Chapter 138

1985 REPLACEMENT PART

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APPEALS

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

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

138.020 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, 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, and any sentence of the court may be reviewed as to whether it exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual. 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 exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the 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, 1985 c.348 §1]

Note: Section 3, chapter 348, Oregon Laws 1985, provides:

Sec 3. The amendments to ORS 138.040 and 138.050 by sections 1 and 2 of this Act shall apply only to appeals of judgments that were entered after the effective date of this Act [September 20, 1985].

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 judgment on conviction where it imposes a sentence that exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual. 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 district court for the county in which such court is located or if there is no district court for the county, to the circuit court for the county. On such appeal, the appellate court shall only consider the question whether a sentence has been imposed that exceeds the maximum sentence allowable by law or is unconstitutionally cruel and unusual. If in the judgment of the appellate court the punishment imposed does exceed the maximum sentence allowable by law or is unconstitutionally cruel and unusual, the appellate court shall direct the court from which the appeal is taken to impose the punishment which should be administered. [Amended by 1969 c.198 §63; 1973 c.836 §275a; 1975 c.611 §23; 1977 c.372 §14; 1985 c.342 §20; 1985 c.348 §2]

Note: Section 30, chapter 342, Oregon Laws 1985, provides:

Sec. 30. Sections 1 to 29 of this Act are first operative January 1, 1986, and apply only in respect to actions and proceedings affected by those sections that are initially commenced on or after that date and to appeals and other subsequent proceedings relating thereto. Actions and proceedings affected by sections 1 to 29 of this Act that were initially commenced before January 1, 1986, and appeals and other subsequent proceedings relating thereto shall continue to be governed by the law applicable thereto in effect immediately before that date.

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 sub-

sections (2) and (3) of this section, the notice of appeal shall be served and filed not later than 30 days after the judgment or order appealed from was entered in the register.

(2) If a motion for new trial or motion in arrest of judgment is served and filed 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 the 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; 1985 c.282 §1; 1985 c.734 §§17,17a]

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

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

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

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

138.110 Service of notice of appeal on defendant or attorney by publication in certain cases. If, after due diligence, the service cannot be made as directed in ORS 138.081 (1)(a)(B), the court or judge thereof from which the appeal is sought to be taken, upon proof thereof, may make an order for the publication of the notice of appeal in such newspaper and for such time as the court or judge deems proper. [Amended by 1963 c.324 §1; 1971 c.565 §24]

138.120 When appeal is perfected in case of service 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, the defendant shall be held in custody at the institution designated in the judgment without execution of sentence, except as provided in ORS 138.145.

(2) A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the 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 the assets of the defendant.

(3) If a petition for review by the Supreme Court is filed, any stay shall remain in effect pending a final disposition of the cause, unless otherwise ordered by the Supreme Court. [1963 c.155 §2 (138 135 and 138.145 enacted in lieu of 138.130, 138.140 and 138.150); 1967 c 372 §5; 1969 c.198 §66; 1977 c.752 §4]

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 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 the release agreement and, if applicable, the security for release, is held for the appearance and surrender of the defendant until the final determination of the appeal and the proceedings consequent thereon, if any; but if the defendant is in custody, the defendant may be released by the court subject to ORS 135.230 to 135.290, pending the appeal. [Amended by 1959 c.638 §20; 1973 c.836 §278]

138.170 [Repealed by 1959 c.638 §26]

138.180 [Repealed by 1959 c.558 §51]

138.185 Transmission of record to Court of Appeals; when court acquires jurisdiction; dismissals; powers of trial court. (1) In an appeal to the Court of Appeals, when the notice of appeal if 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 19.028, 19.033, 19.069, 19.074, 19.108, 19.114, 19.170, 19.180 and 19.190 and the provisions in ORS 19.140 authorizing review of intermediate orders 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; 1985 c.734 §19]

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 the defendant is in custody, that the defendant be discharged therefrom, or if the defendant has been released, that the release agreement be exonerated, or if a security release has been entered into, that the security be refunded to the defendant or the sureties of the defendant. [Amended by 1973 c.836 §279]

138.255 Court of Appeals certification of appeal to Supreme Court in lieu of disposition. 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 [1981 c.178 §6; repealed by 1985 c.734 §20]

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

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

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

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

138.310 Notice to court below when 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 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 a proceeding in a circuit or district court, 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; 1985 c 502 §22]

138.500 Appointment of counsel and furnishing of transcript for appellant without funds; compensation. (1) If a defendant in a criminal action or a petitioner in a proceeding pursuant to ORS 138.510 to 138.680 wishes to appeal from an appealable adverse final order or judgment of a circuit court 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 oral argument on the appeal or, if there is no oral argument, after submission of the appeal to the court for decision, 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 and shall

determine and allow fair compensation for counsel appointed under this section. Compensation payable to appointed counsel shall not be less than the applicable minimum compensation set forth in the schedule established under ORS 151.430 (5). A verified statement of such costs and expenses and a petition for allowance of compensation of counsel shall be filed after the date of oral argument, or if there is no oral argument, after the date of submission of the appeal to the court for decision, but not later than the 21st day after the date of the decision of the appeal by the court or such further time as may be allowed by the court. Except as the court may otherwise provide by rule, only one statement and petition may be filed. 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. If the Court of Appeals or Supreme Court and the appointed counsel disagree in respect to the fair compensation of counsel or the costs and expenses of appellant in an appeal, the matter may be submitted for arbitration and decision as provided in ORS 151.460.

(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; 1985 c.58 §1; 1985 c.502 §20]

Note: Section 2, chapter 58, Oregon Laws 1985, provides:

Sec. 2. The amendment of ORS 138.500 by section 1 of this Act is not applicable in respect to appeals of which the appellate court acquired jurisdiction before the effective date of this Act [September 20, 1985]

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

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

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

(1) The failure of petitioner to have sought appellate review of the conviction, or to have raised matters alleged in the petition at the trial of the petitioner, shall not affect the availability of relief under ORS 138.510 to 138.680. But no proceeding under ORS 138.510 to 138.680 shall be pursued while direct appellate review of the conviction of the petitioner, a motion for new trial, or a motion in arrest of judgment remains available.

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

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

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

resulted in the conviction and sentence of the petitioner. [1959 c.636 §15]

138.560 Procedure upon filing petition for relief; 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 pur-

suant 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 the trial of the petitioner. When the record is so contradicted, the defendant may introduce in evidence any evidence which was admitted in evidence at the trial to support the contradicted matter and may call witnesses whose testimony at such trial supported the contradicted matter. Whenever such evidence or such witnesses cannot be produced by defendant for any reason which is sufficient in the opinion of the court, such parts of the duly authenticated record of the trial as support the contradicted matter may be introduced in evidence by the defendant. A duly authenticated record of the testimony of any witness at the trial may be introduced in evidence to impeach the credibility of any testimony by the same witness in the hearing upon the petition. [1959 c.636 §13]

138.640 Judgment. 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]

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]