

# Senate Bill 395

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## 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 court to order examination when court has reason to doubt defendant's fitness to proceed. Establishes time limits for filing report, contesting report, holding hearing, commencing treatment for defendant and determining fitness to proceed or need for further treatment.

## A BILL FOR AN ACT

1  
2 Relating to fitness to proceed; amending ORS 161.360, 161.365 and 161.370.

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

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

5 161.360. (1) If, before or during the trial in any criminal case, the court has reason to doubt the  
6 defendant's fitness to proceed by reason of incapacity, the court [*may*] **shall** order an examination  
7 in the manner provided in ORS 161.365.

8 (2) A defendant may be found incapacitated if, as a result of mental disease or defect, the de-  
9 fendant is unable:

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

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

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

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

14 161.365. (1) When the court has reason to doubt the defendant's fitness to proceed by reason of  
15 incapacity as described in ORS 161.360, the court [*may call any witness to its assistance in reaching*  
16 *its decision. If the court determines the assistance of a psychiatrist or psychologist would be helpful,*  
17 *the court may*] **shall**:

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

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

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

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

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

28 (c) If the defendant suffers from a mental disease or defect, an opinion as to whether the de-  
29 fendant is incapacitated within the description set out in ORS 161.360; and

30 (d) If the defendant is incapacitated within the description set out in ORS 161.360, a recom-

**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 mendment of treatment and services necessary to restore capacity.

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

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

10 (5) The report shall be filed in triplicate with the clerk of the court **within 30 days of the**  
11 **court's order**, who shall cause copies to be delivered to the district attorney and to counsel for  
12 defendant.

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

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

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

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

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

27 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-  
28 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the  
29 finding of the report filed under ORS 161.365 **within 14 days of receiving the report**, the court  
30 may make the determination on the basis of the report. If the finding is contested, the court shall  
31 hold a hearing on the issue **within 21 days of receiving notice that the report is contested**. If  
32 the report is received in evidence in the hearing, the party who contests the finding has the right  
33 to summon and to cross-examine any psychiatrist or psychologist who submitted the report and to  
34 offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be  
35 introduced by either party.

36 (2) **The court shall determine the issue of fitness to proceed within 10 days of the hearing**  
37 **described in subsection (1) of this section or, if the report is not contested, within 20 days**  
38 **of receiving the report**. If the court determines that the defendant lacks fitness to proceed, the  
39 criminal proceeding against the defendant shall be suspended and:

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

1 the authority if the defendant is under 18 years of age; or

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

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

10 **(4) Treatment necessary for the defendant to gain or regain fitness to proceed shall be**  
11 **commenced within 30 days of the court's determination described in subsection (2) of this**  
12 **section.**

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

22 [(5)] (6) The superintendent of a state hospital or director of a facility to which the defendant  
23 is committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery  
24 into the superintendent's or director's custody, for the purpose of determining whether there is a  
25 substantial probability that, in the foreseeable future, the defendant will have the capacity to stand  
26 trial. In addition, the superintendent or director shall:

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

29 (b) Within 90 days of the defendant's delivery into the superintendent's or director's custody,  
30 **provide the committing court with the report resulting from the evaluation and** notify the  
31 [committing] court that:

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

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

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

39 **(7)(a) The court shall determine whether the defendant has the present capacity to stand**  
40 **trial or is in need of further treatment to gain or regain fitness to proceed within 14 days**  
41 **of receiving the report described in subsection (6) of this section.**

42 **(b) The prosecuting attorney or counsel for the defendant may contest the court's de-**  
43 **termination by notifying the court within 14 days of the determination. If the court receives**  
44 **notice under this paragraph, the court shall hold a hearing on the issue within 21 days of**  
45 **receiving the notification and shall make a determination on further treatment within 10**

1 **days of the hearing.**

2 [(6)(a)] **(8)(a)** If the superintendent or director [*determines*] **notifies the court** that there is a  
 3 substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity  
 4 to stand trial, [*unless the court otherwise orders*] **and the court determines that the defendant is**  
 5 **in need of further treatment as described in subsection (7) of this section**, the defendant shall  
 6 remain in the superintendent's or director's custody where the defendant shall receive treatment  
 7 designed for the purpose of enabling the defendant to gain or regain capacity. In keeping with the  
 8 notice requirement under subsection [(5)(b)] **(6)(b)** of this section, the superintendent or director  
 9 shall, for the duration of the defendant's period of commitment, submit a progress report to the  
 10 committing court, concerning the defendant's capacity or incapacity, at least once every 180 days  
 11 as measured from the date of the defendant's delivery into the superintendent's or director's custody.

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

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

24 (A) Three years; or

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

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

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

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

35 [(8)] **(10)** The superintendent or director shall notify the committing court of the defendant's  
 36 impending discharge 30 days before the date on which the superintendent or director is required to  
 37 discharge the defendant under subsection [(7)] **(9)** of this section.

38 [(9)] **(11)** When the committing court receives a notice from the superintendent or director under  
 39 subsection [(5) or (8)] **(10)** of this section concerning the defendant's progress or lack thereof, the  
 40 committing court shall determine, after a hearing, if a hearing is requested, whether the defendant  
 41 presently has the capacity to stand trial.

42 [(10)] **(12)** If at any time the court determines that the defendant lacks the capacity to stand  
 43 trial, the court shall further determine whether there is a substantial probability that the defendant,  
 44 in the foreseeable future, will gain or regain the capacity to stand trial and whether the defendant  
 45 is entitled to discharge under subsection [(7)] **(9)** of this section. If the court determines that there

1 is no substantial probability that the defendant, in the foreseeable future, will gain or regain the  
2 capacity to stand trial or that the defendant is entitled to discharge under subsection [(7)] (9) of this  
3 section, the court shall dismiss, without prejudice, all charges against the defendant and:

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

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

6 [(11)] (13) All notices required under this section shall be filed with the clerk of the court and  
7 delivered to both the district attorney and the counsel for the defendant.

8 [(12)] (14) If the defendant **gains or** regains fitness to proceed, the term of any sentence received  
9 by the defendant for conviction of the crime charged shall be reduced by the amount of time the  
10 defendant was committed under this section to the custody of a state mental hospital, or to the  
11 custody of a secure intensive community inpatient facility, designated by the Oregon Health Au-  
12 thority.

13 [(13)] (15) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this  
14 section, the fact that the defendant is unfit to proceed does not preclude any objection through  
15 counsel and without the personal participation of the defendant on the grounds that the indictment  
16 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon  
17 any other ground at the discretion of the court which the court deems susceptible of fair determi-  
18 nation prior to trial.

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