

**PROPOSED AMENDMENTS TO
HOUSE BILL 2420**

1 On page 1 of the printed bill, line 2, before the period insert “and
2 161.365”.

3 Delete lines 4 through 30 and delete pages 2 through 4 and insert:

4 **“SECTION 1.** ORS 161.365 is amended to read:

5 “161.365. (1) When the court has reason to doubt the defendant’s fitness
6 to proceed by reason of incapacity as described in ORS 161.360, the court
7 may call any witness to its assistance in reaching its decision **and shall**
8 **order that a community mental health program director or the**
9 **director’s designee consult with the defendant to determine whether**
10 **services and supervision necessary to safely restore the defendant’s**
11 **fitness to proceed are available in the community. After the consul-**
12 **tation, the program director or the director’s designee shall provide**
13 **to the court a copy of the findings resulting from the consultation.** If
14 the court determines the assistance of a psychiatrist or psychologist would
15 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 for a period not exceeding 30 days to a state mental hospital or other
21 facility designated by the Oregon Health Authority if the defendant is at
22 least 18 years of age, or to a secure intensive community inpatient facility

1 designated by the authority if the defendant is under 18 years of age.

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

4 “(a) A description of the nature of the examination;

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

6 “(c) If the defendant suffers from a mental disease or defect, an opinion
7 as to whether the defendant is incapacitated within the description set out
8 in ORS 161.360; and

9 “(d) If the defendant is incapacitated within the description set out in
10 ORS 161.360, a recommendation of treatment and services necessary to re-
11 store capacity.

12 “(3) Except when the defendant and the court both request to the con-
13 trary, the report may not contain any findings or conclusions as to whether
14 the defendant as a result of mental disease or defect was subject to the
15 provisions of ORS 161.295 or 161.300 at the time of the criminal act charged.

16 “(4) If the examination by the psychiatrist or psychologist cannot be
17 conducted by reason of the unwillingness of the defendant to participate in
18 the examination, the report shall so state and shall include, if possible, an
19 opinion as to whether the unwillingness of the defendant was the result of
20 mental disease or defect affecting capacity to proceed.

21 “(5) The report shall be filed in triplicate with the clerk of the court, who
22 shall cause copies to be delivered to the district attorney and to counsel for
23 defendant.

24 “(6)(a) When upon motion of the court or a financially eligible defendant,
25 the court has ordered a psychiatric or psychological examination of the de-
26 fendant, a county or justice court shall order the county to pay, and a circuit
27 court shall order the public defense services executive director to pay from
28 funds available for the purpose:

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

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

5 “(b) When an examination is ordered at the request or with the
6 acquiescence of a defendant who is determined not to be financially eligible,
7 the examination shall be performed at the defendant’s expense. When an ex-
8 amination is ordered at the request of the prosecution, the county shall pay
9 for the expense of the examination.

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

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

13 “161.370. (1) When the defendant’s fitness to proceed is drawn in question,
14 the issue shall be determined by the court. If neither the prosecuting attor-
15 ney nor counsel for the defendant contests the finding of the report filed
16 under ORS 161.365, the court may make the determination on the basis of the
17 report. If the finding is contested, the court shall hold a hearing on the issue.
18 If the report is received in evidence in the hearing, the party who contests
19 the finding has the right to summon and to cross-examine any psychiatrist
20 or psychologist who submitted the report and to offer evidence upon the is-
21 sue. Other evidence regarding the defendant’s fitness to proceed may be in-
22 troduced by either party.

23 “(2) If the court determines that the defendant lacks fitness to proceed,
24 the criminal proceeding against the defendant shall be suspended and:

25 “(a) If the court finds that the defendant is dangerous to self or others
26 as a result of mental disease or defect, or that, **based on the findings re-**
27 **sulting from the consultation described in ORS 161.365 (1),** the services
28 and supervision necessary to restore the defendant’s fitness to proceed are
29 not available in the community, the court shall commit the defendant to the
30 custody of the superintendent of a state mental hospital or director of a fa-

1 cility, designated by the Oregon Health Authority, if the defendant is at least
2 18 years of age, or to the custody of the director of a secure intensive com-
3 munity inpatient facility designated by the authority if the defendant is un-
4 der 18 years of age; or

5 “(b) If the court does not make a finding described in paragraph (a) of this
6 subsection, or if the court determines that care other than commitment for
7 incapacity to stand trial would better serve the defendant and the commu-
8 nity, the court shall release the defendant on supervision for as long as the
9 unfitness endures.

10 “(3) When a defendant is released on supervision under [*this section*]
11 **subsection (2)(b) of this section**, the court may place conditions that the
12 court deems appropriate on the release, including the requirement that the
13 defendant regularly report to the authority or a community mental health
14 program for examination to determine if the defendant has **gained or** re-
15 gained capacity to stand trial.

16 “(4) When the court, on its own motion or upon the application of the
17 superintendent of the hospital or director of the facility in which the de-
18 fendant is committed, a person examining the defendant as a condition of
19 release on supervision, or either party, determines, after a hearing, if a
20 hearing is requested, that the defendant has **gained or** regained fitness to
21 proceed, the criminal proceeding shall be resumed. If, however, the court is
22 of the view that so much time has elapsed since the commitment or release
23 of the defendant on supervision that it would be unjust to resume the crim-
24 inal proceeding, the court on motion of either party may dismiss the charge
25 and may order the defendant to be discharged or cause a proceeding to be
26 commenced forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

27 “(5) The superintendent of a state hospital or director of a facility to
28 which the defendant is committed shall cause the defendant to be evaluated
29 within 60 days from the defendant’s delivery into the superintendent’s or
30 director’s custody, for the purpose of determining whether there is a sub-

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

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

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

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

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

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

16 “(6)(a) If the superintendent or director determines that there is a sub-
17 stantial probability that, in the foreseeable future, the defendant will gain
18 or regain the capacity to stand trial, unless the court otherwise orders, the
19 defendant shall remain in the superintendent’s or director’s custody where
20 the defendant shall receive treatment designed for the purpose of enabling
21 the defendant to gain or regain capacity. In keeping with the notice re-
22 quirement under subsection (5)(b) of this section, the superintendent or di-
23 rector shall, for the duration of the defendant’s period of commitment, submit
24 a progress report to the committing court, concerning the defendant’s ca-
25 pacity or incapacity, at least once every 180 days as measured from the date
26 of the defendant’s delivery into the superintendent’s or director’s custody.

27 “(b) Notwithstanding paragraph (a) of this subsection, if the superinten-
28 dent or director determines that a defendant committed under this section
29 is no longer dangerous to self or others as a result of mental disease or de-
30 fect, or that the services and supervision necessary to restore the defendant’s

1 fitness to proceed are available in the community, the superintendent or di-
2 rector shall file notice of that determination with the court. Upon receipt
3 of the notice, the court shall order the person released on supervision as
4 described in subsection (3) of this section.

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

12 “(A) Three years; or

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

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

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

20 “(B) The defendant shall be given credit against each charge alleged in
21 the accusatory instrument for each day the defendant is committed under
22 this section, whether the days are consecutive or are interrupted by a period
23 of time during which the defendant has **gained or** regained fitness to pro-
24 ceed.

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

29 “(9) When the committing court receives a notice from the superintendent
30 or director under subsection (5) or (8) of this section concerning the

1 defendant's progress or lack thereof, the committing court shall determine,
2 after a hearing, if a hearing is requested, whether the defendant presently
3 has the capacity to stand trial.

4 “(10) If at any time the court determines that the defendant lacks the
5 capacity to stand trial, the court shall further determine whether there is a
6 substantial probability that the defendant, in the foreseeable future, will
7 gain or regain the capacity to stand trial and whether the defendant is en-
8 titled to discharge under subsection (7) of this section. If the court deter-
9 mines that there is no substantial probability that the defendant, in the
10 foreseeable future, will gain or regain the capacity to stand trial or that the
11 defendant is entitled to discharge under subsection (7) of this section, the
12 court shall dismiss, without prejudice, all charges against the defendant and:

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

14 “(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to
15 427.290.

16 “(11) All notices required under this section shall be filed with the clerk
17 of the court and delivered to both the district attorney and the counsel for
18 the defendant.

19 “(12) If the defendant **gains or** regains fitness to proceed, the term of any
20 sentence received by the defendant for conviction of the crime charged shall
21 be reduced by the amount of time the defendant was committed under this
22 section to the custody of a state mental hospital, or to the custody of a se-
23 cure intensive community inpatient facility, designated by the Oregon Health
24 Authority.

25 “(13) Notwithstanding the suspension of the criminal proceeding under
26 subsection (2) of this section, the fact that the defendant is unfit to proceed
27 does not preclude any objection through counsel and without the personal
28 participation of the defendant on the grounds that the indictment is insuffi-
29 cient, that the statute of limitations has run, that double jeopardy principles
30 apply or upon any other ground at the discretion of the court which the

1 court deems susceptible of fair determination prior to trial.”.

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