

SB 24 -2 STAFF MEASURE SUMMARY

Senate Committee On Judiciary

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Meeting Dates: 3/11, 4/4, 4/8

WHAT THE MEASURE DOES:

Moves the requirement that a community mental health consultation occur from ORS 161.365 to ORS 161.370, requiring it after a fitness to proceed examination but before the court's determination of the defendant's fitness to proceed. Provides that when the court orders the commitment of the defendant to the Oregon State Hospital (OSH) or other facility it can be for the purpose of treatment and examination. Provides that a defendant committed to OSH or other facility for examination on issue of fitness to proceed or mental defense be transported to hospital or facility for examination, after which the hospital or director of the 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 OSH to provide a copy of fitness examination to the community mental health program. Prohibits the commitment of misdemeanants rehabilitation to gain or regain fitness to proceed unless there is a finding that the defendant requires a hospital level of care. Prohibits the commitment of defendants charged only with violations of municipal ordinances for rehabilitation to gain or regain fitness to proceed. Clarifies that defendants committed to OSH or another facility for treatment and rehabilitation to gain or regain fitness to proceed who are charged with lesser offenses must receive credit for time spent in jail prior to and after commitment to state hospital. Extends the length of time that a defendant can be committed for a mental defense evaluation to 60 days. Directs OSH to assign a specific number of fitness to proceed beds per county. Allows counties to get negotiate with each other for additional beds. Directs the Oregon health authority to propagate rules to effectuate the provisions of this measure.

ISSUES DISCUSSED:

EFFECT OF AMENDMENT:

-2 Replaces measure. Permits the court to find good cause to allow for observation of an individual placed at the state hospital for a fitness to proceed examination. Allows the state hospital to provide treatment when an individual has been placed in its care for a fitness to proceed examination. Permits the state hospital or other facility providing a fitness to proceed examination to return the defendant to the facility from which they were transported or request an amended order from the court to allow the defendant to remain at the hospital or facility for further observation or treatment. Requires the individual performing a fitness to proceed examination to include a determination as to whether a hospital level of care is required due to the defendant's dangerousness or acuity of symptoms. Requires the entity or evaluator who has conducted a fitness to proceed examination to provide a copy of the examination to the appropriate community mental health program. Requires the court, after determining that the defendant lacks fitness to proceed, to make a dispositional determination. To aid in that determination requires the court to order the community mental health program director to consult with the defendant to determine whether services and supervision necessary to safely allow the defendant to gain fitness to proceed are available in the community. Mandates that the results of that evaluation are provided to the court within seven days if the defendant is in custody and 10 days if not in custody. Requires the court and parties, upon receipt of the consultation report to consider and pursue a disposition consistent with release criteria, is the least restrictive, and best serves the needs of the defendant and the interest of justice. Lists potential dispositions.

Permits the court to order status reports for defendants engaged in community restoration. Requires the community mental health program to provide the court notice when the defendant regains fitness. Prohibits the

SB 24 -2 STAFF MEASURE SUMMARY

court from committing a defendant charged with a violation or misdemeanor to the state hospital or another facility unless the fitness to proceed evaluation or the community mental health program consultation finds that the defendant requires a hospital level of care due to the dangerousness and acuity of the defendant's symptoms. Requires court to make specific findings when committing a defendant under this section. Mandates the court to order a consultation with the community mental health program when the state hospital or other facility determines that an individual no longer needs to be committed for the purposes of restoration of fitness to proceed. Requires the community mental health director to report the results of the consultation within 14 days. Requires the court to hold a dispositional hearing and consider alternative dispositions, and only after finding that the defendant remains dangerous to self or others, or that the services and supervision necessary to restore the defendant's fitness to proceed are not available in the community, may the court continue the commitment. Protects the confidentiality of fitness to proceed examination reports under ORS 161.365 and ORS 161.370 with specific exceptions to provide access to parties to the case and their agents. Allows the facilities housing the defendant to have access to the examination report but prohibits their use to support disciplinary action against the defendant. Allows prosecuting attorneys and defense attorneys to discuss the contents of the report with witness or victims as otherwise permitted by law.

Permits the court to find good cause to allow for observation of an individual placed at the state hospital for a mental defense examination. Provides that if a mental defense examiner finds a defendant's fitness to proceed to be in doubt, the examiner must report the issue to the court and the state hospital or other facility to which the defendant is committed. Upon such notice the hospital or facility may return the defendant to the place from which they were transported or requested an amended order from the court to allow the defendant to remain at the hospital or facility for observation and treatment. Protects the confidentiality of mental defense examination reports under with specific exceptions that provide access to parties to the case and their agents. Allows the facilities housing the defendant to have access to the examination report but prohibits their use to support disciplinary action against the defendant. Allows prosecuting attorneys and defense attorneys to discuss the contents of the report with witness or victims as otherwise permitted by law.

Permits Oregon Health Authority to promulgate rules to effectuate the measure.

Declares emergency; effective on passage.

BACKGROUND:

If there is doubt as to whether a defendant is able to aid and assist in their own defense the court may require the defendant to consult with a community mental health program to determine whether there are services available in the community to restore the defendant's fitness, may order an examination of the defendant by a certified evaluator, or may order the defendant be committed to the state hospital for the purposes of evaluation. ORS 161.365. If a defendant is determined unable to aid in their own defense, the criminal proceeding against the defendant is suspended until such time as the defendant has gained or regained their "fitness to proceed." ORS 161.370. Under current statutes, if the court finds that the defendant is dangerous to self or others, or that after consultation with community mental health the services and supervision necessary to restore the defendant's fitness to proceed are not available in the community, the court must commit the individual to the state hospital for a rehabilitation services. ORS 161.370.

In *Oregon Advocacy Center v. Mink* (2003) the Ninth Circuit Court of Appeals found that defendants had a constitutional right to transfer from jail to the state hospital within seven days for the purpose of a fitness to proceed evaluation, citing "the undisputed harms that incapacitated criminal defendants suffer when they spend weeks or months in jail waiting for transfer." Recent reporting found that in 2018 over 200 defendants were not transferred in this time--63 of whom were only charged with misdemeanors. Identified barriers included a lack of available beds at the institution, late filing of paperwork by county court officers, delays on the part of county

SB 24 -2 STAFF MEASURE SUMMARY

sheriffs to schedule transport to the Oregon State Hospital in Salem, and in rare cases, bad weather.

In *Trueblood v. Washington State Department of Social and Health Services*, (2016) the Ninth Circuit Court of Appeals held that defendants have a constitutional right to a prompt fitness evaluation if ordered by the court. Upon remand from the Ninth Circuit, the Western District of Washington interpreted that decision to require that an evaluation be completed within 14 days if the defendant remains in jail. *Trueblood v. Washington State Department of Social and Health Services*, WL 4418180 (W.D. Wash. 2016). Reports from Disability Rights Oregon suggest that in some counties defendants with mental health issues currently wait between three to six weeks in jail for evaluations, with some defendants waiting months.

The population of defendants committed to the Oregon State Hospital (OSH) for the purpose of restoring their fitness to proceed and for a fitness to proceed evaluation has increased steadily since 2012. In 2012, the average daily fitness to proceed population at the state hospital was 109; in January 2019 that number was 259. Similarly, in 2012 there were 0 individuals admitted for the sole purpose of a fitness to proceed evaluation while there were 83 committed for this purpose in 2018. The highest rate of increase has been for misdemeanants.

In the interim, the Oregon State Hospital convened a workgroup during to examine ways to improve the fitness to proceed processes, decrease the state hospital population, and increasing community rehabilitation programs and support. Concerns about the confidentiality of defendants' mental health evaluations were also raised during the workgroup process.

Senate Bill 24 makes changes to the fitness to proceed processes in ORS 161.365 and ORS 161.370 that require a court to consider ordering examination and rehabilitation in the least restrictive setting possible or creating an alternative disposition for a defendant who does not require a hospital level of care. It also prohibits the commitment of violators and misdemeanants and moves the requirement for community consultation to after a fitness to proceed examination but before the court's determination of the defendant's fitness to proceed.