



Civil Commitment and Aid & Assist



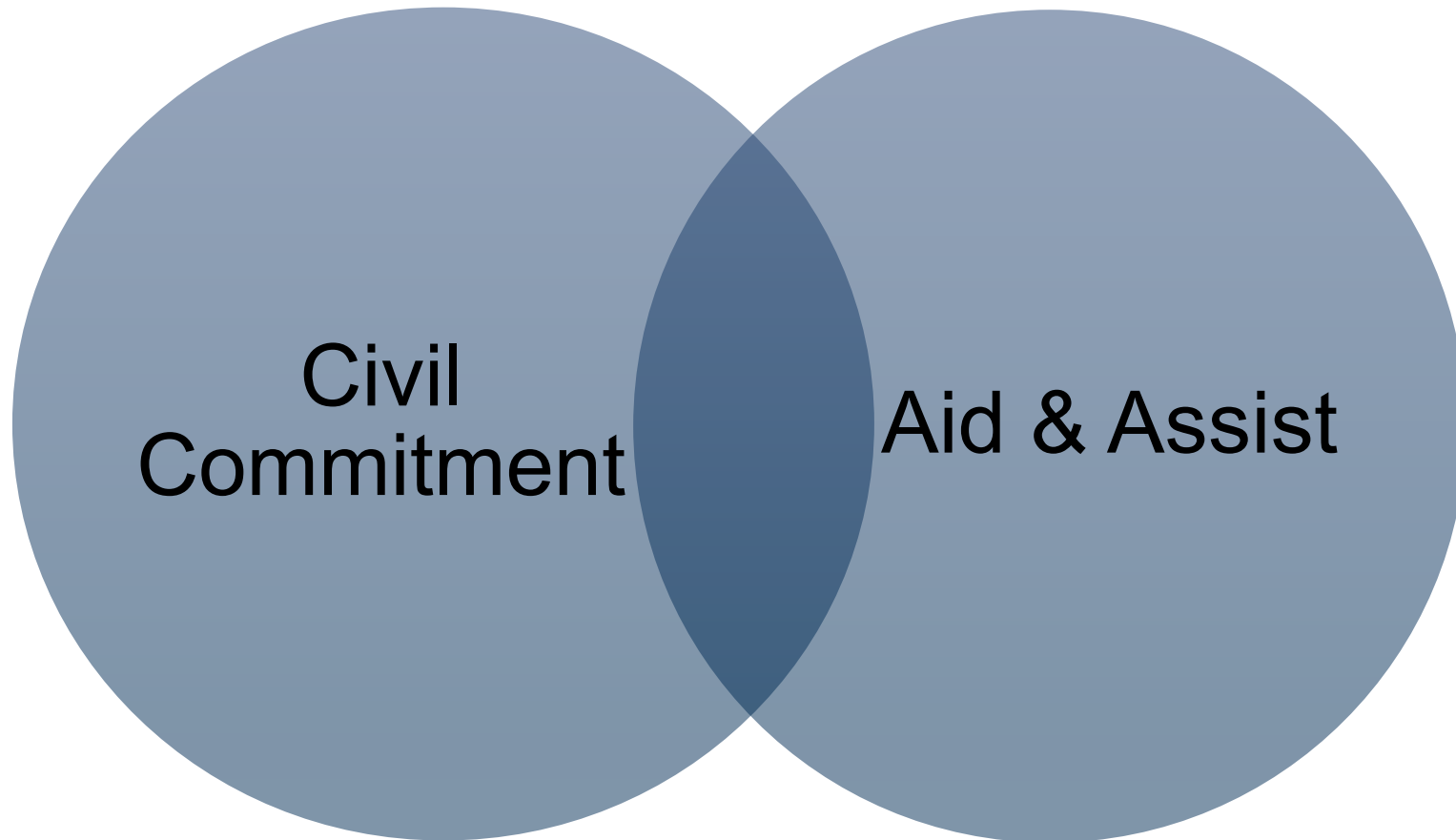
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Two Separate Court Processes



Aid & Assist – Constitutional right to assist in defense against a criminal charge.

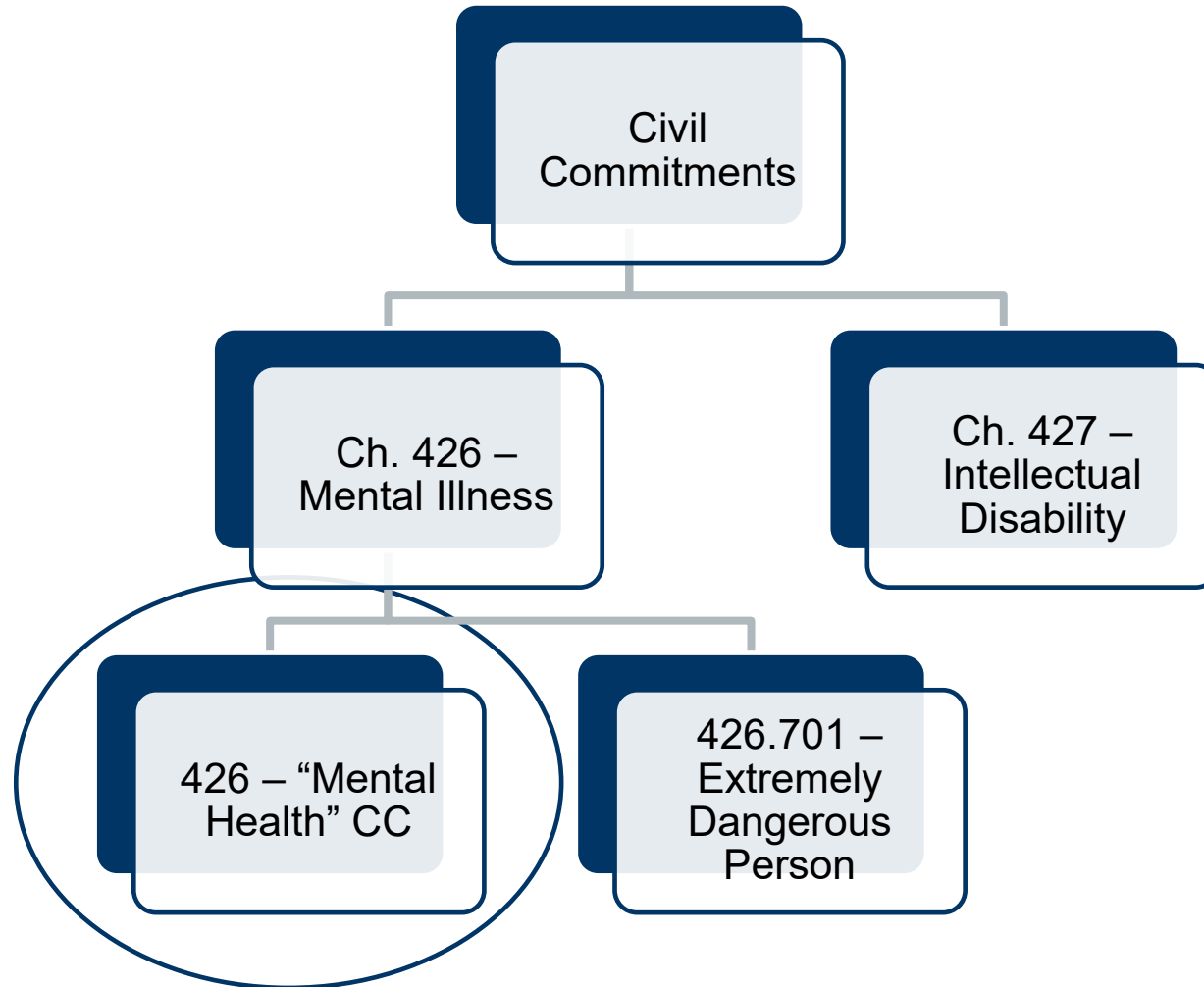
Civil Commitment – Involuntary treatment of a person who is dangerous to self or others, or unable to provide for their basic needs.

Both involve people with a mental disorder.

A Word About Acronyms

- A&A = Aid and Assist
- CC = Civil Commitment
- GEI = Guilty Except for Insanity
- NMI = Notice of Mental Illness
- CMHP = Community Mental Health Program
- QMHP = Qualified Mental Health Provider
- AMIP/PAMI = Allegedly Mentally Ill Person/Person Allegedly Mentally Ill
- OSH = Oregon State Hospital
- CR = Community Restoration
- HLOC = Hospital Level of Care

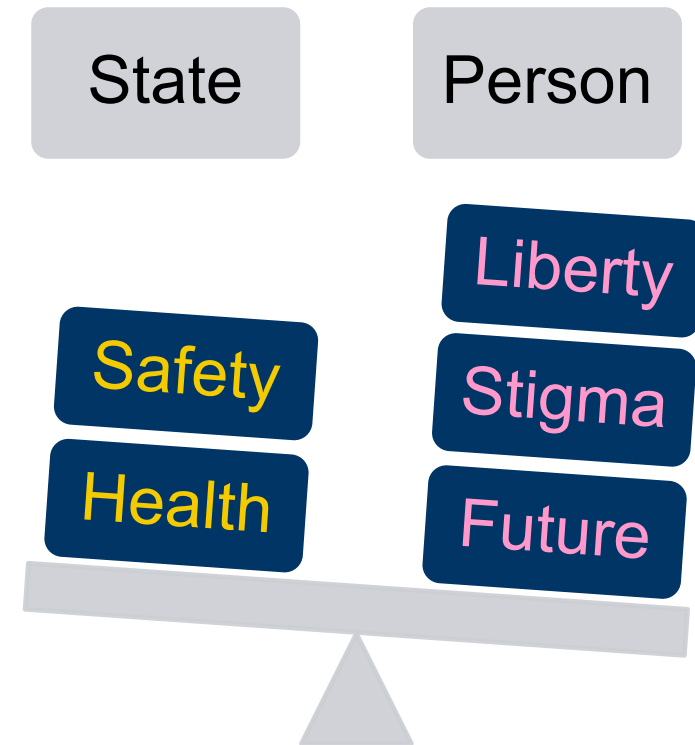
Civil Commitment



Purpose of Civil Commitments

This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. Moreover, it is indisputable that involuntary commitment to a mental hospital after a finding of probable dangerousness to self or others can engender adverse social consequences to the individual. The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.

State v. Addington, 441 US 418 (1979)



WHAT IS A CIVIL COMMITMENT?

Legal intervention by the state; determined by a judge

A finding that a person experiences a mental disorder and because of that disorder:

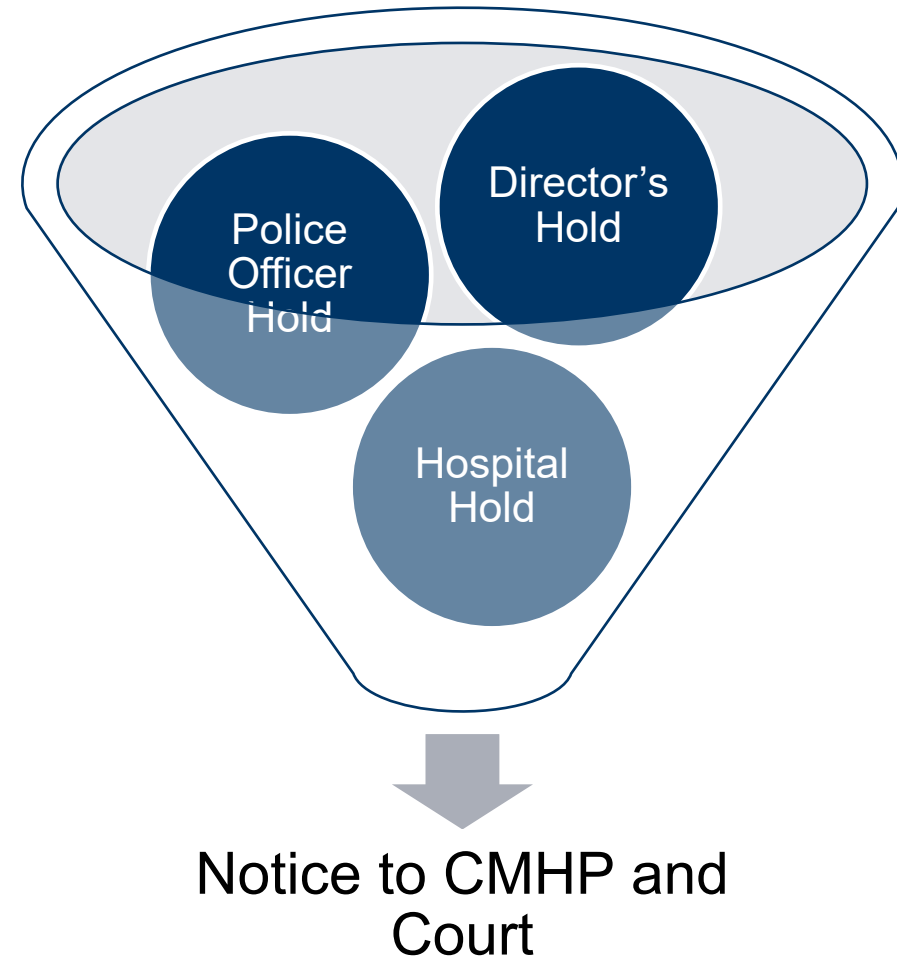
- Is a danger to self, or others, or unable to meet basic needs; or qualifies under expanded criteria

- Not engaged in voluntary treatment

Can be placed in treatment setting for up to 180 days

How Does a Civil Commitment Start?

- Police officer hold
- Director's hold
- Hospital/Physician's hold
- *Also 2 Person Hold

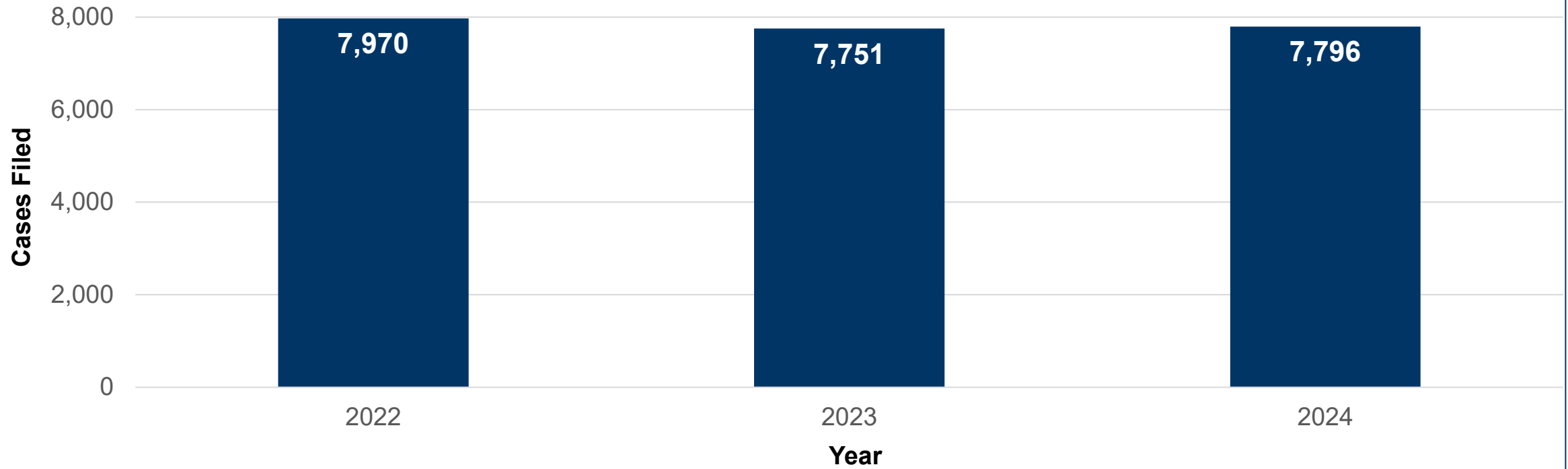


What Happens After a Hold?

- Five judicial days from hold to hearing
- CMHP begins precommitment investigation
- Report of investigation filed with court
- Probable cause determination + warrant of detention
- No later than 24 hours before a hearing, CMHP files hearing or no hearing recommendation
- Counsel is appointed—often at citation
- 14-day diversion is explored and might be offered

Total Cases Filed by Year

Mental Illness Commitment: Cases Filed



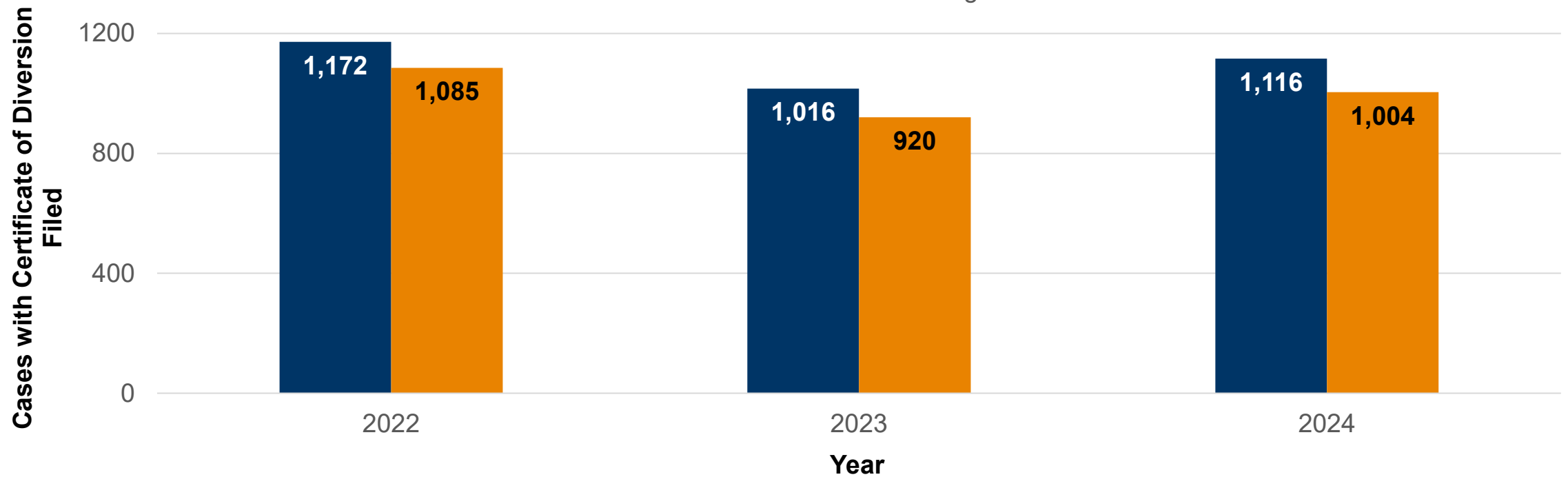
Diversion; “14-Day Period of Intensive Treatment”

- ORS 426.237
 - The community mental health program director can convert a civil commitment into a diversion
 - No later than day three of the hold
 - Medical provider has to agree to the diversion
 - Person must be informed of the certification for diversion, court appoints an attorney, and person has 24 hours to consult with attorney about diversion
 - Both attorney and person have to consent to the diversion
 - Can have a civil commitment hearing near conclusion of diversion if requested by person or QMHP

Diversion

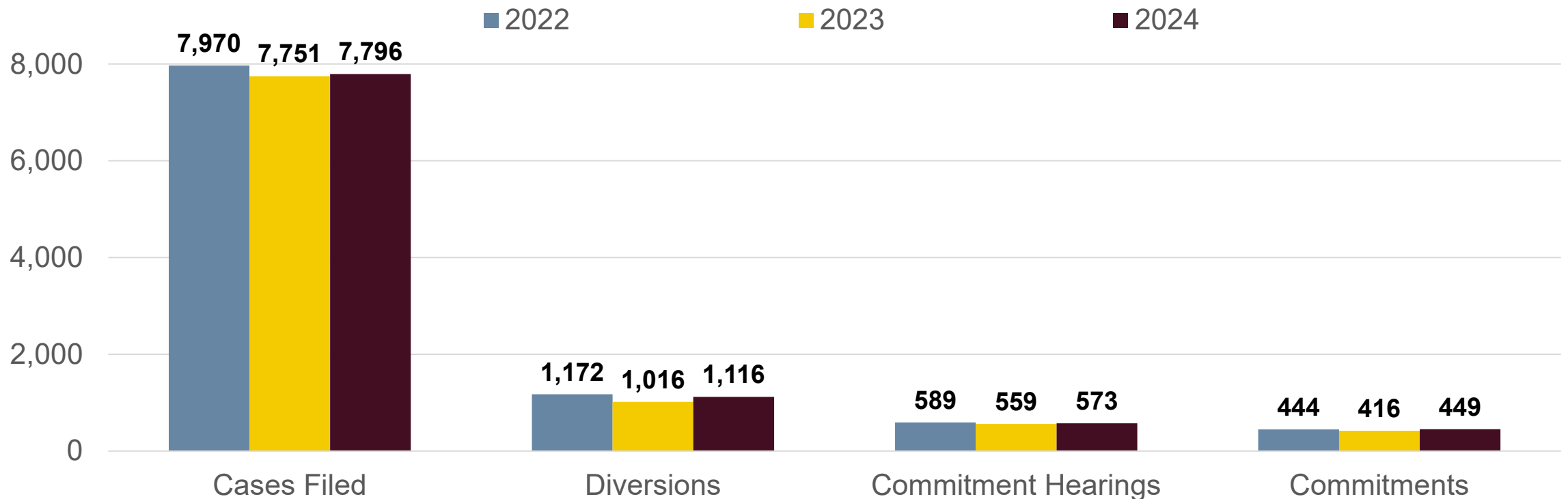
Diversion in Mental Illness Commitment Cases

■ Total Diversions ■ Diversions Resulting in Dismissal



In 2024, 6% of Filings Resulted in Commitment

Commitment Filings and Outcomes



The Commitment Hearing



Hearing with evidence, witnesses, and findings of examiner



Can take place in a courtroom or hospital, or other location



Testimony of witnesses, medical providers, and results of examination



Adversarial proceeding

Person with a Mental Illness—

ORS 426.005(1):

(f) “Person with mental illness” means a person who, *because of a mental disorder*, is one or more of the following:

(A) Dangerous to self or others.

(B) Unable to provide for basic personal needs that are necessary to avoid serious physical harm in the near future and is not receiving such care as is necessary to avoid such harm.

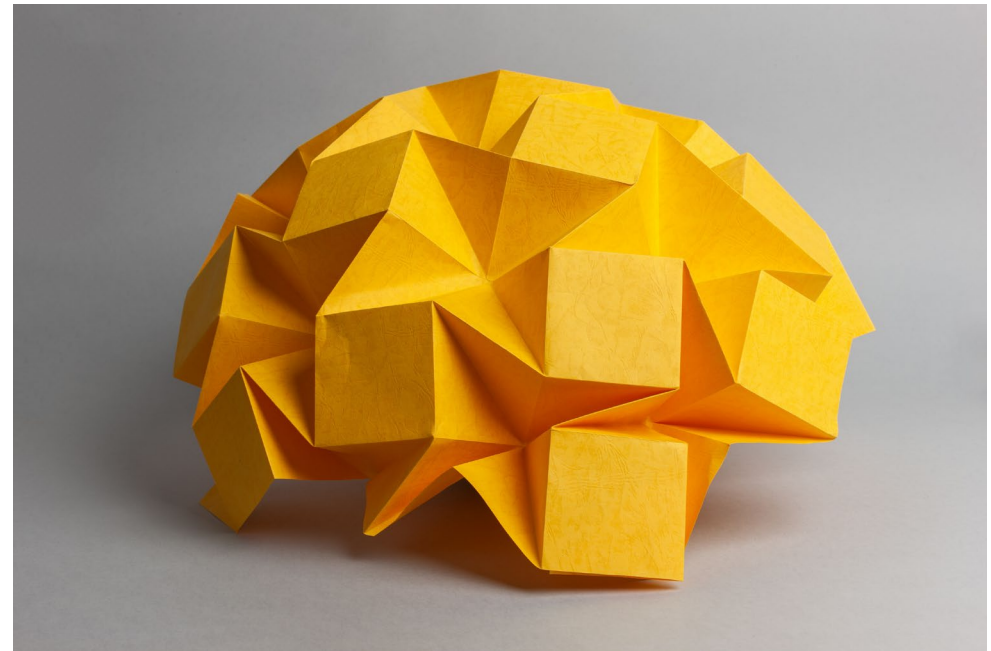
Expanded Criteria—ORS 426.005(1)

- A person who, because of a mental illness:
 - 18+ years old and diagnosed with chronic psychotic mental disorder
 - Two hospitalizations by State in three years
 - For substantially similar behaviors
 - Will continue to deteriorate

What is a Mental Disorder?

- Not defined

Matter of ABK, 323 Or App 246 (12/14/22), “In sum, despite the categorization by the DSM-5 of autism spectrum disorder as a mental disorder, we conclude that the legislature did not intend to include developmental disorders such as autism spectrum disorder as mental disorders for purposes of ORS 426.005(1)(f) and civil commitment under ORS 426.130.”



Danger to Self

- Self harm: whether the person's mental disorder would cause the person to engage in behavior that is likely to result in physical harm to self **in the near term**. *State v. B.B.* 240 Or App 75 (2010).
- Present threat + recent overt action => sufficient
 - Suicidal ideation with plan
 - Specific
 - Immediate

Danger to Self

- Harm's way: whether the person placed themselves in situations that resulted in harm or created situations likely to result in harm.
 - Running into traffic
 - Being misunderstood by others/provoking a response
- “Evidence that a person is likely to engage in actions that will provoke an assaultive response may be enough to support a civil commitment...” *State v. M.A.*, 276 Or App 624 (2016)

Danger to Self

- Serious and highly probable threats of harm.
- Risk must be nonspeculative and “particularized, and highly probable, threat to the AMIP’s safe survival, including a risk of substantial harm in the near future” *State v. B.B.*, 240 Or App 75, 84 (2010)
- Harm must be actual serious physical harm to self in near future. *State v. L.D.*, 247 Or App 394 (2011)

Danger to Others

- “The state must establish that actual future violence is highly likely.” *State v. L.D.*, 247 Or App 394 (2011)
- “[E]xplicit threats combined with overt acts that made it highly likely that actual violence would follow.” *Matter of S.R.J.*, 281 Or App 741 (2016)
- “Whether a person is a danger to others is determined by [his] condition at the time of the hearing as understood in the context of [his] history.” *State v. D.L.W.*, 244 Or App 401, 405 (2011)

Unable to Meet Basic Needs

- A person is unable to provide for their basic needs in a way that leaves the person at nonspeculative risk of serious physical harm, meaning that the person's safe survival will be compromised in the near future.
- Must establish how soon an anticipated harm will likely occur if a patient is released and is unable to provide for their basic needs. *Matter of R.L.M.* (2021)
- Nonvague estimation of patient's expected rate of decline or decompensation. *Matter of M.A.E.*, 200 Or App 231 (2019)

426.701—Extremely Dangerous Persons

- Not connected to “standard” 426 CC or 427 CC.
- Reserved for the most concerning criminal conduct:
 - Caused the death of another person;
 - Caused serious physical injury to another person by means of a dangerous weapon;
 - Caused physical injury to another person by means of a firearm as defined in ORS 166.210 or an explosive as defined in ORS 164.055;
 - Engaged in oral-genital contact with a child under 14 years of age;
 - Forcibly compelled sexual intercourse, oral-genital contact or the penetration of another person’s anus or vagina; or
 - Caused a fire or explosion that damaged the protected property of another, as those terms are defined in ORS 164.305, or placed another person in danger of physical injury, and the fire or explosion was not the incidental result of normal and usual daily activities.

426.701—Extremely Dangerous Person

To be considered an extremely dangerous person:

- Is at least 18 years old;
- Is exhibiting symptoms or behaviors of mental disorder substantially similar to those that preceded their dangerous act;
- Because of their mental disorder, presents serious danger to the safety of other persons by reason of an extreme risk that the person **will** inflict grave or potentially lethal physical injury on the other person; and
- Unless committed, will continue to represent an extreme risk to the safety of other persons in the foreseeable future.

426.701—Extremely Dangerous Person

To qualify for a 426.701, the state must prove that the person's mental disorder is resistant to treatment:

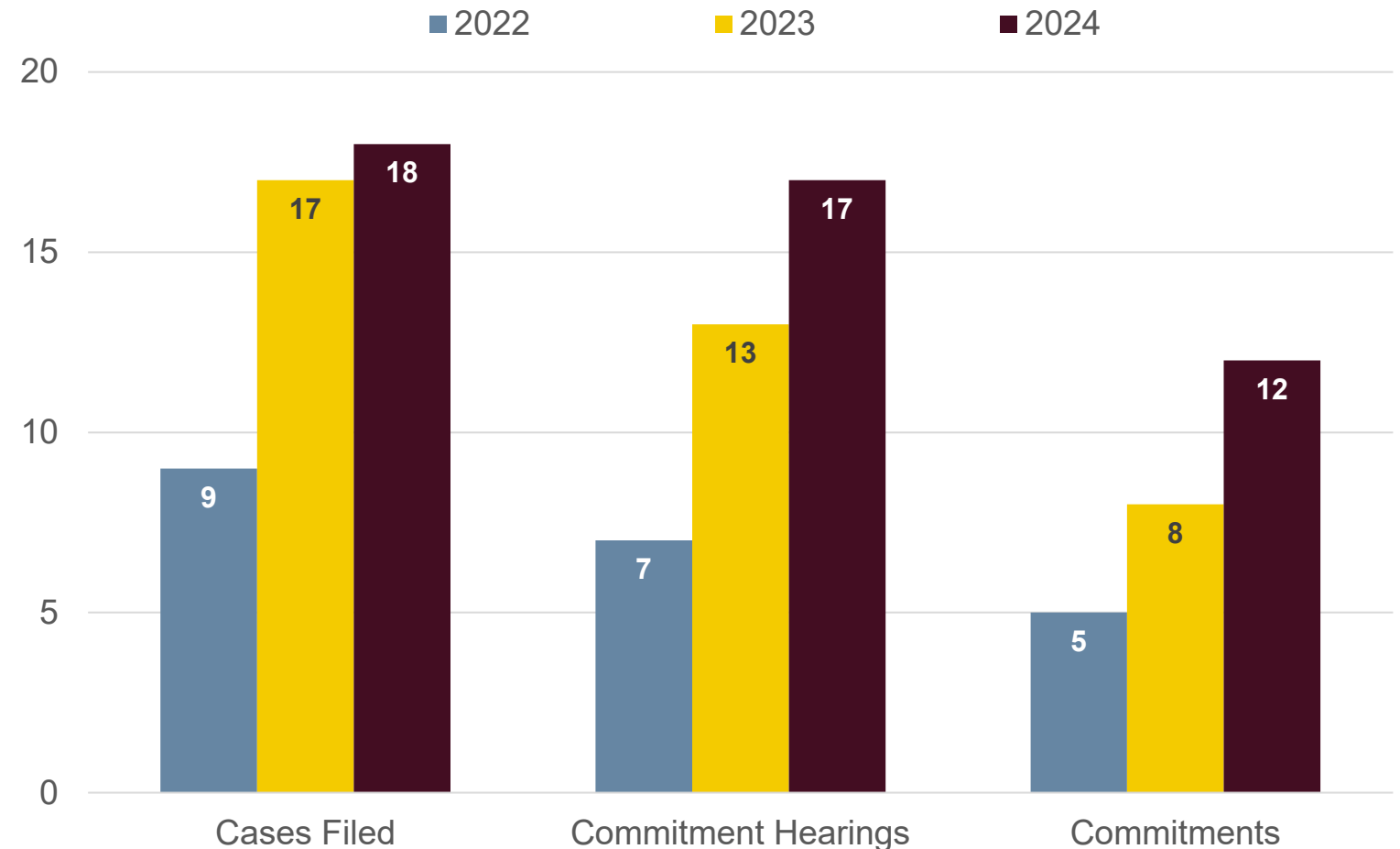
- A mental disorder is resistant to treatment means, “if, after receiving care from a licensed psychiatrist and exhausting all reasonable psychiatric treatment, or after refusing psychiatric treatment, the person continues to be significantly impaired in the person's ability to make competent decisions and to be aware of and control extremely dangerous behavior.”



426.701

- Commitment by clear and convincing evidence
- Committed to PSRB
- Subject to recommitment proceeding every two years

Extremely Dangerous Person Commitment: Cases Filed, Commitment Hearings Held, and Commitments



Ch. 427 Commitments

ORS 427.005

(10)(a) “Intellectual disability” means an intelligence quotient of 70 or below as measured by a qualified professional and existing concurrently with significant impairment in adaptive behavior, that is manifested before the individual is 18 years of age.

(b) An individual with intelligence quotients of 71 through 75 may be considered to have an intellectual disability if there is also significant impairment in adaptive behavior, as diagnosed and measured by a qualified professional.

(c) The impairment in adaptive behavior must be directly related to the intellectual disability.

(1) “Adaptive behavior” means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected for age and cultural group.

Ch. 427 Commitments

- New: **427.290**

After hearing all of the evidence, and reviewing the findings of the investigation and other examiners, the court shall determine whether the person has an intellectual disability ~~and because of the intellectual disability is either dangerous to self or others or is unable to provide for the personal needs of the person and is not receiving care as is necessary for the health, safety or habilitation of the person.~~ and is in need of commitment for residential care, treatment and training.

Ch. 427 Commitments

ORS 427.215

For the purposes of ORS 427.235 to 427.290, a person with an intellectual disability is in need of commitment for residential care, treatment and training if the person is:

- (1) Determined eligible for developmental disability services under ORS 427.104; and
- (2)(a) Dangerous to self or others; or
- (b) Unable to provide for the person's basic personal needs and not receiving care as is necessary for the health, safety or habilitation of the person.

CH. 427 Commitments

After hearing all of the evidence, and reviewing the findings of the investigation and other examiners, the court shall determine whether the person has an intellectual disability and is:

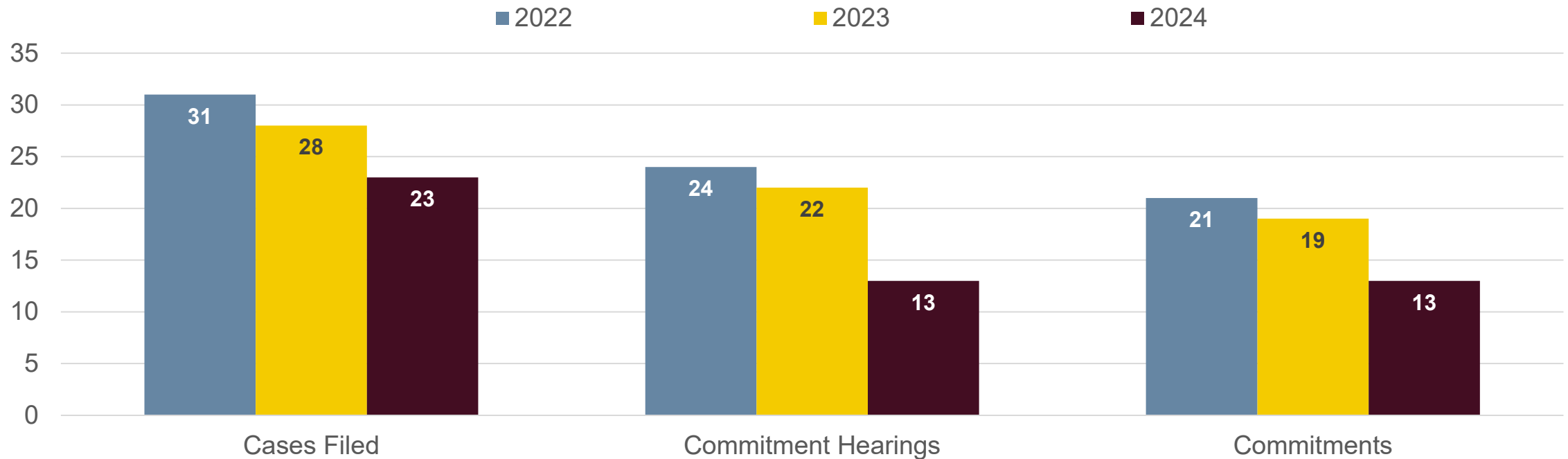
(1) Determined eligible for developmental disability services under ORS 427.104; and

(2)(a) Dangerous to self or others; or

(b) Unable to provide for the person's basic personal needs and not receiving care as is necessary for the health, safety or habilitation of the person.

Ch. 427 Commitments

**Intellectual Disability Commitment:
Cases Filed, Commitment Hearings Held, and Commitments**





AID & ASSIST

AN OVERVIEW OF THE
COMPETENCY TO PROCEED
PROCESS

Basics

Dusky v. United States, 362 U.S. 402 (1960)

A criminal defendant must have “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and “a rational as well as factual understanding of the proceedings against him.”

What Does it Mean to Be Unable to A&A?

ORS 161.360(2), “A defendant may be found incapacitated if, as a result of a qualifying mental disorder, the defendant is unable:

- (a) To understand the nature of the proceedings against the defendant; or
- (b) To assist and cooperate with the counsel of the defendant; or
- (c) To participate in the defense of the defendant.

ORS 161.370(2)(a), “If the court determines that the defendant lacks fitness to proceed, the criminal proceeding against the defendant shall be suspended. . . .”

What Does it Mean to Be Unable to A&A?

Unable—
Suspend
Proceedings



Qualifying Mental Health Disorder



Unable to Understand Proceedings

OR



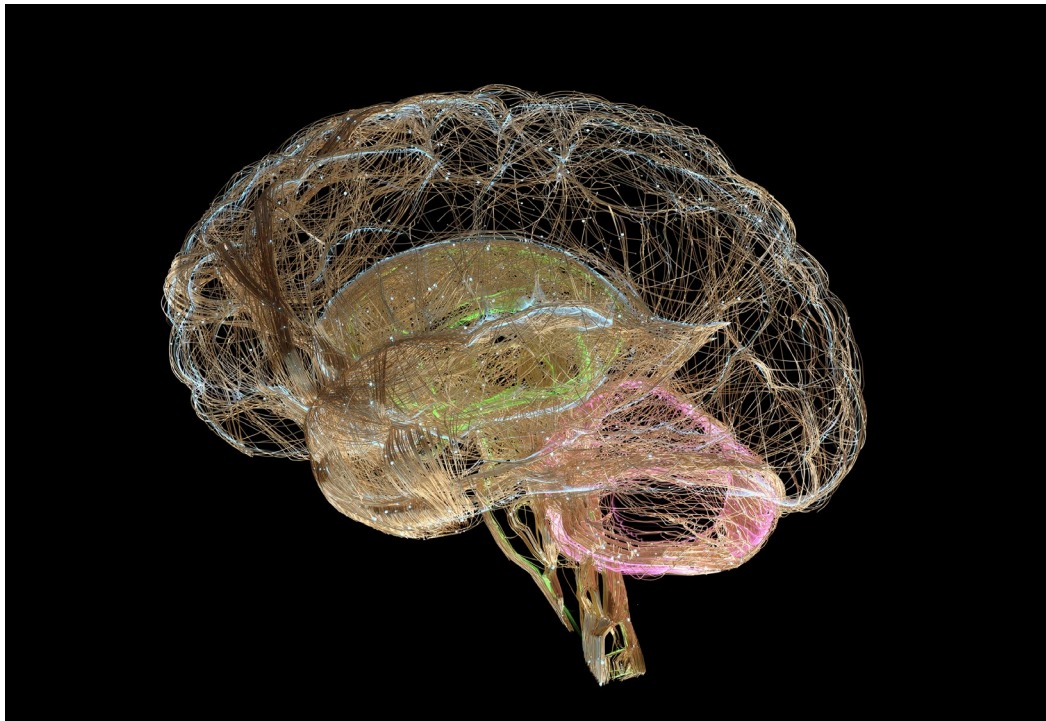
Unable to Assist and Cooperate
with Counsel

OR



Unable to Participate in Defense

WHAT IS A QUALIFYING MENTAL HEALTH DISORDER?



- ORS 161.295(2):
- As used in chapter 743, Oregon Laws 1971, the term “qualifying mental disorder” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor does the term include any abnormality constituting solely a personality disorder.

Determination of Ability

Any party can raise concerns

Judge makes a determination with witnesses, testimony, or expert assistance

If using an expert, a certified forensic evaluator examines defendant and puts findings in writing

Forensic Evaluations

Retained by Defense

- Paid by OPDC
- Protected by attorney/client privilege

Rapid

- Contracted with particular entity or firm
- Reserved # per week
- Developed by jurisdiction

OSH

- ORS 161.365
- Long wait time

Private Evaluations

- Ordered by court
- Must be given to court

Contesting Evaluations

- Once the evaluation is received, and given to the court, Defense or State can chose to contest or not contest the opinion of the evaluation
- If not contested, court can adopt the findings of the report
- State can request evaluation under ORS 161.365 at OSH
- State can hire own evaluator
- If contested, then the contesting party obtains another evaluation and it's a battle of dueling expert witnesses

If Able

- Case resumes in normal course

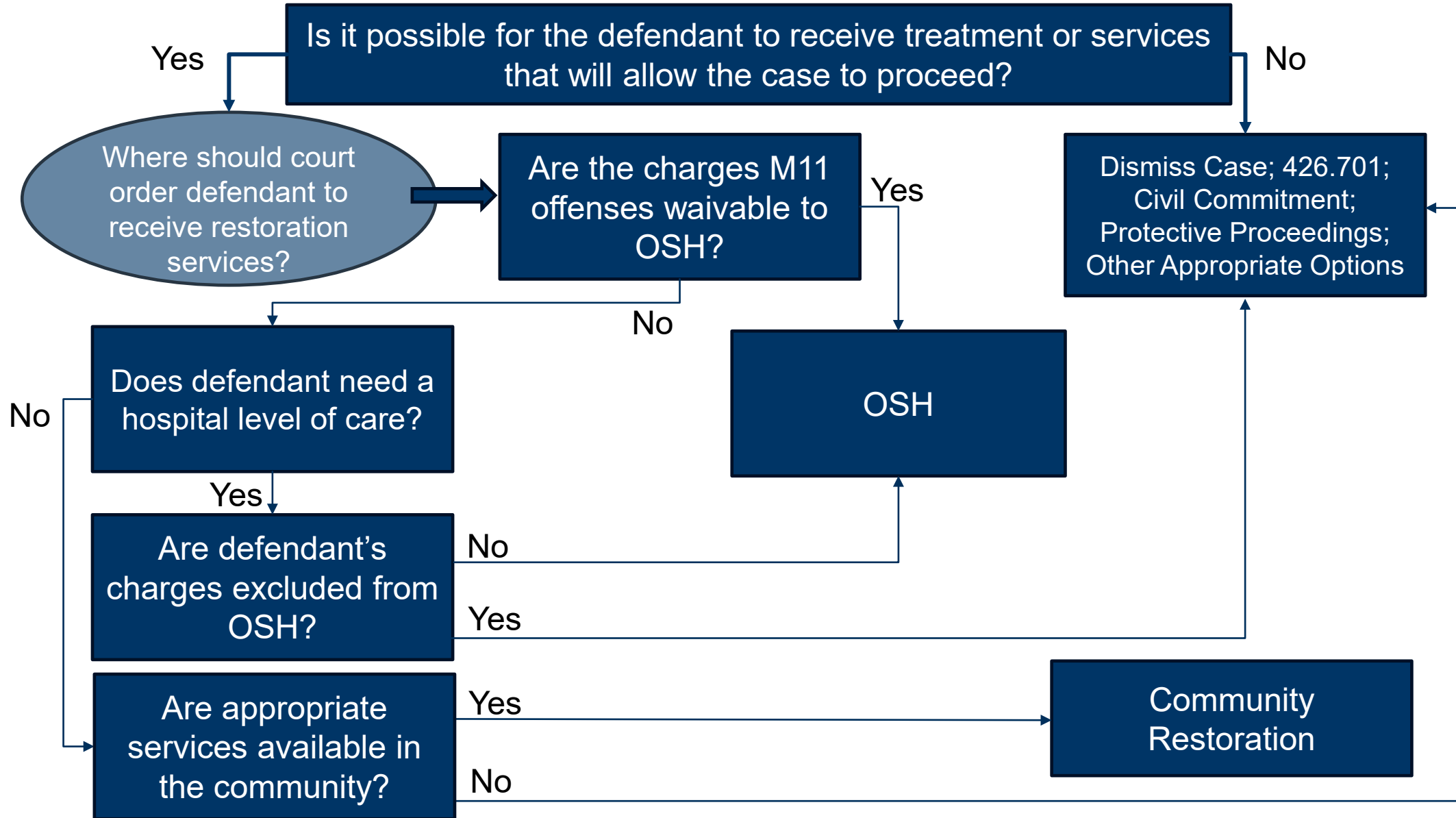


If Found Unable

If the defendant is unable, the court next must determine the appropriate action to take:

- OSH
- Community Restoration (CR)
- Civil Commitment / 426.701
- Release
- Guardianship
- Dismissal
- Other actions as court determines appropriate

Determining Location of Restorative Services



MINK/BOWMAN AND THE MOSMAN ORDERS

May 15, 2002–Federal Court

“...[A]dmissions must be done in a reasonable manner, and completed not later than seven days after the issuance of an order determining a criminal defendant to be unfit to proceed to trial because of mental incapacities under ORS 161.370(2).”

Basis: 14th Amendment Due Process



Mink/Bowman and the Mosman Orders

- Litigation began in 2002
- 2019 parties agreed to appoint neutral expert to provide recommendations to address capacity issues at OSH and ongoing violation of Due Process rights through lengthy waits for transport to OSH.
- September 1, 2022 – Mosman Order implementing neutral expert's recommendations
- Revised Mosman Order on July 3, 2023
- Case now overseen by Judge Nelson
- Litigation is ongoing

How Long for Restoration Services?

- ORS 161.371(5)
- No Limit on CR

Offense Level	Commitment to OSH per Statute	Commitment per Revised Mosman Order 7/3/2023	Additional Info
Misdemeanors	1 year	90 days for person misdemeanors, restraining order violations	No nonperson misdemeanors under Mosman order
Non-BM 11 Felonies	3 years	6 months	
BM 11 Felonies	3 years	12 months	With 180-day extensions, Mosman revised order

While at OSH

- Defendant is evaluated on a schedule by Forensic Evaluators at OSH, beginning at day 10 of arrival and every 30 days thereafter
- Notices go out if OSH believes defendant no longer needs hospital level of care, triggering “ready to place” process for community restoration
- Notices go out if OSH believes defendant is not able to be restored without medicating over objection, *Sell* process
- Evaluations may find defendant is able, in which case defendant is returned to local jail

Evaluations Options at OSH

Able Finding

- Returned to jail; can be contested
- Speedy resolution of case

Remains Unable

- Continued placement at OSH; or return if end of time for commitment under Mosman orders
- CR if ready to place

No Substantial Probability of Gaining Fitness in Foreseeable Future

- Defendant returned to jail; can be contested
- Case dismissed, 426.701 or other commitment

Resolution of Case After Able Finding

- Guilty Except for Insanity
- Prison
- Plea to Time Served
- Acquittal
- Dismissal
- Plea into Mental Health or Specialty Courts

Resolution if Defendant Returned Unable

- CR, if available and appropriate
- Appointment of guardian if appropriate or possible
- Commitment
- Release to community
- Dismissal

Under *Mink/Bowman*, defendant's rights are violated if they are waiting in jail without treatment beyond seven days.

Questions?



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