

Requested by SENATE COMMITTEE ON JUDICIARY

**PROPOSED AMENDMENTS TO
A-ENGROSSED SENATE BILL 714**

1 On page 1 of the printed A-engrossed bill, line 2, after “ORS” delete the
2 rest of the line and insert “137.540, 144.102 and 161.370.”.

3 On page 8, after line 41, insert:

4 **“SECTION 3.** ORS 161.370 is amended to read:

5 “161.370. (1) When the defendant’s fitness to proceed is drawn in question,
6 the issue shall be determined by the court. If neither the prosecuting attor-
7 ney nor counsel for the defendant contests the finding of the report filed
8 under ORS 161.365, the court may make the determination on the basis of the
9 report. If the finding is contested, the court shall hold a hearing on the issue.
10 If the report is received in evidence in the hearing, the party who contests
11 the finding has the right to summon and to cross-examine any psychiatrist
12 or psychologist who submitted the report and to offer evidence upon the is-
13 sue. Other evidence regarding the defendant’s fitness to proceed may be in-
14 troduced by either party.

15 “(2)(a) If the court determines that the defendant lacks fitness to proceed,
16 the criminal proceeding against the defendant shall be suspended and[:] **the**
17 **court shall determine where the defendant will receive treatment to**
18 **enable the defendant to gain or regain fitness to proceed as described**
19 **in this subsection.**

20 “(b) **Prior to making any determination concerning where the de-**
21 **fendant will receive treatment, the court shall:**

1 “(A) Confer with the community mental health program director,
2 or the director’s designee, who conducted the consultation described
3 in ORS 161.365; and

4 “(B) Notify the Oregon Health Authority of the pending determi-
5 nation, including the time and place of any hearing on the matter.

6 “[(a)] (c) If the court finds that the defendant is dangerous to self or
7 others as a result of mental disease or defect, or that, based on the findings
8 resulting from the consultation described in ORS 161.365 (1), the services and
9 supervision necessary to restore the defendant’s fitness to proceed are not
10 available in the community, the court shall commit the defendant to the
11 custody of the superintendent of a state mental hospital or director of a fa-
12 cility, designated by the Oregon Health Authority, if the defendant is at least
13 18 years of age, or to the custody of the director of a secure intensive com-
14 munity inpatient facility designated by the authority if the defendant is un-
15 der 18 years of age[; *or*]. **If the defendant is charged with a crime other**
16 **than a person felony or a person Class A misdemeanor, as those terms**
17 **are defined in the rules of the Oregon Criminal Justice Commission,**
18 **the court shall additionally determine whether, if the services and**
19 **supervision necessary to restore the defendant’s fitness to proceed**
20 **become available in the community at a later time, the authority may**
21 **release the defendant on supervision.**

22 “[(b)] (d) If the court does not make a finding described in paragraph
23 [(a)] (c) of this subsection, or if the court determines that care other than
24 commitment for incapacity to stand trial would better serve the defendant
25 and the community, the court shall release the defendant on supervision for
26 as long as the unfitness endures.

27 “(3)(a) When a defendant is released on supervision under subsection
28 [(2)(b)] (2)(d) of this section, **or if the court authorizes the Oregon Health**
29 **Authority to release the defendant on supervision under subsection**
30 **(2)(c) of this section,** the court may place conditions that the court deems

1 appropriate on the release, including the requirement that the defendant
2 regularly report to the authority or a community mental health program for
3 examination to determine if the defendant has gained or regained capacity
4 to stand trial.

5 **“(b) If the court authorizes the Oregon Health Authority to release**
6 **the defendant on supervision under subsection (2)(c) of this section,**
7 **the authority may release the defendant on supervision if the author-**
8 **ity determines that services and supervision necessary to restore the**
9 **defendant’s fitness to proceed are available in the community. The**
10 **authority shall notify the court, the district attorney and the defense**
11 **attorney of the release.**

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

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

29 “(a) Immediately notify the committing court if the defendant, at any
30 time, gains or regains the capacity to stand trial or will never have the ca-

1 capacity to stand trial.

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

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

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

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

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

23 “(b) Notwithstanding paragraph (a) of this subsection, if the superinten-
24 dent or director determines that a defendant committed under this section
25 is no longer dangerous to self or others as a result of mental disease or de-
26 fect, or that the services and supervision necessary to restore the defendant’s
27 fitness to proceed are available in the community, the superintendent or di-
28 rector shall file notice of that determination with the court. Upon receipt
29 of the notice, the court shall order the person released on supervision as
30 described in subsection (3)(a) of this section.

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

8 “(A) Three years; or

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

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

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

16 “(B) The defendant shall be given credit against each charge alleged in
17 the accusatory instrument for each day the defendant is committed under
18 this section, whether the days are consecutive or are interrupted by a period
19 of time during which the defendant has gained or regained fitness to proceed.

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

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

29 “(10) If at any time the court determines that the defendant lacks the
30 capacity to stand trial, the court shall further determine whether there is a

1 substantial probability that the defendant, in the foreseeable future, will
2 gain or regain the capacity to stand trial and whether the defendant is en-
3 titled to discharge under subsection (7) of this section. If the court deter-
4 mines that there is no substantial probability that the defendant, in the
5 foreseeable future, will gain or regain the capacity to stand trial or that the
6 defendant is entitled to discharge under subsection (7) of this section, the
7 court shall dismiss, without prejudice, all charges against the defendant and:

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

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

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

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

20 “(13) Notwithstanding the suspension of the criminal proceeding under
21 subsection (2) of this section, the fact that the defendant is unfit to proceed
22 does not preclude any objection through counsel and without the personal
23 participation of the defendant on the grounds that the indictment is insuffi-
24 cient, that the statute of limitations has run, that double jeopardy principles
25 apply or upon any other ground at the discretion of the court which the
26 court deems susceptible of fair determination prior to trial.

27 “**SECTION 4.** ORS 161.370, as amended by section 3 of this 2017 Act, is
28 amended to read:

29 “161.370. (1) When the defendant’s fitness to proceed is drawn in question,
30 the issue shall be determined by the court. If neither the prosecuting attor-

1 ney nor counsel for the defendant contests the finding of the report filed
2 under ORS 161.365, the court may make the determination on the basis of the
3 report. If the finding is contested, the court shall hold a hearing on the issue.
4 If the report is received in evidence in the hearing, the party who contests
5 the finding has the right to summon and to cross-examine any psychiatrist
6 or psychologist who submitted the report and to offer evidence upon the is-
7 sue. Other evidence regarding the defendant’s fitness to proceed may be in-
8 troduced by either party.

9 “(2)[(a)] If the court determines that the defendant lacks fitness to pro-
10 ceed, the criminal proceeding against the defendant shall be suspended and:
11 *[the court shall determine where the defendant will receive treatment to enable*
12 *the defendant to gain or regain fitness to proceed as described in this sub-*
13 *section.]*

14 “[*(b) Prior to making any determination concerning where the defendant*
15 *will receive treatment, the court shall:]*

16 “[*(A) Confer with the community mental health program director, or the*
17 *director’s designee, who conducted the consultation described in ORS 161.365;*
18 *and]*

19 “[*(B) Notify the Oregon Health Authority of the pending determination,*
20 *including the time and place of any hearing on the matter.]*

21 “[*(c) (a) If the court finds that the defendant is dangerous to self or*
22 *others as a result of mental disease or defect, or that, based on the findings*
23 *resulting from the consultation described in ORS 161.365 (1), the services and*
24 *supervision necessary to restore the defendant’s fitness to proceed are not*
25 *available in the community, the court shall commit the defendant to the*
26 *custody of the superintendent of a state mental hospital or director of a fa-*
27 *ility, designated by the Oregon Health Authority, if the defendant is at least*
28 *18 years of age, or to the custody of the director of a secure intensive com-*
29 *munity inpatient facility designated by the authority if the defendant is un-*
30 *der 18 years of age[.]; or [If the defendant is charged with a crime other than*

1 *a person felony or a person Class A misdemeanor, as those terms are defined*
2 *in the rules of the Oregon Criminal Justice Commission, the court shall ad-*
3 *ditionally determine whether, if the services and supervision necessary to re-*
4 *store the defendant's fitness to proceed become available in the community at*
5 *a later time, the authority may release the defendant on supervision.]*

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

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

18 “[*(b)* *If the court authorizes the Oregon Health Authority to release the*
19 *defendant on supervision under subsection (2)(c) of this section, the authority*
20 *may release the defendant on supervision if the authority determines that ser-*
21 *vices and supervision necessary to restore the defendant's fitness to proceed are*
22 *available in the community. The authority shall notify the court, the district*
23 *attorney and the defense attorney of the release.]*

24 “**(4)** When the court, on its own motion or upon the application of the
25 superintendent of the hospital or director of the facility in which the de-
26 fendant is committed, a person examining the defendant as a condition of
27 release on supervision, or either party, determines, after a hearing, if a
28 hearing is requested, that the defendant has gained or regained fitness to
29 proceed, the criminal proceeding shall be resumed. If, however, the court is
30 of the view that so much time has elapsed since the commitment or release

1 of the defendant on supervision that it would be unjust to resume the crim-
2 inal proceeding, the court on motion of either party may dismiss the charge
3 and may order the defendant to be discharged or cause a proceeding to be
4 commenced forthwith under ORS 426.070 to 426.170 or 427.235 to 427.290.

5 “(5) The superintendent of a state hospital or director of a facility to
6 which the defendant is committed shall cause the defendant to be evaluated
7 within 60 days from the defendant’s delivery into the superintendent’s or
8 director’s custody, for the purpose of determining whether there is a sub-
9 stantial probability that, in the foreseeable future, the defendant will have
10 the capacity to stand trial. In addition, the superintendent or director shall:

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

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

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

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

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

24 “(6)(a) If the superintendent or director determines that there is a sub-
25 stantial probability that, in the foreseeable future, the defendant will gain
26 or regain the capacity to stand trial, unless the court otherwise orders, the
27 defendant shall remain in the superintendent’s or director’s custody where
28 the defendant shall receive treatment designed for the purpose of enabling
29 the defendant to gain or regain capacity. In keeping with the notice re-
30 quirement under subsection (5)(b) of this section, the superintendent or di-

1 rector shall, for the duration of the defendant's period of commitment, submit
2 a progress report to the committing court, concerning the defendant's ca-
3 pacity or incapacity, at least once every 180 days as measured from the date
4 of the defendant's delivery into the superintendent's or director's custody.

5 “(b) Notwithstanding paragraph (a) of this subsection, if the superinten-
6 dent or director determines that a defendant committed under this section
7 is no longer dangerous to self or others as a result of mental disease or de-
8 fect, or that the services and supervision necessary to restore the defendant's
9 fitness to proceed are available in the community, the superintendent or di-
10 rector shall file notice of that determination with the court. Upon receipt
11 of the notice, the court shall order the person released on supervision as
12 described in subsection (3)[(a)] of this section.

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

20 “(A) Three years; or

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

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

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

28 “(B) The defendant shall be given credit against each charge alleged in
29 the accusatory instrument for each day the defendant is committed under
30 this section, whether the days are consecutive or are interrupted by a period

1 of time during which the defendant has gained or regained fitness to proceed.

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

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

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

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

21 “(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to
22 427.290.

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

26 “(12) If the defendant gains or regains fitness to proceed, the term of any
27 sentence received by the defendant for conviction of the crime charged shall
28 be reduced by the amount of time the defendant was committed under this
29 section to the custody of a state mental hospital, or to the custody of a se-
30 cure intensive community inpatient facility, designated by the Oregon Health

1 Authority.

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

9 In line 42, delete “3” and insert “5”.

10 After line 43, insert:

11 **“SECTION 6. The amendments to ORS 161.370 by section 4 of this**
12 **2017 Act become operative on June 30, 2019.”.**

13
