

**INCOMPETENT TO STAND TRIAL ON A FELONY CHARGE  
AND  
UNABLE TO DETERMINE IF RESTORABLE  
(Examiner needs up to 4 More Months to Evaluate)**

**I. WHAT'S GOING ON WITH DEFENDANT?**

The defendant is before the municipal court AND IS CHARGED WITH A FELONY. At the time when the municipal court is setting bond or holding a preliminary hearing or earlier, the court finds reason to believe the defendant was incompetent. In fact, the report or testimony of *the examining doctor has found that defendant is incompetent to stand trial right now*. The doctor must next determine the likelihood of the defendant being restored to competency within one year. The 20 day evaluation period is up but in that short period of time, the doctor hasn't been able to decide if the defendant is likely to become competent within the year.

Under these circumstances, the court SHALL order the defendant to undergo a longer period of evaluation – not longer than 4 months – so that the doctor has more time to see if the defendant is likely to become competent within the year.

**II. QUESTION PRESENTED:**

Although the defendant is surely not competent at this time, is the defendant likely to become competent within one year? The doctor needs time to observe the defendant in order to make this determination.

**III. RELEVANT STATUTES:**

**O.R.C. 2945.38(B)(1)(a):** If the doctor determines the defendant is incompetent to stand trial but is unable to determine whether there is a substantial probability that the defendant can be restored to competency after a course of treatment, the **court shall order the defendant to undergo a continuing evaluation/treatment for a period not to exceed four months to determine whether there is a substantial probability that the defendant will become competent to stand trial within one year with treatment.**

**O.R.C. 2945.38(B)(2):** If the court finds that the defendant is incompetent to stand trial and that, even if the defendant is provided with a course of treatment, 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 (and dismissal of the case) unless, upon motion of the prosecutor or on its own motion, the court either seeks to retain jurisdiction over the defendant pursuant to section 2945.39 of the Revised Code or the state files an affidavit in probate court asking for the civil commitment of the defendant pursuant to Chapter 5122 or 5123 of the Revised Code alleging that the defendant is a mentally ill person subject to hospitalization by court order or a mentally retarded person subject to institutionalization by court order. If an affidavit is filed in the probate court, the trial court shall send to the probate court copies of all written reports of the defendant's mental condition that were prepared pursuant to section 2945.371 of the Ohio Revised Code.

**IV. EVIDENCE NEEDED TO PROVE THAT IT CANNOT BE DETERMINED WHETHER THE DEFENDANT IS RESTORABLE WITHIN THE TIME PERMITTED BY LAW:**

The doctor cannot determine with a reasonable degree of medical (psychiatric) certainty whether there is a substantial probability that the defendant will be restored to competency within a year if given a course of treatment for any number of reasons.

- A. Can the defendant be restored at all? If the answer is “no,” proceed to the section on INCOMPETENT AND UNRESTORABLE. If the answer is yes:
- B. Is the probability that the defendant can be restored within one year *substantial*? Whether the probability is substantial depends on factors such as:
  - 1. What medication/treatment is recommended?
  - 2. Has the defendant taken this medication/treatment before and with what results? If it worked, how quickly did it work?
  - 3. Is the same treatment as used previously or a new treatment likely to have the same or different effects on the defendant?

**V. EVIDENCE WHICH MAY BE PRESENTED TO THE COURT:**

- A. Doctor’s/Examiner’s Reports and Testimony: Can the doctor/examiner say with a reasonable degree of medical (psychiatric) certainty that defendant’s chances of being restored are debatable or uncertain and that the defendant therefore requires further evaluation?

See **COMMON EVIDENTIARY ISSUES**, *supra*.

- B. Medical History/Records: Do defendant’s records contain information about past medications/treatment and how they worked which may guide an examiner in being able to consider what combination of medication and/or therapy can restore the defendant?

See **COMMON EVIDENTIARY ISSUES**, *supra*.

- C. Police Reports/Testimony: Past police involvement may help to determine whether defendant’s past misbehaviors occurred when the defendant was noncompliant with medication.

See **COMMON EVIDENTIARY ISSUES**, *supra*.

- D. Prior Convictions: Same as above – a criminal history might indicate whether defendant has committed past crimes when off medication, whether the crimes were based upon delusions, etc.

See **COMMON EVIDENTIARY ISSUES**, *supra*.

## **VI. WHO WILL BE AT THE HEARING?**

Without parties stipulating to evidence, reports or exhibits, testimony may be needed from doctors, custodians of records, police and others.

**IN THE \_\_\_\_\_ MUNICIPAL COURT  
CUYAHOGA COUNTY, OHIO**

STATE/MUNICIPALITY	)	CASE NO. _____
vs.	)	JUDGE _____
DEFENDANT	)	<b>JOURNAL ENTRY</b>
	)	<b>Defendant Incompetent to Stand Trial in Felony Case, Unable to Determine if Restorable, 4 Month Evaluation Order</b>

This cause came for hearing this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_. Based upon the evidence presented and the opinion of Dr. \_\_\_\_\_ in his/her report dated \_\_\_\_\_, the court finds the defendant is incompetent to stand trial. The defendant's present mental condition 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 in this felony case. After taking into consideration all relevant reports, information, and other evidence, the court is unable at this time to determine whether there is a substantial probability that the defendant will become competent to stand trial within one year if the defendant is provided with a course of treatment.

Therefore and pursuant to R.C. 2945.38(B)(1)(a) the court orders the defendant to  
Northcoast Behavioral Healthcare  
*(Any center, program or facility operated or certified by the Department of Mental Health or the Cuyahoga County Board of Developmental Disabilities)*  
 for a continuing evaluation of the defendant for a period not to exceed four months to determine whether there is a substantial probability that the defendant will become competent to stand trial within one year if the defendant is provided with a course of treatment. Hospitalization at the above-named program or facility is the least restrictive treatment setting for the defendant.

\_\_\_\_\_ shall transport defendant upon notification by the designated  
*(Custodial police dept./agency)*  
 agent or agency that a bed is available.

Defendant is granted level 4 movement for medical purposes only.

**DATE** \_\_\_\_\_

\_\_\_\_\_  
**JUDGE**