Chapter 136

2017 EDITION

Criminal Trials

WITNESSES

(Generally)

(Material Witness Order)

(Compelling Witnesses)

(Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings)

(Competency)

(Hypnotized Witnesses)

PROCEDURE TO RELY ON ENHANCEMENT FACT AT SENTENCING

GENERAL PROVISIONS

136.001 Right to jury trial; waiver. (1) The defendant and the state in all criminal prosecutions have the right to public trial by an impartial jury.

(2) Both the defendant and the state may elect to waive trial by jury and consent to a trial by the judge of the court alone, provided that the election of the defendant is in writing and with the consent of the trial judge. [1973 c.836 §221; 1997 c.313 §21]

136.005 Challenge to jury panel. (1) The district attorney or the defendant in a criminal action may challenge the jury panel on the ground that there has been a material departure from the requirements of the law governing selection of jurors by filing a motion with the court supported by an affidavit alleging facts that, if true, constitute a material departure from the requirements of the law governing the selection of jurors. The party making the motion shall serve the motion and supporting affidavit on the other party, the trial court administrator and the State Court Administrator.

(2) A challenge to the panel shall be made before the voir dire examination of the jury.

(3) If the court determines that there has been a material departure from the requirements of the law governing selection of jurors, the court shall:

(a) Stay the proceedings pending the selection of a jury panel in conformity with the applicable provisions of law; and

(b) Grant such other relief as may be appropriate.

(4) The procedures prescribed by this section are the exclusive means by which a district attorney or defendant may challenge a jury panel. [1973 c.836 §222; 2001 c.779 §17]

136.010 When issue of fact arises. An issue of fact arises upon a plea of not guilty. [Amended by 1973 c.836 §223]

136.020 [Repealed by 1973 c.836 §358]

136.030 How issues are tried. An issue of law shall be tried by the judge of the court and an issue of fact by a jury of the county in which the action is triable. [Amended by 1973 c.836 §224]

136.040 When presence of defendant is necessary. (1) If the charge is for a misdemeanor, the trial may be had in the absence of the defendant if the defendant appears by counsel; but if it is for a felony, the defendant shall appear in person.

(2) Notwithstanding the provisions of subsection (1) of this section, if the charge is for a misdemeanor, the trial may be had in the absence of the defendant and defendant's counsel if the misdemeanor is treated as a violation under ORS 161.566 or 161.568. [Amended by 1973 c.836 §225; 1993 c.533 §3; 1999 c.1051 §123]

136.050 Reasonable doubt as to degree of crime committed by defendant. When it appears that the defendant has committed a crime of which there are two or more degrees and there is a reasonable doubt as to the degree of which the defendant is guilty, the defendant can be convicted of the lowest of those degrees only.

136.060 Jointly charged defendants to be tried jointly; exception. (1) Jointly charged defendants shall be tried jointly unless the court concludes before trial that it is clearly inappropriate to do so and orders that a defendant be tried separately. In reaching its conclusion the court shall strongly consider the victim's interest in a joint trial.

(2) In ruling on a motion by a defendant for severance, the court may order the prosecution to deliver to the court for inspection in camera any statements or confessions made by any defendant that the prosecution intends to introduce in evidence at the trial. [Amended by 1983 c.705 §1; 1987 c.2 §6]

136.070 Postponement of trial. When a case is at issue upon a question of fact and before the same is called for trial, the court may, upon sufficient cause shown by the affidavit of the defendant or the statement of the district attorney, direct the trial to be postponed for a reasonable period of time. [Amended by 1959 c.638 §18; 1973 c.836 §226]

136.080 Deposition of witness as condition of postponement. When an application is made for the postponement of a trial, the court may in its discretion require as a condition precedent to granting the same that the party applying therefor consent that the deposition of a witness may be taken and read on the trial of the case. Unless such consent is given, the court may refuse to allow such postponement for any cause.

136.090 Procedure for taking deposition. When the consent mentioned in ORS 136.080 is given, the court shall make an order appointing some proper time and place for taking the deposition of the witness, either by the judge thereof or before some suitable person to be named therein as commissioner and upon either written or oral interrogatories.

136.100 Filing and use of deposition. Upon the making of the order provided in ORS 136.090, the deposition shall be taken and filed in court and may be read on the trial of the case in like manner and with like effect and subject to the same objections as in civil cases.

136.110 Commitment of defendant after release. When a defendant who has been released appears for trial, the court may in its discretion at any time after such appearance order the defendant to be committed to actual custody to abide the judgment or further order of the court; and the defendant shall be committed and held in custody accordingly. [Amended by 1973 c.836 §227]

136.120 Dismissal when prosecutor unready for trial; effect on subsequent prosecution; release of defendant. (1) If the defendant appears at the time set for trial and the prosecuting attorney is not ready and does not show sufficient cause for postponing the trial, the court shall dismiss the accusatory instrument unless the court determines that dismissal is not in the public interest.

(2) If the court dismisses the accusatory instrument under subsection (1) of this section and:

(a) The instrument charges a felony or Class A misdemeanor, the dismissal is not a bar to another action for the same offense unless the court so orders.

(b) The instrument charges an offense other than a felony or Class A misdemeanor, the dismissal shall be a bar to another action for the same offense.

(3) If the dismissal is a bar to another action for the same offense, the court shall follow the procedures described in ORS 135.680 concerning the defendant's release. [Amended by 1973 c.836 §228; 2017 c.529 §5]

136.130 [Amended by 1973 c.836 §229; repealed by 2017 c.529 §26]

136.140 [Amended by 1973 c.836 §230; repealed by 2017 c.529 §26]

136.145 Setting of court dates when presence of victim required. When resetting any trial date or setting any court hearing requiring the presence of the victim, the court shall take the victim into consideration. The court shall inquire of the district attorney as to whether the victim has been informed of the prospective date and whether that date is convenient for the victim. [1987 c.2 §4]

136.150 [Amended by 1963 c.503 §1; repealed by 1971 c.743 §432]

136.160 [Amended by 1965 c.551 §1; repealed by 1971 c.743 §432]

SELECTION OF JURY

136.210 Jury number; examination. (1) Except as provided in subsection (2) of this section, in criminal cases the trial jury shall consist of 12 persons unless the parties consent to a less number. It shall be formed, except as otherwise provided in ORS 136.220 to 136.250, in the same manner provided by ORCP 57 B, D(1)(a), D(1)(b), D(1)(g) and E. When the full number of jurors has been called, they shall thereupon be examined as to their qualifications, first by the court, then by the defendant and then by the state. After they have been passed for cause, peremptory challenges, if any, shall be exercised as provided in ORS 136.230.

(2) In criminal cases in the circuit courts in which the only charges to be tried are misdemeanors, the trial jury shall consist of six persons. [Amended by 1973 c.836 §231; 1979 c.284 §112; 1979 c.488 §2; 1991 c.247 §1; 1995 c.658 §76]

136.220 Challenge for implied bias. A challenge for implied bias shall be allowed for any of the following causes and for no other:

(1) Consanguinity or affinity within the fourth degree to the person alleged to be injured by the offense charged in the accusatory instrument, to the complainant or to the defendant.

(2) Standing in the relation of guardian and ward, attorney and client, physician and patient, naturopathic physician and patient, physician assistant and patient, nurse practitioner and patient, master and servant, debtor and creditor, principal and agent or landlord and tenant with the:

(a) Defendant;

(b) Person alleged to be injured by the offense charged in the accusatory instrument; or

(c) Complainant.

(3) Being a member of the family, a partner in business with or in the employment of any person referred to in subsection (2)(a), (b) or (c) of this section or a surety in the action or otherwise for the defendant.

(4) Having served on the grand jury which found the indictment or on a jury of inquest which inquired into the death of a person whose death is the subject of the indictment or information.

(5) Having been one of a jury formerly sworn in the same action, and whose verdict was set aside or which was discharged without a verdict after the cause was submitted to it.

(6) Having served as a juror in a civil action, suit or proceeding brought against the defendant for substantially the same act charged as an offense.

(7) Having served as a juror in a criminal action upon substantially the same facts, transaction or criminal episode. [Amended by 1961 c.444 §1; 1967 c.372 §1; 1973 c.836 §232; 1999 c.1051 §252; 2014 c.45 §22; 2017 c.356 §15]

136.230 Peremptory challenges. (1) If the trial is upon an accusatory instrument in which one or more of the crimes charged is punishable with imprisonment in a Department of Corrections institution for life or is a capital offense, both the defendant and the state are entitled to 12 peremptory challenges, and no more. In any trial before more than six jurors, both are entitled to six. In any trial before six jurors, both are entitled to three.

(2) Peremptory challenges shall be taken in writing by secret ballot as follows:

(a) The defendant may challenge two jurors and the state may challenge two, and so alternating, the defendant exercising two challenges and the state two until the peremptory challenges are exhausted.

(b) After each challenge the panel shall be filled and the additional juror passed for cause before another peremptory challenge is exercised. Neither party shall be required to exercise a peremptory challenge unless the full number of jurors is in the jury box at the time.

(c) The refusal to challenge by either party in order of alternation does not prevent the adverse party from exercising that adverse party's full number of challenges, and such refusal on the part of a party to exercise a challenge in proper turn concludes that party as to the jurors once accepted by that party. If that party's right of peremptory challenge is not exhausted, that party's further challenges shall be confined, in that party's proper turn, to such additional jurors as may be called.

(3) Notwithstanding subsection (2) of this section, the defendant and the state may stipulate to taking peremptory challenges orally.

(4) Peremptory challenges are subject to ORCP 57 D(4). [Amended by 1973 c.836 §233; 1977 c.63 §1; 1987 c.2 §7; 1987 c.320 §26; 1995 c.530 §2; 1997 c.801 §70]

136.240 Challenge of accepted juror. If the peremptory challenges of the moving party are not already exhausted, the court may for good cause shown permit a challenge to be taken to any juror before the jury is completed and sworn, notwithstanding the juror challenged may have been theretofore accepted.

136.250 Taking of challenges; number of challenges if two or more defendants. All peremptory challenges may be taken by the state or defendant, but when several defendants are tried together, the defendants are entitled to the number of challenges they would have had if each defendant had been tried separately. When two or more defendants are tried together, the state is entitled to the same total number of peremptory challenges as the sum of the peremptory challenges the defendants could have exercised. [Amended by 1973 c.836 §234; 1997 c.511 §2]

136.260 Selection of alternate jurors; peremptory challenges. (1)(a) In the trial of a person charged with a crime, the court may in its discretion direct the calling of additional jurors, to be known as "alternate jurors." The court may call:

(A) One to six additional jurors if the person is charged with a felony; and

(B) One to three additional jurors if the person is charged with a misdemeanor.

(b) Jurors called under paragraph (a) of this subsection:

(A) Must be drawn from the same source and in the same manner and must have the same qualifications as other jurors in the case.

(B) Are subject to the same examination and may be challenged in the same manner as other jurors.

(c) In the drawing of alternate jurors, the names of jurors excused for cause or on peremptory challenges in the selection of the jury to which the jurors shall serve as alternates must be excluded from the names from which the drawing is made.

(2) Each side is entitled to the following peremptory challenges in addition to those otherwise allowed by statute:

(a) If one or two alternate jurors are to be impaneled, each side is entitled to one peremptory challenge.

(b) If three or four alternate jurors are to be impaneled, each side is entitled to two peremptory challenges.

(c) If five or six alternate jurors are to be impaneled, each side is entitled to three peremptory challenges.

(3) The court has discretion to decide:

(a) When and in what manner the alternate jurors are selected;

(b) When and in what manner the additional peremptory challenges described in subsection (2) of this section may be used; and

(c) When and in what manner the alternate jurors are informed of their status as alternate jurors. [Amended by 1991 c.725 §1; 2003 c.358 §1; 2017 c.359 §1]

136.270 Oath, conduct and attendance of alternate jurors at trial. Alternate jurors shall take the same oath and shall be subject to the same laws, orders and rules, including any order preventing the separation of the jury during the trial, shall be seated near the other jurors in the case, with

equal opportunity and facilities for seeing and hearing the proceedings and shall attend at all times upon the trial of the case in company with the other jurors.

136.280 Substitution of alternate for discharged juror; retention and discharge of alternates. (1) If, before the final submission of the case, any juror dies or is unable to perform the duty because of illness or other sufficient cause, the court shall discharge the juror from the case. The court shall draw the name of an alternate juror, who shall then become a member of the jury, replacing the discharged juror as though the alternate juror had been selected as one of the original jurors.

(2) If, after the jury has begun deliberations, any juror dies or is unable to perform the duty because of illness or other sufficient cause, the court shall discharge the juror from the case and may draw the name of an alternate juror to replace the discharged juror if:

(a) An alternate juror is available and has not yet been discharged; and

(b) Both parties agreed to the substitution after the jury was selected but prior to the beginning of the trial.

(3) If an alternate juror replaces a juror under this section after deliberations have begun, the court shall instruct the jury to begin deliberations anew.

(4) The court may retain alternate jurors after the case is submitted to the jury to replace jurors as provided in subsection (2) of this section. An alternate juror retained under this subsection shall not attend or otherwise participate in deliberations unless the alternate juror is selected to replace a juror.

(5) An alternate juror who does not replace a juror as provided in subsection (1) or (2) of this section and who is not retained as provided in subsection (4) of this section shall be discharged after deliberations have begun. [Amended by 1991 c.725 §3; 2005 c.463 §§18,19; 2007 c.16 §8; 2017 c.359 §2]

SCHEDULING OF TRIAL

136.285 Priority in trial schedule for defendants in custody. The court shall endeavor to schedule trial dates for defendants in custody before defendants who have been released pending trial, subject however to rights of all defendants to be tried without unreasonable delay. [1971 c.323 §2]

136.290 Limit on custody of defendant prior to trial; release if limit exceeded. (1) Except as provided in ORS 136.295, a defendant shall not remain in custody pending commencement of the trial of the defendant more than 60 days after the time of arrest unless the trial is continued with the express consent of the defendant. Absent the consent of the defendant or an extension under ORS 136.295, the court shall order that the trial of the defendant commence within 60 days after arrest if the state is prepared to proceed to trial.

(2) If a trial is not commenced within the period required by subsection (1) of this section, the court shall release the defendant on the own recognizance of the defendant, or in the custody of a third party, or upon whatever additional reasonable terms and conditions the court deems just as provided in ORS 135.230 to 135.290. [1971 c.323 §§3,4; 1973 c.836 §235; 1999 c.923 §1; amendments by 1999 c.923 §3 repealed by 2001 c.870 §19]

136.295 Application of ORS 136.290; when extensions granted. (1) ORS 136.290 does not apply to persons charged with crimes that are not releasable offenses under ORS 135.240 or to persons charged with conspiracy to commit murder, or charged with attempted murder, or to prisoners serving sentences resulting from prior convictions.

(2)(a) If the defendant is extradited from another jurisdiction, the 60-day period shall not commence until the defendant enters the State of Oregon, provided that law enforcement authorities from the other jurisdiction and this state have conducted the extradition with all practicable speed. The original 60-day period shall not be extended more than an additional 60 days, except where delay has been caused by the defendant in opposing the extradition.

(b) For purposes of this subsection, an extradition is presumed to have been conducted with all practicable speed if it has been conducted within 90 days after the date the defendant has been delivered to an agent of this state.

(3) Any reasonable delay resulting from examination or hearing regarding the defendant's mental condition or competency to stand trial, or resulting from other motion or appeal by the defendant, shall not be included in the 60-day period.

(4)(a) If a victim or witness to the crime in question is unable to testify within the original 60-day period because of injuries received at the time the alleged crime was committed or upon a showing of good cause, the court may order an extension of custody and postponement of the date of the trial of not more than 60 additional days. The court, for the same reason, may order a second extension of custody and postponement of the date of the trial of not more than 60 days, but in no event shall the defendant be held in custody before trial for more than a total of 180 days. A court may grant an extension based upon good cause as described in para-

graph (b)(C), (D) or (E) of this subsection only if requested by the defendant or defense counsel or by the court on its own motion.

(b) As used in this subsection, "good cause" means situations in which:

(A) The court failed to comply with ORS 136.145 and the victim is unable to attend the trial;

(B) The victim or an essential witness for either the state or the defense is unable to testify at the trial because of circumstances beyond the control of the victim or witness;

(C) The attorney for the defendant cannot reasonably be expected to try the case within the 60-day period;

(D) The attorney for the defendant has recently been appointed and cannot be ready to try the case within the 60-day period;

(E) The attorney for the defendant is unable to try the case within the 60-day period because of conflicting schedules;

(F) Scientific evidence is necessary and because of the complexity of the procedures it would be unreasonable to have the procedures completed within the 60-day period;

(G) The defendant has filed notice under ORS 161.309 of the defendant's intention to rely upon a defense of insanity, partial responsibility or diminished capacity;

(H) The defendant has filed any notice of an affirmative defense within the last 20 days of the 60-day period;

(I) A claim under ORS 147.515, or a motion under ORS 147.522, relating to victims' rights is pending, the court has considered the factors described in ORS 147.525 and the court has determined that the trial date should be rescheduled subject to the time limit provided in ORS 147.525; or

(J) The defendant has received discovery of digital video evidence from a video camera worn upon a law enforcement officer's person and, though discovery has occurred in a reasonably timely manner, editing of the digital video evidence is necessary.

(5) Any period following defendant's arrest in which the defendant is not actually in custody shall not be included in the 60-day computation. [1971 c.323 §5; 1973 c.836 §236; 1999 c.923 §2; amendments by 1999 c.923 §4 repealed by 2001 c.870 §19; 2003 c.127 §3; 2009 c.178 §34; 2009 c.357 §1; 2015 c.550 §4]

136.300 Time limit on appeals to circuit court. A defendant who is in custody pending an appeal to circuit court from a judgment of a municipal court or justice court shall have the appeal of the defendant heard not more than 60 days after the defendant gives notice of appeal. [1971 c.323 §6; 1977 c.290 §3]

CONDUCT OF TRIAL

136.310 Function of court; effect of judicial notice of a fact. All questions of law, including the admissibility of testimony, the facts preliminary to such admission and the construction of statutes and other writings and other rules of evidence shall be decided by the court. All discussions of law shall be addressed to it. Whenever the knowledge of the court is by statute made evidence of a fact, the court shall declare such knowledge to the jury, which is bound to accept it as conclusive, except as provided in ORS 40.085. [Amended by 1983 c.433 §4]

136.320 Function of jury; jury to receive law as laid down by court. Although the jury may find a general verdict, which includes questions of law as well as fact, it is bound, nevertheless, to receive as law what is laid down as such by the court; but all questions of fact, other than those mentioned in ORS 136.310, shall be decided by the jury, and all evidence thereon addressed to it.

136.325 Jury not to be informed of and not to consider punishment that may be imposed. Except as required in ORS 161.313 and 163.150, the jury in a criminal proceeding may not be informed of, and may not consider, any punishment that the court may impose if the defendant is convicted of the charge. [1997 c.852 §10]

Note: 136.325 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.330 Trial procedure; polling jurors in writing. (1) ORS 10.100 and ORCP 58 B, C and D and 59 B through F and G(1), (3), (4) and (5), apply to and regulate the conduct of the trial of criminal actions. The jury in a criminal action may, in the discretion of the court, be polled in writing. If the jury is polled in writing, the written results shall be sealed and placed in the court record.

(2) ORCP 59 H applies to and regulates exceptions in criminal actions. [Amended by 1959 c.558 §31; 1979 c.284 §113; 1985 c.703 §27]

136.340 [Repealed by 1973 c.836 §358]

136.345 When attendance of woman officer is required. Whenever any woman or girl is interrogated with reference to the commission of any sexual crime, is accused of or charged with the commission of any sexual crime before any committing magistrate and is taken into custody therefor, or is called as a witness at a hearing before a committing magistrate with reference to any such class of crimes, and whether such crime has been committed by her or by some other person, she shall only be orally examined by or in the presence of a woman officer, ap-

pointed as provided in ORS 136.347. [Formerly 133.770]

136.347 Appointment, duties and compensation of woman officer. The court or officer before whom any female person mentioned in ORS 136.345 is interrogated, taken into custody or called as a witness, shall appoint some suitable female person who shall conduct or be present at the examination of such accused person or witness or receive or be present at the receiving or making of any confession or statement which such accused person or witness desires to make. The compensation of any such person, when so appointed, shall be paid out of the general funds of the county wherein such proceeding is had by the county treasurer of the county, upon vouchers signed by the judge of the court or the officer making such appointment, which vouchers shall certify the nature and extent of the services performed and the amount of compensation due the person in whose favor the same is drawn. [Formerly 133.780]

136.350 [Repealed by 1973 c.836 §358]

136.360 [Repealed by 1961 c.288 §2]

136.370 [Repealed by 1961 c.288 §2]

136.380 [Repealed by 1961 c.288 §2]

136.390 [Amended by 1957 c.380 §1; repealed by 1971 c.743 §432]

136.400 [Repealed by 1971 c.743 §432]

136.410 [Repealed by 1971 c.743 §432]

EVIDENCE

136.415 Presumption of innocence; acquittal in case of reasonable doubt. A defendant in a criminal action is presumed to be innocent until the contrary is proved. In case of a reasonable doubt whether the guilt of the defendant is satisfactorily shown, the defendant is entitled to be acquitted. [Formerly 136.520]

136.420 Testimony to be given orally in court; exceptions. In a criminal action, the testimony of a witness shall be given orally in the presence of the court and jury, except:

(1) In the case of a witness whose testimony is taken by deposition by order of the court in pursuance of the consent of the parties, as provided in ORS 136.080 to 136.100; or

(2) As provided in ORS 131.045. [Formerly 136.530; 2009 c.219 §1]

136.425 Confessions and admissions; corroboration; defendant's conduct in relation to declaration or act of another. (1) A confession or admission of a defendant, whether in the course of judicial proceedings or otherwise, cannot be given in evidence against the defendant when it was made under the influence of fear produced by threats.

(2) Except as provided in ORS 136.427, a confession alone is not sufficient to warrant the conviction of the defendant without some other proof that the crime has been committed.

(3) Evidence of a defendant's conduct in relation to a declaration or act of another, in the presence and within the observation of the defendant, cannot be given when the defendant's conduct occurred while the defendant was in the custody of a peace officer unless the defendant's conduct affirmatively indicated the belief of the defendant in the truth of the matter stated or implied in the declaration or act of the other person. [Formerly 136.540; 2009 c.875 §1]

136.427 Confessions; corroboration not required; notice; hearing. (1) A confession alone is sufficient to warrant the conviction of the defendant without some other proof that the crime has been committed if:

(a) The state files notice in accordance with subsection (3) of this section;

(b) The defendant is charged with a crime listed in ORS 163A.005;

(c) The victim of the crime is a vulnerable person;

(d) The victim is incompetent to testify under ORS 40.310;

(e) The confession is made to a peace officer or a federal officer, as those terms are defined in ORS 133.005, or to an individual conducting an investigation under ORS 430.745, while the officer or individual is acting in the course of official duty; and

(f) The court finds that there is sufficient evidence to establish the trustworthiness of the confession.

(2) In making the determination described in subsection (1)(f) of this section, the court shall consider the following factors, in addition to other factors the court considers important:

(a) Whether there is evidence demonstrating the truthfulness of portions of the confession;

(b) Whether the defendant had the opportunity to commit the crime;

(c) The method of interrogation used to solicit the confession; and

(d) Whether the defendant is a vulnerable person.

(3) The state shall file notice of the intention to rely on this section within 60 days of the arraignment, or of the defendant's entry of the initial plea on an accusatory instrument, whichever is sooner. The court shall grant the state an extension for good cause shown.

(4) When the state files the notice described in subsection (3) of this section, the court shall conduct a hearing prior to trial. After the hearing, the court shall enter an order that indicates whether the confession alone is sufficient to warrant the conviction of the defendant without some other proof that the crime has been committed.

(5) As used in this section:

(a) "Activities of daily living" includes dressing, eating, toileting, bathing, exercising appropriate personal hygiene practices and moving from place to place.

(b) "Vulnerable person" means:

(A) A person under 18 years of age;

(B) A person 65 years of age or older;

(C) A person who meets the medical criteria for the receipt of services from a community program or facility as those terms are defined in ORS 430.735;

(D) A person with a developmental disability as that term is defined in ORS 40.460 (18a)(d); or

(E) A person who, as the result of a diagnosed medical condition, requires assistance in two or more activities of daily living. [2009 c.875 §2]

Note: 136.427 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.430 Civil laws of evidence in criminal trials; exceptions. The law of evidence in civil actions is also the law of evidence in criminal actions and proceedings, except as otherwise specifically provided in the statutes relating to crimes and criminal procedure. [Formerly 136.510]

136.432 Limitation on court's authority to exclude relevant evidence. A court may not exclude relevant and otherwise admissible evidence in a criminal action on the grounds that it was obtained in violation of any statutory provision unless exclusion of the evidence is required by:

(1) The United States Constitution or the Oregon Constitution;

(2) The rules of evidence governing privileges and the admission of hearsay; or

(3) The rights of the press. [1997 c.313 §1]

Note: 136.432 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.433 Proving previous conviction; stipulation; presentation to jury. (1) Except as provided in ORS 163.103 and 813.326, if an accusatory instrument or the written notice described in ORS 136.765 (2) alleges that the defendant has previously been convicted of an offense, the state has the burden of proving the previous conviction unless the defendant stipulates to that fact. The stipulation must:

(a) Be in writing;

(b) Admit without qualification that the defendant previously was convicted of the offense and that the conviction is valid;

(c) Include an express waiver of the defendant's right to a jury trial on the fact of the previous conviction; and

(d) Be filed with the court and served on the district attorney.

(2) If the defendant submits a stipulation to a previous conviction that meets the requirements of subsection (1) of this section, the court shall accept the stipulation. Upon acceptance:

(a) The stipulation constitutes a judicial admission to the fact of the previous conviction;

(b) If the previous conviction is a material element of the offense and the jury finds the defendant guilty upon instruction regarding the balance of the elements of the offense, the court shall enter a judgment of guilt on the charged offense in accordance with the stipulation;

(c) Except as provided in subsection (3) of this section, the court may not submit the allegation of the previous conviction to the jury; and

(d) Except as provided in subsections (3) and (4) of this section, neither the court nor the state may reveal to the jury the defendant's previous conviction.

(3)(a) A stipulation that is accepted by the court must be presented to the jury if:

(A) The statute that defines the charged offense includes as a material element that the defendant previously was convicted of the offense that is the subject of the stipulation and the charged conduct does not constitute a criminal offense except with that element; or

(B) The previous conviction is relevant to an enhancement fact that will be submitted to the jury in accordance with ORS 136.765 to 136.785.

(b) Except as provided in subsection (4) of this section, when the court presents a stipulation to the jury under this subsection, the court may not admit any other evidence of the previous conviction.

(4) The state may offer, and the court may receive and submit to the jury, evidence of the previous offense or conviction for any purpose other than establishing the fact of the previous conviction when the evidence

of the previous offense or conviction is otherwise admissible for that purpose. When evidence of the previous offense or conviction has been admitted by the court, the state may comment upon, and the court may give instructions about, the evidence of the previous offense or conviction only to the extent that the comments or instructions relate to the purpose for which the evidence was admitted. [2009 c.180 §2]

Note: 136.433 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.434 Challenge to validity of previous conviction. (1) Except as provided in ORS 813.328, if an accusatory instrument or the written notice described in ORS 136.765 (2) alleges that the defendant has previously been convicted of an offense, the defendant may challenge the validity of the previous conviction by filing a notice of the defendant's intent to do so. The notice must:

(a) Identify the previous conviction that the defendant seeks to challenge;

(b) Specify the factual and legal basis for the challenge; and

(c) Be filed with the court and served on the district attorney within 35 days of the arraignment, or of the defendant's entry of the initial plea on an accusatory instrument, whichever is sooner, unless a different time is permitted by the court for good cause shown.

(2) The validity of the previous conviction shall be determined by the court before trial. At the hearing on the defendant's challenge:

(a) The state has the burden of proving by a preponderance of the evidence that the defendant previously was convicted of the offense; and

(b) The defendant has the burden of proving by a preponderance of the evidence that the previous conviction is not valid.

(3) If the court determines that the defendant was not previously convicted of the offense that is the subject of the challenge or that the previous conviction is not valid, the court shall enter an order prior to trial that so provides and excludes evidence of the previous conviction. The state may appeal from the order pursuant to ORS 138.045 (1)(d).

(4) If the court determines that the defendant previously was convicted of the offense and that the conviction is valid, or if the defendant does not file and serve a notice under subsection (1) of this section, the previous conviction shall be admitted at trial or, if the previous conviction is relevant to an enhancement fact described in ORS 136.770 (4) or 136.773 (1), during the sentencing phase of the proceeding. If the previous conviction is admitted, the defendant may dispute whether the defendant previously was convicted of the alleged offense but may not challenge the validity of the conviction. If the previous conviction is a material element of the charged offense or is an enhancement fact, the state must prove the previous conviction beyond a reasonable doubt unless the defendant stipulates to the fact of the previous conviction in accordance with ORS 136.433.

(5) For purposes of this section, a previous conviction is not valid if:

(a) In the proceedings resulting in the conviction, the defendant was not represented by counsel and was deprived of the right to counsel in violation of the state or federal Constitution and the defendant is entitled under either Constitution to challenge the validity of the prior conviction in the proceeding before the court.

(b) Before the defendant committed the charged offense, the previous conviction was vacated by the court of conviction, reversed or set aside by a court of competent jurisdiction, expunged or pardoned. [2009 c.180 §3; 2017 c.529 §22]

Note: 136.434 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.435 Admissibility of evidence from felony defendant not informed as required under ORS 135.070. Evidence obtained directly or indirectly as a result of failure of a magistrate to comply with ORS 135.070 shall not be admissible, over the objection of the defendant, in any court. [Formerly 136.545]

136.440 Testimony of accomplice; corroboration; "accomplice" defined. (1) A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by other evidence that tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense or the circumstances of the commission.

(2) As used in this section, an "accomplice" means a witness in a criminal action who, according to the evidence adduced in the action, is criminally liable for the conduct of the defendant under ORS 161.155 and 161.165, or, if the witness is a juvenile, has committed a delinquent act, which, if committed by an adult, would make the adult criminally liable for the conduct of the defendant. [Formerly 136.550]

136.445 Motion for acquittal; standard for granting motion; effect. In any criminal action the defendant may, after close of the state's evidence or of all the evidence, move the court for a judgment of acquittal. The court shall grant the motion if the evidence introduced theretofore is such as would not support a verdict against the defendant. The acquittal shall be a bar to another prosecution for the same offense. [Formerly 136.605]

136.447 Medical records. Medical records may be obtained by subpoena as provided in ORCP 55 H and shall be sent only to the court or the clerk of the court before which the matter is pending. In relation to grand jury proceedings, notice need not be given as required in ORCP 55 H and the medical records shall be sent only to the grand jury. [1995 c.196 §2]

VERDICT AND JUDGMENT

136.450 Number of jurors required for verdict. (1) Except as otherwise provided in subsection (2) of this section, the verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors.

(2) Except when the state requests a unanimous verdict, a verdict of guilty for murder or aggravated murder shall be by concurrence of at least 11 of 12 jurors. [Formerly 136.610; 1997 c.313 §25]

136.455 General verdict on plea of not guilty. A general verdict upon a plea of not guilty is either "guilty," of an offense charged in the accusatory instrument, or "not guilty." [Formerly 136.620]

136.460 Verdict where crime consists of degrees; lesser included offenses. (1) Upon a charge for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the accusatory instrument and guilty of any degree inferior thereto or of an attempt to commit the crime or any such inferior degree thereof.

(2) The jury shall first consider the charged offense. Only if the jury finds the defendant not guilty of the charged offense may the jury consider a lesser included offense. If there is more than one lesser included offense, the jury shall consider the lesser included offenses in order of seriousness. The jury may consider a less serious lesser included offense only after finding the defendant not guilty of any more serious lesser included offenses.

(3) When a jury finds a defendant guilty of a lesser included offense, the court, upon a request by the state or defendant, shall poll the jury on the original charge. If fewer than the required number of jurors vote to find the defendant not guilty on the original charge, the court shall not receive the verdict and shall instruct the jury to continue deliberations.

(4) If the jury is unable to reach a decision on the original charge, the state and defendant may stipulate that the jury may consider any lesser included offense. [Formerly 136.650; 1997 c.511 §1]

136.465 Verdict where crime or attempt included within charge. In all cases, the defendant may be found guilty of any crime the commission of which is necessarily included in that with which the defendant is charged in the accusatory instrument or of an attempt to commit such crime. [Formerly 136.660]

136.470 Conviction or acquittal of one or more of several defendants. Upon an accusatory instrument against several defendants, any one or more may be convicted or acquitted. [Formerly 136.670]

136.475 Verdict as to some of several defendants; retrial of others. Upon an accusatory instrument against several defendants, if the jury cannot agree upon a verdict as to all, it may give a verdict as to those in regard to whom it does agree, on which a judgment shall be given accordingly. The case as to the rest of the defendants may be tried by another jury. [Formerly 136.680]

136.480 Reconsideration of verdict when jury makes mistake as to law. When a verdict is found in which it appears to the court that the jury has mistaken the law, the court may explain the reason for that opinion and direct the jury to reconsider its verdict; but if after such reconsideration the jury finds the same verdict, it must be received. [Formerly 136.690]

136.485 Reconsideration of verdict which is not general verdict. If the jury finds a verdict which is not a general verdict, the court may, with proper instructions as to the law, direct the jury to reconsider it; and the verdict cannot be received until it is given in some form from which it can be clearly understood that the intent of the jury is to render a general verdict. [Formerly 136.700]

136.490 Discharge of defendant upon acquittal; exception. If judgment of acquittal is given on a general verdict and the defendant is not detained for any other legal cause, the defendant shall be discharged as soon as the judgment is given, except that, when the acquittal is for variance between the proof and the accusatory instrument, which may be obviated by a new accusatory instrument, the court may order the detention of the defendant, to the end that a new accusatory instrument may be preferred,

in the same manner and with like effect, as provided in ORS 135.540. [Formerly 136.710]

136.495 Proceedings after adverse general verdict. If a general verdict against the defendant is given, the defendant shall be remanded, if in custody; if the defendant has been released, the defendant may be committed to await the judgment of the court upon the verdict. When committed, the release agreement of the defendant is exonerated or, if the defendant has deposited money in lieu of a release agreement, it shall be refunded to the defendant. [Formerly 136.720]

MOTION IN ARREST OF JUDGMENT; NEW TRIAL

136.500 Motion in arrest of judgment; basis and time for making. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty. It may be founded on either or both of the grounds specified in ORS 135.630 (1) and (4), and not otherwise. The motion must be made within the time allowed to file a motion for a new trial, and both such motions may be made and heard as the court directs. [Formerly 136.810]

136.505 Effect of allowance of motion. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which the defendant was before indictment was found. [Formerly 136.820]

136.510 [Amended by 1973 c.836 §237; renumbered 136.430]

136.515 Order when evidence shows guilt; new accusatory instrument. If, from the evidence given on the trial, there is reasonable ground to believe the defendant guilty and a new accusatory instrument can be framed upon which the defendant may be convicted, the court shall order the defendant to be recommitted to custody or released and to answer the new accusatory instrument, if one is found; and if the evidence shows the defendant to be guilty of another offense than that charged in the accusatory instrument, the defendant shall in like manner be committed or held thereon. In neither case is the verdict a bar to another action for the same crime. [Formerly 136.830]

136.520 [Renumbered 136.415]

136.525 Order when evidence is insufficient; acquittal. If the evidence appears insufficient to charge the defendant with any offense, the defendant shall, if in custody, be discharged or, if the defendant has been released or deposited money in lieu thereof, the release agreement of the defendant is exonerated or the money of the defendant shall be refunded to the defendant; and in such case, the arrest of judgment operates as an acquittal of the charge upon which the accusatory instrument was founded. [Formerly 136.840]

136.530 [Renumbered 136.420]

136.535 New trial; application of ORCP 64 F to motion in arrest of judgment. (1) Except that a new trial may not be granted on application of the state, ORS 19.430 and ORCP 64 A, B and D to G apply to and regulate new trials in criminal actions.

(2) The provisions of ORCP 64 F governing motions for a new trial apply to and regulate motions in arrest of judgment in criminal actions. [Formerly 136.851; 1979 c.284 §114; 2003 c.288 §1; 2009 c.112 §1]

136.540 [Amended by 1957 c.567 §1; renumbered 136.425]

136.545 [1963 c.511 §2; 1973 c.836 §238; renumbered 136.435]

136.550 [Amended by 1973 c.836 §239; renumbered 136.440]

WITNESSES

(Generally)

136.555 Subpoena defined. The process by which the attendance of a witness before a court or magistrate is required is a subpoena. [Formerly 139.010]

136.557 Issuance of subpoena by magistrate for witnesses at preliminary examination. A magistrate before whom an information is laid or complaint made may issue subpoenas subscribed by the magistrate for witnesses within the state, either on behalf of the state or of the defendant. [Formerly 139.020]

136.560 [Amended by 1957 c.551 §1; 1959 c.302 §1; repealed by 1971 c.743 §432]

136.563 Issuance of subpoena by district attorney for witnesses before grand jury. The district attorney may issue subpoenas subscribed by the district attorney for witnesses within the state in support of the prosecution or for such other witnesses as the grand jury directs to appear before the grand jury upon an investigation pending before it. [Formerly 139.030]

136.565 Issuance of subpoena by district attorney for witnesses at trial. The district attorney may issue subpoenas subscribed by the district attorney for not to exceed 10 witnesses within the state in support of an indictment to appear before the court at which it is to be tried. [Formerly 139.040]

136.567 Issuance of subpoena for witnesses for defendant; bar to dismissal. (1) A defendant in a criminal action is entitled, at the expense of the state or city, to have subpoenas issued for not to exceed 10 witnesses within the state. A defendant is entitled, at the expense of the defendant, to have

subpoenas issued for any number of additional witnesses without an order of the court. The defendant is responsible for the costs of serving the subpoenas and for the costs, as provided in ORS 136.602, of witness per diem and mileage and for expenses allowed under ORS 136.603.

(2) Any subpoena that a defendant in a criminal action is entitled to have issued shall be issued:

(a) Upon application of the defendant, by the clerk of the court in which the criminal action is pending for trial, and in blank, under the seal of the court and subscribed by the clerk; or

(b) By an attorney of record of the defendant, and subscribed by the attorney.

(3) A prosecution for violation of ORS 813.010 may not be dismissed based solely on the unavailability of a witness who was subpoenaed by the defendant to provide testimony with respect to an instrument that was used to test a person's breath, blood or urine to determine the alcoholic content of the person's blood. This subsection does not apply to the subpoena of an officer or employee of a public body, as defined in ORS 174.109. [Formerly 139.050; 1977 c.746 §4; 1981 c.174 §1; 1987 c.606 §2; 1989 c.171 §17; 2007 c.581 §3]

136.570 Application for subpoenas for more than 10 witnesses. If either party in a criminal action desires more than 10 witnesses, as provided in ORS 136.565 and 136.567, application therefor shall be made to the court or judge thereof by motion for an order allowing the issuance of subpoenas for such additional witnesses, which motion shall be supported either by the statement of the district attorney or city attorney in writing or by the affidavit of the defendant. The statement or affidavit shall state the names of such witnesses, their places of residence and the facts expected to be proved by each of them. The court or judge thereof shall make an order allowing the issuance of subpoenas for so many of such witnesses as appear from such statement or affidavit to be necessary and material to a fair, full and impartial trial. [Formerly 139.060; 1977 c.746 §5]

136.575 Forms of subpoenas. Subpoenas authorized by ORS 136.557 to 136.567 shall be substantially in the following form:

(1) By a magistrate:

IN THE NAME OF THE
STATE OF OREGON
(or CITY OF _____)

To A_____ B_____:

You are hereby commanded to appear before C. D., (adding the name of office and place of jurisdiction), at (naming the place), on (stating the day and hour), as a witness on the examination of a criminal charge against E. F. on behalf of (the state, city or the defendant, as the case may be).

Dated the ____ day of _____, 2____.

G. H.

(Adding the name of office and place of jurisdiction, as in the body of the subpoena.)

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(2) By the district attorney:

IN THE NAME OF THE
STATE OF OREGON

To A_____ B_____:

You are hereby commanded to appear before (the grand jury of the County of _____ or the Circuit Court for the County of _____, as the case may be), at (naming the place), on (stating the day and hour), as a witness (before the grand jury or in a criminal action prosecuted by the State of Oregon against E. F., as the case may be).

Dated the ____ day of _____, 2____.

G. H., District Attorney.

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(3) By the city attorney:

IN THE NAME OF THE
CITY OF _____

To A_____ B_____:

You are hereby commanded to appear before the Municipal Court for the City of _____, at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the City of _____ against E. F.

Dated the ____ day of _____, 2____.

G. H., City Attorney.

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(4) By the clerk:

IN THE NAME OF THE
STATE OF OREGON

To A_____ B_____:

You are hereby commanded to appear before the Circuit Court for the County of _____ at (naming the place), on (stating the day and hour), as a witness in a criminal

action prosecuted by the State of Oregon against E. F. on behalf of the defendant.

Witness my name and the seal of said court, affixed at _____, the ____ day of _____, 2____.

G. H., Clerk.

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(5) By the clerk of a municipal court:

IN THE NAME OF THE
CITY OF _____

To A_____ B_____:

You are hereby commanded to appear before the Municipal Court for the City of _____ at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the City of _____ against E. F. on behalf of the defendant.

Witness my name and seal of said court, affixed at _____, the ____ day of _____, 2____.

G. H., Clerk.

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(6) By an attorney of record of a defendant:

IN THE NAME OF THE
STATE OF OREGON
(or CITY OF _____)

To A_____ B_____:

You are hereby commanded to appear before (the Circuit Court for the County of _____ or the Municipal Court for the City of _____, as the case may be) at (naming the place), on (stating the day and hour), as a witness in a criminal action prosecuted by the (State of Oregon or the City of _____, as the case may be) against E. F. on behalf of the defendant.

Dated the ____ day of _____, 2____.

G. H., Attorney of Record of Defendant.

[Formerly 139.070; 1977 c.746 §6; 1981 c.174 §2]

136.580 Subpoenas when books, papers or documents are required. (1) If books, papers or documents are required, a direction to the following effect shall be added to the form provided in ORS 136.575: "And you are required, also, to bring with you the following: (describing intelligibly the books, papers or documents required)."

(2) Upon the motion of the state or the defendant, the court may direct that the books, papers or documents described in the subpoena be produced before the court prior to the trial or prior to the time when the books, papers or documents are to be offered in evidence and may, upon production, permit the books, papers or documents to be inspected and copied by the state or the defendant and the state's or the defendant's attorneys. [Formerly 139.080; 1993 c.304 §1]

136.583 Seizure or production of papers, documents or records from recipient; notice; authentication. (1) Notwithstanding ORS 136.557, 136.563, 136.565 or 136.567 and subject to ORS 136.580 (2), criminal process authorizing or commanding the seizure or production of papers, documents, records or other things may be issued to a recipient, regardless of whether the recipient or the papers, documents, records or things are located within this state, if:

(a) The criminal matter is triable in Oregon under ORS 131.205 to 131.235; and

(b) The exercise of jurisdiction over the recipient is not inconsistent with the Constitution of this state or the Constitution of the United States.

(2) Criminal process that authorizes or commands the seizure or production of papers, documents, records or other things from a recipient may be served by:

(a) Delivering a copy to the recipient personally; or

(b) Sending a copy by:

(A) Certified or registered mail, return receipt requested;

(B) Express mail; or

(C) Facsimile or electronic transmission, if the copy is sent in a manner that provides proof of delivery.

(3) When criminal process is served under subsection (2) of this section, the recipient shall provide the applicant, or if the process is described in ORS 136.447 or 136.580 (2), the court, with all of the papers, documents, records or other things described in the criminal process within 20 business days from the date the criminal process is received, unless:

(a) The court, for good cause shown, includes in the process a requirement for production within a period of time that is less than 20 business days;

(b) The court, for good cause shown, extends the time for production to a period of time that is more than 20 business days; or

(c) The applicant consents to a request from the recipient for additional time to comply with the process.

(4) A recipient who seeks to quash or otherwise challenge the criminal process must seek relief from the court that issued the process within the time required for production. The court shall hear and decide the issue as soon as practicable. The consent of the applicant to additional time to comply with the process under subsection (3)(c) of this section does not extend the date by which a recipient must seek relief under this subsection.

(5) Criminal process issued under this section must contain a notice on the first page of the document that indicates:

(a) That the process was issued under this section;

(b) The date before which the recipient must respond to the process; and

(c) That the deadline for seeking relief is not altered by the applicant's consent to additional time to respond to the process.

(6) Upon order of the court or the written request of the applicant, the recipient of the process shall verify the authenticity of the papers, documents, records or other things that the recipient produces in response to the criminal process by providing an affidavit or declaration that includes contact information for the custodian or other qualified person completing the document and attests to the nature of the papers, documents, records or other things. An affidavit or declaration that complies with this subsection may fulfill the requirements of ORS 40.460 (6), 40.505 and 132.320.

(7) A party that intends to offer a paper, document, record or other thing into evidence under this section must file written notice of that intention with the court and must disclose the affidavit or declaration sufficiently in advance of offering the paper, document, record or other thing into evidence to provide the adverse party with an opportunity to challenge the affidavit or declaration and to have that challenge determined without prejudice to the ability of the moving party to produce the custodian or other qualified person at trial. A motion opposing admission of the paper, document, record or other thing into evidence must be filed and determined by the court before trial and with sufficient time to allow the party offering the paper, document, record or other thing, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating a hardship on the party or the custodian or other qualified person.

(8) Failure by a party that receives notice under subsection (7) of this section to timely file a motion opposing admission of the paper, document, record or other thing constitutes a waiver of objection to the admission of the evidence on the basis of the insufficiency of the affidavit or declaration unless the court finds good cause to grant relief from the waiver. If the court grants relief from the waiver, the court shall order the trial continued upon the request of the proponent of the evidence and allow the proponent sufficient time to arrange for the necessary witness to appear.

(9) A recipient of criminal process under this section or any individual that responds to the process is immune from civil and criminal liability for complying with the process and for any failure to provide notice of any disclosure to a person who is the subject of, or identified in, the disclosure.

(10) Nothing in this section limits the authority of a court to issue criminal process under any other provision of law or prohibits a party from calling the custodian of the evidence or other qualified person to testify regarding the evidence.

(11) As used in this section:

(a) "Applicant" means:

(A) A police officer or district attorney who applies for a search warrant or other court order or seeks to issue a subpoena under this section; or

(B) A defense attorney who applies for a court order or seeks to issue a subpoena under this section.

(b) "Criminal process" means a subpoena, search warrant or other court order.

(c) "Declaration" means a declaration under penalty of perjury under ORCP 1 E or an unsworn declaration under ORS 194.800 to 194.835, if the declarant is physically outside the boundaries of the United States.

(d) "Defense attorney" means an attorney of record for a person charged with a crime who is seeking the issuance of criminal process for the defense of the criminal case.

(e) "Recipient" means a business entity or nonprofit entity that has conducted business or engaged in transactions occurring at least in part in this state. [2009 c.617 §1; 2013 c.218 §17]

Note: 136.583 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.585 By whom subpoena is served. A subpoena may be served by the defendant or any other person over 18 years of age and shall be served by any sheriff or constable within the county or district of the sheriff or constable, as the case may be, when delivered to the sheriff or constable for service, either on the part of the prosecution or of the defendant. [Formerly 139.090; 1977 c.746 §7]

136.595 How subpoena is served; proof of service; service on law enforcement agency. (1) Except as provided in ORS 136.447 and 136.583 and subsection (2) of this section, a subpoena is served by delivering a copy to the witness personally. If the witness is under 14 years of age, the subpoena may be served by delivering a copy to the witness or to the witness's parent, guardian or guardian ad litem. Proof of the service is made in the same manner as in the service of a summons.

(2)(a) Every law enforcement agency shall designate an individual or individuals upon whom service of subpoena may be made. At least one of the designated individuals shall be available during normal business hours. In the absence of the designated individuals, service of subpoena pursuant to paragraph (b) of this subsection may be made upon the officer in charge of the law enforcement agency.

(b) If a peace officer's attendance at trial is required as a result of employment as a peace officer, a subpoena may be served on such officer by delivering a copy personally to the officer or to one of the individuals designated by the agency that employs the officer. A subpoena may be served by delivery to one of the individuals designated by the agency that employs the officer only if the subpoena is delivered at least 10 days before the date the officer's attendance is required, the officer is currently employed as a peace officer by the agency, and the officer is present within the state at the time of service.

(c) When a subpoena has been served as provided in paragraph (b) of this subsection, the law enforcement agency shall make a good faith effort to actually notify the officer whose attendance is sought of the date, time and location of the court appearance. If the officer cannot be notified, the law enforcement agency shall contact the court and a continuance may be granted to allow the officer to be personally served.

(d) As used in this subsection, "law enforcement agency" means the Oregon State Police, a county sheriff's department, a municipal police department, a police department established by a university under ORS 352.121 or 353.125 or, if the witness whose attendance at trial is required is an authorized tribal police officer as defined in ORS 181A.680, a tribal government as defined in ORS 181A.680.

(3) When a subpoena has been served as provided in ORS 136.583 or subsection (1) or (2) of this section and, subsequent to service, the date on, or the time at, which the person subpoenaed is to appear has changed, a new subpoena is not required to be served if:

(a) The subpoena is continued orally in open court in the presence of the person subpoenaed; or

(b) The party who issued the original subpoena notifies the person subpoenaed of the change by first class mail and by:

(A) Certified or registered mail, return receipt requested; or

(B) Express mail. [Formerly 139.100; 1977 c.789 §1; 1995 c.196 §3; 2005 c.298 §1; 2007 c.158 §1; 2009 c.364 §2; 2009 c.617 §3; 2011 c.644 §§20,65,72; 2013 c.180 §16,17; 2015 c.174 §8]

136.600 Certain civil procedures applicable in criminal context. The provisions of ORS 44.150 and ORCP 39 B and 55 E and G apply in criminal actions, examinations and proceedings. [Formerly 139.110; 1979 c.284 §115; 1989 c.980 §6]

136.602 Witness fees payable by county; method of payment; defense witness fees payable by defendant. (1) Except as otherwise specifically provided by law, the per diem fees and mileage and any expenses allowed under ORS 136.603 due to any witness in a grand jury proceeding, or any prosecution witness in a criminal action or proceeding in a circuit or justice court or before a committing magistrate shall be paid by the county in which the grand jury proceeding or criminal action or proceeding is held. Payment shall be made upon a claim verified by the witness, showing the number of days attended and the number of miles traveled, and a certified statement, prepared by the district attorney, justice of the peace or committing magistrate, showing the amounts due the witness.

(2) The per diem fees and mileage due to any defense witness in a criminal action or proceeding in a circuit or justice court, or before a committing magistrate, and any expenses allowed the witness under ORS 136.603, shall be paid by the defendant. In the case of a defendant determined to be financially eligible for appointed counsel at state expense, these amounts may be paid pursuant to ORS 135.055. [1981 s.s. c.3 §63; 1983 c.401 §1; 1987 c.606 §3; 1989 c.171 §18; 1989 c.1053 §3; 2001 c.962 §87]

136.603 Payment of witness who is from outside state or is indigent. (1)(a) Whenever any person attends any court, grand jury or committing magistrate as a witness on behalf of the prosecution or of any person accused of a crime upon request of the district attorney or city attorney or pursuant to subpoena, or by virtue of a recognizance for that purpose, and it appears that the witness has come from outside the state or that the witness is indigent, the court may, by an order entered in its records, direct payment to the witness of such sum of money as the court considers reasonable

for the expenses of the witness. The order of the court, so entered, is sufficient authority for the payment.

(b) Except as otherwise specifically provided by law, if a witness who is to be paid expenses pursuant to this subsection:

(A) Attends a grand jury, a circuit court or judge thereof, a judge of a county court or a justice of the peace, on behalf of the prosecution, payment shall be made by the county.

(B) Attends a municipal court or judge thereof on behalf of the prosecution, payment shall be made by the city.

(C) Attends a circuit court or judge thereof on behalf of a financially eligible defendant, payment shall be made by the public defense services executive director.

(D) Attends a judge of the county court or a justice of the peace on behalf of a financially eligible defendant, payment shall be made by the county.

(E) Attends a municipal court or judge thereof on behalf of a financially eligible defendant, payment shall be made by the city.

(F) Attends any court on behalf of a defendant who is not financially eligible, payment shall be made by the defendant, and the court shall so order.

(2) In the case of a prisoner of a jurisdiction outside of this state who is required to attend as a witness in this state, whether for the prosecution or the defense, the sheriff shall be responsible for transporting the witness to the proper court of this state, and the sheriff shall assume any costs incurred in connection with the witness while the witness is in the custody of the sheriff. However, the sheriff and not the witness shall be entitled to the witness fees, mileage and expenses to which the witness would otherwise be entitled under this section and ORS 136.627 or other applicable law. [Formerly 139.140; 1977 c.746 §8; 1981 s.s. c.3 §64; 1983 c.401 §2; 1987 c.606 §5; 1989 c.171 §19; 2001 c.962 §27]

136.605 [1957 c.576 §1; 1973 c.836 §240; renumbered 136.445]

136.607 [Formerly 139.150; 1977 c.746 §9; repealed by 1995 c.657 §18]

(Material Witness Order)

136.608 Application procedure. (1) The district attorney or the defendant may apply to the court for a material witness order when:

(a) An indictment has been filed, and is pending, against the defendant in a circuit court;

(b) A grand jury proceeding has been commenced against the defendant; or

(c) A complainant's information or a district attorney's information alleging that the defendant has committed a felony has been filed, and is pending, in a court of competent jurisdiction.

(2) The application must be in writing and sworn to by the applicant. The request must state facts establishing a reasonable belief that the person the applicant desires to call as a witness:

(a) Possesses information material to the determination of the action against the defendant; and

(b) Will not appear at the time when attendance of the witness is required.

(3) The applicant shall file the application:

(a) If an indictment has been filed, a grand jury proceeding has been commenced or the defendant has been held to answer by any court to await the action of a grand jury, in the circuit court in which the indictment is pending or by which the grand jury has been impaneled; or

(b) If information alleging the commission of a felony is pending in a court authorized to hold a preliminary hearing, in that court or in the circuit court that would have jurisdiction of the case upon holding the defendant to answer to await the action of the grand jury.

(4) As used in this section and ORS 136.612 and 136.614, "material witness order" means an order finding a person to be a material witness in a pending criminal action and fixing a security amount to be posted to secure future attendance of the witness. [1995 c.657 §14]

Note: 136.608 to 136.614 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.609 [Formerly 139.160; 1977 c.746 §10; repealed by 1995 c.657 §18]

136.610 [Amended by 1973 c.836 §241; renumbered 136.450]

136.611 Court action upon receipt of application. (1) If, upon receipt of an application under ORS 136.608, the court determines that the application is well founded, the court shall:

(a) Enter an order directing the prospective witness to appear before the court at a designated time; or

(b) Issue a warrant of arrest directing the sheriff to take the person into custody and bring the person before the court, if the application included facts establishing a reasonable belief that the prospective witness would not respond to an order to appear.

(2) An order under subsection (1) of this section must inform the prospective witness of the purpose of the hearing and must be served in the manner provided in ORCP 7 for the service of a summons.

(3) When the prospective witness appears before the court, the court shall inform the person:

(a) Of the nature and purpose of the hearing; and

(b) That the person has all of the rights of a person in a criminal proceeding including, but not limited to, the right to counsel, the right to appointed counsel at state expense if the person is unable to afford counsel and the right to call witnesses and have subpoenas issued.

(4) The hearing may be postponed at the request of the prospective witness for the purpose of obtaining counsel. If the hearing is postponed, the court shall order the prospective witness to appear at a future time. In addition, the court may require the prospective witness to pay an amount to secure the person's appearance. If the person refuses to comply with the order, the court shall commit the person to the jail of the county, or other appropriate detention facility, until the person complies or is discharged. [1995 c.657 §15]

Note: See note under 136.608.

136.612 Hearing; security amount; vacation or modification of order. (1) At the hearing to determine whether a material witness order should be entered:

(a) The applicant has the burden of proving by a preponderance of the evidence all facts essential to support the order;

(b) The prospective witness may testify and may call witnesses;

(c) All testimony is under oath; and

(d) The Oregon Evidence Code shall apply in any material witness proceeding under ORS 136.611, except that hearsay may be admitted if the court determines that it would impose an unreasonable hardship on one of the parties or on a witness to require that the primary source of the evidence be produced at the hearing, and if the witness furnishes information bearing on the informant's reliability and, as far as possible, the means by which the information was obtained.

(2) If the court finds by a preponderance of the evidence that the prospective witness possesses information that is material to the pending action and will not appear at the time the attendance of the witness is required, the court shall establish a security amount calculated to ensure the attendance of the witness and shall enter a material witness order.

(3)(a) If the security amount is paid, the court shall release the witness. If someone other than the witness pays the security amount, the court shall release the witness only if the witness consents, in writing, to the payment of the security.

(b) If the security amount is not paid, the court shall commit the witness to the jail of the county, or other appropriate detention facility, until the witness pays the security amount or the attendance of the witness is no longer needed in the action.

(4) Unless vacated as provided in subsection (5) of this section, a material witness order remains in effect:

(a) If issued by a circuit court, during the pendency of the criminal action in the circuit court; or

(b) If issued by a court other than a circuit court, until the attendance of the witness is no longer needed in any part of the criminal action.

(5) At any time after the entry of a material witness order, the court, upon application of either party to the order and notice to the other party, may vacate or modify the order. The court shall consider new, or changed, facts or circumstances. The court may vacate the order or may modify any part of the order. If the court reduces the security amount, the court shall exonerate any part of the original security amount in excess of the modified amount that has been paid. [1995 c.657 §16]

Note: See note under 136.608.

136.613 [Formerly 139.170; 1977 c.746 §11; repealed by 1995 c.657 §18]

136.614 Witness held in detention facility; payment. A witness held in a county jail, or other appropriate detention facility, as the result of a material witness order must be paid $7.50 for each day of confinement. The county shall pay the fee upon the release of the witness from custody or, in the discretion of the court, at designated times or intervals during the confinement. [1995 c.657 §17]

Note: See note under 136.608.

136.615 [Formerly 139.180; repealed by 1995 c.657 §18]

136.616 Deposition to perpetuate testimony; procedure. (1) As used in this section, "material witness order" has the meaning given that term in ORS 136.608.

(2) At any time after the court enters a material witness order, the court may order, or the district attorney or the defendant may file a petition to conduct, a deposition to perpetuate the testimony of the material witness.

(3)(a) The petition must be in writing and sworn to by the petitioner.

(b) The petitioner shall serve a notice and a copy of the petition on the opposing party and on the material witness.

(4) A petition filed under this section must describe:

(a) The basis on which the court entered the material witness order;

(b) Any findings made by the court in establishing the security amount under ORS 136.612;

(c) Any findings made by the court in detaining the material witness; and

(d) The reasons that perpetuating the testimony of the material witness is necessary.

(5) The court shall grant or deny the petition no later than 30 days after the date the petition is filed. The court shall consider whether the perpetuation of the testimony will prevent failure or delay of justice for the parties and the material witness. If the court orders the deposition of the material witness, the court may specify the subject matter of the deposition, impose limitations on the deposition and require audio or video recording of the deposition.

(6) The deposition of a material witness under this section does not invalidate or otherwise affect the material witness order, but may be considered in connection with an application to vacate or modify the order under ORS 136.612 (5).

(7) The Oregon Evidence Code applies to depositions under this section. [2015 c.623 §7]

Note: 136.616 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

(Compelling Witnesses)

136.617 Motion to compel witness who may be incriminated to testify. In any criminal proceeding before a court of record or in any proceeding before a grand jury, or in any proceeding before a court of record under ORS 646.760, or in any proceeding for the imposition of remedial or punitive sanction for contempt, if a witness refuses to testify or produce evidence of any kind on the ground that the witness may be incriminated thereby, the prosecuting attorney may move the court to order the witness to testify or produce evidence. The court shall forthwith hold a summary hearing at which the prosecuting attorney shall show reasonable cause to believe the witness possesses knowledge relevant to the proceeding, or that no privilege protects the evidence sought to be produced. The witness may show cause why the witness should not be compelled to testify or produce evidence. The court shall order the witness to testify regarding the subject matter under inquiry upon such showing of reasonable cause or shall order the production of evidence upon a finding that no privilege protects the evidence sought, unless the court finds that to do so would be clearly contrary to the public interest. The court shall hold the summary hearing outside the presence of the jury and the public and may require the prosecuting attorney to disclose the purpose of the testimony or evidence. The witness shall be entitled to be represented by counsel at the summary hearing. [Formerly 139.190; 1975 c.255 §14; 1981 c.882 §1; 1991 c.724 §25a]

136.619 Immunity of witness compelled to testify. (1) A witness who, in compliance with a court order issued under ORS 33.085 or 136.617, testifies or produces evidence that the witness would have been privileged to withhold but for the court order, may be prosecuted or subjected to any penalty or forfeiture for any matter about which the witness testified or produced evidence unless the prosecution, penalty or forfeiture is prohibited by section 12, Article I of the Oregon Constitution. The testimony of the witness or evidence produced or information derived from the testimony or evidence may not be used against the witness in any criminal prosecution. However, the witness may nevertheless be prosecuted or subjected to penalty for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. If a person refuses to testify after being ordered to testify as provided in this section, the person shall be subject to penalty for contempt of court for failure to comply with the order.

(2) Subsection (1) of this section shall not prevent the use of post-judgment collection procedures, including but not limited to wage withholding, income withholding, benefit withholding, assignment, garnishment or execution, based on matters about which a defendant testifies or produces evidence in compliance with a court order issued under ORS 136.617 in any proceeding for the imposition of remedial or punitive sanctions for contempt. [Formerly 139.200; 1981 c.882 §2; 1985 c.709 §1; 1991 c.724 §25b; 1997 c.313 §22]

136.620 [Amended by 1973 c.836 §242; renumbered 136.455]

(Uniform Act to Secure the Attendance of Witnesses From Without a State in Criminal Proceedings)

136.623 Definitions. (1) "Witness," as used in ORS 136.623 to 136.637, shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

(2) The word "state" shall include any territory of the United States and District of Columbia.

(3) The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness. [Formerly 139.210]

136.625 Where witness material to proceeding in another state is in this state. (1) If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in this state certifies under the seal of such court that there is a criminal prosecution pending in such court, or that a grand jury investigation has commenced or is about to commence, that a person being within this state is a material witness in such prosecution, or grand jury investigation, and that the presence of the person will be required for a specified number of days, upon presentation of such certificate to any judge of a court of record in the county in which such person is, such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

(2) If at a hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to be compelled to attend and testify in the prosecution or a grand jury investigation in the other state, and that the laws of the state in which the prosecution is pending, or grand jury investigation has commenced or is about to commence, (and of any other state through which the witness may be required to pass by ordinary course of travel), will give to the witness protection from arrest and the service of civil and criminal process, the judge shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the court where the prosecution is pending, or where a grand jury investigation has commenced or is about to commence at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure the attendance of the witness in the requesting state, such judge may, in lieu of notification of the hearing, direct that such witness be forthwith brought before the judge for said hearing; and the judge at the hearing being satisfied of the desirability of such custody and delivery, for which determination the certificate shall be prima facie proof of such desirability may, in lieu of issuing subpoena or summons, order that said witness be forthwith taken into custody and delivered to an officer of the requesting state only after the tender of payment of the mileage and per diem herein provided for.

(4) If the witness, who is summoned as above provided, after being paid or tendered by some properly authorized person the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day, that the witness is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state. [Formerly 139.220]

136.627 Where witness material to proceeding in this state is in another state. (1) If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the county stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure the attendance of the witness in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state the witness shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and $5 for each day that the witness is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good

cause to attend and testify as directed in the summons, the witness shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state. [Formerly 139.230]

136.630 [Repealed by 1973 c.836 §358]

136.633 Immunity of witness from arrest or service of process. (1) If a person comes into this state in obedience to a summons directing the person to attend and testify in this state the person shall not while in this state pursuant to such summons be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the entrance of the person into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, the person shall not while so passing through this state be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before the entrance of the person into this state under the summons. [Formerly 139.240]

136.635 Construction of ORS 136.623 to 136.637. ORS 136.623 to 136.637 shall be so interpreted and construed as to effectuate their general purpose to make uniform the law of the states which enact the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. [Formerly 139.250]

136.637 Short title. ORS 136.623 to 136.637 may be cited as Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings. [Formerly 139.260]

136.640 [Repealed by 1973 c.836 §358]

(Competency)

136.643 Defendant as witness. In the trial of or examination upon any indictment, complaint, information or other proceeding before any court, magistrate, jury or other tribunal against a person accused or charged with the commission of a crime, the person so charged or accused shall, at the own request of the person, but not otherwise, be deemed a competent witness, the credit to be given to the testimony of the person being left solely to the jury, under the instructions of the court, or to the discrimination of the magistrate, grand jury or other tribunal before which such testimony is given. The waiver of the person of this right creates no presumption against the person. The defendant or accused, when offering testimony as a witness in the own behalf of the defendant, gives the prosecution a right to cross-examination upon all facts to which the defendant or accused has testified and which tend to the conviction or acquittal of the defendant or accused. [Formerly 139.310]

136.645 Codefendant as witness. No person named in an indictment, information or complaint as a codefendant shall be deemed incompetent to testify as a witness at the trial of another defendant solely because the person is so named. [Formerly 139.315]

136.650 [Amended by 1973 c.836 §243; renumbered 136.460]

136.655 Spouse as witness. (1) Except as provided in subsection (2) of this section, in all criminal actions in which a spouse in a marriage is the party accused, the other spouse is a competent witness, but neither spouse shall be compelled or allowed to testify in a criminal action, except as provided in ORS 40.255.

(2) There is no privilege under this section, or under ORS 40.255 in all criminal actions in which a spouse is charged with bigamy or with an offense or attempted offense against the person or property of the other spouse or of a child of either, or with an offense against the person or property of a third person committed in the course of committing or attempting to commit an offense against the other spouse. [Formerly 139.320; 1979 c.721 §1; 1981 c.892 §89; 2015 c.629 §29]

136.660 [Amended by 1973 c.836 §244; renumbered 136.465]

136.670 [Amended by 1973 c.836 §245; renumbered 136.470]

(Hypnotized Witnesses)

136.675 Conditions for use of testimony of persons subjected to hypnosis. If either prosecution or defense in any criminal proceeding in the State of Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device. The unabridged videotape or mechanical recording shall be made available to the other party or parties in accordance with ORS 135.805 to 135.873. [1977 c.540 §1; 1983 c.740 §15]

136.680 [Amended by 1973 c.836 §246; renumbered 136.475]

136.685 Required explanations by law enforcement personnel to hypnosis subject; consent of subject required. (1) No person employed or engaged in any capacity by or on behalf of any state or local law en-

forcement agency shall use upon another person any form of hypnotism, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness without first explaining to the intended subject that:

(a) The intended subject is free to refuse to be subject to the processes delineated in this section;

(b) There is a risk of psychological side effects resulting from the process;

(c) If the intended subject agrees to be subject to such processes, it is possible that the process will reveal emotions or information of which the intended subject is not consciously aware and which the intended subject may wish to keep private; and

(d) The intended subject may request that the process be conducted by a doctor licensed under ORS 677.100 to 677.228 or a licensed psychologist, at no cost to the intended subject.

(2) In the event that the prospective subject refuses to consent, none of the processes delineated in subsection (1) of this section shall be used upon that person. [1977 c.540 §2; 2017 c.409 §5]

136.690 [Renumbered 136.480]

136.695 Evidence obtained in violation of ORS 136.675 or 136.685 inadmissible. No evidence secured in violation of ORS 136.675 or 136.685 shall be admissible in any criminal proceeding in this state. [1977 c.540 §3]

136.700 [Amended by 1973 c.836 §247; renumbered 136.485]

136.710 [Amended by 1973 c.836 §248; renumbered 136.490]

136.720 [Amended by 1973 c.836 §249; renumbered 136.495]

136.730 [Repealed by 1971 c.743 §432]

136.750 [1993 c.379 §1; renumbered 153.805 in 1995]

136.753 [1993 c.379 §2; renumbered 153.808 in 1995]

136.756 [1993 c.379 §3; renumbered 153.810 in 1995]

PROCEDURE TO RELY ON ENHANCEMENT FACT AT SENTENCING

136.760 Definitions for ORS 136.765 to 136.785. As used in ORS 136.765 to 136.785:

(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. [2005 c.463 §1]

Note: 136.760 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.765 Notice to defendant. 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) Providing written notice to the defendant of the enhancement fact, and the state's intention to rely on it, no later than 60 days after the defendant is arraigned on an indictment, waives indictment or is held to answer following a preliminary hearing, or 14 days before trial, whichever occurs earlier, unless the parties agree otherwise or the court authorizes a later date for good cause shown. [2005 c.463 §2; 2011 c.267 §1]

Note: 136.765 to 136.785 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.770 Enhancement fact related to offense. (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. [2005 c.463 §3]

Note: See note under 136.765.

136.773 Enhancement fact related to defendant. (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 retain alternate jurors and may allow the substitution of an alternate juror after the jury has begun deliberations in accordance with ORS 136.280. [2005 c.463 §4; 2017 c.359 §3]

Note: See note under 136.765.

136.776 Effect of waiver of right to jury trial. 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. [2005 c.463 §5]

Note: See note under 136.765.

136.780 Evidence. 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. [2005 c.463 §6]

Note: See note under 136.765.

136.785 Burden of proof; effect of finding. (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 or alternate jurors as provided by ORS 136.773 (5).

(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. [2005 c.463 §7; 2007 c.16 §3]

Note: See note under 136.765.

136.790 Notice to defendant upon remand. In order to rely on an enhancement fact, as defined in ORS 136.760, to increase the sentence that may be imposed upon remand of a case described in section 21 (3), chapter 463, Oregon Laws 2005, 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. [2005 c.463 §22]

Note: 136.790 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.792 Jury upon remand. (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 July 7, 2005, the court may impanel a new jury to determine the enhancement facts as defined in ORS 136.760. Laws relating to impaneling a jury for a criminal trial apply to impaneling a jury under this section.

(2) ORS 136.785 (3) 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. [2005 c.463 §23]

Note: 136.792 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 136 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

136.810 [Amended by 1973 c.836 §250; renumbered 136.500]

136.820 [Renumbered 136.505]

136.830 [Amended by 1973 c.836 §251; renumbered 136.515]

136.840 [Amended by 1973 c.836 §252; renumbered 136.525]

136.850 [Repealed by 1971 c.565 §17 (136.851 enacted in lieu of 136.850)]

136.851 [1971 c.565 §18 (136.851 enacted in lieu of 136.850); 1973 c.836 §253; renumbered 136.535]