

Senate Bill 24

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SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Modifies procedures related to criminal defendants lacking fitness to proceed. Provides that court-ordered consultation with community mental health program director or director's designee occur after examination and before court's determination of defendant's fitness to proceed.

Provides that defendant committed to state mental hospital or other facility for examination on issue of fitness to proceed or mental defense be transported to hospital or facility for examination, after which superintendent of hospital or director of facility may order defendant transported back or kept for treatment. Extends time period of commitment for mental defense examination from 30 days to 60 days.

Authorizes Oregon Health Authority to provide copy of evaluation or progress report concerning defendant's fitness to proceed to community mental health program director of county in which defendant is charged.

Restricts circumstances in which court may commit defendant lacking fitness to proceed to state mental hospital or other facility.

Provides that defendant committed for treatment to restore fitness to proceed receive credit for time served in jail both before and after commitment.

Directs authority to assign to each county maximum number of beds in state mental hospital or other facility to which defendants from county may be committed for purposes relating to fitness to proceed. Authorizes counties to enter into agreements with other counties for use of unoccupied beds and payment to authority of per diem fee.

A BILL FOR AN ACT

1
2 Relating to forensic evaluations; creating new provisions; and amending ORS 161.315, 161.365 and
3 161.370.

4 **Be It Enacted by the People of the State of Oregon:**

5 **SECTION 1.** ORS 161.365 is amended to read:

6 161.365. (1) When the court has reason to doubt the defendant's fitness to proceed by reason of
7 incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching
8 its decision [*and shall order that a community mental health program director or the director's*
9 *designee consult with the defendant to determine whether services and supervision necessary to safely*
10 *restore the defendant's fitness to proceed are available in the community. After the consultation, the*
11 *program director or the director's designee shall provide to the court a copy of the findings resulting*
12 *from the consultation*]. If the court determines the assistance of a psychiatrist or psychologist would
13 be helpful, the court may:

14 (a) Order that a psychiatric or psychological examination of the defendant be conducted by a
15 certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or

16 (b) Order the defendant to be committed for the purpose of an examination **and treatment** for
17 a period not exceeding 30 days to a state mental hospital or other facility designated by the Oregon
18 Health Authority if the defendant is at least 18 years of age, or to a secure intensive community
19 inpatient facility designated by the authority if the defendant is under 18 years of age.

20 **(2) A defendant committed under subsection (1)(b) of this section shall be transported to**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 **the state mental hospital or other facility for the examination. At the conclusion of the ex-**
 2 **amination, the superintendent of the state mental hospital or the superintendent's designee**
 3 **or the director of the facility may:**

4 (a) **Order the defendant returned to the facility from which the defendant was trans-**
 5 **ported; or**

6 (b) **Order that the defendant remain at the hospital or facility for treatment.**

7 [(2)] (3) The report of an examination described in this section must include, but is not neces-
 8 sarily limited to, the following:

9 (a) A description of the nature of the examination;

10 (b) A statement of the mental condition of the defendant;

11 (c) If the defendant suffers from a qualifying mental disorder, an opinion as to whether the de-
 12 fendant is incapacitated within the description set out in ORS 161.360; and

13 (d) If the defendant is incapacitated within the description set out in ORS 161.360, a recom-
 14 mendation of treatment and services necessary to restore capacity.

15 [(3)] (4) Except when the defendant and the court both request to the contrary, the report may
 16 not contain any findings or conclusions as to whether the defendant as a result of a qualifying
 17 mental disorder was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal
 18 act charged.

19 [(4)] (5) If the examination by the psychiatrist or psychologist cannot be conducted by reason
 20 of the unwillingness of the defendant to participate in the examination, the report must so state and
 21 must include, if possible, an opinion as to whether the unwillingness of the defendant was the result
 22 of a qualifying mental disorder affecting capacity to proceed.

23 [(5)] (6) The report must be filed with the clerk of the court, who shall cause copies to be de-
 24 livered to the district attorney and to counsel for defendant.

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

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

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

34 (b) When an examination is ordered at the request or with the acquiescence of a defendant who
 35 is determined not to be financially eligible, the examination shall be performed at the defendant's
 36 expense. When an examination is ordered at the request of the prosecution, the county shall pay for
 37 the expense of the examination.

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

40 (8) **The Oregon Health Authority may provide a copy of a report resulting from an ex-**
 41 **amination of a defendant under this section to the community mental health program di-**
 42 **rector in the county in which the defendant is charged.**

43 **SECTION 2.** ORS 161.370 is amended to read:

44 161.370. (1)(a) When the defendant's fitness to proceed is drawn in question, the issue shall be
 45 determined by the court. **Prior to the determination, the court shall order that a community**

1 **mental health program director or the director's designee consult with the defendant to de-**
 2 **termine whether services and supervision necessary to safely restore the defendant's fitness**
 3 **to proceed are available in the community. After the consultation, the program director or**
 4 **the director's designee shall provide to the court a copy of the findings resulting from the**
 5 **consultation.**

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

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

15 (a) **Except as provided in subsection (3) of this section,** if the court finds that the defendant
 16 is dangerous to self or others as a result of a qualifying mental disorder, or that, based on the
 17 findings resulting from the consultation described in [ORS 161.365 (1)] **subsection (1) of this sec-**
 18 **tion and from any information provided by community-based mental health providers,** the
 19 services and supervision necessary to restore the defendant's fitness to proceed are not available in
 20 the community, the court shall commit the defendant to the custody of the superintendent of a state
 21 mental hospital or director of a facility[,] designated by the Oregon Health Authority[,] if the de-
 22 fendant is at least 18 years of age, or to the custody of the director of a secure intensive community
 23 inpatient facility designated by the authority if the defendant is under 18 years of age; or

24 (b) If the court does not make a finding described in paragraph (a) of this subsection, **if the**
 25 **circumstances in subsection (3) of this section apply** or if the court determines that care other
 26 than commitment for incapacity to stand trial would better serve the defendant and the community,
 27 the court shall release the defendant on supervision for as long as the unfitness endures.

28 (3)(a) **If the most serious offense in the charging instrument is a misdemeanor, the court**
 29 **may not commit the defendant under subsection (2)(a) of this section without a determi-**
 30 **nation by a certified evaluator as defined in ORS 161.309 that the defendant requires a hos-**
 31 **pital level of care.**

32 (b) **The court may not commit a defendant under paragraph (a) of this subsection if the**
 33 **defendant is charged only with one or more violations of a municipal ordinance.**

34 [(3)] (4) When a defendant is released on supervision under subsection (2)(b) of this section, the
 35 court may place conditions that the court deems appropriate on the release, including the require-
 36 ment that the defendant regularly report to the authority or a community mental health program for
 37 examination to determine if the defendant has gained or regained capacity to stand trial.

38 [(4)] (5) When the court, on its own motion or upon the application of the superintendent of the
 39 hospital or director of the facility in which the defendant is committed, a person examining the de-
 40 fendant as a condition of release on supervision, or either party, determines, after a hearing, if a
 41 hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal
 42 proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed
 43 since the commitment or release of the defendant on supervision that it would be unjust to resume
 44 the criminal proceeding, the court on motion of either party may dismiss the charge and may order
 45 the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070

1 to 426.170 or 427.235 to 427.290.

2 [(5)] (6) The superintendent of a state hospital or director of a facility to which the defendant
3 is committed shall cause the defendant to be evaluated within 60 days from the defendant's delivery
4 into the superintendent's or director's custody, for the purpose of determining whether there is a
5 substantial probability that, in the foreseeable future, the defendant will have the capacity to stand
6 trial. In addition, the superintendent or director shall:

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

9 (b) Within 90 days of the defendant's delivery into the superintendent's or director's custody,
10 notify the committing court that:

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

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

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

18 [(6)(a)] (7)(a) If the superintendent or director determines that there is a substantial probability
19 that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless
20 the court otherwise orders, the defendant shall remain in the superintendent's or director's custody
21 where the defendant shall receive treatment designed for the purpose of enabling the defendant to
22 gain or regain capacity. In keeping with the notice requirement under subsection [(5)(b)] (6)(b) of
23 this section, the superintendent or director shall, for the duration of the defendant's period of com-
24 mitment, submit a progress report to the committing court, concerning the defendant's capacity or
25 incapacity, at least once every 180 days as measured from the date of the defendant's delivery into
26 the superintendent's or director's custody.

27 (b) Notwithstanding paragraph (a) of this subsection, if the superintendent or director deter-
28 mines that a defendant committed under this section is no longer dangerous to self or others as a
29 result of a qualifying mental disorder, or that the services and supervision necessary to restore the
30 defendant's fitness to proceed are available in the community, the superintendent or director shall
31 file notice of that determination with the court. Upon receipt of the notice, the court shall order
32 the person released on supervision as described in subsection [(3)] (4) of this section.

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

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

35 (B) An evaluation conducted under subsection [(5)] (6) of this section, if the defendant did not
36 receive an examination under ORS 161.365.

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

43 (A) Three years; or

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

1 (b) For purposes of calculating the maximum period of commitment described in paragraph (a)
2 of this subsection:

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

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

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

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

14 [(8)] (9) The superintendent or director shall notify the committing court of the defendant's im-
15 pending discharge 30 days before the date on which the superintendent or director is required to
16 discharge the defendant under subsection [(7)] (8) of this section.

17 [(9)] (10) When the committing court receives a notice from the superintendent or director under
18 subsection [(5)] (6) or [(8)] (9) of this section concerning the defendant's progress or lack thereof,
19 the committing court shall determine, after a hearing, if a hearing is requested, whether the de-
20 fendant presently has the capacity to stand trial.

21 [(10)] (11) If at any time the court determines that the defendant lacks the capacity to stand
22 trial, the court shall further determine whether there is a substantial probability that the defendant,
23 in the foreseeable future, will gain or regain the capacity to stand trial and whether the defendant
24 is entitled to discharge under subsection [(7)] (8) of this section. If the court determines that there
25 is no substantial probability that the defendant, in the foreseeable future, will gain or regain the
26 capacity to stand trial or that the defendant is entitled to discharge under subsection [(7)] (8) of this
27 section, the court shall dismiss, without prejudice, all charges against the defendant and:

28 (a) Order that the defendant be discharged; or

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

30 [(11)] (12) All notices required under this section shall be filed with the clerk of the court and
31 delivered to both the district attorney and the counsel for the defendant.

32 [(12)] (13) If the defendant gains or regains fitness to proceed, the term of any sentence received
33 by the defendant for conviction of the crime charged shall be reduced by the amount of time the
34 defendant was committed under this section to the custody of a state mental hospital, or to the
35 custody of a secure intensive community inpatient facility[,] designated by the Oregon Health Au-
36 thority.

37 [(13)] (14) Notwithstanding the suspension of the criminal proceeding under subsection (2) of this
38 section, the fact that the defendant is unfit to proceed does not preclude any objection through
39 counsel and without the personal participation of the defendant on the grounds that the indictment
40 is insufficient, that the statute of limitations has run, that double jeopardy principles apply or upon
41 any other ground at the discretion of the court which the court deems susceptible of fair determi-
42 nation prior to trial.

43 [(14)] (15) At the time that the court determines that the defendant lacks fitness to proceed
44 under subsection (2) of this section, the court shall notify the defendant that federal law prohibits
45 the defendant from purchasing or possessing a firearm unless the person obtains relief from the

1 prohibition under federal law. The court shall again notify the defendant of the prohibition if the
 2 court finds that the defendant has gained or regained fitness to proceed under subsection [(4)] (5)
 3 of this section.

4 **(16) The Oregon Health Authority may provide a copy of a defendant's progress report**
 5 **or evaluation described in this section to the community mental health program director,**
 6 **or the director's designee, in the county in which the defendant is charged.**

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

9 **SECTION 3.** ORS 161.315 is amended to read:

10 161.315. (1) Upon filing of notice or the introduction of evidence by the defendant as provided
 11 in ORS 161.309, the state shall have the right to have at least one psychiatrist or licensed psychol-
 12 ogist of its selection examine the defendant. The state shall file notice with the court of its intention
 13 to have the defendant examined.

14 (2)(a) Upon filing of the notice, the court, in its discretion, may order the defendant committed
 15 to a state institution or any other suitable facility, if the defendant is 18 years of age or older, for
 16 observation, [and] examination **and treatment** as the court may designate for a period not to ex-
 17 ceed [30] **60** days.

18 (b) If the defendant is under 18 years of age, upon filing of the notice, the court, in its discretion,
 19 may order the defendant committed to a secure intensive community inpatient facility designated
 20 by the Oregon Health Authority for observation, [and] examination **and treatment** as the court
 21 may designate for a period not to exceed [30] **60** days.

22 **(3) A defendant committed under subsection (2) of this section shall be transported to the**
 23 **state institution or other facility for the examination. At the conclusion of the examination,**
 24 **the superintendent of the state institution or the superintendent's designee or the director**
 25 **of the facility may:**

26 **(a) Order the defendant returned to the facility from which the defendant was trans-**
 27 **ported; or**

28 **(b) Order that the defendant remain at the institution or facility for treatment.**

29 [(3)] (4) If the defendant objects to the examiner chosen by the state, the court for good cause
 30 shown may direct the state to select a different examiner.

31 [(4)] (5) An examiner performing an examination on the issue of insanity of a defendant under
 32 this section is not obligated to examine the defendant for fitness to proceed unless, during the ex-
 33 amination, the examiner determines that the defendant's fitness to proceed is drawn in question.

34 **SECTION 4. (1) The Oregon Health Authority shall assign to each county, based on cen-**
 35 **sus population figures, the maximum number of beds in a state mental hospital and other**
 36 **facilities designated by the authority that may, at any one time, be occupied by defendants**
 37 **committed from the county to the hospital or other facility under ORS 161.365 and 161.370.**

38 (2)(a) A county may enter into an agreement with another county of this state under
 39 ORS 190.010 for the use of the other county's unoccupied beds in a state mental hospital or
 40 other facility under subsection (1) of this section.

41 (b) An agreement entered into under this subsection shall include a provision that the
 42 county using another county's unoccupied beds reimburse the authority on a per diem basis
 43 at a rate determined by the authority by rule.

44 (3) The authority may adopt rules to carry out the provisions of this section.