

**Enrolled**  
**Senate Bill 528**

Sponsored by COMMITTEE ON JUDICIARY

CHAPTER .....

AN ACT

Relating to crime; creating new provisions; amending ORS 40.015, 136.280, 137.765, 137.767, 161.725 and 161.735; and declaring an emergency.

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

**SECTION 1. As used in sections 2 to 7 of this 2005 Act:**

- (1) "Accusatory instrument" has the meaning given that term in ORS 131.005.
- (2) "Enhancement fact" means a fact that is constitutionally required to be found by a jury in order to increase the sentence that may be imposed upon conviction of a crime.

**SECTION 2. In order to rely on an enhancement fact to increase the sentence that may be imposed in a criminal proceeding, the state shall notify the defendant of its intention to rely on the enhancement fact by:**

- (1) Pleading the enhancement fact in the accusatory instrument; or
- (2) Within a reasonable time after filing the accusatory instrument, providing written notice to the defendant of the enhancement fact and the state's intention to rely on it.

**SECTION 3. (1) When an enhancement fact relates to an offense charged in the accusatory instrument, the court shall submit the enhancement fact to the jury during the trial phase of the criminal proceeding unless the defendant:**

- (a) Defers trial of the enhancement fact under subsection (4) of this section; or
- (b) Makes a written waiver of the right to a jury trial on the enhancement fact and:
  - (A) Admits to the enhancement fact; or
  - (B) Elects to have the enhancement fact tried to the court.
- (2) If the defendant makes the election under subsection (1)(b)(B) of this section and is found guilty during the trial phase of the criminal proceeding, the enhancement fact shall be tried during the sentencing phase of the proceeding.
- (3) If there is more than one enhancement fact relating to the offense and the defendant does not admit to all of them, the defendant shall elect to try to the jury or to the court all enhancement facts relating to the offense to which the defendant does not admit.
- (4) If the court finds that trying an enhancement fact relating to the offense during the trial phase of the criminal proceeding would unfairly prejudice the jury's verdict on an underlying offense, the court shall allow the defendant to defer trial of the enhancement fact to the sentencing phase of the proceeding without waiving the right to a jury trial on the enhancement fact.
- (5) If two or more defendants are being tried in the same criminal proceeding, each defendant shall make the elections required by this section.

**SECTION 4.** (1) When an enhancement fact relates to the defendant, the court shall submit the enhancement fact to the jury during the sentencing phase of the criminal proceeding if the defendant is found guilty of an offense to which the enhancement fact applies unless the defendant makes a written waiver of the right to a jury trial on the enhancement fact and:

- (a) Admits to the enhancement fact; or
- (b) Elects to have the enhancement fact tried to the court.

(2) If the defendant makes the election under subsection (1)(b) of this section and is found guilty during the trial phase of the criminal proceeding, the enhancement fact shall be tried during the sentencing phase of the proceeding.

(3) If there is more than one enhancement fact relating to the defendant and the defendant does not admit to all of them, the defendant shall elect to try to the jury or to the court all enhancement facts relating to the defendant to which the defendant does not admit.

(4) If two or more defendants are being tried in the same criminal proceeding, each defendant shall make the elections required by this section.

(5) Unless the defendant waives the right to a jury trial on enhancement facts related to the defendant, the sentencing phase shall be conducted in the trial court before the jury following a finding of guilt by the jury. If for any reason a juror is unable to perform the function of a juror, the court shall dismiss the juror from the sentencing phase and draw the name of one of the alternate jurors. The alternate juror then becomes a member of the jury for the sentencing phase notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt. The court may allow the substitution of an alternate juror only if the jury has not begun to deliberate on the issue of an enhancement fact.

**SECTION 5.** When a defendant waives the right to a jury trial on the issue of guilt or innocence, the waiver constitutes a written waiver of the right to a jury trial on all enhancement facts whether related to the offense or the defendant.

**SECTION 6.** All evidence received during the trial phase of a criminal proceeding may be considered by the jury or, if the defendant waives the right to a jury trial, by the court during the sentencing phase of the proceeding.

**SECTION 7.** (1) When an enhancement fact is tried to a jury, any question relating to the enhancement fact shall be submitted to the jury.

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

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

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

(b) Of the jurors who find that the state has met its burden of proof, at least the minimum number of jurors required by this subsection to prove an enhancement fact are also jurors who found the defendant guilty of the crime.

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

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

**SECTION 8.** ORS 40.015 is amended to read:

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

(a) A tax court small claims procedure or a hearing or mediation before a magistrate of the Oregon Tax Court as provided by ORS 305.501;

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

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

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

(3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and proceedings.

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

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

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

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

(d) Sentencing proceedings, except proceedings under ORS 138.012 and 163.150, [or] as required by ORS 137.090 **or proceedings under sections 2 to 7 of this 2005 Act.**

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

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

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

(h) Proceedings to determine proper disposition of a child in accordance with ORS 419B.325 (2) and 419C.400 (3).

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

**SECTION 9.** ORS 161.725 is amended to read:

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

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

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

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

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

[(3)] **(2)** As used in this section, "previously convicted of a felony" means:

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

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

(c) Previous conviction by a general court-martial of the United States or in a court of any other state or territory of the United States, or of the Commonwealth of Puerto Rico, of an offense which at the time of conviction of the offense was punishable by death or by imprisonment in a

penitentiary, prison or similar institution for a term of one year or more and which offense also at the time of conviction of the instant crime would have been a felony if committed in this state.

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

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

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

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

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

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

**SECTION 10.** ORS 161.735 is amended to read:

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

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

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

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

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

(6) If, after considering [*the presentence report, the examination reports and*] the evidence in the case or [*on*] **in** the presentence hearing, **the jury or, if the defendant waives the right to a jury trial**, the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant as a dangerous offender.

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

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

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

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

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

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

**SECTION 11.** ORS 137.765 is amended to read:

137.765. (1) As used in this section:

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

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

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

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

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

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

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

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

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

(A) Subjected to forcible compulsion by the person;

(B) Under 12 years of age; or

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

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

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

**SECTION 12.** ORS 137.767 is amended to read:

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

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

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

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

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

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

(3) because the defendant has:

(a) Psychopathic personality features; and

(b) Sexually deviant arousal patterns or interests.

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

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

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

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

**(7) The fact that a person is a sexually violent dangerous offender is an enhancement fact, as defined in section 1 of this 2005 Act, and sections 2 to 7 of this 2005 Act apply to making a determination of the fact.**

**SECTION 13.** ORS 40.015, as amended by section 8 of this 2005 Act, is amended to read:  
40.015. (1) The Oregon Evidence Code applies to all courts in this state except for:

(a) A tax court small claims procedure or a hearing or mediation before a magistrate of the Oregon Tax Court as provided by ORS 305.501;

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

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

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

(3) ORS 40.225 to 40.295 relating to privileges apply at all stages of all actions, suits and proceedings.

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

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

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

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

(d) Sentencing proceedings, except proceedings under ORS 138.012 and 163.150[,] **or** as required by ORS 137.090 [*or proceedings under sections 2 to 7 of this 2005 Act*].

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

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

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

(h) Proceedings to determine proper disposition of a child in accordance with ORS 419B.325 (2) and 419C.400 (3).

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

**SECTION 14.** ORS 161.725, as amended by section 9 of this 2005 Act, is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**SECTION 15.** ORS 161.735, as amended by section 10 of this 2005 Act, is amended to read:

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

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

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

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

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

(6) If, after considering **the presentence report, the examination reports and** the evidence in the case or in the presentence hearing, [*the jury or, if the defendant waives the right to a jury trial,*] the court finds that the defendant comes within ORS 161.725, the court may sentence the defendant as a dangerous offender.

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

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

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

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

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

*[(9) The facts required to be found to sentence a defendant as a dangerous offender under this section are enhancement facts, as defined in section 1 of this 2005 Act, and sections 2 to 7 of this 2005 Act apply to making determinations of those facts.]*

**SECTION 16.** ORS 137.765, as amended by section 11 of this 2005 Act, is amended to read:

137.765. (1) As used in this section:

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

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

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

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

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

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

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

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

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

(A) Subjected to forcible compulsion by the person;

(B) Under 12 years of age; or

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

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

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

**SECTION 17.** ORS 137.767, as amended by section 12 of this 2005 Act, is amended to read:

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

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

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

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

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

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

(a) Psychopathic personality features; and

(b) Sexually deviant arousal patterns or interests.

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

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

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

*[(7) The fact that a person is a sexually violent dangerous offender is an enhancement fact, as defined in section 1 of this 2005 Act, and sections 2 to 7 of this 2005 Act apply to making a determination of the fact.]*

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

**SECTION 18.** ORS 136.280 is amended to read:

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

**SECTION 19.** ORS 136.280, as amended by section 18 of this 2005 Act, is amended to read:

136.280. If, before the final submission of the case, any juror dies or is unable to perform the duty because of illness or other cause which the court deems sufficient, the juror shall be dismissed from the case. Except as provided by ORS 163.150, the court shall cause to be drawn the name of an alternate juror, who shall then become a member of the jury as though the alternate juror had been selected as one of the original jurors. [*Except as provided in section 4 (5) of this 2005 Act,*] Any alternate juror not selected to become a member of the jury shall be dismissed from the case upon its final submission to the jury.

**SECTION 20.** (1) Sections 1 to 7 of this 2005 Act are repealed on January 2, 2008.

(2) The amendments to ORS 40.015, 136.280, 137.765, 137.767, 161.725 and 161.735 by sections 13 to 17 and 19 of this 2005 Act become operative on January 2, 2008.

**SECTION 21.** Sections 1 to 7 of this 2005 Act and the amendments to ORS 40.015, 136.280, 137.765, 137.767, 161.725 and 161.735 by sections 8 to 12 and 18 of this 2005 Act apply to:

(1) A criminal action commencing on or after the effective date of this 2005 Act and before January 2, 2008;

(2) A criminal action commencing prior to the effective date of this 2005 Act in which a sentence has not been imposed prior to the effective date of this 2005 Act; and

(3) A case that has been remanded to a trial court that will result in resentencing for which a new sentence has not been imposed prior to the effective date of this 2005 Act.

**SECTION 22.** In order to rely on an enhancement fact, as defined in section 1 of this 2005 Act, to increase the sentence that may be imposed upon remand of a case described in section 21 (3) of this 2005 Act, the state, within a reasonable time before resentencing, shall notify the defendant of its intention to rely on the enhancement fact by providing written notice to the defendant of the enhancement fact and the state's intention to rely on it.

**SECTION 23.** (1) For the purpose of imposing a new sentence in a case that has been remanded to a trial court that will result in resentencing for which a new sentence has not been imposed prior to the effective date of this 2005 Act, the court may impanel a new jury to determine the enhancement facts as defined in section 1 of this 2005 Act. Laws relating to impaneling a jury for a criminal trial apply to impaneling a jury under this section.

(2) Section 7 (3) of this 2005 Act does not apply to a case in which the court has impaneled a new jury under this section. In a case with a jury impaneled under this section, an enhancement fact is not proven unless the number of jurors who find that the state has met its burden of proof with regard to the enhancement fact is equal to or greater than the number of jurors that was required to find the defendant guilty of the crime.

**SECTION 24.** This 2005 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2005 Act takes effect on its passage.

Passed by Senate June 9, 2005

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Secretary of Senate

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President of Senate

Passed by House June 23, 2005

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Speaker of House

Received by Governor:

.....M,....., 2005

Approved:

.....M,....., 2005

.....  
Governor

Filed in Office of Secretary of State:

.....M,....., 2005

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Secretary of State