

SENATE AMENDMENTS TO SENATE BILL 24

By COMMITTEE ON JUDICIARY

April 19

- 1 On page 1 of the printed bill, line 2, delete “creating new provisions; and”.
- 2 In line 3, after “161.370” insert “; and declaring an emergency”.
- 3 Delete lines 5 through 20.
- 4 Delete pages 2 through 6 and insert:
- 5 **“SECTION 1.** ORS 161.365 is amended to read:
- 6 **“161.365.** (1) When the court has reason to doubt the defendant’s fitness to proceed by reason
- 7 of incapacity as described in ORS 161.360, the court may call any witness to its assistance in
- 8 reaching its decision [*and shall order that a community mental health program director or the*
- 9 *director’s designee consult with the defendant to determine whether services and supervision necessary*
- 10 *to safely restore the defendant’s fitness to proceed are available in the community. After the consulta-*
- 11 *tion, the program director or the director’s designee shall provide to the court a copy of the findings*
- 12 *resulting from the consultation*]. If the court determines the assistance of a psychiatrist or psychol-
- 13 ogist would be helpful, the court may:
- 14 **“(a)** Order that a psychiatric or psychological examination of the defendant be conducted by a
- 15 certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or
- 16 **“(b)** Order the defendant to be committed for the purpose of an examination, **which may in-**
- 17 **clude treatment**, for a period not exceeding 30 days to a state mental hospital or other facility
- 18 designated by the Oregon Health Authority if the defendant is at least 18 years of age, or to a se-
- 19 cure intensive community inpatient facility designated by the authority if the defendant is under 18
- 20 years of age. **The court may find good cause, supported by findings made on the record, to**
- 21 **order observation of the defendant of up to 21 days before the examination occurs.**
- 22 **“(2)(a)** A defendant committed under subsection (1)(b) of this section shall be transported
- 23 **to the state mental hospital or other facility for the examination.**
- 24 **“(b)** At the conclusion of the examination, the superintendent of the state mental hospi-
- 25 **tal or the superintendent’s designee or the director of the facility may:**
- 26 **“(A)** Return the defendant to the facility from which the defendant was transported; or
- 27 **“(B)** Request an amended order from the court for the defendant to remain at the hos-
- 28 **pital or facility for further observation and treatment.**
- 29 **“[(2)] (3)** The report of an examination described in this section must include, but is not neces-
- 30 sarily limited to, the following:
- 31 **“(a)** A description of the nature of the examination **and any treatment;**
- 32 **“(b)** A statement of the mental condition of the defendant;
- 33 **“(c)** If the defendant suffers from a qualifying mental disorder, an opinion as to whether the
- 34 defendant is incapacitated within the description set out in ORS 161.360; and
- 35 **“(d)** If the defendant is incapacitated within the description set out in ORS 161.360, a recom-

1 mendment of treatment and services necessary to restore capacity, **including whether a hospital**
2 **level of care is required due to the defendant’s dangerousness and the acuity of symptoms**
3 **of the defendant’s qualifying mental disorder.**

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

8 “[4] (5) If the examination by the psychiatrist or psychologist cannot be conducted by reason
9 of the unwillingness of the defendant to participate in the examination, the report must so state and
10 must include, if possible, an opinion as to whether the unwillingness of the defendant was the result
11 of a qualifying mental disorder affecting capacity to proceed.

12 “[5] (6) The report must be filed with the clerk of the court, who shall cause copies to be de-
13 livered to the district attorney and to counsel for defendant.

14 “[6)(a)] (7)(a) When upon motion of the court or a financially eligible defendant, the court has
15 ordered a psychiatric or psychological examination of the defendant, a county or justice court shall
16 order the county to pay, and a circuit court shall order the public defense services executive di-
17 rector to pay from funds available for the purpose:

18 “(A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or
19 psychologist in private practice; and

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

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

27 “[7) *The Oregon Health Authority shall establish by rule standards for the consultation described*
28 *in subsection (1) of this section.*]

29 “(8)(a) **The entity or evaluator conducting an examination of a defendant under this sec-**
30 **tion shall provide a copy of the report resulting from the examination to the community**
31 **mental health program director or designee in:**

32 “(A) **The county in which the defendant is charged; and**

33 “(B) **The county of the defendant’s last known residence.**

34 “(b) **Reports prepared under this section are confidential and may be made available only:**

35 “(A) **To the court, prosecuting attorney, defense attorney, agent of the prosecuting or**
36 **defense attorney, defendant, community mental health program director or designee and any**
37 **facility in which the defendant is housed; or**

38 “(B) **As ordered by a court.**

39 “(c) **Any facility in which a defendant is housed may not use a report prepared under this**
40 **section to support a disciplinary action against the defendant.**

41 “(d) **Nothing in this subsection prohibits the prosecuting attorney, defense attorney or**
42 **agent of the prosecuting or defense attorney from discussing the contents of a report pre-**
43 **pared under this section with witnesses or victims as otherwise permitted by law.**

44 “**SECTION 2.** ORS 161.370 is amended to read:

45 “161.370. (1)(a) When the defendant’s fitness to proceed is drawn in question, the issue shall be

1 determined by the court.

2 “(b) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the
3 report filed under ORS 161.365, the court may make the determination on the basis of the report.
4 If the finding is contested, the court shall hold a hearing on the issue. If the report is received in
5 evidence in the hearing, the party who contests the finding has the right to summon and to cross-
6 examine any psychiatrist or psychologist who submitted the report and to offer evidence upon the
7 issue. Other evidence regarding the defendant’s fitness to proceed may be introduced by either
8 party.

9 “(2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal pro-
10 ceeding against the defendant shall be suspended and[.] **the court shall make a disposition de-**
11 **termination.**

12 “(b) **To aid in making a determination concerning disposition, the court shall order a**
13 **community mental health program director, or the director’s designee, to consult with the**
14 **defendant and with any local entity that would be responsible for supervising the defendant**
15 **if the defendant was released in the community, to determine whether services and super-**
16 **vision necessary to safely allow the defendant to gain or regain fitness to proceed are avail-**
17 **able in the community.**

18 “(c) **Within seven judicial days of the order if the defendant is in custody, or 10 judicial**
19 **days if the defendant is not in custody, the community mental health program director or**
20 **designee shall provide to the court a copy of the findings resulting from the consultation.**

21 “(d) **Upon receipt of the consultation findings, the court and the parties shall consider**
22 **and pursue a disposition that is consistent with primary and secondary release criteria de-**
23 **scribed in ORS 135.230, is the least restrictive and best serves the needs of the defendant and**
24 **the interests of justice. Dispositions may include but are not limited to:**

25 “(A) **Community restoration as recommended by the community mental health program**
26 **director or designee;**

27 “(B) **Release on supervision;**

28 “(C) **Commencement of a civil commitment proceeding under ORS 426.070 to 426.170,**
29 **426.701 or 427.235 to 427.290;**

30 “(D) **Commencement of protective proceedings under ORS chapter 125; or**

31 “(E) **Dismissal of the charges pursuant to ORS 135.755.**

32 “[a] (3)(a) **Except as otherwise provided in this section,** if the court finds that the defendant
33 is dangerous to self or others as a result of a qualifying mental disorder, or that, based on the
34 findings resulting from the consultation described in [ORS 161.365 (1)] **subsection (2) of this sec-**
35 **tion and from any information provided by community-based mental health providers,** the
36 services and supervision necessary to restore the defendant’s fitness to proceed are not available in
37 the community, the court shall commit the defendant to the custody of the superintendent of a state
38 mental hospital or director of a facility[,] designated by the Oregon Health Authority[,] if the de-
39 fendant is at least 18 years of age, or to the custody of the director of a secure intensive community
40 inpatient facility designated by the authority if the defendant is under 18 years of age[; or].

41 “(b) **The court may not commit the defendant under this subsection until the court has**
42 **received and considered the findings resulting from the consultation with the community**
43 **mental health program director or designee described in subsection (2) of this section.**

44 “(c) **If the defendant is committed under this subsection, the community mental health**
45 **program director shall, during any period of commitment, continually review available com-**

1 **munity resources and maintain communication with the defendant and the superintendent**
2 **of the state mental hospital or director of the facility in order to facilitate an efficient**
3 **transition to treatment in the community when available.**

4 “[*(b)*] **(4)(a)** If the court does not make a finding described in [*paragraph (a) of this subsection,*]
5 **subsection (3) of this section, if the circumstances in subsection (5)(c) of this section apply**
6 **or if the court determines that care other than commitment for incapacity to stand trial would bet-**
7 **ter serve the defendant and the community, the court shall release the defendant on supervision for**
8 **as long as the unfitness endures.**

9 **“(b) The court may order a community mental health program director providing treat-**
10 **ment to the defendant in the community to provide the court with status reports on the**
11 **defendant’s progress in gaining or regaining fitness to proceed.**

12 **“(c) A community mental health program director providing treatment to the defendant**
13 **in the community shall notify the court if the defendant gains or regains fitness to proceed.**

14 **“(5)(a) If the most serious offense in the charging instrument is a misdemeanor or vio-**
15 **lation, the court may not commit the defendant under subsection (3) of this section without**
16 **a determination by a certified evaluator as defined in ORS 161.309, or a community mental**
17 **health program director or the director’s designee, that the defendant requires a hospital**
18 **level of care due to the defendant’s dangerousness and the acuity of symptoms of the**
19 **defendant’s qualifying mental disorder.**

20 **“(b) If at the time of disposition the court has not received a determination described in**
21 **paragraph (a) of this subsection, the court shall order a certified evaluator or a community**
22 **mental health program director, or the director’s designee, to make such determination.**

23 **“(c) If the defendant is determined to not require a hospital level of care, the court shall**
24 **within seven judicial days hold a disposition hearing in accordance with subsection (2)(d) of**
25 **this section.**

26 **“(d) If the defendant is determined to require a hospital level of care, the court shall**
27 **make specific findings regarding why the defendant requires such level of care and may**
28 **commit the defendant under subsection (3) of this section.**

29 “[*(3)*] **(6)** When a defendant is released on supervision under subsection [*(2)(b)*] **(4)** of this sec-
30 **tion, the court may place conditions that the court deems appropriate on the release, including the**
31 **requirement that the defendant regularly report to the authority or a community mental health**
32 **program for examination to determine if the defendant has gained or regained capacity to stand**
33 **trial.**

34 “[*(4)*] **(7)** When the court, on its own motion or upon the application of the superintendent of the
35 **hospital or director of the facility in which the defendant is committed, a person examining the de-**
36 **fendant as a condition of release on supervision, or either party, determines, after a hearing, if a**
37 **hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal**
38 **proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed**
39 **since the commitment or release of the defendant on supervision that it would be unjust to resume**
40 **the criminal proceeding, the court on motion of either party may dismiss the charge and may order**
41 **the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070**
42 **to 426.170, 426.701 or 427.235 to 427.290.**

43 “[*(5)*] **(8)** The superintendent of a state hospital or director of a facility to which the defendant
44 **is committed shall cause the defendant to be evaluated within 60 days from the defendant’s delivery**
45 **into the superintendent’s or director’s custody, for the purpose of determining whether there is a**

1 substantial probability that, in the foreseeable future, the defendant will have the capacity to stand
2 trial. In addition, the superintendent or director shall:

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

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

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

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

10 “(C) There is a substantial probability that, in the foreseeable future, the defendant will gain
11 or regain the capacity to stand trial. If the probability exists, the superintendent or director shall
12 give the court an estimate of the time in which the defendant, with appropriate treatment, is ex-
13 pected to gain or regain capacity.

14 “[~~(6)(a)~~] **(9)(a)** If the superintendent or director determines that there is a substantial probability
15 that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless
16 the court otherwise orders, the defendant shall remain in the superintendent’s or director’s custody
17 where the defendant shall receive treatment designed for the purpose of enabling the defendant to
18 gain or regain capacity. In keeping with the notice requirement under subsection [~~(5)(b)~~] **(8)(b)**
19 of this section, the superintendent or director shall, for the duration of the defendant’s period of com-
20 mitment, submit a progress report to the committing court, concerning the defendant’s capacity or
21 incapacity, at least once every 180 days as measured from the date of the defendant’s delivery into
22 the superintendent’s or director’s custody.

23 “(b)**(A)** Notwithstanding paragraph (a) of this subsection, if the superintendent or director de-
24 termines that a defendant committed under this section is no longer dangerous to self or others as
25 a result of a qualifying mental disorder, or that the services and supervision necessary to restore
26 the defendant’s fitness to proceed are available in the community, the superintendent or director
27 shall file notice of that determination with the court.

28 “**(B)** Upon receipt of the notice, [*the court shall order the person released on supervision as de-*
29 *scribed in subsection (3) of this section.*] **the court shall order that a community mental health**
30 **program director or the director’s designee consult with the defendant and with any local**
31 **entity that would be responsible for supervising the defendant if the defendant was released**
32 **in the community, within seven judicial days, to determine whether services and supervision**
33 **necessary to safely restore the defendant’s fitness to proceed are available in the community.**
34 **The director or designee shall provide the court with findings resulting from the consultation**
35 **within 14 judicial days of the court’s order.**

36 “**(C)** **Within 14 judicial days of receiving the findings, the court shall hold a disposition**
37 **hearing in accordance with subsection (2)(d) of this section. If, after consideration of the**
38 **factors and dispositions described in subsection (2)(d) of this section, and any findings re-**
39 **sulting from the consultation described in this paragraph, the court determines that the**
40 **defendant remains dangerous to self or others as a result of a qualifying mental disorder,**
41 **or that the services and supervision necessary to restore the defendant’s fitness to proceed**
42 **are not available in the community, the court may, after making specific findings to that**
43 **effect, continue the commitment.**

44 “(c) A progress report described in paragraph (a) of this subsection may consist of an update to:

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

1 “(B) An evaluation conducted under subsection [(5)] (8) of this section, if the defendant did not
2 receive an examination under ORS 161.365.

3 “[7)(a)] (10)(a) A defendant who remains committed under subsection [(6)] (9) of this section
4 shall be discharged within a period of time that is reasonable for making a determination concerning
5 whether or not, and when, the defendant may gain or regain capacity. However, regardless of the
6 number of charges with which the defendant is accused, in no event shall the defendant be com-
7 mitted for longer than whichever of the following, measured from the defendant’s initial custody
8 date, is shorter:

9 “(A) Three years; or

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

12 “(b) For purposes of calculating the maximum period of commitment described in paragraph (a)
13 of this subsection:

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

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

18 “(i) For each day the defendant is committed under this section, whether the days are consec-
19 utive or are interrupted by a period of time during which the defendant has gained or regained fit-
20 ness to proceed; and

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

25 “[8)] (11) The superintendent or director shall notify the committing court of the defendant’s
26 impending discharge 30 days before the date on which the superintendent or director is required to
27 discharge the defendant under subsection [(7)] (10) of this section.

28 “[9)] (12) When the committing court receives a notice from the superintendent or director
29 under subsection [(5)] (8) or [(8)] (11) of this section concerning the defendant’s progress or lack
30 thereof, the committing court shall determine, after a hearing, if a hearing is requested, whether the
31 defendant presently has the capacity to stand trial.

32 “[10)] (13) If at any time the court determines that the defendant lacks the capacity to stand
33 trial, the court shall further determine whether there is a substantial probability that the defendant,
34 in the foreseeable future, will gain or regain the capacity to stand trial and whether the defendant
35 is entitled to discharge under subsection [(7)] (10) of this section. If the court determines that there
36 is no substantial probability that the defendant, in the foreseeable future, will gain or regain the
37 capacity to stand trial or that the defendant is entitled to discharge under subsection [(7)] (10) of
38 this section, the court shall dismiss, without prejudice, all charges against the defendant and:

39 “(a) Order that the defendant be discharged; or

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

41 “[11)] (14) All notices required under this section shall be filed with the clerk of the court and
42 delivered to both the district attorney and the counsel for the defendant.

43 “[12)] (15) If the defendant gains or regains fitness to proceed, the term of any sentence re-
44 ceived by the defendant for conviction of the crime charged shall be reduced by the amount of time
45 the defendant was committed under this section to the custody of a state mental hospital, or to the

1 custody of a secure intensive community inpatient facility[,] designated by the Oregon Health Au-
2 thority.

3 “[13] (16) Notwithstanding the suspension of the criminal proceeding under subsection (2) of
4 this section, the fact that the defendant is unfit to proceed does not preclude any objection through
5 counsel and without the personal participation of the defendant on the grounds that the indictment
6 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon
7 any other ground at the discretion of the court which the court deems susceptible of fair determi-
8 nation prior to trial.

9 “[14] (17) At the time that the court determines that the defendant lacks fitness to proceed
10 under subsection (2) of this section, the court shall notify the defendant that federal law prohibits
11 the defendant from purchasing or possessing a firearm unless the person obtains relief from the
12 prohibition under federal law. The court shall again notify the defendant of the prohibition if the
13 court finds that the defendant has gained or regained fitness to proceed under subsection [(4)] (7)
14 of this section.

15 “(18)(a) **The entity or evaluator conducting an examination of a defendant under this**
16 **section shall provide a copy of a progress report or report resulting from an examination**
17 **described in this section to the community mental health program director or designee in:**

18 “(A) **The county in which the defendant is charged; and**

19 “(B) **The county of the defendant’s last known residence.**

20 “(b) **Reports prepared under this section are confidential and may be made available only:**

21 “(A) **To the court, prosecuting attorney, defense attorney, agent of the prosecuting or**
22 **defense attorney, defendant, community mental health program director or designee and any**
23 **facility in which the defendant is housed; or**

24 “(B) **As ordered by a court.**

25 “(c) **Any facility in which a defendant is housed may not use a report prepared under this**
26 **section to support a disciplinary action against the defendant.**

27 “(d) **Nothing in this subsection prohibits the prosecuting attorney, defense attorney or**
28 **agent of the prosecuting or defense attorney from discussing the contents of a report pre-**
29 **pared under this section with witnesses or victims as otherwise permitted by law.**

30 “(19) **Unless the court or either party objects, a defendant committed to a state hospital**
31 **or other facility, or a certified evaluator or other expert witness, may attend hearings held**
32 **under this section via simultaneous electronic transmission.**

33 “(20) **The Oregon Health Authority shall establish by rule standards for the consultation**
34 **described in subsection (2) of this section.**

35 “**SECTION 3.** ORS 161.315 is amended to read:

36 “161.315. (1) Upon filing of notice or the introduction of evidence by the defendant as provided
37 in ORS 161.309, the state shall have the right to have at least one psychiatrist or licensed psychol-
38 ogist of its selection examine the defendant. The state shall file notice with the court of its intention
39 to have the defendant examined.

40 “(2)(a) Upon filing of the notice, the court, in its discretion, may order the defendant committed
41 to a state [*institution*] **mental hospital** or any other suitable facility, if the defendant is 18 years
42 of age or older, for [*observation and*] examination, **which may include treatment**, as the court may
43 designate for a period not to exceed 30 days. **The court may include in the order specific**
44 **findings regarding why a particular length of observation is needed before the examination**
45 **occurs.**

1 “(b) If the defendant is under 18 years of age, upon filing of the notice, the court, in its dis-
2 cretion, may order the defendant committed to a secure intensive community inpatient facility des-
3 ignated by the Oregon Health Authority for [observation and] examination, **which may include**
4 **treatment**, as the court may designate for a period not to exceed 30 days. **The court may include**
5 **in the order specific findings regarding why a particular length of observation is needed be-**
6 **fore the examination occurs.**

7 “(3) If the defendant objects to the examiner chosen by the state, the court for good cause shown
8 may direct the state to select a different examiner.

9 “(4) An examiner performing an examination on the issue of insanity of a defendant under this
10 section is not obligated to examine the defendant for fitness to proceed unless, during the examina-
11 tion, the examiner determines that the defendant’s fitness to proceed is drawn in question. **If, dur-**
12 **ing the examination, the examiner determines that the defendant’s fitness to proceed is in**
13 **doubt, the examiner shall report the issue to the court and to the superintendent of the state**
14 **mental hospital or the superintendent’s designee, or to the director of the facility to which**
15 **the defendant is committed. The superintendent or director may:**

16 “(a) Return the defendant to the facility from which the defendant was transported; or

17 “(b) Request an amended order from the court for the defendant to remain at the hos-
18 pital or facility for further observation and treatment.

19 “(5)(a) Reports resulting from examinations conducted under this section are confidential
20 and may be made available only:

21 “(A) To the court, prosecuting attorney, defense attorney, agent of the prosecuting or
22 defense attorney, defendant, community mental health program director or designee and any
23 facility in which the defendant is housed; or

24 “(B) As ordered by a court.

25 “(b) Any facility in which a defendant is housed may not use a report prepared under this
26 section to support a disciplinary action against the defendant.

27 “(c) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or
28 agent of the prosecuting or defense attorney from discussing the contents of a report pre-
29 pared under this section with witnesses or victims as otherwise permitted by law.

30 “SECTION 4. This 2019 Act being necessary for the immediate preservation of the public
31 peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect
32 on its passage.”

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