

House Bill 2309

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 **as introduced**.

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 progress reports of defendants lacking fitness to proceed who have been committed to state mental hospital or facility for treatment.

A BILL FOR AN ACT

1
2 Relating to forensic evaluations of criminal defendants; amending ORS 161.365 and 161.370.

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

4 **SECTION 1.** ORS 161.365 is amended to read:

5 161.365. (1) When the court has reason to doubt the defendant's fitness to proceed by reason of
6 incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching
7 its decision and shall order that a community mental health program director or the director's
8 designee consult with the defendant to determine whether services and supervision necessary to
9 safely restore the defendant's fitness to proceed are available in the community. After the consul-
10 tation, the program director or the director's designee shall provide to the court a copy of the
11 findings resulting from the consultation. If the court determines the assistance of a psychiatrist or
12 psychologist would be helpful, the court may:

13 (a) Order that a psychiatric or psychological examination of the defendant be conducted by a
14 certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or

15 (b) Order the defendant to be committed for the purpose of an examination for a period not ex-
16 ceeding 30 days to a state mental hospital or other facility designated by the Oregon Health Au-
17 thority if the defendant is at least 18 years of age, or to a secure intensive community inpatient
18 facility designated by the authority if the defendant is under 18 years of age.

19 (2)(a) The report of an examination described in this section must include, but is not
20 *[necessarily]* limited to, the following:

21 [(a)] (A) A description of the nature of the examination;

22 [(b)] (B) A statement of the mental condition of the defendant;

23 [(c)] (C) If the defendant suffers from a mental disease or defect, an opinion as to whether the
24 defendant is incapacitated within the description set out in ORS 161.360; and

25 [(d)] (D) If the defendant is incapacitated within the description set out in ORS 161.360, a rec-
26 ommendation of treatment and services necessary to restore capacity.

27 (b) **The Oregon Health Authority may by rule establish requirements for reports of ex-**
28 **aminations described in subsection (1) of this section.**

29 (3) Except when the defendant and the court both request to the contrary, the report may not

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 contain any findings or conclusions as to whether the defendant as a result of mental disease or
 2 defect was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act
 3 charged.

4 (4) If the examination by the psychiatrist or psychologist cannot be conducted by reason of the
 5 unwillingness of the defendant to participate in the examination, the report shall so state and shall
 6 include, if possible, an opinion as to whether the unwillingness of the defendant was the result of
 7 mental disease or defect affecting capacity to proceed.

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

10 (6)(a) When upon motion of the court or a financially eligible defendant, the court has ordered
 11 a psychiatric or psychological examination of the defendant, a county or justice court shall order
 12 the county to pay, and a circuit court shall order the public defense services executive director to
 13 pay from funds available for the purpose:

14 (A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or psy-
 15 chologist in private practice; and

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

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

23 (7) The Oregon Health Authority shall establish by rule standards for the consultation described
 24 in subsection (1) of this section.

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

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

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

36 (a) If the court finds that the defendant is dangerous to self or others as a result of mental
 37 disease or defect, or that, based on the findings resulting from the consultation described in ORS
 38 161.365 (1), the services and supervision necessary to restore the defendant's fitness to proceed are
 39 not available in the community, the court shall commit the defendant to the custody of the super-
 40 intendent of a state mental hospital or director of a facility, designated by the Oregon Health Au-
 41 thority, if the defendant is at least 18 years of age, or to the custody of the director of a secure
 42 intensive community inpatient facility designated by the authority if the defendant is under 18 years
 43 of age; or

44 (b) If the court does not make a finding described in paragraph (a) of this subsection, or if the
 45 court determines that care other than commitment for incapacity to stand trial would better serve

1 the defendant and the community, the court shall release the defendant on supervision for as long
 2 as the unfitness endures.

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

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

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

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

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

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

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

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

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

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

1 the person released on supervision as described in subsection (3) of this section.

2 **(c) The Oregon Health Authority may establish by rule requirements for the progress**
 3 **reports described in paragraph (a) of this subsection.**

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

10 (A) Three years; or

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

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

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

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

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

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

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

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

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

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

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

43 (13) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this
 44 section, the fact that the defendant is unfit to proceed does not preclude any objection through
 45 counsel and without the personal participation of the defendant on the grounds that the indictment

1 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon
2 any other ground at the discretion of the court which the court deems susceptible of fair determi-
3 nation prior to trial.

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