

# Enrolled Senate Bill 24

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CHAPTER .....

## AN ACT

Relating to forensic evaluations; amending ORS 161.315, 161.365 and 161.370; and declaring an emergency.

### Be It Enacted by the People of the State of Oregon:

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

161.365. (1) When the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as described in ORS 161.360, the court may call any witness to its assistance in reaching its decision and shall order that a community mental health program director, or the director's designee, consult with the defendant **and with any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community**, to determine whether services and supervision necessary to safely [restore] **allow the [defendant's] defendant to gain or regain** fitness to proceed are available in the community. After the consultation, the program director or the director's designee shall provide to the court a copy of the findings resulting from the consultation. If the court determines the assistance of a psychiatrist or psychologist would be helpful, the court may:

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

(b) Order the defendant to be committed for the purpose of an examination [for a period not exceeding 30 days] to a state mental hospital or other facility designated by the Oregon Health Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age. **The state mental hospital or other facility may retain custody of a defendant committed under this paragraph for the duration necessary to complete the examination of the defendant, not to exceed 30 days. The examination may include a period of observation.**

**(2)(a) A defendant committed under subsection (1)(b) of this section shall be transported to the state mental hospital or other facility for the examination.**

**(b) At the conclusion of the examination, the superintendent of the state mental hospital or the superintendent's designee or the director of the facility may:**

**(A) Return the defendant to the facility from which the defendant was transported; or**

**(B) Inform the court and the parties that the defendant requires a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder and request that the defendant remain at the state mental hospital or other facility pending a hearing or order under ORS 161.370.**

**(c) If both parties consent, the court may, without holding a hearing, enter any order authorized by ORS 161.370 based on a report resulting from an examination conducted under this section.**

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

- (a) A description of the nature of the examination;
- (b) A statement of the mental condition of the defendant;
- (c) If the defendant suffers from a qualifying mental disorder, an opinion as to whether the defendant is incapacitated within the description set out in ORS 161.360; and
- (d) If the defendant is incapacitated within the description set out in ORS 161.360, a recommendation of treatment and services necessary to *[restore]* **allow the defendant to gain or regain capacity, including whether a hospital level of care is required due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder.**

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

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

[5)] **(6)(a)** The report **resulting from the examination of a defendant under this section** must be filed with the clerk of the court, who shall cause copies to be delivered to the district attorney and to counsel for defendant.

**(b) The entity or evaluator conducting the examination shall provide a copy of the report resulting from the examination to the community mental health program director or designee in:**

- (A) The county in which the defendant is charged; and**
- (B) The county of the defendant's last known residence.**
- (c) Reports prepared under this section are confidential and may be made available only:**
  - (A) To the court, prosecuting attorney, defense attorney, agent of the prosecuting or defense attorney, defendant, community mental health program director or designee and any facility in which the defendant is housed; or**
  - (B) As ordered by a court.**
  - (d) Any facility in which a defendant is housed may not use a report prepared under this section to support a disciplinary action against the defendant.**

**(e) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the prosecuting or defense attorney from discussing the contents of a report prepared under this section with witnesses or victims as otherwise permitted by law.**

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

- (A) A reasonable fee if the examination of the defendant is conducted by a psychiatrist or psychologist in private practice; and
- (B) All costs including transportation of the defendant if the examination is conducted by a psychiatrist or psychologist in the employ of the Oregon Health Authority or a community mental health program established under ORS 430.610 to 430.670.

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

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

**SECTION 1a. If Senate Bill 25 becomes law, section 1 of this 2019 Act (amending ORS 161.365) is repealed and ORS 161.365, as amended by section 4, chapter 311, Oregon Laws 2019 (Enrolled Senate Bill 25), is amended to read:**

161.365. (1)(a) When the court has reason to doubt the defendant's fitness to proceed by reason of incapacity as described in ORS 161.360, the court may call any witness to assist it in reaching its decision and shall order that a community mental health program director, or the director's designee, consult with the defendant **and with any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community**, to determine whether services and supervision necessary to safely [restore] **allow the [defendant's] defendant to gain or regain** fitness to proceed are available in the community. After the consultation, the program director or the director's designee shall provide to the court a copy of the findings resulting from the consultation. If the court determines the assistance of a psychiatrist or psychologist would be helpful, the court may:

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

(B) Order the defendant to be committed for the purpose of an examination [for a period not exceeding 30 days] to a state mental hospital or other facility designated by the Oregon Health Authority if the defendant is at least 18 years of age, or to a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age. **The state mental hospital or other facility may retain custody of a defendant committed under this paragraph for the duration necessary to complete the examination of the defendant, not to exceed 30 days. The examination may include a period of observation.**

(b) The court shall provide a copy of any order entered under this subsection to the community mental health program director or designee and to the state mental hospital or other facility by the end of the next judicial day.

**(2)(a) A defendant committed under subsection (1)(a)(B) of this section shall be transported to the state mental hospital or other facility for the examination.**

**(b) At the conclusion of the examination, the superintendent of the state mental hospital or the superintendent's designee or the director of the facility may:**

**(A) Return the defendant to the facility from which the defendant was transported; or**

**(B) Inform the court and the parties that the defendant requires a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder and request that the defendant remain at the state mental hospital or other facility pending a hearing or order under ORS 161.370.**

**(c) If both parties consent, the court may, without holding a hearing, enter any order authorized by ORS 161.370 based on a report resulting from an examination conducted under this section.**

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

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

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

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

(d) If the defendant is incapacitated within the description set out in ORS 161.360, a recommendation of treatment and services necessary to [restore] **allow the defendant to gain or regain** capacity, **including whether a hospital level of care is required due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder.**

[3] (4) Except when the defendant and the court both request to the contrary, the report may not contain any findings or conclusions as to whether the defendant as a result of a qualifying

mental disorder was subject to the provisions of ORS 161.295 or 161.300 at the time of the criminal act charged.

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

[(5)] **(6)(a)** The report **resulting from the examination of a defendant under this section may be filed electronically and** must be filed with the **clerk of the court**, [*and may be filed electronically. The clerk of the court*] **who** shall cause copies to be delivered to the district attorney[, *to the community mental health program director or designee*] and to counsel for defendant.

**(b) The entity or evaluator conducting the examination shall provide a copy of the report resulting from the examination to the community mental health program director or designee in:**

**(A) The county in which the defendant is charged; and**

**(B) The county of the defendant's last known residence.**

**(c) Reports prepared under this section are confidential and may be made available only:**

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

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

**(d) Any facility in which a defendant is housed may not use a report prepared under this section to support a disciplinary action against the defendant.**

**(e) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the prosecuting or defense attorney from discussing the contents of a report prepared under this section with witnesses or victims as otherwise permitted by law.**

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

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

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

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

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

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

*[(B) As ordered by a court.]*

*[(b) A facility in which a defendant is housed may not use a report or evaluation conducted under this section to support a disciplinary action against the defendant.]*

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

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

161.370. **(1)(a)** When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court.

**(b) If neither the prosecuting attorney nor counsel for the defendant contests the finding of the report filed under ORS 161.365, the court may make the determination on the basis of the report.**

If the finding is contested, the court shall hold a hearing on the issue. If the report is received in evidence in the hearing, the party who contests the finding has the right to summon and to cross-examine any psychiatrist or psychologist who submitted the report and to offer evidence upon the issue. Other evidence regarding the defendant's fitness to proceed may be introduced by either party.

(2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding against the defendant shall be suspended and[:] **the court shall, at a hearing, proceed in accordance with this subsection.**

(b) **After making the determination under paragraph (a) of this subsection, the court shall receive a recommendation, to be considered at the hearing, from a community mental health program director or the director's designee, and from any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community, concerning whether services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available in the community.**

(c) **The court and the parties shall at the hearing determine an appropriate action in the case, and the court shall enter an order necessary to implement the action. In determining the appropriate action, the court shall consider the primary and secondary release criteria as defined in ORS 135.230, the least restrictive option appropriate for the defendant, the needs of the defendant and the interests of justice. Actions may include but are not limited to:**

(A) **Commitment for the defendant to gain or regain fitness to proceed under subsection (3) or (5) of this section;**

(B) **Community restoration as recommended by the community mental health program director or designee;**

(C) **Release on supervision;**

(D) **Commencement of a civil commitment proceeding under ORS 426.070 to 426.170, 426.701 or 427.235 to 427.290;**

(E) **Commencement of protective proceedings under ORS chapter 125; or**

(F) **Dismissal of the charges pursuant to ORS 135.755.**

(d) **If the court, while considering or ordering an appropriate action under this subsection, determines that the defendant does not require a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, but that services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are not available in the community, for any defendant remaining in custody after such determination, the court shall set a review hearing seven days from the date of the determination under paragraph (a) of this subsection. At the review hearing, the court shall consider all relevant information and determine an appropriate action in the case as described in paragraph (c) of this subsection. If the defendant remains in custody following the initial review hearing, the court shall hold further review hearings every seven days thereafter until the defendant is no longer in custody.**

[(a)] (3)(a) **Unless the court orders an action other than commitment under subsection (2) of this section, and except as otherwise provided in subsections (4) and (5) of this section, if the court finds that the defendant is dangerous to self or others as a result of a qualifying mental disorder, [or] that a hospital level of care is necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, and that, based on the findings resulting from the consultation described in ORS 161.365 (1) and from any information provided by community-based mental health providers or any other sources, the services and supervision necessary to [restore] allow the [defendant's] defendant to gain or regain fitness to proceed are not available in the community, the court shall commit the defendant to the custody of the superintendent of a state mental hospital or director of a facility[,] designated by the Oregon Health Authority[,] if the defendant is at least 18 years of age, or to the custody of the director of**

a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age[; or].

**(b) If the defendant is committed under this subsection, the community mental health program director shall at regular intervals, during any period of commitment, review available community resources and maintain communication with the defendant and the superintendent of the state mental hospital or director of the facility in order to facilitate an efficient transition to treatment in the community when ordered.**

**[(b)] (4)(a) If the court does not make a finding described in [paragraph (a) of this subsection,] subsection (3) of this section, if commitment is precluded under subsection (5) of this section or if the court determines that care other than commitment for incapacity to stand trial would better serve the defendant and the community, the court shall release the defendant on supervision for as long as the unfitness endures.**

**(b) The court may order a community mental health program director providing treatment to the defendant in the community to provide the court with status reports on the defendant's progress in gaining or regaining fitness to proceed.**

**(c) A community mental health program director providing treatment to the defendant in the community shall notify the court if the defendant gains or regains fitness to proceed.**

**(5)(a) If the most serious offense in the charging instrument is a violation, the court may not commit the defendant under subsection (3) of this section.**

**(b) If the most serious offense in the charging instrument is a misdemeanor, the court may not commit the defendant under subsection (3) of this section unless the finding that the defendant requires a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder is based on a recommendation by a certified evaluator as defined in ORS 161.309, or a community mental health program director or the director's designee, that the defendant requires such level of care.**

**(c) If at the time of determining the appropriate action for the case the court has not received a recommendation as to whether the defendant requires a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, the court shall order a certified evaluator or a community mental health program director, or the director's designee, to make such a recommendation.**

**(d) If the court does not order the commitment of a defendant described in this subsection to the state mental hospital or other facility, the court shall hold a hearing in accordance with subsection (2)(c) of this section to determine and order an appropriate action other than commitment.**

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

**[(4)] (7) When the court, on its own motion or upon the application of the superintendent of the hospital or director of the facility in which the defendant is committed, a person examining the defendant as a condition of release on supervision, or either party, determines, after a hearing, if a hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or release of the defendant on supervision that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170, **426.701** or 427.235 to 427.290.**

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

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

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

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

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

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

[(6)(a)] **(9)(a)** If the superintendent or director determines that there is a substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the court otherwise orders, the defendant shall remain in the superintendent's or director's custody where the defendant shall receive treatment designed for the purpose of enabling the defendant to gain or regain capacity. In keeping with the notice requirement under subsection [(5)(b)] **(8)(b)** of this section, the superintendent or director shall, for the duration of the defendant's period of commitment, submit a progress report to the committing court, concerning the defendant's capacity or incapacity, at least once every 180 days as measured from the date of the defendant's delivery into the superintendent's or director's custody.

(b)**(A)** Notwithstanding paragraph (a) of this subsection, if the superintendent or director determines that a defendant committed under this section is no longer dangerous to self or others as a result of a qualifying mental disorder, **that a hospital level of care is not necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder**, or that the services and supervision necessary to [restore] **allow the [defendant's] defendant to gain or regain** fitness to proceed are available in the community, the superintendent or director shall file notice of that determination with the court.

**(B)** Upon receipt of the notice, [the court shall order the person released on supervision as described in subsection (3) of this section.] **the court shall order that a community mental health program director or the director's designee, within five judicial days:**

(i) **Consult with the defendant and with any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community to determine whether services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available in the community; and**

(ii) **Provide the court and the parties with recommendations from the consultation.**

**(C)** **Within 10 judicial days of receiving the recommendations from the consultation, the court shall hold a hearing to determine an appropriate action in accordance with subsection (2)(c) of this section as follows:**

(i) **If, after consideration of the factors and possible actions described in subsection (2)(c) of this section, and any recommendations from the consultation described in this paragraph, the court determines that the defendant remains dangerous to self or others as a result of a qualifying mental disorder, a hospital level of care is necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, and the services and supervision necessary to allow the defendant to gain or regain fitness to proceed are not available in the community, the court may, after making specific findings to that effect, continue the commitment.**

(ii) **If the court does not make the findings described in sub-subparagraph (i) of this subparagraph, the court shall terminate the commitment and shall set a review hearing seven days from the date of the commitment termination for any defendant remaining in custody. At the review hearing, the court shall consider all relevant information and determine an appropriate action in the case as described in subsection (2)(c) of this section. If the**

**defendant remains in custody following the initial review hearing, the court shall hold further review hearings every seven days thereafter until the defendant is no longer in custody.**

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

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

(B) An evaluation conducted under subsection [(5)] (8) of this section, if the defendant did not receive an examination under ORS 161.365.

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

(A) Three years; or

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

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

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

(B) The defendant shall be given credit against each charge alleged in the accusatory instrument:

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

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

[(8)] (11) The superintendent or director shall notify the committing court of the defendant's impending discharge 30 days before the date on which the superintendent or director is required to discharge the defendant under subsection [(7)] (10) of this section.

[(9)] (12) When the committing court receives a notice from the superintendent or director under subsection [(5)] (8) or [(8)] (11) of this section concerning the defendant's progress or lack thereof, the committing court shall determine, after a hearing, if a hearing is requested, whether the defendant presently has the capacity to stand trial.

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

(a) Order that the defendant be discharged; or

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

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

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



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

[(14)] **(17)** At the time that the court determines that the defendant lacks fitness to proceed under subsection (2) of this section, the court shall notify the defendant that federal law prohibits the defendant from purchasing or possessing a firearm unless the person obtains relief from the prohibition under federal law. The court shall again notify the defendant of the prohibition if the court finds that the defendant has gained or regained fitness to proceed under subsection [(4)] **(7)** of this section.

**(18)(a) The entity or evaluator conducting an examination of a defendant under this section shall provide a copy of any report described in this section to the community mental health program director or designee in:**

**(A) The county in which the defendant is charged; and**

**(B) The county of the defendant's last known residence.**

**(b) Reports prepared under this section are confidential and may be made available only:**

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

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

**(c) Any facility in which a defendant is housed may not use a report prepared under this section to support a disciplinary action against the defendant.**

**(d) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the prosecuting or defense attorney from discussing the contents of a report prepared under this section with witnesses or victims as otherwise permitted by law.**

**(19) Unless the court orders otherwise or either party objects, a defendant committed to a state hospital or other facility, or a certified evaluator or other expert witness, may attend hearings held under this section via simultaneous electronic transmission.**

**(20) The Oregon Health Authority shall establish by rule standards for the recommendation provided to the court described in subsection (2) of this section.**

**SECTION 2a. If Senate Bill 25 becomes law, section 2 of this 2019 Act (amending ORS 161.370) is repealed and ORS 161.370, as amended by section 5, chapter 311, Oregon Laws 2019 (Enrolled Senate Bill 25), is amended to read:**

161.370. (1)(a) When the defendant's fitness to proceed is drawn in question, the issue shall be determined by the court.

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

(2)(a) If the court determines that the defendant lacks fitness to proceed, the criminal proceeding against the defendant shall be suspended and[:] **the court shall, at a hearing, proceed in accordance with this subsection.**

(b) **After making the determination under paragraph (a) of this subsection, the court shall receive a recommendation, to be considered at the hearing, from a community mental health program director or the director's designee, and from any local entity that would be responsible for supervising the defendant if the defendant were to be released in the com-**

munity, concerning whether services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available in the community.

(c) The court and the parties shall at the hearing determine an appropriate action in the case, and the court shall enter an order necessary to implement the action. In determining the appropriate action, the court shall consider the primary and secondary release criteria as defined in ORS 135.230, the least restrictive option appropriate for the defendant, the needs of the defendant and the interests of justice. Actions may include but are not limited to:

(A) Commitment for the defendant to gain or regain fitness to proceed under subsection (3) or (5) of this section;

(B) Community restoration as recommended by the community mental health program director or designee;

(C) Release on supervision;

(D) Commencement of a civil commitment proceeding under ORS 426.070 to 426.170, 426.701 or 427.235 to 427.290;

(E) Commencement of protective proceedings under ORS chapter 125; or

(F) Dismissal of the charges pursuant to ORS 135.755.

(d) If the court, while considering or ordering an appropriate action under this subsection, determines that the defendant does not require a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, but that services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are not available in the community, for any defendant remaining in custody after such determination, the court shall set a review hearing seven days from the date of the determination under paragraph (a) of this subsection. At the review hearing, the court shall consider all relevant information and determine an appropriate action in the case as described in paragraph (c) of this subsection. If the defendant remains in custody following the initial review hearing, the court shall hold further review hearings every seven days thereafter until the defendant is no longer in custody.

*[(A)]* (3)(a) Unless the court orders an action other than commitment under subsection (2) of this section, and except as otherwise provided in subsections (4) and (5) of this section, if the court finds that the defendant is dangerous to self or others as a result of a qualifying mental disorder, *[or]* that a hospital level of care is necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, and that, based on the findings resulting from the consultation described in ORS 161.365 (1) and from any information provided by community-based mental health providers or any other sources, the services and supervision necessary to *[restore]* allow the *[defendant's]* defendant to gain or regain fitness to proceed are not available in the community, the court shall commit the defendant to the custody of the superintendent of a state mental hospital or director of a facility*[,]* designated by the Oregon Health Authority*[,]* if the defendant is at least 18 years of age, or to the custody of the director of a secure intensive community inpatient facility designated by the authority if the defendant is under 18 years of age*;* *or]*.

(b) If the defendant is committed under this subsection, the community mental health program director shall at regular intervals, during any period of commitment, review available community resources and maintain communication with the defendant and the superintendent of the state mental hospital or director of the facility in order to facilitate an efficient transition to treatment in the community when ordered.

*[(B)]* (4)(a) If the court does not make a finding described in *[subparagraph (A) of this paragraph,]* subsection (3) of this section, if commitment is precluded under subsection (5) of this section or if the court determines that care other than commitment for incapacity to stand trial would better serve the defendant and the community, the court shall release the defendant on supervision for as long as the unfitness endures.

**(b) The court may order a community mental health program director providing treatment to the defendant in the community to provide the court with status reports on the defendant's progress in gaining or regaining fitness to proceed.**

**(c) A community mental health program director providing treatment to the defendant in the community shall notify the court if the defendant gains or regains fitness to proceed.**

**(5)(a) If the most serious offense in the charging instrument is a violation, the court may not commit the defendant under subsection (3) of this section.**

**(b) If the most serious offense in the charging instrument is a misdemeanor, the court may not commit the defendant under subsection (3) of this section unless the finding that the defendant requires a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder is based on a recommendation by a certified evaluator as defined in ORS 161.309, or a community mental health program director or the director's designee, that the defendant requires such level of care.**

**(c) If at the time of determining the appropriate action for the case the court has not received a recommendation as to whether the defendant requires a hospital level of care due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, the court shall order a certified evaluator or a community mental health program director, or the director's designee, to make such a recommendation.**

**(d) If the court does not order the commitment of a defendant described in this subsection to the state mental hospital or other facility, the court shall hold a hearing in accordance with subsection (2)(c) of this section to determine and order an appropriate action other than commitment.**

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

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

*[(4)]* **(7)** When the court, on its own motion or upon the application of the superintendent of the hospital or director of the facility in which the defendant is committed, a person examining the defendant as a condition of release on supervision, or either party, determines, after a hearing, if a hearing is requested, that the defendant has gained or regained fitness to proceed, the criminal proceeding shall be resumed. If, however, the court is of the view that so much time has elapsed since the commitment or release of the defendant on supervision that it would be unjust to resume the criminal proceeding, the court on motion of either party may dismiss the charge and may order the defendant to be discharged or cause a proceeding to be commenced forthwith under ORS 426.070 to 426.170, **426.701** or 427.235 to 427.290.

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

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

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

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

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

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

[(6)(a)] **(9)(a)** If the superintendent or director determines that there is a substantial probability that, in the foreseeable future, the defendant will gain or regain the capacity to stand trial, unless the court otherwise orders, the defendant shall remain in the superintendent's or director's custody where the defendant shall receive treatment designed for the purpose of enabling the defendant to gain or regain capacity. In keeping with the notice requirement under subsection [(5)(b)] **(8)(b)** of this section, the superintendent or director shall, for the duration of the defendant's period of commitment, submit a progress report to the committing court, concerning the defendant's capacity or incapacity, at least once every 180 days as measured from the date of the defendant's delivery into the superintendent's or director's custody.

(b)**(A)** Notwithstanding paragraph (a) of this subsection, if the superintendent or director determines that a defendant committed under this section is no longer dangerous to self or others as a result of a qualifying mental disorder, **that a hospital level of care is not necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder**, or that the services and supervision necessary to [restore] **allow** the [defendant's] **defendant to gain or regain** fitness to proceed are available in the community, the superintendent or director shall file notice of that determination with the court.

**(B)** Upon receipt of the notice, [the court shall order the person released on supervision as described in subsection (3) of this section.] **the court shall order that a community mental health program director or the director's designee, within five judicial days:**

(i) **Consult with the defendant and with any local entity that would be responsible for supervising the defendant if the defendant were to be released in the community to determine whether services and supervision necessary to safely allow the defendant to gain or regain fitness to proceed are available in the community; and**

(ii) **Provide the court and the parties with recommendations from the consultation.**

**(C) Within 10 judicial days of receiving the recommendations from the consultation, the court shall hold a hearing to determine an appropriate action in accordance with subsection (2)(c) of this section as follows:**

(i) **If, after consideration of the factors and possible actions described in subsection (2)(c) of this section, and any recommendations from the consultation described in this paragraph, the court determines that the defendant remains dangerous to self or others as a result of a qualifying mental disorder, a hospital level of care is necessary due to the defendant's dangerousness and the acuity of symptoms of the defendant's qualifying mental disorder, and the services and supervision necessary to allow the defendant to gain or regain fitness to proceed are not available in the community, the court may, after making specific findings to that effect, continue the commitment.**

(ii) **If the court does not make the findings described in sub-subparagraph (i) of this subparagraph, the court shall terminate the commitment and shall set a review hearing seven days from the date of the commitment termination for any defendant remaining in custody. At the review hearing, the court shall consider all relevant information and determine an appropriate action in the case as described in subsection (2)(c) of this section. If the defendant remains in custody following the initial review hearing, the court shall hold further review hearings every seven days thereafter until the defendant is no longer in custody.**

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

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

(B) An evaluation conducted under subsection [(5)] **(8)** of this section, if the defendant did not receive an examination under ORS 161.365.

[(7)(a)] **(10)(a)** A defendant who remains committed under subsection [(6)] **(9)** of this section shall be discharged within a period of time that is reasonable for making a determination concerning

whether or not, and when, the defendant may gain or regain capacity. However, regardless of the number of charges with which the defendant is accused, in no event shall the defendant be committed for longer than whichever of the following, measured from the defendant's initial custody date, is shorter:

(A) Three years; or

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

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

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

(B) The defendant shall be given credit against each charge alleged in the accusatory instrument:

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

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

[(8)] (11) The superintendent or director shall notify the committing court of the defendant's impending discharge 30 days before the date on which the superintendent or director is required to discharge the defendant under subsection [(7)] (10) of this section.

[(9)] (12) When the committing court receives a notice from the superintendent or director under subsection [(5)] (8) or [(8)] (11) of this section concerning the defendant's progress or lack thereof, the committing court shall determine, after a hearing, if a hearing is requested, whether the defendant presently has the capacity to stand trial.

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

(a) Order that the defendant be discharged; or

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

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

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

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

[(14)] (17) At the time that the court determines that the defendant lacks fitness to proceed under subsection (2) of this section, the court shall notify the defendant that federal law prohibits

the defendant from purchasing or possessing a firearm unless the person obtains relief from the prohibition under federal law. The court shall again notify the defendant of the prohibition if the court finds that the defendant has gained or regained fitness to proceed under subsection [(4)] (7) of this section.

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

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

*[(B) As ordered by a court.]*

*[(b) A facility in which a defendant is housed may not use a report or evaluation conducted under this section to support a disciplinary action against the defendant.]*

**(18)(a) The entity or evaluator conducting an examination of a defendant under this section shall provide a copy of any report described in this section to the community mental health program director or designee in:**

**(A) The county in which the defendant is charged; and**

**(B) The county of the defendant's last known residence.**

**(b) Reports prepared under this section are confidential and may be made available only:**

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

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

**(c) Any facility in which a defendant is housed may not use a report prepared under this section to support a disciplinary action against the defendant.**

**(d) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the prosecuting or defense attorney from discussing the contents of a report prepared under this section with witnesses or victims as otherwise permitted by law.**

**(19) The court shall ensure that an order entered under this section is provided, by the end of the next judicial day, to any entity ordered to provide services and supervision necessary to restore the defendant's fitness to proceed.**

**(20) Unless the court orders otherwise or either party objects, a defendant committed to a state hospital or other facility, or a certified evaluator or other expert witness, may attend hearings held under this section via simultaneous electronic transmission.**

**(21) The Oregon Health Authority shall establish by rule standards for the recommendation provided to the court described in subsection (2) of this section.**

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

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

(2)(a) Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state *[institution]* **mental hospital** or any other suitable facility, if the defendant is 18 years of age or older, for observation and examination, **which may include treatment as permitted by law** *[as the court may designate for a period not to exceed 30 days]*.

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

**(c) The state mental hospital or other facility may retain custody of a defendant committed under this subsection only for the duration necessary to complete the observation and examination of the defendant, not to exceed 30 days.**

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

(4) An examiner performing an examination on the issue of insanity of a defendant under this section is not obligated to examine the defendant for fitness to proceed unless, during the examination, the examiner determines that the defendant's fitness to proceed is drawn in question. **If, during the examination, the examiner determines that the defendant's fitness to proceed is in doubt, the examiner shall report the issue to the court and to the superintendent of the state mental hospital or the superintendent's designee, or to the director of the facility to which the defendant is committed. The superintendent or director may:**

(a) **Return the defendant to the facility from which the defendant was transported; or**

(b) **Inform the court and the parties that the defendant should remain at the state mental hospital or other facility for the purpose of an examination under ORS 161.365. If neither party objects, the court may order an examination under ORS 161.365 without holding a hearing.**

(5)(a) **Reports resulting from examinations conducted under this section are confidential and may be made available only:**

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

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

(b) **Any facility in which a defendant is housed may not use a report prepared under this section to support a disciplinary action against the defendant.**

(c) **Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the prosecuting or defense attorney from discussing the contents of a report prepared under this section with witnesses or victims as otherwise permitted by law.**

**SECTION 3a. If Senate Bill 25 becomes law, section 3 of this 2019 Act (amending ORS 161.315) is repealed and ORS 161.315, as amended by section 3, chapter 311, Oregon Laws 2019 (Enrolled Senate Bill 25), is amended to read:**

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

(2)(a) Upon filing of the notice, the court, in its discretion, may order the defendant committed to a state [*institution*] **mental hospital** or any other suitable facility, if the defendant is 18 years of age or older, for observation and examination, **which may include treatment as permitted by law** [*as the court may designate for a period not to exceed 30 days*].

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

(c) **The state mental hospital or other facility may retain custody of a defendant committed under this subsection only for the duration necessary to complete the observation and examination of the defendant, not to exceed 30 days.**

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

(4) An examiner performing an examination on the issue of insanity of a defendant under this section is not obligated to examine the defendant for fitness to proceed unless, during the examination, the examiner determines that the defendant's fitness to proceed is drawn in question. **If, during the examination, the examiner determines that the defendant's fitness to proceed is in doubt, the examiner shall report the issue to the court and to the superintendent of the state mental hospital or the superintendent's designee, or to the director of the facility to which the defendant is committed. The superintendent or director may:**

(a) **Return the defendant to the facility from which the defendant was transported; or**

**(b) Inform the court and the parties that the defendant should remain at the state mental hospital or other facility for the purpose of an examination under ORS 161.365. If neither party objects, the court may order an examination under ORS 161.365 without holding a hearing.**

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

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

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

*[(B) As ordered by a court.]*

*[(b) A facility in which a defendant is housed may not use a report or evaluation conducted under this section to support a disciplinary action against the defendant.]*

**(6)(a) Reports resulting from examinations conducted under this section are confidential and may be made available only:**

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

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

**(b) Any facility in which a defendant is housed may not use a report prepared under this section to support a disciplinary action against the defendant.**

**(c) Nothing in this subsection prohibits the prosecuting attorney, defense attorney or agent of the prosecuting or defense attorney from discussing the contents of a report prepared under this section with witnesses or victims as otherwise permitted by law.**

**SECTION 4. This 2019 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2019 Act takes effect on its passage.**

Passed by Senate April 23, 2019

Received by Governor:

Repassed by Senate June 29, 2019

.....M.,....., 2019

Approved:

.....  
Lori L. Brocker, Secretary of Senate

.....M.,....., 2019

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Peter Courtney, President of Senate

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Kate Brown, Governor

Passed by House June 4, 2019

Filed in Office of Secretary of State:

Repassed by House June 25, 2019

.....M.,....., 2019

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Tina Kotek, Speaker of House

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Bev Clarno, Secretary of State