

# A-Engrossed Senate Bill 25

Ordered by the Senate March 22  
Including Senate Amendments dated March 22

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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.

Directs public bodies, and private *[entities]* **medical providers** in possession of relevant records, to comply, within specified time period, with court order for release of records to state mental hospital or other facility for purposes of forensic evaluation. **Authorizes exception for good cause and for certain entities.**

*[Requires]* **Allows** report resulting from forensic evaluation on issue of mental defense to be filed with court electronically. **Specifies manner in which report may be disclosed and used.**

**Allows** forensic evaluation on issue of fitness to proceed to be filed with court electronically. **Specifies manner in which fitness to proceed evaluations and reports may be disclosed and used.**

*[Extends time period of commitment for mental defense examination from 30 days to 60 days.]*

Requires that court provide, by end of next *[business]* **judicial** day, copies of orders relating to fitness to proceed to state mental hospital or other facility **and community mental health program director or designee**, and, if defendant is found to lack fitness, to any entity ordered to provide services and supervision to restore fitness.

**Declares emergency, effective on passage.**

## A BILL FOR AN ACT

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

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

5 **SECTION 1. Section 2 of this 2019 Act is added to and made a part of ORS 161.290 to**  
6 **161.370.**

7 **SECTION 2. (1) Unless otherwise prohibited by law or for good cause, all public bodies,**  
8 **as defined in ORS 174.109, and any private medical provider in possession of records con-**  
9 **cerning the defendant, shall, within five business days of receipt of the order, comply with**  
10 **a court order for the release of records to the state mental hospital or other facility desig-**  
11 **minated by the Oregon Health Authority for the purpose of conducting an examination or**  
12 **evaluation under ORS 161.365 or 161.370.**

13 **(2) Notwithstanding subsection (1) of this section, the Oregon Youth Authority, the De-**  
14 **partment of Corrections, a community college district, a community college service district,**  
15 **a public university, a school district or an education service district may, after notifying the**  
16 **state hospital or other facility designated by the Oregon Health Authority, comply with the**  
17 **court order within 15 business days of receipt of the order without good cause.**

18 **(3) As used in this section, in the case of a community college district, a community**  
19 **college service district, a public university, a school district or an education service district,**

**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 **“business day” does not include any day on which the central administration offices of the**  
2 **district or university are closed.**

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

4 161.315. (1) Upon filing of notice or the introduction of evidence by the defendant as provided  
5 in ORS 161.309, the state shall have the right to have at least one psychiatrist or licensed psychol-  
6 ogist of its selection examine the defendant. The state shall file notice with the court of its intention  
7 to have the defendant examined.

8 (2)(a) Upon filing of the notice, the court, in its discretion, may order the defendant committed  
9 to a state institution or any other suitable facility, if the defendant is 18 years of age or older, for  
10 observation and examination as the court may designate for a period not to exceed 30 days.

11 (b) If the defendant is under 18 years of age, upon filing of the notice, the court, in its discretion,  
12 may order the defendant committed to a secure intensive community inpatient facility designated  
13 by the Oregon Health Authority for observation and examination as the court may designate for a  
14 period not to exceed 30 days.

15 (3) If the defendant objects to the examiner chosen by the state, the court for good cause shown  
16 may direct the state to select a different examiner.

17 (4) An examiner performing an examination on the issue of insanity of a defendant under this  
18 section is not obligated to examine the defendant for fitness to proceed unless, during the examina-  
19 tion, the examiner determines that the defendant’s fitness to proceed is drawn in question.

20 **(5) A report resulting from an examination under this section may be filed with the court**  
21 **electronically.**

22 **(6)(a) Reports and evaluations conducted under this section are confidential and may be**  
23 **made available only:**

24 **(A) To the court, prosecuting attorney, defense attorney, defendant, community mental**  
25 **health program director or designee and facility in which the defendant is housed; or**

26 **(B) As ordered by a court.**

27 **(b) A facility in which a defendant is housed may not use a report or evaluation con-**  
28 **ducted under this section to support a disciplinary action against the defendant.**

29 **SECTION 4.** ORS 161.365 is amended to read:

30 161.365. (1)(a) When the court has reason to doubt the defendant’s fitness to proceed by reason  
31 of incapacity as described in ORS 161.360, the court may call any witness to *[its assistance]* **assist**  
32 **it** in reaching its decision and shall order that a community mental health program director or the  
33 director’s designee consult with the defendant to determine whether services and supervision nec-  
34 essary to safely restore the defendant’s fitness to proceed are available in the community. After the  
35 consultation, the program director or the director’s designee shall provide to the court a copy of the  
36 findings resulting from the consultation. If the court determines the assistance of a psychiatrist or  
37 psychologist would be helpful, the court may:

38 *[(a)]* **(A)** Order that a psychiatric or psychological examination of the defendant be conducted  
39 by a certified evaluator as defined in ORS 161.309 and a report of the examination be prepared; or

40 *[(b)]* **(B)** Order the defendant to be committed for the purpose of an examination for a period  
41 not exceeding 30 days to a state mental hospital or other facility designated by the Oregon Health  
42 Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient  
43 facility designated by the authority if the defendant is under 18 years of age.

44 **(b) The court shall provide a copy of any order entered under this subsection to the**  
45 **community mental health program director or designee and to the state mental hospital or**

1 **other facility by the end of the next judicial day.**

2 (2) The report of an examination described in this section must include, but is not necessarily  
3 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 qualifying mental disorder, an opinion as to whether the de-  
7 fendant is incapacitated within the description set out in ORS 161.360; and

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

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

14 (4) If the examination by the psychiatrist or psychologist cannot be conducted by reason of the  
15 unwillingness of the defendant to participate in the examination, the report must so state and must  
16 include, if possible, an opinion as to whether the unwillingness of the defendant was the result of  
17 a qualifying mental disorder affecting capacity to proceed.

18 (5) The report must be filed with the [*clerk of the*] court[,] **and may be filed electronically. The**  
19 **clerk of the court** [*who*] shall cause copies to be delivered to the district attorney, **to the com-**  
20 **munity mental health program director or designee** and to counsel for defendant.

21 (6)(a) When upon motion of the court or a financially eligible defendant, the court has ordered  
22 a psychiatric or psychological examination of the defendant, a county or justice court shall order  
23 the county to pay, and a circuit court shall order the public defense services executive director to  
24 pay from funds available for the purpose:

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

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

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

34 **(7)(a) Reports and evaluations conducted under this section are confidential and may be**  
35 **made available only:**

36 **(A) To the court, prosecuting attorney, defense attorney, defendant, community mental**  
37 **health program director or designee and facility in which the defendant is housed; or**

38 **(B) As ordered by a court.**

39 **(b) A facility in which a defendant is housed may not use a report or evaluation con-**  
40 **ducted under this section to support a disciplinary action against the defendant.**

41 [(7)] **(8)** The Oregon Health Authority shall establish by rule standards for the consultation de-  
42 scribed in subsection (1) of this section.

43 **SECTION 5.** ORS 161.370 is amended to read:

44 161.370. (1) When the defendant's fitness to proceed is drawn in question, the issue shall be de-  
45 termined by the court. If neither the prosecuting attorney nor counsel for the defendant contests the

1 finding of the report filed under ORS 161.365, the court may make the determination on the basis  
 2 of the report. If the finding is contested, the court shall hold a hearing on the issue. If the report  
 3 is received in evidence in the hearing, the party who contests the finding has the right to summon  
 4 and to cross-examine any psychiatrist or psychologist who submitted the report and to offer evidence  
 5 upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by  
 6 either party.

7 (2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal proceed-  
 8 ing against the defendant shall be suspended and:

9 [(a)] (A) If the court finds that the defendant is dangerous to self or others as a result of a  
 10 qualifying mental disorder, or that, based on the findings resulting from the consultation described  
 11 in ORS 161.365 (1), the services and supervision necessary to restore the defendant's fitness to pro-  
 12 ceed are not available in the community, the court shall commit the defendant to the custody of the  
 13 superintendent 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 secure  
 15 intensive community inpatient facility designated by the authority if the defendant is under 18 years  
 16 of age; or

17 [(b)] (B) If the court does not make a finding described in [paragraph (a)] **subparagraph (A)** of  
 18 this [subsection] **paragraph**, or if the court determines that care other than commitment for inca-  
 19 pacity to stand trial would better serve the defendant and the community, the court shall release  
 20 the defendant on supervision for as long as the unfitness endures.

21 **(b) The court shall ensure that an order entered under this subsection is provided, by the**  
 22 **end of the next judicial day, to any entity ordered to provide services and supervision nec-**  
 23 **essary to restore the defendant's fitness to proceed.**

24 (3) When a defendant is released on supervision under subsection [(2)(b)] (2)(a)(B) of this sec-  
 25 tion, the court may place conditions that the court deems appropriate on the release, including the  
 26 requirement that the defendant regularly report to the authority or a community mental health  
 27 program for examination to determine if the defendant has gained or regained capacity to stand  
 28 trial.

29 (4) When the court, on its own motion or upon the application of the superintendent of the  
 30 hospital or director of the facility in which the defendant is committed, a person examining the de-  
 31 fendant as a condition of release on supervision, or either party, determines, after a hearing, if a  
 32 hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal  
 33 proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed  
 34 since the commitment or release of the defendant on supervision that it would be unjust to resume  
 35 the criminal proceeding, the court on motion of either party may dismiss the charge and may order  
 36 the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070  
 37 to 426.170 or 427.235 to 427.290.

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

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

45 (b) Within 90 days of the defendant's delivery into the superintendent's or director's custody,

1 notify the committing court that:

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

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

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

9 (6)(a) If the superintendent or director determines that there is a substantial probability that,  
10 in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the  
11 court otherwise orders, the defendant shall remain in the superintendent's or director's custody  
12 where the defendant shall receive treatment designed for the purpose of enabling the defendant to  
13 gain or regain capacity. In keeping with the notice requirement under subsection (5)(b) of this sec-  
14 tion, the superintendent or director shall, for the duration of the defendant's period of commitment,  
15 submit a progress report to the committing court, concerning the defendant's capacity or incapacity,  
16 at least once every 180 days as measured from the date of the defendant's delivery into the  
17 superintendent's or director's custody.

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

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

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

26 (B) An evaluation conducted under subsection (5) of this section, if the defendant did not receive  
27 an examination under ORS 161.365.

28 (7)(a) A defendant who remains committed under subsection (6) of this section shall be dis-  
29 charged within a period of time that is reasonable for making a determination concerning whether  
30 or not, and when, the defendant may gain or regain capacity. However, regardless of the number  
31 of charges with which the defendant is accused, in no event shall the defendant be committed for  
32 longer than whichever of the following, measured from the defendant's initial custody date, is  
33 shorter:

34 (A) Three years; or

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

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

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

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

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

1 (ii) Unless the defendant is charged with aggravated murder or a crime listed in ORS 137.700  
2 (2), for each day the defendant is held in jail, whether the days are consecutive or are interrupted  
3 by a period of time during which the defendant lacks fitness to proceed.

4 (8) The superintendent or director shall notify the committing court of the defendant's impending  
5 discharge 30 days before the date on which the superintendent or director is required to discharge  
6 the defendant under subsection (7) of this section.

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

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

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

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

20 (11) All notices required under this section shall be filed with the [*clerk of the*] court and **may**  
21 **be filed electronically. The clerk of the court shall cause copies of the notices to be** delivered  
22 to both the district attorney and the counsel for the defendant.

23 (12) If the defendant gains or regains fitness to proceed, the term of any sentence received by  
24 the defendant for conviction of the crime charged shall be reduced by the amount of time the de-  
25 fendant was committed under this section to the custody of a state mental hospital, or to the custody  
26 of a secure intensive community inpatient facility, designated by the Oregon Health Authority.

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

33 (14) At the time that the court determines that the defendant lacks fitness to proceed under  
34 subsection (2) of this section, the court shall notify the defendant that federal law prohibits the de-  
35 fendant from purchasing or possessing a firearm unless the person obtains relief from the prohibition  
36 under federal law. The court shall again notify the defendant of the prohibition if the court finds  
37 that the defendant has gained or regained fitness to proceed under subsection (4) of this section.

38 **(15)(a) Reports and evaluations conducted under this section are confidential and may**  
39 **be made available only:**

40 **(A) To the court, prosecuting attorney, defense attorney, defendant, community mental**  
41 **health program director or designee and facility in which the defendant is housed; or**

42 **(B) As ordered by a court.**

43 **(b) A facility in which a defendant is housed may not use a report or evaluation con-**  
44 **ducted under this section to support a disciplinary action against the defendant.**

45 **SECTION 6. This 2019 Act being necessary for the immediate preservation of the public**

1 **peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect**  
2 **on its passage.**

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