

House Bill 2405

Sponsored by Representative DIEHL (at the request of former Representative Raquel Moore-Green, Danielle Bethell)
(Presession filed.)

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**.

Requires that court dismissing charges due to defendant lacking fitness to proceed also order transport of defendant back to jurisdiction in which charges were initiated.

A BILL FOR AN ACT

1
2 Relating to fitness to proceed; amending ORS 161.367, 161.370 and 161.371.

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

4 **SECTION 1.** ORS 161.367 is amended to read:

5 161.367. (1) If at any time the court determines that the defendant lacks fitness to proceed, the
6 court shall further determine whether there is a substantial probability that the defendant, in the
7 foreseeable future, will gain or regain fitness to proceed. If the court determines that there is no
8 substantial probability that the defendant, in the foreseeable future, will gain or regain fitness to
9 proceed, the court shall dismiss, without prejudice **and in accordance with subsection (6) of this**
10 **subsection**, all charges against the defendant and:

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

12 (b) Initiate commitment proceedings under ORS 426.070, 426.701 or 427.235 to 427.290.

13 (2)(a) The superintendent of the hospital or director of the facility in which the defendant is
14 committed under ORS 161.370 or a person examining the defendant as a condition of release to
15 community restoration services shall notify the court if the defendant gains or regains fitness to
16 proceed.

17 (b) A party to the case may notify the court if the defendant has gained or regained fitness to
18 proceed.

19 (c) The court may, upon its own motion or the request of either party, hold a hearing to deter-
20 mine whether the defendant has gained or regained fitness to proceed. If the court determines that
21 the defendant has gained or regained fitness to proceed, the court shall resume the criminal pro-
22 ceeding unless the court determines that so much time has elapsed since the commitment or release
23 of the defendant to community restoration services that it would be unjust to resume the criminal
24 proceeding. If the court determines that it would be unjust to resume the criminal proceeding, the
25 court, on motion of either party, may dismiss the charge **in accordance with subsection (6) of this**
26 **section**, and may order the defendant to be discharged or cause a proceeding to be commenced
27 forthwith under ORS 426.070 to 426.170, 426.701 or 427.235 to 427.290.

28 (3) If the defendant gains or regains fitness to proceed, the defendant shall be given credit
29 against each charge alleged in the accusatory instrument for each day the defendant was committed
30 under ORS 161.370 to the custody of a state mental hospital, or to the custody of a secure intensive
31 community inpatient facility designated by the Oregon Health Authority.

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 (4) Notwithstanding the suspension of the criminal proceeding under ORS 161.370 (2), the fact
 2 that the defendant is unfit to proceed does not preclude any objection through counsel and without
 3 the personal participation of the defendant on the grounds that the indictment is insufficient, that
 4 the statute of limitations has run, that double jeopardy principles apply or upon any other ground
 5 at the discretion of the court which the court deems susceptible of fair determination prior to trial.

6 (5) At the time that the court determines that the defendant lacks fitness to proceed under ORS
 7 161.370 (2), the court shall notify the defendant in writing that federal law prohibits the defendant
 8 from purchasing or possessing a firearm unless the person obtains relief from the prohibition under
 9 federal law. The court shall again notify the defendant in writing of the prohibition if the court finds
 10 that the defendant has gained or regained fitness to proceed under subsection (2) of this section.

11 **(6) If the court intends to dismiss the charges against a defendant who is committed to**
 12 **and currently located at a state mental hospital or other facility, the court shall order that**
 13 **the defendant be immediately transported back to the jurisdiction in which the charges were**
 14 **initiated, and the dismissal shall take effect only upon the defendant's arrival in that juris-**
 15 **diction.**

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

17 161.370. (1)(a) When the defendant's fitness to proceed is drawn in question, the issue shall be
 18 determined by the court.

19 (b) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the
 20 report filed under ORS 161.365, the court may make the determination on the basis of the report.
 21 If the finding is contested, the court shall hold a hearing on the issue. If the report is received in
 22 evidence in the hearing, the party who contests the finding has the right to summon and to cross-
 23 examine any certified evaluator who submitted the report and to offer evidence upon the issue.
 24 Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

25 (2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding
 26 against the defendant shall be suspended and the court shall proceed in accordance with this sub-
 27 section.

28 (b) After making the determination under paragraph (a) of this subsection, the court shall re-
 29 ceive a recommendation from a community mental health program director or the director's
 30 designee, and from any local entity that would be responsible for treating the defendant if the de-
 31 fendant were to be released in the community, concerning whether appropriate community restora-
 32 tion services are present and available in the community.

33 (c) If the parties agree as to the appropriate action under this section, the court may, after
 34 making all findings required by law, enter any order authorized by this section. If the parties do not
 35 agree as to the appropriate action, the court and the parties shall, at a hearing, consider an ap-
 36 propriate action in the case, and the court shall make a determination and enter an order necessary
 37 to implement the action. In determining the appropriate action, the court shall consider the primary
 38 and secondary release criteria as defined in ORS 135.230, the least restrictive option appropriate for
 39 the defendant, the needs of the defendant and the interests of justice. Actions may include but are
 40 not limited to:

41 (A) Commitment for the defendant to gain or regain fitness to proceed under subsection (3) or
 42 (4) of this section;

43 (B) An order to engage in community restoration services, as recommended by the community
 44 mental health program director or designee, under subsection (6) of this section;

45 (C) Commencement of a civil commitment proceeding under ORS 426.070 to 426.170, 426.701 or

1 427.235 to 427.290;

2 (D) Commencement of protective proceedings under ORS chapter 125; or

3 (E) Dismissal of the charges pursuant to ORS 135.755 **and in accordance with ORS 161.367**

4 **(6).**

5 (d) If the court, while considering or ordering an appropriate action under this subsection, does
6 not order the defendant committed to a state mental hospital or other facility, but finds that ap-
7 propriate community restoration services are not present and available in the community, for any
8 defendant remaining in custody after such determination, the court shall set a review hearing seven
9 days from the date of the determination under paragraph (a) of this subsection. At the review
10 hearing, the court shall consider all relevant information and determine if commitment to the state
11 mental hospital or other facility is appropriate under subsection (3) or (4) of this section, or if an-
12 other action described in paragraph (c) of this subsection is appropriate. At the conclusion of the
13 hearing the court shall enter an order in accordance with the defendant’s constitutional rights to
14 due process.

15 (e) If the court determines that the appropriate action in the case is an order for the defendant
16 to engage in community restoration services, but the defendant has a pending criminal case, warrant
17 or hold in one or more other jurisdictions, the other jurisdictions shall, within two judicial days of
18 becoming aware of the proceeding under this section, communicate with the court and the other
19 jurisdictions, if applicable, to develop a plan to address the interests of all jurisdictions in the de-
20 fendant in a timely manner.

21 (3)(a) If the most serious offense in the charging instrument is a felony, the court shall commit
22 the defendant to the custody of the superintendent of a state mental hospital or director of a facility
23 designated by the Oregon Health Authority if the defendant is at least 18 years of age, or to the
24 custody of the director of a secure intensive community inpatient facility designated by the author-
25 ity if the defendant is under 18 years of age, if the court makes the following findings:

26 (A) The defendant requires a hospital level of care due to public safety concerns if the defendant
27 is not hospitalized or in custody or the acuity of symptoms of the defendant’s qualifying mental
28 disorder; and

29 (B) Based on the findings resulting from a consultation described in ORS 161.365 (1), if applica-
30 ble, from any information provided by community-based mental health providers or any other
31 sources, and primary and secondary release criteria as defined in ORS 135.230, the appropriate
32 community restoration services are not present and available in the community.

33 (b) If the defendant is committed under this subsection, the community mental health program
34 director, or director’s designee, shall at regular intervals, during any period of commitment, review
35 available community restoration services and maintain communication with the defendant and the
36 superintendent of the state mental hospital or director of the facility in order to facilitate an effi-
37 cient transition to treatment in the community when ordered.

38 (c) If the court does not order the commitment of the defendant under this subsection, the court
39 shall proceed in accordance with subsection (2)(c) of this section to determine and order an appro-
40 priate action other than commitment.

41 (4)(a) If the most serious offense in the charging instrument is a misdemeanor, the court may
42 not commit the defendant to the custody of the superintendent of a state mental hospital or director
43 of a facility designated by the Oregon Health Authority if the defendant is at least 18 years of age,
44 or to the custody of the director of a secure intensive community inpatient facility designated by
45 the authority if the defendant is under 18 years of age, unless the court:

1 (A)(i) Receives a recommendation from a certified evaluator that the defendant requires a hos-
 2 pital level of care due to the acuity of symptoms of the defendant's qualifying mental disorder; and

3 (ii) Receives a recommendation from a community mental health program director, or director's
 4 designee, that the appropriate community restoration services are not present and available in the
 5 community; or

6 (B) Determines that the defendant requires a hospital level of care after making all of the fol-
 7 lowing written findings:

8 (i) The defendant needs a hospital level of care due to the acuity of the symptoms of the
 9 defendant's qualifying mental disorder;

10 (ii) There are public safety concerns; and

11 (iii) The appropriate community restoration services are not present and available in the com-
 12 munity.

13 (b) If at the time of determining the appropriate action for the case, the court is considering
 14 commitment under paragraph (a)(A) of this subsection and:

15 (A) Has not received a recommendation from a certified evaluator as to whether the defendant
 16 requires a hospital level of care due to the acuity of symptoms of the defendant's qualifying mental
 17 disorder, the court shall order a certified evaluator to make such a recommendation.

18 (B) Has not received a recommendation from the community mental health program director or
 19 designee concerning whether appropriate community restoration services are present and available
 20 in the community, the court shall order the director or designee to make such a recommendation.

21 (c) If the court does not order the commitment of the defendant under this subsection, the court
 22 shall proceed in accordance with subsection (2)(c) of this section to determine and order an appro-
 23 priate action other than commitment.

24 (d) If the defendant is committed under this subsection, the community mental health program
 25 director, or director's designee, shall at regular intervals, during any period of commitment, review
 26 available community restoration services and maintain communication with the defendant and the
 27 superintendent of the state mental hospital or director of the facility in order to facilitate an effi-
 28 cient transition to treatment in the community when ordered.

29 (5) If the most serious offense in the charging instrument is a violation, the court may not
 30 commit the defendant to the custody of the superintendent of a state mental hospital or director of
 31 a facility designated by the Oregon Health Authority if the defendant is at least 18 years of age,
 32 or to the custody of the director of a secure intensive community inpatient facility designated by
 33 the authority if the defendant is under 18 years of age.

34 (6)(a) If the court does not order the commitment of the defendant under subsection (3) or (4)
 35 of this section, if commitment is precluded under subsection (5) of this section or if the court de-
 36 termines that care other than commitment would better serve the defendant and the community, the
 37 court shall release the defendant, pursuant to an order that the defendant engage in community
 38 restoration services, until the defendant has gained or regained fitness to proceed, or until the court
 39 finds there is no substantial probability that the defendant will, within the foreseeable future, gain
 40 or regain fitness to proceed. The court may not order the defendant to engage in community resto-
 41 ration services in another county without permission from the other county.

42 (b) The court may order a community mental health program director coordinating the
 43 defendant's treatment in the community to provide the court with status reports on the defendant's
 44 progress in gaining or regaining fitness to proceed. The director shall provide a status report if the
 45 defendant is not complying with court-ordered restoration services.

1 (c) A community mental health program director coordinating the defendant's treatment in the
 2 community shall notify the court if the defendant gains or regains fitness to proceed. The notice
 3 shall be filed with the court and may be filed electronically. The clerk of the court shall cause
 4 copies of the notice to be delivered to both the district attorney and the counsel for the defendant.

5 (d) When a defendant is ordered to engage in community restoration services under this sub-
 6 section, the court may place conditions that the court deems appropriate on the release, including
 7 the requirement that the defendant regularly report to a state mental hospital or a certified evalu-
 8 ator for examination to determine if the defendant has gained or regained fitness to proceed.

9 (7) The Oregon Health Authority shall establish by rule standards for the recommendation pro-
 10 vided to the court described in subsection (2) of this section.

11 **SECTION 3.** ORS 161.371 is amended to read:

12 161.371. (1) The superintendent of a state mental hospital or director of a facility to which the
 13 defendant is committed under ORS 161.370 shall cause the defendant to be evaluated within 60 days
 14 from the defendant's delivery into the superintendent's or director's custody, for the purpose of de-
 15 termining whether there is a substantial probability that, in the foreseeable future, the defendant
 16 will have fitness to proceed. In addition, the superintendent or director shall:

17 (a) Immediately notify the committing court if the defendant, at any time, gains or regains fit-
 18 ness to proceed or if there is no substantial probability that, within the foreseeable future, the de-
 19 fendant will gain or regain fitness to proceed.

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

22 (A) The defendant has present fitness to proceed;

23 (B) There is no substantial probability that, in the foreseeable future, the defendant will gain
 24 or regain fitness to proceed; or

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

29 (c) Notify the court if court-ordered involuntary medication is necessary for the defendant to
 30 gain or regain fitness to proceed and, if appropriate, submit a report to the court under ORS 161.372.

31 (2)(a) If the superintendent of the state mental hospital or director of the facility to which the
 32 defendant is committed determines that there is a substantial probability that, in the foreseeable
 33 future, the defendant will gain or regain fitness to proceed, unless the court otherwise orders, the
 34 defendant shall remain in the superintendent's or director's custody where the defendant shall re-
 35 ceive treatment designed for the purpose of enabling the defendant to gain or regain fitness to pro-
 36 ceed. In keeping with the notice requirement under subsection (1)(b) of this section, the
 37 superintendent or director shall, for the duration of the defendant's period of commitment, submit
 38 a progress report to the committing court, concerning the defendant's fitness to proceed, at least
 39 once every 180 days as measured from the date of the defendant's delivery into the superintendent's
 40 or director's custody.

41 (b) A progress report described in paragraph (a) of this subsection may consist of an update to:

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

43 (B) An evaluation conducted under subsection (1) of this section, if the defendant did not receive
 44 an examination under ORS 161.365.

45 (3)(a) Notwithstanding subsection (2) of this section, if the most serious offense in the charging

1 instrument is a felony, and the superintendent of the state mental hospital or director of the facility
2 to which the defendant is committed determines that a hospital level of care is no longer necessary
3 due to present public safety concerns and the acuity of symptoms of the defendant's qualifying
4 mental disorder, the superintendent or director may file notice of the determination with the court.
5 Upon receipt of the notice, the court shall order that a community mental health program director
6 or the director's designee, within five judicial days:

7 (A) Consult with the defendant and with any local entity that would be responsible for providing
8 community restoration services, if the defendant were to be released in the community, to determine
9 whether community restoration services are present and available in the community; and

10 (B) Provide the court and the parties with recommendations from the consultation.

11 (b) Notwithstanding subsection (2) of this section, if the most serious offense in the charging
12 instrument is a felony, and the community mental health program director determines that commu-
13 nity restoration services that would mitigate any risk posed by the defendant are present and
14 available in the community, the community mental health program director may file notice of the
15 determination with the court. Upon receipt of the notice, the court shall order that the superinten-
16 dent of the state mental hospital or director of the facility to which the defendant is committed,
17 within five judicial days:

18 (A) Evaluate the defendant to determine whether a hospital level of care is no longer necessary
19 due to present public safety concerns, or no longer necessary due to the acuity of symptoms of the
20 defendant's qualifying mental disorder; and

21 (B) Provide the court and the parties with recommendations from the evaluation.

22 (c) Within 10 judicial days of receiving the recommendations described in paragraph (a) or (b)
23 of this subsection, the court shall hold a hearing to determine an appropriate action in accordance
24 with ORS 161.370 (2)(c) as follows:

25 (A) If, after consideration of the factors and possible actions described in ORS 161.370 (2)(c) and
26 any recommendations received under paragraph (a) or (b) of this subsection, the court determines
27 that a hospital level of care is necessary due to public safety concerns or the acuity of symptoms
28 of the defendant's qualifying mental disorder, and that based on the consultation or evaluation de-
29 scribed in paragraph (a) or (b) of this subsection, any information provided by community-based
30 mental health providers or any other sources, primary and secondary release criteria as defined in
31 ORS 135.230, and any other information the court finds to be trustworthy and reliable, the appro-
32 priate community restoration services are not present and available in the community, the court
33 may continue the commitment of the defendant.

34 (B) If the court does not make the determination described in subparagraph (A) of this para-
35 graph, the court shall terminate the commitment and shall set a review hearing seven days from the
36 date of the commitment termination for any defendant remaining in custody. At the review hearing,
37 the court shall consider all relevant information, determine an appropriate action in the case as
38 described in ORS 161.370 (2)(c) and enter an order in accordance with the defendant's constitutional
39 rights to due process.

40 (4)(a) Notwithstanding subsection (2) of this section, if the most serious offense in the charging
41 instrument is a misdemeanor, and the superintendent of the state mental hospital or director of the
42 facility to which the defendant is committed determines that the defendant no longer needs a hos-
43 pital level of care due to the acuity of symptoms of the defendant's qualifying mental disorder or
44 there are not present public safety concerns, the superintendent or director shall file notice of the
45 determination with the court, along with recommendations regarding the necessary community res-

1 toration services that would mitigate any risk presented by the defendant. Upon receipt of the no-
2 tice, the court shall order that a community mental health program director or the director's
3 designee, within five judicial days:

4 (A) Consult with the defendant and with any local entity that would be responsible for providing
5 community restoration services, if the defendant were to be released in the community, to determine
6 whether appropriate community restoration services are present and available in the community;
7 and

8 (B) Provide the court and the parties with recommendations from the consultation.

9 (b) Notwithstanding subsection (2) of this section, if the most serious offense in the charging
10 instrument is a misdemeanor, and the community mental health program director determines that
11 the community restoration services that would mitigate any risk posed by the defendant are present
12 and available in the community, the community mental health program director may file notice of
13 the determination with the court. Upon receipt of the notice, the court shall order that the super-
14 intendent of the state mental hospital or director of the facility to which the defendant is committed,
15 within five judicial days:

16 (A) Evaluate the defendant to determine whether a hospital level of care is no longer necessary
17 due to present public safety concerns, or no longer necessary due to the acuity of symptoms of the
18 defendant's qualifying mental disorder; and

19 (B) Provide the court and the parties with recommendations from the evaluation.

20 (c) Within 10 judicial days of receiving the recommendations described in paragraph (a) or (b)
21 of this subsection, the court shall hold a hearing to determine an appropriate action in accordance
22 with ORS 161.370 (2)(c) as follows:

23 (A) After consideration of the factors and possible actions described in ORS 161.370 (2)(c), the
24 consultation or evaluation and any recommendations described in paragraph (a) or (b) of this sub-
25 section, and any other information the court finds to be trustworthy and reliable, the court may
26 continue the commitment of the defendant if the court makes written findings that a hospital level
27 of care is necessary due to public safety concerns and the acuity of symptoms of the defendant's
28 qualifying mental disorder, and that appropriate community restoration services are not present and
29 available in the community.

30 (B) If the court does not make the findings described in subparagraph (A) of this paragraph, the
31 court shall terminate the commitment and shall set a review hearing seven days from the date of
32 the commitment termination for any defendant remaining in custody. At the review hearing, the
33 court shall consider all relevant information, determine an appropriate action in the case as de-
34 scribed in ORS 161.370 (2)(c) and enter an order in accordance with the defendant's constitutional
35 rights to due process.

36 (5)(a) If a defendant remains committed under this section, the court shall determine within a
37 reasonable period of time whether there is a substantial probability that, in the foreseeable future,
38 the defendant will gain or regain fitness to proceed. However, regardless of the number of charges
39 with which the defendant is accused, in no event shall the defendant be committed for longer than
40 whichever of the following, measured from the defendant's initial custody date, is shorter:

41 (A) Three years; or

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

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

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

3 (B) The defendant shall be given credit against each charge alleged in the accusatory instru-
 4 ment:

5 (i) For each day the defendant is committed under this section, whether the days are consecutive
 6 or are interrupted by a period of time during which the defendant has gained or regained fitness to
 7 proceed; and

8 (ii) Unless the defendant is charged on any charging instrument with aggravated murder or a
 9 crime listed in ORS 137.700 (2), for each day the defendant is held in jail before and after the date
 10 the defendant is first committed, whether the days are consecutive or are interrupted by a period
 11 of time during which the defendant lacks fitness to proceed.

12 (c) The superintendent of the state mental hospital or director of the facility to which the de-
 13 fendant is committed shall notify the committing court of the defendant's impending discharge 30
 14 days before the date on which the superintendent or director is required to discharge the defendant
 15 under this subsection.

16 (6)(a) All notices required under this section shall be filed with the court and may be filed
 17 electronically. The clerk of the court shall cause copies of the notices to be delivered to both the
 18 district attorney and the counsel for the defendant.

19 (b) When the committing court receives a notice from the superintendent or director under
 20 subsection (1) of this section concerning the defendant's progress or lack thereof, or under sub-
 21 section (5) of this section concerning the defendant's impending discharge, the committing court
 22 shall determine, after a hearing if a hearing is requested, whether the defendant presently has fit-
 23 ness to proceed.

24 (7) If at any time the court determines that the defendant lacks fitness to proceed, the court
 25 shall further determine whether the defendant is entitled to discharge under subsection (5) of this
 26 section. If the court determines that the defendant is entitled to discharge under subsection (5) of
 27 this section, the court shall dismiss, without prejudice **and in accordance with ORS 161.367 (6)**,
 28 all charges against the defendant and:

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

30 (b) Initiate commitment proceedings under ORS 426.070, 426.701 or 427.235 to 427.290.

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