

Requested by SENATE COMMITTEE ON JUDICIARY

**PROPOSED AMENDMENTS TO
SENATE BILL 24**

1 On page 1 of the printed bill, line 2, delete the first “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
7 to proceed by reason of incapacity as described in ORS 161.360, the court
8 may call any witness to its assistance in reaching its decision [*and shall*
9 *order that a community mental health program director or the director’s*
10 *designee consult with the defendant to determine whether services and super-*
11 *vision necessary to safely restore the defendant’s fitness to proceed are avail-*
12 *able in the community. After the consultation, the program director or the*
13 *director’s designee shall provide to the court a copy of the findings resulting*
14 *from the consultation*]. If the court determines the assistance of a psychiatrist
15 or psychologist would be helpful, the court may:

16 “(a) Order that a psychiatric or psychological examination of the defend-
17 ant be conducted by a certified evaluator as defined in ORS 161.309 and a
18 report of the examination be prepared; or

19 “(b) Order the defendant to be committed for the purpose of an examina-
20 tion, **which may include observation and treatment**, for a period not
21 exceeding 30 days to a state mental hospital or other facility designated by

1 the Oregon Health Authority if the defendant is at least 18 years of age, or
2 to a secure intensive community inpatient facility designated by the author-
3 ity if the defendant is under 18 years of age. **The court may find good**
4 **cause, supported by findings made on the record, to authorize obser-**
5 **vation of the defendant of up to 21 days before the examination occurs.**

6 “(2)(a) **A defendant committed under subsection (1)(b) of this sec-**
7 **tion shall be transported to the state mental hospital or other facility**
8 **for the examination.**

9 “(b) **At the conclusion of the examination, the superintendent of**
10 **the state mental hospital or the superintendent’s designee or the di-**
11 **rector of the facility may:**

12 “(A) **Order the defendant returned to the facility from which the**
13 **defendant was transported; or**

14 “(B) **Request an amended order from the court for the defendant**
15 **to remain at the hospital or facility for further observation and**
16 **treatment.**

17 “[2] (3) The report of an examination described in this section must in-
18 clude, but is not necessarily limited to, the following:

19 “(a) A description of the nature of the examination **and any treatment;**

20 “(b) A statement of the mental condition of the defendant;

21 “(c) If the defendant suffers from a qualifying mental disorder, an opinion
22 as to whether the defendant is incapacitated within the description set out
23 in ORS 161.360; and

24 “(d) If the defendant is incapacitated within the description set out in
25 ORS 161.360, a recommendation of treatment and services necessary to re-
26 store capacity, **including whether a hospital level of care is required due**
27 **to the defendant’s dangerousness and the acuity of symptoms of the**
28 **defendant’s qualifying mental disorder.**

29 “[3] (4) Except when the defendant and the court both request to the
30 contrary, the report may not contain any findings or conclusions as to

1 whether the defendant as a result of a qualifying mental disorder was subject
2 to the provisions of ORS 161.295 or 161.300 at the time of the criminal act
3 charged.

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

9 “[5] (6) The report must be filed with the clerk of the court, who shall
10 cause copies to be delivered to the district attorney and to counsel for de-
11 fendant.

12 “[6)(a)] (7)(a) When upon motion of the court or a financially eligible
13 defendant, the court has ordered a psychiatric or psychological examination
14 of the defendant, a county or justice court shall order the county to pay, and
15 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
18 by a psychiatrist or psychologist in private practice; and

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

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

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

30 “(8)(a) **The entity or evaluator conducting an examination of a de-**

1 **defendant under this section shall provide a copy of the report resulting**
2 **from the examination to the community mental health program di-**
3 **rector or designee in:**

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

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

6 **“(b) Reports prepared and examinations conducted under this sec-**
7 **tion are confidential and may be made available only:**

8 **“(A) To the court, prosecuting attorney, defense attorney, defend-**
9 **ant, community mental health program director or designee and any**
10 **facility in which the defendant is housed; or**

11 **“(B) As ordered by a court.**

12 **“(c) Any facility in which a defendant is housed may not use a re-**
13 **port or examination conducted under this section to support a disci-**
14 **plinary action against the defendant.**

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

16 **“161.370. (1)(a) When the defendant’s fitness to proceed is drawn in**
17 **question, the issue shall be determined by the court.**

18 **“(b) If neither the prosecuting attorney nor counsel for the defendant**
19 **contests the finding of the report filed under ORS 161.365, the court may**
20 **make the determination on the basis of the report. If the finding is contested,**
21 **the court shall hold a hearing on the issue. If the report is received in evi-**
22 **dence in the hearing, the party who contests the finding has the right to**
23 **summon and to cross-examine any psychiatrist or psychologist who submitted**
24 **the report and to offer evidence upon the issue. Other evidence regarding the**
25 **defendant’s fitness to proceed may be introduced by either party.**

26 **“(2)(a) If the court determines that the defendant lacks fitness to proceed,**
27 **the criminal proceeding against the defendant shall be suspended and[:] **the****
28 **court shall make a disposition determination. In making the determi-**
29 **nation, the court shall consider the least restrictive treatment option**
30 **to allow the defendant to gain or regain fitness to proceed.**

1 **“(b) To aid in making a determination concerning disposition, the**
2 **court shall order a community mental health program director, or the**
3 **director’s designee, to consult with the defendant to determine**
4 **whether services and supervision necessary to safely allow the de-**
5 **fendant to gain or regain fitness to proceed are available in the com-**
6 **munity.**

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

11 **“(d) Upon receipt of the consultation findings, the court and the**
12 **parties shall consider and determine whether to pursue a treatment**
13 **option or disposition other than commitment in a state mental hospi-**
14 **tal or other facility if the alternative treatment option or other dis-**
15 **position would better serve the needs of the defendant and the**
16 **interests of justice. The court may order an alternative treatment op-**
17 **tion or other disposition including but not limited to community res-**
18 **toration, the transfer of the case to a mental health specialty court,**
19 **the commencement of a proceeding under ORS 426.070 to 426.170 or**
20 **427.235 to 427.290, the commencement of protective proceedings under**
21 **ORS chapter 125 or dismissal of the charges.**

22 **“[(a)] (3)(a) Except as otherwise provided in this section, if the court**
23 **finds that the defendant is dangerous to self or others as a result of a qual-**
24 **ifying mental disorder, or that, based on the findings resulting from the**
25 **consultation described in [ORS 161.365 (1)] subsection (2) of this section**
26 **and from any information provided by community-based mental health**
27 **providers, the services and supervision necessary to restore the defendant’s**
28 **fitness to proceed are not available in the community, the court shall commit**
29 **the defendant to the custody of the superintendent of a state mental hospital**
30 **or director of a facility[,] designated by the Oregon Health Authority[,] if the**

1 defendant is at least 18 years of age, or to the custody of the director of a
2 secure intensive community inpatient facility designated by the authority if
3 the defendant is under 18 years of age[; *or*].

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

8 **“(c) If the defendant is committed under this subsection, the com-**
9 **munity mental health program director shall, during any period of**
10 **commitment, continually review available community resources and**
11 **maintain communication with the defendant and the superintendent**
12 **of the state mental hospital or director of the facility in order to fa-**
13 **cilitate an efficient transition to treatment in the community when**
14 **available.**

15 **“[(b)] (4)(a) If the court does not make a finding described in [paragraph**
16 **(a) of this subsection,] subsection (3) of this section, if the circumstances**
17 **in subsection (5) of this section apply or if the court determines that care**
18 **other than commitment for incapacity to stand trial would better serve the**
19 **defendant and the community, the court shall release the defendant on**
20 **supervision for as long as the unfitness endures.**

21 **“(b) The court may order a community mental health program di-**
22 **rector providing treatment to the defendant in the community to**
23 **provide the court with status reports on the defendant’s progress in**
24 **gaining or regaining fitness to proceed.**

25 **“(c) A community mental health program director providing treat-**
26 **ment to the defendant in the community shall notify the court if the**
27 **defendant gains or regains fitness to proceed.**

28 **“(5)(a) If the most serious offense in the charging instrument is a**
29 **misdemeanor, or if the defendant is charged only with one or more**
30 **violations of a municipal ordinance, except as provided in paragraph**

1 (b) of this subsection, the court may not commit the defendant under
2 subsection (3) of this section without a determination by a certified
3 evaluator as defined in ORS 161.309 or a community mental health
4 program director's designee that the defendant requires a hospital
5 level of care due to the defendant's dangerousness and the acuity of
6 symptoms of the defendant's qualifying mental disorder.

7 “(b) If a certified evaluator or a community mental health program
8 director's designee determines that a defendant described in paragraph
9 (a) of this subsection does not require a hospital level of care, the
10 court shall within seven judicial days hold a hearing to decide whether
11 to accept the determination as follows:

12 “(A) If the court accepts the determination that the defendant does
13 not require a hospital level of care, the court shall make a release
14 decision under ORS 135.230 to 135.290 and the court and the parties
15 shall consider whether to pursue a treatment option or other dispo-
16 sition other than commitment in a state mental hospital or other facil-
17 ity if the alternative treatment option or other disposition would
18 better serve the needs of the defendant and the interests of justice.
19 The court may order an alternative treatment option or other dispo-
20 sition including but not limited to community restoration, the transfer
21 of the case to a mental health specialty court, the commencement of
22 a proceeding under ORS 426.070 to 426.170 or 427.235 to 427.290, the
23 commencement of protective proceedings under ORS chapter 125 or
24 dismissal of the charges.

25 “(B) If the court does not accept the determination that the de-
26 fendant does not require a hospital level of care, the court shall make
27 specific findings regarding why the court does not agree with the de-
28 termination and may commit the defendant under subsection (3) of
29 this section.

30 “[3] (6) When a defendant is released on supervision under subsection

1 [(2)(b)] (4) of this section, the court may place conditions that the court
2 deems appropriate on the release, including the requirement that the de-
3 fendant regularly report to the authority or a community mental health
4 program for examination to determine if the defendant has gained or re-
5 gained capacity to stand trial.

6 “[(4)] (7) When the court, on its own motion or upon the application of
7 the superintendent of the hospital or director of the facility in which the
8 defendant is committed, a person examining the defendant as a condition of
9 release on supervision, or either party, determines, after a hearing, if a
10 hearing is requested, that the defendant has gained or regained fitness to
11 proceed, the criminal proceeding shall be resumed. If, however, the court is
12 of the view that so much time has elapsed since the commitment or release
13 of the defendant on supervision that it would be unjust to resume the crim-
14 inal proceeding, the court on motion of either party may dismiss the charge
15 and may order the defendant to be discharged or cause a proceeding to be
16 commenced forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

17 “[(5)] (8) The superintendent of a state hospital or director of a facility
18 to which the defendant is committed shall cause the defendant to be evalu-
19 ated within 60 days from the defendant’s delivery into the superintendent’s
20 or director’s custody, for the purpose of determining whether there is a
21 substantial probability that, in the foreseeable future, the defendant will
22 have the capacity to stand trial. In addition, the superintendent or director
23 shall:

24 “(a) Immediately notify the committing court if the defendant, at any
25 time, gains or regains the capacity to stand trial or will never have the ca-
26 pacity to stand trial.

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

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

30 “(B) There is no substantial probability that, in the foreseeable future, the

1 defendant will gain or regain the capacity to stand trial; or

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

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

19 “(b) Notwithstanding paragraph (a) of this subsection, if the superinten-
20 dent or director determines that a defendant committed under this section
21 is no longer dangerous to self or others as a result of a qualifying mental
22 disorder, or that the services and supervision necessary to restore the
23 defendant’s fitness to proceed are available in the community, the super-
24 intendent or director shall file notice of that determination with the court.
25 Upon receipt of the notice, [*the court shall order the person released on*
26 *supervision as described in subsection (3) of this section.*] **the court shall**
27 **order that a community mental health program director or the**
28 **director’s designee consult with the defendant within seven judicial**
29 **days to determine whether services and supervision necessary to safely**
30 **restore the defendant’s fitness to proceed are available in the com-**

1 **munity. The director or designee shall provide the court with findings**
2 **resulting from the consultation within 14 judicial days of the court’s**
3 **order. Within 14 judicial days of receiving the findings, the court shall**
4 **either order the person released on supervision as described in sub-**
5 **section (4) of this section, or hold a hearing to consider and determine**
6 **whether to pursue a treatment option or disposition other than com-**
7 **mitment in a state mental hospital. The court may order an alterna-**
8 **tive treatment option or other disposition including but not limited to**
9 **community restoration, the transfer of the case to a mental health**
10 **specialty court, the commencement of a proceeding under ORS 426.070**
11 **to 426.170 or 427.235 to 427.290, the commencement of protective pro-**
12 **ceedings under ORS chapter 125 or dismissal of the charges.**

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

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

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

18 “[7(a)] (10)(a) A defendant who remains committed under subsection
19 [(6)] (9) of this section shall be discharged within a period of time that is
20 reasonable for making a determination concerning whether or not, and when,
21 the defendant may gain or regain capacity. However, regardless of the num-
22 ber of charges with which the defendant is accused, in no event shall the
23 defendant be committed for longer than whichever of the following, measured
24 from the defendant’s initial custody date, is shorter:

25 “(A) Three years; or

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

28 “(b) For purposes of calculating the maximum period of commitment de-
29 scribed in paragraph (a) of this subsection:

30 “(A) The initial custody date is the date on which the defendant is first

1 committed under this section on any charge alleged in the accusatory in-
2 strument; and

3 “(B) The defendant shall be given credit against each charge alleged in
4 the accusatory instrument:

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

8 “(ii) Unless the defendant is charged with aggravated murder or a crime
9 listed in ORS 137.700 (2), for each day the defendant is held in jail **before**
10 **and after the date the defendant is first committed**, whether the days
11 are consecutive or are interrupted by a period of time during which the de-
12 fendant lacks fitness to proceed.

13 “[8] **(11)** The superintendent or director shall notify the committing
14 court of the defendant’s impending discharge 30 days before the date on
15 which the superintendent or director is required to discharge the defendant
16 under subsection [(7)] **(10)** of this section.

17 “[9] **(12)** When the committing court receives a notice from the super-
18 intendent or director under subsection [(5)] **(8)** or [(8)] **(11)** of this section
19 concerning the defendant’s progress or lack thereof, the committing court
20 shall determine, after a hearing, if a hearing is requested, whether the de-
21 fendant presently has the capacity to stand trial.

22 “[10] **(13)** If at any time the court determines that the defendant lacks
23 the capacity to stand trial, the court shall further determine whether there
24 is a substantial probability that the defendant, in the foreseeable future, will
25 gain or regain the capacity to stand trial and whether the defendant is en-
26 titled to discharge under subsection [(7)] **(10)** of this section. If the court
27 determines that there is no substantial probability that the defendant, in the
28 foreseeable future, will gain or regain the capacity to stand trial or that the
29 defendant is entitled to discharge under subsection [(7)] **(10)** of this section,
30 the court shall dismiss, without prejudice, all charges against the defendant

1 and:

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

3 “(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to
4 427.290.

5 “[~~(11)~~] **(14)** All notices required under this section shall be filed with the
6 clerk of the court and delivered to both the district attorney and the counsel
7 for the defendant.

8 “[~~(12)~~] **(15)** If the defendant gains or regains fitness to proceed, the term
9 of any sentence received by the defendant for conviction of the crime charged
10 shall be reduced by the amount of time the defendant was committed under
11 this section to the custody of a state mental hospital, or to the custody of
12 a secure intensive community inpatient facility[,] designated by the Oregon
13 Health Authority.

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

21 “[~~(14)~~] **(17)** At the time that the court determines that the defendant lacks
22 fitness to proceed under subsection (2) of this section, the court shall notify
23 the defendant that federal law prohibits the defendant from purchasing or
24 possessing a firearm unless the person obtains relief from the prohibition
25 under federal law. The court shall again notify the defendant of the prohi-
26 bition if the court finds that the defendant has gained or regained fitness to
27 proceed under subsection [~~(4)~~] **(7)** of this section.

28 **“(18)(a) The entity or evaluator conducting an examination of a**
29 **defendant under this section shall provide a copy of a progress report**
30 **or evaluation described in this section to the community mental**

1 **health program director or designee in:**

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

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

4 **“(b) Reports and evaluations conducted under this section are con-**
5 **fidential and may be made available only:**

6 **“(A) To the court, prosecuting attorney, defense attorney, defend-**
7 **ant, community mental health program director or designee and any**
8 **facility in which the defendant is housed; or**

9 **“(B) As ordered by a court.**

10 **“(c) Any facility in which a defendant is housed may not use a re-**
11 **port or evaluation conducted under this section to support a discipli-**
12 **nary action against the defendant.**

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

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

16 **“161.315. (1) Upon filing of notice or the introduction of evidence by the**
17 **defendant as provided in ORS 161.309, the state shall have the right to have**
18 **at least one psychiatrist or licensed psychologist of its selection examine the**
19 **defendant. The state shall file notice with the court of its intention to have**
20 **the defendant examined.**

21 **“(2)(a) Upon filing of the notice, the court, in its discretion, may order**
22 **the defendant committed to a state [*institution*] **mental hospital** or any**
23 **other suitable facility, if the defendant is 18 years of age or older, for [*ob-***
24 ***servation and*] examination, **which may include observation and treat-****
25 **ment, as the court may designate for a period not to exceed 30 days. **The****
26 **court may include in the order specific findings regarding why a par-**
27 **ticular length of observation is needed before the examination occurs.**

28 **“(b) If the defendant is under 18 years of age, upon filing of the notice,**
29 **the court, in its discretion, may order the defendant committed to a secure**
30 **intensive community inpatient facility designated by the Oregon Health Au-**

1 thority for [*observation and*] examination, **which may include observation**
2 **and treatment**, as the court may designate for a period not to exceed 30
3 days.

4 **“(3) A defendant committed under subsection (2)(b) of this section**
5 **shall be transported to the state mental hospital or other facility for**
6 **the examination. At the conclusion of the examination, the super-**
7 **intendent of the state institution or the superintendent’s designee or**
8 **the director of the facility may:**

9 **“(a) Order the defendant returned to the facility from which the**
10 **defendant was transported; or**

11 **“(b) Order that the defendant remain at the institution or facility**
12 **for observation and treatment.**

13 **“[(3)] (4) If the defendant objects to the examiner chosen by the state, the**
14 **court for good cause shown may direct the state to select a different exam-**
15 **iner.**

16 **“[(4)] (5) An examiner performing an examination on the issue of insanity**
17 **of a defendant under this section is not obligated to examine the defendant**
18 **for fitness to proceed unless, during the examination, the examiner deter-**
19 **mines that the defendant’s fitness to proceed is drawn in question.**

20 **“(6)(a) Examinations conducted under this section are confidential**
21 **and may be made available only:**

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

25 **“(B) As ordered by a court.**

26 **“(b) Any facility in which a defendant is housed may not use an**
27 **examination conducted under this section to support a disciplinary**
28 **action against the defendant.**

29 **“SECTION 4. This 2019 Act being necessary for the immediate**
30 **preservation of the public peace, health and safety, an emergency is**

1 **declared to exist, and this 2019 Act takes effect on its passage.”.**

2
