Chapter 138

2011 EDITION

Appeals; Post-Conviction Relief

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APPEALS

138.005 Definitions for ORS 138.010 to 138.310. As used in ORS 138.010 to 138.310, unless the context requires otherwise, the terms defined in ORS 19.005 have the meanings set forth in ORS 19.005. [1959 c.558 §35]

138.010 Mode of review; abolition of writs of error and certiorari. Writs of error and of certiorari in criminal actions are abolished. The only mode of reviewing a judgment or order in a criminal action is that prescribed by ORS 138.010 to 138.310.

138.012 Sentence of death; automatic and direct review by Supreme Court. (1) The judgment of conviction and sentence of death entered under ORS 163.150 (1)(f) is subject to automatic and direct review by the Supreme Court. The review by the Supreme Court has priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.

(2) Notwithstanding ORS 163.150 (1)(a), after automatic and direct review of a conviction and sentence of death the following apply:

(a) If a reviewing court finds prejudicial error in the sentencing proceeding only, the court may set aside the sentence of death and remand the case to the trial court. No error in the sentencing proceeding results in reversal of the defendant's conviction for aggravated murder. Upon remand and at the election of the state, the trial court shall either:

(A) Sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c); or

(B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant should be sentenced to:

(i) Death;

(ii) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105 (1)(b); or

(iii) Imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c).

(b) The new sentencing proceeding is governed by the provisions of ORS 163.150 (1), (2), (3) and (5). A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence.

(c) The provisions of this subsection are procedural and apply to any defendant sentenced to death after December 6, 1984. [1999 c.1055 §5; 2001 c.306 §2]

Note: 138.012 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.020 Who may appeal. Either the state or the defendant may as a matter of right appeal from a judgment in a criminal action in the cases prescribed in ORS 138.010 to 138.310, and not otherwise.

138.030 Parties designated "appellant" and "respondent"; title of action. The party appealing is known as the appellant and the adverse party as the respondent; but the title of the action is not changed in consequence of the appeal.

138.040 Appeal by defendant generally; reviewable matters. Except as provided under ORS 138.050, the defendant may appeal to the Court of Appeals from a judgment or order described under ORS 138.053 in a circuit court, and may cross-appeal when the state appeals pursuant to ORS 138.060 (1)(c) or (2)(a). The following apply upon such appeal or cross-appeal:

(1) The appellate court may review:

(a) Any decision of the court in an intermediate order or proceeding.

(b) Any disposition described under ORS 138.053 as to whether it:

(A) Exceeds the maximum allowable by law; or

(B) Is unconstitutionally cruel and unusual.

(2) If the appellate court determines the disposition imposed exceeds the maximum allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the disposition that should be imposed. [Amended by 1959 c.558 §36; 1963 c.207 §1; 1969 c.198 §62; 1971 c.565 §19; 1977 c.372 §13; 1977 c.752 §1; 1985 c.348 §1; 1989 c.849 §4; 2001 c.870 §6]

138.050 Appeal from sentence on plea of guilty or no contest. (1) Except as otherwise provided in ORS 135.335, a defendant who has pleaded guilty or no contest may take an appeal from a judgment or order described in ORS 138.053 only when the defendant makes a colorable showing that the disposition:

(a) Exceeds the maximum allowable by law; or

(b) Is unconstitutionally cruel and unusual.

(2) If the judgment or order described under ORS 138.053 is in the:

(a) Circuit court, the appeal shall be taken to the Court of Appeals.

(b) Justice court or municipal court, the appeal shall be taken to the circuit court for the county.

(3) On appeal under subsection (1) of this section, the appellate court shall consider only whether the disposition:

(a) Exceeds the maximum allowable by law; or

(b) Is unconstitutionally cruel and unusual.

(4) If the appellate court determines the disposition imposed does exceed the maximum allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the disposition that should be imposed. [Amended by 1969 c.198 §63; 1973 c.836 §275a; 1975 c.611 §23; 1977 c.372 §14; 1985 c.342 §20; 1985 c.348 §2; 1989 c.849 §5; 1995 c.658 §78; 1999 c.134 §3; 1999 c.788 §47; 2001 c.644 §1]

138.053 Judgments and orders that are subject to appeal. (1) A judgment, or order of a court, if the order is imposed after judgment, is subject to the appeal provisions and limitations on review under ORS 138.040 and 138.050 if the disposition includes any of the following:

(a) Imposition of a sentence on conviction.

(b) Suspension of imposition or execution of any part of a sentence.

(c) Extension of a period of probation.

(d) Imposition or modification of a condition of probation or of sentence suspension.

(e) Imposition or execution of a sentence upon revocation of probation or sentence suspension.

(2) A disposition described under subsection (1) of this section is not subject to appeal after the expiration of the time specified in ORS 138.071 for appealing from the judgment or order imposing it, except as may be provided in ORS 138.510 to 138.680.

(3) Notwithstanding ORS 138.040 and 138.050, upon an appeal from a judgment or order described in subsection (1)(c) to (e) of this section, the appellate court may review the order that extended the period of the defendant's probation, imposed or modified a condition of the defendant's probation or sentence suspension or revoked the defendant's probation or sentence suspension if the defendant shows a colorable claim of error in the proceeding from which the appeal is taken. [1989 c.849 §3; 1993 c.14 §16; 2001 c.644 §2; 2003 c.737 §101]

138.057 Appeal from judgment involving violation. (1)(a) If a justice court or municipal court has become a court of record under ORS 51.025 or 221.342, an appeal from a judgment involving a violation shall be as provided in ORS chapter 19 for appeals from judgments entered by circuit courts, except that the standard of review is the same as for an appeal from a judgment in a proceeding involving a misdemeanor or felony. If a justice court or municipal court has not become a court of record under ORS 51.025 or 221.342, the appeal from a judgment involving a violation entered by the justice court or municipal court may be taken to the circuit court for the county in which the justice court or municipal court is located. An appeal to a circuit court must be taken in the manner provided in this subsection.

(b) Within 30 days after the entry of the judgment by the justice court or municipal court, a party who wishes to appeal the decision must serve a copy of the notice of appeal on the adverse party and must file the original notice of appeal with the justice court or municipal court along with proof of service on the adverse party or an acknowledgment of service signed by the adverse party.

(c) If the appeal is made by the defendant from the decision of a municipal court, the copy of the notice of appeal must be served on the city attorney. If the appeal is made by the defendant from a decision in a justice court, the copy of the notice of appeal must be served on the district attorney for the county.

(d) No undertaking shall be required of the party filing a notice of appeal under the provisions of this subsection.

(e) Upon filing of the notice of appeal, the justice court or municipal court shall forward all files relating to the case to the circuit court to which the appeal is taken.

(f) The circuit court shall treat a matter appealed under this subsection as though the case had been originally filed with the circuit court and shall try the case anew, disregarding any irregularity or imperfection in the proceedings in the justice court or municipal court.

(g) Upon entry of a judgment in the matter, the judgment may be appealed as provided in subsection (2) of this section.

(2) Subject to the provisions of this subsection, an appeal from a judgment involving a violation entered by a circuit court may be taken as provided in ORS chapter 19.

(a) For the purpose of meeting the requirements imposed by ORS 19.240, the copy of the notice of appeal must be served on:

(A) The city attorney, if the appeal is made by the defendant from a decision initially made in a municipal court.

(B) The district attorney for the county, if the appeal is made by the defendant from a decision initially made in a justice court.

(b) Notwithstanding ORS 19.270, timely service on the city attorney or district attorney under the provisions of this subsection is not jurisdictional and the Court of Appeals may extend the time for that service.

(c) Notwithstanding any provision of ORS chapter 19, an undertaking on appeal is not required for an appeal from a judgment involving a violation.

(d) The filing of a notice of an appeal from a judgment involving a violation does not act to automatically stay the judgment.

(e) The standard of review for an appeal under this subsection is the same as for an appeal from a judgment in a proceeding involving a misdemeanor or felony.

(3) In any case in which only violations are charged, the state may not appeal from an order dismissing the case that is entered by reason of a police officer's failure to appear at the trial of the matter. [1993 c.379 §5; 1995 c.658 §79; 1997 c.389 §12; 1999 c.682 §11; 2005 c.266 §2]

Note: 138.057 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.060 Appeal by state. (1) The state may take an appeal from the circuit court, or from a municipal court or a justice court that has become a court of record under ORS 51.025 or 221.342, to the Court of Appeals from:

(a) An order made prior to trial dismissing or setting aside the accusatory instrument;

(b) An order arresting the judgment;

(c) An order made prior to trial suppressing evidence;

(d) An order made prior to trial for the return or restoration of things seized;

(e) A judgment of conviction based on the sentence as provided in ORS 138.222;

(f) An order in a probation revocation hearing finding that a defendant who was sentenced to probation under ORS 137.712 has not violated a condition of probation by committing a new crime;

(g) An order made after a guilty finding dismissing or setting aside the accusatory instrument;

(h) An order granting a new trial; or

(i) An order dismissing an accusatory instrument under ORS 136.130.

(2) Notwithstanding subsection (1) of this section, when the state chooses to appeal from an order listed in paragraph (a) or (b) of this subsection, the state shall take the appeal to the Supreme Court if the defendant is charged with murder or aggravated murder. The orders to which this subsection applies are:

(a) An order made prior to trial suppressing evidence; and

(b) An order made prior to trial dismissing or setting aside the accusatory instrument.

(3) In an appeal by the state under subsection (2) of this section, the Supreme Court shall issue its decision no later than one year after the date of oral argument or, if the appeal is not orally argued, the date that the State Court Administrator delivers the briefs to the Supreme Court for decision. Failure of the Supreme Court to issue a decision within one year is not a ground for dismissal of the appeal. [Amended by 1963 c.385 §1; 1969 c.198 §64; 1969 c.529 §1; 1971 c.644 §1; 1973 c.836 §276; 1977 c.752 §2; 1989 c.790 §21a; 1997 c.852 §11; 1999 c.946 §2; 2001 c.870 §4; 2011 c.379 §1]

138.070 [Repealed by 1971 c.565 §20 (138.071 enacted in lieu of 138.070)]

138.071 Time within which appeal must be taken. (1) Except as provided in this section, a notice of appeal must be served and filed not later than 30 days after the judgment or order appealed from was entered in the register.

(2) If a motion for new trial or motion in arrest of judgment is served and filed, a notice of appeal must be served and filed within 30 days from the earlier of the following dates:

(a) The date of entry of the order disposing of the motion; or

(b) The date on which the motion is deemed denied.

(3) A defendant cross-appealing must serve and file the notice of cross-appeal within 10 days of the expiration of the time allowed in subsection (1) of this section.

(4) If the trial court enters a corrected or a supplemental judgment under ORS 138.083, a notice of appeal from the corrected or supplemental judgment must be filed not later than 30 days after the defendant receives notice that the judgment has been entered.

(5)(a) Upon motion of a defendant, the Court of Appeals shall grant the defendant leave to file a notice of appeal after the time limits described in subsections (1) to (4) of this section if:

(A) The defendant, by clear and convincing evidence, shows that the failure to file a timely notice of appeal is not attributable to the defendant personally; and

(B) The defendant shows a colorable claim of error in the proceeding from which the appeal is taken.

(b) A defendant is not entitled to relief under this subsection for failure to file timely notice of cross-appeal when the state appeals pursuant to ORS 138.060 (1)(c) or (2)(a).

(c) The request for leave to file a notice of appeal after the time limits prescribed in subsections (1) to (3) of this section must be filed no later than 90 days after entry of the order or judgment being appealed. The request for leave to file a notice of appeal after the time limit prescribed in subsection (4) of this section must be filed no later than 90 days after the defendant receives notice that the judgment has been entered. A request for leave under this subsection must be accompanied by the notice of appeal, may be filed by mail and is deemed filed on the date of mailing if the request is mailed as provided in ORS 19.260.

(d) The court may not grant relief under this subsection unless the state has notice and opportunity to respond to the defendant's request for relief.

(e) The denial of a motion under paragraph (a) of this subsection is a bar to post-conviction relief under ORS 138.510 to 138.680 on the same ground, unless the court provides otherwise. [1971 c.565 §21 (enacted in lieu of 138.070); 1977 c.752 §3; 1985 c.282 §1; 1985 c.734 §§17,17a; 1987 c.852 §1; 2001 c.870 §7; 2003 c.288 §2; 2007 c.547 §2; 2009 c.11 §10]

138.080 [Amended by 1959 c.558 §37; 1969 c.198 §65; 1971 c.193 §28; repealed by 1971 c.565 §22 (138.081 enacted in lieu of 138.080)]

138.081 Service and filing of notice of appeal. (1) An appeal shall be taken by causing a notice of appeal in the form prescribed by ORS 19.250 to be served:

(a)(A) On the district attorney for the county in which the judgment is entered, when the defendant appeals, or if the appeal is under ORS 221.360 on the plaintiff's attorney; or

(B) On the attorney of record for the defendant, or if the defendant has no attorney of record, on the defendant, when the state appeals; and

(b) On the trial court transcript coordinator if a transcript is required in connection with the appeal; and

(c) On the clerk of the trial court.

(2)(a) The original of the notice shall be filed with the clerk of the court to which the appeal is made.

(b) Proof of service of the notice of appeal shall be indorsed on or affixed to the original filed with the Court of Appeals or the Supreme Court. [1971 c.565 §23 (enacted in lieu of 138.080); 1985 c.734 §18; 1997 c.389 §9; 2001 c.870 §8]

138.083 Retention of authority by trial court for certain purposes. (1)(a) The sentencing court shall retain authority irrespective of any notice of appeal after entry of judgment of conviction to modify its judgment and sentence to correct any arithmetic or clerical errors or to delete or modify any erroneous term in the judgment. The court may correct the judgment either on the motion of one of the parties or on the court's own motion after written notice to all the parties.

(b) If a sentencing court enters a corrected judgment under this subsection while an appeal of the judgment is pending, the court shall immediately forward a copy of the corrected judgment to the appellate court. Any modification of the appeal necessitated by the corrected judgment shall be made in the manner specified by rules adopted by the appellate court.

(2)(a) A judgment that orders payment of restitution but does not specify the amount of restitution imposed is final for the purpose of appealing the judgment.

(b) Notwithstanding the filing of a notice of appeal, the sentencing court retains authority to determine the amount of restitution and to enter a supplemental judgment to specify the amount and terms of restitution.

(c) If a sentencing court enters a supplemental judgment under this subsection while an appeal of the judgment of conviction is pending, the court shall immediately forward a copy of the supplemental judgment to the appellate court. Any modification of the appeal necessitated by the supplemental judgment may be made in the manner specified by rules adopted by the appellate court. [1989 c.790 §20; 1995 c.109 §1; 1997 c.389 §2; 2003 c.576 §165; 2007 c.547 §3]

138.090 Signature to notice of appeal. When the state takes an appeal, the notice of appeal shall be signed by the district attorney for the county or by the Attorney General. When the defendant takes an appeal, the notice of appeal shall be signed by the defendant or an attorney of the court for the defendant. [Amended by 1975 c.119 §1]

138.100 [Amended by 1959 c.558 §38; 1961 c.101 §1; repealed by 1971 c.565 §1]

138.110 Service of notice of appeal on defendant or attorney by publication in certain cases. If, after due diligence, the service cannot be made as directed in ORS 138.081 (1)(a)(B), the court or judge thereof from which the appeal is sought to be taken,

upon proof thereof, may make an order for the publication of the notice of appeal in such newspaper and for such time as the court or judge deems proper. [Amended by 1963 c.324 §1; 1971 c.565 §24]

138.120 When appeal is perfected in case of service by publication. At the expiration of the time appointed for the publication, on filing an affidavit thereof with the clerk, the appeal becomes perfected.

138.130 [Repealed by 1963 c.155 §1 (138.135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150)]

138.135 Defendant's appeal or petition for review as stay of sentence. (1) A sentence of confinement shall be stayed if an appeal is taken and the defendant elects not to commence service of the sentence or is released on security under ORS 135.230 to 135.290. If a defendant is not released on security and elects not to commence service of the sentence pending appeal, the defendant shall be held in custody at the institution designated in the judgment without execution of sentence, except as provided in ORS 138.145.

(2) A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the circuit court, the Court of Appeals, or by the Supreme Court upon such terms as the court deems proper. The court may require the defendant, pending appeal, to deposit the whole or any part of the fine and costs with the clerk of the circuit court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating the assets of the defendant.

(3) If a petition for review by the Supreme Court is filed, any stay shall remain in effect pending a final disposition of the cause, unless otherwise ordered by the Supreme Court. [1963 c.155 §2 (138.135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150); 1967 c.372 §5; 1969 c.198 §66; 1977 c.752 §4; 1999 c.1051 §257]

138.140 [Amended by 1953 c.99 §2; 1955 c.660 §19; repealed by 1963 c.155 §1 (138.135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150)]

138.145 Delivery of defendant under sentence of imprisonment to intake center. If the confinement designated by the court is the custody of the Department of Corrections, the defendant may be taken to a designated intake center during normal business hours unless prior arrangements have been made with the department. To the extent possible, the county taking a defendant to a designated intake center shall notify the department one business day prior to the defendant's arrival. The county may not take the defendant to a designated intake center if the court has ordered the retention of the defendant at the place of original custody for the period of time deemed necessary by the court for preparation of an appeal. [1963 c.155 §3 (138.135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150); 1973 c.836 §277; 1987 c.320 §43; 2003 c.458 §1]

138.150 [Repealed by 1963 c.155 §1 (138.135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150)]

138.160 Appeal by state as stay of judgment or order; release. An appeal taken by the state stays the effect of the judgment or order in favor of the defendant, so that the release agreement and, if applicable, the security for release, is held for the appearance and surrender of the defendant until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant is in custody, the defendant may be released by the court subject to ORS 135.230 to 135.290, pending the appeal. [Amended by 1959 c.638 §20; 1973 c.836 §278]

138.170 [Repealed by 1959 c.638 §26]

138.180 [Repealed by 1959 c.558 §51]

138.185 Transmission of record to Court of Appeals; statutes applicable to appeal to Court of Appeals. (1) In an appeal to the Court of Appeals, when the notice of appeal is filed, or when the appeal is perfected upon publication of notice as provided in ORS 138.120, the record in the trial court shall be prepared and transmitted to the State Court Administrator, at Salem, in the manner and within the time prescribed in ORS chapter 19.

(2) The provisions of ORS 19.250, 19.260, 19.270, 19.385, 19.390, 19.435, 19.450 and 19.510 and the provisions in ORS 19.425 authorizing review of intermediate orders and, if the defendant is the appellant, the provisions of ORS 19.420 (3) shall apply to appeals to the Court of Appeals. [1959 c.558 §39; 1969 c.198 §67; 1971 c.193 §29; 1971 c.565 §25; 1985 c.734 §19; 1987 c.852 §2; 1997 c.389 §26]

138.190 [Repealed by 1959 c.558 §51]

138.200 [Repealed by 1959 c.558 §51]

138.210 Necessity of appearance of appellant. If the appellant fails to appear in the appellate court, judgment of affirmance shall be given as a matter of course; but the defendant need not personally appear in the appellate court.

138.220 Scope of review. Upon an appeal, the judgment or order appealed from can be reviewed only as to questions of law appearing upon the record. [Amended by 1959 c.558 §40]

138.222 Scope of review of sentence imposed for felony committed on or after November 1, 1989. (1) Notwithstanding the provisions of ORS 138.040 and 138.050, a sentence imposed for a judgment of conviction entered for a felony committed on or after November 1, 1989, may be reviewed only as provided by this section.

(2) Except as otherwise provided in subsection (4)(c) of this section, on appeal from a judgment of conviction entered for a felony committed on or after November 1, 1989, the appellate court may not review:

(a) Any sentence that is within the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission.

(b) A sentence of probation when the rules of the Oregon Criminal Justice Commission prescribe a presumptive sentence of imprisonment but allow a sentence of probation without departure.

(c) A sentence of imprisonment when the rules of the Oregon Criminal Justice Commission prescribe a presumptive sentence of imprisonment but allow a sentence of probation without departure.

(d) Any sentence resulting from a stipulated sentencing agreement between the state and the defendant which the sentencing court approves on the record.

(e) Except as authorized in subsections (3) and (4) of this section, any other issue related to sentencing.

(3) In any appeal from a judgment of conviction imposing a sentence that departs from the presumptive sentence prescribed by the rules of the Oregon Criminal Justice Commission, sentence review is limited to whether the sentencing court's findings of fact and reasons justifying a departure from the sentence prescribed by the rules of the Oregon Criminal Justice Commission:

(a) Are supported by the evidence in the record; and

(b) Constitute substantial and compelling reasons for departure.

(4) In any appeal, the appellate court may review a claim that:

(a) The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence;

(b) The sentencing court erred in ranking the crime seriousness classification of the current crime or in determining the appropriate classification of a prior conviction or juvenile adjudication for criminal history purposes; or

(c) The sentencing court erred in failing to impose a minimum sentence that is prescribed by ORS 137.700 or 137.707.

(5)(a) The appellate court may reverse or affirm the sentence. If the appellate court concludes that the trial court's factual findings are not supported by evidence in the record or do not establish substantial and compelling reasons for a departure, it shall remand the case to the trial court for resentencing. If the appellate court determines that the sentencing court, in imposing a sentence in the case, committed an error that requires resentencing, the appellate court shall remand the entire case for resentencing. The sentencing court may impose a new sentence for any conviction in the remanded case.

(b) If the appellate court, in a case involving multiple counts of which at least one is a felony, reverses the judgment of conviction on any count and affirms other counts, the appellate court shall remand the case to the trial court for resentencing on the affirmed count or counts.

(6) The appellate court shall issue a written opinion whenever the judgment of the sentencing court is reversed and may issue a written opinion in any other case when the appellate court believes that a written opinion will provide guidance to sentencing judges and others in implementing the sentencing guidelines adopted by the Oregon Criminal Justice Commission provided that the appellate courts may provide by rule for summary disposition of cases arising under this section when no substantial question is presented by the appeal.

(7) Either the state or the defendant may appeal a judgment of conviction based on the sentence for a felony committed on or after November 1, 1989, to the Court of Appeals subject to the limitations of chapter 790, Oregon Laws 1989. The defendant may appeal under this subsection only upon showing a colorable claim of error in a proceeding if the appeal is from a proceeding in which:

(a) A sentence was entered subsequent to a plea of guilty or no contest;

(b) Probation was revoked, the period of probation was extended, a new condition of probation was imposed, an existing condition of probation was modified or a sentence suspension was revoked; or

(c) A sentence was entered subsequent to a resentencing ordered by an appellate court or a post-conviction relief court. [1989 c.790 §21; 1993 c.692 §2; 1993 c.698 §1; 1997 c.852 §9; 2001 c.644 §3; 2003 c.737 §102; 2005 c.563 §1]

Note: Legislative Counsel has substituted "chapter 790, Oregon Laws 1989," for the words "this Act" in section 21, chapter 790, Oregon Laws 1989, compiled as 138.222. Specific ORS references have not been substituted, pursuant to 173.160. These sections may be determined by referring to the 1989 Comparative Section Table located in Volume 20 of ORS.

138.225 Summary affirmation. In reviewing the judgment of any court under ORS 138.010 to 138.310, the Court of Appeals, on its own motion or on the motion of the respondent, may summarily affirm, without oral argument, the judgment after submission of the appellant's brief and without submission of the respondent's brief if the court

finds that no substantial question of law is presented by the appeal. Notwithstanding ORS 2.570, the Chief Judge of the Court of Appeals may deny or, if the petitioner does not oppose the motion, grant a respondent's motion for summary affirmation. A dismissal of appeal under this section constitutes a decision upon the merits of the appeal. [1995 c.295 §2]

138.227 Vacation of judgment and remand. (1) Upon joint motion of the parties to an appeal in a criminal action, the court may vacate the judgment or order from which the appeal was taken and remand the matter to the trial court to reconsider the judgment or order, or any order entered by the trial court. Upon remand, the trial court shall have jurisdiction to enter a revised judgment or order.

(2) After entry of a modified judgment or order on reconsideration, or upon reentry of the original judgment or order, either party may appeal in the same time and manner as an appeal from the original judgment or order. [1995 c.295 §3]

138.230 Rulings in discretion of court and technical defects as grounds for reversal. After hearing the appeal, the court shall give judgment, without regard to the decision of questions which were in the discretion of the court below or to technical errors, defects or exceptions which do not affect the substantial rights of the parties.

138.240 Judgments appellate court may give. The appellate court may reverse, affirm or modify the judgment or order appealed from and shall, if necessary or proper, order a new trial.

138.250 New trial to be in court below; reversal without new trial. When a new trial is ordered, it shall be directed to be had in the court below; and if a judgment against a defendant is reversed without ordering a new trial, the appellate court shall direct, if the defendant is in custody, that the defendant be discharged therefrom, or if the defendant has been released, that the release agreement be exonerated, or if a security release has been entered into, that the security be refunded to the defendant or the sureties of the defendant. [Amended by 1973 c.836 §279]

138.255 Court of Appeals certification of appeal to Supreme Court in lieu of disposition; party request for Supreme Court review. (1) An appeal to the Court of Appeals may be certified to the Supreme Court, and the Supreme Court may accept or deny acceptance of the certified appeal, as provided in ORS 19.405.

(2) At any time before the State Court Administrator sends notice to the parties of the date of oral argument or, if the case is not orally argued, the date that the State Court Administrator delivers the briefs to the Court of Appeals for decision, a party may request the Supreme Court to take and decide an appeal taken by the state under ORS 138.060 (1). In determining whether to accept an appeal under this subsection, the Supreme Court shall consider, in addition to other factors that the Supreme Court deems appropriate:

(a) Whether the defendant is charged with a Class A felony listed under ORS 137.700 or 137.707;

(b) The extent to which the case presents speedy trial concerns; and

(c) The extent to which the case presents a significant issue of law. [1981 c.550 §4; 2001 c.870 §4c]

138.260 [Repealed by 1981 c.178 §18]

138.261 Time within which certain appeals must be decided. (1) When a defendant is charged with a felony and is in custody pending an appeal under ORS 138.060 (1)(a) or (c), the Court of Appeals and the Supreme Court shall decide the appeal within the time limits prescribed by this section.

(2)(a) Pursuant to rules adopted by the Court of Appeals, the Court of Appeals shall ensure that the appeal is fully briefed no later than 90 days after the date the transcript is settled under ORS 19.370.

(b) Notwithstanding paragraph (a) of this subsection, the Court of Appeals may allow more than 90 days after the transcript is settled to fully brief the appeal if it determines that the ends of justice served by allowing more time outweigh the best interests of the public, the parties and the victim of the crime.

(3) The Court of Appeals shall decide the appeal no later than 180 days after the date of oral argument or, if the appeal is not orally argued, the date that the State Court Administrator delivers the briefs to the Court of Appeals for decision. Any reasonable period of delay incurred by the Court of Appeals on its own motion or at the request of one of the parties is excluded from the 180-day period within which the Court of Appeals is required to issue a decision if the Court of Appeals determines that the ends of justice served by a decision on a later date outweigh the best interests of the public, the parties and the victim of the crime.

(4)(a) In determining whether to allow more than 90 days after the transcript is settled to fully brief the appeal or more than 180 days after oral argument or delivery of the briefs to decide the appeal, the Court of Appeals shall consider whether:

(A) The appeal is unusually complex or presents novel questions of law so that the prescribed time limit is unreasonable; and

(B) The failure to extend the time limit would likely result in a miscarriage of justice.

(b) If the Court of Appeals decides to allow additional time to fully brief the appeal or to decide the appeal, the Court of Appeals shall state the reasons for doing so in writing and shall serve a copy of the writing on the parties.

(5) If the Supreme Court allows review of a decision of the Court of Appeals on an appeal described in subsection (1) of this section, the Supreme Court shall issue its decision on review no later than 180 days after the date of oral argument or, if the review is not orally argued, the date the State Court Administrator delivers the briefs to the Supreme Court for decision. Any reasonable period of delay incurred by the Supreme Court on its own motion or at the request of one of the parties is excluded from the 180-day period within which the Supreme Court is required to issue a decision if the Supreme Court determines that the ends of justice served by a decision on a later date outweigh the best interests of the public, the parties and the victim of the crime.

(6)(a) In determining whether to allow more than 180 days after oral argument or delivery of the briefs to decide the review, the Supreme Court shall consider whether:

(A) The review is unusually complex or presents novel questions of law so that the prescribed time limit is unreasonable; and

(B) The failure to extend the time limit would likely result in a miscarriage of justice.

(b) If the Supreme Court decides to allow additional time to decide the review, the Supreme Court shall state the reasons for doing so in writing and shall serve a copy of the writing on the parties.

(7) Failure of the Court of Appeals or the Supreme Court to decide an appeal or review within the time limits prescribed in this section is not a ground for dismissal of the appeal or review.

(8) Any delay sought or acquiesced in by the defendant does not count against the state with respect to any statutory or constitutional right of the defendant to a speedy trial. [2001 c.870 §4b]

138.265 [1981 c.178 §6; repealed by 1985 c.734 §20]

138.270 [Amended by 1981 c.178 §7; repealed by 1985 c.734 §20]

138.280 [Amended by 1959 c.558 §41; 1981 c.178 §8; repealed by 1985 c.734 §20]

138.290 [Amended by 1981 c.178 §9; repealed by 1985 c.734 §20]

138.300 County's liability for costs on appeal in criminal action. Except as otherwise specifically provided by law, upon final reversal of the judgment of the lower court in a criminal action, the county shall be liable for costs on appeal to the Court of Appeals and on review by the Supreme Court and with like effect as in the case of natural persons; and such costs shall be paid in the first instance by the county from which the appeal is taken. [Amended by 1969 c.198 §68; 1983 c.763 §15]

138.310 Notice to court below when public defense services executive director certifies costs, expenses or compensation. When the public defense services executive director pays costs, expenses or compensation under ORS 138.500 (5) on appeal in a criminal action, the public defense services executive director shall notify the court below of the costs, expenses and compensation paid in order that the court below may exercise its discretion under ORS 151.505 or 161.665 (2). [1983 c.763 §14; 1989 c.1053 §10; 1991 c.790 §16; 1997 c.761 §11; 2001 c.962 §69; 2007 c.291 §2]

138.410 [Formerly 138.810; repealed by 1967 c.372 §13]

138.420 [Formerly 138.820; repealed by 1967 c.372 §13]

138.430 [Formerly 138.830: repealed by 1967 c.372 §13]

138.440 [Formerly 138.840; 1961 c.480 §1; repealed by 1967 c.372 §13]

138.480 Public Defense Services Commission to provide representation for prisoner in proceeding before appellate court. The Supreme Court or the Court of Appeals may, in its discretion, at the request of an individual who is deprived of liberty by a judgment, is without means to retain an attorney and is without the aid of an attorney, direct the Public Defense Services Commission to provide representation for the individual in a proceeding before it to test the validity of that judgment. [1963 c.600 §10; 1969 c.198 §69; 2001 c.962 §28]

138.490 [1963 c.600 §11; 1969 c.198 §70; 1977 c.752 §5; 1979 c.867 §2; 1981 s.s. c.3 §125; 1985 c.502 §22; 1989 c.1053 §5; 1993 c.33 §302; 2001 c.962 §104; repealed by 2001 c.962 §115]

138.500 Appointment of counsel and furnishing of transcript for appellant without funds; compensation. (1) If a defendant in a criminal action or a petitioner in a proceeding pursuant to ORS 138.510 to 138.680 wishes to appeal from an appealable adverse final order or judgment of a circuit court and if the person is without funds to employ suitable counsel possessing skills and experience commensurate with the nature and complexity of the case for the appeal, the person may request the circuit court from which the appeal is or would be taken to appoint counsel to represent the person on

appeal. The following apply to a request under this subsection:

(a) The request shall be in writing and shall be made within the time during which an appeal may be taken or, if the notice of appeal has been filed, at any time thereafter. The request shall include a brief statement of the assets, liabilities and income in the previous year of the person unless the court already determined the person to be financially eligible for appointed counsel at state expense for purposes of the specific case, in which instance, the written request need only so indicate. However, if a request relies on a court's previous determination that the person is financially eligible, the court, in its discretion, may require the person to submit a new statement of assets, liabilities and income.

(b) If, based upon a request under paragraph (a) of this subsection, the court finds that petitioner or defendant previously received the services of appointed counsel or currently is without funds to employ suitable counsel for an appeal, the court shall appoint counsel to represent petitioner or defendant on the appeal.

(2)(a) Notwithstanding subsection (1) of this section, when a defendant has been sentenced to death, the request for appointed counsel shall be made to the Supreme Court. The Supreme Court shall appoint suitable counsel to represent the defendant on the appeal.

(b) After the notice of appeal has been filed, the Court of Appeals has concurrent authority to appoint or substitute counsel or appoint or substitute a legal advisor for the defendant under ORS 138.504.

(c) The Supreme Court has concurrent authority to appoint or substitute counsel or appoint or substitute a legal advisor for the defendant under ORS 138.504 in connection with review of a Court of Appeals decision under ORS 2.520.

(d) Neither the Court of Appeals nor the Supreme Court may substitute one appointed counsel for another under paragraph (b) or (c) of this subsection except pursuant to the policies, procedures, standards and guidelines of the Public Defense Services Commission.

(3) Whenever a defendant in a criminal action or a petitioner in a proceeding pursuant to ORS 138.510 to 138.680 has filed a notice of appeal from an appealable adverse final order or judgment of a circuit court and the person is without funds to pay for a transcript, or portion thereof, necessary to present adequately the case upon appeal, the person may request the public defense services executive director to have the transcript, or portion thereof, prepared for purposes of appeal. The following apply to a request under this subsection:

(a) The public defense services executive director shall authorize the preparation of a transcript after a court has determined that the person is eligible for court-appointed counsel or, if the person has not applied for court-appointed counsel, the person submits a statement of the person's assets, liabilities and income in the previous year and the director determines that the person is eligible for preparation of a transcript at state expense.

(b) The cost of the transcript preparation under paragraph (a) of this subsection shall be in the amount prescribed in ORS 21.345 and paid for as provided by the policies, procedures, standards and guidelines of the Public Defense Services Commission.

(4) After submission of the original brief by counsel, the public defense services executive director shall determine the cost of briefs and any other expenses of appellant, except transcripts, necessary to appellate review and a reasonable amount of compensation for counsel appointed under this section. Compensation payable to appointed counsel shall be as established under ORS 151.216. On any review by the Supreme Court of the judgment of the Court of Appeals the public defense services executive director shall similarly determine the costs of briefs and any other expenses necessary for review and a reasonable amount of compensation for counsel appointed under this section.

(5) Costs, expenses and compensation determined by the public defense services executive director under subsection (4) of this section shall be paid by the public defense services executive director from funds available for that purpose.

(6) If the public defense services executive director denies, in whole or in part, costs, expenses and compensation submitted for review and payment, the person who submitted the payment request may appeal the decision to the Chief Judge of the Court of Appeals, if the appeal is in the Court of Appeals, or to the Chief Justice of the Supreme Court, if the appeal is in the Supreme Court. The Chief Judge, Chief Justice or the designee of the Chief Judge or Chief Justice, as appropriate, shall review the public defense services executive director's decision for abuse of discretion. The decision of the Chief Judge, the Chief Justice or the designee of the Chief Judge or Chief Justice is final.

(7) The provisions of this section shall apply in favor of the defendant in a criminal action or the petitioner in a proceeding pursuant to ORS 138.510 to 138.680 when the person is respondent in an appeal taken by

the state in a criminal action or by the defendant in a proceeding pursuant to ORS 138.510 to 138.680.

(8) As used in this section, "criminal action" does not include an action that involves only violations.

(9) As used in subsection (4) of this section, "counsel" includes a legal advisor appointed under ORS 138.504. [1959 c.636 §23; 1961 c.480 §2; 1963 c.600 §8; 1969 c.198 §71; 1971 c.257 §3; 1977 c.752 §6; 1979 c.867 §3; 1981 s.s. c.3 §126; 1983 c.763 §16; 1983 c.774 §5; 1985 c.58 §1; 1985 c.502 §20; 1989 c.1053 §6; 1991 c.790 §17; 1991 c.827 §1; 1995 c.117 §2; 1995 c.194 §1; 2001 c.962 §§29,108; 2003 c.449 §§7,44; 2005 c.454 §1; 2007 c.291 §1]

138.504 Waiver of counsel; appointment of legal advisor. (1) If the defendant wishes to waive counsel in the appeal of a criminal action to the Court of Appeals or on review of a criminal action by the Supreme Court, the court shall determine whether the defendant has made a knowing and voluntary waiver of counsel. The court shall accept the waiver of counsel if the defendant is not charged with a capital offense. The court may decline to accept the waiver of counsel if the defendant is charged with a capital offense.

(2) If the court accepts a defendant's waiver of counsel, the court may allow an attorney to serve as the defendant's legal advisor and, if the defendant is financially eligible for appointed counsel at state expense, may appoint an attorney as the defendant's legal advisor.

(3) If the court declines to accept a defendant's waiver of counsel under subsection (1) of this section, the court shall give the defendant a reasonable opportunity, as prescribed by order or rule of the court, to file a brief on the defendant's own behalf. [2001 c.472 §2; 2001 c.962 §29a]

Note: 138.504 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

POST-CONVICTION RELIEF

138.510 Persons who may file petition for relief; time limit. (1) Except as otherwise provided in ORS 138.540, any person convicted of a crime under the laws of this state may file a petition for post-conviction relief pursuant to ORS 138.510 to 138.680.

(2) A petition for post-conviction relief may be filed by one person on behalf of another person who has been convicted of aggravated murder and sentenced to death only if the person filing the petition demonstrates by a preponderance of the evidence that:

(a) The person sentenced to death is unable to file a petition on the person's own behalf due to mental incapacity or because of a lack of access to the court; and

(b) The person filing the petition has a significant relationship with the person sentenced to death and will act in the best interest of the person on whose behalf the petition is being filed.

(3) A petition pursuant to ORS 138.510 to 138.680 must be filed within two years of the following, unless the court on hearing a subsequent petition finds grounds for relief asserted which could not reasonably have been raised in the original or amended petition:

(a) If no appeal is taken, the date the judgment or order on the conviction was entered in the register.

(b) If an appeal is taken, the date the appeal is final in the Oregon appellate courts.

(c) If a petition for certiorari to the United States Supreme Court is filed, the later of:

(A) The date of denial of certiorari, if the petition is denied; or

(B) The date of entry of a final state court judgment following remand from the United States Supreme Court.

(4) A one-year filing period shall apply retroactively to petitions filed by persons whose convictions and appeals became final before August 5, 1989, and any such petitions must be filed within one year after November 4, 1993. A person whose post-conviction petition was dismissed prior to November 4, 1993, cannot file another post-conviction petition involving the same case.

(5) The remedy created by ORS 138.510 to 138.680 is available to persons convicted before May 26, 1959.

(6) In any post-conviction proceeding pending in the courts of this state on May 26, 1959, the person seeking relief in such proceedings shall be allowed to amend the action and seek relief under ORS 138.510 to 138.680. If such person does not choose to amend the action in this manner, the law existing prior to May 26, 1959, shall govern the case. [1959 c.636 §§1,16,17; 1989 c.1053 §18; 1993 c.517 §1; 1999 c.1055 §7; 2007 c.292 §1]

138.520 Relief which court may grant. The relief which a court may grant or order under ORS 138.510 to 138.680 shall include release, new trial, modification of sentence, and such other relief as may be proper and just. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody and release on security. [1959 c.636 §2; 1999 c.1051 §258]

138.525 Dismissal of meritless petition. (1) The court may, on its own motion or on the motion of the defendant, enter a judgment denying a meritless petition brought under ORS 138.510 to 138.680.

(2) As used in this section, "meritless petition" means one that, when liberally construed, fails to state a claim upon which post-conviction relief may be granted.

(3) Notwithstanding ORS 138.650, a judgment dismissing a meritless petition is not appealable.

(4) A dismissal is without prejudice if a meritless petition is dismissed without a hearing and the petitioner was not represented by counsel. [1993 c.517 §3]

138.527 Frivolous petition or response; attorney fees. (1) In addition to any other relief a court may grant or order under ORS 138.510 to 138.680, the court shall award attorney fees to the prevailing party if the court finds that the other party's petition or response was frivolous.

(2) An award of attorney fees under this section may not exceed $100.

(3) If the party required to pay attorney fees is an inmate of a correctional institution, the fees may be drawn from, or charged against, the inmate's trust account. [1995 c.657 §3]

Note: 138.527 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.530 When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state. [1959 c.636 §§3,5]

138.540 Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies. (1) Except as otherwise provided in ORS 138.510 to 138.680, a petition pursuant to ORS 138.510 to 138.680 shall be the exclusive means, after judgment rendered upon a conviction for a crime, for challenging the lawfulness of such judgment or the proceedings upon which it is based. The remedy created by ORS 138.510 to 138.680 does not replace or supersede the motion for new trial, the motion in arrest of judgment or direct appellate review of the sentence or conviction, and a petition for relief under ORS 138.510 to 138.680 shall not be filed while such motions or appellate review remain available. With the exception of habeas corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

(2) When a person restrained by virtue of a judgment upon a conviction of crime asserts the illegality of the restraint upon grounds other than the unlawfulness of such judgment or the proceedings upon which it is based or in the appellate review thereof, relief shall not be available under ORS 138.510 to 138.680 but shall be sought by habeas corpus or other remedies, if any, as otherwise provided by law. As used in this subsection, such other grounds include but are not limited to unlawful revocation of parole or conditional pardon or completed service of the sentence imposed. [1959 c.636 §4]

138.550 Availability of relief as affected by prior judicial proceedings. The effect of prior judicial proceedings concerning the conviction of petitioner which is challenged in the petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS

138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.

(2) When the petitioner sought and obtained direct appellate review of the conviction and sentence of the petitioner, no ground for relief may be asserted by petitioner in a petition for relief under ORS 138.510 to 138.680 unless such ground was not asserted and could not reasonably have been asserted in the direct appellate review proceeding. If petitioner was not represented by counsel in the direct appellate review proceeding, due to lack of funds to retain such counsel and the failure of the court to appoint counsel for that proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided by the appellate court may be asserted in the first petition for relief under ORS 138.510 to 138.680, unless otherwise provided in this section.

(3) All grounds for relief claimed by petitioner in a petition pursuant to ORS 138.510 to 138.680 must be asserted in the original or amended petition, and any grounds not so asserted are deemed waived unless the court on hearing a subsequent petition finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition. However, any prior petition or amended petition which was withdrawn prior to the entry of judgment by leave of the court, as provided in ORS 138.610, shall have no effect on petitioner's right to bring a subsequent petition.

(4) Except as otherwise provided in this subsection, no ground for relief under ORS 138.510 to 138.680 claimed by petitioner may be asserted when such ground has been asserted in any post-conviction proceeding prior to May 26, 1959, and relief was denied by the court, or when such ground could reasonably have been asserted in the prior proceeding. However, if petitioner was not represented by counsel in such prior proceeding, any ground for relief under ORS 138.510 to 138.680 which was not specifically decided in the prior proceedings may be raised in the first petition for relief pursuant to ORS 138.510 to 138.680. Petitioner's assertion, in a post-conviction proceeding prior to May 26, 1959, of a ground for relief under ORS 138.510 to 138.680, and the decision of the court in such proceeding adverse to the petitioner, shall not prevent the assertion of the same ground in the first petition pursuant to ORS 138.510 to 138.680 if the prior adverse decision was on the ground that no remedy heretofore existing allowed relief upon the grounds alleged, or if the decision rested upon the inability of the petitioner to allege and prove matters contradicting the record of the trial which resulted in the conviction and sentence of the petitioner. [1959 c.636 §15]

138.560 Procedure upon filing petition for relief; filing fee; venue and transfer of proceedings; surcharge. (1) A proceeding for post-conviction relief pursuant to ORS 138.510 to 138.680 shall be commenced by filing a petition and two copies thereof with the clerk of the circuit court for the county in which the petitioner is imprisoned or, if the petitioner is not imprisoned, with the clerk of the circuit court for the county in which the petitioner's conviction and sentence was rendered. Except as otherwise provided in ORS 138.590, the petitioner must pay the filing fee established under ORS 21.135 at the time of filing a petition under this section. If the petitioner prevails, the petitioner shall recover the fee pursuant to the Oregon Rules of Civil Procedure. The clerk of the court in which the petition is filed shall enter and file the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by petitioner on the defendant, but, in lieu thereof, the clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the Attorney General or other attorney for the defendant named in ORS 138.570.

(2) For the purposes of ORS 138.510 to 138.680, a person released on parole or conditional pardon shall be deemed to be imprisoned in the institution from which the person is so released.

(3) Except when petitioner's conviction was for a misdemeanor, the release of the petitioner from imprisonment during the pendency of proceedings instituted pursuant to ORS 138.510 to 138.680 shall not cause the proceedings to become moot. Such release of petitioner shall not change the venue of the proceedings out of the circuit court in which they were commenced and shall not affect the power of such court to transfer the proceedings as provided in subsection (4) of this section.

(4) Whenever the petitioner is imprisoned in a Department of Corrections institution and the circuit court for the county in which the petitioner is imprisoned finds that the hearing upon the petition can be more expeditiously conducted in the county in which the petitioner was convicted and sentenced, the circuit court upon its own motion or the motion of a party may order the petitioner's case to be transferred to the circuit court for the county in which petitioner's conviction and sentence were rendered. The court's order is not reviewable by any court of this state.

(5) When a petitioner who is imprisoned in a Department of Corrections institution is transferred to another Department of Corrections institution, the circuit court in which a post-conviction relief proceeding is pending may deny a motion for a change of venue to the county where the petitioner is transferred. The court's order is not reviewable by any court of this state. [1959 c.636 §6; 1983 c.505 §14; 1987 c.320 §44; 1991 c.249 §17; 1995 c.273 §20; 1995 c.657 §4; 2003 c.261 §1; 2003 c.737 §§65,66; 2005 c.702 §§77,78,79; 2011 c.595 §57]

138.570 Who shall be named as defendant; counsel for defendant. If the petitioner is imprisoned, the petition shall name as defendant the official charged with the confinement of petitioner. If the petitioner is not imprisoned, the defendant shall be the State of Oregon. Whenever the defendant is the superintendent of a Department of Corrections institution, the Attorney General shall act as the superintendent's attorney in the proceedings. Whenever the defendant is some other official charged with the confinement of petitioner, the district attorney of the county wherein the petitioner is imprisoned shall be the attorney for the defendant. Whenever petitioner is not imprisoned, counsel for the State of Oregon as defendant shall be the district attorney of the county in which petitioner's conviction and sentence were rendered. Whenever the petitioner is released from imprisonment during the pendency of any proceedings pursuant to ORS 138.510 to 138.680, the State of Oregon shall be substituted as defendant. Upon such substitution, counsel for the original defendant shall continue to serve as counsel for the substituted defendant. [1959 c.636 §7; 1983 c.505 §15; 1987 c.320 §45]

138.580 Petition. The petition shall be certified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The Supreme Court, by rule, may prescribe the form of the certification. The petition shall identify the proceedings in which petitioner was convicted and any appellate proceedings thereon, give the date of entry of judgment and sentence complained of and identify any previous post-conviction proceedings that the petitioner has undertaken to secure a post-conviction remedy, whether under ORS 138.510 to 138.680 or otherwise, and the disposition thereof. The petition shall set forth specifically the grounds upon which relief is claimed, and shall state clearly the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be certified as heretofore provided in this section. Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law. [1959 c.636 §8; 1991 c.885 §1; 1993 c.517 §4]

138.585 Access to confidential jury records. (1) A person who files a petition for post-conviction relief under ORS 138.510 to 138.680 and who seeks jury records that are confidential under ORS 10.215 must either include in the petition a request for access to the confidential records or file a motion in the proceedings seeking access to the confidential records. A motion under this subsection must be filed not later than 90 days before the hearing date for the petition, unless the court allows a later filing for good cause shown. The petition or motion, and any supporting affidavit for the petition or motion, must be served on the trial court administrator for the court that entered the judgment of conviction and on the State Court Administrator. The request for confidential records must:

(a) Specify the purpose for which the jury records are sought; and

(b) Identify with particularity the relevant jury records sought to be released, including the type and time period of the records.

(2) The court in the post-conviction relief proceeding may order release of the jury records if the court finds that:

(a) The jury records sought are likely to produce evidence relevant to a claim of a substantial denial of the petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both; and

(b) Production of the jury records is not unduly burdensome.

(3) An order under subsection (2) of this section may include, but need not be limited to:

(a) A requirement that the petitioner provide advance payment to the trial court administrator for the court that entered the judgment of conviction and, if applicable, the State Court Administrator for the reasonable costs of providing copies of the jury records; and

(b) Restrictions on further disclosure of the jury records including, but not limited to:

(A) A requirement that the petitioner return all originals and copies to the court at the conclusion of the proceeding;

(B) A requirement that the jury records may be used only for the purpose of supporting the petition for post-conviction relief;

(C) A prohibition against distributing the jury records to a person who is not an agent or representative of the petitioner; and

(D) A prohibition against contacting or attempting to contact the persons whose names appear on the jury records without specific authorization of the court.

(4) The trial court administrator for the court that entered the judgment of conviction or the State Court Administrator may intervene at any time as a matter of right as to any issues relating to the release of jury records under this section.

(5) The procedure established by this section is the exclusive means for compelling production of confidential jury records as evidence in post-conviction relief proceedings. The procedure established by ORS 10.275 is the exclusive means for compelling production of confidential jury records as evidence relevant to a challenge to a jury panel under ORS 136.005 or ORCP 57A. [2011 c.308 §2]

138.590 Petitioner may proceed as a financially eligible person. (1) Any petitioner who is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ suitable counsel possessing skills and experience commensurate with the nature of the conviction and complexity of the case for the proceeding may proceed as a financially eligible person pursuant to this section upon order of the circuit court in which the petition is filed.

(2) If the petitioner wishes to proceed as a financially eligible person, the person shall file with the petition an affidavit stating inability to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680, including, but not limited to, the filing fee required by ORS 138.560, or to employ suitable counsel for such a proceeding. The affidavit shall contain a brief statement of the petitioner's assets and liabilities and income during the previous year. If the circuit court is satisfied that the petitioner is unable to pay such expenses or to employ suitable counsel, it shall order that the petitioner proceed as a financially eligible person. If the court finds that a petitioner who has been sentenced to death is not competent to decide whether to accept or reject the appointment of counsel, the court shall appoint counsel to represent the petitioner. However, when a circuit court orders petitioner's case transferred to another circuit court as provided in ORS 138.560 (4), the matter of petitioner's proceeding as a financially eligible person shall be determined by the latter court.

(3) If a petitioner who has been sentenced to death qualifies for the appointment of counsel under this section but rejects the appointment, the court shall determine, after a hearing if necessary, whether the petitioner rejected the offer of counsel and made the decision with an understanding of its legal consequences. The court shall make appropriate findings on the record.

(4) In the order to proceed as a financially eligible person, the circuit court shall appoint suitable counsel to represent petitioner. Counsel so appointed shall represent petitioner throughout the proceedings in the circuit court. The court may not substitute one appointed counsel for another except pursuant to the policies, procedures, standards and guidelines of the Public Defense Services Commission.

(5) If counsel appointed by the circuit court determines that the petition as filed by petitioner is defective, either in form or in substance, or both, counsel may move to amend the petition within 15 days following counsel's appointment, or within a further period as the court may allow. The amendment shall be permitted as of right at any time during this period. If appointed counsel believes that the original petition cannot be construed to state a ground for relief under ORS 138.510 to 138.680, and cannot be amended to state a ground for relief, counsel shall, in lieu of moving to amend the petition, inform the petitioner and notify the circuit court of counsel's belief by filing an affidavit stating the belief and the reasons therefor with the clerk of the circuit court. This affidavit does not constitute a ground for denying the petition prior to a hearing upon its sufficiency, but the circuit court may consider the affidavit in deciding upon the sufficiency of the petition at the hearing.

(6) When a petitioner has been ordered to proceed as a financially eligible person, the expenses which are necessary for the proceedings upon the petition in the circuit court and the compensation to appointed counsel for petitioner as provided in this subsection shall be paid by the public defense services executive director from funds available for the purpose. At the conclusion of proceedings on a petition pursuant to ORS 138.510 to 138.680, the public defense services executive director shall determine and pay, as provided by the policies, procedures, standards and guidelines of the Public Defense Services Commission, the amount of expenses of petitioner and compensation for the services of appointed counsel in the proceedings in the circuit court.

(7) If the public defense services executive director denies, in whole or in part, expenses and compensation submitted for review and payment, the person who submitted the payment request may appeal the decision to the presiding judge of the circuit court. The presiding judge or the designee of

the presiding judge shall review the public defense services executive director's decision for abuse of discretion. The decision of the presiding judge or the designee of the presiding judge is final.

(8)(a) When a petitioner has been authorized to proceed as a financially eligible person, all court fees in the circuit court, except for the filing fee required by ORS 138.560, are waived.

(b) When a petitioner is allowed to file a petition without payment of the fee required by ORS 138.560 due to inability to pay, the fee is not waived but may be drawn from, or charged against, the petitioner's trust account if the petitioner is an inmate in a correctional facility.

(9) Notwithstanding any other provision of this chapter, a court may not appoint as counsel for a petitioner who has been sentenced to death a counsel who previously represented the petitioner at trial or on automatic and direct review in the case resulting in the death sentence unless the petitioner and the counsel expressly request continued representation. [1959 c.636 §9; 1961 c.480 §3; 1963 c.600 §9; 1973 c.836 §279a; 1979 c.867 §4; 1981 s.s c.3 §127; 1983 c.763 §17; 1987 c.320 §46; 1989 c.1053 §7; 1991 c.827 §2; 1995 c.657 §5; 1999 c.1055 §8; 2001 c.962 §30; 2003 c.261 §§5,6; 2003 c.449 §§8,45]

138.600 [1959 c.636 §10; repealed by 1997 c.872 §6]

138.610 Pleadings. Within 30 days after the docketing of the petition, or within any further time the court may fix, the defendant shall respond by demurrer, answer or motion. No further pleadings shall be filed except as the court may order. The court may grant leave, at any time prior to entry of judgment, to withdraw the petition. The court may make appropriate orders as to the amendment of the petition or any other pleading, or as to the filing of further pleadings, or as to extending the time of the filing of any pleading other than the original petition. [1959 c.636 §11]

138.620 Hearing. (1) After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or motion raising solely issues of law, the circuit court need not order that petitioner be present at such hearing, as long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present. Whenever the court orders that petitioner be present at the hearing, the court may order that petitioner appear by telephone or other communication device as provided in ORS 138.622 rather than in person.

(2) If the petition states a ground for relief, the court shall decide the issues raised and may receive proof by affidavits, depositions, oral testimony or other competent evidence. The burden of proof of facts alleged in the petition shall be upon the petitioner to establish such facts by a preponderance of the evidence. [1959 c.636 §12; 1996 c.4 §4; 2003 c.261 §4]

138.622 Appearance by communication device. For the purpose of a court appearance under ORS 138.510 to 138.680, the court may approve the appearance of the parties, counsel for the parties or witnesses by telephone or other communication device approved by the court. However, the court may not approve the appearance of the petitioner or counsel for the petitioner by telephone or other communication device unless the facilities used enable the petitioner to consult privately with the petitioner's counsel during the proceedings. [2003 c.261 §3]

138.625 Victim testimony. (1) A petitioner in a post-conviction relief proceeding may not compel a victim to testify, either by deposition, hearing or otherwise unless the petitioner moves for an order of the court allowing a subpoena.

(2) A copy of the motion for a subpoena under this section must be served on the counsel for the defendant.

(3) The court may not grant an order allowing a subpoena under this section unless the petitioner can demonstrate good cause by showing that the victim has information that is material to the post-conviction relief proceeding, is favorable to the petitioner and is other than what was admitted at trial.

(4) If the court grants an order allowing a subpoena under this section, upon a request by the victim for no personal contact between the parties, the court may allow the victim to appear by telephone or other communication device approved by the court. [2007 c.470 §1]

Note: 138.625 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.627 Victim's rights. (1) To accord crime victims due dignity and respect, a victim of a crime that is the subject of a petition for post-conviction relief filed under ORS 138.510 to 138.680 has, upon request, the following rights:

(a) The right to have the victim's schedule taken into account in scheduling the post-conviction proceedings;

(b) The right to inspect, in advance of the post-conviction proceedings, any public record on which the disposition of the petition will be based;

(c) The right to be heard, either orally or in writing, at the hearing;

(d) The right to consult with counsel for the state regarding the post-conviction proceeding, including, if applicable, notice of and the opportunity to consult regarding a settlement agreement; and

(e) The right to be informed by counsel for the state of the manner in which the petition was disposed.

(2) As used in this section, "victim" has the meaning given that term in ORS 131.007. [2010 c.89 §2]

Note: 138.627 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.630 Evidence of events occurring at trial of petitioner. In a proceeding pursuant to ORS 138.510 to 138.680, events occurring at the trial of petitioner may be shown by a duly authenticated transcript, record or portion thereof. If such transcript or record cannot be produced, the affidavit of the judge who presided at the trial setting forth the facts occurring at the trial shall be admissible in evidence when relevant. When necessary to establish any ground for relief specified in ORS 138.530, the petitioner may allege and prove matters in contradiction of the record of the trial of the petitioner. When the record is so contradicted, the defendant may introduce in evidence any evidence which was admitted in evidence at the trial to support the contradicted matter and may call witnesses whose testimony at such trial supported the contradicted matter. Whenever such evidence or such witnesses cannot be produced by defendant for any reason which is sufficient in the opinion of the court, such parts of the duly authenticated record of the trial as support the contradicted matter may be introduced in evidence by the defendant. A duly authenticated record of the testimony of any witness at the trial may be introduced in evidence to impeach the credibility of any testimony by the same witness in the hearing upon the petition. [1959 c.636 §13]

138.640 Judgment; enforcement. (1) After deciding the issues raised in the proceeding, the court shall enter a judgment denying the petition or granting the appropriate relief. The judgment may include orders as provided in ORS 138.520. The judgment must clearly state the grounds on which the cause was determined, and whether a state or federal question was presented and decided.

(2) If the court grants the petitioner relief, the judgment is not enforceable in the petitioner's favor until:

(a) The petitioner causes a certified copy of the judgment to be entered in the circuit court in which the petitioner's conviction and sentence were rendered; and

(b) The petitioner serves a certified copy of the judgment on the district attorney of the county in which the petitioner's conviction and sentence were rendered. [1959 c.636 §14; 2003 c.576 §245; 2007 c.193 §2]

138.650 Appeal. (1) Either the petitioner or the defendant may appeal to the Court of Appeals within 30 days after the entry of a judgment on a petition pursuant to ORS 138.510 to 138.680. The manner of taking the appeal and the scope of review by the Court of Appeals and the Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that:

(a) The trial court may provide that the transcript contain only such evidence as may be material to the decision of the appeal; and

(b) With respect to ORS 138.081 (1), if petitioner appeals, petitioner shall cause the notice of appeal to be served on the attorney for defendant, and, if defendant appeals, defendant shall cause the notice of appeal to be served on the attorney for petitioner or, if petitioner has no attorney of record, on petitioner.

(2)(a) Upon motion of the petitioner, the Court of Appeals shall grant the petitioner leave to file a notice of appeal after the time limit described in subsection (1) of this section if:

(A) The petitioner, by clear and convincing evidence, shows that the failure to file a timely notice of appeal is not attributable to the petitioner personally; and

(B) The petitioner shows a colorable claim of error in the proceeding from which the appeal is taken.

(b) The request for leave to file a notice of appeal after the time limit described in subsection (1) of this section shall be filed no later than 90 days after entry of the judgment from which the petitioner seeks to appeal and shall be accompanied by the notice of appeal sought to be filed. A request for leave under this subsection may be filed by mail. The date of filing shall be the date of mailing if the request is mailed as provided in ORS 19.260.

(c) The Court of Appeals may not grant relief under this subsection unless the defendant has received notice of and an opportunity to respond to the petitioner's request for relief.

(3) An appeal under this section taken by the defendant stays the effect of the judgment. If the petitioner is incarcerated, the trial court may stay the petitioner's sentence

pending the defendant's appeal and order conditional release or security release, in accordance with ORS 135.230 to 135.290, only if:

(a) The post-conviction court's judgment vacates the judgment of conviction or reduces the sentence or sentences imposed upon conviction;

(b) The petitioner has completed any other sentence of incarceration to which the petitioner is subject; and

(c) The petitioner otherwise would be entitled to immediate release from incarceration under the court's judgment. [1959 c.636 §18; 1963 c.557 §1; 1969 c.198 §72; 1971 c.565 §26; 1987 c.852 §3; 2003 c.576 §246; 2007 c.193 §1]

138.660 Summary affirmation of judgment; dismissal of appeal. In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Court of Appeals on its own motion or on motion of respondent may summarily affirm, after submission of the appellant's brief and without submission of the respondent's brief, the judgment on appeal without oral argument if it finds that no substantial question of law is presented by the appeal. Notwithstanding ORS 2.570, the Chief Judge of the Court of Appeals may deny or, if the petitioner does not oppose the motion, grant a respondent's motion for summary affirmation. A dismissal of the appeal under this section shall constitute a decision upon the merits of the appeal. [1959 c.636 §19; 1963 c.557 §2; 1969 c.198 §73; 1995 c.295 §4]

138.670 Admissibility, at new trial, of testimony of witness at first trial. In the event that a new trial is ordered as the relief granted in a proceeding pursuant to ORS 138.510 to 138.680, a properly authenticated transcript of testimony in the first trial may be introduced in evidence to supply the testimony of any witness at the first trial who has since died or who cannot be produced at the new trial for other sufficient cause. Such transcript shall not be admissible in any other respect, except that the transcript of testimony of a witness at the first trial may be used at the new trial to impeach the testimony at the new trial by the same witness. [1959 c.636 §20]

138.680 Short title. ORS 138.510 to 138.680 may be cited as the Post-Conviction Hearing Act. [1959 c.636 §21]

138.685 [1991 c.885 §3; repealed by 1999 c.1055 §15]

138.686 Automatic stay of sentence of death for federal appeal and state post-conviction relief. (1) The execution of a sentence of death is automatically stayed for 90 days following the effective date of an appellate judgment affirming the sentence of death on automatic and direct review.

(2) If the defendant files a petition for certiorari seeking United States Supreme Court review of the sentence of death within 90 days after the effective date of the appellate judgment or within such other time as allowed by the United States Supreme Court, execution of the sentence of death is automatically stayed until the United States Supreme Court denies the petition or grants the petition and resolves the merits.

(3) Upon final resolution of a petition for certiorari to the United States Supreme Court, execution of the sentence of death is automatically stayed for 30 days after the date the petition is resolved to allow the defendant to file a notice in the circuit court of the county in which the defendant is imprisoned attesting to the defendant's intent to file a petition for post-conviction relief. If the defendant files a first petition for post-conviction relief within 90 days after the notice provided for in this subsection, the execution of the sentence of death is stayed until the post-conviction petition is finally resolved. If a first petition for post-conviction relief is not filed within 90 days after the notice provided for in this subsection, the defendant may apply to the circuit court in which the notice was filed to extend the stay. The circuit court shall extend the stay for a reasonable time upon the defendant's showing that progress is being made in the preparation of the petition and that it will be filed within a reasonable time.

(4) If the defendant does not file a petition for certiorari seeking United States Supreme Court review of the sentence of death but does file a first petition for post-conviction relief within 90 days after the date upon which the appellate judgment becomes effective, execution of the sentence of death is stayed until the petition for post-conviction relief is finally resolved. [1999 c.1055 §6]

Note: 138.686 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.687 [1991 c.885 §4; repealed by 1999 c.1055 §15]

POST-CONVICTION MOTION FOR DNA TESTING

138.690 Motion. A person may file in the circuit court in which the judgment of conviction was entered a motion requesting the performance of DNA (deoxyribonucleic acid) testing on specific evidence if the person:

(1) Is incarcerated in a Department of Corrections institution as the result of a conviction for aggravated murder or a person felony as defined in the rules of the Oregon Criminal Justice Commission; or

(2) Is not in custody but has been convicted of aggravated murder, murder or a sex crime as defined in ORS 181.594. [2001 c.697 §1; 2005 c.759 §1; 2007 c.800 §1]

Note: 138.690 to 138.698 were enacted into law by the Legislative Assembly but were not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

138.692 Affidavit; order; costs. (1)(a) When a person files a motion under ORS 138.690 requesting the performance of DNA (deoxyribonucleic acid) testing on specified evidence, the motion must be supported by an affidavit. The affidavit must:

(A)(i) For a person described in ORS 138.690 (1), contain a statement that the person is innocent of the offense for which the person was convicted or of the conduct underlying any mandatory sentence enhancement; or

(ii) For a person described in ORS 138.690 (2), contain a statement that the person is innocent of the offense for which the person was convicted;

(B) Identify the specific evidence to be tested and a theory of defense that the DNA testing would support. The specific evidence must have been secured in connection with the prosecution, including the investigation, that resulted in the conviction of the person; and

(C) Include the results of any previous DNA test of the evidence if a previous DNA test was conducted by either the prosecution or the defense.

(b) The person must present a prima facie showing that DNA testing of the specified evidence would, assuming exculpatory results, establish the actual innocence of the person of:

(A) The offense for which the person was convicted; or

(B) Conduct, if the exoneration of the person of the conduct would result in a mandatory reduction in the person's sentence.

(2) The court shall order the DNA testing requested in a motion under subsection (1) of this section if the court finds that:

(a) The requirements of subsection (1) of this section have been met;

(b) Unless the parties stipulate otherwise, the evidence to be tested is in the possession of a city, county, state or the court and has been subject to a chain of custody sufficient to establish that the evidence has not been altered in any material aspect;

(c) The motion is made in a timely manner and for the purpose of demonstrating the innocence of the person of the offense or of the conduct and not to delay the execution of the sentence or administration of justice; and

(d) There is a reasonable possibility that the testing will produce exculpatory evidence that would establish the innocence of the person of:

(A) The offense for which the person was convicted; or

(B) Conduct, if the exoneration of the person of the conduct would result in a mandatory reduction in the person's sentence.

(3) In granting a motion under this section, the court may impose reasonable conditions designed to protect the interests of the state in the integrity of the evidence and the testing process.

(4) Unless both parties agree otherwise, the court shall order the Department of State Police to conduct the DNA testing. The court may order a second test upon a showing that the state police failed to follow appropriate DNA protocols and that failure reasonably affected the accuracy of the DNA test.

(5) The costs of DNA tests ordered under this section must be paid by:

(a) The person making the motion for DNA testing if the person is not incarcerated or, if the person is incarcerated, if the person is financially able to pay; or

(b) The state if counsel at state expense has been appointed under ORS 138.694.

(6) The results of a DNA test ordered under this section must be disclosed to the person filing the motion and to the state.

(7) Notwithstanding the fact that an appeal of the conviction or a petition for post-conviction relief in the underlying case is pending at the time a motion is filed under ORS 138.690, the circuit court shall consider the motion. If the court grants the motion, the court shall notify the court considering the appeal or post-conviction petition of that fact. When a court receives notice under this subsection, the court shall stay the appeal or post-conviction proceedings pending the outcome of the motion filed under ORS 138.690 and any further proceedings resulting from the motion. [2001 c.697 §2; 2005 c.759 §2; 2007 c.800 §2]

Note: See note under 138.690.

138.694 Appointed counsel. (1) A person described in ORS 138.690 (1) may file a petition in the circuit court in which the judgment of conviction was entered requesting the appointment of counsel at state expense to assist the person in determining whether to file a motion under ORS 138.690. The petition must be accompanied by:

(a) A completed affidavit of eligibility for appointment of counsel at state expense; and

(b) An affidavit stating that:

(A) The person meets the criteria in ORS 138.690 (1);

(B) The person is innocent of the charge for which the person was convicted or of the conduct that resulted in a mandatory sentence enhancement;

(C) The identity of the perpetrator of the crime or conduct was at issue in the original prosecution or, if the person was documented as having mental retardation prior to the time the crime was committed, should have been at issue; and

(D) The person is without sufficient funds and assets, as shown by the affidavit required by paragraph (a) of this subsection, to hire an attorney to represent the person in determining whether to file a motion under ORS 138.690.

(2) The court shall grant a petition filed under this section if:

(a) The petitioner complies with the requirements of subsection (1) of this section; and

(b) It appears to the court that the petitioner is financially unable to employ suitable counsel possessing skills and experience commensurate with the nature and complexity of the matter.

(3) When a court grants a petition under this section, the court shall appoint the attorney originally appointed to represent the petitioner in the action that resulted in the conviction unless the attorney is unavailable.

(4) An attorney appointed under this section:

(a) If other than counsel provided pursuant to ORS 151.460, is entitled to compensation and expenses as provided in ORS 135.055; or

(b) If counsel provided pursuant to ORS 151.460, is entitled to expenses as provided in ORS 135.055. [2001 c.697 §4; 2007 c.800 §3]

Note: See note under 138.690.

138.696 Test results. (1) If DNA (deoxyribonucleic acid) testing ordered under ORS 138.692 produces inconclusive evidence or evidence that is unfavorable to the person requesting the testing:

(a) The court shall forward the results to the State Board of Parole and Post-Prison Supervision; and

(b) The Department of State Police shall compare the evidence to DNA evidence from unsolved crimes in the Combined DNA Index System.

(2) If DNA testing ordered under ORS 138.692 produces exculpatory evidence, the person who requested the testing may file in the court that ordered the testing a motion for a new trial based on newly discovered evidence. Notwithstanding the time limit established in ORCP 64 F, a person may file a motion under this subsection at any time during the 60-day period that begins on the date the person receives the test results.

(3) Upon receipt of a motion filed under subsection (2) of this section and notwithstanding the time limits in ORCP 64 F, the court shall hear the motion. [2001 c.697 §3; 2003 c.288 §3]

Note: See note under 138.690.

138.698 Effect of setting aside conviction on plea agreement. When a conviction has been set aside as the result of evidence obtained through DNA (deoxyribonucleic acid) testing conducted under ORS 138.692, the prosecution of any offense that was dismissed or not charged pursuant to a plea agreement that resulted in the conviction that has been set aside may be commenced within the later of:

(1) The period of limitation established for the offense under ORS 131.125 to 131.155; or

(2) Notwithstanding ORS 131.125 and 131.155, two years after the date the conviction was set aside. [2005 c.759 §3]

Note: See note under 138.690.

138.710 [1963 c.600 §1; renumbered 151.210]

138.720 [1963 c.600 §2; 1969 c.314 §6; renumbered 151.270]

138.730 [1963 c.600 §3; renumbered 151.280]

138.740 [1963 c.600 §4(1),(3),(4),(5),(6),(7); renumbered 151.220]

138.750 [Subsection (1) enacted as 1963 c.600 §4(2); subsection (2) enacted as 1963 c.600 §5(4); 1967 c.35 §1; 1969 c.644 §1; 1971 c.642 §3; renumbered 151.230]

138.760 [1963 c.600 §5(1),(2),(3); renumbered 151.240]

138.770 [1963 c.600 §6; 1967 c.372 §6; renumbered 151.250]

138.780 [1963 c.600 §7; renumbered 151.260]

138.790 [1963 c.600 §13; renumbered 151.290]

138.810 [1955 c.662 §2; 1959 c.558 §42; renumbered 138.410]

138.820 [1955 c.662 §3; 1959 c.558 §43; renumbered 138.420]

138.830 [1955 c.662 §4; renumbered 138.430]

138.840 [1955 c.662 §5; 1959 c.558 §44; renumbered 138.440]