

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

In the Matter of the Application of _____)

)

_____)

Petitioner,)

)

vs.)

)

_____)

(Name of Custodian or Superintendent;)

State of Oregon if not imprisoned))

)

_____)

(Title) Defendant.)

Case No. _____

(To Be Supplied by Court Clerk)

PETITION FOR POST CONVICTION RELIEF

(ORS 138.510, et. seq.)

Comes now the above named Petitioner, and respectfully petitions this Court for post conviction relief pursuant to ORS 138.510 - 138.680, and alleges as follows:

1.

Petitioner [] is [] was imprisoned in the _____

(Name of Institution, City, County and State)

unlawfully confined and restrained of liberty by the above named Defendant.

2.

Petitioner was imprisoned by virtue of a judgment of conviction and sentence imposed by the _____ County Circuit Court in the case of State of Oregon v. _____

_____, Case Number _____. The judgment was entered on

_____. Sentence was imposed on _____, _____.

The sentencing judge was _____, and the judgment sentences Petitioner to the

legal and/or physical custody of the Department of Corrections or County Corrections for a period not to exceed: (Number of years/months, minimum sentence(s), restitution, etc.)

3.

An appeal [] was [] was not taken from said conviction and sentence. The Oregon Court of Appeals or Supreme Court (circle one) entered the appellate judgment on _____, _____, and the result was _____

A petition for review [] was [] was not filed in the Oregon Supreme Court. The result of the petition for review was _____, _____, and this occurred on _____, _____. The attorney of record on the appeal was _____.

4.

Petition [] has [] has not previously applied for post conviction relief pertaining to this case. The result of the previous post conviction relief case was _____

5.

Petitioner was represented by attorney _____ at the trial level proceedings. Said attorney was [] retained [] appointed.

6.

At the present time, petitioner is financially unable to retain counsel.

7.

Petitioner was charged in the foregoing proceedings with the following offenses:

_____.

Petitioner was convicted of the following offenses: _____

following a [] jury trial [] bench trial [] plea of guilty [] plea of no contest [] other.

(If other, explain) _____.

8.

This Petition is being filed within two years of the date that the judgment was entered (if no appeal was taken) or the date the appellate judgment was entered (if an appeal was taken). (If outside the two-year limit, state why this Petition is nonetheless timely and should be heard.)

_____.

9.

Petitioner believes that the conviction and imprisonment from the proceedings described above was, and is, illegal. Petitioner was substantially denied his rights in violation of ORS 138.530 as follows:

FIRST CLAIM FOR RELIEF: _____

SECOND CLAIM FOR RELIEF: _____

(State additional claims if appropriate)

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF _____

In the Matter of the Application of _____)

)

)

Petitioner,

)

Case No. _____

vs.

)

(To Be Supplied by Court Clerk)

)

)

(Name of Custodian of Superintendent-Title;

)

State of Oregon if not imprisoned)

)

Defendant.

)

**PETITIONER’S MOTION TO PROCEED AS AN INDIGENT PERSON
AND FOR APPOINTMENT OF COUNSEL**

Pursuant to ORS 138.590, Petitioner respectfully moves this Court to waive the prepayment of the court costs, fees and expenses to this action.

Petitioner further moves for appointment of suitable counsel to assist and represent Petitioner in this proceeding.

This Motion is based upon the attached Affidavit of Financial Eligibility indicating that Petitioner is without the funds and/or assets necessary to pay the expenses of this proceeding or to retain counsel.

Dated: _____, 20_____.

Respectfully submitted,

(Petitioner’s Signature)

AFFIDAVIT OF FINANCIAL ELIGIBILITY

STATE OF OREGON)
) ss.
County of _____)

Case No. _____

I, _____ being duly sworn, on oath, depose and say:
That I make this Affidavit in connection with the attached Petition for Post-Conviction Relief;
that I am financially unable to bear any of the costs, expenses or fees incurred herein; and that
the following is the best estimate of my assets, liabilities and income during the previous year.

Net income during the previous 12 months.....\$ _____

Money on hand, in savings, trust account,
with Superintendent, etc.....\$ _____

Real property (house, land, etc.).....\$ _____

Personal property (cars, tools, TV, etc.).....\$ _____

Money owed to me by others.....\$ _____

Money I owe to others.....\$ _____

Other assets (examples: stocks, bonds).....\$ _____

Other liabilities (examples: restitution, child support, fines).....\$ _____

Petitioner's Signature

SUBSCRIBED AND SWORN to before me this _____ day of _____, 20__.

NOTARY PUBLIC FOR OREGON
My Commission Expires: _____

POST-CONVICTION RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

corpus, all common law post-conviction remedies, including the motion to correct the record, coram nobis, the motion for relief in the nature of coram nobis and the motion to vacate the judgment, are abolished in criminal cases.

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

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

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

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

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

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

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

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

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

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

(5) When a petitioner who is imprisoned in a Department of Corrections institution is transferred to another Department of Corrections institution, the circuit court in which a post-conviction relief proceeding is pending may deny a motion for a change of venue to the county where the petitioner is transferred. The court's order is not reviewable by any court of this state. [1959 c.636 §6; 1983 c.505 §14; 1987 c.320 §44; 1991 c.249 §17; 1995 c.273 §20; 1995 c.657 §4; 2003 c.261 §1; 2003 c.737 §§65,66; 2005 c.702 §§77,78,79; 2011 c.595 §57; 2015 c.119 §1]

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

138.580 Petition. The petition shall be certified by the petitioner. Facts within the personal knowledge of the petitioner and the authenticity of all documents and exhibits included in or attached to the petition must be sworn to affirmatively as true and correct. The Supreme Court, by rule, may

prescribe the form of the certification. The petition shall identify the proceedings in which petitioner was convicted and any appellate proceedings thereon, give the date of entry of judgment and sentence complained of and identify any previous post-conviction proceedings that the petitioner has undertaken to secure a post-conviction remedy, whether under ORS 138.510 to 138.680 or otherwise, and the disposition thereof. The petition shall set forth specifically the grounds upon which relief is claimed and shall state clearly the relief desired. All facts within the personal knowledge of the petitioner shall be set forth separately from the other allegations of fact and shall be certified as provided in this section. Except as provided in rules adopted under ORS 1.002, affidavits, records or other documentary evidence supporting the allegations of the petition shall be attached to the petition. Argument, citations and discussion of authorities shall be omitted from the petition but may be submitted in a separate memorandum of law. [1959 c.636 §8; 1991 c.885 §1; 1993 c.517 §4; 2015 c.119 §2]

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

- (a) Specify the purpose for which the jury records are sought; and
- (b) Identify with particularity the relevant jury records sought to be released, including the type and time period of the records.

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

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

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

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

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

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

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

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

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

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

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

(5) The procedure established by this section is the exclusive means for compelling production of confidential jury records as evidence in post-conviction relief proceedings. The procedure established

by ORS 10.275 is the exclusive means for compelling production of confidential jury records as evidence relevant to a challenge to a jury panel under ORS 136.005 or ORCP 57A. [2011 c.308 §2]

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

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

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

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

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

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

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

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

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

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

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

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

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

138.615 Disclosure of witness information. (1) In any proceeding for post-conviction relief pursuant to ORS 138.510 to 138.680, a party shall provide to the other party, upon written request of the other party or an order of the court, the identity of and, except as provided in subsection (5) of this section, the contact information for any person who is a potential witness, whether the person may be called to testify at the proceeding or provide sworn written testimony.

(2) Unless otherwise ordered by the court, the disclosure required by subsection (1) of this section concerning any witness that a party may use at the proceeding to present evidence under ORS 40.410, 40.415 or 40.420 must be accompanied by a written report that is prepared and signed by the witness. The report must contain:

- (a) A complete statement of all opinions the witness intends to assert as an expert witness; and
- (b) The data or other information considered by the witness in forming the opinions.

(3) The disclosures required by subsections (1) and (2) of this section must be made according to timelines established by the court in each case.

(4) Upon being apprised of any breach of the duty imposed under subsections (1) and (2) of this section, and after taking into account the reason, if any, for the breach and the prejudice, if any, to the other party, the court may grant a continuance, refuse to permit a witness not properly disclosed from testifying, refuse to receive in evidence the material not disclosed, impose costs incurred by the other party as a result of the breach or enter such other order as the court considers appropriate.

(5) Unless ordered by the court, the defendant shall not disclose to the petitioner any personal identifiers, as defined in ORS 135.815, of the victim.

(6) Upon the request of either party, the court may enter a protective order as provided in ORS 135.873. [2013 c.226 §2]

138.620 Hearing. (1) After the response of the defendant to the petition, the court shall proceed to a hearing on the issues raised. If the defendant's response is by demurrer or motion raising solely

issues of law, the circuit court need not order that petitioner be present at such hearing, as long as petitioner is represented at the hearing by counsel. At the hearing upon issues raised by any other response, the circuit court shall order that petitioner be present. Whenever the court orders that petitioner be present at the hearing, the court may order that petitioner appear by telephone or other communication device as provided in ORS 138.622 rather than in person.

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

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

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

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

(3) The court may not grant an order allowing a subpoena under this section unless the petitioner can demonstrate good cause by showing that:

- (a) The victim's testimony is material to the post-conviction relief proceeding;
- (b) The testimony is favorable to the petitioner; and
- (c) The testimony was not introduced at trial.

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

(5) If contacted by the defense or any agent of the defense, the victim must be clearly informed by the defense or other contacting agent, either in person or in writing, of the identity and capacity of the person contacting the victim, that the victim does not have to talk to the defendant's attorney, or other agents of the defendant, or provide other discovery unless the victim wishes, and that the victim may have a district attorney, assistant attorney general or other attorney or advocate present during any interview or other contact.

(6) As used in this section, "victim" has the meaning given that term in ORS 135.970. [2007 c.470 §1; 2013 c.144 §2]

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

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

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

- (b) The right to inspect, in advance of the post-conviction proceedings, any public record on which the disposition of the petition will be based;
- (c) The right to be heard, either orally or in writing, at the hearing;
- (d) The right to consult with counsel for the state regarding the post-conviction proceeding, including, if applicable, notice of and the opportunity to consult regarding a settlement agreement; and
- (e) The right to be informed by counsel for the state of the manner in which the petition was disposed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) An appeal under this section taken by the defendant stays the effect of the judgment. If the petitioner is incarcerated, the trial court may stay the petitioner's sentence pending the defendant's appeal and order conditional release or security release, in accordance with ORS 135.230 to 135.290, only if:

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

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

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

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

138.665 Remand for reconsideration of judgment or order; appeal. (1) Upon joint motion of the parties to an appeal in a post-conviction relief proceeding, the court may vacate the judgment or order from which the appeal was taken and remand the matter to the circuit court to reconsider the judgment or order. Upon remand, the circuit court shall have jurisdiction to enter a revised judgment or order.

(2) After entry of a modified judgment or order on reconsideration, or upon reentry of the original judgment or order, either party may appeal in the same time and manner as an appeal from the original judgment or order. [2015 c.12 §1]

Note: 138.665 was enacted into law by the Legislative Assembly but was not added to or made a part of ORS chapter 138 or any series therein by legislative action. See Preface to Oregon Revised Statutes for further explanation.

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

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

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

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

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

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

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

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

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