

SENATE AMENDMENTS TO SENATE BILL 1575

By COMMITTEE ON JUDICIARY

February 14

1 On page 1 of the printed bill, line 2, delete “and”.

2 In line 3, after “430.230” insert “; and declaring an emergency”.

3 Delete lines 5 through 24 and delete pages 2 through 14 and insert:

“PRELIMINARY PROVISIONS

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7 “**SECTION 1.** (1) Sections 2 to 5 of this 2020 Act are added to and made a part of ORS
8 161.290 to 161.373.

9 “(2) ORS 161.360, 161.365 and 161.370 are added to and made a part of sections 2 to 5 of
10 this 2020 Act.

11 “**SECTION 2.** As used in sections 2 to 5 of this 2020 Act:

12 “(1) ‘Certified evaluator’ has the meaning given that term in ORS 161.309.

13 “(2) ‘Community restoration services’ means appropriate services and treatment neces-
14 sary to safely allow a defendant to gain or regain fitness to proceed in the community, which
15 may include supervision by pretrial services.

16 “(3) ‘Hospital level of care’ means that a defendant requires the type of care provided by
17 an inpatient hospital in order to gain or regain fitness to proceed.

18 “(4) ‘Public safety concerns’ means that the defendant presents a risk to self or to the
19 public if not hospitalized or in custody.

20 “**SECTION 3.** (1) A recommendation provided by a certified evaluator, pursuant to
21 sections 2 to 5 of this 2020 Act, that a defendant requires a hospital level of care due to the
22 acuity of the defendant’s symptoms must be based upon a review of necessary community
23 restoration services, the defendant’s current diagnosis and symptomology, the defendant’s
24 current ability to engage in treatment and present safety concerns relating to the defendant.
25 The recommendation must state the relevant considerations supporting the determination
26 that a hospital level of care is required and why a hospital level of care is appropriate.

27 “(2) A determination by a community mental health program director, or the director’s
28 designee, pursuant to sections 2 to 5 of this 2020 Act, that appropriate community restora-
29 tion services are not present and available in the community must include information con-
30 cerning the community restoration services necessary to safely restore the defendant in the
31 community and must specify those services that are not present and available in the com-
32 munity.

33 “(3)(a) Reports resulting from examinations performed by a certified evaluator, and doc-
34 uments containing the recommendations of or resulting from consultations with a commu-
35 nity mental health program director or the director’s designee, prepared under sections 2 to

1 5 of this 2020 Act, and any document submitted to the court by a state mental hospital re-
2 lated to the proceedings under sections 2 to 5 of this 2020 Act, are confidential and may be
3 made available only:

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

7 “(B) As ordered by a court.

8 “(b) Any facility in which a defendant is housed may not use a report or document de-
9 scribed in paragraph (a) of this subsection to support a disciplinary action against the de-
10 fendant.

11 “(c) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or
12 agent of the prosecuting or defense attorney from discussing the contents of a report or
13 document described in paragraph (a) of this subsection with witnesses or victims as other-
14 wise permitted by law.

15 “(4) The court shall ensure that an order entered under sections 2 to 5 of this 2020 Act
16 is provided, by the end of the next judicial day, to any entity ordered to provide restoration
17 services.

18 “(5) Unless the court orders otherwise or either party objects, a defendant committed to
19 a state mental hospital or other facility, or a certified evaluator or other expert witness,
20 may attend hearings held under sections 2 to 5 of this 2020 Act via simultaneous electronic
21 transmission.

22
23 **“FITNESS TO PROCEED GENERALLY**

24
25 **“SECTION 4. (1) If at any time the court determines that the defendant lacks the ca-**
26 **capacity to stand trial, the court shall further determine whether there is a substantial prob-**
27 **ability that the defendant, in the foreseeable future, will gain or regain the capacity to stand**
28 **trial. If the court determines that there is no substantial probability that the defendant, in**
29 **the foreseeable future, will gain or regain the capacity to stand trial, the court shall dismiss,**
30 **without prejudice, all charges against the defendant and:**

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

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

33 “(2)(a) The superintendent of the hospital or director of the facility in which the defend-
34 ant is committed under ORS 161.370 or a person examining the defendant as a condition of
35 release to community restoration services shall notify the court if the defendant gains or
36 regains fitness to proceed.

37 “(b) A party to the case may notify the court if the defendant has gained or regained
38 fitness to proceed.

39 “(c) The court may, upon its own motion or the request of either party, hold a hearing
40 to determine whether the defendant has gained or regained fitness to proceed. If the court
41 determines that the defendant has gained or regained fitness to proceed, the court shall re-
42 sume the criminal proceeding unless the court determines that so much time has elapsed
43 since the commitment or release of the defendant to community restoration services that
44 it would be unjust to resume the criminal proceeding. If the court determines that it would
45 be unjust to resume the criminal proceeding, the court, on motion of either party, may dis-

1 miss the charge and may order the defendant to be discharged or cause a proceeding to be
2 commenced forthwith under ORS 426.070 to 426.170, 426.701 or 427.235 to 427.290.

3 “(3) If the defendant gains or regains fitness to proceed, the defendant shall be given
4 credit against each charge alleged in the accusatory instrument for each day the defendant
5 was committed under ORS 161.370 to the custody of a state mental hospital, or to the cus-
6 tody of a secure intensive community inpatient facility designated by the Oregon Health
7 Authority.

8 “(4) Notwithstanding the suspension of the criminal proceeding under ORS 161.370 (2), the
9 fact that the defendant is unfit to proceed does not preclude any objection through counsel
10 and without the personal participation of the defendant on the grounds that the indictment
11 is insufficient, that the statute of limitations has run, that double jeopardy principles apply
12 or upon any other ground at the discretion of the court which the court deems susceptible
13 of fair determination prior to trial.

14 “(5) At the time that the court determines that the defendant lacks fitness to proceed
15 under ORS 161.370 (2), the court shall notify the defendant that federal law prohibits the
16 defendant from purchasing or possessing a firearm unless the person obtains relief from the
17 prohibition under federal law. The court shall again notify the defendant of the prohibition
18 if the court finds that the defendant has gained or regained fitness to proceed under sub-
19 section (2) of this section.

20
21 **“COMMITTED DEFENDANTS**
22

23 **“SECTION 5. (1) The superintendent of a state mental hospital or director of a facility**
24 **to which the defendant is committed under ORS 161.370 shall cause the defendant to be**
25 **evaluated within 60 days from the defendant’s delivery into the superintendent’s or director’s**
26 **custody, for the purpose of determining whether there is a substantial probability that, in**
27 **the foreseeable future, the defendant will have the capacity to stand trial. In addition, the**
28 **superintendent or director shall:**

29 **“(a) Immediately notify the committing court if the defendant, at any time, gains or re-**
30 **gains the capacity to stand trial or if there is no substantial probability that, within the**
31 **foreseeable future, the defendant will gain or regain the capacity to stand trial.**

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

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

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

37 **“(C) There is a substantial probability that, in the foreseeable future, the defendant will**
38 **gain or regain the capacity to stand trial. If the probability exists, the superintendent or di-**
39 **rector shall give the court an estimate of the time in which the defendant, with appropriate**
40 **treatment, is expected to gain or regain capacity.**

41 **“(c) Notify the court if court-ordered involuntary medication is necessary for the de-**
42 **fendant to gain or regain the capacity to stand trial and, if appropriate, submit a report to**
43 **the court under ORS 161.372.**

44 **“(2)(a) If the superintendent of the state mental hospital or director of the facility to**
45 **which the defendant is committed determines that there is a substantial probability that, in**

1 the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless
2 the court otherwise orders, the defendant shall remain in the superintendent's or director's
3 custody where the defendant shall receive treatment designed for the purpose of enabling the
4 defendant to gain or regain capacity. In keeping with the notice requirement under sub-
5 section (1)(b) of this section, the superintendent or director shall, for the duration of the
6 defendant's period of commitment, submit a progress report to the committing court, con-
7 cerning the defendant's capacity or incapacity, at least once every 180 days as measured
8 from the date of the defendant's delivery into the superintendent's or director's custody.

9 “(b) A progress report described in paragraph (a) of this subsection may consist of an
10 update to:

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

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

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

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

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

27 “(b) Notwithstanding subsection (2) of this section, if the most serious offense in the
28 charging instrument is a felony, and the community mental health program director deter-
29 mines that community restoration services that would mitigate any risk posed by the de-
30 fendant are present and available in the community, the community mental health program
31 director may file notice of the determination with the court. Upon receipt of the notice, the
32 court shall order that the superintendent of the state mental hospital or director of the fa-
33 cility to which the defendant is committed, within five judicial days:

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

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

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

41 “(A) If, after consideration of the factors and possible actions described in ORS 161.370
42 (2)(c) and any recommendations received under paragraph (a) or (b) of this subsection, the
43 court determines that a hospital level of care is necessary due to public safety concerns or
44 the acuity of symptoms of the defendant's qualifying mental disorder, and that based on the
45 consultation or evaluation described in paragraph (a) or (b) of this subsection, any informa-

1 tion provided by community-based mental health providers or any other sources, primary
2 and secondary release criteria as defined in ORS 135.230, and any other information the court
3 finds to be trustworthy and reliable, the appropriate community restoration services are not
4 present and available in the community, the court may continue the commitment of the de-
5 fendant.

6 “(B) If the court does not make the determination described in subparagraph (A) of this
7 paragraph, the court shall terminate the commitment and shall set a review hearing seven
8 days from the date of the commitment termination for any defendant remaining in custody.
9 At the review hearing, the court shall consider all relevant information, determine an ap-
10 propriate action in the case as described in ORS 161.370 (2)(c) and enter an order in accord-
11 ance with the defendant’s constitutional rights to due process.

12 “(4)(a) Notwithstanding subsection (2) of this section, if the most serious offense in the
13 charging instrument is a misdemeanor, and the superintendent of the state mental hospital
14 or director of the facility to which the defendant is committed determines that the acuity
15 of symptoms of the defendant’s qualifying mental disorder is not severe or there are not
16 present public safety concerns, the superintendent or director shall file notice of the deter-
17 mination with the court, along with recommendations regarding the necessary community
18 restoration services that would mitigate any risk presented by the defendant. Upon receipt
19 of the notice, the court shall order that a community mental health program director or the
20 director’s designee, within five judicial days:

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

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

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

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

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

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

40 “(A) After consideration of the factors and possible actions described in ORS 161.370
41 (2)(c), the consultation or evaluation and any recommendations described in paragraph (a)
42 or (b) of this subsection, and any other information the court finds to be trustworthy and
43 reliable, the court may continue the commitment of the defendant if the court makes written
44 findings that a hospital level of care is necessary due to public safety concerns and the acuity
45 of symptoms of the defendant’s qualifying mental disorder, and that appropriate community

1 restoration services are not present and available in the community.

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

8 “(5)(a) A defendant who remains committed under this section shall be discharged within
9 a period of time that is reasonable for making a determination concerning whether, and
10 when, the defendant may gain or regain capacity. However, regardless of the number of
11 charges with which the defendant is accused, in no event shall the defendant be committed
12 for longer than whichever of the following, measured from the defendant’s initial custody
13 date, is shorter:

14 “(A) Three years; or

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

17 “(b) For purposes of calculating the maximum period of commitment described in para-
18 graph (a) of this subsection:

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

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

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

26 “(ii) Unless the defendant is charged on any charging instrument with aggravated murder
27 or a crime listed in ORS 137.700 (2), for each day the defendant is held in jail before and after
28 the date the defendant is first committed, whether the days are consecutive or are inter-
29 rupted by a period of time during which the defendant lacks fitness to proceed.

30 “(c) The superintendent of the state mental hospital or director of the facility to which
31 the defendant is committed shall notify the committing court of the defendant’s impending
32 discharge 30 days before the date on which the superintendent or director is required to
33 discharge the defendant under this subsection.

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

37 “(b) When the committing court receives a notice from the superintendent or director
38 under subsection (1) of this section concerning the defendant’s progress or lack thereof, or
39 under subsection (5) of this section concerning the defendant’s impending discharge, the
40 committing court shall determine, after a hearing if a hearing is requested, whether the de-
41 fendant presently has the capacity to stand trial.

42 “(7) If at any time the court determines that the defendant lacks the capacity to stand
43 trial, the court shall further determine whether the defendant is entitled to discharge under
44 subsection (5) of this section. If the court determines that the defendant is entitled to dis-
45 charge under subsection (5) of this section, the court shall dismiss, without prejudice, all

1 **charges against the defendant and:**

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

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

4
5 **“EXAMINATION OF DEFENDANT**

6
7 **“SECTION 6.** ORS 161.365 is amended to read:

8 “161.365. (1)(a) When the court has reason to doubt the defendant’s fitness to proceed by reason
9 of incapacity as described in ORS 161.360, the court may call any witness to assist it in reaching
10 its decision and shall order that a community mental health program director, or the director’s
11 designee, consult with the defendant and with any local entity that would be responsible for
12 [*supervising*] **providing community restoration services to** the defendant if the defendant were
13 to be released in the community, to determine whether [*services and supervision necessary to safely*
14 *allow the defendant to gain or regain fitness to proceed*] **community restoration services** are
15 **present and** available in the community. After the consultation, the program director or the
16 director’s designee shall provide to the court a copy of the findings resulting from the consultation.

17 **“(b)** If the court determines the assistance of a psychiatrist or psychologist would be helpful,
18 the court may:

19 **“(A)** Order that a psychiatric or psychological examination of the defendant be conducted by a
20 certified evaluator and a report of the examination be prepared; or

21 **“(B)** Order the defendant to be committed for the purpose of an examination to a state mental
22 hospital or other facility designated by the Oregon Health Authority if the defendant is at least 18
23 years of age, or to a secure intensive community inpatient facility designated by the authority if the
24 defendant is under 18 years of age. The state mental hospital or other facility may retain custody
25 of a defendant committed under this paragraph for the duration necessary to complete the exam-
26 ination of the defendant, not to exceed 30 days. The examination may include a period of observa-
27 tion.

28 **“[(b)] (c)** The court shall provide a copy of any order entered under this subsection to the
29 community mental health program director or designee and to the state mental hospital or other
30 facility by the end of the next judicial day.

31 **“(2)(a)** A defendant committed under subsection [(1)(a)(B)] **(1)(b)(B)** of this section shall be
32 transported to the state mental hospital or other facility for the examination.

33 **“(b)** At the conclusion of the examination, the superintendent of the state mental hospital or the
34 superintendent’s designee or the director of the facility may:

35 **“(A)** Return the defendant to the facility from which the defendant was transported; or

36 **“(B)** Inform the court and the parties that the defendant requires a hospital level of care due
37 to [*the defendant’s dangerousness and*] the acuity of symptoms of the defendant’s qualifying mental
38 disorder and request that the defendant remain at the state mental hospital or other facility pending
39 a hearing or order under ORS 161.370.

40 **“(c)** If both parties consent, the court may, without holding a hearing, enter any order author-
41 ized by ORS 161.370 based on a report resulting from an examination conducted under this section.

42 **“(3)** The report of an examination described in this section must include, but is not necessarily
43 limited to, the following:

44 **“(a)** A description of the nature of the examination;

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

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

3 “(d) If the defendant is incapacitated within the description set out in ORS 161.360, a recom-
4 mendation of treatment and services necessary to allow the defendant to gain or regain capacity,
5 including whether a hospital level of care is required due to *[the defendant’s dangerousness and]* the
6 acuity of symptoms of the defendant’s qualifying mental disorder.

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

11 “(5) If the examination by the certified evaluator cannot be conducted by reason of the unwill-
12 ingness of the defendant to participate in the examination, the report must so state and must in-
13 clude, if possible, an opinion as to whether the unwillingness of the defendant was the result of a
14 qualifying mental disorder affecting capacity to proceed.

15 “(6)[(a)] The report resulting from the examination of a defendant under this section may be filed
16 electronically and must be filed with the clerk of the court, who shall cause copies to be delivered
17 to the district attorney and to counsel for defendant.

18 “[*(b) The entity or evaluator conducting the examination shall provide a copy of the report result-*
19 *ing from the examination to the community mental health program director or designee in:]*

20 “[*(A) The county in which the defendant is charged; and]*

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

22 “[*(c) Reports prepared under this section are confidential and may be made available only:]*

23 “[*(A) To the court, prosecuting attorney, defense attorney, agent of the prosecuting or defense at-*
24 *torney, defendant, community mental health program director or designee and any facility in which the*
25 *defendant is housed; or]*

26 “[*(B) As ordered by a court.]*

27 “[*(d) Any facility in which a defendant is housed may not use a report prepared under this section*
28 *to support a disciplinary action against the defendant.]*

29 “[*(e) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the*
30 *prosecuting or defense attorney from discussing the contents of a report prepared under this section*
31 *with witnesses or victims as otherwise permitted by law.]*

32 “(7)(a) When upon motion of the court or a financially eligible defendant, the court has ordered
33 a psychiatric or psychological examination of the defendant, a county or justice court shall order
34 the county to pay, **a municipal court shall order the city to pay**, and a circuit court shall order
35 the public defense services executive director to pay from funds available for the purpose:

36 “(A) A reasonable fee if the examination of the defendant is conducted by a certified evaluator
37 in private practice; and

38 “(B) All costs including transportation of the defendant if the examination is conducted by a
39 certified evaluator in the employ of the Oregon Health Authority or a community mental health
40 program established under ORS 430.610 to 430.670.

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

45 “(8) The Oregon Health Authority shall establish by rule standards for the consultation de-

1 scribed in subsection (1) of this section.

2 “[(9) As used in this section and ORS 161.370, ‘certified evaluator’ has the meaning given that term
3 in ORS 161.309.]

4
5 **“DISPOSITION UPON FINDING OF LACK OF FITNESS**

6
7 **“SECTION 7.** ORS 161.370 is amended to read:

8 “161.370. (1)(a) When the defendant’s fitness to proceed is drawn in question, the issue shall be
9 determined by the court.

10 “(b) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the
11 report filed under ORS 161.365, the court may make the determination on the basis of the report.
12 If the finding is contested, the court shall hold a hearing on the issue. If the report is received in
13 evidence in the hearing, the party who contests the finding has the right to summon and to cross-
14 examine any certified evaluator who submitted the report and to offer evidence upon the issue.
15 Other evidence regarding the defendant’s fitness to proceed may be introduced by either party.

16 “(2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal pro-
17 ceeding against the defendant shall be suspended and the court shall, at a hearing, proceed in ac-
18 cordance with this subsection.

19 “(b) After making the determination under paragraph (a) of this subsection, the court shall re-
20 ceive a recommendation, to be considered at the hearing, from a community mental health program
21 director or the director’s designee, and from any local entity that would be responsible for [*super-*
22 *vising*] **treating** the defendant if the defendant were to be released in the community, concerning
23 whether [*services and supervision necessary to safely allow the defendant to gain or regain fitness to*
24 *proceed are available*] **community restoration services are present and available** in the commu-
25 nity.

26 “(c) The court and the parties shall at the hearing [*determine*] **consider** an appropriate action
27 in the case, and the court shall **determine the appropriate action and** enter an order necessary
28 to implement the action. In determining the appropriate action, the court shall consider the primary
29 and secondary release criteria as defined in ORS 135.230, the least restrictive option appropriate for
30 the defendant, the needs of the defendant and the interests of justice. Actions may include but are
31 not limited to:

32 “(A) Commitment for the defendant to gain or regain fitness to proceed under subsection (3) or
33 [(5)] **(4)** of this section;

34 “(B) **An order to engage in** community restoration **services**, as recommended by the commu-
35 nity mental health program director or designee, **under subsection (6) of this section**;

36 “[*(C) Release on supervision*];

37 “[*(D)*] **(C)** Commencement of a civil commitment proceeding under ORS 426.070 to 426.170,
38 426.701 or 427.235 to 427.290;

39 “[*(E)*] **(D)** Commencement of protective proceedings under ORS chapter 125; or

40 “[*(F)*] **(E)** Dismissal of the charges pursuant to ORS 135.755.

41 “(d) If the court, while considering or ordering an appropriate action under this subsection,
42 [*determines that the defendant does not require a hospital level of care due to the defendant’s*
43 *dangerousness and the acuity of symptoms of the defendant’s qualifying mental disorder, but that ser-*
44 *vices and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are*
45 *not available*] **does not order the defendant committed to a state mental hospital or other fa-**

1 **cility, but finds that community restoration services are not present and available** in the
2 community, for any defendant remaining in custody after such determination, the court shall set a
3 review hearing seven days from the date of the determination under paragraph (a) of this subsection.
4 At the review hearing, the court shall consider all relevant information and determine [*an appro-*
5 *priate action in the case as described in paragraph (c) of this subsection. If the defendant remains in*
6 *custody following the initial review hearing, the court shall hold further review hearings every seven*
7 *days thereafter until the defendant is no longer in custody.*] **if commitment to the state mental**
8 **hospital or other facility is appropriate under subsection (3) or (4) of this section, or if an-**
9 **other action described in paragraph (c) of this subsection is appropriate. At the conclusion**
10 **of the hearing the court shall enter an order in accordance with the defendant's constitu-**
11 **tional rights to due process.**

12 “[(3)(a) *Unless the court orders an action other than commitment under subsection (2) of this sec-*
13 *tion, and except as otherwise provided in subsections (4) and (5) of this section, if the court finds that*
14 *the defendant is dangerous to self or others as a result of a qualifying mental disorder, that a hospital*
15 *level of care is necessary due to the defendant's dangerousness and the acuity of symptoms of the*
16 *defendant's qualifying mental disorder, and that, based on the findings resulting from the consultation*
17 *described in ORS 161.365 (1) and from any information provided by community-based mental health*
18 *providers or any other sources, the services and supervision necessary to allow the defendant to gain*
19 *or regain fitness to proceed are not available in the community, the court shall commit the defendant*
20 *to the custody of the superintendent of a state mental hospital or director of a facility designated by the*
21 *Oregon Health Authority if the defendant is at least 18 years of age, or to the custody of the director*
22 *of a secure intensive community inpatient facility designated by the authority if the defendant is under*
23 *18 years of age.*]

24 “(3)(a) **If the most serious offense in the charging instrument is a felony, the court shall**
25 **commit the defendant to the custody of the superintendent of a state mental hospital or di-**
26 **rector of a facility designated by the Oregon Health Authority if the defendant is at least 18**
27 **years of age, or to the custody of the director of a secure intensive community inpatient**
28 **facility designated by the authority if the defendant is under 18 years of age, if the court**
29 **makes the following findings:**

30 “(A) **The defendant requires a hospital level of care due to public safety concerns if the**
31 **defendant is not hospitalized or in custody or the acuity of symptoms of the defendant's**
32 **qualifying mental disorder; and**

33 “(B) **Based on the findings resulting from the consultation described in ORS 161.365 (1),**
34 **from any information provided by community-based mental health providers or any other**
35 **sources, and primary and secondary release criteria as defined in ORS 135.230, the appropri-**
36 **ate community restoration services are not present and available in the community.**

37 “(b) If the defendant is committed under this subsection, the community mental health program
38 director, **or director's designee**, shall at regular intervals, during any period of commitment, re-
39 view available community [*resources*] **restoration services** and maintain communication with the
40 defendant and the superintendent of the state mental hospital or director of the facility in order to
41 facilitate an efficient transition to treatment in the community when ordered.

42 “(c) **If the court does not order the commitment of the defendant under this subsection,**
43 **the court shall proceed in accordance with subsection (2)(c) of this section to determine and**
44 **order an appropriate action other than commitment.**

45 “[4)(a) *If the court does not make a finding described in subsection (3) of this section, if commit-*

1 *ment is precluded under subsection (5) of this section or if the court determines that care other than*
2 *commitment for incapacity to stand trial would better serve the defendant and the community, the court*
3 *shall release the defendant on supervision for as long as the unfitness endures.]*

4 “[*b*] *The court may order a community mental health program director providing treatment to the*
5 *defendant in the community to provide the court with status reports on the defendant’s progress in*
6 *gaining or regaining fitness to proceed.]*

7 “[*c*] *A community mental health program director providing treatment to the defendant in the*
8 *community shall notify the court if the defendant gains or regains fitness to proceed.]*

9 “[*5*)(*a*) *If the most serious offense in the charging instrument is a violation, the court may not*
10 *commit the defendant under subsection (3) of this section.]*

11 “[*b*)] **(4)(a)** *If the most serious offense in the charging instrument is a misdemeanor, the court*
12 *may not commit the defendant [under subsection (3) of this section] to the custody of the super-*
13 **intendent of a state mental hospital or director of a facility designated by the Oregon Health**
14 **Authority if the defendant is at least 18 years of age, or to the custody of the director of a**
15 **secure intensive community inpatient facility designated by the authority if the defendant is**
16 **under 18 years of age,** *unless the [finding that the defendant requires a hospital level of care due to*
17 *the defendant’s dangerousness and the acuity of symptoms of the defendant’s qualifying mental disorder*
18 *is based on a recommendation by a certified evaluator as defined in ORS 161.309, or a community*
19 *mental health program director or the director’s designee, that the defendant requires such level of*
20 *care.]* **court:**

21 **“(A)(i) Receives a recommendation from a certified evaluator that the defendant requires**
22 **a hospital level of care due to the acuity of symptoms of the defendant’s qualifying mental**
23 **disorder; and**

24 **“(ii) Receives a recommendation from a community mental health program director, or**
25 **director’s designee, that the appropriate community restoration services are not present and**
26 **available in the community; or**

27 **“(B) Determines that the defendant requires a hospital level of care after making all of**
28 **the following written findings:**

29 **“(i) The acuity of symptoms of the defendant’s qualifying mental disorder are severe;**

30 **“(ii) There are public safety concerns; and**

31 **“(iii) The appropriate community restoration services are not present and available in the**
32 **community.**

33 “[*c*)] **(b)** *If at the time of determining the appropriate action for the case, the court is consid-*
34 **ering commitment under paragraph (a)(A) of this subsection and:**

35 **“(A)** *Has not received a recommendation from a certified evaluator as to whether the de-*
36 *fendant requires a hospital level of care due to [the defendant’s dangerousness and] the acuity of*
37 *symptoms of the defendant’s qualifying mental disorder, the court shall order a certified evaluator*
38 *[or a community mental health program director, or the director’s designee,] to make such a recom-*
39 *mendation.*

40 **“(B)** *Has not received a recommendation from the community mental health program*
41 *director or designee that appropriate community restoration services are not present and*
42 *available in the community, the court shall order the director or designee to make such a*
43 **recommendation.**

44 “[*d*)] **(c)** *If the court does not order the commitment of [a] the defendant [described in this*
45 *subsection to the state mental hospital or other facility] under this subsection, the court shall [hold*

1 a hearing] **proceed** in accordance with subsection (2)(c) of this section to determine and order an
2 appropriate action other than commitment.

3 **“(d) If the defendant is committed under this subsection, the community mental health**
4 **program director, or director’s designee, shall at regular intervals, during any period of**
5 **commitment, review available community restoration services and maintain communication**
6 **with the defendant and the superintendent of the state mental hospital or director of the**
7 **facility in order to facilitate an efficient transition to treatment in the community when or-**
8 **dered.**

9 **“(5) If the most serious offense in the charging instrument is a violation, the court may**
10 **not commit the defendant to the custody of the superintendent of a state mental hospital**
11 **or director of a facility designated by the Oregon Health Authority if the defendant is at least**
12 **18 years of age, or to the custody of the director of a secure intensive community inpatient**
13 **facility designated by the authority if the defendant is under 18 years of age.**

14 **“(6)(a) If the court does not order the commitment of the defendant under subsection (3)**
15 **or (4) of this section, if commitment is precluded under subsection (5) of this section or if**
16 **the court determines that care other than commitment for incapacity to stand trial would**
17 **better serve the defendant and the community, the court shall release the defendant, pur-**
18 **suant to an order that the defendant engage in community restoration services, until the**
19 **defendant has gained or regained fitness to proceed, or until the court finds there is no**
20 **substantial probability that the defendant will, within the foreseeable future, gain or regain**
21 **the capacity to stand trial.**

22 **“(b) The court may order a community mental health program director coordinating the**
23 **defendant’s treatment in the community to provide the court with status reports on the**
24 **defendant’s progress in gaining or regaining fitness to proceed. The director shall provide a**
25 **status report if the defendant is not complying with court-ordered restoration services.**

26 **“(c) A community mental health program director coordinating the defendant’s treat-**
27 **ment in the community shall notify the court if the defendant gains or regains fitness to**
28 **proceed. The notice shall be filed with the court and may be filed electronically. The clerk**
29 **of the court shall cause copies of the notice to be delivered to both the district attorney and**
30 **the counsel for the defendant.**

31 **“[(6)] (d) When a defendant is [released on supervision] ordered to engage in community res-**
32 **toration services under [subsection (4) of this section] this subsection, the court may place condi-**
33 **tions that the court deems appropriate on the release, including the requirement that the defendant**
34 **regularly report to the authority [or a community mental health program] for examination to deter-**
35 **mine if the defendant has gained or regained capacity to stand trial.**

36 **“[(7) When the court, on its own motion or upon the application of the superintendent of the hos-**
37 **pital or director of the facility in which the defendant is committed, a person examining the defendant**
38 **as a condition of release on supervision, or either party, determines, after a hearing, if a hearing is**
39 **requested, that the defendant has gained or regained fitness to proceed, the criminal proceeding shall**
40 **be resumed. If, however, the court is of the view that so much time has elapsed since the commitment**
41 **or release of the defendant on supervision that it would be unjust to resume the criminal proceeding,**
42 **the court on motion of either party may dismiss the charge and may order the defendant to be dis-**
43 **charged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170, 426.701 or**
44 **427.235 to 427.290.]**

45 **“[(8) The superintendent of a state hospital or director of a facility to which the defendant is com-**

1 *mitted shall cause the defendant to be evaluated within 60 days from the defendant's delivery into the*
2 *superintendent's or director's custody, for the purpose of determining whether there is a substantial*
3 *probability that, in the foreseeable future, the defendant will have the capacity to stand trial. In addi-*
4 *tion, the superintendent or director shall:]*

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

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

9 *“(A) The defendant has the present capacity to stand trial;]*

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

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

16 *“(c) Notify the court if court-ordered involuntary medication is necessary for the defendant to gain*
17 *or regain the capacity to proceed and, if appropriate, submit a report to the court under ORS*
18 *161.372.]*

19 *“(9)(a) If the superintendent or director determines that there is a substantial probability that, in*
20 *the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the court*
21 *otherwise orders, the defendant shall remain in the superintendent's or director's custody where the*
22 *defendant shall receive treatment designed for the purpose of enabling the defendant to gain or regain*
23 *capacity. In keeping with the notice requirement under subsection (8)(b) of this section, the superinten-*
24 *dent or director shall, for the duration of the defendant's period of commitment, submit a progress re-*
25 *port to the committing court, concerning the defendant's capacity or incapacity, at least once every 180*
26 *days as measured from the date of the defendant's delivery into the superintendent's or director's cus-*
27 *tody.]*

28 *“(b)(A) Notwithstanding paragraph (a) of this subsection, if the superintendent or director deter-*
29 *mines that a defendant committed under this section is no longer dangerous to self or others as a result*
30 *of a qualifying mental disorder, that a hospital level of care is not necessary due to the defendant's*
31 *dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, or that the*
32 *services and supervision necessary to allow the defendant to gain or regain fitness to proceed are*
33 *available in the community, the superintendent or director shall file notice of that determination with*
34 *the court.]*

35 *“(B) Upon receipt of the notice, the court shall order that a community mental health program*
36 *director or the director's designee, within five judicial days:]*

37 *“(i) Consult with the defendant and with any local entity that would be responsible for supervising*
38 *the defendant if the defendant were to be released in the community to determine whether services and*
39 *supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available*
40 *in the community; and]*

41 *“(ii) Provide the court and the parties with recommendations from the consultation.]*

42 *“(C) Within 10 judicial days of receiving the recommendations from the consultation, the court*
43 *shall hold a hearing to determine an appropriate action in accordance with subsection (2)(c) of this*
44 *section as follows:]*

45 *“(i) If, after consideration of the factors and possible actions described in subsection (2)(c) of this*

1 section, and any recommendations from the consultation described in this paragraph, the court deter-
2 mines that the defendant remains dangerous to self or others as a result of a qualifying mental disor-
3 der, a hospital level of care is necessary due to the defendant's dangerousness and the acuity of
4 symptoms of the defendant's qualifying mental disorder, and the services and supervision necessary to
5 allow the defendant to gain or regain fitness to proceed are not available in the community, the court
6 may, after making specific findings to that effect, continue the commitment.]

7 “[ii] If the court does not make the findings described in sub-subparagraph (i) of this subpara-
8 graph, the court shall terminate the commitment and shall set a review hearing seven days from the
9 date of the commitment termination for any defendant remaining in custody. At the review hearing, the
10 court shall consider all relevant information and determine an appropriate action in the case as de-
11 scribed in subsection (2)(c) of this section. If the defendant remains in custody following the initial re-
12 view hearing, the court shall hold further review hearings every seven days thereafter until the
13 defendant is no longer in custody.]

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

16 “[A] The original examination report conducted under ORS 161.365; or]

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

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

24 “[A] Three years; or]

25 “[B] A period of time equal to the maximum sentence the court could have imposed if the defend-
26 ant had been convicted.]

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

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

31 “[B] The defendant shall be given credit against each charge alleged in the accusatory
32 instrument:]

33 “[i] For each day the defendant is committed under this section, whether the days are consecutive
34 or are interrupted by a period of time during which the defendant has gained or regained fitness to
35 proceed; and]

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

40 “[11] The superintendent or director shall notify the committing court of the defendant's impending
41 discharge 30 days before the date on which the superintendent or director is required to discharge the
42 defendant under subsection (10) of this section.]

43 “[12] When the committing court receives a notice from the superintendent or director under sub-
44 section (8) or (11) of this section concerning the defendant's progress or lack thereof, the committing
45 court shall determine, after a hearing, if a hearing is requested, whether the defendant presently has

1 *the capacity to stand trial.]*

2 *“(13) If at any time the court determines that the defendant lacks the capacity to stand trial, the*
3 *court shall further determine whether there is a substantial probability that the defendant, in the fore-*
4 *seeable future, will gain or regain the capacity to stand trial and whether the defendant is entitled to*
5 *discharge under subsection (10) of this section. If the court determines that there is no substantial*
6 *probability that the defendant, in the foreseeable future, will gain or regain the capacity to stand trial*
7 *or that the defendant is entitled to discharge under subsection (10) of this section, the court shall dis-*
8 *miss, without prejudice, all charges against the defendant and:]*

9 *“(a) Order that the defendant be discharged; or]*

10 *“(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to 427.290.]*

11 *“(14) All notices required under this section shall be filed with the court and may be filed elec-*
12 *tronically. The clerk of the court shall cause copies of the notices to be delivered to both the district*
13 *attorney and the counsel for the defendant.]*

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

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

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

28 *“(18)(a) The entity or evaluator conducting an examination of a defendant under this section shall*
29 *provide a copy of any report described in this section to the community mental health program director*
30 *or designee in:]*

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

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

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

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

37 *“(B) As ordered by a court.]*

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

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

43 *“(19) The court shall ensure that an order entered under this section is provided, by the end of*
44 *the next judicial day, to any entity ordered to provide services and supervision necessary to restore the*
45 *defendant’s fitness to proceed.]*

