

# House Bill 2323

Introduced and printed pursuant to House Rule 12.00. Pre-session filed (at the request of House Interim Committee on Judiciary)

## 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 court to make fitness to proceed determination during any stage of criminal proceeding.

Declares emergency, effective on passage.

## A BILL FOR AN ACT

1  
2 Relating to fitness to proceed; amending ORS 161.360, 161.365 and 161.370; and declaring an emer-  
3 gency.

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

5 **SECTION 1.** ORS 161.360 is amended to read:

6 161.360. (1) If, [*before or during the trial in any criminal case*] **at any stage of a criminal pro-**  
7 **ceeding**, the court has reason to doubt the defendant's fitness to proceed by reason of incapacity,  
8 the court may order an examination in the manner provided in ORS 161.365.

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

11 (a) To understand the nature of the proceedings against the defendant; or

12 (b) To assist and cooperate with the counsel of the defendant; or

13 (c) To participate in the defense of the defendant.

14 **SECTION 2.** ORS 161.365 is amended to read:

15 161.365. (1) When the court has reason to doubt the defendant's fitness to proceed by reason of  
16 incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching  
17 its decision. If the court determines the assistance of a psychiatrist or psychologist would be helpful,  
18 the court may:

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

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

25 (2) The report of an examination described in this section must include, but is not necessarily  
26 limited to, the following:

27 (a) A description of the nature of the examination;

28 (b) A statement of the mental condition of the defendant;

29 (c) If the defendant suffers from a mental disease or defect, an opinion as to whether the de-  
30 fendant [*is incapacitated*] **lacks fitness to proceed by reason of incapacity** within the description

**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 set out in ORS 161.360; and

2 (d) If the defendant [*is incapacitated*] **lacks fitness to proceed by reason of incapacity** within  
 3 the description set out in ORS 161.360, a recommendation of treatment and services necessary [*to*  
 4 *restore capacity*] **for the defendant to gain or regain fitness to proceed.**

5 (3) Except when the defendant and the court both request to the contrary, the report may not  
 6 contain any findings or conclusions as to whether the defendant as a result of mental disease or  
 7 defect was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act  
 8 charged.

9 (4) If the examination by the psychiatrist or psychologist cannot be conducted by reason of the  
 10 unwillingness of the defendant to participate in the examination, the report shall so state and shall  
 11 include, if possible, an opinion as to whether the unwillingness of the defendant was the result of  
 12 mental disease or defect affecting [*capacity*] **fitness** to proceed.

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

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

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

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

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

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

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

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

39 (a) If the court finds that the defendant is dangerous to self or others as a result of mental  
 40 disease or defect, or that the services and supervision necessary to restore the defendant's fitness  
 41 to proceed are not available in the community, the court shall commit the defendant to the custody  
 42 of the superintendent of a state mental hospital or director of a facility, designated by the Oregon  
 43 Health Authority, if the defendant is at least 18 years of age, or to the custody of the director of  
 44 a secure intensive community inpatient facility designated by the authority if the defendant is under  
 45 18 years of age; or

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

5 (3) When a defendant is released on supervision under this section, the court may place condi-  
 6 tions that the court deems appropriate on the release, including the requirement that the defendant  
 7 regularly report to the authority or a community mental health program for examination to deter-  
 8 mine if the defendant has **gained or** regained [*capacity to stand trial*] **fitness to proceed**.

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

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

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

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

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

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

32 [(C)] (B) There is a substantial probability that, in the foreseeable future, the defendant will  
 33 gain or regain [*the capacity to stand trial*] **fitness to proceed**. If the probability exists, the super-  
 34 intendent or director shall give the court an estimate of the time in which the defendant, with ap-  
 35 propriate treatment, is expected to gain or regain [*capacity*] **fitness to proceed**.

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

45 (b) Notwithstanding paragraph (a) of this subsection, if the superintendent or director deter-

1 mines that a defendant committed under this section is no longer dangerous to self or others as a  
 2 result of mental disease or defect, or that the services and supervision necessary to restore the  
 3 defendant's fitness to proceed are available in the community, the superintendent or director shall  
 4 file notice of that determination with the court. Upon receipt of the notice, the court shall order  
 5 the person released on supervision as described in subsection (3) of this section.

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*] **fitness to proceed**. However, re-  
 9 gardless of the number of charges with which the defendant is accused, in no event shall the de-  
 10 fendant be committed for longer than whichever of the following, measured from the defendant's  
 11 initial custody date, is 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 **or revoked from probation**.

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 **or on any probation violation**  
 19 **allegation**; and

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

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

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

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

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

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

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

43 (12) If the defendant **gains or** regains fitness to proceed, the term of any sentence received by  
 44 the defendant for conviction of the crime charged **or violation of the conditions of supervision**  
 45 shall be reduced by the amount of time the defendant was committed under this section to the cus-

1 tody of a state mental hospital, or to the custody of a secure intensive community inpatient facility,  
2 designated by the Oregon Health Authority.

3 (13) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this  
4 section, the fact that the defendant is unfit to proceed does not preclude any objection through  
5 counsel and without the personal participation of the defendant on the grounds that the indictment  
6 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon  
7 any other ground at the discretion of the court which the court deems susceptible of fair determi-  
8 nation prior to trial.

9 **SECTION 4. This 2015 Act being necessary for the immediate preservation of the public**  
10 **peace, health and safety, an emergency is declared to exist, and this 2015 Act takes effect**  
11 **on its passage.**

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