on motion of either party may dismiss the charge and may order  
13 the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070  
14 to 426.170 or 427.235 to 427.290.

15 (5) The superintendent of a state hospital or director of a facility to which the defendant is  
16 committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery  
17 into the superintendent's or director's custody, for the purpose of determining whether there is a  
18 substantial probability that, in the foreseeable future, the defendant will have the capacity to stand  
19 trial. In addition, the superintendent or director shall:

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

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

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

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

27 (C) There is a substantial probability that, in the foreseeable future, the defendant will gain or  
28 regain the capacity to stand trial. If the probability exists, the superintendent or director shall give  
29 the court an estimate of the time in which the defendant, with appropriate treatment, is expected  
30 to gain or regain capacity.

31 (6)(a) If the superintendent or director determines that there is a substantial probability that,  
32 in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the  
33 court otherwise orders, the defendant shall remain in the superintendent's or director's custody  
34 where the defendant shall receive treatment designed for the purpose of enabling the defendant to  
35 gain or regain capacity. In keeping with the notice requirement under subsection (5)(b) of this sec-  
36 tion, the superintendent or director shall, for the duration of the defendant's period of commitment,  
37 submit a progress report to the committing court, concerning the defendant's capacity or incapacity,  
38 at least once every 180 days as measured from the date of the defendant's delivery into the  
39 superintendent's or director's custody.

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

1       **(c) A progress report described in paragraph (a) of this subsection may consist of an**  
2 **update to:**

3       **(A) The original examination report conducted under ORS 161.365; or**

4       **(B) An evaluation conducted under subsection (5) of this section, if the defendant did not**  
5 **receive an examination under ORS 161.365.**

6       (7)(a) A defendant who remains committed under subsection (6) of this section shall be dis-  
7 charged within a period of time that is reasonable for making a determination concerning whether  
8 or not, and when, the defendant may gain or regain capacity. However, regardless of the number  
9 of charges with which the defendant is accused, in no event shall the defendant be committed for  
10 longer than whichever of the following, measured from the defendant's initial custody date, is  
11 shorter:

12       (A) Three years; or

13       (B) A period of time equal to the maximum sentence the court could have imposed if the de-  
14 fendant had been convicted.

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

17       (A) The initial custody date is the date on which the defendant is first committed under this  
18 section on any charge alleged in the accusatory instrument; and

19       (B) The defendant shall be given credit against each charge alleged in the accusatory instrument  
20 for each day the defendant is committed under this section, whether the days are consecutive or are  
21 interrupted by a period of time during which the defendant has gained or regained fitness to pro-  
22 ceed.

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

26       (9) When the committing court receives a notice from the superintendent or director under  
27 subsection (5) or (8) of this section concerning the defendant's progress or lack thereof, the com-  
28 mitting court shall determine, after a hearing, if a hearing is requested, whether the defendant  
29 presently has the capacity to stand trial.

30       (10) If at any time the court determines that the defendant lacks the capacity to stand trial, the  
31 court shall further determine whether there is a substantial probability that the defendant, in the  
32 foreseeable future, will gain or regain the capacity to stand trial and whether the defendant is en-  
33 titled to discharge under subsection (7) of this section. If the court determines that there is no  
34 substantial probability that the defendant, in the foreseeable future, will gain or regain the capacity  
35 to stand trial or that the defendant is entitled to discharge under subsection (7) of this section, the  
36 court shall dismiss, without prejudice, all charges against the defendant and:

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

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

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

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

45       (13) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this

1 section, the fact that the defendant is unfit to proceed does not preclude any objection through  
2 counsel and without the personal participation of the defendant on the grounds that the indictment  
3 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon  
4 any other ground at the discretion of the court which the court deems susceptible of fair determi-  
5 nation prior to trial.

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