

# Chapter 138

## 1983 REPLACEMENT PART

### Appeals; Post-conviction Relief

#### APPEALS

- 138.005 Definitions for ORS 138.010 to 138.310
- 138.010 Mode of review; abolition of writs of error and certiorari
- 138.020 Who may appeal
- 138.030 Parties designated "appellant" and "respondent"; title of action
- 138.040 Appeal by defendant generally; reviewable matters; time limit
- 138.050 Appeal from sentence on plea of guilty or no contest when sentence is excessive
- 138.060 Appeal by state
- 138.071 Time within which appeal must be taken
- 138.081 Service and filing of notice of appeal
- 138.090 Signature to notice of appeal
- 138.110 Service of notice of appeal on defendant or attorney by publication in certain cases
- 138.120 When appeal is perfected in case of service of notice of appeal by publication
- 138.135 Defendant's appeal or petition for review as stay of sentence
- 138.145 Temporary retention of custody of defendant under sentence of imprisonment
- 138.160 Appeal by state as stay of judgment or order; release
- 138.185 Transmission of record to Court of Appeals; when court acquires jurisdiction; dismissals; powers of trial court
- 138.210 Necessity of appearance of appellant
- 138.220 Scope of review
- 138.230 Rulings in discretion of court and technical defects as grounds for reversal
- 138.240 Judgments appellate court may give
- 138.250 New trial to be in court below; reversal without new trial
- 138.255 Court of Appeals certification of appeal to Supreme Court in lieu of disposition
- 138.265 Appellate decision to include judgment; date of entry; stays; State Court Administrator to mail copy of decision to lower court
- 138.270 Proceedings in court below; enforcement of judgment; new trial
- 138.280 Retention of transcript in appellate court; transmission of copy of judgment to trial court
- 138.290 Termination of appellate jurisdiction; orders giving effect to judgment
- 138.300 County's liability for costs on appeal in criminal action
- 138.310 Notice to court below when appellate court allows costs, expenses or compensation
- 138.480 Appointment of Public Defender to represent prisoner in proceeding before appellate court
- 138.490 Compensation of original attorney for services in subsequent proceeding brought by Public Defender
- 138.500 Appointment of counsel and furnishing of transcript for appellant without funds; fee

#### POST-CONVICTION RELIEF

- 138.510 Convicted person may file petition for relief
- 138.520 Relief which court may grant
- 138.530 When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected
- 138.540 Petition for relief as exclusive remedy for challenging conviction; when petition may not be filed; abolition or availability of other remedies
- 138.550 Availability of relief as affected by prior judicial proceedings
- 138.560 Procedure upon filing petition for relief; venue and transfer of proceedings
- 138.570 Who shall be named as defendant; counsel for defendant
- 138.580 Petition
- 138.590 Petitioner may proceed as an indigent person
- 138.600 Filing fee and undertaking not required
- 138.610 Pleadings
- 138.620 Hearing
- 138.630 Evidence of events occurring at trial of petitioner
- 138.640 Judgment
- 138.650 Appeal
- 138.660 Dismissal of appeal
- 138.670 Admissibility, at new trial, of testimony of witness at first trial
- 138.680 Short title

#### CROSS REFERENCES

- 138.005 to 138.500
  - Appeals from:
    - Final orders of juvenile court, 419.561
    - Justices' and district courts in criminal actions, Ch. 157
    - Municipal courts, 221.390
  - Appeals from municipal, justice or district courts, time limit, 136.300
  - Appellate jurisdiction of circuit courts, Const. Art. VII (O), §9
  - Appointment of counsel by court, 135.045, 135.050
  - Duties relating to administration of justice, enforcement of performance, 1.025
  - Inspection by defendant of evidence obtained from defendant, 133.723
  - Right to appeal, notice to defendant required upon judgment, 137.020
- 138.010
  - Writ of review in justice court, 157.070
- 138.185
  - Defendant without funds, payment of costs of transcript on appeal, 21.470
  - Record on appeal that is transmitted to Supreme Court, Const. Art. VII (A), §3

## **PROCEDURE IN CRIMINAL MATTERS GENERALLY**

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**138.230**

Affirmance notwithstanding errors, Const. Art. VII (A), §3

**138.520**

New trial in criminal actions, 136.535

**138.255**

Court of Appeals certification to Supreme Court, 19.210

**138.650**

Transcript as bill of exceptions, 19.114

**138.500**

Preparation of trial court file, 137.220

## 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.

**138.020 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; time limit.** The defendant may appeal to the Court of Appeals from a judgment on a conviction in a district or circuit court, including a judgment where the court imposes a sentence which is cruel, unusual or excessive in light of the nature and background of the offender or the facts and circumstances of the offense, and may cross-appeal when the state appeals pursuant to ORS 138.060 (3). Upon an appeal, or cross-appeal, any decision of the court in an intermediate order or proceeding may be reviewed. A judgment suspending imposition or execution of sentence or placing a defendant on probation shall be deemed a judgment on a conviction and shall not be subject to appeal after expiration of the time specified in ORS 138.071 except as may be provided in ORS 138.050 and 138.510 to 138.680. If in the judgment of the appellate court the punishment imposed by the sentence appealed from is cruel, unusual or excessive, the appellate court shall direct the court from which the appeal is taken to impose the punishment that should be administered. [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]

**138.050 Appeal from sentence on plea of guilty or no contest when sentence is excessive.** A defendant who has pleaded guilty or no contest may take an appeal from a judg-

ment on conviction where it imposes a sentence that is cruel, unusual or excessive in light of the nature and background of the offender or the facts and circumstances of the offense. If the judgment of conviction is in the circuit court or the district court, the appeal shall be taken to the Court of Appeals; if it is in the 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, cruel or unusual punishment has been imposed. If in the judgment of the appellate court the punishment imposed is excessive, unusual or cruel, it shall direct the court from which the appeal is taken to impose the punishment which should be administered. [Amended by 1969 c.198 §63; 1973 c.836 §275a; 1975 c.611 §23; 1977 c.372 §14]

**138.060 Appeal by state.** The state may take an appeal from the circuit court or the district court to the Court of Appeals from:

- (1) An order made prior to trial dismissing or setting aside the accusatory instrument;
- (2) An order arresting the judgment;
- (3) An order made prior to trial suppressing evidence; or
- (4) An order made prior to trial for the return or restoration of things seized. [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]

**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 subsections (2) and (3) of this section, the notice of appeal shall be served and filed at any time after verdict, but not later than 30 days after the judgment or order appealed from was given or made.

(2) If a motion for new trial or motion in arrest of judgment is served and filed the notice of appeal shall 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, as provided in ORS 136.535.

(3) A defendant cross-appealing shall serve and file his notice of cross-appeal within 10 days of the expiration of the time allowed in subsection (1) of this section. [1971 c.565 §21 (enacted in lieu of 138.070); 1977 c.752 §3]

**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 19.029 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 reporter if a transcript is required in connection with the appeal; and

(c) On the clerk of the trial court.

(2) The original of the notice with proof of service indorsed thereon or affixed thereto shall be filed with the clerk of the court to which the appeal is made. [1971 c.565 §23 (enacted in lieu of 138.080)]

**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 him or an attorney of the court for him. [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 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 (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 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 district court, 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 the district 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.

(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]

**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 Temporary retention of custody of defendant under sentence of imprisonment.** If the confinement designated by the court is the custody of the Corrections Division, 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 released 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 (138.135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150); 1973 c.836 §277]

**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 his 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, he 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; when court acquires jurisdiction; dismissals; powers of trial court.** (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 19.029 and 19.078 to 19.098.

(2) The provisions of ORS 19.033 and 19.170 and, if the defendant is the appellant, the provisions of ORS 19.130 (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]

**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 released, that his release agreement be

exonerated, or if a security release has been entered into, that the security be refunded to the defendant or his sureties. [Amended by 1973 c.836 §279]

**138.255 Court of Appeals certification of appeal to Supreme Court in lieu of disposition.** 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 19.210. [1981 c.550 §4]

**138.260** [Repealed by 1981 c.178 §18]

**138.265 Appellate decision to include judgment; date of entry; stays; State Court Administrator to mail copy of decision to lower court.** The decision of the appellate court shall include its judgment. The date of the filing of the decision shall be deemed to be the date of entry of the judgment, except that the judgment of the Court of Appeals shall be stayed until the expiration of the time provided in ORS 2.520 for filing a petition for review to the Supreme Court and thereafter as provided in the rules of the Supreme Court, and the judgment of the Supreme Court shall be stayed in accordance with the rules of the Supreme Court. The State Court Administrator shall mail a copy of the appellate court decision, or such part thereof as may be required by the rules of the Supreme Court, to the court below as soon as possible after the date when the decision is no longer stayed. [1981 c.178 §6]

**138.270 Proceedings in court below; enforcement of judgment; new trial.** (1) Upon the receipt of the copy of the judgment, 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. [Amended by 1981 c.178 §7]

**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 copy of the judgment of the appellate court shall be transmitted to, and filed in, the trial court. [Amended by 1959 c.558 §41; 1981 c.178 §8]

**138.290 Termination of appellate jurisdiction; orders giving effect to judgment.** After the effective date of the judgment of the appellate court, as provided in ORS 138.265, 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 decision is mailed.

[Amended by 1981 c.178 §9]

**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 appellate court allows costs, expenses or compensation.** If the appellate court allows costs, expenses or compensation under ORS 138.500 (3) on appeal in a criminal action, the appellate court shall notify the court below of the costs, expenses and compensation allowed in order that the court below may exercise its discretion under ORS 161.665 (2). [1983 c.763 §14]

**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 Appointment of Public Defender to represent 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 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; 1969 c.198 §69]

**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 or Court of Appeals under ORS 135.045, 135.050,

419.498 or 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 ORS 151.240 (1)(d), the circuit court or the district court from which or to which the case is taken:

(a) May order that the attorney be paid compensation, determined and allowed as provided in ORS 135.055, for those services not 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 state shall pay the attorney, from funds available for the purpose, the sum ordered to be paid under this section. [1963 c.600 §11; 1969 c.198 §70; 1977 c.752 §5; 1979 c.867 §2; 1981 s.s. c.3 §125]

**138.500 Appointment of counsel and furnishing of transcript for appellant without funds; fee.** (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 or district court and if such 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 or district court from which the appeal is or would be taken to appoint such counsel to represent the person 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 or district court, if it finds that petitioner or defendant is without funds to employ suitable counsel for an appeal, shall appoint such counsel to represent petitioner or defendant on the appeal. The circuit court or district court, in its discretion, may appoint counsel who represented petitioner or defendant in the circuit court or district 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 or district court and such person is without funds to pay for a transcript, or portion thereof, necessary to present

adequately the case upon appeal, such person may request the circuit court or district court to order such transcript, or portion thereof, furnished to the person. 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 or district 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 or district 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 Court of Appeals 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 necessary to appellate review. The Court of Appeals shall also determine, as provided in ORS 135.055, and allow compensation for counsel appointed under this section. A verified statement of such costs and expenses, including petition for allowance of compensation for counsel, shall be filed within 21 days or such further time as may be allowed by the court after the time an opinion is rendered or, if no opinion is handed down, then within 21 days after the giving of a decision by the court. On any review by the Supreme Court of the judgment of the Court of Appeals a person for whom counsel has been appointed shall by similar procedure recover the cost of briefs, any other expense of the review and compensation for counsel. The cost, expenses and compensation so allowed by the Supreme Court and by the Court of Appeals shall be paid by the state from funds available for the purpose.

(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 151.280 or counsel who is under contract to provide services for the appeal pursuant to ORS 151.150, the appellate court shall not allow compensation for that appointed counsel. In all other cases, counsel shall be compensated as provided in this section. [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]

Note: To the extent that amendments to 138.500 by section 5, chapter 774, Oregon Laws 1983, increase time periods, those amendments are not applicable to time periods that began and did not expire before January 1, 1984. Those time periods that began and did not expire before January 1, 1984, shall expire as provided by the law in effect immediately before that effective date. See section 1, chapter 774, Oregon Laws 1983.

## 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, 16, 17]

**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 arraignment, 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 the petitioner's 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 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 petitioner is imprisoned in the Oregon State Penitentiary or the Oregon State Correctional Institution and the Circuit Court for Marion County or in the Eastern Oregon Correctional Institution and the Circuit Court for Umatilla 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 or the Circuit Court for Umatilla County, respectively, 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; 1983 c.505 §14]

**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 the Oregon State Penitentiary, Eastern Oregon Correctional Institution or the Oregon State Correctional 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]

**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 an indigent 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 such a proceeding may proceed as an indigent 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 an indigent 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 or to employ suitable counsel for such a proceeding. The affidavit shall contain a brief statement of petitioner's assets and liabilities and income during the previous year. If the circuit court is satisfied that petitioner is unable to pay such expenses or to employ suitable counsel, it shall order that petitioner proceed as an indigent person. However, when the Circuit Court for Marion County orders petitioner's case transferred to another circuit court as provided in ORS 138.560 (4), the matter of petitioner's proceeding as an indigent person shall be determined by the latter court.

(3) In the order to proceed as an indigent person, the circuit court shall appoint suitable counsel to represent petitioner. When the petitioner is held in the custody of the Corrections Division, and the Public Defender established by ORS 151.280 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, counsel may move to amend the petition within 15 days following counsel's 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, counsel shall, in lieu of moving to amend the petition, inform the petitioner and notify the circuit court of such belief by filing an affidavit stating such belief and the 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 an indigent 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 state from funds available for the purpose. At the conclusion of proceedings on a petition pursuant to ORS 138.510 to 138.680, the circuit court shall determine and allow, as provided in ORS 135.055, the amount of expenses of petitioner and compensation for the services of appointed counsel in the proceedings in the circuit court. The expenses and compensation determined by the circuit court shall be certified to and shall be ordered to be paid and shall be paid by the state.

(6) If appointed counsel is the Public Defender established by ORS 151.280 or counsel who is under contract to provide services for the proceeding pursuant to ORS 151.150, the court shall not allow compensation for that appointed counsel. In all other cases, counsel shall be compensated as provided in this section.

(7) When petitioner has been ordered to proceed as an indigent person, all court fees in the circuit court are waived. [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]

**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 Court of Appeals within 30 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 Court of Appeals and 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; 1969 c.198 §72; 1971 c.565 §26]

**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 Court of Appeals 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; 1969 c.198 §73]

**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]

**138.710** [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]

## PROCEDURE IN CRIMINAL MATTERS GENERALLY

**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]