

LC 520
2023 Regular Session
44300-024
11/2/22 (JLM/ps)

D R A F T

SUMMARY

Modifies timing of progress report superintendent of state mental hospital or director of facility to which defendant is committed must send court concerning defendant's fitness to proceed. Requires committing court to cause defendant to be transported back to court when certain circumstances occur. Establishes maximum time period authorized for restoration of defendant who lacks fitness to proceed.

Directs Oregon Health Authority to retain consultant to work with local governments, community mental health programs and other entities to establish recommendations concerning community restoration services and financial liability for defendants who lack fitness to proceed.

Declares emergency, effective on passage.

A BILL FOR AN ACT

Relating to fitness to proceed; creating new provisions; amending ORS 161.371; and declaring an emergency.

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

SECTION 1. ORS 161.371 is amended to read:

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

(a) Immediately notify the committing court if the defendant, at any time, gains or regains fitness to proceed or if there is no substantial probability

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.

that, within the foreseeable future, the defendant will gain or regain fitness to proceed.

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

(A) The defendant has present fitness to proceed;

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

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

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

(2)(a) If the superintendent of the state mental hospital or director of the facility to which the defendant is committed determines that there is a substantial probability that, in the foreseeable future, the defendant will gain or regain fitness to proceed, unless the court otherwise orders, the defendant shall remain in the superintendent's or director's custody where the defendant shall receive treatment designed for the purpose of enabling the defendant to gain or regain fitness to proceed. In keeping with the notice requirement under subsection (1)(b) of this section, the superintendent or director shall, for the duration of the defendant's period of commitment, submit a progress report to the committing court, concerning the defendant's fitness to proceed, at least once every [180] **30 days for the first 90 days of the commitment**, as measured from the date of the defendant's delivery into the superintendent's or director's custody, **and thereafter at least once every 90 days**.

(b) A progress report described in paragraph (a) of this subsection **shall consist of a brief update regarding the defendant's clinical functioning**

as it relates to fitness to proceed, and may consist of an update to:

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

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

(3)(a) Notwithstanding subsection (2) of this section, if the most serious offense in the charging instrument is a felony, and the superintendent of the state mental hospital or director of the facility to which the defendant is committed determines that a hospital level of care is no longer necessary due to present public safety concerns and the acuity of symptoms of the defendant's qualifying mental disorder, the superintendent or director may file notice of the determination with the court. Upon receipt of the notice, the court shall order that a community mental health program director or the director's designee, within five judicial days:

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

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

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

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

1 disorder; and

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

4 (c) Within 10 judicial days of receiving the recommendations described in
5 paragraph (a) or (b) of this subsection, the court shall hold a hearing to de-
6 termine an appropriate action in accordance with ORS 161.370 (2)(c) as fol-
7 lows:

8 (A) If, after consideration of the factors and possible actions described in
9 ORS 161.370 (2)(c) and any recommendations received under paragraph (a)
10 or (b) of this subsection, the court determines that a hospital level of care
11 is necessary due to public safety concerns or the acuity of symptoms of the
12 defendant's qualifying mental disorder, and that based on the consultation
13 or evaluation described in paragraph (a) or (b) of this subsection, any infor-
14 mation provided by community-based mental health providers or any other
15 sources, primary and secondary release criteria as defined in ORS 135.230,
16 and any other information the court finds to be trustworthy and reliable, the
17 appropriate community restoration services are not present and available in
18 the community, the court may continue the commitment of the defendant.

19 (B) If the court does not make the determination described in subpara-
20 graph (A) of this paragraph, the court shall terminate the commitment and
21 shall set a review hearing seven days from the date of the commitment ter-
22 mination for any defendant remaining in custody. At the review hearing, the
23 court shall consider all relevant information, determine an appropriate
24 action in the case as described in ORS 161.370 (2)(c) and enter an order in
25 accordance with the defendant's constitutional rights to due process.

26 (4)(a) Notwithstanding subsection (2) of this section, if the most serious
27 offense in the charging instrument is a misdemeanor, and the superintendent
28 of the state mental hospital or director of the facility to which the defendant
29 is committed determines that the defendant no longer needs a hospital level
30 of care due to the acuity of symptoms of the defendant's qualifying mental
31 disorder or there are not present public safety concerns, the superintendent

or director shall file notice of the determination with the court, along with recommendations regarding the necessary community restoration services that would mitigate any risk presented by the defendant. Upon receipt of the notice, the court shall order that a community mental health program director or the director's designee, within five judicial days:

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

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

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

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

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

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

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

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

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

[(A) Three years; or]

[(B) A period of time equal to the maximum sentence the court could have imposed if the defendant had been convicted.]

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

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

1 *[(B) The defendant shall be given credit against each charge alleged in the*
2 *accusatory instrument:]*

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

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

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

16 **(5) The committing court shall cause the defendant to be trans-**
17 **ported to the court upon notification from the superintendent of the**
18 **state mental hospital or director of the facility to which the defendant**
19 **is committed, or the designee of the superintendent or director, that**
20 **the defendant has gained or regained fitness to proceed, or that there**
21 **is no substantial probability that, within the maximum time period**
22 **authorized for restoration under section 3 of this 2023 Act, the de-**
23 **fendant will gain or regain fitness to proceed.**

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

28 (b) When the committing court receives a notice from the superintendent
29 or director under subsection (1) of this section concerning the defendant's
30 progress or lack thereof, or under *[subsection (5) of this section]* **section 3**
31 **of this 2023 Act** concerning the defendant's impending discharge, the com-

mitting court shall determine, after a hearing if a hearing is requested, whether the defendant presently has fitness to proceed.

(7) If at any time the court determines that the defendant lacks fitness to proceed, the court shall further determine whether the defendant is entitled to discharge under *[subsection (5) of this section]* **section 3 of this 2023 Act**. If the court determines that the defendant is entitled to discharge under *[subsection (5) of this section]* **section 3 of this 2023 Act**, the court shall dismiss, without prejudice, all charges against the defendant and:

(a) Order that the defendant be discharged; or

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

SECTION 2. Section 3 of this 2023 Act is added to and made a part of ORS 161.355 to 161.371.

SECTION 3. (1) If a defendant is committed or ordered to engage in community restoration services under ORS 161.370 (2)(c), the court shall determine within a reasonable period of time whether there is a substantial probability that, within the maximum time period authorized for restoration described in this section, the defendant will gain or regain fitness to proceed.

(2) If the most serious offense in the charging instrument is a misdemeanor, in no event shall the restoration period be longer than whichever of the following, measured from the defendant's initial restoration date, is shorter:

(a) 90 days; or

(b) A period of time equal to the maximum sentence the court could have imposed if the defendant had been convicted.

(3) If the most serious offense in the charging instrument is a felony, in no event shall the restoration period be longer than whichever of the following, measured from the defendant's initial restoration date, is shorter:

(a) Six months; or

1 (b) A period of time equal to the maximum sentence the court could
2 have imposed if the defendant had been convicted.

3 (4)(a) Notwithstanding subsection (3) of this section, if the most
4 serious offense in the charging instrument is aggravated murder or a
5 felony listed in ORS 137.700 (2), the parties may request an extension
6 of the time period described in subsection (3) of this section of an ad-
7 ditional six months, and the court may order the extension if:

8 (A) The defendant has been evaluated and, based on the evaluator's
9 clinical opinions, the court finds that the defendant is likely to gain
10 or regain fitness to proceed during the extension; and

11 (B) The parties acknowledge an intent to proceed with the case and
12 the court finds that the state has a strong interest in prosecuting the
13 charges.

14 (b) If the court orders an extension of the restoration period under
15 this subsection, the court shall further order that the extended resto-
16 ration period occur in the least restrictive placement in which it is
17 appropriate for the restoration to occur. Any finding concerning the
18 least restrictive appropriate placement must be based on clinical evi-
19 dence.

20 (5) The maximum time period authorized for restoration for any
21 felony may not exceed one year.

22 (6) For purposes of calculating the maximum time period authorized
23 for restoration under this section:

24 (a) The initial restoration date is the date on which the defendant
25 is first committed or ordered to engage in community restoration
26 services on any charge alleged in the accusatory instrument;

27 (b) Multiple charges must be consolidated into a single commit-
28 ment, with the maximum time period authorized for restoration based
29 on the most serious charge as described in subsections (2) to (5) of this
30 section; and

31 (c) The defendant shall be given credit for each day the defendant

is committed or ordered to engage in community restoration services.

(7) A defendant who has been discharged under this section due to the expiration of the maximum time period authorized for restoration may not be committed or ordered to engage in community restoration services under ORS 161.370 (2)(c) on new charges based on the same conduct.

(8) The superintendent of the state mental hospital or director of the facility to which the defendant is committed shall notify the committing court of the defendant's impending discharge 30 days before the date on which the superintendent or director is required to discharge the defendant under this section.

SECTION 4. (1) No later than December 1, 2023, the Oregon Health Authority shall retain a consultant to work with the authority, community mental health programs, local mental health authorities, county governments, relevant tribal partners and the courts to establish recommendations related to cost-sharing and incentive agreements between the authority and community mental health programs for appropriate levels of treatment for defendants who lack fitness to proceed.

(2) The recommendations of the consultant specifically must include:

(a) Recommendations concerning shared financial liability and clear accountability requirements when the clinical recommendations of Oregon State Hospital staff are that the defendant does not require a hospital level of care due to the acuity of symptoms of the defendant's qualifying mental disorder, but that the appropriate community restoration services are not present and available in the community.

(b) Recommendations concerning shared financial liability and clear accountability requirements when more than one county is responsible for the defendant's commitment to the Oregon State Hospital, including responsibility for costs between counties.

1 (c) Recommendations for when a county orders a defendant to en-
2 gage in community restoration services within an appropriate time
3 frame, including potential incentives or credits to offset costs for de-
4 fendants committed to the Oregon State Hospital from that county.

5 (3) The consultant shall prepare a report containing the recom-
6 mendations and, no later than December 31, 2024, provide the report
7 to:

8 (a) The Oregon Health Authority; and

9 (b) The interim committees of the Legislative Assembly related to
10 behavioral health, in the manner provided under ORS 192.245.

11 SECTION 5. Section 4 of this 2023 Act is repealed on July 1, 2025.

12 SECTION 6. This 2023 Act being necessary for the immediate pres-
13 ervation of the public peace, health and safety, an emergency is de-
14 clared to exist, and this 2023 Act takes effect on its passage.