

House Bill 2133

Ordered printed by the Speaker pursuant to House Rule 12.00A (5). Pre-session filed (at the request of Attorney General Hardy Myers for Department of Justice)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Allows for late filing of notice of appeal in post-conviction cases when lateness is no fault of petitioner. Provides for stay of post-conviction judgment if defendant appeals. Requires post-conviction petitioner to serve petition and judgment on district attorney in county in which convicted and to file petition and judgment in circuit court in county in which convicted.

A BILL FOR AN ACT

1
2 Relating to post-conviction proceedings; amending ORS 138.570, 138.640 and 138.650.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 138.650 is amended to read:

5 138.650. (1) Either the petitioner or the defendant may appeal to the Court of Appeals within
6 30 days after the entry of a judgment on a petition pursuant to ORS 138.510 to 138.680. The manner
7 of taking the appeal and the scope of review by the Court of Appeals and the Supreme Court shall
8 be the same as that provided by law for appeals in criminal actions, except that:

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

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

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

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

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

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

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

28 (3) **An appeal under this section taken by the defendant stays the effect of the judgment.
29 If the petitioner is incarcerated, the trial court may stay the petitioner's sentence pending
30 the defendant's appeal and order conditional release or security release, in accordance with**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 **ORS 135.230 to 135.290, only if:**

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

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

6 (c) **The petitioner otherwise would be entitled to immediate release from incarceration**
 7 **under the court's judgment.**

8 **SECTION 2.** ORS 138.570 is amended to read:

9 138.570. (1) If the petitioner is imprisoned, the petition shall name as defendant the official
 10 charged with the confinement of petitioner. If the petitioner is not imprisoned, the defendant shall
 11 be the State of Oregon. Whenever the defendant is the superintendent of a Department of Cor-
 12 rections institution, the Attorney General shall act as the superintendent's attorney in the pro-
 13 ceedings. Whenever the defendant is some other official charged with the confinement of petitioner,
 14 the district attorney of the county wherein the petitioner is imprisoned shall be the attorney for the
 15 defendant. Whenever petitioner is not imprisoned, counsel for the State of Oregon as defendant shall
 16 be the district attorney of the county in which petitioner's conviction and sentence were rendered.
 17 Whenever the petitioner is released from imprisonment during the pendency of any proceedings
 18 pursuant to ORS 138.510 to 138.680, the State of Oregon shall be substituted as defendant. Upon
 19 such substitution, counsel for the original defendant shall continue to serve as counsel for the sub-
 20 stituted defendant.

21 (2) **If, under subsection (1) of this section, the attorney for the defendant is other than**
 22 **the district attorney of the county in which the petitioner's conviction and sentence were**
 23 **rendered, the petitioner shall cause a copy of the petition for post-conviction relief to be**
 24 **served on the district attorney of the county in which the petitioner's conviction and sen-**
 25 **tence were rendered within 30 days of filing with the court. The court may not grant any**
 26 **form of relief to the petitioner unless the petitioner has served the appropriate district at-**
 27 **torney with the petition.**

28 **SECTION 3.** ORS 138.640 is amended to read:

29 138.640. (1) After deciding the issues raised in the proceeding, the court shall enter a judgment
 30 denying the petition or granting the appropriate relief. The judgment may include orders as provided
 31 in ORS 138.520. The judgment must clearly state the grounds on which the cause was determined,
 32 and whether a state or federal question was presented and decided.

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

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

37 (b) **The petitioner serves a certified copy of the judgment on the district attorney of the**
 38 **county in which the petitioner's conviction and sentence were rendered.**