Chapter 138

1967 REPLACEMENT PART

Appeals; Post-conviction Relief; Public Defender

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APPEALS

138.005 Definitions for ORS 138.010 to 138.300. As used in ORS 138.010 to 138.300, 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 138.300.

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 138.300, 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. The defendant may appeal to the Supreme Court from a judgment on a conviction in a circuit court; and upon an appeal, any decision of the court in an intermediate order or proceeding may be reviewed.
[Amended by 1959 c.558 §36; 1963 c.207 §1]

138.050 Appeal from sentence on plea of guilty where fine or punishment is excessive. A defendant who has plead guilty may take an appeal from a judgment on conviction where it imposes an excessive fine or excessive, cruel or unusual punishment. If the judgment of conviction is in the circuit court, the appeal shall be taken to the Supreme Court; if it is in the district court, justice of the peace court or municipal court or city recorder's court, the appeal shall be taken to the circuit court of the county in which such court is located. On such appeal, the appellate court shall only consider the question whether an excessive fine or excessive, cruel or unusual punishment not proportionate to the offense has been imposed. If in the judgment of the appellate court the fine imposed is excessive or the punishment imposed is excessive, unusual or cruel and not proportionate to the offense, it shall direct the court from which the appeal is taken to impose the punishment which should be administered.

138.060 Appeal by state. The state may take an appeal to the Supreme Court from:

(1) A judgment for the defendant on a demurrer to the indictment;

(2) An order sustaining a plea of former conviction or acquittal; or

(3) An order arresting the judgment.
[Amended by 1963 c.385 §1]

138.070 Time within which appeal must be taken. An appeal must be taken within 60 days after the judgment or order appealed from was given or made.

138.080 Manner of taking appeal; notice. (1) An appeal shall be taken by filing a notice in writing with the clerk of the court where the judgment is entered, stating substantially that the appellant appeals from the judgment.

(2) Where the appeal is to the Supreme Court, the clerk, within 10 days after the notice of appeal has been filed with him, shall send a certified copy of the notice of appeal to the clerk of the Supreme Court, at Salem.
[Amended by 1959 c.558 §37]

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. When the defendant takes an appeal, the notice of appeal shall be signed by him or an attorney of the court for him.

138.100 Service of notice of appeal on district attorney or plaintiff's attorney. When the defendant appeals, the notice of appeal shall be served on the district attorney for the county in which the judgment is entered. However, if the appeal is under ORS 221.360, the notice of appeal shall be served on the plaintiff's attorney.
[Amended by 1959 c. 558 §38; 1961 c.101 §1]

138.110 Service of notice of appeal on defendant or his attorney; publication in certain cases. When the state takes an appeal, a notice similar to the one mentioned in ORS 138.080 shall be served on an attorney of record for the defendant, or, if the defendant has no attorney of record, on the defendant. If, after due diligence, the servvice cannot be made as in this section directed, 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]

138.120 When appeal is perfected in case of service of notice of appeal 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 (ORS 138.135 and 138.145 enacted in lieu of ORS 138.130, 138.140 and 138.150)]

138.135 Defendant's appeal 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 admitted to bail. If a defendant is not admitted to bail and elects not to commence service of the sentence pending appeal, he 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 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 his assets.
[1963 c.155 §2 (ORS 138.135 and 138.145 enacted in lieu of ORS 138.130, 138.140 and 138.150); 1967 c.372 §5]

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

138.145 Temporary retention at place of original custody of defendant under sentence of imprisonment. If the place of confinement designated by the court is the Oregon State Penitentiary or the Oregon State Correctional Institution, the defendant shall be retained in the place of his original custody for a period of at least 48 hours prior to being taken to the designated institution, unless the defendant elects to be taken to such institution without delay or is admitted to bail pending appeal. The court shall order retention of the defendant at the place of original custody or restoration thereto, if required for preparation of an appeal, at such times and for such periods as may be deemed necessary by the court.
[1963 c.155 §3 (ORS 138.135 and 138.145 enacted in lieu of ORS 138.130, 138.140 and 138.150)]

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

138.160 Appeal by state as stay of judgment or order; bail. An appeal taken by the state stays the effect of the judgment or order in favor of the defendant, so that his bail or money deposited in lieu thereof 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, he may, in the discretion of the court, be admitted to bail, pending the appeal, on his own undertaking.
[Amended by 1959 c.638 §20]

138.170 [Repealed by 1959 c.638 §26]

138.180 [Repealed by 1959 c.558 §51]

138.185 Transmission of record to Supreme Court; when Supreme Court acquires jurisdiction; dismissals; powers of trial court. (1) In an appeal to the Supreme Court, 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 Clerk of the Supreme Court, at Salem, in the same manner and within the time prescribed in ORS 19.074 to 19.098.

(2) The provisions of ORS 19.033 and 19.170 and, if the defendant is the appellant, the provisions of subsection (3) of ORS 19.130 shall apply to appeals to the Supreme Court.
[1959 c.558 §39]

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]

138.230 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 he is in custody, that he be discharged therefrom, or if he has been admitted to bail, that his bail be exonerated, or if money has been deposited instead of bail, that it be refunded to the defendant.

138.260 Entry of judgment in journal; transmission to court below. When the judgment of the appellate court is given, it shall be entered in its journal, and a certified copy of the entry shall be forthwith remitted to the clerk of the court below.

138.270 Proceedings in court below; enforcement of judgment; new trial. (1) Upon the receipt of the certified copy of the entry of judgment mentioned in ORS 138.260, the clerk shall enter the same in the journal of the court below and thereafter the judgment shall be enforced without any further proceedings, unless the appellate court so directs, as a judgment of the court below.

(2) If by the judgment of the appellate court a new trial is ordered from the entry of the judgment in the court below, the action is to be deemed pending and for trial in such court, according to the directions of the appellate court.

138.280 Retention of transcript in appellate court; transmission of copy of judgment to trial court. The transcript transmitted to the appellate court shall there remain of record and shall not be remitted to the court below. After entry thereof, a certified copy of the judgment of the appellate court shall be transmitted to, and filed in, the trial court.
[Amended by 1959 c.558 §41]

138.290 Termination of appellate jurisdiction; orders giving effect to judgment. After the certified copy of the judgment has been remitted, as provided in ORS 138.260, the appellate court has no further jurisdiction of the appeal or of the proceedings thereon; and all orders which may be necessary to carry the judgment into effect shall be made by the court to which the certified copy is remitted.

138.300 County's liability for costs on appeal in criminal action. Upon reversal of the judgment of the lower court in a criminal action, the county shall be liable for costs on appeal to 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.

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; amended by 1961 c.480 §1; repealed by 1967 c.372 §13]

138.480 Appointment of Public Defender to represent prisoner in proceeding before Supreme Court. The Supreme Court may, in its discretion, at the request of an individual who is deprived of his liberty by a judgment, is without means to retain an attorney and is without the aid of an attorney, direct the Public Defender to represent the individual in a proceeding before it to test the validity of that judgment.
[1963 c.600 §10]

138.490 Compensation of original attorney for services in subsequent proceeding brought by Public Defender. (1) When an attorney has been appointed by a court or magistrate other than the Supreme Court under ORS 135.320, 419.498 and 426.100 and the case later is taken to a court, by the Public Defender, on an appeal or on a post-conviction proceeding, and that attorney previously appointed is consulted or joined by the Public Defender under paragraph (d) of subsection (1) of ORS 138.760, the circuit court from which or to which the case is taken:

(a) May order that the attorney be paid a sum that will reasonably compensate the attorney for his services to the extent that those services have not been compensated pursuant to an earlier order for payment in the case; and

(b) May order that the attorney be reimbursed for expenses incurred in connection with the consultation or joinder.

(2) The county from which the case is taken shall pay the attorney the sum ordered to be paid under this section.
[1963 c.600 §11]

138.500 Appointment of counsel and furnishing of transcript for appellant without funds. (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 such person is without funds to employ counsel for the appeal, he may request the circuit court from which the appeal is or would be taken to appoint counsel to represent him on such appeal. 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 such person. Upon receiving such a request, the circuit court, if it finds that petitioner or defendant is without funds to employ counsel for an appeal, shall appoint counsel to represent petitioner or defendant on the appeal. The circuit court, in its discretion, may appoint counsel who represented petitioner or defendant in the circuit court in the case, or if the Public Defender is able to serve, it may appoint the Public Defender as counsel on appeal.

(2) 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 such person is without funds to pay for a transcript, or portion thereof, necessary to present adequately his case upon appeal, such person may request the circuit court to order such transcript, or portion thereof, furnished to him. The request shall be in writing and shall include a brief statement of the assets, liabilities and income in the previous year of such person. Upon receiving such request, the circuit court shall order furnished to such person such portion of the transcript as may be material to the decision on appeal, if the circuit court finds that such transcript or portion thereof is necessary and that such person is unable to pay for it. The cost of such transcript shall be in the amount prescribed in ORS 21.470 and paid for as provided in subsection (3) of this section.

(3) After determination of the appeal the Supreme Court shall allow the cost of the transcript furnished pursuant to subsection (2) of this section, the cost of briefs and any other expenses of appellant which were necessary to appellate review. The Supreme Court may also determine and allow a reasonable fee for counsel appointed under this section. A verified statement of such costs and expenses, including petition for allowance of attorney's fee, shall be filed within 20 days or such further time as may be allowed by the court from the time an opinion is rendered or, if no opinion is handed down, then within 20 days from the giving of a decision by the court. The cost, expenses and fee so allowed by the Supreme Court shall be paid by:

(a) The county in which the final order or judgment appealed from was rendered, if the appeal is taken to review directly an order or judgment in a criminal action; or

(b) The county in which the conviction complained of was rendered, if the appeal is taken to review the judgment in a proceeding pursuant to ORS 138.510 to 138.680.

(4) 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 such 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.

(5) If appointed counsel on appeal is the Public Defender established by ORS 138.730, no fee for his services shall be ordered by the court or paid by the county.
[1959 c.636 §23; 1961 c.480 §2; 1963 c.600 §8]

POST-CONVICTION RELIEF

138.510 Convicted person may file petition for relief. (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 pursuant to ORS 138.510 to 138.680 may be filed without limit in time.

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

(4) 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 his action and seek relief under ORS 138.510 to 138.680. If such person does not choose to amend his action in this manner, the law existing prior to May 26, 1959, shall govern his case.
[1959 c.636 §§1, 17, 16]

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 bail.
[1959 c.636 §2]

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 his 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 his petition shall be as specified in this section and not otherwise:

(1) The failure of petitioner to have sought appellate review of his conviction, or to have raised matters alleged in his petition at his trial, 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 his conviction, 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 his conviction and sentence, 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 his 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 his 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 his conviction and sentence. [1959 c.636 §15]

138.560 Procedure upon filing petition for relief; venue and transfer of proceedings. (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 his conviction and sentence was rendered. The clerk of the court in which the petition is filed shall docket 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 by registered mail 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 he 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 by him 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 petitioner is imprisoned in the Oregon State Penitentiary or the Oregon State Correctional Institution and the circuit court for Marion County 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 for Marion County 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. Such an order shall not be reviewable by any court of this state.
[1959 c.636 §6]

138.570 Defendant and 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 Warden of the Oregon State Penitentiary or the Superintendent of the Oregon State Correctional Institution, the Attorney General shall act as his 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]

138.580 Petition. The petition shall be verified 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 such verification. 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 verified as heretofore provided in this section. Affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition, or the petition shall state why they are not attached. 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]

138.590 Petitioner may proceed as poor 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 counsel for such a proceeding may proceed as a poor 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 poor person, he shall file with his petition an affidavit stating that he is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or to employ counsel for such a proceeding. The affidavit shall contain a brief statement of petitioner's assets and liabilities and his income during the previous year. If the circuit court is satisfied that petitioner is unable to pay such expenses or to employ counsel, it shall order that petitioner proceed as a poor person. However, when the circuit court for Marion County orders petitioner's case transferred to another circuit court as provided in subsection (4) of ORS 138.560, the matter of petitioner's proceeding as a poor person shall be determined by the latter court.

(3) In the order to proceed as a poor person, the circuit court shall appoint counsel to represent petitioner. When the petitioner is held in the custody of either the Warden of the Oregon State Penitentiary or the Superintendent of the Oregon State Correctional Institution, and the Public Defender authorized by ORS 137.205, 138.480 to 138.500, 138.590 and 138.710 to 138.790 is able to serve, the circuit court shall appoint the Public Defender as counsel to represent petitioner. Counsel so appointed shall represent petitioner throughout the proceedings in the circuit court.

(4) 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, he may move to amend the petition within 15 days following his appointment, or within such further period as the court may allow. Such 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 such a ground, he shall, in lieu of moving to amend the petition, inform the petitioner and notify the circuit court of his belief by filing an affidavit stating his belief and his reasons therefor with the clerk of the circuit court. This affidavit shall not constitute a ground for denying the petition prior to a hearing upon its sufficiency, but the circuit court may consider such affidavit in deciding upon the sufficiency of the petition at the hearing.

(5) When a petitioner has been ordered to proceed as a poor person, the expenses which are necessary for the proceedings upon his petition in the circuit court and the award to appointed counsel for petitioner as provided in this subsection shall be a charge against and shall be paid by the county in which petitioner's conviction and sentence were rendered. At the conclusion of proceedings on a petition pursuant to ORS 138.510 to 138.680, the circuit court shall determine the amount of expenses of petitioner in the circuit court. The circuit court may also determine a reasonable fee for the services of appointed counsel in the proceedings in the circuit court. The expenses and fee determined by the circuit court shall be certified to and shall be ordered to be paid by the county in which petitioner's conviction and sentence were rendered and shall be paid by such county.

(6) When the Public Defender established by ORS 138.730 is the appointed counsel no fee for his services shall be ordered by the court or paid by the county.

(7) When petitioner has been ordered to proceed as a poor person, all court fees in the circuit court are waived.

[1959 c.636 §9; 1961 c.480 §3; 1963 c.600 §9]

138.600 Filing fee and undertaking not required. Notwithstanding any other fees provided by law, there shall be no filing fee or undertaking required in any court for a proceeding pursuant to ORS 138.510 to 138.680.

[1959 c.636 §10]

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, so 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.

(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]

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 his trial. 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. After deciding the issues raised in the proceeding, the court shall deny the petition or enter an order granting the appropriate relief. The court may also make orders as provided in ORS 138.520. The order making final disposition of the petition shall state clearly the grounds upon which the cause was determined, and whether a state or federal question, or both, was presented and decided. This order shall constitute a final judgment for purposes of appellate review and for purposes of res judicata.
[1959 c.636 §14]

138.650 Appeal. Either the petitioner or the defendant may appeal to the Supreme Court of Oregon within 60 days after the entry of final 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 Supreme Court shall be the same as that provided by law for appeals in criminal actions, except that the trial court may provide that the transcript contain only such evidence as may be material to the decision of the appeal.
[1959 c.636 §18; 1963 c.557 §1]

138.660 Dismissal of appeal. In reviewing the judgment of the circuit court in a proceeding pursuant to ORS 138.510 to 138.680, the Supreme Court on its own motion or on motion of respondent and upon receipt of the trial court file and transcript, if any, may dismiss the appeal without oral argument or submission of briefs if it finds that no substantial question of law is presented by the appeal. 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]

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]

PUBLIC DEFENDER COMMITTEE

138.710 Definitions for ORS 138.720 to 138.780. As used in ORS 138.720 to 138.780, unless the context requires otherwise:

(1) "Committee" means the Public Defender Committee appointed under ORS 138.720.

(2) "Defender" means the Public Defender appointed under ORS 138.730.
[1963 c.600 §1]

138.720 Public Defender Committee; appointment; expenses; term. (1) The Supreme Court shall appoint a Public Defender Committee of not fewer than five individuals, who, in the opinion of the Court, are qualified by training or experience to perform the functions of the committee. A majority of the committee is a quorum for the transaction of business.

(2) Each member shall serve without compensation but shall receive, subject to any other applicable law regulating travel and other expenses of state officers, reimbursement for his actual and necessary travel and other expenses incurred in the performance of his official duties.

(3) Each member's term is four years and he may be reappointed.
[1963 c.600 §2]

138.730 Duties of committee. The committee shall:

(1) Appoint a Public Defender;

(2) Determine policies and procedures for the performance of the defender's functions;

(3) Determine standards of eligibility for the defender and his deputies;

(4) Approve the original estimate sheet in connection with the budget for the defender's office and generally be responsible for supervision of the expenditures made for the defender's office;

(5) Prescribe a form of oath of financial circumstances for use under subsection (3) of ORS 138.770;

(6) Prescribe a formula of apportionment of expenses under ORS 137.205; and

(7) Where the defender is unable to perform fully his authorized functions, determine the nature and extent of the services he shall render.
[1963 c.600 §3]

138.740 Public Defender; term; qualifications; deputies. (1) The defender's term is four years, and he may be reappointed. The office of defender becomes vacant upon the conditions prescribed in ORS 236.010, upon the committee's finding of any of the causes enumerated in subsections (1) to (3) of ORS 241.425, or upon the defender's failure to comply with subsection (2) of this section.

(2) The defender shall be an active member of the Oregon State Bar.

(3) To qualify for office the individual appointed defender shall file with the Secretary of State his signed oath of office to the effect that he will support the Constitution of the United States and the Constitution of Oregon, and that he will faithfully and honestly demean himself in his office.

(4) The defender and his deputies shall be members of the exempt service established by ORS 240.200. One secretary for the defender shall be a member of the unclassified service.

(5) The defender, and any of his deputies who receive a salary of $10,000 per year or more, shall not engage in the private practice of law.

(6) The defender and his deputies shall not be employed in any capacity by a district attorney or other public prosecutor.
[1963 c.600 §4 (1), (3), (4), (5), (6), (7)]

138.750 Salary of defender. (1) The minimum salary of the defender is $13,800 a year and his maximum salary is $16,500 a year. The defender shall receive the minimum salary unless such salary is or has been altered by the Public Defender Committee in the manner prescribed in ORS 292.855.

(2) The defender shall be paid by the state in the same manner as other state officers are paid. Such salary shall be the full compensation to the defender for all his services, except for the allowance of his expense as a state officer.
[Subsection (1) enacted as 1963 c.600 §4 (2); subsection (2) enacted as 1963 c.600 §5 (4); 1967 c.35 §1]

138.760 Administrative powers of defender. (1) When it is necessary to enable the defender to perform his duties, the defender may:

(a) Employ deputies with the power and authority of the defender.

(b) Employ other individuals, including expert investigators, witnesses and interpreters.

(c) Contract for the purchase of materials or other services.

(d) Consult with and, in appropriate cases, join in the defense, any attorney who had previously represented the individual in a case which resulted in a conviction under consideration in the proceeding where the defender represents the individual. Any compensation paid such attorney for services rendered under this paragraph shall be paid solely as provided by ORS 138.490.

(e) Make or assist in making any study, survey or report upon the need for, use of and availability of legal aid to indigent persons in the State of Oregon, and accept payment therefor.

(2) Subject to the express approval of the committee, the defender may accept gifts, grants or services from, or contract with nonprofit organizations, educational institutions and other state or federal agencies; in rendering legal aid to persons without means to retain an attorney and in studying, surveying and reporting on the need, use and availability of such aid in the State of Oregon.

(3) Payment for materials and services procured under this section shall be made in the same manner as other state expenses are paid.
[1963 c.600 §5 (1), (2), (3)]

138.770 When defender may render services. (1) In accordance with subsections (2) to (4) of this section and the determinations of the committee under subsection (2) or (7) of ORS 138.730, the defender may act as attorney at any stage of a proceeding before any court, including the Supreme Court, for an individual who is being deprived of his liberty in the custody of the Warden of the Oregon State Penitentiary or of the Superintendent of the Oregon Correctional Institution, and the proceeding is other than:

(a) A habeas corpus proceeding;

(b) A proceeding for which counsel is appointed under ORS 133.625, 135.320, 419.498 or 426.100; or

(c) A proceeding for contempt of court, criminal or civil.

(2) The defender may act only at the request of the individual described in subsection (1) of this section, or, if no such request is made, at the request of the court or magistrate.

(3) The individual on whose behalf the defender is requested to act shall submit to the defender, in the form prescribed by the committee, an affidavit of his financial circumstances.

(4) At the request of the defender or an individual who seeks the defender's aid, the court or magistrate before whom a proceeding is pending or to whom an application for relief has been made, shall finally determine whether the individual is eligible under this section for the defender's aid.

[1963 c.600 §6; 1967 c.372 §6]

138.780 Register of proceedings. The defender shall keep a register in which he shall make a note of each proceeding in which he serves in his official capacity. The right to custody of the register passes to the defender's successor in office, and the defender shall deliver the register to his successor in office.

[1963 c.600 §7]

138.790 Public Defender's Account. There hereby is established in the General Fund of the State Treasury an account to be known as the Public Defender's Account. All moneys received by the Public Defender shall be paid into the State Treasury and credited to the Public Defender's Account. All moneys in the Public Defender's Account hereby are appropriated continuously for and, subject to approval by the Public Defender Committee, shall be used by the Public Defender in carrying out the purposes of ORS 137.205, 138.480 to 138.500, 138.590 and 138.710 to 138.790.

[1963 c.600 §13]

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]

CERTIFICATE OF LEGISLATIVE COUNSEL

Pursuant to ORS 173.170, I, Robert W. Lundy, Legislative Counsel, do hereby certify that I have compared each section printed in this chapter with the original section in the enrolled bill, and that the sections in this chapter are correct copies of the enrolled sections, with the exception of the changes in form permitted by ORS 173.160 and other changes specifically authorized by law.

Done at Salem, Oregon,
on December 1, 1967.

Robert W. Lundy
Legislative Counsel