

Requested by SENATE COMMITTEE ON JUDICIARY

**PROPOSED AMENDMENTS TO
SENATE BILL 1575**

- 1 On page 1 of the printed bill, line 2, delete “and”.
- 2 In line 3, after “430.230” insert “; and declaring an emergency”.
- 3 Delete lines 5 through 24 and delete pages 2 through 14 and insert:

4

5 **“PRELIMINARY PROVISIONS**

6

7 **“SECTION 1. (1) Sections 2 to 5 of this 2020 Act are added to and**

8 **made a part of ORS 161.290 to 161.373.**

9 **“(2) ORS 161.360, 161.365 and 161.370 are added to and made a part**

10 **of sections 2 to 5 of this 2020 Act.**

11 **“SECTION 2. As used in sections 2 to 5 of this 2020 Act:**

12 **“(1) ‘Certified evaluator’ has the meaning given that term in ORS**

13 **161.309.**

14 **“(2) ‘Community restoration services’ means appropriate services**

15 **and treatment necessary to safely allow a defendant to gain or regain**

16 **fitness to proceed in the community, which may include supervision**

17 **by pretrial services.**

18 **“(3) ‘Hospital level of care’ means that a defendant requires the**

19 **type of care provided by an inpatient hospital in order to gain or re-**

20 **gain fitness to proceed.**

21 **“(4) ‘Public safety concerns’ means that the defendant presents a**

1 risk to self or to the public if not hospitalized or in custody.

2 **“SECTION 3. (1) A recommendation provided by a certified evalu-**
3 **ator, pursuant to sections 2 to 5 of this 2020 Act, that a defendant re-**
4 **quires a hospital level of care due to the acuity of the defendant’s**
5 **symptoms must be based upon a review of necessary community res-**
6 **toration services, the defendant’s current diagnosis and**
7 **symptomology, the defendant’s current ability to engage in treatment**
8 **and present safety concerns relating to the defendant. The recom-**
9 **mendation must state the relevant considerations supporting the de-**
10 **termination that a hospital level of care is required and why a hospital**
11 **level of care is appropriate.**

12 **“(2) A determination by a community mental health program di-**
13 **rector, or the director’s designee, pursuant to sections 2 to 5 of this**
14 **2020 Act, that appropriate community restoration services are not**
15 **present and available in the community must include information**
16 **concerning the community restoration services necessary to safely**
17 **restore the defendant in the community and must specify those ser-**
18 **vices that are not present and available in the community.**

19 **“(3)(a) Reports resulting from examinations performed by a certi-**
20 **fied evaluator, and documents containing the recommendations of or**
21 **resulting from consultations with a community mental health pro-**
22 **gram director or the director’s designee, prepared under sections 2 to**
23 **5 of this 2020 Act, and any document submitted to the court by a state**
24 **mental hospital related to the proceedings under sections 2 to 5 of this**
25 **2020 Act, are confidential and may be made available only:**

26 **“(A) To the court, prosecuting attorney, defense attorney, agent of**
27 **the prosecuting or defense attorney, defendant, community mental**
28 **health program director or designee and any facility in which the de-**
29 **fendant is housed; or**

30 **“(B) As ordered by a court.**

1 **“(b) Any facility in which a defendant is housed may not use a re-**
2 **port or document described in paragraph (a) of this subsection to**
3 **support a disciplinary action against the defendant.**

4 **“(c) Nothing in this subsection prohibits the prosecuting attorney,**
5 **defense attorney or agent of the prosecuting or defense attorney from**
6 **discussing the contents of a report or document described in para-**
7 **graph (a) of this subsection with witnesses or victims as otherwise**
8 **permitted by law.**

9 **“(4) The court shall ensure that an order entered under sections 2**
10 **to 5 of this 2020 Act is provided, by the end of the next judicial day,**
11 **to any entity ordered to provide restoration services.**

12 **“(5) Unless the court orders otherwise or either party objects, a**
13 **defendant committed to a state mental hospital or other facility, or a**
14 **certified evaluator or other expert witness, may attend hearings held**
15 **under sections 2 to 5 of this 2020 Act via simultaneous electronic**
16 **transmission.**

17
18 **“FITNESS TO PROCEED GENERALLY**
19

20 **“SECTION 4. (1) If at any time the court determines that the de-**
21 **fendant lacks the capacity to stand trial, the court shall further de-**
22 **termine whether there is a substantial probability that the defendant,**
23 **in the foreseeable future, will gain or regain the capacity to stand**
24 **trial. If the court determines that there is no substantial probability**
25 **that the defendant, in the foreseeable future, will gain or regain the**
26 **capacity to stand trial, the court shall dismiss, without prejudice, all**
27 **charges against the defendant and:**

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

29 **“(b) Initiate commitment proceedings under ORS 426.070, 426.701 or**
30 **427.235 to 427.290.**

1 **“(2)(a) The superintendent of the hospital or director of the facility**
2 **in which the defendant is committed under ORS 161.370 or a person**
3 **examining the defendant as a condition of release to community res-**
4 **toration services shall notify the court if the defendant gains or re-**
5 **gains fitness to proceed.**

6 **“(b) A party to the case may notify the court if the defendant has**
7 **gained or regained fitness to proceed.**

8 **“(c) The court may, upon its own motion or the request of either**
9 **party, hold a hearing to determine whether the defendant has gained**
10 **or regained fitness to proceed. If the court determines that the de-**
11 **fendant has gained or regained fitness to proceed, the court shall re-**
12 **sume the criminal proceeding unless the court determines that so**
13 **much time has elapsed since the commitment or release of the de-**
14 **fendant to community restoration services that it would be unjust to**
15 **resume the criminal proceeding. If the court determines that it would**
16 **be unjust to resume the criminal proceeding, the court, on motion of**
17 **either party, may dismiss the charge and may order the defendant to**
18 **be discharged or cause a proceeding to be commenced forthwith under**
19 **ORS 426.070 to 426.170, 426.701 or 427.235 to 427.290.**

20 **“(3) If the defendant gains or regains fitness to proceed, the de-**
21 **fendant shall be given credit against each charge alleged in the**
22 **accusatory instrument for each day the defendant was committed un-**
23 **der ORS 161.370 to the custody of a state mental hospital, or to the**
24 **custody of a secure intensive community inpatient facility designated**
25 **by the Oregon Health Authority.**

26 **“(4) Notwithstanding the suspension of the criminal proceeding**
27 **under ORS 161.370 (2), the fact that the defendant is unfit to proceed**
28 **does not preclude any objection through counsel and without the per-**
29 **sonal participation of the defendant on the grounds that the**
30 **indictment is insufficient, that the statute of limitations has run, that**

1 double jeopardy principles apply or upon any other ground at the dis-
2 cretion of the court which the court deems susceptible of fair deter-
3 mination prior to trial.

4 “(5) At the time that the court determines that the defendant lacks
5 fitness to proceed under ORS 161.370 (2), the court shall notify the
6 defendant that federal law prohibits the defendant from purchasing
7 or possessing a firearm unless the person obtains relief from the pro-
8 hibition under federal law. The court shall again notify the defendant
9 of the prohibition if the court finds that the defendant has gained or
10 regained fitness to proceed under subsection (2) of this section.

11
12 **“COMMITTED DEFENDANTS**

13
14 **“SECTION 5. (1) The superintendent of a state mental hospital or**
15 **director of a facility to which the defendant is committed under ORS**
16 **161.370 shall cause the defendant to be evaluated within 60 days from**
17 **the defendant’s delivery into the superintendent’s or director’s cus-**
18 **tody, for the purpose of determining whether there is a substantial**
19 **probability that, in the foreseeable future, the defendant will have the**
20 **capacity to stand trial. In addition, the superintendent or director**
21 **shall:**

22 **“(a) Immediately notify the committing court if the defendant, at**
23 **any time, gains or regains the capacity to stand trial or if there is no**
24 **substantial probability that, within the foreseeable future, the de-**
25 **fendant will gain or regain the capacity to stand trial.**

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

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

30 **“(B) There is no substantial probability that, in the foreseeable fu-**

1 ture, the defendant will gain or regain the capacity to stand trial; or
2 “(C) There is a substantial probability that, in the foreseeable fu-
3 ture, the defendant will gain or regain the capacity to stand trial. If
4 the probability exists, the superintendent or director shall give the
5 court an estimate of the time in which the defendant, with appropriate
6 treatment, is expected to gain or regain capacity.

7 “(c) Notify the court if court-ordered involuntary medication is
8 necessary for the defendant to gain or regain the capacity to stand
9 trial and, if appropriate, submit a report to the court under ORS
10 161.372.

11 “(2)(a) If the superintendent of the state mental hospital or director
12 of the facility to which the defendant is committed determines that
13 there is a substantial probability that, in the foreseeable future, the
14 defendant will gain or regain the capacity to stand trial, unless the
15 court otherwise orders, the defendant shall remain in the
16 superintendent’s or director’s custody where the defendant shall re-
17 ceive treatment designed for the purpose of enabling the defendant to
18 gain or regain capacity. In keeping with the notice requirement under
19 subsection (1)(b) of this section, the superintendent or director shall,
20 for the duration of the defendant’s period of commitment, submit a
21 progress report to the committing court, concerning the defendant’s
22 capacity or incapacity, at least once every 180 days as measured from
23 the date of the defendant’s delivery into the superintendent’s or
24 director’s custody.

25 “(b) A progress report described in paragraph (a) of this subsection
26 may consist of an update to:

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

29 “(B) An evaluation conducted under subsection (1) of this section,
30 if the defendant did not receive an examination under ORS 161.365.

1 **“(3)(a) Notwithstanding subsection (2) of this section, if the most**
2 **serious offense in the charging instrument is a felony, and the super-**
3 **intendent of the state mental hospital or director of the facility to**
4 **which the defendant is committed determines that a hospital level of**
5 **care is no longer necessary due to present public safety concerns and**
6 **the acuity of symptoms of the defendant’s qualifying mental disorder,**
7 **the superintendent or director may file notice of the determination**
8 **with the court. Upon receipt of the notice, the court shall order that**
9 **a community mental health program director or the director’s**
10 **designee, within five judicial days:**

11 **“(A) Consult with the defendant and with any local entity that**
12 **would be responsible for providing community restoration services, if**
13 **the defendant were to be released in the community, to determine**
14 **whether community restoration services are present and available in**
15 **the community; and**

16 **“(B) Provide the court and the parties with recommendations from**
17 **the consultation.**

18 **“(b) Notwithstanding subsection (2) of this section, if the most se-**
19 **rious offense in the charging instrument is a felony, and the commu-**
20 **nity mental health program director determines that community**
21 **restoration services that would mitigate any risk posed by the de-**
22 **fendant are present and available in the community, the community**
23 **mental health program director may file notice of the determination**
24 **with the court. Upon receipt of the notice, the court shall order that**
25 **the superintendent of the state mental hospital or director of the fa-**
26 **cility to which the defendant is committed, within five judicial days:**

27 **“(A) Evaluate the defendant to determine whether a hospital level**
28 **of care is no longer necessary due to present public safety concerns,**
29 **or no longer necessary due to the acuity of symptoms of the**
30 **defendant’s qualifying mental disorder; and**

1 **“(B) Provide the court and the parties with recommendations from**
2 **the evaluation.**

3 **“(c) Within 10 judicial days of receiving the recommendations de-**
4 **scribed in paragraph (a) or (b) of this subsection, the court shall hold**
5 **a hearing to determine an appropriate action in accordance with ORS**
6 **161.370 (2)(c) as follows:**

7 **“(A) If, after consideration of the factors and possible actions de-**
8 **scribed in ORS 161.370 (2)(c) and any recommendations received under**
9 **paragraph (a) or (b) of this subsection, the court determines that a**
10 **hospital level of care is necessary due to public safety concerns or the**
11 **acuity of symptoms of the defendant’s qualifying mental disorder, and**
12 **that based on the consultation or evaluation described in paragraph**
13 **(a) or (b) of this subsection, any information provided by community-**
14 **based mental health providers or any other sources, primary and sec-**
15 **ondary release criteria as defined in ORS 135.230, and any other**
16 **information the court finds to be trustworthy and reliable, the appro-**
17 **priate community restoration services are not present and available**
18 **in the community, the court may continue the commitment of the**
19 **defendant.**

20 **“(B) If the court does not make the determination described in**
21 **subparagraph (A) of this paragraph, the court shall terminate the**
22 **commitment and shall set a review hearing seven days from the date**
23 **of the commitment termination for any defendant remaining in cus-**
24 **tody. At the review hearing, the court shall consider all relevant in-**
25 **formation, determine an appropriate action in the case as described in**
26 **ORS 161.370 (2)(c) and enter an order in accordance with the**
27 **defendant’s constitutional rights to due process.**

28 **“(4)(a) Notwithstanding subsection (2) of this section, if the most**
29 **serious offense in the charging instrument is a misdemeanor, and the**
30 **superintendent of the state mental hospital or director of the facility**

1 to which the defendant is committed determines that the acuity of
2 symptoms of the defendant's qualifying mental disorder is not severe
3 or there are not present public safety concerns, the superintendent or
4 director shall file notice of the determination with the court, along
5 with recommendations regarding the necessary community restoration
6 services that would mitigate any risk presented by the defendant.
7 Upon receipt of the notice, the court shall order that a community
8 mental health program director or the director's designee, within five
9 judicial days:

10 “(A) Consult with the defendant and with any local entity that
11 would be responsible for providing community restoration services, if
12 the defendant were to be released in the community, to determine
13 whether community restoration services are present and available in
14 the community; and

15 “(B) Provide the court and the parties with recommendations from
16 the consultation.

17 “(b) Notwithstanding subsection (2) of this section, if the most se-
18 rious offense in the charging instrument is a misdemeanor, and the
19 community mental health program director determines that the com-
20 munity restoration services that would mitigate any risk posed by the
21 defendant are present and available in the community, the community
22 mental health program director may file notice of the determination
23 with the court. Upon receipt of the notice, the court shall order that
24 the superintendent of the state mental hospital or director of the fa-
25 cility to which the defendant is committed, within five judicial days:

26 “(A) Evaluate the defendant to determine whether a hospital level
27 of care is no longer necessary due to present public safety concerns,
28 or no longer necessary due to the acuity of symptoms of the
29 defendant's qualifying mental disorder; and

30 “(B) Provide the court and the parties with recommendations from

1 the evaluation.

2 “(c) Within 10 judicial days of receiving the recommendations de-
3 scribed in paragraph (a) or (b) of this subsection, the court shall hold
4 a hearing to determine an appropriate action in accordance with ORS
5 161.370 (2)(c) as follows:

6 “(A) After consideration of the factors and possible actions de-
7 scribed in ORS 161.370 (2)(c), the consultation or evaluation and any
8 recommendations described in paragraph (a) or (b) of this subsection,
9 and any other information the court finds to be trustworthy and reli-
10 able, the court may continue the commitment of the defendant if the
11 court makes written findings that a hospital level of care is necessary
12 due to public safety concerns and the acuity of symptoms of the
13 defendant’s qualifying mental disorder, and that appropriate commu-
14 nity restoration services are not present and available in the commu-
15 nity.

16 “(B) If the court does not make the findings described in subpara-
17 graph (A) of this paragraph, the court shall terminate the commit-
18 ment and shall set a review hearing seven days from the date of the
19 commitment termination for any defendant remaining in custody. At
20 the review hearing, the court shall consider all relevant information,
21 determine an appropriate action in the case as described in ORS 161.370
22 (2)(c) and enter an order in accordance with the defendant’s constitu-
23 tional rights to due process.

24 “(5)(a) A defendant who remains committed under this section shall
25 be discharged within a period of time that is reasonable for making a
26 determination concerning whether, and when, the defendant may gain
27 or regain capacity. However, regardless of the number of charges with
28 which the defendant is accused, in no event shall the defendant be
29 committed for longer than whichever of the following, measured from
30 the defendant’s initial custody date, is shorter:

1 **“(A) Three years; or**

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

4 **“(b) For purposes of calculating the maximum period of commit-**
5 **ment described in paragraph (a) of this subsection:**

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

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

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

15 **“(ii) Unless the defendant is charged on any charging instrument**
16 **with aggravated murder or a crime listed in ORS 137.700 (2), for each**
17 **day the defendant is held in jail before and after the date the defend-**
18 **ant is first committed, whether the days are consecutive or are inter-**
19 **rupted by a period of time during which the defendant lacks fitness**
20 **to proceed.**

21 **“(c) The superintendent of the state mental hospital or director of**
22 **the facility to which the defendant is committed shall notify the**
23 **committing court of the defendant’s impending discharge 30 days be-**
24 **fore the date on which the superintendent or director is required to**
25 **discharge the defendant under this subsection.**

26 **“(6)(a) All notices required under this section shall be filed with the**
27 **court and may be filed electronically. The clerk of the court shall**
28 **cause copies of the notices to be delivered to both the district attorney**
29 **and the counsel for the defendant.**

30 **“(b) When the committing court receives a notice from the super-**

1 **intendent or director under subsection (1) of this section concerning**
2 **the defendant’s progress or lack thereof, or under subsection (5) of this**
3 **section concerning the defendant’s impending discharge, the commit-**
4 **ting court shall determine, after a hearing if a hearing is requested,**
5 **whether the defendant presently has the capacity to stand trial.**

6 **“(7) If at any time the court determines that the defendant lacks**
7 **the capacity to stand trial, the court shall further determine whether**
8 **the defendant is entitled to discharge under subsection (5) of this sec-**
9 **tion. If the court determines that the defendant is entitled to dis-**
10 **charge under subsection (5) of this section, the court shall dismiss,**
11 **without prejudice, all charges against the defendant and:**

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

13 **“(b) Initiate commitment proceedings under ORS 426.070, 426.701 or**
14 **427.235 to 427.290.**

15
16 **“EXAMINATION OF DEFENDANT**

17
18 **“SECTION 6.** ORS 161.365 is amended to read:

19 **“161.365. (1)(a) When the court has reason to doubt the defendant’s fitness**
20 **to proceed by reason of incapacity as described in ORS 161.360, the court**
21 **may call any witness to assist it in reaching its decision and shall order that**
22 **a community mental health program director, or the director’s designee,**
23 **consult with the defendant and with any local entity that would be respon-**
24 **sible for [*supervising*] **providing community restoration services to the****
25 **defendant if the defendant were to be released in the community, to deter-**
26 **mine whether [*services and supervision necessary to safely allow the defendant***
27 ***to gain or regain fitness to proceed*] **community restoration services are****
28 **present and available in the community. After the consultation, the program**
29 **director or the director’s designee shall provide to the court a copy of the**
30 **findings resulting from the consultation.**

1 “(b) If the court determines the assistance of a psychiatrist or psychol-
2 ogist would be helpful, the court may:

3 “(A) Order that a psychiatric or psychological examination of the de-
4 fendant be conducted by a certified evaluator and a report of the examina-
5 tion be prepared; or

6 “(B) Order the defendant to be committed for the purpose of an examina-
7 tion to a state mental hospital or other facility designated by the Oregon
8 Health Authority if the defendant is at least 18 years of age, or to a secure
9 intensive community inpatient facility designated by the authority if the
10 defendant is under 18 years of age. The state mental hospital or other facility
11 may retain custody of a defendant committed under this paragraph for the
12 duration necessary to complete the examination of the defendant, not to ex-
13 ceed 30 days. The examination may include a period of observation.

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

18 “(2)(a) A defendant committed under subsection [(1)(a)(B)] (1)(b)(B) of
19 this section shall be transported to the state mental hospital or other facility
20 for the examination.

21 “(b) At the conclusion of the examination, the superintendent of the state
22 mental hospital or the superintendent’s designee or the director of the facil-
23 ity may:

24 “(A) Return the defendant to the facility from which the defendant was
25 transported; or

26 “(B) Inform the court and the parties that the defendant requires a hos-
27 pital level of care due to [*the defendant’s dangerousness and*] the acuity of
28 symptoms of the defendant’s qualifying mental disorder and request that the
29 defendant remain at the state mental hospital or other facility pending a
30 hearing or order under ORS 161.370.

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

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

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

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

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

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

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

20 “(5) If the examination by the certified evaluator cannot be conducted by
21 reason of the unwillingness of the defendant to participate in the examina-
22 tion, the report must so state and must include, if possible, an opinion as to
23 whether the unwillingness of the defendant was the result of a qualifying
24 mental disorder affecting capacity to proceed.

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

29 “[*(b) The entity or evaluator conducting the examination shall provide a*
30 *copy of the report resulting from the examination to the community mental*

1 *health program director or designee in:]*

2 *“[(A) The county in which the defendant is charged; and]*

3 *“[(B) The county of the defendant’s last known residence.]*

4 *“[(c) Reports prepared under this section are confidential and may be made*
5 *available only:]*

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

9 *“[(B) As ordered by a court.]*

10 *“[(d) Any facility in which a defendant is housed may not use a report*
11 *prepared under this section to support a disciplinary action against the de-*
12 *fendant.]*

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

17 **“(7)(a) When upon motion of the court or a financially eligible defendant,**
18 **the court has ordered a psychiatric or psychological examination of the de-**
19 **fendant, a county or justice court shall order the county to pay, a **municipal****
20 **court shall order the city to pay, and a circuit court shall order the public**
21 **defense services executive director to pay from funds available for the pur-**
22 **pose:**

23 **“(A) A reasonable fee if the examination of the defendant is conducted**
24 **by a certified evaluator in private practice; and**

25 **“(B) All costs including transportation of the defendant if the examina-**
26 **tion is conducted by a certified evaluator in the employ of the Oregon Health**
27 **Authority or a community mental health program established under ORS**
28 **430.610 to 430.670.**

29 **“(b) When an examination is ordered at the request or with the**
30 **acquiescence of a defendant who is determined not to be financially eligible,**

1 the examination shall be performed at the defendant’s expense. When an ex-
2 amination is ordered at the request of the prosecution, the county shall pay
3 for the expense of the examination.

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

6 “[9] *As used in this section and ORS 161.370, ‘certified evaluator’ has the*
7 *meaning given that term in ORS 161.309.*”

8

9 **“DISPOSITION UPON FINDING OF LACK OF FITNESS**

10

11 **“SECTION 7.** ORS 161.370 is amended to read:

12 “161.370. (1)(a) When the defendant’s fitness to proceed is drawn in ques-
13 tion, the issue shall be determined by the court.

14 “(b) If neither the prosecuting attorney nor counsel for the defendant
15 contests the finding of the report filed under ORS 161.365, the court may
16 make the determination on the basis of the report. If the finding is contested,
17 the court shall hold a hearing on the issue. If the report is received in evi-
18 dence in the hearing, the party who contests the finding has the right to
19 summon and to cross-examine any certified evaluator who submitted the re-
20 port and to offer evidence upon the issue. Other evidence regarding the
21 defendant’s fitness to proceed may be introduced by either party.

22 “(2)(a) If the court determines that the defendant lacks fitness to proceed,
23 the criminal proceeding against the defendant shall be suspended and the
24 court shall, at a hearing, proceed in accordance with this subsection.

25 “(b) After making the determination under paragraph (a) of this sub-
26 section, the court shall receive a recommendation, to be considered at the
27 hearing, from a community mental health program director or the director’s
28 designee, and from any local entity that would be responsible for
29 [*supervising*] **treating** the defendant if the defendant were to be released in
30 the community, concerning whether [*services and supervision necessary to*

1 *safely allow the defendant to gain or regain fitness to proceed are available]*
2 **community restoration services are present and available** in the com-
3 munity.

4 “(c) The court and the parties shall at the hearing [*determine*] **consider**
5 an appropriate action in the case, and the court shall **determine the ap-**
6 **propriate action and** enter an order necessary to implement the action. In
7 determining the appropriate action, the court shall consider the primary and
8 secondary release criteria as defined in ORS 135.230, the least restrictive
9 option appropriate for the defendant, the needs of the defendant and the in-
10 terests of justice. Actions may include but are not limited to:

11 “(A) Commitment for the defendant to gain or regain fitness to proceed
12 under subsection (3) or [*(5)*] **(4)** of this section;

13 “(B) **An order to engage in community restoration services**, as recom-
14 mended by the community mental health program director or designee, **un-**
15 **der subsection (6) of this section;**

16 “[*(C) Release on supervision;*]

17 “[*(D)*] **(C)** Commencement of a civil commitment proceeding under ORS
18 426.070 to 426.170, 426.701 or 427.235 to 427.290;

19 “[*(E)*] **(D)** Commencement of protective proceedings under ORS chapter
20 125; or

21 “[*(F)*] **(E)** Dismissal of the charges pursuant to ORS 135.755.

22 “(d) If the court, while considering or ordering an appropriate action un-
23 der this subsection, [*determines that the defendant does not require a hospital*
24 *level of care due to the defendant’s dangerousness and the acuity of symptoms*
25 *of the defendant’s qualifying mental disorder, but that services and supervision*
26 *necessary to safely allow the defendant to gain or regain fitness to proceed are*
27 *not available]* **does not order the defendant committed to a state mental**
28 **hospital or other facility, but finds that community restoration ser-**
29 **vices are not present and available** in the community, for any defendant
30 remaining in custody after such determination, the court shall set a review

1 hearing seven days from the date of the determination under paragraph (a)
2 of this subsection. At the review hearing, the court shall consider all rele-
3 vant information and determine [*an appropriate action in the case as de-*
4 *scribed in paragraph (c) of this subsection. If the defendant remains in custody*
5 *following the initial review hearing, the court shall hold further review*
6 *hearings every seven days thereafter until the defendant is no longer in cus-*
7 *tody.*] **if commitment to the state mental hospital or other facility is**
8 **appropriate under subsection (3) or (4) of this section, or if another**
9 **action described in paragraph (c) of this subsection is appropriate. At**
10 **the conclusion of the hearing the court shall enter an order in ac-**
11 **cordance with the defendant’s constitutional rights to due process.**

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

27 “**(3)(a) If the most serious offense in the charging instrument is a**
28 **felony, the court shall commit the defendant to the custody of the**
29 **superintendent of a state mental hospital or director of a facility des-**
30 **ignated by the Oregon Health Authority if the defendant is at least 18**

1 years of age, or to the custody of the director of a secure intensive
2 community inpatient facility designated by the authority if the de-
3 fendant is under 18 years of age, if the court makes the following
4 findings:

5 “(A) The defendant requires a hospital level of care due to public
6 safety concerns if the defendant is not hospitalized or in custody or
7 the acuity of symptoms of the defendant’s qualifying mental disorder;
8 and

9 “(B) Based on the findings resulting from the consultation described
10 in ORS 161.365 (1), from any information provided by community-based
11 mental health providers or any other sources, and primary and sec-
12 ondary release criteria as defined in ORS 135.230, the appropriate
13 community restoration services are not present and available in the
14 community.

15 “(b) If the defendant is committed under this subsection, the community
16 mental health program director, or director’s designee, shall at regular
17 intervals, during any period of commitment, review available community
18 [resources] restoration services and maintain communication with the de-
19 fendant and the superintendent of the state mental hospital or director of the
20 facility in order to facilitate an efficient transition to treatment in the
21 community when ordered.

22 “(c) If the court does not order the commitment of the defendant
23 under this subsection, the court shall proceed in accordance with
24 subsection (2)(c) of this section to determine and order an appropriate
25 action other than commitment.

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

1 “[(b) *The court may order a community mental health program director*
2 *providing treatment to the defendant in the community to provide the court*
3 *with status reports on the defendant’s progress in gaining or regaining fitness*
4 *to proceed.*]

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

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

10 “[(b)] **(4)(a)** If the most serious offense in the charging instrument is a
11 misdemeanor, the court may not commit the defendant [*under subsection (3)*
12 *of this section*] **to the custody of the superintendent of a state mental**
13 **hospital or director of a facility designated by the Oregon Health Au-**
14 **thority if the defendant is at least 18 years of age, or to the custody**
15 **of the director of a secure intensive community inpatient facility des-**
16 **ignated by the authority if the defendant is under 18 years of age, un-**
17 *less the [finding that the defendant requires a hospital level of care due to the*
18 *defendant’s dangerousness and the acuity of symptoms of the defendant’s*
19 *qualifying mental disorder is based on a recommendation by a certified eval-*
20 *uator as defined in ORS 161.309, or a community mental health program di-*
21 *rector or the director’s designee, that the defendant requires such level of*
22 *care.]* **court:**

23 **“(A)(i) Receives a recommendation from a certified evaluator that**
24 **the defendant requires a hospital level of care due to the acuity of**
25 **symptoms of the defendant’s qualifying mental disorder; and**

26 **“(ii) Receives a recommendation from a community mental health**
27 **program director, or director’s designee, that the appropriate com-**
28 **munity restoration services are not present and available in the com-**
29 **munity; or**

30 **“(B) Determines that the defendant requires a hospital level of care**

1 **after making all of the following written findings:**

2 **“(i) The acuity of symptoms of the defendant’s qualifying mental**
3 **disorder are severe;**

4 **“(ii) There are public safety concerns; and**

5 **“(iii) The appropriate community restoration services are not pres-**
6 **ent and available in the community.**

7 **“[(c)] (b) If at the time of determining the appropriate action for the**
8 **case, the court is considering commitment under paragraph (a)(A) of**
9 **this subsection and:**

10 **“(A) Has not received a recommendation from a certified evaluator** as
11 to whether the defendant requires a hospital level of care due to [*the*
12 *defendant’s dangerousness and*] the acuity of symptoms of the defendant’s
13 qualifying mental disorder, the court shall order a certified evaluator [*or a*
14 *community mental health program director, or the director’s designee,*] to make
15 such a recommendation.

16 **“(B) Has not received a recommendation from the community**
17 **mental health program director or designee that appropriate commu-**
18 **nity restoration services are not present and available in the commu-**
19 **nity, the court shall order the director or designee to make such a**
20 **recommendation.**

21 **“[(d)] (c) If the court does not order the commitment of [a] the defendant**
22 [*described in this subsection to the state mental hospital or other facility*]
23 **under this subsection, the court shall [hold a hearing] proceed** in accord-
24 ance with subsection (2)(c) of this section to determine and order an appro-
25 priate action other than commitment.

26 **“(d) If the defendant is committed under this subsection, the com-**
27 **munity mental health program director, or director’s designee, shall**
28 **at regular intervals, during any period of commitment, review avail-**
29 **able community restoration services and maintain communication**
30 **with the defendant and the superintendent of the state mental hospital**

1 or director of the facility in order to facilitate an efficient transition
2 to treatment in the community when ordered.

3 “(5) If the most serious offense in the charging instrument is a vi-
4 olation, the court may not commit the defendant to the custody of the
5 superintendent of a state mental hospital or director of a facility des-
6 ignated by the Oregon Health Authority if the defendant is at least 18
7 years of age, or to the custody of the director of a secure intensive
8 community inpatient facility designated by the authority if the de-
9 fendant is under 18 years of age.

10 “(6)(a) If the court does not order the commitment of the defendant
11 under subsection (3) or (4) of this section, if commitment is precluded
12 under subsection (5) of this section or if the court determines that care
13 other than commitment for incapacity to stand trial would better
14 serve the defendant and the community, the court shall release the
15 defendant, pursuant to an order that the defendant engage in com-
16 munity restoration services, until the defendant has gained or re-
17 gained fitness to proceed, or until the court finds there is no
18 substantial probability that the defendant will, within the foreseeable
19 future, gain or regain the capacity to stand trial.

20 “(b) The court may order a community mental health program di-
21 rector coordinating the defendant’s treatment in the community to
22 provide the court with status reports on the defendant’s progress in
23 gaining or regaining fitness to proceed. The director shall provide a
24 status report if the defendant is not complying with court-ordered
25 restoration services.

26 “(c) A community mental health program director coordinating the
27 defendant’s treatment in the community shall notify the court if the
28 defendant gains or regains fitness to proceed. The notice shall be filed
29 with the court and may be filed electronically. The clerk of the court
30 shall cause copies of the notice to be delivered to both the district at-

1 **torney and the counsel for the defendant.**

2 “[6] (d) When a defendant is [*released on supervision*] **ordered to en-**
3 **gage in community restoration services** under [*subsection (4) of this sec-*
4 *tion*] **this subsection**, the court may place conditions that the court deems
5 appropriate on the release, including the requirement that the defendant
6 regularly report to the authority [*or a community mental health program*] for
7 examination to determine if the defendant has gained or regained capacity
8 to stand trial.

9 “[7] *When the court, on its own motion or upon the application of the su-*
10 *perintendent of the hospital or director of the facility in which the defendant*
11 *is committed, a person examining the defendant as a condition of release on*
12 *supervision, or either party, determines, after a hearing, if a hearing is re-*
13 *quested, that the defendant has gained or regained fitness to proceed, the*
14 *criminal proceeding shall be resumed. If, however, the court is of the view that*
15 *so much time has elapsed since the commitment or release of the defendant on*
16 *supervision that it would be unjust to resume the criminal proceeding, the*
17 *court on motion of either party may dismiss the charge and may order the*
18 *defendant to be discharged or cause a proceeding to be commenced forthwith*
19 *under ORS 426.070 to 426.170, 426.701 or 427.235 to 427.290.]*

20 “[8] *The superintendent of a state hospital or director of a facility to which*
21 *the defendant is committed shall cause the defendant to be evaluated within*
22 *60 days from the defendant’s delivery into the superintendent’s or director’s*
23 *custody, for the purpose of determining whether there is a substantial proba-*
24 *bility that, in the foreseeable future, the defendant will have the capacity to*
25 *stand trial. In addition, the superintendent or director shall:]*

26 “[a] *Immediately notify the committing court if the defendant, at any time,*
27 *gains or regains the capacity to stand trial or will never have the capacity to*
28 *stand trial.]*

29 “[b] *Within 90 days of the defendant’s delivery into the superintendent’s*
30 *or director’s custody, notify the committing court that:]*

1 “[A] *The defendant has the present capacity to stand trial;*]

2 “[B] *There is no substantial probability that, in the foreseeable future, the*
3 *defendant will gain or regain the capacity to stand trial; or]*

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

9 “[c] *Notify the court if court-ordered involuntary medication is necessary*
10 *for the defendant to gain or regain the capacity to proceed and, if appropriate,*
11 *submit a report to the court under ORS 161.372.]*

12 “[9](a) *If the superintendent or director determines that there is a sub-*
13 *stantial probability that, in the foreseeable future, the defendant will gain or*
14 *regain the capacity to stand trial, unless the court otherwise orders, the de-*
15 *fendant shall remain in the superintendent’s or director’s custody where the*
16 *defendant shall receive treatment designed for the purpose of enabling the de-*
17 *fendant to gain or regain capacity. In keeping with the notice requirement*
18 *under subsection (8)(b) of this section, the superintendent or director shall, for*
19 *the duration of the defendant’s period of commitment, submit a progress report*
20 *to the committing court, concerning the defendant’s capacity or incapacity, at*
21 *least once every 180 days as measured from the date of the defendant’s delivery*
22 *into the superintendent’s or director’s custody.]*

23 “[b](A) *Notwithstanding paragraph (a) of this subsection, if the super-*
24 *intendent or director determines that a defendant committed under this section*
25 *is no longer dangerous to self or others as a result of a qualifying mental*
26 *disorder, that a hospital level of care is not necessary due to the defendant’s*
27 *dangerousness and the acuity of symptoms of the defendant’s qualifying mental*
28 *disorder, or that the services and supervision necessary to allow the defendant*
29 *to gain or regain fitness to proceed are available in the community, the su-*
30 *perintendent or director shall file notice of that determination with the*

1 court.]

2 “[B] Upon receipt of the notice, the court shall order that a community
3 mental health program director or the director’s designee, within five judicial
4 days:]

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

10 “[(ii) Provide the court and the parties with recommendations from the
11 consultation.]

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

15 “[(i) If, after consideration of the factors and possible actions described in
16 subsection (2)(c) of this section, and any recommendations from the consulta-
17 tion described in this paragraph, the court determines that the defendant re-
18 mains dangerous to self or others as a result of a qualifying mental disorder,
19 a hospital level of care is necessary due to the defendant’s dangerousness and
20 the acuity of symptoms of the defendant’s qualifying mental disorder, and the
21 services and supervision necessary to allow the defendant to gain or regain
22 fitness to proceed are not available in the community, the court may, after
23 making specific findings to that effect, continue the commitment.]

24 “[(ii) If the court does not make the findings described in sub-subparagraph
25 (i) of this subparagraph, the court shall terminate the commitment and shall
26 set a review hearing seven days from the date of the commitment termination
27 for any defendant remaining in custody. At the review hearing, the court shall
28 consider all relevant information and determine an appropriate action in the
29 case as described in subsection (2)(c) of this section. If the defendant remains
30 in custody following the initial review hearing, the court shall hold further

1 review hearings every seven days thereafter until the defendant is no longer
2 in custody.]

3 “[c] A progress report described in paragraph (a) of this subsection may
4 consist of an update to:]

5 “[A] The original examination report conducted under ORS 161.365; or]

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

8 “[10](a) A defendant who remains committed under subsection (9) of this
9 section shall be discharged within a period of time that is reasonable for
10 making a determination concerning whether or not, and when, the defendant
11 may gain or regain capacity. However, regardless of the number of charges
12 with which the defendant is accused, in no event shall the defendant be com-
13 mitted for longer than whichever of the following, measured from the
14 defendant’s initial custody date, is shorter:]

15 “[A] Three years; or]

16 “[B] A period of time equal to the maximum sentence the court could have
17 imposed if the defendant had been convicted.]

18 “[b] For purposes of calculating the maximum period of commitment de-
19 scribed in paragraph (a) of this subsection:]

20 “[A] The initial custody date is the date on which the defendant is first
21 committed under this section on any charge alleged in the accusatory instru-
22 ment; and]

23 “[B] The defendant shall be given credit against each charge alleged in
24 the accusatory instrument:]

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

28 “[ii] Unless the defendant is charged on any charging instrument with
29 aggravated murder or a crime listed in ORS 137.700 (2), for each day the de-
30 fendant is held in jail before and after the date the defendant is first com-

1 *mitted, whether the days are consecutive or are interrupted by a period of time*
2 *during which the defendant lacks fitness to proceed.]*

3 *“(11) The superintendent or director shall notify the committing court of*
4 *the defendant’s impending discharge 30 days before the date on which the su-*
5 *perintendent or director is required to discharge the defendant under sub-*
6 *section (10) of this section.]*

7 *“(12) When the committing court receives a notice from the superintendent*
8 *or director under subsection (8) or (11) of this section concerning the*
9 *defendant’s progress or lack thereof, the committing court shall determine, af-*
10 *ter a hearing, if a hearing is requested, whether the defendant presently has*
11 *the capacity to stand trial.]*

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

21 *“(a) Order that the defendant be discharged; or]*

22 *“(b) Initiate commitment proceedings under ORS 426.070 or 427.235 to*
23 *427.290.]*

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

28 *“(15) If the defendant gains or regains fitness to proceed, the term of any*
29 *sentence received by the defendant for conviction of the crime charged shall*
30 *be reduced by the amount of time the defendant was committed under this*

1 *section to the custody of a state mental hospital, or to the custody of a secure*
2 *intensive community inpatient facility designated by the Oregon Health Au-*
3 *thority.]*

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

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

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

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

22 *“(B) The county of the defendant’s last known residence.]*

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

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

28 *“(B) As ordered by a court.]*

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

1 *fendant.]*

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

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

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

14 *“[(21)] (7) The Oregon Health Authority shall establish by rule standards*
15 *for the recommendation provided to the court described in subsection (2) of*
16 *this section.”.*

17 On page 15, delete lines 1 through 13.

18 On page 18, after line 24, insert:

19 **“SECTION 15. This 2020 Act being necessary for the immediate**
20 **preservation of the public peace, health and safety, an emergency is**
21 **declared to exist, and this 2020 Act takes effect on its passage.”.**

22
