

# Senate Bill 258

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## SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Makes provisions relating to sentencing based on enhancement facts permanent. Describes requirements for proving enhancement fact to jury when alternate juror has been seated.

## A BILL FOR AN ACT

1  
2 Relating to sentencing; amending ORS 40.015, 136.280, 137.765, 137.767, 161.725 and 161.735 and  
3 sections 7 and 21, chapter 463, Oregon Laws 2005; and repealing section 20, chapter 463, Oregon  
4 Laws 2005.

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

6 **SECTION 1. Section 20, chapter 463, Oregon Laws 2005, is repealed.**

7 **SECTION 2.** ORS 40.015, as amended by section 13, chapter 463, Oregon Laws 2005, and section  
8 25, chapter 843, Oregon Laws 2005, is amended to read:

9 40.015. (1) The Oregon Evidence Code applies to all courts in this state except for:

10 (a) A hearing or mediation before a magistrate of the Oregon Tax Court as provided by ORS  
11 305.501;

12 (b) The small claims department of a circuit court as provided by ORS 46.415; and

13 (c) The small claims department of a justice court as provided by ORS 55.080.

14 (2) The Oregon Evidence Code applies generally to civil actions, suits and proceedings, criminal  
15 actions and proceedings and to contempt proceedings except those in which the court may act  
16 summarily.

17 (3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and pro-  
18 ceedings.

19 (4) ORS 40.010 to 40.210 and 40.310 to 40.585 do not apply in the following situations:

20 (a) The determination of questions of fact preliminary to admissibility of evidence when the issue  
21 is to be determined by the court under ORS 40.030.

22 (b) Proceedings before grand juries, except as required by ORS 132.320.

23 (c) Proceedings for extradition, except as required by ORS 133.743 to 133.857.

24 (d) Sentencing proceedings, except proceedings under ORS 138.012 and 163.150, [*or*] as required  
25 by ORS 137.090 **or proceedings under sections 2 to 7, chapter 463, Oregon Laws 2005.**

26 (e) Proceedings to revoke probation, except as required by ORS 137.090.

27 (f) Issuance of warrants of arrest, bench warrants or search warrants.

28 (g) Proceedings under ORS chapter 135 relating to conditional release, security release, release  
29 on personal recognizance, or preliminary hearings, subject to ORS 135.173.

30 (h) Proceedings to determine proper disposition of a child in accordance with ORS 419B.325 (2)

**NOTE:** Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 and 419C.400 (4).

2 (i) Proceedings under ORS 813.210, 813.215, 813.220, 813.230, 813.250 and 813.255 to determine  
3 whether a driving while under the influence of intoxicants diversion agreement should be allowed  
4 or terminated.

5 **SECTION 3.** Section 7, chapter 463, Oregon Laws 2005, is amended to read:

6 **Sec. 7.** (1) When an enhancement fact is tried to a jury, any question relating to the enhance-  
7 ment fact shall be submitted to the jury.

8 (2) The state has the burden of proving an enhancement fact beyond a reasonable doubt.

9 (3) An enhancement fact that is tried to a jury is not proven unless:

10 (a) The number of jurors who find that the state has met its burden of proof with regard to the  
11 enhancement fact is equal to or greater than the number of jurors that was required to find the  
12 defendant guilty of the crime; and

13 (b) Of the jurors who find that the state has met its burden of proof, at least the minimum  
14 number of jurors required by this subsection to prove an enhancement fact are also jurors who  
15 found the defendant guilty of the crime **or alternate jurors as provided by section 4 (5), chapter**  
16 **463, Oregon Laws 2005.**

17 (4) An enhancement fact that is tried to the court is not proven unless the court finds that the  
18 state has met its burden of proof with regard to the enhancement fact.

19 (5) A finding relating to an enhancement fact made by a jury during the trial or sentencing  
20 phase of a criminal proceeding may not be reexamined by the court. Notwithstanding the findings  
21 made by a jury relating to an enhancement fact, the court is not required to impose an enhanced  
22 sentence.

23 **SECTION 4.** ORS 161.725, as amended by section 14, chapter 463, Oregon Laws 2005, is  
24 amended to read:

25 161.725. (1) Subject to the provisions of ORS 161.737, the maximum term of an indeterminate  
26 sentence of imprisonment for a dangerous offender is 30 years, if [*the court finds that*] because of the  
27 dangerousness of the defendant an extended period of confined correctional treatment or custody is  
28 required for the protection of the public and [*if it further finds, as provided in ORS 161.735, that*]  
29 one or more of the following grounds exist:

30 (a) The defendant is being sentenced for a Class A felony[, *and the court finds that*] **and** the  
31 defendant is suffering from a severe personality disorder indicating a propensity toward crimes that  
32 seriously endanger the life or safety of another.

33 (b) The defendant is being sentenced for a felony that seriously endangered the life or safety  
34 of another, the defendant has been previously convicted of a felony not related to the instant crime  
35 as a single criminal episode and [*the court finds that*] the defendant is suffering from a severe per-  
36 sonality disorder indicating a propensity toward crimes that seriously endanger the life or safety  
37 of another.

38 (c) The defendant is being sentenced for a felony that seriously endangered the life or safety of  
39 another, the defendant has previously engaged in unlawful conduct not related to the instant crime  
40 as a single criminal episode that seriously endangered the life or safety of another and [*the court*  
41 *finds that*] the defendant is suffering from a severe personality disorder indicating a propensity to-  
42 ward crimes that seriously endanger the life or safety of another.

43 [*(2) Unless the parties stipulate otherwise, the state has the burden of proving beyond a reasonable*  
44 *doubt that the felonies or unlawful conduct referred to in subsection (1)(b) and (c) of this section seri-*  
45 *ously endangered the life and safety of another.*]

1        [(3)] (2) As used in this section, “previously convicted of a felony” means:

2        (a) Previous conviction of a felony in a court of this state;

3        (b) Previous conviction in a court of the United States, other than a court-martial, of an offense  
 4 which at the time of conviction of the offense was and at the time of conviction of the instant crime  
 5 is punishable under the laws of the United States by death or by imprisonment in a penitentiary,  
 6 prison or similar institution for a term of one year or more; or

7        (c) Previous conviction by a general court-martial of the United States or in a court of any other  
 8 state or territory of the United States, or of the Commonwealth of Puerto Rico, of an offense which  
 9 at the time of conviction of the offense was punishable by death or by imprisonment in a  
 10 penitentiary, prison or similar institution for a term of one year or more and which offense also at  
 11 the time of conviction of the instant crime would have been a felony if committed in this state.

12       [(4)] (3) As used in this section, “previous conviction of a felony” does not include:

13       (a) An offense committed when the defendant was less than 16 years of age;

14       (b) A conviction rendered after the commission of the instant crime;

15       (c) A conviction that is the defendant’s most recent conviction described in subsection [(3)] (2)  
 16 of this section, and the defendant was finally and unconditionally discharged from all resulting  
 17 imprisonment, probation or parole more than seven years before the commission of the instant crime;  
 18 or

19       (d) A conviction that was by court-martial of an offense denounced only by military law and  
 20 triable only by court-martial.

21       [(5)] (4) As used in this section, “conviction” means an adjudication of guilt upon a plea, verdict  
 22 or finding in a criminal proceeding in a court of competent jurisdiction, but does not include an  
 23 adjudication which has been expunged by pardon, reversed, set aside or otherwise rendered  
 24 nugatory.

25       **SECTION 5.** ORS 161.735, as amended by section 15, chapter 463, Oregon Laws 2005, is  
 26 amended to read:

27       161.735. (1) Upon motion of the district attorney, and if, in the opinion of the court, there is  
 28 reason to believe that the defendant falls within ORS 161.725, the court shall order a presentence  
 29 investigation and an examination by a psychiatrist or psychologist. The court may appoint one or  
 30 more qualified psychiatrists or psychologists to examine the defendant in the local correctional fa-  
 31 cility.

32       (2) All costs connected with the examination shall be paid by the state.

33       (3) The examination performed pursuant to this section shall be completed within 30 days, sub-  
 34 ject to additional extensions not exceeding 30 days on order of the court. Each psychiatrist and  
 35 psychologist appointed to examine a defendant under this section shall file with the court a written  
 36 report of findings and conclusions, including an evaluation of whether the defendant is suffering  
 37 from a severe personality disorder indicating a propensity toward criminal activity.

38       (4) No statement made by a defendant under this section or ORS 137.124 or 423.090 shall be used  
 39 against the defendant in any civil proceeding or in any other criminal proceeding.

40       (5) Upon receipt of the examination and presentence reports the court shall set a time for a  
 41 presentence hearing, unless the district attorney and the defendant waive the hearing. At the pre-  
 42 sentence hearing the district attorney and the defendant may question any psychiatrist or psychol-  
 43 ogist who examined the defendant pursuant to this section.

44       (6) If, after considering [*the presentence report, the examination reports and*] the evidence in the  
 45 case or in the presentence hearing, **the jury or, if the defendant waives the right to a jury trial,**

1 the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant  
 2 as a dangerous offender.

3 (7) In determining whether a defendant has been previously convicted of a felony for purposes  
 4 of ORS 161.725, the court shall consider as prima facie evidence of the previous conviction:

5 (a) A copy of the judicial record of the conviction which copy is authenticated under ORS  
 6 40.510;

7 (b) A copy of the fingerprints of the subject of that conviction which copy is authenticated under  
 8 ORS 40.510; and

9 (c) Testimony that the fingerprints of the subject of that conviction are those of the defendant.

10 (8) Subsection (7) of this section does not prohibit proof of the previous conviction by any other  
 11 procedure.

12 **(9) The facts required to be found to sentence a defendant as a dangerous offender under**  
 13 **this section are enhancement facts, as defined in section 1, chapter 463, Oregon Laws 2005,**  
 14 **and sections 2 to 7, chapter 463, Oregon Laws 2005, apply to making determinations of those**  
 15 **facts.**

16 **SECTION 6.** ORS 137.765, as amended by section 16, chapter 463, Oregon Laws 2005, is  
 17 amended to read:

18 137.765. (1) As used in this section:

19 (a) “History of sexual assault” means that a person has engaged in unlawful sexual conduct that:

20 (A) Was not committed as part of the same criminal episode as the crime for which the person  
 21 is currently being sentenced; and

22 (B) Seriously endangered the life or safety of another person or involved a victim under 12 years  
 23 of age.

24 (b) “Sexually violent dangerous offender” means a person who has psychopathic personality  
 25 features, sexually deviant arousal patterns or interests and a history of sexual assault and [*who the*  
 26 *court finds*] presents a substantial probability of committing a crime listed in subsection (3) of this  
 27 section.

28 (2) Notwithstanding ORS 161.605, when a person is convicted of a crime listed in subsection (3)  
 29 of this section, in addition to any sentence of imprisonment required by law, a court shall impose  
 30 a period of post-prison supervision that extends for the life of the person if:

31 (a) The person was 18 years of age or older at the time the person committed the crime; and

32 (b) The [*court finds that the*] person is a sexually violent dangerous offender.

33 (3) The crimes to which subsection (2) of this section applies are:

34 (a) Rape in the first degree and sodomy in the first degree if the victim was:

35 (A) Subjected to forcible compulsion by the person;

36 (B) Under 12 years of age; or

37 (C) Incapable of consent by reason of mental defect, mental incapacitation or physical  
 38 helplessness;

39 (b) Unlawful sexual penetration in the first degree; and

40 (c) An attempt to commit a crime listed in paragraph (a) or (b) of this subsection.

41 **SECTION 7.** ORS 137.767, as amended by section 17, chapter 463, Oregon Laws 2005, is  
 42 amended to read:

43 137.767. (1)(a) A court shall order a presentence investigation and an examination of the de-  
 44 fendant by a psychiatrist or psychologist upon motion of the district attorney if:

45 (A) The defendant is convicted of a crime listed in ORS 137.765 (3); and

1 (B) In the opinion of the court, there is reason to believe that the defendant is a sexually violent  
2 dangerous offender as defined in ORS 137.765.

3 (b) The court may appoint one or more qualified psychiatrists or psychologists to examine the  
4 defendant in the local correctional facility.

5 (2) The state shall pay all costs connected with an examination under this section.

6 (3) The examination performed pursuant to this section must be completed within 30 days if the  
7 defendant is in custody or within 60 days if the defendant is not in custody. The court may order  
8 extensions not exceeding 30 days. Each psychiatrist or psychologist appointed to examine a defend-  
9 ant under this section shall file with the court a written report of findings and conclusions, includ-  
10 ing an evaluation of whether the defendant is predisposed to commit a crime listed in ORS 137.765

11 (3) because the defendant has:

12 (a) Psychopathic personality features; and

13 (b) Sexually deviant arousal patterns or interests.

14 (4) No statement made by a defendant under this section may be used against the defendant in  
15 any civil proceeding or in any other criminal proceeding.

16 (5) Upon receipt of the examination and presentence reports the court shall set a time for a  
17 sentence hearing. At the sentence hearing the district attorney and the defendant may question any  
18 psychiatrist or psychologist who examined the defendant pursuant to this section.

19 (6) If, after considering [*the presentence report, the examination reports and*] the evidence in the  
20 case or in the sentence hearing, **the jury or, if the defendant waives the right to a jury trial,**  
21 the court finds that the defendant is a sexually violent dangerous offender, the court shall sentence  
22 the defendant as provided in ORS 137.765.

23 [*(7) Unless the parties stipulate otherwise, the state has the burden of proving beyond a reasonable*  
24 *doubt that the person is a sexually violent dangerous offender.*]

25 **(7) The fact that a person is a sexually violent dangerous offender is an enhancement**  
26 **fact, as defined in section 1, chapter 463, Oregon Laws 2005, and sections 2 to 7, chapter 463,**  
27 **Oregon Laws 2005, apply to making a determination of the fact.**

28 **SECTION 8.** ORS 136.280, as amended by section 19, chapter 463, Oregon Laws 2005, is  
29 amended to read:

30 136.280. If, before the final submission of the case, any juror dies or is unable to perform the  
31 duty because of illness or other cause which the court deems sufficient, the juror shall be dismissed  
32 from the case. Except as provided by ORS 163.150, the court shall cause to be drawn the name of  
33 an alternate juror, who shall then become a member of the jury as though the alternate juror had  
34 been selected as one of the original jurors. **Except as provided in section 4 (5), chapter 463,**  
35 **Oregon Laws 2005,** any alternate juror not selected to become a member of the jury shall be dis-  
36 missed from the case upon its final submission to the jury.

37 **SECTION 9.** Section 21, chapter 463, Oregon Laws 2005, is amended to read:

38 **Sec. 21.** Sections 1 to 7, **chapter 463, Oregon Laws 2005,** [*of this 2005 Act*] and the amendments  
39 to ORS 40.015, 136.280, 137.765, 137.767, 161.725 and 161.735 by sections 8 to 12 and 18, **chapter 463,**  
40 **Oregon Laws 2005,** [*of this 2005 Act*] apply to:

41 (1) A criminal action commencing on or after [*the effective date of this 2005 Act and before Jan-*  
42 *uary 2, 2008*] **July 7, 2005;**

43 (2) A criminal action commencing prior to [*the effective date of this 2005 Act*] **July 7, 2005,** in  
44 which a sentence has not been imposed prior to [*the effective date of this 2005 Act*] **July 7, 2005;** and

45 (3) A case that has been remanded to a trial court that will result in resentencing for which a

1 new sentence has not been imposed prior to [*the effective date of this 2005 Act*] **July 7, 2005.**

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