

**INCOMPETENT TO STAND TRIAL AND UNRESTORABLE
AND
CONTINUING COURT JURISDICTION**

I. WHAT'S GOING ON WITH DEFENDANT?

Defendant is incompetent to stand trial and cannot be restored within the time period per the examiner's testimony or stipulated report.

II. QUESTION PRESENTED:

What happens to the defendant and to the case when the court determines based upon evidence presented at the competency hearing that defendant is not restorable to competency within a one year period of time? Generally, the court will have to order the defendant's discharge and/or cause an affidavit to be filed in probate court for the defendant's civil commitment.

III. RELEVANT STATUTES:

O.R.C. 2945.38(B)(2): If the court finds the defendant is incompetent to stand trial and that there is not a substantial probability that the defendant will become competent to stand trial within one year, the court *shall order the discharge of the defendant* (order dismissal of the case) **unless:**

1. The court files an affidavit in the probate court for civil commitment of the defendant. See Civil Commitment, *infra*; OR
2. ONLY if the defendant's most serious charge is a first or second degree felony of violence – see O.R.C. 2945.38(C)(1) for more detailed definition – upon the court's or prosecutor's motion, the court seeks to retain jurisdiction over the defendant.

O.R.C. 2945.39(A)(2): ONLY if the defendant's most serious charge is a first or second degree felony of violence – see O.R.C. 2945.38(C)(1): the court can maintain jurisdiction over the defendant on the motion of the prosecuting attorney or on the court's own motion, *if the court finds by clear and convincing evidence* that the defendant:

1. Committed the offense with which he/she is charged AND
2. is a "mentally ill/mentally retarded person subject to hospitalization/institutionalization."

O.R.C. 5122.01: (A) "Mental illness" means a substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life.

(B) "Mentally ill person subject to hospitalization by court order" means a mentally ill person who, because of the person's illness:

- (1) Represents a substantial risk of physical harm to self as manifested by evidence of threats of, or attempts at, suicide or serious self-inflicted bodily harm; OR
- (2) Represents a substantial risk of physical harm to others as manifested by evidence of recent homicidal or other violent behavior, evidence of recent threats that place another in reasonable fear of violent behavior and serious physical harm, or other evidence of present dangerousness: OR

- (3) Represents a substantial and immediate risk of serious physical impairment or injury to him/herself as manifested by evidence that the person is unable to provide for and is not providing for the person's basic physical needs because of the person's mental illness and that appropriate provision for those needs cannot be made immediately available in the community; OR
- (4) Would benefit from treatment in a hospital for his mental illness and is in need of such treatment as manifested by evidence of behavior that creates a grave and imminent risk to substantial rights of others or him/herself.

O.R.C. 2945.38(B)(2) (cont.): If the municipal court chooses to file an affidavit in the probate court where the defendant resides, the affidavit must allege that the defendant is a mentally ill person subject to hospitalization or a mentally retarded person subject to institutionalization by court order. When such affidavit is filed, the court shall send to the probate court all written reports it has concerning the defendant's mental condition.

If the affidavit is filed with the probate court, the municipal court may then issue an order stating that the defendant be detained until the initial hearing of the probate court (which, according to law, shall occur within 10 days).

O.R.C. 2945.401(J)(1): A defendant who has been civilly committed
 -pursuant to O.R.C. 2945.39 because he/she is incompetent to stand trial and unrestorable or
 -pursuant to O.R.C. 2945.40 because he/she has been found not guilty by reason of insanity
 will continue to be under the municipal court's jurisdiction until "final termination of the commitment." "Final termination of the commitment" means whichever of the following events first occurs:

- (a) Defendant is no longer a mentally ill person subject to hospitalization or a mentally retarded person subject to institutionalization and the trial court makes such a finding (after a hearing on the subject);
- (b) Defendant has been hospitalized for the maximum amount of time for which the defendant could have been jailed if convicted of the most serious offense charged;
- (c) Defendant is found to have become competent to stand trial.

See O.R.C. 2945.401(J)(1) and (2) for greater detail.

Incompetent to Stand Trial and Restorable but not within the maximum time hospitalization can be ordered:

The time limits can get a bit confusing. To determine if defendant can be restored to competency from an incompetent status, the test is one year: Can defendant be restored to competency within one year?

If not, the charges should be dismissed. The prosecutor or court can then apply to the probate court for the defendant to get the mental health help needed.

When a defendant is incompetent to stand trial but restorable within the one year, the court can order the defendant hospitalized for treatment BUT ONLY for a specific duration:

1. For murder, death or life sentence crimes of violence, 1st or 2nd degree felonies and some attempt to commit the above – one year.
2. For any felonies not covered by (1) – six months.
3. For an M1 or M2 – 60 days.
4. For an M3, M4, MM or unclassified misdemeanor – 30 days.
(2945.38(c))

This does not mean the defendant gets released from the hospital because the time the court can force defendant's hospitalization is expired. It does mean that the court or prosecutor files with the probate court an affidavit for civil commitment (See, Involuntary Civil Commitments, *supra*). The state hospital where defendant is being treated sometimes does the filing.

ORC 2945.38(H)(4) Once the competency hearing is held and even if defendant is found restorable, if the maximum treatment term has expired the court shall dismiss the case, but the dismissal is without prejudice.

If the court or prosecutor files with Probate Court to civilly commit the defendant he/she may be detained for 10 more days pending the civil commitment.

IV. EVIDENCE NEEDED TO PROVE THAT THE COURT RETAINS JURISDICTION OVER THE INCOMPETENT DEFENDANT (FELONY ONLY)

The court may consider the following evidence to determine whether to retain jurisdiction over the defendant:

- ▶ any psychiatric, psychological or medical testimony or reports,
- ▶ the acts constituting the offense charged,
- ▶ any history of the defendant that is relevant to the defendant's ability to conform to the law,
- ▶ any other relevant evidence. (See, O.R.C. 2945.39(B).)

The court may maintain jurisdiction if it finds by clear and convincing evidence that the defendant:

1. Committed the charged offense AND
2. Is a "mentally ill person subject to hospitalization" as defined by O.R.C. 5122.01(B):
 - a) Does the defendant represent a substantial risk of physical harm to him/her self as manifested by evidence of threat of, or attempt at suicide or serious self-inflicted bodily harm?
 - b) Does the defendant represent a substantial risk of physical harm to others as manifested by evidence of:
 - 1.) recent homicidal or other violent behavior OR
 - 2.) recent threats that place another in reasonable fear of violent behavior and serious physical harm, OR
 - 3.) other evidence of present dangerousness?
 - c) Does the Defendant represent a substantial and immediate risk of serious physical impairment or injury to him/her self as manifested by evidence that the defendant is unable to provide for and is not

providing for his/her own basic physical needs due to mental illness?

- d) Would the defendant benefit from treatment in a hospital for the person's mental illness and is the defendant in need of such treatment as manifested by evidence of behavior that creates a grave, imminent risk to substantial rights of others or the defendant?

V. EVIDENCE PRESENTED:

- A. Doctor's reports: Why can't the defendant be restored within a year?
See **Common Evidentiary Issues**, *supra*.
- B. Medical History/Reports: Has defendant been treated before for this illness and was defendant responsive to the treatment? Does defendant stay on his meds and participate in treatment when he is required to do so?
See **Common Evidentiary Issues**, *supra*.
- C. Witness Testimony: Does defendant have a history of violence towards himself or others?
See **Common Evidentiary Issues**, *supra*.
- D. Previous Convictions: Has defendant been convicted of other crimes that indicate he is dangerous?
See **Common Evidentiary Issues**, *supra*.

**IN THE _____ MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO**

STATE/MUNICIPALITY	)	CASE NO. _____
vs.	)	JUDGE _____
DEFENDANT	)	JOURNAL ENTRY
	)	Incompetent and Hospitalized – Time for Court-Ordered Hospitalization Expired Orders Civil Commitment, Dismissal of Case

On _____ 20__ this defendant was found incompetent to stand trial and was
(Date)
committed to Northcoast Behavioral Healthcare for Restoration to Competence.

On consideration of the report of Northcoast Behavioral Healthcare dated
_____ 20 __, the court now finds that:
(Date)

The defendant is not capable of understanding the nature and objective of the proceedings against him/her and is not capable of assisting in his/her defense.

The defendant is mentally ill, would benefit from further psychiatric treatment and is suitable for civil commitment.

The most serious offense with which the defendant is charged is a

- 1st or 2nd degree misdemeanor for which defendant can be ordered hospitalized for up to 60 days.
- 3rd, 4th, minor or unclassified misdemeanor for which defendant can be ordered hospitalized for up to 30 days.

The time for court ordered hospitalization is expired.

IT IS THEREFORE ORDERED:

An affidavit shall be filed in Probate Court for civil commitment in accordance with O.R.C. §5122.01 by Northcoast Behavioral Healthcare staff.

The defendant shall be returned to and detained at Northcoast Behavioral Healthcare until the probable cause or initial hearing can be held in Probate Court pursuant to O.R.C. 2945.38(H)(4), said detention not exceed ten (10) days.

If defendant is in court, the _____
(Custodial Police Department)
are ordered to transport defendant to Northcoast forthwith following this hearing.

The person who supervises the defendant's treatment shall:

Notify the prosecutor in writing of the discharge date of the defendant at least 10 days prior to discharge.

Notify the prosecutor in writing of the change of the defendant's commitment or admission to voluntary status.

The complaint pending in this matter is dismissed without prejudice to further action.

DATE: _____

JUDGE

**IN THE _____ MUNICIPAL COURT
CUYAHOGA COUNTY, OHIO**

STATE/MUNICIPALITY	)	CASE NO. _____
vs.	)	JUDGE _____
)	
DEFENDANT	)	JOURNAL ENTRY
	)	Defendant Incompetent to Stand Trial;
	)	Not Restorable Within One year, Orders
	)	Civil Commitment
	)	Dismissal of Case

This cause came for hearing this _____ day of _____, 20___. Based on the evidence presented and the opinion of Dr. _____ in his/her report dated _____, 20___, the court finds that defendant is still incompetent to stand trial. Despite efforts to restore the defendant to competency, the defendant’s present mental condition still renders him/her incapable of understanding the nature and objective of the proceedings against the defendant or of presently assisting in his/her own defense. Based upon the evidence presented and the report of Dr. _____ the court further finds that there is not a substantial probability that the defendant will become competent to stand trial within one year.

Therefore and pursuant to R.C. 2945.38(H)(4), the indictment against defendant is dismissed without prejudice.

Choose only one option below:

- The court finds that the defendant is a “mentally ill person subject to hospitalization” according to the criteria set forth in R.C. 5122.01(B). The court further orders that the prosecutor file an affidavit in Probate Court for Civil Commitment pursuant to R.C. Chapter 5122. Defendant is remanded to _____ pending a civil
(County Jail/Custodial Police Dept)commitment hearing. Jail time not to exceed 10 days.
- The court does not find there is reason to believe the defendant is a “mentally ill person subject to hospitalization” or finds the defendant does not fit the criteria set forth in R.C. 5122.01(B) for civil commitment. Therefore, the defendant is ordered released.

DATE _____

JUDGE