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Amendments to ORS Chapter 138 Relating to Appeals in Criminal Cases

Report of the Direct Criminal Appeals Work Group on SB 896 (2017)

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I. Introductory Summary

In February 2015, the Appellate Commissioner for the Oregon Court of Appeals requested the Oregon Law Commission to sponsor a Work Group to overhaul the procedural law governing appeals in criminal cases.

The Oregon appellate courts are courts of limited jurisdiction, yet, over the last several years the criteria for determining whether the appellate courts have jurisdiction of appeals in criminal cases have become increasingly complex and to some extent obscure. Attorneys, parties, and the appellate courts have also struggled over determining whether appellate courts have authority to review and decide particular issues on appeal in criminal cases.

As a result, the Office of Public Defense Services, the Department of Justice, the Court of Appeals, and the Supreme Court, all tax-supported institutions, increasingly have expended their limited resources sorting out whether the appellate courts have jurisdiction to decide certain appeals in criminal cases and authority to decide certain issues.

Some of the statutes governing appeals in criminal cases have not been amended since the Deady Code, compiled in 1864. From time to time since adoption of the Deady Code, the Legislature has amended the statutes governing appeals in criminal cases. Over the years, the appellate courts have interpreted and applied those statutes in individual cases. Deciding individual cases makes it difficult to always apply a statutory scheme amended piecemeal over the years in a cohesive way. As a result, despite the best efforts of all the participants (the Legislature, the appellate courts, and appellate practitioners), the pieces do not always fit well together. For example, in *State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011), the court examined the historical evolution of the various statutes pertaining to jurisdiction found in ORS Chapter 138 and ultimately concluded that there were differences in the way that misdemeanor and felony cases could be appealed; those differences, however, are not clear from the text of the relevant statutes. The *Cloutier* decision and others led the Appellate Commissioner and numerous appellate practitioners to conclude that reorganizing ORS Chapter 138 to clarify and simplify the criminal appeal process would be a worthwhile endeavor.

Determining whether an appellate court has jurisdiction to entertain an appeal in a criminal case, and the authority to review and decide particular issues that arise on appeal, should be a relatively quick and easy process, freeing up resources to argue and decide the merits of appeals. The rules and standards governing appealability and reviewability should be as clear, simple, and straightforward as practicable. They also should be easy to find; interested persons should not need to engage in extensive legal research just to determine whether an appellate court will decide an appeal.

The Oregon Law Commission ("Commission") charged the Direct Criminal Appeals Work Group with the task of comprehensively reviewing the statutes and case law governing procedures on appeal in criminal cases -- especially the rules for determining

appealability and reviewability. The task focused on reorganizing, streamlining, and clarifying existing statutory provisions. In addition, the Work Group proposes to codify some case law, to modernize some older statutory provisions, and to make a few substantive changes to the law, as outlined in this Legislative Report. Senate Bill 896 is the result of the Work Group's efforts.

When reviewing this bill, practitioners should keep in mind that the Work Group left untouched ORS 138.010, 138.012, 138.020, 138.030, 138.057, and 138.090; likewise, many existing statutory provisions have been retained, even if recodified in a different section of ORS Chapter 138. The bill does not render existing appellate court decisions immaterial. Cases interpreting retained provisions remain significant, and other appellate decisions may provide context for amendments to this bill.

II. The Work Group Membership & Activities

The Commission selected the membership for the Work Group to reflect the major participants in the appellate-court part of the criminal justice system, including representatives of the Office of the Attorney General and the Appellate Division of the Office of Public Defense Services, the appellate courts, trial courts, private practitioners, and the victims of crimes. The voting members of the Work Group are:

- Judge Stephen Bushong, Multnomah County Circuit Court Judge, Work Group Chair
- Judge Erika Hadlock, Chief Judge, Oregon Court of Appeals
- Judge David Leith, Marion County Circuit Court Judge
- Andrew Lavin, Assistant Attorney General, Department of Justice
- Michael Salvas, Deputy District Attorney for Clackamas County, Oregon District Attorneys Association
- Laura Graser, Appellate Attorney in Private Practice, Oregon Criminal Defense Lawyers Association
- Eleanor Wallace, Staff Attorney, Oregon Supreme Court
- Ernest Lannet, Chief Defender, Criminal Appellate Division, Office of Public Defense Services

Support for the Work Group was provided by:

- Jessica Minifie, Assistant Legislative Counsel
- James W. Nass, Appellate Commissioner for the Oregon Court of Appeals, Work Group Reporter

The Work Group also was supported by the following Commission staff:

- Prof. Jeff Dobbins, Executive Director of the Commission
- Laura Handzel, Deputy Director of the Commission
- Jenna Jones, Legal Assistant

- Hanh-Thao Tran, Student Office Assistant
- Paul Charas, Commission Extern
- Tyler Skidmore, Commission Extern
- Mackenzie Zook, Commission Extern

The following persons regularly attended Work Group meetings and provided invaluable input:

- Eric Deitrick, Attorney, Multnomah Defenders, Inc.
- Melissa Franz, Legislative Analyst, Oregon Judicial Department
- Kimberly Dailey, Criminal Law Staff Counsel, Office of the State Court Administrator
- Matt Shields, Office of Public Affairs, Oregon State Bar
- Matt Shoop, Law Clerk, Office of Appellate Commissioner[1]
- Julie Smith, Staff Attorney, Oregon Court of Appeals (attended meetings in place of Judge Hadlock and provided input in her absence)
- Jennifer Lloyd, Assistant Attorney General, Office of the Attorney General (attended meeting in place of Andrew Lavin)
- Marc Brown, Deputy Public Defender, Office of Public Defense Services (attended meetings in place of Ernest Lannet)

Other interested persons include:

- Kimberly McCullough, American Civil Liberties Union of Oregon
- Bobbin Singh, Criminal Justice Resources Center
- Channa Newell, Judiciary Analyst, Legislative Policy & Research Office
- Lane Shetterly, Chair, Oregon Law Commission.

The Work Group met 24 times, beginning on April 29, 2016, with the last meeting occurring on March 3, 2017.

Work Group product includes legal research memoranda on various topics the Work Group addressed. *See* the list at the end of this report. The memoranda reflect the views of the respective authors of the memoranda and do not necessarily reflect the view of all Work Group members or the Work Group collectively.

III. Recommendation to Form Work Group to Review Law Relating to Appeals from Justice & Municipal Courts

Historically, appeals from justice courts created by counties and municipal courts created by cities were taken to the circuit court in which the justice or municipal courts

[1] The Work Group acknowledges Matt Shoop's yeoman services engaging in legal research and preparing memoranda on various legal issues as requested by the Work Group. On occasion, in Mr. Nass's absence, Mr. Shoop also served as Reporter.

were located. A party dissatisfied with the decision of the circuit court then could appeal to the Court of Appeals.

In 1999, the Legislature enacted statutes authorizing any justice or municipal court to become a "court of record," and, if a justice or municipal court chose to become a court of record, an appeal from such a court would be taken directly to the Court of Appeals. Oregon Laws 1999, ch 682, § 11, amending ORS 138.057. When the Work Group undertook to review those provisions, the work group discovered that the statutory framework governing appeals from justice and municipal courts were complex, perhaps bordering on labyrinthine. *See* Appendix I, memorandum entitled "Appeal Provisions Relating to Justice and Municipal Courts" dated October 10, 2016.

That the statutes governing appeals from justice and municipal courts are so complex is particularly unfortunate because many, if not most, private parties appearing in such courts are not represented by counsel and are proceeding without the advice or assistance of attorneys.

Apart from the amount of time and effort it would likely take to master appeals from justice and municipal courts, the membership of the Work Group did not include representatives of affected parties, such as judges of justice or municipal courts, city attorneys, county counsels, or attorneys who practice in those courts.

The Work Group determined that the scope of the problem of appeals from justice and municipal courts and the absence of participants by persons who would be most affected by changing the law respecting those courts required a separate Work Group devoted to that topic. Therefore, the Work Group recommends that the Commission consider forming a Work Group to review the statutory and case law relating to appeals from justice and municipal courts.

IV. Recommendation to Continue Work Group to Focus on "Special Statutory Proceedings"

The appellate courts have held that a trial court's disposition of certain statutory proceedings that take place within or related to a criminal case, but are not appealable under the statute creating the proceeding or under ORS Chapter 138 generally, may be appealable under ORS 19.205(5). ORS Chapter 19 governs appeals in civil cases and ORS 19.205(5) authorizes appeals from the trial court disposition of "special statutory proceedings."

When the Work Group was formed, its charge included addressing the appealability of circuit court disposition of "special statutory proceedings" in criminal cases. However, after addressing and resolving other important topics, the Work Group determined it could not do justice to the complex policy considerations relating to appealability, reviewability, appellate procedures, and scope of review on appeal of "special statutory proceedings" in a proposed bill for the 2017 legislative session. *See generally* the "Special Statutory Proceedings" memorandum dated June 7, 2016. The Work Group recommends that the Commission authorize the Work Group to continue meeting to

address those issues with the goal of proposing legislation for the 2018 Legislation Session.

Note that the bill recommends including at Section 12 a "sign post" to alert practitioners in a summary manner of the effect of current case law: The disposition of a "special statutory proceeding," as that term is used in ORS 19.250(5), in a criminal case may be appealable under ORS 19.205(5).

V. Bill Organization

The Commission submits Senate Bill 896 to the 2017 Legislative Assembly to clarify the procedural law governing appeals by defendants and the State from circuit court to the Court of Appeals or Supreme Court in criminal cases.

Generally, the bill and the remainder of this report are organized as follows:

Section 1	Definitions
Sections 2 & 3	Appeal by the Defendant
Sections 4 & 5	Appeal by the State
Sections 6 to 12	Appellate Procedures
Sections 13 & 14	Reviewability
Sections 15 to 17	Determination on Appeal
Sections 18 to 20	Supplemental, Corrected, & Amended Judgments
Sections 21 to 25	Conforming Amendments
Sections 26 & 27	Miscellaneous Provisions
Section 28	Applicability

SECTION 1. DEFINITIONS

"Appealability" & "Reviewability"

As suggested above, one of the most perplexing features of current law is that the current statutory scheme (and case law) does not always clearly distinguish between appealability and reviewability. Section 1(2) and (4) define those terms.

"Appealability" refers to a circuit court decision that the Legislature has authorized the State or the defendant to appeal, such as a judgment of conviction and sentence (typically appealable by the defendant) or a pre-trial order suppressing evidence (appealable by the State).

"Reviewability" refers to whether the appellate court may consider and decide requests to review the validity of any of the myriad decisions a trial court may make along the way to rendering an appealable judgment or order. Examples: A trial court's ruling on an evidentiary issue at trial, or a trial court's failure to impose a period of post-prison supervision at sentencing.

Some may wonder why appealability and reviewability are not congruent. These are some of the reasons:

- With limited exceptions, appeals are taken only after the trial court has decided all matters in the trial court. It would hamper the administration of justice if either the State or the defendant could appeal every time either was unhappy with a trial court decision. Defendants' appeals generally are taken only after the trial court has decided all matters in the trial court, and the Legislature has authorized the State to appeal from a limited group of pre-trial orders, such as an order dismissing the case or an order suppressing evidence.

- Often the attorneys who represent the State and the defendant in the trial court are not the same attorneys who represent the State and the defendant on appeal. Generally, there is a 30-day time limit to file an appeal. The attorney who will be representing the appellant on appeal will likely not yet be familiar with the case or the trial court record and must decide whether to appeal without a sufficient degree of certainty regarding the trial court decisions that might need to be challenged on appeal. Only after the appeal is filed will a transcript be prepared and the appellate attorney will have a chance to review the transcript and other parts of the trial court record.

- The Legislature has imposed limits on review of certain trial court decisions. For instance, if the defendant has pled guilty or no contest to a crime, the Legislature has disallowed appellate court review of the trial court's decision to enter a judgment of conviction for that crime. Nor may the State get appellate review of a jury's decision not to convict a defendant of a crime. The Legislature has disallowed appellate court review of the sentence imposed by the trial court when the defendant and the State have stipulated to the sentence, and has limited review when the trial court has imposed a sentence consistent with the Sentencing Guidelines.

- Consequently, often the appellate attorney will need to file a notice of appeal before knowing whether particular decisions of the trial court are reviewable. Separating appealability and reviewability allows for more efficient operation of the justice system.

Having ORS Chapter 138 clearly distinguish between appealability and reviewability is important for these reasons: When the criteria for whether a party may appeal a trial court decision are clear, attorneys and self-represented parties can more easily decide

whether to file a notice of appeal at all. When the criteria are not clear, attorneys and self-represented parties may end up filing notices of appeal that, sooner or later, are dismissed by the appellate court, but sometimes not until after substantial tax-supported resources are expended.

Clear statements of whether an appellate court may review and decide particular trial court decisions may be even more important, because the appellate courts do not confront reviewability until after the transcript is prepared, the trial court has submitted the trial court record, the parties have prepared briefs, and the appellate court has held oral argument. All of these activities consume time and, for the most part, taxpayer resources.[2] When it is clear that an appellate court will have no authority to review and decide the only issues the appellant wants to raise on appeal, the appellant may not file the appeal at all, or may dismiss the appeal sooner, on realizing that the appeal will serve no useful purpose.

Although case law is replete with references to "appealability" and "reviewability," there are no statutory definitions for those terms. One of the main goals of the Work Group was to produce a bill that clearly distinguishes between appealability and reviewability; therefore, the Work Group thought it prudent to define those terms.

A defendant or attorney for a defendant considering whether to appeal a trial court decision should closely review Section 3 to determine if the trial court, as yet, has rendered a judgment or order the defendant may appeal. Then, the defendant, or the defendant's attorney, should review Section 13 to determine if the appellate court may review the particular trial court decision the defendant is considering challenging on appeal.

Likewise, if the State disagrees with a trial court decision, the prosecutor should review ORS 138.060 as amended by this bill to determine whether the trial court has rendered a judgment or order from which the State may appeal, then review Section 14 to determine if the appellate court may review the particular trial court decision.

"Colorable Claim of Error"

Under current law, the following statutes include the phrase "colorable claim of error" or some variant of that wording as one of the criteria for determining whether a defendant may appeal or get review of certain trial court decisions:

- ORS 138.050(1) (requiring a "colorable showing" of certain sentencing errors, applicable to a defendant's appeal following a plea of guilty or no contest)

- ORS 138.053(3) and 138.222(7) (requiring a "colorable claim of error," applicable to a defendant's opportunity to appeal various post-judgment orders or trial court judgments on remand from a prior appeal or pursuant to a decision of a court

[2] Or consume the resources of a defendant whose has retained counsel.

exercising post-conviction relief authority)

- ORS 138.071(5)(a)(B) (requiring a showing of "colorable claim of error," applicable to a defendant's opportunity to proceed with an otherwise untimely appeal under certain circumstances)

But, ORS Chapter 138 does not define the phrase "colorable claim of error."

The appellate courts have interpreted the phrase "colorable claim of error" in other contexts, including ORS 419A.200(5), which is applicable to juvenile court cases and which, like ORS 138.071(5), is part of the standard for determining whether the appellate court may allow an otherwise untimely appeal to go forward. *E.g.*, *State ex rel Dept. of Human Services v. Rardin*, 338 Or 399, 408, 110 P3d 580 (2005) ("colorable claim of error" " * * * [describes] a claim that a party reasonably may assert under current law and that is plausible given the facts and the current law (or a reasonable extension or modification of current law)."). The Court of Appeals has acknowledged the applicability of the holdings of those cases to use of the phrase "colorable claim of error" in ORS 138.222(7), applicable to criminal appeals: *State v. Brewer,* 260 Or App 607, 614-15,fn 2, 320 P3d 620 (2014) ("* * * Oregon courts have held that the colorable claim of error standard requires a party to present a claim that may reasonably be asserted under current law and that is plausible given the facts and the current law, or a reasonable extension or modification of current law" and citing to *Rardin*, among other cases).

Section 1(3) includes a definition of "colorable claim of error" that the Work Group intends to be consistent with *Rardin* and *Brewer*.

The bill changes somewhat the role of the required showing of "colorable claim of error." Under Section 6 of the bill, a defendant must include a showing of colorable claim of error in the notice of appeal essentially under the same circumstances as current law, but the requirement is non-jurisdictional. The failure of the defendant to make a "colorable claim of error" after notice and opportunity to cure is a ground on which the appellate court may, but is not required to, dismiss.

"Sentence"

Current law, at various places, uses the terms "sentence," "disposition," and "legal consequences" of a conviction -- compare ORS 138.040(1)(b) ("disposition), ORS 138.050(1) and (4) ("disposition"); ORS 138.053 ("disposition" and "sentence"); ORS 138.222(7) ("sentence"); *see also* ORS 137.071 (addressing requirements for judgments in criminal cases and using the terms "legal consequences," "disposition," and "sentence") – but does not define those terms. "Disposition" appears to be the broader term that includes not only the legal consequences imposed by the trial court for a conviction, but also acquittals and dismissals of charges, as well as post-judgment

events such as revocation of probation.[3] The bill strives to avoid using the term "disposition" and defines "sentence" to mean all of the legal consequences a court may impose based on a conviction, including post-judgment events such as probation revocation. Section 1(5)(a) is derived from the list of legal consequences described in ORS 137.071(1)(g) that a judge may impose and, if so imposed, must be in the judgment of conviction; Section 1(5)(b) is derived from the list of "dispositions" presently found in ORS 138.053(1).

For the most part, ORS 137.071(1)(g) and ORS 138.053 use different terms, but the concept that a "sentence" includes suspension of imposition of sentence is found in both ORS 137.071(1)(g) and ORS 138.053(3); its omission from paragraph (a) and its inclusion in paragraph (b) has no significance other than a decision to only mention it once.

In adopting a definition of "sentence," the Work Group does not intend to effect any substantive change in the law respecting appealability or reviewability of sentences or consequences of a conviction that fall within the new definition of "sentence."[4]

SECTONS 2 & 3. APPEAL BY THE DEFENDANT

Section 2

Section 2 adopts Section 3 as a part of ORS 138.010 to 138.310, relating to appeals in criminal cases.[5]

Section 3

Under current law, references to trial court judgments and orders that the defendant in a criminal case may appeal are found in many places, including ORS 138.040, ORS 138.050(1), ORS 138.053(1), ORS 138.083, and ORS 138.222(7). Section 3 is intended to consolidate all of those provisions into a single, easy to find, easy to read, place.

Subsection 3 recognizes the usual practice of appeals being taken from judgments and orders of the circuit court, but also recognizes that the legislature has authorized justice courts and municipal courts to become courts of record and, if a justice or municipal

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[3] *See* the memorandum in Appendix I entitled "Dispositions and Sentences," dated July 11, 2016.

[4] Unrelated to defining "sentence," the Work Group does intend to change the scope of review on appeal of sentences for misdemeanor convictions. *See* the discussion in this Legislative Report of Section 13, subsection (7).

[5] The remainder of ORS Chapter 138 addresses such topics as appointed counsel on appeal, post-conviction relief proceedings, and post-conviction motions for DNA testing.

court chooses to become a court of record, the appeal is to the Court of Appeals.[6] The wording is similar to that in current ORS 138.060(1) relating to State's appeals.[7]

Subsection 3(1)(a) is intended to reflect the long-standing principle of appellate law that a defendant may take an appeal only from a "final" judgment; that is, a judgment that conclusively disposes of all charges in the accusatory instrument. *See also* ORS 137.071(1)(g) (requiring judgment to include disposition of all counts and the sentence imposed on each conviction); *see also* the memorandum in Appendix I entitled "Finality of Criminal Judgments and Appealability," dated June 20, 2016. The Work Group does not intend to change the import of ORS 138.071(1), which provides that the remedy for a judgment that does not conclusively dispose of all counts is not to dismiss the appeal, but, rather, to give the trial court leave to enter one or more additional judgments or a corrected judgment disposing of all counts.

However, in cases in which the defendant is charged with multiple counts, a trial court may sever one or more counts for disposition ahead of other counts. The phrase "conclusively disposing of all counts severed from other counts" in Section 3(1)(a)(A), together with (B) and (C), is intended to codify the holding of *State v. Smith,* 100 Or App 284, 785 P2d 1081 (1990): If a trial court conclusively disposes of the severed counts, the judgment of conviction and sentence as to the severed counts is appealable notwithstanding that the trial court has not yet disposed of other counts.

Section 3(1)(b) is a new statutory provision reflecting case law articulating the principle that when a trial court merges determinations that a defendant is guilty of two or more counts into a single conviction and imposes a single sentence, the trial court conclusively disposes of the merged counts.

Section 3(2) is intended to restate ORS 138.083(2)(a): A judgment that includes a provision stating the defendant will pay restitution to the victim is conclusive and appealable notwithstanding that the judgment does not specify the amount of restitution. Typically, the determination of the amount of restitution to be imposed takes place after the trial court renders the judgment of conviction and sentence itself. A corollary to the defendant's opportunity to appeal a judgment providing for restitution but not specifying the amount thereof is that the decision to order restitution is not reviewable by an appellate court until entry of a supplemental judgment specifying the amount of restitution. *See* Section 13(6) of the bill. Section 3(2)(b) explicitly states that which is implicit in current ORS 138.083(2) and (3): A defendant may appeal from a supplemental judgment awarding restitution in a specific amount.

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[6] Most justice and municipal courts have not chosen to become courts of record; therefore, appeals from those courts are taken to the circuit court for the county in the justice or municipal court is located.

[7] *See also* ORS 138.057 addressing appeals from convictions of violations prosecuted in justice and municipal courts of record.

Section 3(3) is intended to restate the provisions of ORS 138.053(1)(b) through (e) authorizing a defendant's appeal from various post-judgment decisions, such as revocation of probation or modification of conditions of probation.

Section 3(4) makes explicit that which is implied in current ORS 138.083(1): A defendant may appeal from a corrected judgment entered by the trial court.

The Work Group included a reference to "amended" judgments in Section 3(4) in part because ORS 137.107 authorizes entry of an "amended" judgment awarding restitution to comply with ORS 19.048, relating to money awards imposing a monetary obligation. However, the reference to both "corrected" and "amended" also recognizes that trial courts do not always use the terms "amended judgment" or "corrected judgment" consistently with statutory provisions. In recommending adoption of Section 3(4), the Work Group intends that a defendant may appeal from a judgment that changes the previous iteration of the judgment, regardless of whether it is labeled "amended" or "corrected."

Note that Section 13(10) imposes limits on the reviewability of a defendant's appeal from a corrected or amended judgment.

Section 3(5) restates the provision of ORS 138.040 that a defendant may cross-appeal when the State appeals from pretrial orders suppressing evidence or dismissing or setting aside an accusatory instrument. Note the limits on reviewability imposed by Section 13(11).

SECTIONS 4 & 5. APPEAL BY THE STATE

Section 4

Section 4 amends ORS 138.060, addressing appeals by the State.

The amendment to ORS 138.060(1)(a) clarifies that a trial court need not dismiss the entire accusatory instrument; rather, the State may appeal the trial court's pre-trial dismissal of one or more counts in the accusatory instrument.

The amendment that will become ORS 138.060(1)(b) clarifies that the State may appeal from a trial court order sustaining a demurrer. A defendant may demur to a charging instrument on a variety of grounds identified in ORS 135.630; if the trial court sustains a defendant's demurrer, the State cannot prosecute the offense demurred to. Current law does not expressly say whether the State has the right to appeal a trial court order sustaining a demurrer.[8] However, sustaining a demurrer can be tantamount to dismissing an accusatory instrument, which the State may appeal under current ORS

[8] In *State v. Cervantes*, 232 Or App 567, 223 P3d 425 (2009), the court decided a State's appeal from a trial court's order sustaining defendant's demurrer without comment on whether the State may appeal from such an order.

138.060(1)(b). The proposed new (1)(b) makes clear that the State may take an appeal from a trial court order sustaining a demurrer.

Existing ORS 138.060(1)(e) is an example of how current law mixes concepts of appealability and reviewability. [9] Subsection (1)(e) addresses judgments entered since adoption of the Sentencing Guidelines in 1989, and, in effect, authorizes the State to appeal from a judgment of conviction for an offense committed after the effective date of that legislation – November 1, 1989 – but subject to the limits on reviewability found in ORS 138.222 relating to sentences imposed under the Sentencing Guidelines.

Consistently with one of the Work Group's goals to separately state principles of appealability and reviewability, the Work Group proposes to delete the reference to ORS 138.222 in ORS 138.060(1)(e) – paragraph (f) in the bill – but to restate the limits on reviewability in a separate statutory provision governing limits on reviewability in a State's appeal. *See* Section 14 of the bill, particularly subsections (5), (6), and (7). The proposed amendment to existing ORS 138.060(1)(e) – (1)(f) in the bill – is not intended as a substantive change of law.

Proposed new ORS 138.060(1)(g) is intended to clarify that the State has the right to take an appeal from a trial court judgment or order that either denies the State's request for restitution or awards less restitution than the State sought.

The Work Group proposes to delete existing ORS 138.060(1)(i). Existing ORS 138.060(1)(i) authorizes appeals from orders dismissing charges when the prosecution appears for trial and is not ready to proceed. ORS 138.060(1)(a) authorizes appeal from any order "prior to trial" dismissing charges for any reason. The Work Group agreed that ORS 138.060(1)(a) subsumes existing ORS 138.060(1)(i), as they both relate to dismissal of charges prior to trial—when the prosecution is not ready to proceed and the court dismisses charges, no trial has occurred and the order dismissing those charges occurs "prior to trial." The Work Group proposes the deletion to eliminate that redundancy.

Existing ORS 138.060(2) authorizes direct State's appeals to the Supreme Court when the trial court enters certain pre-trial orders in murder and aggravated murder cases. The Work Group proposes to clarify that the two types of orders described in ORS 138.060(2) are the same as the orders described in ORS 138.060(1)(a) and (d), and to clarify that a State's appeal of a trial court order sustaining a demurrer under (1)(b) in a murder or aggravated murder case also would be taken to the Supreme Court.

Existing ORS 138.060(3) has nothing to do with appealability, but rather imposes a time limit on the Supreme Court for deciding a State's appeal of pretrial orders in murder and aggravated murder cases under ORS 138.060(2). The Work Group proposes to recodify ORS 138.060(3) as new subsection (6) in ORS 138.261, which addresses other time limits for deciding appeals in criminal cases. *See* Section 17 of the bill.

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[9] *See* generally *State v. Cloutier*, 351 Or 68, 261 P3d 1234 (2011), which tracks the history of appealability and reviewability in criminal cases; *see also* the memorandum in the Appendix entitled "Reviewability of Misdemeanors and Felonies Post-*Cloutier*," dated September 7, 2016.

Section 5

ORS 136.120 and 136.130 address those cases in which the trial court dismisses the accusatory instrument when a case is scheduled for trial, the State is unable to proceed, and the trial court determines that the State does not have good cause for postponing trial.[10] ORS 136.120 and 136.130 give the trial court discretion whether "in the public interest" to dismiss the accusatory instrument, and provide that, if the defendant is charged with a felony or Class A misdemeanor, the trial court has discretion whether to bar the State from filing another action for the same offense by entering a "judgment of acquittal."[11] Use of the term "judgment of *acquittal*" in ORS 136.130 is problematic because it suggests an adjudication of the merits of the charges, rather than the actual disposition, which is dismissal of the charges because of the prosecutor's inability to proceed to trial. *See State v. Shaw*, 338 Or 586, 113 P3d 898 (2005).

Section 5 amends ORS 136.120(1), adds a new subsection incorporating the relevant provisions of ORS 136.130, and modernizes the wording of ORS 136.120 and 136.130.

Lastly, ORS 136.140, in effect, required the trial court, if it dismissed the accusatory instrument under ORS 136.120 and 136.130, to determine whether to remand the defendant to custody pending the State filing a new action (in those felony and Class A misdemeanor cases where the trial court ordered that the dismissal was not a bar to filing of a new action) or to release the defendant on own recognizance or on security, or to discharge the defendant from custody altogether. However, ORS 136.140 contained archaic wording that the Work Group saw no need to retain because ORS 135.680 already contains essentially the same provisions and is more clearly worded. Section 5 also amends ORS 136.120 to add a new subsection (3) to accomplish the same ends as ORS 136.140.

Because ORS 136.120 would subsume the material provisions of ORS 136.130 and 136.140, the bill would repeal those statutes. *See* Section 26 of the bill.

The Work Group does not intend the repeal of ORS 136.130 and 136.140 or the amendments to ORS 136.120 to effect any substantive change in the law.

SECTIONS 6 - 12. APPELLATE PROCEDURES

Sections 6 through 12 address some of the mechanics of filing, serving, and administering an appeal.

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[10] *See* the memorandum in Appendix I entitled "ORS 136.120 and 136.130," dated August 4, 2016.

[11] ORS 136.130 also provides that dismissal of any other offense type (Class B or C misdemeanor or a violation) is a bar to the State filing another action for the same offense.

Section 6

Historically, Oregon law has imposed limits on a defendant's opportunity to appeal when a conviction is based on a plea of guilty or no contest. However, there are exceptions. ORS 138.050(1) currently allows a defendant to appeal from a judgment of conviction based on a guilty or no contest plea if, under ORS 135.335, as a part of the defendant's plea, the defendant has reserved in writing an adverse pre-trial court ruling for appeal. ORS 138.050(1) also allows an appeal where the defendant wishes to take issue with the sentence imposed by the trial court.

As noted above, under current law, certain statutes condition a defendant's opportunity to appeal or get review of certain trial court decisions dependent on the defendant showing of "colorable claim of error" or a "colorable showing" of error. As phrased in ORS 138.050(1) and ORS 138.222(7), the requirement appears to be jurisdictional, and the failure to make the required showing results in dismissal of the appeal. Those requirements are awkward for appellate counsel for both the defendant and the State, and the appellate court, to administer because they are unlikely to have access to the trial court record during and immediately following the 30-day appeal period when jurisdictional determinations are made.

With respect to the requirement that a defendant make a "colorable" showing to proceed with an appeal in certain circumstances, the bill does three things.

First, the bill generally requires the defendant to make the showing in the same circumstances in which the defendant is required to make the showing under current law. Thus, when the trial court has convicted and sentenced a defendant based on the defendant's guilty or no contest plea, Section 6(1)(a) carries forward the provision of ORS 138.050(1) that a defendant may appeal the trial court's adverse pretrial ruling if, pursuant to ORS 135.335, the defendant has reserved the ruling for appeal. Section 6(1)(b) is intended to carry forward the requirement in ORS 138.050(1) and ORS 138.222(7)(a) that the defendant make a "showing of colorable claim of error" respecting sentencing errors. Section 6(2)(a) is intended to carry forward the requirement of ORS 138.053(2) and ORS 138.222(7)(b) that the defendant make a showing of colorable claim of error on appeal from probation revocation and similar judgments and orders. Section 6(2)(b) is intended to carry forward the requirement currently found in ORS 138.222(7)(c). The Work Group intends to make the requirement to show colorable claim of error applicable to all judgments and orders described in Section 6, regardless of whether the judgment or order relates to a misdemeanor or a felony and regardless of whether the felony was committed before or after November 1, 1989.

Second, to address the challenges that appellate counsel may face in identifying a "colorable claim of error" within the 30-day appeal period, Section 6(3) changes current law by making the need to show "colorable claim of error" a non-jurisdictional requirement. Under the bill, the defendant can cure the failure to make any showing or a sufficient showing in the notice of appeal, and the appellate court may dismiss the

appeal for lack of a sufficient showing only after giving the defendant notice of the deficiency and the opportunity to correct it.

Third, Sections 6(1) and (2) change current law by adding a requirement that, in circumstances where the defendant must identify a "colorable claim of error," that claimed error must also be one that is reviewable under Section 13 of the bill.[12] As a result, the appellate court will have authority to dismiss an appeal in which the only claim of error that the defendant identifies is one that the appellate court would not be able to review, if the appeal were to proceed.

The Work Group anticipates that the non-jurisdictional requirement to identify a claim of error that is colorable *and* reviewable will serve a gatekeeping function. The requirement discourages the filing of meritless appeals and streamlines resolution of other appeals by permitting early dismissal when the defendant is not able to make the required showing.

Section 7

Section 7 amends ORS 138.071(2) to clarify that a motion for new trial or in arrest of judgment extends the time to appeal from a judgment only if the defendant *timely* filed the motion for new trial or in arrest of judgment.

Current ORS 138.071(4) and (6), and ORS 138.083(3) and (4), contain overlapping provisions relating to corrected and supplemental judgments entered in criminal cases during the pendency of an appeal. The bill would repeal ORS 138.083 in its entirety, including subsections (3) and (4), and combine the overlapping provisions into a new ORS 138.071(4).

Section 7 further amends ORS 138.071(4) to clarify that the provisions of existing law pertaining to the time within which to file notice of appeal following entry of a corrected judgment also apply to an "amended" judgment (and to an amended or corrected order, where the defendant has appealed from the prior order).

Section 7 also amends (4)(b), consistent with what will be former ORS 138.083(3)(b), to clarify that, where an appeal already is pending and the appellant does not intend to assign error to the amended, corrected, or supplemental judgment or order, the requirement to file notice of intent to proceed with the pending appeal is not jurisdictional.

Section (7) repeals ORS 138.071(6), which defines "parties," a term used in what will become former subsection (4), and enacts (4)(b), defining "appellant," a term used in new subsection (4), derived from what will become former ORS 138.083(4).

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[12] The concept of "colorable claim of error" does not, itself, encompass a requirement that the claim be reviewable on appeal. *State v. Silsby*, 282 Or App 104, 108 (2016), *rev den*, 360 Or 752 (2017).

Section 7 also amends ORS 138.071(5)(b) to conform its provisions to the amendments made to ORS 138.060 respecting a State's appeal from pre-trial rulings.

The Work Group does not intend the amendments to ORS 138.071 to make any substantive change in the law.

Section 8

Section 8 amends ORS 138.081, pertaining to service of a copy of the notice of appeal on the adverse party. Section 8 rearranges the wording of ORS 138.081(1)(a)(A) and (B) solely to make the provisions, the Work Group hopes, more readily understandable.

Section 8 modifies ORS 138.081(1)(c) to replace the older phrase "clerk of the trial court" with the more accurate term "trial court administrator."

ORS 138.110 and 138.120 pertain to service, by alternative means, of notice of appeal filed by the State when the defendant cannot be located for traditional service. The bill would repeal ORS 138.110 and 138.120 and incorporate their essential provisions into new subsection (2) of ORS 138.081. Section 8 also amends ORS 138.081 to incorporate by reference the application of ORCP 7 D(6) to criminal cases. Oregon Rule of Civil Procedure (ORCP) 7 D deals comprehensively with alternative means of serving a party and could be useful if, during the period in which the State could appeal, the defendant may have absconded.

Current ORS 138.081(2) would become subsection (3) and conforms the wording to modern practice.

Although ORS 138.081, 138.110, and 138.120 are consolidated and some of the wording is changed, the Work Group does not intend to make any substantive change in the law governing service of notice of appeal in criminal cases.

Section 9

Section 9 amends ORS 138.185, which generally makes many provisions of ORS Chapter 19 (pertaining to appeals in civil cases) applicable to appeals in criminal cases, such as the title of the case, identifying the parties, designating the record on appeal, filing notice of appeal by mail or commercial carrier, defining when appellate court jurisdiction begins and ends, identifying jurisdictional filing and service requirements, authorizing the court to decide appeals by memorandum opinion, issuance of the appellate judgment terminating an appeal, and the authority of successor judges.

Section 9 proposes to amend ORS 138.185(2) to add references to those statutes in ORS Chapter 19 governing preparation and filing of the transcript, including extensions of

time to accomplish those tasks. Adoption of those amendments would render ORS 138.185(1) obsolete; therefore, subsection (1) should be deleted.[13]

In addition to the parts of ORS 138.185(2) pertaining to the trial court record, the statute as currently worded also addresses an entirely different topic, which is the appellate court's scope of review. ORS 138.185(2) makes "the provisions in ORS 19.425 authorizing review of intermediate orders" applicable to criminal cases. In relevant part, ORS 19.425 provides:

> Upon an appeal, the appellate court may review any intermediate order involving the merits or necessarily affecting the judgment appealed from * * *.

That wording differs from ORS 138.040(1)(b), which provides in relevant part as to a *defendant's* appeal:

> (1) The appellate court may review:
>
> * * * * *
>
> (b) Any decision of the court in an intermediate order or proceeding.

Because ORS 138.185(2) on its face applies to both defendants' appeals and the State's appeals, there are conflicting scopes of review for defendants' appeals, but only one scope of review for the State's appeals. The Work Group proposes to resolve the conflict as to defendants' appeals by retaining the wording from ORS 138.040(1) as to defendants' appeals and making the wording from ORS 19.425 applicable only to State's appeals. Compare Section 13(2) (defendant's appeals) and Section 14(2) (State's appeals).

Lastly, Section 9 would amend ORS 138.185(2), consistent with current practice, to provide that all of the specified appellate procedural provisions in ORS Chapter 19 that are applicable to appeals to the Court of Appeals also are applicable to the Supreme Court. That amendment would come into play for State's appeals of certain pre-trial orders in murder and aggravated murder cases that go directly to the Supreme Court.

Section 10

ORS 138.083(1)(b) and (2)(c) currently require the trial court, when it enters either a corrected judgment or a supplemental judgment in a criminal case during the pendency of an appeal from some prior judgment or order of the trial court, to forward a copy of the judgment to the appellate court. The appellate court is obligated, in turn, to notify the parties to the appeal. Receipt of notice of entry of a corrected or supplemental judgment triggers ORS 138.071(4), which states the time within which a party may file a

[13] ORS 138.185(1) also is obsolete because, as a matter of practice, trial courts do not forward the trial court record to the appellate court until the appellate court administrator so requests.

notice of appeal, amended notice of appeal, or notice of intent to proceed with the appeal.

The bill proposes to repeal ORS 138.083; Section 10 extracts concepts from ORS 138.083(1)(b), (2)(c), and (4) and restates them in a freestanding statute addressing the appellate court's duty to forward a copy of a corrected or supplemental judgment received from the trial court to the parties. ORS 138.083(4) in effect provides that, when the defendant is not represented by counsel, the appellant must be provided with notice "personally." The Work Group omitted that word from Section 10 because some might read it as requiring personal service, when the intent is to contrast providing notice to counsel versus to the defendant himself or herself.

Section 11

Section 11 amends ORS 138.210 to reflect current practice and modern usage of words to the end that, if the appellant fails to file a brief, the appellate court will dismiss the appeal.

Section 12

Section 12 is a new provision reflecting current appellate court cases holding that "special statutory proceedings," as that term is used in ORS 19.205(5), can take place in the context of a criminal case. *See* Appendix I, memorandum entitled "'Special Statutory Proceedings' Memo," dated June 7, 2016. Section 12 serves as a sign post to practitioners that whether the trial court's disposition of a special statutory proceeding in a criminal case is appealable may be governed by ORS 19.205(5), relating to civil cases. It is possible that, in a special statutory proceeding that takes place within a criminal case, there could be a third-party who may be able to appeal under ORS 19.205(5). *See State v. Branstetter*, 332 Or 389, 29 P3d 1 (2001) (sheriff and humane society initiated civil forfeiture proceeding against the defendant with pending criminal case).[14]

SECTIONS 13 & 14. REVIEWABILITY

Assuming that the appellate court has jurisdiction to entertain an appeal, under current law, whether the appellate court has authority to review and rule on particular trial court decisions is found in a number of statutes, some of which also address appealability. As stated earlier in this Legislative Report, one of the Work Group's primary goals was to clearly distinguish between the two concepts and separately state principles of reviewability.

[14] *Also see infra* on page 4 the discussion regarding continuation of the Work Group to focus on "special statutory proceedings."

In some instances, reviewability standards are the same for both defendants' appeals and State's appeals, but in some instances, the standards differ. The Work Group proposes two sections, one to address reviewability on defendants' appeals (Section 13) and another to address reviewability on State's appeals (Section 14), even though many of the provisions are identical or substantially similar. Where the provisions are identical or substantially similar, the discussion of the provision in Section 14 refers back to the discussion of comparable provision in Section 13.

Section 13. Reviewability on Appeal by Defendant

Subsection (1). In the course of the Work Group addressing the topic of reviewability of intermediate trial court decisions, the issue arose whether there was express statutory authority for an appellate court to review trial court decisions memorialized or reflected in the judgment or order being appealed. It appears that current law does not so expressly state. Work Group members agreed that appellate courts necessarily have that authority and it ought to be stated in statutory form. Subsection (1) so states.

Subsection (2) incorporates the essential provisions of ORS 138.220: Appellate review is limited to questions of law appearing on the record; that is, the appellate court's authority to decide questions of law on appeal is limited to the record as established in the trial court. Generally, in the course of deciding the merits of an appeal, the appellate court has no authority to consider evidence not presented at trial, including evidence of events that may have occurred after trial.[15]

Subsection (3) of Section 13 and Section 14 authorize appellate review of intermediate decisions of the trial court; that is, decisions other than decisions memorialized in the judgment or order being appealed. However, the wording of Section 13(3), and Section 14(3) differ. That difference has its origins in existing law. Section 13(3) restates ORS 138.040(1)(b), applicable to defendant's appeals, whereas Section 14(3) reflects existing ORS 138.185(2), which makes the part of ORS 19.425 addressing review of intermediate orders on appeal in civil cases applicable to appeals in criminal cases, including State's appeals.

The Work Group determined that the scope of review articulated in ORS 138.040(1) is the more expansive scope of review, consistent with the circumstance that defendants generally have a wider array of trial court decisions of which they can obtain review. Likewise, the scope of review articulated in ORS 19.245 – providing that review is limited to those intermediate decision "involving the merits or necessarily affecting the judgment appealed from" reflected the more narrow range of decisions of which the State may obtain review.

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[15] An appellate court does have authority to consider evidence outside the record to determine matters other than the merits of the appeal, for instance, whether an appeal has become moot or whether the defendant has absconded. An appellate court also has authority to take judicial notice of certain facts as provided in OEC (Oregon Evidence Code) 201(a)-(b).

Subsection (3) of both Section 13 and Section 14 include a qualifier – "[e]xcept as provided in this section" – because, under current law, there are limits on the appellate courts' authority to review intermediate trial court decisions, and the bill carries forward those limitations.

Subsection (4)(a) of Section 13 is intended to codify the holding of *State v. Sullens*, 314 Or 436, 939 P2d 708 (1982), that on a defendant's appeal from a judgment of conviction and sentence, the defendant may assign error to the trial court's denial of a motion for new trial under ORS 136.535 based on allegations of newly discovered evidence or events occurring during trial but not discovered until after trial.[16] Subsection (3)(b) clarifies that an appellate court may review the trial court's denial of a defendant's post-trial motion in arrest of judgment under ORS 136.500.[17] Section 14 contains no comparable limitation on the appellate court's authority to review a trial court order *granting* a motion for new trial or an arrest of judgment, because, under ORS 138.060 as amended by this bill, the State may appeal those orders directly and under Section 14(1), the appellate court may review those trial court decisions.

Subsection (5)(a) is intended to restate the principle currently found in ORS 138.050(1)(a) that where the defendant pleaded guilty or no contest to the offense of which the defendant was convicted, on appeal, the appellate court may not review the validity of the plea or the conviction, except when the defendant, under ORS 135.335, has reserved in writing an adverse pre-trial trial court ruling for appeal.

Subsection (5)(b) is new statutory law relating to merger of determinations of guilt. Under ORS 161.067, under certain circumstances, if a defendant is found guilty of multiple counts arising from the same criminal episode, the trial court may convict the defendant of only one offense, so-called "merger." Although trial courts typically decide merger issues after trial (or sometimes after the defendant has pleaded guilty or no contest to multiple offenses), conceptually, merger has to do with whether the defendant is guilty of one or more offenses. Accordingly, under current law, appellate courts may decide a merger issue raised on a defendant's appeal even when the defendant pleaded guilty or no contest to the offenses the defendant asserts should be merged into a single determination of guilt.[18] Subsection (5)(b) reflects that appellate practice and authorizes appellate court review of a merger issue. That authority is subject to a limitation, which is new statutory law, that the appellate court may not review the merger issue if the trial

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[16] In *State v. Evans*, 98 Or 214, 193 P 927 (1920), the court explained why a defendant may not appeal the trial court's denial of a motion for new trial on other grounds, namely that those grounds must have been raised before entry of judgment and therefore the denial of relief would be reviewable on appeal from the judgment of conviction and sentence. The Work Group does not intend that the provision would change existing law regarding the limited circumstances under which appellate courts may review a trial court's denial of a motion for a new trial.

[17] *See* the memorandum in the Appendix entitled "The Reviewability of Denials of Motions in Arrest of Judgment," dated September 12, 2016.

[18] *See State v. Summerlin*, 139 Or App 579, 913 P2d 340 (1996), and *State v. Davis*, 265 Or App 425, (2014).

court convicted the defendant of multiple offenses pursuant to a plea agreement in which the defendant agreed to plead guilty or no contest to the convictions in question.

Subsection (6) relates to current ORS 138.083(2)(a) as recodified in Section 3(2)(a), authorizing a defendant to appeal from a judgment determining that the defendant should be liable for restitution, but not specifying the amount of restitution. Subsection (6) states the corollary that on appeal from such a judgment, the appellate court may not review the determination of defendant's liability for restitution.

Subsection (7) addresses the appellate courts' scope of review respecting the sentence imposed on a conviction. Respecting convictions of misdemeanors (and felonies committed before November 1, 1989), subsection (7) represents one of the more significant changes made by this bill. Under current ORS 138.040(1)(b), an appellate court may review the disposition of a misdemeanor (or pre-November 1989 felony) conviction only as to whether the disposition exceeds the maximum allowable by law or is unconstitutionally cruel and unusual. [19] Subsection (7) would do away with those limits and permit review of "whether the trial court failed to comply with requirements of law in imposing or failing to impose a sentence."[20]

Subsection (8)(a) is intended to restate the limits on reviewability of sentences imposed on convictions for felonies committed after November 1, 1989 (that is, convictions subject to the Oregon Criminal Justice Commissioner's Sentencing Guidelines) currently set forth in ORS 138.222(2)(a) through (c). Subsection (8)(b) is intended to restate the limitations on review currently set forth in ORS 138.222(3). Subsection (8)(c) is intended to restate the limitations on review currently set forth in ORS 138.222(4)(b) and (c).

Subsection (9) is intended to restate the limits on reviewability currently set forth in ORS 138.222(2)(d). It omits the phrase "which the sentencing court approved on the record," because the important factor is whether the parties stipulated to the sentence, not whether the trial judge approved the stipulation "on the record" somewhere other than as reflected in the judgment of conviction and sentence itself. The addition of the phrase "any part of a" before "sentence" is not intended to change current law. Rather, the Work Group added the phrase to make explicit the conclusion in *State v. Capri*, 248 Or App 391, 395, 273 P3d 290 (2012), and *State v. Davis*, 134 Or App 310, 314, 895 P2d

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[19] On its face, ORS 138.040(1) is not limited to misdemeanors and pre-November 1, 1989, felonies. But, in *State v. Cloutier,* 351 Or 68, 261 P3d 1234 (2011), the court held that, when the Legislature enacted ORS 138.222, the Legislature intended ORS 138.222 to govern appealability and reviewability of sentences for felonies committed after November 1, 1989. Thus, by default, ORS 138.040(1)(b) currently applies to misdemeanors and felonies committed before that date. Also, in *Cloutier* the court held that the phrase "maximum allowable by law" means the maximum allowable by *statutory* law.

[20] Under current law, that is the scope of review applicable to both defendants' and the State's appeals from judgments of conviction of a felony committed after November 1, 1989. ORS 138.222(4)(a). *See* the memorandum in Appendix I entitled "Endorse a Uniform Scope of Review of Sentences in Criminal Cases," dated December 8, 2016.

1374 (1995), that any portion of a sentence not agreed to between the state and a defendant is reviewable; that is, only those parts of the sentence the defendant and the State stipulated to are not subject to review.

Subsection (10)(a) is intended to reflect principles articulated in ORS 18.107(2) and (3) respecting appeals from corrected or amended judgments. Although ORS 18.107(2) and (3) speak in terms of appealability and the time within which notice of appeal must be filed, and subsection (10) speaks in terms of reviewability, the principles are the same. First, if a trial court enters a corrected or amended judgment that restates the prior version of the judgment *in toto* except for the part that is changed within the 30-day appeal period, the corrected or amended judgment in effect supplants the prior judgment and, if the defendant timely appeals from the amended or corrected judgment, the corrected judgment *in toto* is reviewable.[21] Second, if a trial court does not enter a corrected or amended judgment restating the prior judgment *in toto* until after expiration of the 30-day appeal period, the prior judgment is no longer subject to appeal and review; on appeal from the corrected or amended judgment, the appellate court may review only the amended or corrected part of the judgment, any part of the prior judgment affected by the amendment or correction, or the trial court's denial of a request to correct the prior judgment.[22]

The Work Group intends a corollary to the latter principle, albeit not explicitly reflected in the bill itself: After expiration of the appeal period from the prior judgment, if a trial court enters a judgment containing a corrected or amended version of a part of the prior judgment, then only the amendments or corrections are reviewable on appeal from that judgment (together with any part of the prior judgment affected by the amended or corrected judgment, and the denial of any other request to correct the judgment).

Subsection (10)(c) clarifies that the principles stated in paragraph (b) are applicable regardless of whether the prior trial court decision was a judgment of conviction and

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[21] However, if an amended or corrected judgment is entered after the 30-day appeal period, a defendant may file a late appeal from the *original* judgment until the 90-day delayed appeal period under ORS 138.071(4) expires. Under those circumstances, in order for the appellate court to review the original and new judgment *in toto*, a defendant must file a late notice of appeal from the original judgment *and* a notice of appeal from the amended or corrected judgment.

[22] There is an important limitation in play here. The appellate court may review the denial of a request to correct a judgment only if the trial court changed or modified the prior judgment in some way such that the judgment is appealable under Section 3 of the bill. The Work Group did not intend to change existing law to the effect that, where the trial court simply denies a motion to correct the judgment, the denial is not appealable. *See, e.g., State v. Hart*, 188 Or App 650, 72 P3d 671 (2003) (no appeal lies from order in criminal case denying post-judgment motion); *State v. Sagar*, 249 Or App 252, 274 P3d 890 (2012) (post-judgment denial of relief for relief under ORS 137.754 relating to eligibility for leave, work release, and post-prison supervision programs not appealable).

sentence, a supplemental judgment awarding restitution, or an order that a defendant may appeal.

Subsection 11(a) relates back to Section (3)(6), which permits a defendant to cross-appeal when the State appeals from pre-trial orders, and is intended to codify the holding of *State v. Shaw*, 338 Or 586, 113 P3d 898 (2005), that the appellate court may limit review of the defendant's cross-assignments of errors to those "inextricably linked to the State's assignments of error. Subsection 11(b) states an important consideration not expressly stated in current law: A defendant who, in reliance on *Shaw*, forgoes assigning error to a trial court ruling not closely linked to the State's assignments of error does not waive the right to seek review of the same trial ruling on appeal following conviction and sentence. Thus, a practitioner representing a defendant on a State's cross-appeal may comfortably forgo briefing an unrelated issue knowing that, if the defendant is convicted and chooses to appeal, the defendant may assign error to the same ruling on the defendant's appeal.

Section 14. Reviewability on State's Appeals

Subsection (1). *See* the discussion of Section 13(1)

Subsection (2). *See* the discussion of Section 13(2).

Subsection (3). *See* the discussion of Section 13(3).

Subsection (4)(a) is new statutory wording, but is necessary because of the manner in which the bill amends ORS 138.060(1)(e) to permit the State to appeal judgments of conviction and sentence as to felonies committed after November 1, 1989. The existing provision, by referring to ORS 138.222, implicitly imports all of the limitations on review found in ORS 138.222; by removing the reference to ORS 138.222 (and repealing ORS 138.222), the limitations on review will be found in Section 14. When the State appeals a judgment of conviction and sentence, review is limited to the sentence imposed by the trial court; the appellate courts will have no authority to review the trial court's determination that the defendant is or is not guilty of an offense. However, that principle is subject to an exception – where merger of determinations of guilt is at issue, as provided in Section (4)(b) – the mirror of the same principle applicable to defendants. *See* the discussion of Section 13(5)(b). (And, like a defendant's appeal, on a State's appeal, the appellate court may not review the trial court's merger decision if it results from a plea agreement between the State and the defendant.)

Subsection (5) is intended to restate a principle of reviewability of sentences currently found in ORS 138.222(4)(a) applicable to convictions for felonies committed after November 1, 1989 (that is, convictions subject to the Oregon Criminal Justice Commissioner's Sentencing Guidelines). However, subsection (5) also would apply to all felonies, including a felony committed before November 1, 1989, and any felony subject to a sentence other than a Sentencing Guidelines sentence, such as a mandatory sentence.

Subsection (6) is the counterpart to Section 13(9). Subsection(6)(a) is intended to restate limitations on review of sentences imposed under the Sentencing Guidelines for felonies committed after November 1, 1989, as currently set forth in ORS 138.222(2)(a) through (c). Subsection (6)(b) is intended to restate the limitations on review currently set forth in ORS 138.222(3). Subsection (6)(c) is intended to restate the limitations on review currently set forth in ORS 138.222(4)(b) and (c).

Subsection (7) is intended to restate the limits on reviewability of sentences imposed pursuant to stipulated sentencing agreements currently set forth in ORS 138.222(2)(d).

Subsection (8)(a) and (b). *See* the discussion of Section 13(10)(a) and (b).

There is no reviewability counterpart to ORS 138.060, as amended by Section (4), new (1)(g), authorizing a State's appeal from a judgment or orders declining to award restitution or awarding less restitution than sought by the prosecutor because the trial court's decision would be reviewable under Section 14(1).

Section 15 - 17. DETERMINATION ON APPEAL

Sections 15 through 17 address the relief an appellate court may grant on appeal.

Section 15

Subsection (1) restates the provisions of current ORS 138.240 that an appellate court may reverse, affirm or modify the trial court judgment or order being appealed, but clarifies that an appellate court also may vacate the judgment or order. Section 15 also is intended to clarify that the authority to affirm, reverse, vacate, or modify applies to any part of the judgment or order being appealed. Section 15(1) omits the provision in existing ORS 138.240 that the appellate court "shall, if necessary or proper, order a new trial" for two reasons: First, a remand inherently is plenary in nature, and the appellate court does not need to remand specifically for a new trial for the trial court to have the authority to conduct a new trial if the trial court determines, in light of the appellate court decision and the circumstances of the case, that a new trial is appropriate. Second, other potential outcomes may remain available on remand, other than a new trial, including a negotiated plea or other disposition.

Subsection (2). The broad grant of authority stated in subsection (1) is subject to the "harmless error" limitation found in the Oregon Constitution, Article VII (amended), § 3: "If the supreme court shall be of opinion, after consideration of all matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial * * *." The Work Group intends that subsection (2) would replace current ORS 138.230, which contains a different iteration of the harmless error principle. ORS 138.230 is of ancient vintage and is largely unchanged from the Deady Code. *See* General Laws of Oregon, Crim Code, ch XXIII, § 246 (Deady 1845-1864). ORS 138.230 precedes adoption of the Article VII (amended) in 1910.

The appellate courts have not always relied on ORS 138.230 and, instead, often, have relied on the constitutional provision itself. *See* the memorandum in Appendix I entitled "Relationship of ORS 138.230 to Article VII Section 3," dated August 4, 2016. Confronted with claimed trial court error, the appellate courts have often articulated the harmless error standard as whether there is little, if any, likelihood that the claimed error changed the result of the trial or whether the claimed error as a practical matter affected a substantial right of the appellant.[23] The Work Group determined that the "little likelihood that any error affected the outcome" of the trial court case standard best reflected the appellate cases that have applied the harmless error principle derived from Article VII, Section 3.

Subsection (3) is intended to clarify that, when an appellate court reverses, vacates or modifies the judgment or order being appealed, the court may do so with or without explicitly remanding the case to the trial court and with or without instructions. When an appellate judgment issues after the appellate court has reversed, vacated, or modified the judgment or order, jurisdiction of the matter returns to the trial court as necessary for implementation of the appellate court's decision. *See* ORS 19.270(6). Any subsequent actions by the trial court must comport with the appellate court's decision, including the "tag line" of the opinion, which must be read in the context of the opinion as a whole. *See State v. Barajas*, 262 Or App 364, 366 (2014).

Subsection (4) is intended to restate the essence of existing ORS 138.222(5)(a) and (b) pertaining to resentencing when an appellate court holds that a trial court erred in imposing a sentence or the appellate court reverses a conviction on at least one count and affirms another conviction. The Work Group does not intend subsection (4) to make any substantive change in the law except for this: Unlike current ORS 138.222, which applies only to felonies committed after November 1, 1989, subject to the Sentencing Guidelines, subsection (4) would apply to all misdemeanors and all felonies.

Subsection (5) is intended to carry forward the provisions of current ORS 138.250 regarding whether, when an appellate court reverses a conviction without explicitly remanding for a new trial, the trial court must determine whether the defendant will be discharged, released on own recognizance or on security, or will remain in custody. However, instead of relying on the older wording of ORS 138.250, subsection (5) proposes to refer to ORS 135.680, which addresses release decisions in detail and reflecting modern practices.

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[23] Iterations of a "harmless error" standard also are found in ORS 19.415(2), pertaining to appeals in civil cases ("No judgment shall be reversed or modified except for error substantially affecting the right of a party."), and in the Oregon Evidence Code (OEC) 103(1) ("Evidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.") and (4) ("Nothing in this rule precludes taking notice of plain error affecting substantial rights although they were not brought to the attention of the court.").

Section 16

Section 16 amends ORS 138.227 to clarify that the appellate court's authority, on joint motion of the parties, to vacate and remand to a trial court for reconsideration, includes the authority to remand for reconsideration of an intermediate decision, not just the judgment or order being appealed.

Practitioners should note that the Work Group declined to adopt an amendment that would authorize, on joint motion of the parties, reversal of the trial court judgment or order being appealed and remand with specific instructions. Under ORS 2.570(5), only a department of the court or the court *en banc* may reverse a trial court judgment or order. ORS 2.570(6) authorizes the Chief Judge, or the Appellate Commissioner, only to decide motions and procedural matters.

Practitioners also should note that ORS 138.227 provides a mechanism for implementing an alternative disposition of the case that the defendant and the State have negotiated. A motion to vacate and remand to the trial court, if granted, will give the trial court an opportunity to rule on the proposed alternative disposition. Under those circumstances, vacating and remanding to the trial court to determine whether the trial court will accept the alternative disposition is the better practice rather than having the appellate court remand with specific instructions.

Section 17

Section 17 amends ORS 138.261, which, generally, addresses time limits for the prosecution and decision of State appeals of pre-trial orders. If the defendant is charged with murder or aggravated murder, the appeal is filed in and decided by the Supreme Court; if the defendant is charged with any other offense, the appeal is filed in and decided by the Court of Appeals. The time limit for the Supreme Court to decide such a case currently is found in ORS 138.060(2), which deals with State appeals generally. The Work Group determined that ORS 138.060 should be amended to deal exclusively with appealability by the State, and to move ORS 138.060(2) into ORS 138.261. Proposed new subsection (6) of ORS 138.361(6) would accomplish that.

Subsection (1) also is amended to conform to amendments made to ORS 138.060(1).

SECTIONS 18 - 20. SUPPLEMENTAL, CORRECTED, & AMENDED JUDGMENTS

Section 18(1) would make Section 19 a part of the ORS 137.101 to 137.109 series, relating to trial court determinations whether to require a defendant to pay restitution and the amount thereof, including during the pendency of an appeal from the judgment of conviction and sentence. Section 19 recodifies the essential provisions of ORS 138.083(2)(b) and (c). The Work Group did not incorporate the last sentence of ORS 138.083(2)(c) authorizing the appellate courts to adopt rules for modification of appeals because ORS 138.083(3) adequately addressed that topic. Although this bill also repeals

ORS 138.083, Section 10 of the bill recodifies the essential provisions of the last sentence of ORS 138.083(3).

Section 18(2) makes Section 20 part of Chapter 137 relating to sentencing generally. Section 20 recodifies the provisions of ORS 138.083(1)(a) and (b), relating to trial court authority to correct or modify judgments, including during the pendency of an appeal. The Work Group did not incorporate the last sentence of ORS 138.083(1)(c) authorizing the appellate courts to adopt rules for modification of appeals because ORS 138.083(3) adequately addressed that topic. Although this bill also repeals ORS 138.083, Section 10 of the bill recodifies the essential provisions of the last sentence of ORS 138.083(3). Section 20 retains the phase "modify any erroneous term in the judgment" currently found in ORS 138.083(1)(a). The bill does not attempt to define the scope of that authority.

SECTIONS 21 - 25. CONFORMING AMENDMENTS

Sections 21 and 22, respectively, amend ORS 40.460(18a)(b) and ORS 136.434(3) to reflect renumbering of the part of ORS 138.060 relating to State's appeals from pre-trial orders determining the inadmissibility of evidence.

Section 23 amends ORS 137.020(5)(b), which currently requires trial judges, at the time of sentencing of defendants who have pleaded guilty or no contest, to advise such defendants of the limitations on *appealability*. The bill restates those limitations on appealability as limitations on review, as set out in Section 13. Consequently, Section 28 amends ORS 137.020(5)(b) to require trial judges to advise defendants of the limitations on *reviewability* as set out in Section 13 of the bill.

Section 24 amends ORS 137.079(8), which limits review of trial court decisions relating to a defendant's criminal history "[e]xcept as provided in ORS 138.222" to reflect that, under the bill, reviewability would be as provided in Section 13.

Section 25 amends ORS 138.697(3), relating to appeals from trial court decisions in post-judgment proceedings in which the defendant has requested DNA testing, to clarify that the relief that the appellate court may grant is as stated in Section 15 of the bill.

SECTIONS 26 - 27. MISCELLANEOUS PROVISIONS

Section 26 identifies the statutes that the bill would repeal. In most instances, the statutory provisions are being repealed because the bill recodifies the provisions as is or as modified.

Notes about the repeal of ORS 138.083: ORS 138.083 currently addresses the authority of a trial court during the pendency of an appeal to correct a judgment and to enter a supplemental judgment awarding restitution. The presence of those provisions in ORS Chapter 138 makes sense to the extent that the statute makes clear that a trial court may correct a judgment and may enter a supplemental judgment for restitution during the

pendency of an appeal.[24] However, having those provisions in ORS Chapter 138 begs the question whether the trial court has authority to enter a corrected or supplemental judgment only when the case is on appeal. The Work Group ultimately determined that the better policy would be for the trial court to have authority to correct a judgment and to enter a supplemental judgment awarding restitution whether or not an appeal is pending.

Therefore, the Work Group proposes to recodify the provisions of ORS 138.083(1)(a) and (2)(b) in ORS Chapter 137, relating generally to entry of judgments in criminal cases. *See* Sections 19 and 20 of the bill. Those sections make clear that the trial court has authority to enter corrected judgments and supplemental judgments during the pendency of an appeal.

Section 27 states that unit captions in the bill are for the convenience of the reader and do not become part of the statutory law or express legislative intent.

SECTION 28. APPLICABILITY

Section 28 addresses the issue of whether the provisions of the bill should apply retroactively to pending appeals or apply prospectively only. The Work Group intends that the bill would be prospective only, applying to appeals of judgments and orders entered after the effective date of the bill.

The Work Group decided not to include an emergency clause in the bill. Trial and appellate courts and attorney practitioners will need sufficient lead time before the bill goes into effect to inform persons affected of the changes made by the bill, adopt or modify procedures as required by the bill, and otherwise to implement the bill.

[24] It is important to so state because ORS 19.270(1) – made applicable to criminal cases by ORS 138.185(2) – provides that, when notice of appeal has been filed, the appellate court has jurisdiction of the cause. The appellate courts have interpreted ORS 19.270(1) to mean appellate court jurisdiction is exclusive and, absent some authority providing otherwise, a trial court may not exercise jurisdiction when the case is on appeal from the judgment of conviction and sentence.

APPENDICES

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole, or its members.

APPENDIX I

(memoranda referred to in the report)

"Special Statutory Proceedings" Memo, dated June 7, 2016

Finality of Criminal Judgments and Appealability, dated June 20, 2016

Dispositions and Sentences, dated July 11, 2016

ORS 136.120 and 136.130, dated August 4, 2016

Relationship of ORS 138.230 to Article3 VII Section 3, dated August 23, 2016

Reviewability in Misdemeanors and Felonies Post-*Cloutier*, dated September 7, 2016

The Reviewability of Denials of Motions in Arrest of Judgment, dated September 12, 2016

Endorse a Uniform Scope of Review of Sentences in Criminal Cases, dated December 8, 2016

APPENDIX II

(memoranda considered by the Work Group but not referred to in the report)

Scope of Review of Corrected Judgments, dated September 20, 2016

Revocation of Conditional Release: Appealability and Scope of Review, dated September 20, 2016

Determination on Appeal: "Harmless Error" Standard: *Purdy v. Deere and Company*, dated October 10, 2016

Appeal Provisions Relating to Justice and Municipal Courts, dated October 10, 2016

Development of Sentencing Review in State and Defendant Appeals, dated November 10, 2016

Adams and *Huddleston* Research, dated November 18, 2016

ORS 138.060(1)(e) Legislative History, dated December 5, 2016

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

"Special Statutory Proceedings" Memo

Prepared by Matt Shoop and Jim Nass

June 7, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

ORS 19.205(5)

ORS 19.205(5) provides:

> "An appeal may be taken from the circuit court in any special statutory proceeding under the same conditions, in the same manner and with like effect from a judgment or order entered in an action unless appeal is expressly prohibited by the law authorizing the special statutory proceeding."

Case Law Addressing "Special Statutory Proceedings" Generally

The defining characteristic of a special statutory proceeding is that it is separate and distinct from other judicial proceedings. *State v. Threet*, 294 Or 1, 5, 653 P2d 960 (1982). The proceeding must be functionally separate from other proceedings, but need not be formally separate and a different case number is not required. *State v. Branstetter*, 332 Or 389, 398-99, 29 P3d 1 (2001). A judicial proceeding is separate if it can go forward without disruption to other proceedings. *Garganese v. Oregon Department of Justice*, 318 Or 181, 185-86, 864 P2d 364 (1993). Where the statutory proceeding arises from another proceeding, the court looks at the relationship between the two proceedings to determine if they are separate. *State v. Hart*, 188 Or App 650, 653-54, 72 P3d 671 (2003). A special statutory proceeding also must have clearly defined parties. *Garganese*, 318 Or at 186.

Threet included a short examination of the history of special statutory proceedings in Oregon since 1862.

> "'Special proceedings' have existed in Oregon law since 1862. See General Laws of Oregon, 1845–1864, ch. 7 (M. Deady ed 1866). In 1862, the legislature provided for procedures to be followed in special proceedings. Remedy by special proceedings was provided for in a separate chapter of the code of 1862, the detailed requirements of which differed from the pleading and practice prescribed for ordinary actions. *See Buell v. Jefferson County Court*, 175 Or. 402, 408–09, 152 P.2d 578 (1944). The specific special proceedings dealt with there were the writs of review, mandamus, and habeas corpus, and the punishment of contempt. Each of these proceedings is a separate judicial proceeding with clearly defined parties. We believe that separateness is a necessary attribute of a 'special statutory proceeding.' This is true of the writs of review, mandamus, habeas corpus, and contempt proceedings. It is also true of other proceedings that we have held to be 'special statutory proceedings.' As we said in *Smith Securities Co. v. Multnomah County*, 98 Or. 418, 422, 192 P. 654 (1920), *rehearing denied*, 98 Or. 422, 194 P. 428 (1921), in reference to a special statutory proceeding, 'This statute provides a special proceeding and is summary and complete within itself.'"

State v. Threet, 294 Or 1, 4-5, 653 P2d 960, 962 (1982)

Case Law Addressing "Special Statutory Proceedings" in Criminal Cases

Proceedings Held to be "Special Statutory Proceedings"

- Motion under ORS 137.225 to expunge or to set aside conviction and seal record of arrest and conviction. *State v. Young*, 24 Or App 5, 544 P2d 179 (1976) (order granting relief appealable by state); *State v. K. P.*, 324 Or 1, 921 P.2d 380 (1996) (order denying relief appealable by defendant).

- Motion under ORS 137.347 for forfeiture of animals impounded pending disposition of criminal animal neglect charges. *State v. Branstetter*, 332 Or 389, 29 P3d 1 (2001) (order appealable by defendant).

- Proceeding under ORS 151.487 to determine whether defendant is financially eligible person. *State v. Shank*, 206 Or App 280, 136 P3d 101 (2006) (limited judgment imposing liability for eligibility determination fee and compensation of court-appointed counsel appealable by defendant).

- Motion under ORS 163.643 for return of evidence seized in course of criminal investigation. Unpublished order the Appellate Commissioner.

- Motion under ORS 133.715(4) for preservation of biological evidence. Unpublished order of the Appellate Commissioner.

Proceedings Held *not* to be "Special Statutory Proceedings"

- Proceeding to compel witnesses to appear and testify before a grand jury. *State v. Threet*, 294 Or 1, 653 P2d 960 (1982) (circuit court order not appealable).

- Motion under ORS 138.083(1) to correct or modify judgment of conviction and sentence. *State v. Hart*, 188 Or App 650, 72 P3d 671 (2003) (order denying motion not appealable. But note: If the trial court grants the motion and enters a corrected or modified judgment, the judgment is appealable).

- Petition for writ of error *coram nobis*. *State v. Endsley*, 214 Or 537, 331 P2d 338 (1958) (ORS 138.010 abolishes [common law] writs of error; writ of error proceeding is not and never was a statutory proceeding).

- Orders denying motions for DNA testing under ORS 138.690 to 138.698. - *State v. Johnson*, 254 Or App 447, 295 P3d 677 (2013). [In 2013 and 2015, the legislation adopted and amended ORS 138.697 authorizing defendant to appeal from denial or limitation on DNA testing, denial of appointment of counsel, or denial of new trial based on new DNA testing, and authorizing state to appeal from granting DNA testing or granting new trial based on DNA testing).

- Probation revocation proceeding under ORS 137.550(2). *State v. Baxley*, 27 Or App 73, 555 P2d 782 (1976) (state may not appeal from order suppressing evidence in probation revocation proceeding; order is not appealable under ORS 138.060(3) – because a hearing on a motion to revoke probation is not a "trial"; and probation revocation proceeding is not a special statutory proceeding under ORS *former* ORS 19.010(4), now ORS 19.205(4))

- Proceeding after entry of judgment determining defendant not responsible due to mental disease or defect to determine, under ORS 161.336, whether defendant should be placed under jurisdiction of the Psychiatric Security Review Board. *State v. Cooper*, 37 Or App 443, 587 P2d 1051 (1978) (court declined to decide whether the commitment proceeding was a special statutory proceeding, noting that legislature had provided for appellate review via judicial review of the PSRB order committing the person for care and treatment or conditionally releasing the defendant. Note: The court did not explain how the appellate court could review the *circuit court's* order on judicial review of the PSRB's order.)

Case Law Addressing "Special Statutory Proceedings" in Civil Cases

Proceedings Held to be "Special Statutory Proceeding"

- Petition under ORS 107.700 to 107.735 for Family Abuse Prevention Act restraining order). *Strother and Strother*, 130 Or App 624, 883 P2d 249 (1994) (defendant may appeal restraining order).

- Complaint under ORS 163.735 and 163.744 for stalking protective order *Johnson v. McGrew*, 137 Or App 55, 902 P2d 1209 (1995) (complaint for stalking protective order itself is civil in nature, notwithstanding that alleged violation of thereof is a criminal proceeding; protective order appealable by defendant).

- Petition under ORS chapter 24 to register foreign judgment. - *Andrysek and Andrysek*, 280 Or 61, 569 P2d 615 (1977) (proceeding to register foreign judgment is special statutory proceeding; respondent may appeal trial court's denial of motion to strike registration as sham).

- Motion in Tax Court under ORS 305.190(2) to require taxpayer to allow Department of Revenue to inspect financial records. *Southern Oregon Broadcasting Co. v. Dept. of Revenue*, 287 Or 35, 597 P2d 795 (1979) (circuit court order granting motion appealable). *But see, Department of Revenue v. Universal Foods Corp*, 311 Or 537, 815 P2d 1237 (1991) (limiting scope of *Southern Broadcasting*).

- Motion in circuit court under ORS 646.628(1) to compel party to comply with Department of Justice investigative demand. *Garganese v. Oregon Department of Justice*, 318 Or 181, 864 P2d 364 (1993) (order appealable by defendant).

- Petition under ORS 126.227 to appoint special conservator. *Connell v. Franklin*, 120 Or App 414, 852 P2d 924 (1993) (order appointing special conservator appealable; appeal dismissed because appellant failed timely to appeal from order).

Proceedings Held *not* to be "Special Statutory Proceedings

Motion to compel arbitration. *Peter Kiewit v. Port of Portland*, 291 Or 49, 628 P2d 720 (1982) (order compelling arbitration not appealable).

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP
"FINALITY OF CRIMINAL JUDGMENTS AND APPEALABILITY"

Prepared by Matt Shoop and Jim Nass

June 20, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

Summary. Under current case law, a defendant may appeal only from a judgment that conclusively decides all charges alleged in the charging instruction. Similarly, ORS 137.071 requires a judgment to dispose of all charges in the charging instrument and to state all of the legal consequences of conviction of a charge. ORS 137.071 provides that an appellate court may not *reverse* a judgment in a criminal case merely because it does not dispose of all charges or state all of the legal consequences of a conviction, and, if an appeal is taken from a judgment that does not, it authorizes the appellate court to give the trial court leave under ORS 19.270 to enter a judgment that does so. However, ORS 137.071 does not address whether a trial court's failure to comply with its provisions is a *jurisdictional* defect requiring or permitting *dismissal* of an appeal from the judgment.

Terminology. The legislature introduced the concept of "concluding decision" of charges (in a criminal action) or requests for relief/claims (in a civil action) in 1984, and it adopted the requirement for a "concluding decision" in civil cases when it adopted the Oregon Law Commission's "Judgments Bill." 2003 Or Laws, ch. 576." ORS 18.005(8) defines "judgment" to mean "the concluding decision of a court on one or more requests for relief in one or more actions, as reflected in a judgment document." ORS 18.005(16) defined "request for relief" to mean "a claim, a charge in a criminal action or any other

request for a determination of the rights and liabilities of one or more parties in an action that a legal authority allows the court to decide by a judgment."[1]

The Oregon Law Commission Work Group that sponsored the bill wanted to move away from using the word "final" in connection with the concluding decision of an action because "finality" was used in the law in two ways: to indicate when a case was ripe for appeal, and to indicate when issue or claim preclusion arose. The OLC Work Group used "concluding decision" to indicate, in effect, when a judgment is ripe for enforcement and appeal. *See* ORS 18.082 (addressing the effect of a properly prepared and entered judgment, including that it becomes enforceable in the manner provided by law and appealable in the manner provided by law).[2] The Work Group intended that the concept of a "final" judgment refer to a judgment that conclusively decided all requests for relief AND as to which all opportunity for appeal had been exhausted, such that the doctrines of issue or claim preclusion would apply.

Case Law. In *State v. Bonner*, 307 Or 598, 771 P2d 272 (1989), the Supreme Court considered whether a judgment was final and appealable when the judgment indicated that the trial court intended to award restitution, but deferred the matter of restitution for future disposition. *Bonner* consisted of appeals from three cases in which the defendant was convicted of burglary. In each of the cases the trial court entered a judgment convicting the defendant of burglary and generally imposing sentence, but also stating that the amount of restitution would be determined at a future hearing. Bonner appealed from those judgments. The Supreme Court determined that, under then-existing law, restitution was part of the sentence and that a defendant could only appeal from the final judgment that imposed the entire sentence. Because the trial court

[1] It may not be well understood that parts of ORS chapter 18 apply to criminal cases, but the definitions show that chapter 18 can apply to criminal cases. Some parts of chapter 18, such as ORS 18.038(2), which requires that a judgment be titled as a general, limited, or supplemental judgment, do not apply to criminal cases because the specific statute so provides. ORS 18.038(2)(b) (provisions of ORS 18.083(2) do not apply to criminal actions). At least one other statute in ORS chapter 18 applies only to criminal actions. ORS 18.048 (requirements for judgments in criminal cases that include a money award).

[2] ORS 18.082, in describing the legal effect of a general judgment, includes this provision in referring to request for relief in an action: "Reflects an express determination by the court the *decision be conclusive as to the requests for relief that are resolved*." [Emphasis added.] ORS 18.082(2)(c).

had not been completely imposed sentence, the court determined that the judgment in each case was not final and appealable. The Court directed the Court of Appeals to grant the trial court leave to enter amended judgments under what is now ORS 19.270(4)[3] in order to perfect the judgments for appeal. (It should be noted that, thereafter, the legislature adopted amendments to ORS 138.083(2) to make judgments in criminal cases appealable notwithstanding that the trial court has not resolved the matter of restitution.) [4]

In *State v. Smith*, 100 Or App 284, 785 P2d 1081 (1990), the court considered the effect of the trial court having severed some charges in a multi-count indictment on the appealability of judgments entered at different times, each disposing of some but not all charges. The trial court directed that counts I through VI proceed to trial first. Defendant was convicted, the trial court imposed sentence, and the defendant appealed from the ensuing judgment. The remaining counts VII and VIII proceeded to trial, defendant was convicted, the trial court imposed judgment, and the defendant appealed from that judgment. The Court of Appeals on its own motions raised the issue of whether either judgment was appealable since neither decided all counts alleged in the indictment. The Court also questioned whether, under ORS 19.270(1), the trial court had been deprived of jurisdiction to try and decide counts VII and VIII when the defendant filed notice of appeal from the judgment disposing of counts I through VI. The court concluded that severing the counts resulted in separate cases, even if the trial court continued to adjudicate the offenses under the same case number. Based on that determination, the court concluded that each judgment was sufficiently final, and that

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[3] ORS 19.270(4) provides:

> "Notwithstanding the filing of a notice of appeal, the trial court has jurisdiction, with leave of the appellate court, to enter an appealable judgment or order if the appellate court determines that:
>
> (a) At the time of the filing of the notice of appeal the trial court intended to enter an appealable judgment or order; and
>
> (b) The judgment or order from which the appeal is taken is defective in form or was entered at a time when the trial court did not have jurisdiction of the cause under subsection (1) of this section, or the trial court had not yet entered an appealable judgment or order."

[4] Under ORS 137.107 a trial court may modify a judgment after it is entered to as it relates to the amount of restitution as long as the original judgment imposed restitution.

the trial court retained jurisdiction to adjudicate counts VII and VIII notwithstanding the defendant's appeal from the first judgment.

In *State v. Handley*, 116 Or App 591, 843 P2d 456 (1992), the court address the finality of the judgment in a footnote. The court noted that the judgment only disposed of two of the three counts and was therefore not final for the purposes of appeal. Although the opinion does not make the matter clear, it suggests that perhaps the trial court acquitted the defendant of the third count. On its own motion the court gave the trial court leave to enter an amended judgment disposing of all counts. After the trial court entered the amended judgment to explicitly dispose of all counts, the court proceeded to decide the appeal.

Finally, the court addressed the issue of finality most recently in *State v. Shumate*, 262 Or App 109, 330 P3d 29 (2014). *Shumate* had an unusual procedural history. In 1987, Shumate pleaded guilty to attempted aggravated murder and "ex-convict in possession of a firearm." As part of the plea agreement, the state agreed to dismiss a count of first-degree burglary. The trial court imposed a 30-year dangerous offender sentence with a 15-year minimum term of incarceration in a document titled "ORDER." The order did not address the burglary count. Shumate did not appeal from the order. In another case—which took place around the same time—Shumate pleaded guilty to aggravated felony murder and was sentenced to a 30-year minimum term of imprisonment. In 2010 Shumate was scheduled to appear at a hearing before the Board of Parole in the aggravated murder case. The prosecutor discovered that the Department of Corrections ("DOC") had not included the attempted murder and possession of a firearm sentences on defendant's face sheet. DOC refused to adjust the face sheet without a judgment. The prosecutor filed a motion in the trial court asking the court to "amend" or enter a judgment. In October 2011, the trial court entered a judgment of conviction and sentence for the attempted murder and possession of firearm convictions and imposing the same sentence imposed in the 1987 order. Shumate appealed from that judgment.

On appeal the state argued that the appeal should be dismissed because Shumate could have appealed in 1987 and failed to do so. The court concluded that the 1987 order "could not qualify as an appealable judgment" because it had a "lack of finality." *Id*. at 118. "Under the law as it existed when defendant entered his plea, a document announcing a conviction and sentence in a criminal case—no matter how it was

captioned—qualified as an appealable judgment only if it was final, that is, if it fully resolved all charges in the case." *Id*. The court concluded that "the 1987 sentencing order resolved only two of the three counts with which defendant had been charged; dismissal of the third count first-degree burglary did not occur until January 1988, after the sentencing order had been entered. Because the 1987 sentencing order did not resolve all charges brought in this case, it was not a final, appealable judgment." *Id*.

ORS 137.071. The legislature enacted ORS 137.071 in 1989. ORS 137.071(2)(f) provides that a judgment must "[s]pecify clearly the court's determination for each charge in the information, indictment or complaint." The first sentence of ORS 137.071(2)(g) provides that the judgment must "[s]pecify clearly the court's disposition including all legal consequences the court establishes or imposes." The second sentence goes on to provide that, if the disposition is conviction, then the judgment must include all of the legal consequences imposed by the trial court for that conviction. To that extent, ORS 137.071 is consistent with the case law discussed above.

However, ORS 137.071(1) includes this provision:

> "On appeal, the appellate court may give leave as provided in ORS 19.270 for entry of a judgment document that complies with this section but may *not reverse or set aside a judgment*, determination or disposition on the sole ground that the judgment document fails to comply with this section. "

[Emphasis added.] That provision creates an ambiguity because, historically, appellant courts, confronted with a nonfinal judgment, would *dismiss* the appeal, not reverse or set aside the judgment. Moreover, ORS 19.270(4) is the fix for the problem created by ORS 19.270(1): Filing of notice of appeal confers jurisdiction on the appellate court and, according to case law, at the same deprives the trial court of jurisdiction, of “the cause.”

If the requirements of ORS 137.071(2) were merely matters of form and are not jurisdictional, then there would be no need to give a trial court leave under ORS 19.270 to correct the judgment. On the other hand, ORS 137.071(1) merely authorizes an appellate court to give a trial court leave to enter a corrected judgment; it does not require the appellate court to do so. Moreover, ORS 137.071 does not bar the appellate court from *dismissing* for lack of jurisdiction; rather, it bars only reversing or setting aside the judgment.

To be sure, the appellate court's practice is to grant trial courts leave to correct the judgment in a criminal case if the judgment does not dispose of all counts. *See State v. Love*, 271 Or App 545, 556, 351 P3d 780 (2015) ("Defendant filed a timely notice of appeal from the June 15 judgment. Thereafter, the Appellate Commissioner issued an order that explained that the June 15 judgment was not conclusive because it failed to reflect the dismissal of two counts with which defendant had been charged * * * and gave the court leave under ORS 19.270(4) to enter an amended judgment disposing of those two counts. * * * Thereafter, the trial court entered two additional judgments * * * disposing of the two counts referenced in the commissioner's order.") But, consistent with case law, ORS 137.071 does not bar dismissing an appeal when a judgment does not dispose of all counts or impose complete sentence.

Indeed, ORS 19.270(4) presupposes that, in fact, the trial court has disposed of all claims or counts and has merely failed to memorialize the disposition in a judgment entered in the register before notice of appeal is filed. If a trial court, in a multi-count cases convicted a defendant on multiple charges, and entered a judgment imposing sentence on some of the convictions but deferring sentence on other convictions, and the defendant attempted to appeal from the judgment, the appellate court could not give leave under ORS 19.270(4) because, in fact, the trial court had not yet determined the "legal consequences" of some of the convictions. Such a judgment would not comply with ORS 137.071(2) and, under existing law, probably would not be appealable (unless the appellate court determined that, in effect, the trial judge had severed the counts on which sentence was imposed from the counts on which sentence was not imposed).

Conclusion. Case law holds that "finality" (that is, a concluding decision on all counts, including imposition of sentence on all convictions) is a jurisdictional requirement. ORS 137.071 does not explicitly change that conclusion.[5]

[5] We have not reviewed the legislative history of ORS 137.071 to determine if it sheds any light on the legislature's intention when it adopted the provision barring reversing or setting aside a judgment that fails to comply with ORS 137.071(2).

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Dispositions and Sentences

Prepared by Matt Shoop

June 7, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

Summary

"Disposition", as used in ORS 138.050 and ORS 138.053, is limited to the five trial court decisions listed in ORS 138.053(1) as well as a few other decisions that the court has allowed. "Sentence" is interpreted broadly to mean imposition of punishment for conviction of a crime or other offense.

Disposition

The Legislature amended ORS 138.050 in 1989 and substituted "disposition" for "sentence." *State v. Landahl*, 254 Or App 46, 54, 292 P3d 646, 650 (2012). The change was made in response to *State v. Carmickle*, 307 Or 1, 762 P2d 290 (1988), to make probation decisions appealable decisions under ORS 138.050. *State v. Cloutier*, 351 Or 68, 91, 261 P3d 1234 (2011). During a hearing on the 1989 bill, a representative for the State Court Administrator explained that the purpose of the change was to "clarify that probation can be reviewed on appeal in the same manner as a sentence." *Id*. at 92. By changing sentence to disposition "the legislature intended to broaden [the court's] review." *Landahl*, 254 Or App at 54. A disposition may include a sentence, but a disposition is not limited to only a sentence, and disposition means something different from sentence. *State v. Nave*, 214 Or App 324, 326-28, 164 P3d 1219 (2007) ("The state's argument that [disposition and sentence] are, in effect, interchangeable, is not persuasive. * * * Although a 'disposition' may included a 'sentence' it does not logically follow that a 'disposition' is nothing more than a 'sentence.'")

Cases that have examined whether or not a particular trial court decision is a disposition have limited a disposition to the dispositions listed in ORS 138.053(1).[1] *See, Cloutier*, 351 Or at 99-100 ("In a related vein, we observe that, as amended in 1989, ORS 138.040 and ORS 138.050 authorize a defendant to appeal a 'disposition' instead of a 'sentence.' ORS 138.053(1) then specifies the five types of 'dispositions' that are appealable."); *State v. Stubbs*, 193 Or App 595, 607, 91 P3d 774 (2004) (stating that ORS 138.053 defined disposition as it is used in ORS 138.050); *Landahl*, 254 Or at 58 ("A 'disposition' is one of the five things listed in ORS 138.053(1)."); *State v. McAnulty*, 356 Or 432, 440 n. 6, 338 P3d 653 (2014) ("ORS 138.053 designates five dispositions as subject to the appeal provisions and limitations on review under ORS 138.050.")

In *State v. Landahl* the court explained why a disposition is limited to that listed in ORS 138.053(1). Landahl pleaded no contest to DUII and entered a diversion program. Landahl failed to complete the diversion program, and the trial court subsequently entered a judgment of conviction based on his plea and sentenced him to diversion. Landahl appealed the judgment under ORS 138.050. Landahl argued that disposition should be read broadly to mean a final determination which includes a conviction. *Id*. at 48-49.

The court began by observing that Landahl's proposed construction of disposition was so broad that if it was correct then ORS 138.040 and ORS 138.050 were equally broad. *Id*. at 51. The court stated that such an interpretation would result in ORS 138.050 becoming surplusage and that Landahl's proposed construction was incorrect. *Id*. The court also concluded that legislative history did not support Landahl's construction. *Id*. at 54-55 (quoting *Cloutier*). A conviction therefore is not included in a disposition. *Id*. at 58-59. The court finally concluded that for the purposes of ORS 138.050 "[a] disposition is one of the five things listed in ORS 138.053(1)."

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[1] ORS 138.053(1) provides:
"A judgment, or order of a court, if the order is imposed after judgment, is subject to the appeal provisions and limitations on review under ORS 138.040 and 138.050 if the disposition includes any of the following:
(a) Imposition of a sentence on conviction.
(b) Suspension of imposition or execution of any part of a sentence.
(c) Extension of a period of probation.
(d) Imposition or modification of a condition of probation or of sentence suspension.
(e) Imposition or execution of a sentence upon revocation of probation or sentence suspension."

In *State v. Balukovic*, 153 Or App 253, 956 P2d 250 (1998), the court explained that a disposition under ORS 138.050 does not include appeals from orders that occur before entry of the judgment of conviction. Balukovic attempted to appeal from a deferred sentencing program that would have resulted in dismissal of the charges upon his successful completion. The court concluded that "the legislature has chosen not to authorize review[2] of statutory violations that occur before the entry of a judgment of conviction when a defendant enters a guilty plea." Therefore, a disposition does not include trial court actions prior to entry of judgment of conviction.[3]

In some cases the court has decided that trial court actions and decisions that are not expressly listed in ORS 138.053(1) are dispositions. The court has allowed appeals under ORS 138.050 where the defendant assigned error to the trial court's failure to merge convictions. *State v. Sumerlin*, 139 Or App. 579, 581, 913 P.2d 340 (1996); *State v. Stubbs*, 193 Or App 595, 606-07, 91 P3d 774 (2004) (concluding that an appeal assigning error to the trial court's failure to merge convictions is an argument pertaining to a disposition that exceeds the maximum allowable by law). Imposition of attorney fees upon an indigent defendant is a disposition. *State v. Pendergrapht*, 251 Or App 630, 631 n. 2, 284 P.3d 573 (2012). Finally, revocation of driving privileges upon conviction is a disposition within the meaning of ORS 138.050. *State v. Nave*, 214 Or App 324, 326-28, 164 P3d 1219 (2007).[4] It may be arguable whether or not these issues fit within the list of dispositions in ORS 138.053(1), but the court has not explained how they fit within that list.

Sentence

[2] The court puts its decision in terms of reviewability, but late case law makes it clear that ORS 138.050 is about appealability and *Balukovic* should be read that way.

[3] This also answers the question of whether a deferred sentence is appealable under current law. In a case where a defendant has pleaded guilty or no contest, a deferred sentence is not appealable.

[4] It seems likely that revocation of driving privileges would be p
art of a sentence, imposition of which is a disposition under ORS 138.053(1), but the court did not make that explicit so I have included it here.

The Oregon Supreme Court recently addressed the definition of "sentence" in *State v. Lane*, 357 Or 619, 355 P3d 914 (2015). In *Lane*, the Court construed "sentence" as it is used in Article I section 44, of the Oregon Constitution, however, the court suggests that "sentence" in ORS 138.222(7) should be read consistently with Article I, section 44. *Id*. at 630 (noting that appellant appealed under ORS 138.222(7) and if the court applied his proposed construction to ORS 138.222(7) the probation revocation sanction would not be appealable). "The ordinary meaning of [sentence], however, suggests that it broadly applies to the imposition or punishment for a crime or some other offense." *Id*. at 625. The court determined that "sentence" should be given its ordinary broad meaning. The Court went on to conclude that a sentence includes probation revocation sanctions because the punishment imposed on probation revocation is for conviction of the underlying crime. *Id*. at 638.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

ORS 136.120 and 136.130

Prepared by Matt Shoop and Jessica Minifie

August 4, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

While they are not expressly linked by the statutory text, ORS 136.130 gives effect to a dismissal under ORS 136.120. Case law allows the state to appeal from an order of dismissal under ORS 136.130, no matter whether a judgment of acquittal has been entered or not

ORS 136.120 and 136.130

ORS 136.120 Dismissal when prosecutor unready for trial.

"If, when the case is called for trial, the defendant appears for trial and the district attorney is not ready and does not show any sufficient cause for postponing the trial, the court shall order the accusatory instrument to be dismissed, unless, being of the opinion that the public interests require the accusatory instrument to be retained for trial, the court directs it to be retained."

ORS 136.130 Effect of dismissal on subsequent prosecution for same crime.

"If the court orders the accusatory instrument to be dismissed and the instrument charges a felony or Class A misdemeanor, the order is not a bar to another action for the same crime unless the court so directs. If the court does so direct, judgment of acquittal shall be entered. If the accusatory instrument charges an offense other than a felony or Class A misdemeanor, the order of dismissal shall be a bar to another action for the same offense."

ORS 138.060(1)(i)

The State may appeal from:

"An order dismissing an accusatory instrument under ORS 136.130."

Relationship of ORS 136.120 to 136.130 and ORS 138.060(1)(i)

In *State v. Shaw*, 338 Or 586, 113 P3d 898 (2005), the Oregon Supreme Court addressed the appealability of a judgment of acquittal entered under ORS 136.130. In *Shaw*, the Court addressed whether an order of dismissal and judgment of acquittal under ORS 136.130 in a murder case was appealable by the State under ORS 138.060(2). However, the Court also addressed the relationship of ORS 136.120 to 136.130, and, in dicta, the court discussed the effect of ORS 138.060(1)(i).

Beginning with the relationship between ORS 136.120 and 136.130, the two sections do not contain any express reference to each other, however, the appellate courts have read them together.

> "ORS 136.120 authorizes a trial court to dismiss an indictment when 'the defendant appears for trial and the district attorney is not ready and does not show any sufficient cause for postponing the trial[.]' ORS 136.130, in turn, prescribes the effect of a pretrial dismissal under ORS 136.120 depending on the type of offense at issue."

Shaw, 338 Or at 602; *See also State v. Romero*, 236 Or App 624 , 628, 237 P3d 887 (2010) ("ORS 136.130 addresses the effect of a dismissal under ORS 136.120."). The decision whether or not to enter a judgment of acquittal is within the discretion of the trial court, and on appeal it is reviewed for abuse of discretion. *State v. Winnop*, 224 Or App 338, 341-42, 197 P3d 588 (2008).

Application of ORS 136.120 and 136.130 is interrelated, and the same considerations apply to both the decision to dismiss under ORS 136.120 and whether to dismiss with or without prejudice under ORS 136.130. *Id.*[1] An appeal by the State from an order of

[1] The Court of Appeals has articulated a three criteria for the trial court to consider in applying both ORS 136.120 and 136.130: (1) whether there is sufficient cause for postponement of the trial as determined by considering the "reasons for seeking the postponement" and "whether the prosecutor's conduct constituted inexcusable neglect;" (2) whether the "public interests require the accusatory instrument be retained for trial" assessed in light of "the magnitude of the interests at stake ;" and (3) "whether the defendant would suffer actual prejudice or whether

dismissal and the accompanying judgment entered under ORS 136.130 usually involves one or both of the following issues: (1) whether the trial court erred by dismissing the accusatory instrument under ORS 136.120; or (2) whether the trial court erred by directing that the dismissal is a bar to further action and entering a judgment of acquittal.

The Oregon Supreme Court went on to discuss the effect of ORS 138.060(1)(i). The Court noted that in *State v. Carrillo*, 311 Or 61, 804 P2d 1161 (1991), the Court concluded that a judgment of acquittal entered under ORS 136.130 was not appealable by the State under ORS 138.060(1)(a)[2]. In *Shaw*, the Court explained that the Legislature adopted ORS 138.060(1)(i) which effectively overruled *Carrillo*.

> "Nevertheless, in view of its unqualified reference to orders of dismissal under ORS 136.130, the text of ORS 138.060(1)(i) makes clear that the state may appeal to the Court of Appeals from an order of dismissal with prejudice under ORS 136.130. Because ORS 136.130 directs that a judgment of acquittal must accompany any such order, we conclude that the state's right to appeal from an order of dismissal with prejudice under ORS 136.130 necessarily encompasses the right to appeal from a judgment of acquittal entered pursuant to that order."

Shaw, 338 Or at 603. Even though the Court's discussion of ORS 138.060(1)(i) was dicta, it does not appear that anyone disputes the Court's conclusion. *See State v. Romero*, 236 Or App 624, 237 P3d 887 (2010) (the State appealed from an order of dismissal and judgment of acquittal). The Court went on to conclude that an order of dismissal and accompanying judgment of acquittal entered under ORS 136.130 was appealable by the State under ORS 138.060(2)(a).

Under current case law, ORS 136.120 gives effect to a dismissal under ORS 136.130, and ORS 138.060(1)(i) allows the state to appeal from an order of dismissal or judgment of conviction under and 136.130, which effectively includes ORS 136.120.

Criminal Code Minutes

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defendant's right to a speedy trial would be compromised." *State v. Winnop*, 224 Or App at 342; *citing State v. Parliament*, 164 Or App 707, 995 P2d 544 (2000).

[2] ORS 138.060(1)(a) allows the state to appeal "[a]n order made prior to trial dismissing or setting aside the accusatory instrument."

ORS 136.120 and 136.130 existed prior to being amended in 1973 as part of the Oregon Criminal Law Revision Commission's work.[3] The Commission's subcommittee meeting minutes reflect some disagreement among the members concerning whether the dismissals mentioned in ORS 136.130 only pertained to dismissals when the district attorney is not ready for trial:

> Senator Burns asked why ORS 136.130 was needed. The substance of the section, he said, spoke to the discharge where the prosecution was unprepared for trial. Chariman Chandler commented that 136.130 did not actually speak to discharge where the prosecution was unprepared for trial; it just happened to follow that section. Mr. Paillette was of the opinion that 136.130 was meant to be read with 136.120. Mr. Spaulding took the opposite view that 136.130 was not necessarily meant to be limited by 136.120. Judge Crookham agreed with Mr. Spaulding....[4]

The full commission only briefly discussed ORS 136.120 and 136.130. The meeting minutes do not reflect any mention of the relationship between the two statutes. There was some discussion about making the dismissal of each level of misdemeanor and felony consistent with the speedy trial dismissal statutes (ORS 134.110 to 134.160, since renumbered to ORS 135.745 to 135.757).[5]

[3] The final draft of the commission's Oregon Criminal Procedure Code was introduced as Senate Bill 80 (1973). The amendments to ORS 136.120 and 136.130 were enacted as sections 228 and 229, chapter 836, Oregon Laws 1973.
[4] Minutes, Oregon Criminal Law Revision Commission, Subcommittee No. 1, July 31, 1972, pp. 13-14.
[5] Minutes, Oregon Criminal Law Revision Commission, August 28, 1972, pp. 16-17.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Relationship of ORS 138.230 to Article VII Section 3

Prepared by Matt Shoop

August 23, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

To the extent that the scope of ORS 138.230 is different from Article VII (amended) Section 3, the Oregon Supreme Court has stated that constitutional harmless error provisions are broader than the statutory provisions and are controlling. In most cases appellate courts cite the constitution or the constitution and ORS 138.230 together.

ORS 138.230 states:

> "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."[1]

The Oregon Constitution Article VII (amended), Section 3 of states in relevant part:

> "If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the supreme court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment

[1] The current language of ORS 138.230 is largely unchanged from the Deady Code. The original version of ORS 138.230 stated that "the court must give judgment" as opposed to the current version, which states "the court shall give judgment." General Laws of Oregon, Crim Code, ch XXIII, § 246 (Deady 1845-1864).

> to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the supreme court."

For a time the Oregon Supreme Court treated ORS 138.230 as simply giving effect to Art. VII, section 3.[2] *See State v. McLean*, 255 Or 464, 473-79, 468 P2d 521 (1970) ("In numerous cases this court has relied on Art. VII, s 3, and ORS 138.230 to affirm convictions in criminal cases . . . In the exercise of the powers thus conferred upon this court we have affirmed verdicts and judgments in a number of criminal cases in which evidence was improperly received without regard to whether the resulting error was 'technical' or otherwise so unsubstantial that this court, upon a consideration of the entire record, was able to conclude that the verdict and the judgment was 'such as it should have been rendered in the case.'"). The court in *McLean* went on to conclude that the harmless error rule in the federal courts is "almost identical with that required in Oregon by statute and by constitutional provision." Finally, the court held that it could, in its discretion, affirm the verdict, notwithstanding the existence of an error, when the error "was either so technical in nature or so insubstantial" that the court can find that there is "little, if any, likelihood of having changed the result of the trial."

The melding of ORS 138.230 and Art. VII, Section 3 was short lived however. In *State v. Van Hooser*, 266 Or 19, 511 P2d 359 (1973), the court backed away from *McLean* and articulated what appears to be the current rule. The court highlighted two points in *McLean* which were misleading. "First, we melded the constitutional amendment and statute into one principle, whereas, the language of the amendment is broader and because of its constitutional status is controlling." *Id*. at 23; *see also State v. Cahill*, 208 Or 538, 582, 293 P2d 169 (1956) ("The constitutional provision emphasizes and broadens the salutary provisions of ORS 138.230 under which it has been often held that conviction will not be reversed for technical errors or defects which do not affect the substantial rights of the accused. If the constitutional amendment made no change in the law, it would be pertinent to inquire why it was adopted."). After briefly examining the history of Art. VII, Section 3[3], the court stated "[t]he standard fixed in the

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[2] As discussed below this was a departure from the earlier interpretation which held that the meaning for Art. VII and ORS 138.230 were different.

[3] The Court explained that:

> "Within the decade after the adoption of the amendment and when this court had members who had taken an active part in the adoption of the amendment, we

amendment should be the sole criterion for determining whether the judgment should be affirmed." *Id*. The second error in *McLean* was that *McLean* treated affirmance when there is a harmless error as a matter of the court's discretion, but the court concluded that "[n]o discretion is permitted by the mandate of the amendment." *Id*.

The court in *Van Hooser* went on to state the constitutional mandate created two requirements for affirming a judgment despite an error: "(1) that there was substantial and convincing evidence of guilt; and (2) that the error committed was very unlikely to have changed the result of the trial." *Id*. at 25-26. In *State v. Davis*, 336 Or 19, 77 P3d 1111 (2003), the Supreme Court clarified the constitutional test for whether to affirm despite error consists of a single inquiry: "Is there little likelihood that the particular error affected the verdict?"

The Supreme Court later explained that "we retreated from any reliance on ORS 138.230 because in our view the language of the constitutional amendment is broader and 'because of its constitutional status is controlling.'" *State v. Mains*, 295 Or 640, 663, 669 P2d 1112 (1983); *quoting Van Hooser*, 266 Or at 23; *see also State v. Carr*, 302 Or 20, 27, 725 P2d 1287 (1986) (affirming holding of *Van Hooser*).

Consistent with this approach, most appellate court cases either cite only Art. VII, Section 3, or cite the constitution in conjunction with the relevant statute, ORS 138.230 or OEC 103. *See State v. Schiller-Munneman*, 359 Or 808 (2016) (only citing constitutional standard); *State v. McAnulty*, 356 Or 432, 338 P3d 653 (2014) (citing *Davis* and the constitutional standard); *State v. McRae*, 271 Or App 558, 561, n 5, 351 P3d 797 (2015) (state both the constitution and statutory harmless error standards); *State v. Lobo*, 261 Or App 741, 746, 322 P3d 573 (2014) (citing standard from *State v. Davis*); *State v. Savage*, 278 Or App 523, 531, 375 P3d 568 (2016) (citing standard from *State v. Davis*); *State v. Gilley*, 188 Or App 450, 454, 71 P3d 582 (2003) (treating

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> commented: 'There can be no question but that the amendment of article VII of the Constitution in 1910 changed, or at least accentuated, the law as it stood before in regard to prejudicial errors, in favor of an affirmance of a judgment unless actual prejudicial error appears.' *State v. Merlo*, 92 Or. 678, 689, 173 P. 317, 319, 182 P. 153 (1919). The principal opinion in *State v. Cahill*, 208 Or. 538, 582, 293 P.2d 169, 298 P.2d 214, cert. den. 352 U.S. 895, 77 S.Ct. 132, 1 L.Ed.2d 87 (1956), is to the same general effect."

Van Hooser, 266 Or at 23.

statutory and constitutional harmless error standards as creating one standard, the constitutional standard).[4]

However, in some cases the appellate courts have treated the statutory and constitutional standard as being different, though that does not appear to have affected the outcome. In *State v. Link*, 346 Or 187, 202-03, 208 P3d 936 (2009), the court concluded that the trial court error affected defendant's substantial right and therefore "was not harmless error under ORS 138.230." The court also concluded that the error affected the verdict and was not harmless error under the constitutional standard. *See also State v. Hawkins*, 261 Or App 440, 455, 323 P3d 463 (2014) (holding that the error was not harmless under the statutory standard and under the constitutional standard).

In other cases, the court has relied solely on the statutory standard. *See State v. Liechti*, 202 Or App 649, 651–52, 123 P3d 350 (2005) ("We need not resolve that dispute, however, because even if defendant is correct, we are precluded by ORS 138.230 from modifying the judgment.")

In discussing sentencing issues the appellate courts have been less clear as to the standard. The constitutional standard articulated in *Davis* is not directly applicable to issues of sentencing error because the "verdict" has already been entered, and therefore any error will necessarily not affect the verdict, though it will affect the judgment and sentence. However, the court has not been clear as to what standard it is applying. In *State v. Jones*, 274 Or App 723, 362 P3d 899 (2015), the court began by citing Art. VII, Section 3 and *Davis*. The court addressed Jones' first assignment of error which went to an evidentiary issue and concluded the error was harmless. The court then addressed appellant's second assignment of error in which the appellant argued that the trial court erred "when it reconstituted [his] criminal history score." After examining whether the trial court erred, the court concluded "that the error had no practical effect on defendant and was, therefore, harmless." *Id.*; *see also State v. Powell*, 253 Or App 185, 192, 288 P3d 999 (2012) (concluding that the claimed sentencing error was harmless without articulating any standard).; *State v. Termillion*, 111 Or App 375, 826 P2d 95 (1992)

[4] Many of the OEC 103 harmless error cases cite both OEC 103 and Art. VII, section 3. *See State v. Gibson*, 338 Or 560, 575–76, 113 P3d 423 (2005); *State v. Davis*, 351 Or 35, 60–61, 261 P3d 1197 (2011). In deciding whether an evidentiary error is harmless, the court must focus "on the possible influence of the error on the verdict rendered, not whether this court, sitting as a fact-finder, would regard the evidence of guilt as substantial and compelling." *Gibson*, 338 Or at 576.

(Defendant was sentenced to the a sentence of 15 to 18 months instead of a definite term, but the court affirmed because there was "no adverse consequence about which [defendant] may complain" because the sentence also imposed a 58 month concurrent sentence.).

Modern jurisprudence has treated the harmless error standard in Art. VII, Section 3 as the controlling standard. Given that, ORS 138.230 appears to have little impact on how cases are decided. Any changes to ORS 138.230 should likely reflect or reference the constitutional standard, or be broader than the constitutional standard, otherwise Art. VII, Section 3 will likely remain the controlling harmless error standard and the changes to ORS 138.230 will have little effect.

Below are the harmless error standards from ORS chapter 19 and the Oregon Evidence Code for the Work Groups consideration:

ORS 19.415 Scope of Appellate Review

(1) Except as provided in this section, upon an appeal in an action or proceeding, without regard to whether the action or proceeding was triable to the court or a jury, the scope of review shall be as provided in section 3, Article VII (Amended) of the Oregon Constitution.

(2) No judgment shall be reversed or modified except for error substantially affecting the rights of a party.

* * *.

ORS 19.420

(1) Upon an appeal, the court to which the appeal is made may affirm, reverse or modify the judgment or part thereof appealed from as to any or all of the parties joining in the appeal, and may include in such decision any or all of the parties not joining in the appeal, except a codefendant of the appellant against whom a several judgment might have been given in the court below; and may, if necessary and proper, order a new trial.

(2) Where in the trial court a motion for judgment notwithstanding the verdict and a motion for a new trial were made in the alternative, and an appeal is taken from a judgment notwithstanding the verdict or an order granting a new trial, the court to which the appeal is made may consider the correctness of the ruling of the trial court on either or both motions if such ruling is assigned as erroneous in the brief of any party affected by the appeal, without the necessity of a cross-appeal.

(3) Whenever it appears that an appeal cannot be prosecuted, by reason of the loss or destruction, through no fault of the appellant, of the reporter's notes or audio records, or of the exhibits or other matter necessary to the prosecution of the appeal, the judgment appealed from may be reversed and a new trial ordered as justice may require.

OEC 103 Rulings on Evidence

(1) Evidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and:

(a) In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(b) In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(2) The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made and the ruling thereon. It may direct the making of an offer in question and answer form.

(3) In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(4) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Reviewability in Misdemeanors and Felonies Post-*Cloutier*

Prepared by Matt Shoop

September 7, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

The Work Group asked what assignments of error as to the sentence are currently reviewable for felonies under ORS 138.222 that are not reviewable in misdemeanors and pre-1989 felonies. There are two types of assignments of error that are currently reviewable in felonies, but not reviewable in misdemeanors and pre-1989 felonies.

Multiple Correct Dispositions and Failure to Understand Discretion

In cases where the trial court is authorized by law to impose two or more different sentences the trial court's decision is not reviewable in a misdemeanor case, but the sentence is reviewable in a felony. Similarly, in cases where the trial court has discretion to choose from multiple authorized sentences, but fails to understand the extent of its discretion, the judgment is reviewable in a felony, but not reviewable in a misdemeanor or pre-1989 felony.

Many of the misdemeanor cases were decided on the issue of appealability, not reviewability. However, under ORS 138.040 and 138.050 the scope of appealability and the scope of reviewability is the same. *State v. Davis*, 265 Or App 425, 432, 335 P3d 322 (2014) ("When the appeal is from a judgment based on a plea to a misdemeanor, jurisdiction lies, if at all, under ORS 138.050(1) and the scope of issues that this court may review is also governed by that statute."). Under the proposed statute, many of the

appealability issues will become reviewability issues, and therefore I have treated them as reviewability issues here.

In *State v. Soto,* 268 Or App 822, 343 P3d 666 (2015), the defendant appealed from a misdemeanor DUII conviction. The defendant was placed in diversion, but did not complete diversion and the trial court terminated diversion. Appellant subsequently pleaded no contest. The trial court judgment imposed $2,253 in fines and fees. On appeal Soto argued that the trial court had discretion to waive the fines and fees, and that the trial court erred in failing to exercise that discretion. The court concluded that the appeal is under ORS 138.050(1), and that the judgment was not appealable because the fines and fees imposed did not exceed the maximum allowed by law, specifically, the court concluded that "any error by the trial court in failing to recognize that it had discretion to waive the fines and fees did not expose defendant to a sentence that exceeded the legal maximum. That is, the fines and fees imposed did not exceed 'the maximum allowed by law.' ORS 138.050(1)(a). It follows that ORS 138.050(1) does not allow this appeal." *Id*. at 827-28. Therefore, an assignment of error claiming that a trial court failed to recognize and exercise its discretion to impose a lesser sentence is also not reviewable under ORS 138.040 and 138.050. *See also State v. Johnson*, 269 Or App 497, 501–02, 345 P3d 490 (2015) (Trial court's erroneous conclusion that it lacked discretion to waive parts of the misdemeanor sentence is not appealable or reviewable. "But the court's failure to recognize that it could have waived aspects of defendant's sentence has no bearing on whether the terms of the sentence that were in fact imposed exceed the sentence allowable by statute."); *State v. Jacquez,* 278 Or App 313, 318–19, 373 P3d 1277 (2016) (If the sentence imposed does not exceed the statutory maximum, ORS 138.050(1) does not allow appeal or review "simply because the trial court misunderstood or misapplied applicable law when imposing a sentence.").

The Oregon Court of Appeals considered a similar assignment of error in a post-1989 non-guidelines felony case in *State v. Brewer*, 260 Or App 607, 320 P3d 620 (2014). Brewer pleaded guilty to second-degree robbery and was sentenced to a mandatory minimum sentence of 70 months imprisonment under ORS 137.700. Brewer appealed from the sentence and argued that the trial court erred in concluding that she did not qualify for a downward departure sentence under ORS 137.712. The Court began with a discussion of *Cloutier* and concluded that "[a]fter 1989, ORS 138.222 alone determines

the reviewability of sentencing issues in a felony judgment." *Id*. at 615. The court then determined Brewer's assignment of error was reviewable under ORS 138.222(4)(a).[1]

> "The failing 'failing to impose' provision of ORS 138.222(4)(a) 'permits this court to review a sentencing issue when the sentence that was imposed was an authorized sentence, but the trial court is asserted to have erroneously determined that the defendant was not eligible for a different, also authorized, sentence.'"

Id. at 617, *quoting State v. Arnold*, 214 Or App 201, 164 P3d 334 (2007). The court went on to conclude that the trial court's failure to impose a downward departure sentence, because it improperly determined appellant's eligibility, is a contention that the sentencing court failed to comply with the requirements of law in imposing a sentence, and was therefore reviewable.

In *State v. Clements*, 265 Or App 9, 333 P3d 1177 (2015), the Oregon Court of Appeals again considered issues of the reviewability in an appeal from the sentence in a felony.[2] In *Clements*, the defendant pleaded guilty to one count of sodomy and four counts of first-degree sexual abuse as part of a plea agreement that included an agreed upon sentence. The defendant fled Oregon before he was sentenced. Defendant was eventually apprehended and returned to Oregon. The trial court refused to impose the agreed upon sentence from the plea agreement, and instead imposed a 190 month sentence that greatly exceed the plea agreement sentence. Defendant assigned error to the trial court's failure to impose the plea agreement sentence. The court concluded that the assignment of error was reviewable under ORS 138.222(4)(a) because defendant

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[1] ORS 138.222(4)(a) provides that the appellate court may review a claim that:

> "The sentencing court failed to comply with requirements of law in imposing or failing to impose a sentence."

[2] The Court first considered the issue of appealability under ORS 138.222(7). Specifically, the Court interpreted the phrase "based on the sentence" as it is used on ORS 138.222(7). While not directly applicable here, it does provide context for a discussion reviewability under ORS 138.222. The court held that

> "[W]e conclude that the legislature's use of the phrase “based on the sentence” in ORS 138.222(7) was intended to limit an appeal by a defendant who pleads guilty to a felony to assignments of error concerning either the terms of the sentence or procedural or legal errors bearing directly on the terms of the sentence, congruent with the scope of issues that are reviewable under ORS 138.222."

Id. at 18.

argued that the trial court failed to impose the plea agreement sentence contrary to the requirements of law.[3] *Id*. at 34.[4]

Finally, in *State v. Hikes*, 261 Or App 30, 323 P3d 298 (2014), the court considered whether a sentencing judgment finding substantial and compelling reasons to deny defendant eligibility for sentencing modification programs was reviewable. The court concluded that the assignment of error was reviewable because, "defendant's contention that the factual bases on which the trial court relied are insufficient to support a finding of "substantial and compelling reasons" is subject to review as an error in the imposition of a sentence, 138.222(4)(a)." *Id*. at 34.

The above cases demonstrate that review under ORS 138.222(4)(a) is significantly broader that review under ORS 138.040 and 138.050. In felony cases under ORS 138.222(4)(a) a claim that the trial court failed to comply with any requirement of law is reviewable, even if the trial court's decision is discretionary. In misdemeanor cases, on the other hand, as long as the sentence does not exceed the maximum allowed by law, the sentence is not reviewable.[5]

On Appeal from a Motion to Correct a Judgment, Failure to Correct an Erroneous Sentence

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[3] I find this conclusion especially interesting because it appears to prevent review (or appeal) in misdemeanor cases where a defendant pleads guilty, and the parties agree to a sentence as part of the plea agreement. Even if the plea agreement is intended to be controlling on the sentencing court, if the court disregards the plea agreement and imposes its own sentence, that sentence is not reviewable as long it does not exceed the maximum allowed by law.

[4] *Clements* also concluded that an order denying a motion to withdraw a guilty plea is not reviewable under ORS 138.222 because the assignment of error is not based on the sentence. *Clements*, 265 Or App at 23 ("In sum, we hold that any assignment of error to a matter not based on the sentence in a felony case is not directly appealable under ORS 138.222(7). This case includes one such assignment of error. Defendant's second assignment of error, which challenges the denial of his motion to withdraw his guilty plea, cannot be fairly characterized as a challenge based on the sentence.").

[5] I think this may be problematic when it comes to consecutive sentences in misdemeanor cases. It is not clear whether an assignment of error claiming that a trial court erred in making sentences on multiple counts consecutive instead of concurrent would be reviewable as exceeding the maximum allowed by law. Setting aside that issue, in a case where there is no credible argument (and therefore no "colorable claim") that each of the 10 misdemeanor counts can be sentenced consecutively, a trial court could sentence a defendant to a 10-year sentence consisting of 10 consecutive 1-year misdemeanor sentences, and that sentence would be unreviewable on appeal.

The second instance where an assignment of error is reviewable in a felony case and not in a misdemeanor case is much less common. In *State v. Lewallen*, 262 Or App 51, 324 P3d 530 (2014), the defendant was convicted, following a jury trial, of one count of first-degree assault and two counts of first-degree robbery. The trial court imposed an upward departure sentence, which Lewallen appealed and was affirmed without opinion. Eight years later, defendant filed a motion to correct the judgment, which the trial court granted in part and denied in part. Defendant then appealed the denial of his motion and assigned error to the failure to correct the erroneous departure sentence. The Court of Appeals concluded that the argument that the trial court failed to correct the erroneous sentence was reviewable under ORS 138.222(4)(a). *Id*. at 54.

I have not found any case considering this issue in a misdemeanor appeal, but unless the erroneous sentence exceeds the maximum allowed by law, a motion to correct the sentence arguing that the trial court imposed an incorrect misdemeanor sentence is not reviewable.

Appealability of a motion to correct the judgment in criminal cases is further limited to cases where the trial court grants the motion in part and denies it in part (or grants the motion and allows incomplete relief). The outright denial of a motion to correct the judgment is not appealable in a criminal case. *State v. Hart*, 188 Or App 650, 72 P3d 671 (2003) (no appeal lies from order denying post-judgment motion for relief from judgment of conviction and sentence). This restriction greatly limits the number of cases where *Lewallen* will be applicable and this restriction will continue in the proposed statute.

Merger

Finally, in researching the other issues in this memo I came across the cases discussing reviewability of merger. Merger is currently a reviewable issue in felony cases. It is not clear whether merger is a reviewable issue in a misdemeanor case. In *State v. Davis*, 265 Or App 425, 335 P3d 322 (2014), the court held that, in a felony case, it has jurisdiction over a merger argument under ORS 138.222(7) because the argument is based on the sentence. The court also concluded that the assignment of error was reviewable under ORS 138.222(4)(a) because it raises a claim that the trial court failed to comply with the requirements of law in imposing or failing to impose a sentence. *Id*.

at 438. The court did not decide the issues of appealability and reviewability in an appeal under ORS 138.050, and it does not appear that any subsequent case has decided that issue as of yet. *Id*. at 437 ("Thus, even if the state is correct (and we express no opinion on this point) that a merger argument does not raise a colorable claim of dispositional error that can give rise to jurisdiction under ORS 138.050, that does not mean that a merger argument cannot give rise to jurisdiction under ORS 138.222(7)."). Regardless of the Work Group's decision regarding the reviewability of merger issues, I recommend that the proposed statute include an express statement of when issues of merger are reviewable.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

The Reviewability of Denials of Motions in Arrest of Judgment

Prepared by Ernest Lannet

September 12, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

I was able to identify a number of cases in which the appellate courts have reviewed a trial court's denial of a motion in arrest of judgment. Although it is not a very fruitful grounds for reversal for criminal defendants, I think the work group's submission should retain it as a reviewable decision. So I propose retaining the bracketed phrase in Work Draft #6 at Section 13 (1)(a)(C), pg 11, ln 10-11. Specifically,

(C) The denial of a motion for new trial based on juror misconduct or newly discovered evidence ~~[~~and the denial of a motion in arrest of judgment~~(?)]~~.

Court of Appeals cases reversing after reviewing denial of motion in arrest of judgment:
State v. Touchstone, 188 Or App 45 (2003) (accepting joint motion for an order vacating conviction of harassment and directing the trial court to enter a judgment for attempted harassment after reviewing denial of motion in arrest of judgment on the ground that the indictment failed to allege elements of the offense charged).

State v. Burnett, 185 Or App 409 (2002) (holding that trial court erred in denying defendant's motion in arrest of judgment on the ground that the facts alleged in the indictment did not constitute an offense).

Supreme Court case recognizing reviewability of denial of motion in arrest of judgment:
State v. McKenzie, 307 Or 554 (1989) (remanding case for Court of Appeals to treat defendant's motion for judgment of acquittal as premature motion in arrest of judgment on the ground that facts alleged in indictment did not constitute an offense because of vagueness).

Cases in which the Court of Appeals has reviewed the defendant's assignment of error as to a denial of a motion in arrest of judgment:

State v. Reigard, 243 Or App 442 (2011) (rejecting void for vagueness challenge).

State v. McLaughlin, 243 Or App 214 (2011) (rejecting claim that the indictment failed to state facts constituting an offense because it alleged an incorrect culpable mental state).

State v. Ward, 224 Or App 421 (2008) (treating motion for judgment of acquittal as premature motion in arrest of judgment and rejecting claim that state law did not allow local government to prohibit conduct in city ordinance).

State v. Burns, 213 Or App 38 (2007), *rev dismissed*, 345 Or 302 (2008) (rejecting claim that the indictment failed to state facts constituting an offense because it failed to allege the requisite culpable mental state as to an element).

State v. Harberts, 198 Or App 546 (2005) (rejecting claim that indictment failed to state facts constituting an offense on the ground that it omitted an element).

State v. Wigglesworth, 186 Or App 374 (2003) (reviewing denial of motion for judgment of acquittal as denial of motion for arrest of judgment).

See also:

State v. Anderson, 233 Or App 475, 483 (2010) (noting that denial of a motion of arrest of judgment is reviewed with a less exacting standard than the denial of a demurrer).

State v. Burns, 213 Or App 38, 43 (2007) (discussing difference in standard of review of pre-verdict demurrer and post-verdict motion in arrest of judgment).

State v. Hankins, 197 Or App 345, 347-48 (instructing that when a trial court refuses to consider as premature motion in arrest of judgment mislabeled as motion for judgment of acquittal "and the defendant is convicted, *the defendant must renew the motion after the conviction in order to preserve for appellate review the issue whether the indictment was sufficient*").

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Endorse a Uniform Scope of Review of Sentences in Criminal Cases

Prepared by Ernest Lannet

December 8, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members

The proposal currently before the work group narrows the scope of review of any misdemeanor sentence to a two-prong inquiry as to whether the sentence (1) exceeds a statutory maximum or (2) is unconstitutionally cruel and unusual. By attrition, current law consigns that limited scope of review to misdemeanor sentences when the sentencing court *does not* extend probation, impose or modify conditions of probation or of sentence suspension, or impose or execute a sentence upon revocation of probation or sentence suspension. Furthermore, the courts have interpreted the two-prong inquiry in the current proposal to preclude valid claims of legal error with inadequate justification.

The work group should endorse a uniform scope of sentencing review for all criminal cases, whether the offenses are designated a felony or a misdemeanor, and whether the defendant stood trial or entered a plea of guilty or no contest: a review for errors of law in imposing or failing to impose a sentence.

I. The current proposal would unduly restrict review of misdemeanor sentences.

Under the most recent reorganization, four subsections of Section 14 define the scope of sentencing review of sentences in defendant's appeals (5) (stipulated sentences), (6) (misdemeanor sentences generally), (7) (felony sentences generally), and (8) (felony guideline sentences specifically). Subsection (6) provides:

> "(6) Subject to subsection (5) of this section, as to any sentence imposed on a conviction of a misdemeanor, the appellate court has authority to review only whether the sentence:
>
> "(a) Exceeds the maximum allowable by statutory law; or

"(b) Is unconstitutionally cruel and unusual."

Thus, the scope of review of *any* sentence imposed for a misdemeanor reaches two specific issues, whether the sentence (a) exceeds the maximum allowable by statutory law; or (b) is unconstitutionally cruel and unusual.

Currently, the only time the scope of review for errors arising in sentencing proceedings is restricted to an examination of whether the sentence exceeds a statutory maximum or is unconstitutionally cruel and unusual is instances where defendant pleads guilty or no contest. ORS 138.050(3). When a defendant does not enter such a plea, the appellate court may still review "[a]ny decision of the court in an intermediate order or proceeding." ORS 138.040(1)(a). The current proposal seems to preserve this allowance.

And—although ORS 138.050 itself does not differentiate between felony and misdemeanor sentences—the enactment of the felony sentencing guidelines has relegated its application to misdemeanor sentences only. ORS 138.222(1); *see also State v. Brewer*, 260 Or App 607, 612-18 (2014) (explaining how review of felony sentences—even those arising from a plea of guilty or no contest—is governed by ORS 138.222 rather than ORS 135.050). This is also preserved by the current proposal.

Moreover, the enactment and amendment of ORS 138.053 further limited the applicability of the limited two-prong scope of review. Currently under ORS 138.053(3), that limited scope of review does not apply when the sentencing court extends a period of probation, imposes or modifies a condition of probation or of sentence suspension, or imposes or executes a sentence upon revocation of probation or a sentence suspension. *State v. Donahue*, 243 Or App 520, 525 (2011). The current proposal sets the two-prong inquiry as scope of review in these circumstances. The work group should adopt changes that preserve the current scope of review in these cases, which is for any "error in the proceeding from which the appeal is taken." ORS 138.053(3).

II. The two-prong inquiry is an unjustifiably narrow scope of review.

Current case law interprets each of the inquiries in a very restrictive manner.

A. "Exceeds the maximum allowable by statutory law"

Substantially similar phrasing in ORS 138.050(3)(a) ("exceeds the maximum allowable by law") has been interpreted to mean a claim is reviewable only if the defendant can establish that the sentence "'exceeds a maximum expressed by means of legislation,' regardless of any errors that the trial court may have committed during the sentencing process." *State v. Jacquez*, 278 Or App 313, 318 (2016) (quoting *State v. Cloutier*, 351 Or 68, 104 (2011)). Examples of this preclusion of review of (even uncontested) errors

in imposing a judgment of conviction and sentence are not hard to come by. Most recently, the limitation has been invoked to preclude review of claims that

- a sentencing court erroneously excluded testimony bearing on whether damages were the result of criminal activities and thus supported a restitution award, *State v. Sercus*, 282 Or App 633 (2016);

- a sentencing court impermissibly terminated conditional discharge and imposed conviction and sentence after the term of conditional discharge expired, *State v. Herrera*, 280 Or App 830 (2016);

- a sentencing court erroneously imposed a mandatory minimum fine for a nonqualifying offense, *Jacquez*, 278 Or App 313; and

- a sentencing court erroneously failed to recognize its discretion—which it would have exercised—to waive fees imposed on an indigent defendant whose only failure to fulfill the terms of a diversion agreement was submitting a single late payment; and that the offense to which the defendant pleaded was an act that constituted domestic violence, *State v. Bigsby*, 267 Or App 768 (2014).

B. "Is unconstitutionally cruel and unusual"

The appellate courts have interpreted the "cruel and unusual" limitation to preclude review of a host of other claims, although the courts no longer take the clause to the literal extreme that it precludes proportionality challenges under the constitution. *State v. Baker*, 346 Or 1, 8-9 (2009) (reversing an initially successful contention by the state that a proportionality challenge was outside the scope of review because it was not a claim of cruel and unusual punishment). But it continues to bar review of claims that a sentence exceeds a statutory limitation if the claim of an excess sentence relies on other constitutional principles such as due process or the prohibition against *ex post facto* punishment. *See State v. Buckles*, 268 Or App 293, 297-98 (2014) (permanent suspension of driving privileges was excessive because it impermissibly restricted the defendant's due process right to travel); *State v. Taylor*, 266 Or App 813, 818 (2014) (imposition of conviction fee exceeded that authorized by statute when the defendant committed the offense).

In cases noted above, there was little contention that the defendant's claim was not meritorious. Rather, the state's primary argument was that the defendant was just out of luck because he did not exercise his right to trial. Meaningful appellate review should allow the appellate courts to consider and correct an unlawful sentence (and, perhaps, **especially** when the defendant has taken responsibility and not required that the court and district attorney fulfill their obligation to prove his guilt beyond a reasonable doubt to a jury of peers).

III. The statutory amendments enacted and contemplated by the Legislative Assembly signal its view that sentences should be reviewed for errors of law.

I should note, too, that the limitations here were placed in 1945 on **all** sentences arising from guilty or no contest pleas, a time when a sentencing court's discretion was very broad and when the legislature had not presented the current sentencing scheme that provides many opportunities for an error of law in imposing (or failing to impose) a sentence. Or Laws 1945, ch 62, s 1. In 1989, the legislature enacted the felony sentencing guidelines and specified its determination at that time it believed that sentences should be reviewed for legal error of almost any type. 1989 Or Laws, ch 791, §21(4)(a), *codified at* ORS 138.222(4)(a). Misdemeanor sentencing, as well as other sentencing decisions applicable to misdemeanor offenses, such as restitution, have become similarly more complicated. And I would imagine that a version of ORS 138.222 would have applied to the misdemeanor sentencing guidelines that the legislature intended (what is now) the Criminal Justice Commission to propose in 1991. *See* Or Laws 1989, ch 790, s 91a (directing the State Sentencing Guidelines Board to submit misdemeanor guidelines rules to the Legislative Assembly by January 1, 1991).

In any event, there should be no reason that reviewing court should be precluded from considering whether a misdemeanor sentence violates any provision of the Oregon or United States constitutions and whether the sentencing court committed prejudicial error in some respect other than exceeding a statutory maximum.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Scope of Review of Corrected Judgments

Prepared by Jim Nass

September 20, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

ORS 138.083(1) permits the trial court to enter a corrected judgment. The draft bill, LC 6789, would repeal ORS 138.083, but restate the key provision of ORS 138.083(1) as ORS 137.107(2) – see Section 26(2) of the draft bill. ORS 18.107 makes clear that, on appeal from a corrected judgment in a civil case, the appellate court may only review the corrected part of the judgment (or other parts of the judgment affected by the correction).[1] There is no comparable provision applicable to criminal cases, although there is case law arguably consistent with ORS 18.107.

Also, there is another case that raises the issue of, if an appellate court initially declines to review unpreserved sentencing errors, whether the appellate court may review the claimed sentencing errors on appeal from a corrected judgment. This memorandum addresses both issues and suggests clarifying amendments to the draft bill.

Scope of Review of Corrected Judgments Generally

In *State v. Ritchie*, 263 Or App 566, 330 P3d 37 (2014), the defendant moved to dismiss the indictment on double jeopardy grounds. The trial court denied that motion. Defendant then entered into a plea agreement that stated it was a 'conditional plea" and purported to reserve the right to appeal, but otherwise provided that defendant would plead guilty and the trial court would impose a term of probation subject to various conditions. The trial court accepted the plea and entered a judgment of conviction and sentence that placed the defendant on probation subject to the agreed-upon conditions. The defendant did not appeal from that judgment.

[1] Technically, the statute in question, ORS 18.107, phrases the principle as one of appealability rather than the reviewability, but the principle is the same.

Later, two issues arose: Whether most of the conditions of probation were no longer necessary, and whether the conditional plea agreement was invalid because it did not identify the issue the defendant had intended to reserve for appeal. The State agreed that the conditions of probation in question were no longer necessary, and the State and the defendant signed an amended conditional plea agreement identifying the denied motion to dismiss issue as the issue reserved for appeal. The trial court entered a corrected judgment that eliminated the conditions of probation in question. Defendant appealed from the corrected judgment, but did not assign error to the corrected part of the judgment, but, rather assigned error to the denial of his motion to dismiss on double jeopardy grounds.

The Oregon Court of Appeals affirmed the corrected judgment, holding that, because defendant could have appealed the original judgment, on appeal from the corrected judgment, the court could not review any part of the original judgment that had not been affected by the corrected judgment, which included defendant's conviction based on his guilty plea. The court stated:

> [W]hen a defendant fails to appeal a judgment appealable under ORS 138.053(1) within [*the time*] required by ORS 138.071, he cannot raise issues that could have been brought in that appeal in a later appeal from a subsequent appealable judgment.

Ritchie, 263 Or App at 576.

The court's holding is mysterious, because the defendant could not have appealed from the original judgment and assigned error to the denial of his motion to dismiss, in turn, because, the conditional plea agreement did not identify the issue reserved for appeal, as required by ORS 135.335. The court's disposition of the appeal makes sense in light of this statement:

> * * *, [D]efendant, under ORS 135.335(3), reserved the right to challenge the pretrial ruling denying his motion to dismiss in appeal of any judgment under ORS 138.053(1).

Ritchie, 263 Or App at 574. But, that statement is totally inconsistent with the recitation of facts to the effect that the original plea agreement failed to reserve the right to appeal the denial of the defendant's motion to dismiss. It is unclear what the court's holding would have been had it understood that the defendant could not have obtained review of the double jeopardy issue on appeal from the original judgment because the plea failed to identify that issue as reserved for appeal.

Regardless of whether the court actually correctly decided *Ritchie*, the court in that case articulated the principles consistent with the rule in civil cases, which is captured in ORS 18.107(3), addressing corrected judgments in civil cases:

18.107 Corrections to civil judgments. (1) A court may correct the terms of a civil judgment previously entered as provided in ORCP 71. The court may make the correction by signing a corrected judgment document and filing the document with the court administrator. The title of the judgment document must reflect that the judgment is a corrected limited judgment, corrected general judgment or a corrected supplemental judgment.

(2) Unless a correction to a judgment affects a substantial right of a party, the time for appeal of the judgment commences upon entry of the original judgment.

(3) If the correction of a judgment affects a substantial right of a party, and the corrected judgment is entered before the time for appealing the original judgment has expired, the time for appeal of the judgment commences upon entry of the corrected judgment. If the correction affects a substantial right of a party, and the corrected judgment is entered after the time for appealing the original judgment has expired, the time for appeal of the corrected portions of the judgment and all other portions of the judgment affected by the correction commences upon entry of the corrected judgment.

(4) This section does not apply to justice courts, municipal courts or county courts performing judicial functions.

(5) This section does not apply to juvenile proceedings under ORS chapter 419B.

Subsection (3) reflects these policies: A party to an action may appeal a corrected judgment only the corrected part of the judgment affects a substantial right and, on appeal, the appellate court may review only the corrected part of the judgment or any other part of the judgment affected by the correction. However, ORS 18.107(3) does not reflect the possibility that a corrected judgment may give rise to the opportunity to seek review an intermediate order, as was the circumstance in *Ritchie* and in another case, *State v. Larrance.*

Role of Nonreviewabilty of Issue on Prior Appeal

In *State v. Larrance*, 270 Or App 431, 347 P3d 830 (2015), the defendant pled guilty to certain offenses, and the trial court convicted the defendant of those offenses and imposed sentence. The defendant appealed and assigned error to two aspects of the sentence, acknowledging that he had failed to preserve those errors, but asking the appellate court to exercise its plain error review authority. The appellate court affirmed

without opinion. Thereafter, the defendant moved in the trial court to correct the sentence in three respects, including the two the defendant had raised on appeal. The trial court granted the motion as to the "new" ground and denied the motion as to the two grounds that were the subject of defendant's first appeal. The defendant appealed the ensuing corrected judgment.

Because the judgment was a corrected judgment, it was appealable under ORS 138.040 and 138.053. *See State v. Hart*, 188 Or App 650, 72 P3d 671 (2003) (no appeal lies from an order in criminal case denying post-judgment motion, but appeal does lie if trial court enters corrected judgment). In the second appeal, the defendant assigned error to the denial of his requests to change the judgment consistently with his assignments of error in the first appeal. The State's brief argued only that ORS 138.083(1) conferred discretionary authority on a trial court to correct a criminal judgment and that the trial court did not abuse its discretion in denying the defendant's requests. The State did not argue, as presumably it could have and consistently with *Ritchie*, that review is barred of issues that could have been raised – indeed, actually were raised -- in the prior appeal.[2] The appellate court held that the failure to impose a sentence consistently with legal requirements is an abuse of discretion, and concluded that the trial court should have corrected the original judgment in both ways as the defendant had contended. The appellate court vacated the corrected judgment, and remanded for resentencing.

In both *Ritchie* and *Larrance* there were review principles that actually or potentially barred review of the issues in questions on appeal from the original judgment. In *Ritchie*, the failure to identify the issue reserved for appeal in the plea agreement would have precluded appellate review of the double jeopardy issue on appeal from original judgment. In *Larrance*, the failure to preserve the claimed sentencing errors presumably led to the appellate court to decline to exercise its plain error review authority. In *Ritchie*, the appellate court held that the initial reviewability of the double jeopardy issue barred review of that issue in the second appeal, even though the trial court had entered a corrected judgment from which the defendant could have and did appeal and, by that time, the defendant had properly preserved the claimed error. By contrast, in *Larrance*, the appellate court reviewed the same two asserted sentencing errors (and granted the defendant relief as to both), on appeal from a corrected judgment by which time the defendant had preserved the claimed errors, notwithstanding that the court previously had the opportunity to review those issues and declined to do so.

Recommended Statutory Wording

I recommend that the Work Group adopted wording to the effect that, on appeal from a corrected judgment in a criminal action, the appellate court may review the corrected part of the judgment and any other part of the judgment affected by the correction, but

[2] And, of course, the defendant not only could have appealed the original judgment, he actually did.

also may review an intermediate order for which there was no right to review on appeal from the original judgment but that is reviewable on appeal from the corrected judgment. I offer the following as a potential new subsection (5) to Section 13 and a new subsection (3) to Section 14, addressing the scope of review on appeal by defendants and the State, respectively:[3]

> (#) On appeal from a corrected judgment entered under Section 26 of this 2017 Act, the appellate court may review:
>
> (a) The corrected part of the judgment and any other part of the judgment affected by the correction; and
>
> (b) An intermediate order for which there was no right to review on appeal from the original judgment but that is reviewable on appeal from the corrected judgment.

I suggest amending Section14 because, presumably, that the State has the right to appeal from a corrected judgment convicting a defendant of a felony committed on or after November 1, 1989, subject to the Sentencing Guidelines for the purpose of seeking review of a claimed sentencing error.

[3] Wording is offered with the understanding that Assistant Legislative Counsel Jessica Minifie may have a preferable way to articulate the policy choice.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Revocation of Conditional Release: Appealability and Scope of Review

Prepared by Jim Nass

September 20, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

One of the purposes of this Work Group was to review the current statutory scheme that provides that, at least as to misdemeanors and felonies committed before November 1, 1989 (and possibly as to felonies committed on or after November 1, 1989), if the defendant has pled guilty or no contest to an offense, on appeal from the judgment of conviction and sentence, the appellate court may review only whether the sentence imposed by the trial court exceeds the maximum allowable by statutory law or is unconstitutionally cruel and unusual. The Work Group, to date, has decided to recommend changing that policy to allow review whether any other aspect of sentencing fails to comply with the requirements of law, merger issues, and the denial of a motion to set aside a guilty or no contest plea. It is unclear, however, whether the draft bill would permit review revocation of conditional release and other comparable issues when the defendant has pleaded guilty or no contest to the underlying offense. Assuming that the Work Group agrees that revocation issues should be reviewable regardless of whether the defendant pleaded guilty or no contest to the underlying offense, the purpose of this memorandum to make sure the draft bill implements that policy decision.

Recently, the Court of Appeals decided *State v. Herrera*, 280 Or App 830, __ P3d __ (September 8, 2016). In that case, the defendant pled guilty to one count of possession of a controlled substance, pursuant to which the trial court, under ORS 475.245, initially entered a "Judgment of Conditional Discharge." The judgment recited that the defendant was convicted of that offense, but the conviction "shall not be entered" pending defendant's participation in a drug court program. The judgment also provided that the drug program would extend for 18 months, at the conclusion of which, if defendant completed all treatment requirements, the conviction would be set aside and the case dismissed. The judgment also provided that, if the defendant's participation in

the drug court program was "unsuccessfully terminated," the trial court would place the defendant on probation or impose a prison sentence.

The defendant periodically violated the terms of the conditional discharge and the trial court imposed various sanctions, but otherwise continued the defendant's participation in the program. After the dated on which the 18-month program period expired, in April 2012, defendant did not move to set aside his conviction and dismiss the case, nor did the state move to revoke or extend defendant's participation in the program. Apparently, after expiration of the 18-month period defendant committed an act that would have been a violation of a condition of the program for which, in May 2012, the trial court imposed, without objection from defendant, a 10-day jail sanction. In July 2012, the defendant missed a court appearance. In September 2012, the trial court, after acknowledging that the 18-month program period had expired without the trial court having terminated the defendant's participation, nevertheless revoked the defendant's participation in the conditional discharge program and placed defendant on probation for 18 months. The defendant appealed from the judgment of conviction and sentence.

On appeal, relying on the Court of Appeals intervening decision in *State v. Granberry*, 260 Or App 15, 316 P3d 363 (2013), the defendant argued, because the state did not initiate revocation proceedings before expiration of the drug court program, the trial court lacked authority to entertain the appeal at all. The state did not dispute that *State v. Granberry* supported the defendant's position, but, rather, argued that the court could not review it because the judgment of conviction was based on a plea of guilty and, under ORS 138.053, the defendant could only appeal the judgment to the extent that the sentence exceeded the maximum allowable by statutory law or was unconstitutionally cruel and unusual. Defendant did not contest the sentence imposed by the trial court; accordingly, the Court of Appeals dismissed the appeal for want of jurisdiction.

Granberry was a *state's* appeal from a judgment of dismissal predicated on the defendant having completed the probation period without the state having initiated a revocation proceeding. *Granberry* appeared to be particularly on point because it involved a defendant who also received a conditional discharge ORS 475.245. The Court of Appeals observed that ORS 475.245 mirrored probation under ORS chapter 137, thus case law pertaining to the timing of revocation proceedings controlled. The court affirmed the trial court's dismissal of the case, citing *State v. Miller*, 224 Or App 642, 199 P3d 329 (2008) (unless defendant's probation is extended beyond its original term, trial court may not initiate revocation proceedings and revoke probation after expiration of probation term).

Unlike *Granberry*, *Herrera* was a *defendant's* appeal, which is subject to ORS 138.050, pursuant to which the scope of appeal is limited when the conviction is based on a guilty or no contest plea. The court rejected the defendant's argument that the reference in ORS 138.053(3) to review of an order extending a period of probation, imposing or modifying a condition of probation, or revocation meant that such decisions are always

appealable (and, hence, reviewable). The court held that, because the limited scope of appeal under ORS 138.050 and because the defendant did not challenge the sentence imposed, the defendant could not appeal the judgment.

As *Granberry* and *Herrera* illustrate, whether an appellate court may entertain an appeal, and review, revocation of the kinds of condition release decisions described in ORS 138.053(1)(b) through (e) depends on whether the trial court ruled in favor of the defendant and the state appeals , or whether, if the trial court ruled in favor of the state, the trial court placed the defendant on some form of conditional release after a jury trial, whether the defendant had pleaded guilty or no contest to the antecedent offense. That is, presumably, if the defendant in *Herrera* had been given a conditional discharge following any sort of trial (jury trial, bench trial, or stipulated facts trial), the defendant could have appealed the trial court's decision and obtained a reversal.

The draft bill presently before the Work Group, at Section 3(2), mirrors ORS 138.053 (1)(b) through (e) in that it states that:

> A defendant may appeal from a judgment or order extending a period of probation, imposing a new or modified condition of probation or of sentence suspension, or imposing or executing a sentence upon revocation of probation or sentence suspension.

And, like existing ORS 138.040(1)(a), Section 13(1)(a)(B) of the draft bill provides that the appellate court has authority to review:

> * * * (B) Except as otherwise provided in this section, any decision of the trial court in an intermediate order or proceeding.

The "except as otherwise provided in this section" wording is important because subsection (1)(b) provides, subject to exceptions not material here, that, where a conviction is based on a guilty or no contest plea:

> * * * the appellate court does not have authority to review any decision related to the defendant's guilty * * *.

It is possible that the prophylactic authorization to review "any decision * * * in an intermediate * * * proceeding" would permit review of the revocation decision, but I wonder whether it might be preferable to avoid any potential ambiguity by adding the following subsection to Section 13:

> (#) On appeal under Section (3)(2) of this Act of 2017, the appellate court may review whether the trial court erred in extending a period of probation, imposing a new or modified condition of probation or of sentence suspension, or imposition or executing a sentence upon revocation of probation or sentence suspension.

Query: The court in *Herrera* mentioned an earlier case, *State v. Balukovic*, 153 Or App 253, 956 P2d 250 (1998), in which a trial court had adopted a diversion program with these provisions: If the defendant agreed to plead guilty and enter a program for first-time domestic violence offenders, the defendant would plead guilty to the charge and the trial court would, by order, convict the defendant and continue the matter for sentencing. If the defendant successfully completed the program, the trial court would set aside the conviction and dismiss the case. But, if the defendant failed to comply with program requirements, then the trial court could revoke participation in the program, enter a judgment of conviction based on the guilty plea, and impose sentence. The defendant in that case appealed the judgment revoking, convicting, and sentencing, arguing that the trial court erred in revoking participation in the probation.

The court said that, if the trial court had following the usual practice of imposing a sentence on a conviction based on a guilty or no contest plea, then revoked probation, the court could review whether the trial court erred in revoking probation:

> A subsequent order revoking probation is an order arising out of the continuum of the sentencing process. Under ORS 138.053(1)(e), an order revoking probation is reviewable on appeal, even though the convicted person has pled guilty, in order to determine whether the sentence exceeds the maximum allowable by law.

153 Or App at 257.[1] The court declined to review the assignment of error in that case because the revocation took place *before* the trial court entered a judgment of conviction and impose any sentence. The court distinguished the kind of probation involved in that case from typical probation because typical probation is a form of sentence imposed based on a judgment of conviction, whereas the defendant's participation in the domestic violence program here preceded entry of judgment of conviction and sentence.

Query: Are there programs being used by trial courts today that are similar to the program involved in *Baluckovic* in that a defendant pleads guilty (or no contest) to a charge, the defendant is given the opportunity to participate in a program, and, if the trial court determines that the defendant has failed to comply with the program, the trial court may revoke participation, and enter judgment of conviction and sentence? [Is that what DUI diversion programs are?} If so, would the revocation decision remain nonreviewable under the present version of the Work Group's draft bill?

[1] Later in the opinion, the court reiterated that, in addition to the court having authority under ORS 138.050 to review sentences that exceed the maximum allowable by law, "ORS 138.053 adds to that authority by making reviewable probation and suspended sentence proceedings that result directly in sentences that exceed the maximum allowable by law." 153 Or App at 259. Of course, the Court of Appeals later, in *Hererra*, held directly to the contrary.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Determination on Appeal: "Harmless Error"

Purdy v. Deere and Company

Prepared by Jim Nass

October 10, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

The purpose of this memorandum is to raise the issue of whether the "harmless error" standard that the Work Group has approved to date accurately reflects Oregon Supreme Court case law applying the Oregon Constitution, Article VII (Amended), Section 3. The draft bill (LC 6789) proposes to repeal ORS 138.230, which attempts to state a "harmless error" standard on appeal in criminal cases, and replace it with the wording found in Section 18 of the draft bill. ORS 138.230 provides:

> **138.230.** 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.

The draft bill proposes to add the following new section to ORS chapter 138:

> **SECTION 18. Subject to Section 3, amended Article VII, Oregon Constitution, the appellate court shall not reverse, modify or vacate a trial court decision except for error substantially affecting the right of a party, including but not limited to when:**
>
> **(1) Respecting the determination of guilt of an offense, the trial error, if any, was not likely to have affected the verdict; and**
>
> **(2) Respecting the sentence imposed on an offense, the trial court error, if any, had no practical effect on the right of the defendant.**

My concern is the "not likely" to have affected the verdict wording does not accurately capture case law applying the constitutional standard that Section18 is intended to reflect.

"Substantial Right of the Party" Standard

The last phrase of ORS 138.230 is: "the substantial rights of the parties." As Matt Shoop's memorandum on the relationship of ORS 138.230 to Article VII (amended), § 3, observed, variations of that standard are found in ORS 19.415(2), governing appeals in civil cases, and OEC 103(1), governing the admissibility of evidence:

> **19.420.** (1) Except as provided in this section, upon an appeal in an action or proceeding, * * * the scope of review shall as provided in Section 3, Article VII (Amended) of the Oregon Constitution.
>
> (2) No judgment shall be reversed or modified except for error *substantially affecting the rights of a party*.
>
> * * * * *
>
> **OEC 103.** (1) Evidential error is not presumed to be prejudicial. Error may not be predicated upon a ruling which admits or excludes evidence unless *a substantial right of the party* is affected.

Thus, the Legislature has used the "substantial right of the party" standard respecting civil and criminal appeals generally and respecting evidentiary error.

However, as Matt Shoop's memorandum surveying case law interpreting and applying ORS 138.230 makes clear, the appellate courts have been ambivalent about whether ORS 138.230 is consistent with Section 3. In a case presenting asserted evidentiary error, and therefore implicating the "substantial right the party" standard in OEC 103(1), the Oregon Supreme Court adopted this standard: "Is there little likelihood that the particular error affected the verdict?" *State v. Davis*, 336 Or 19, 77 P3d 1111 (2003).[1]

[1] In the same year, the Supreme Court decided *State v. Pine*, 336 Or 194, 82 P3d 130 (2003), which involved jury instruction error. In that case, the court cited the *State v. Davis* standard and reversed the trial court's jury instruction, concluding that, "* * * [T]he trial court's supplemental instruction created an erroneous impression of the law that * * * would have affected the outcome of the case." 336 Or at 210. Also in 2003, but before *Davis*, the Supreme Court decided *State v. Marrington*, 335 Or 555, 73 P3d 911 (2003), in which the court, applying the OEC 103 "a substantial right of a party" standard to a claim of evidentiary error, held that

In the course of doing so, the court included a footnote observing that ORS 138.230, ORS 19.415(2), and OEC 103(1) contain a similar standard:

> *[State v.] McLean* and *State v.] Van Hooser* referred to statutes that, like Article VII (Amended), Section 3, preclude reversal of a judgment for trial court error in the absence of a demonstration that the error affected the substantial right of a party. *See [State v.] Hansen*,304 Or at 180 (citing OEC 103(1), which provides, in part, that "[e]rror may be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]"); *Van Hooser*, 266 Or at 22 (citing ORS 138.230, which provides, in part, that "[a]fter hearing the appeal, the court shall give judgment, without regard * * * to technical errors, defects or exceptions which do not affect the substantial rights of the parties"). *See also Shoup v. Wal-Mart Stores, Inc.*, 355 Or 164, 168, 61 P3d 928 (2003) (applying ORS 19.415(2), which provides that "[n]o judgment shall be reversed or modified except for error substantially affecting the rights of a party"). Under those statutes, the analysis whether an appellate court must affirm a judgment despite trial error is similar to the analysis that Article VII (Amended), Section 3, requires. This opinion addresses the proper application of Article VII (Amended), Section 3, rather than all or one of those statutes, because the question whether this court's case law has followed a consistent analysis arises from cases apply Article VII (Amended), Section 3.

Davis, 336 Or at 29, fn 7.

I recently became aware that the Supreme Court decided a significant case involving asserted "harmless error" in the context of a civil appeal, *Purdy v. Deere and Company*, 355 Or 204, 324 P3d 455 (2014), an appeal involving asserted evidentiary and instructional error. In that case, the court noted that part of the problem with ORS 14.215(2) does not impose any quantitative measure of the probability that trial court error affected the result of the trial:

> * * * *[ORS 19.415(2)]* asks * * * whether – in an important or essential manner, the error had a detrimental influence on a party's rights. *Shoup*, 335 Or at 172-73. *It does not pretend to measure mathematical probabilities; rather, it assesses the extent to which an error skewed the odds against a legally correct result. This court's previous decisions that have applied the standard to instances of instructional and evidentiary*

"[u]nder the circumstances, we cannot conclude that there is little, if any, likelihood that the error affected the court's verdict."

> *error generally indicates that little likelihood is not enough, but more – that is "some" or a "significant" likelihood that the error influenced the result – will suffice for reversal. See State v. Lopez-Minjarez*, 350 Or 576, 587, 260 P3d 439 (2011) (because "erroneous instruction had no significant likelihood of affecting the jury's verdict" on a charge, it did not substantially affect defendant's rights); *see also Davis*, 336 Or at 29 n 7 ("under [ORS 19.415(2)] the analysis whether an appellate court must affirm a judgment despite trial court is similar to the analysis that Article VII (Amended), Section 3, requires").

355 Or at 226. [Emphasis added.] The court in *Purdy* ultimately stated:

> Generally speaking, if a trial court incorrectly instructs the jury on an element of a claim or defense, and – when the instructions are considered as a whole in light of the evidence and the parties' theories of the case at trial – *there is some likelihood that the jury reached a legally erroneous result*, a party has established that the instructional error substantially affected its rights with the meaning of ORS 19.415(2). *Lopez-Minjarez*, 350 Or at 584-91; * * * *Pine*, 336 Or at 200, 210.

355 Or at 231-32. [Emphasis added.] Apart from the reference to "some likelihood," the excerpt is important because it cites two criminal cases in support of the statement and because the excerpt included this footnote:

> As noted, since deciding *Shoup*, this court has continued to apply the "little likelihood that the error affected the result" construct to assignments of evidentiary error. *See Davis*, 336 Or 32 (applying construct).

I draw these conclusions from *Purdy*, *Davis*, and the other Supreme Court cases addressing this topic:

- Whatever standard Article VII (Amended), Section 3, embodies, the standard applies to both civil and criminal cases. And, therefore, appellate cases interpreting or apply Article VII (Amended), Section 3, in civil cases apply to criminal cases, and *visa versa*.

- The appellate courts do not appear to afford the phrase "substantial right of a party" or similar wording much respect as a standard for determining harmless error, as they probably should not because Article VII

(Amended), Section 3, does not use those words or any words remotely close in meaning to "substantial right of a party".

- The "substantial right of a party" standard at best is a rubric that is used generically to refer to more specific standards applicable to, for instance, evidentiary and instructional error on one hand or sentencing error on the other.

- The standard applicable to evidentiary and instructional error, stated in the most general way, is whether the asserted trial court error affected the result (or outcome or verdict).

- There is a quantitative aspect to the probability that the error affected the result, which has been expressed as "some likelihood," "significant likelihood," or "little likelihood".

If the Work Group wishes to retain some reference to "substantial right of a party," then I concur with the Work Group's proposal to more clearly apply the "substantial right of a party" standard in ORS 19.415(2) to criminal cases, notwithstanding that ORS 138.230 already includes that phrase because, for whatever reason, the appellate courts have found the use of "substantial right of a party" as used in ORS 19.415(2) to be acceptable. However, I question whether we should retain reference to the "substantial right of a party" standard because though those words do not appear in Article VII (Amended), Section 3, and, although appellate opinions are replete with reference to those words, they do not appear to embody the actual standards that the appellate courts employ.

The Quantitative Likelihood that Trial Court Error Affected the Verdict

Chief Judge Balmer penned a concurring opinion in *Purdy* that, in part, addresses the quantitative aspect of the standard. Chief Justice Balmer's concurring opinion included these statements:

> The Oregon statute providing for appellate review of trial court judgments *[ORS 19.415(2)]* sets a standard for reversal between these two extremes. It requires a party seeking reversal to demonstrate that trial court error "substantially affect[ed]" the party's rights, but does not require a showing that the error necessarily led to an incorrect result. * * * * *
>
> * * * * *
>
> The more difficult questions are how to articulate the legal standard – other than simply repeating the words of ORS 19.415(2) – and how to apply it to specific cases. The majority correctly points out that it is not enough for the appellant to argue that the error "possibly" affected the outcome of the case. * * * * * Nor, as the majority states, must the appellant show that the jury actually found against the appellant on the claim or defense to which the error pertained. * * * * * To set the bar that high would be inconsistent with ORS 19.415(2), which does not require a party to demonstrate that is would have prevailed, absent the error, but only that the error "substantially affect[ed] its rights.
>
> So, the bar for the appellant is somewhere above "possibly affected" the result, but below "necessarily affected" the result. * * * [T]he majority articulates the statutory standard to be "whether – in an important or essential manner – the error had a detrimental influence on a party's rights"; the appellate court must "assess [ ] the extent to which an error skewed the odds against a leally correct result. * * * That is not like a preponderance of the evidence test to determine whether a plaintiff in a civil case has met its burden of showing that a particular assertion or fact was "more likely true than not." "Some" likelihood – more than a "little" – that the error influenced the result is required, * * * but "how much" more will depend on factual and legal issues in the case as determined from the trial court record. The majority, correctly in my view, eschews a more precise quantification of the probability that the error affected the result. * * *

Although Chief Justice Balmer may have intended to limit the scope of his discussion to ORS 19.415(2), it seems to me that, necessarily, it applies to the "substantial right of a party" wording as it appears in ORS 138.230 and to Article VII (Amended), Section 3, because, as the court emphasized in *Davis* and reiterated *Purdy*, it was addressing the constitutional standard. And, although the court may be eschewing articulating a more precise quantification of the probability that claimed trial error affected the result of the

trial court proceeding, it is at least "some" likelihood AND "some" means "more than a little."

Proposed Amendments to Section 18

It is not clear to me that the wording in the draft bill accurately reflects the standard as articulated in *Davis* and *Purdy*. I propose three alternatives:

> Subject to Section 3, amended Article VII, Oregon Constitution, the appellate court shall not reverse, modify or vacate a trial court decision except for error substantially affecting the right of a party, including but not limited to when:
>
> (1) Respecting the determination of guilt of an offense, **there is some likelihood that** the trial court error, if any, ~~*was not likely to have*~~ affected the ~~*verdict*~~ **determination**.
>
> (2) Respecting the sentence imposed on ~~*an offense*~~ **a conviction**, the trial court error, if any, had ~~*no*~~ **any substantial** practical effect on ~~*the*~~ **a** right of the defendant.

[Note: Chief Judge Hadlock suggested inserting the word "substantial" in Section 13(2).]

Given the number of times the Supreme Court has visited the issue of the "harmless error" in Article VII (Amended), Section 3, and the difficulty of quantifying how much error requires reversal (or stated another way, how minor the trial court error must be to affirm despite the error), this is another way to articulate the standard:

> Subject to Section 3, amended Article VII, Oregon Constitution, the appellate court shall not reverse, modify or vacate a trial court decision except for error substantially affecting the right of a party**.**[~~*, including but not limited to when:*~~ **In deciding whether to reverse, modify or vacate a decision of the trial court for error substantially affecting the right of a party, the appellate court must consider**:
>
> **(1) Respecting the determination of guilt of an offense, there is some likelihood that the trial court error, if any, affected the determination of guilt.**

(2) Respecting the sentence imposed on a conviction, whether the trial court error, if any, had any substantial practical effect on a right of the defendant.

Lastly, the appellate courts do not appear to afford the phrase "substantially affecting the right of a party" much respect and reference to that phrase could be eliminated altogether or merely treated as another factor the appellate court may consider:

Subject to Section 3, amended Article VII, Oregon Constitution, in deciding whether to reverse, modify or vacate a decision of the trial court for error the appellate court must consider:

(1) Whether the trial court error, if any, substantially affected the right of a party.

(2) Respecting the determination of guilt of an offense, the likelihood that the trial court error, if any, affected the determination of guilt.

(2) Respecting the sentence imposed on a conviction, whether the trial court error, if any, had any substantial practical effect on a right of the defendant.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Appeal Provisions Relating to Justice and Municipal Courts

Prepared by Jim Nass

October 10, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

Justice Courts

The statutory scheme governing proceedings in and appeals from decisions of justice courts make whatever problems ORS chapter 138 pertaining to appeals in criminal cases pale by comparison. There are no less than eight ORS chapters governing proceedings in and appeals from justice courts:

ORS chapter 19	Governs appeals in violation actions heard in justice courts of record
ORS chapter 51	Justice courts generally
ORS chapter 52	Civil actions (in justice courts)
ORS chapter 53	Appeals in civil actions (in justice courts)
ORS chapter 54	Juries (for justice court actions)
ORS chapter 55	Small claims actions (in justice courts)
ORS chapter 156	Criminal actions (in justice courts)
ORS chapter 157	Appeals in criminal actions (in justice courts)
ORS chapter 138	Governs appeals in criminal actions in justice courts

A justice court has jurisdiction of all "offenses" committed within the territorial jurisdiction of the justice court. "Offenses" includes misdemeanors and excludes felonies. ORS 51.050. Presumably "offenses" also excludes violations as defined by state law or county ordinance, at least for appeal purposes.[1] A justice court also has

[1] Although we probably need not concern ourselves with it, a city located entirely or largely within the territorial jurisdiction of a justice may contract with the justice court to serve as its municipal court. ORS 51.035. Presumably, then, any such justice court also would function as a

jurisdiction of certain civil cases (recovery of damages up to $10,000, recovery of personal property with a value of up to $10,000, and recovery of any penalty or forfeiture provided by statute or contract not exceeding $10,000). ORS 51.080. To further complicate things, if a defendant is cited into a justice court for a misdemeanor, the defendant can remove the action to a circuit court. ORS 51.050(2).[2] Lastly, an appeal in either a civil, violation, or criminal case normally is taken to the circuit court in the county in which the justice court is located, but, if the justice court has become a court of record, the appeal is taken to the Court of Appeals. ORS 53.020 and 157.010 (appeal in civil action and criminal action, respectively, taken to a circuit court); ORS 138.057 (appeal from a judgment involving a violation from a justice court of record is "as provided in ORS chapter 19" – that is, appeal taken to the Court of Appeals);[3] ORS 53.005 (appeal from a judgment in a civil action from a justice court of record is "as provided in ORS chapter 19" – that is, taken to the Oregon Court of Appeals); and ORS 157.005 (appeal in criminal action from a justice court of record is "as provided in ORS chapter 19" – that is, taken to the Oregon Court of Appeals).

The Work Group's task includes amending those sections in the various chapters governing appeals in criminal cases prosecuted in justice courts to be consistent with the amendments they are proposing governing appeals in criminal cases prosecuted in a circuit court. Further, ORS 138.057, relating to appeals in violation cases prosecuted in justice courts of record, muddles together procedures in justice courts and municipal courts that, in all other respects, are addressed separately, and Legislative Counsel codified the statute in ORS chapter 138 even though it deals with violations that are

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municipal court to adjudicate violations of the city charter and any ordinances adopted by the city.

[2] Presumably, once removed to circuit, any appeal from a circuit court would be to the Oregon Court of Appeals and would be subject to ORS chapter 138 the same as any other misdemeanor originally charged in a circuit court.

[3] This statute is particularly problematic, because it addresses *violations* and provides that appeals from justice courts of record are taken are provided in ORS chapter 19, but is found in the chapter addressing appeals in criminal cases. And, unlike all other provisions relating to justice and municipal courts, which are addressed separately in their respective enabling statutes, the statute addresses appeals from both justice and municipal courts of record. Lastly, the Legislature adopted the statute as a freestanding statute and Legislative Counsel choose to place it in ORS chapter 138 rather than ORS chapter 19, even though appeals in violation cases having nothing to do with ORS chapter 19.

mostly considered civil cases in nature and that are subject to appeal as provided in ORS chapter 19.

ORS 157.030 provides that, subject to certain exceptions, appeals in criminal cases are "taken in the same manner and within the same time" as appeal in civil cases. Therefore, I propose to move all sections in ORS chapter 157 to ORS chapter 53 and add the following new provision to ORS chapter 156. If we do that, this section could replace existing Section 22 in the draft bill and Section 23 would be eliminated.

> **SECTION 22. An appeal of a decision of the justice court in a criminal action shall be as provided in ORS chapter 53.**

I also propose to repeal ORS 138.057 (relating to violations prosecuted in justice and municipal court) and enact substantially similar provisions in ORS chapter 53 (relating to appeals from decisions in justice courts generally) and ORS chapter 221 (relating to municipal courts).

I envision ORS chapter 53 as amended would look as shown on the accompanying pages.

Municipal Courts

I recommend that ORS 221.342 (as amended by Section 24 of the draft bill) and 221.359 be amended as shown below and that a new section (containing those provisions of ORS 138.057 applicable to municipal court cases) be added to ORS chapter 221, probably following ORS 221.390 (ORS 221.359 to 221.390 deals with appeals from violations of a city charter or ordinance). I would retain the proposed amendments to ORS 221.380 as set forth in Section 25 of the draft bill.

> **SECTION 24.** 221.342 is amended to read:
>
> (1) Any municipal court may become a court of record by:
>
> (a) The passage of an ordinance by the governing body of the city in which the court is located; and
>
> (b) The entry of an order by the Supreme Court acknowledging the filing of the declaration required under subsection (2) of this section.

(2) Before a municipal court may become a court of record, the governing body of the city in which the court is located must file a declaration with the Supreme Court that includes:

(a) A statement that the municipal court satisfies the requirements of this section for becoming a court of record;

(b) The address and telephone number of the clerk of the municipal court; and

(c) The date on which the municipal court will commence operations as a court of record.

(3) The Supreme Court may not charge a fee for filing a declaration under subsection (2) of this section. Not later than 30 days after a declaration is filed under subsection (2) of this section, the Supreme Court shall enter an order acknowledging the filing of the declaration and give notice of the order of acknowledgment to the city and the public.

(4) The city shall provide a court reporter or an audio recording device for each municipal court made a court of record under this section.

[*(5) The appeal from a judgment entered in a municipal court that becomes a court of record under this section shall be as provided in ORS chapter 138 for appeals from judgments of circuit courts.*]

[(6)] **(5)** As a qualification for the office, a municipal judge for any municipal court that becomes a court of record must be a member of the Oregon State Bar.

SECTION ??. ORS 221.359 is amended to read:

(1)(a) The provisions of this section apply only to an appeal from a decision of a municipal court that has not become a court of record under ORS 221.342.

(b) An appeal of a decision in a criminal action in a municipal court that has become a court of record under ORS 221.342 shall be as provided in ORS chapter 138 for an appeal from a decision of a circuit court in a criminal action.

[*(1) Except as provided in subsection (3) of this section,*] **(2)** Whenever any person is convicted in the municipal court of any city of any offense defined and made punishable by any city charter or ordinance, such person shall have the same right of appeal to the circuit court within whose jurisdiction the city has its legal situs and maintains its seat of city government as now obtains from a conviction from justice courts. The

appeal shall be taken and perfected in the manner provided by law for taking appeals from justice courts, except that in appeals taken under this section, ORS 221.360, 221.380 or 221.390:

(a) **A copy of** the notice [*thereof*] **of appeal** shall be served upon the city attorney;

(b) When the notice of appeal has been **timely** filed with the court from which the appeal is being taken, the appellate court shall have jurisdiction of the cause. Failure **timely** to serve a notice of appeal on the appropriate attorney shall not preclude jurisdiction in the appellate court; and

(c) No undertaking providing for the payment of costs and disbursements shall be required.

[*(2) Except as provided in subsection (3) of this section,*] In a prosecution of any offense defined and made punishable by any city charter or ordinance, a plaintiff may appeal to the circuit court within whose jurisdiction the city has its legal situs and maintains its seat of city government in the manner provided by ORS 157.020 (2) for taking appeals from justice courts.

[*(3) The provisions of this section apply only to municipal courts that have not become courts of record under ORS 221.342. Appeals of criminal judgments in municipal courts that have become courts of record under ORS 221.342 shall be as provided in ORS chapter 138 for appeals from judgments of circuit courts.]*

SECTION __. (1)(a) If a municipal court has not become a court of record under 221.342, an appeal from a decision of the municipal court involving only a violation may be taken to the circuit court for the county in which municipal court is located. An appeal to the circuit court shall be taken in the manner provided in this section.

(b) If a municipal court has become a court of record under ORS 221.342, an appeal from a decision of the municipal court involving a violation shall be as provided in ORS chapter 19 for appeals from decisions in a circuit court, except that the standard of review is the same as for an

appeal from a judgment in a proceeding involving a misdemeanor or felony.

(2) Within 30 days after the entry of the judgment by the municipal court docket, a party who wishes to appeal the decision must:

(a)File the original notice of appeal with the municipal court along with proof of service on the adverse party or an acknowledgment of service signed by the adverse party.

(b) Serve a copy of the notice of appeal on the adverse party.
If the defendant is appealing a decision of the municipal court, the defendant must serve a copy of the notice of appeal on the city attorney.

(3) No undertaking shall be required of the party filing a notice of appeal under this section.

(4) Upon filing of the notice of appeal, the municipal court shall forward all files relating to the case to the circuit court to which the appeal is taken.

(5) The circuit court shall treat a matter appealed under this section as though the action had been originally filed with the circuit court and shall try the action anew, disregarding any irregularity or imperfection in the proceedings in municipal court.

(6) Upon entry of a judgment in the matter, the judgment may be appealed as provided in this subsection.

(a) An appeal from a judgment involving a violation entered by a circuit court may be taken as provided in ORS chapter 19.

(b) For the purpose of meeting the requirements imposed by ORS 19.240, the copy of the notice of appeal must be served on the city attorney. Notwithstanding ORS 19.270, timely service on the city attorney is not jurisdictional and the Court of Appeals may extend the time for that service.

(c) Notwithstanding any provision of ORS chapter 19, an undertaking on appeal is not required for an appeal from a judgment involving a violation.

(d) The filing of a notice of an appeal from a judgment involving a violation does not act to automatically stay the judgment.

(e) The standard of review for an appeal under this subsection is the same as for an appeal from a judgment in a proceeding involving a misdemeanor or felony.

(7) In an action in which only a violation is charged, the city may not appeal from an order dismissing the action entered by reason of a police officer's failure to appear at the trial of the matter.

APPEALS FROM DECISIONS IN JUSTICE COURTS

Appeals in Civil Cases

53.005. ORS 53.005 to 53.125 apply only to justice courts that have not become courts of record under ORS 51.025. Appeals of civil judgments in justice courts that have become courts of record under ORS 51.025 shall be as provided in ORS chapter 19 for appeals from judgments of circuit courts.

53.010. Any party to a judgment in a civil action in a justice court, other than a judgment by confession or for want of an answer, may appeal therefrom when the sum in controversy is not less than $30, or when the action is for the recovery of personal property of the value of not less than $30, exclusive of disbursements in either case, also when the action is for the recovery of the possession of real property under ORS 105.110.

53.020. An appeal is taken to the circuit court for the county wherein the judgment is given. The party appealing is known as the appellant and the adverse party as the respondent, but the title of the action is not thereby changed.

53.030. An appeal is taken by serving, within 30 days after rendition of judgment, a written notice thereof on the adverse party, or the attorney of the adverse party, and filing the original with the proof of service indorsed thereon with the justice, and by giving the undertaking for the costs and disbursements on the appeal, as provided in ORS 53.040. A written acknowledgment of service by the respondent or the attorney of the respondent, indorsed on the notice of appeal, shall be sufficient proof of service. When the notice of appeal has been served and filed, the appellate court shall have jurisdiction of the cause.

53.040. The undertaking of the appellant must be given with one or more sureties, to the effect that the appellant will pay all costs and disbursements that may be awarded against the appellant on the appeal. The undertaking does not stay the proceedings unless the undertaking further provides that the appellant will satisfy any judgment that may be given against the appellant in the appellate court on the appeal. The undertaking must be filed with the justice within five days after the notice of appeal is given or filed. The justice may waive, reduce or limit the undertaking upon a showing of good cause, including indigency, and on such terms as shall be just and equitable. The justice or the appellate court may waive a failure to file the undertaking within the time required upon a showing of good cause for that failure.

53.050. If the judgment appealed from is in favor of the appellant, the proceedings thereon are stayed by the notice of appeal and the undertaking for the costs of the appeal.

53.060. When an appeal is taken, the justice must allow the same and make an entry thereof in the docket of the justice, stating whether the proceedings are thereby stayed or not. When the proceedings are stayed, if an execution has been issued to enforce judgment, the justice must recall the execution by written notice to the officer holding it. Thereupon it must be returned and all property taken thereon and not sold released.

53.070. All sureties on an undertaking on appeal must have the qualifications established by ORCP 82. Challenges to the qualifications of sureties may be made as provided by ORCP 82.

53.080. When a judgment has been given for money in an action upon a contract to pay money, notwithstanding an appeal and undertaking for the stay of proceedings, the respondent may enforce the judgment, if within five days from the allowance of the appeal the respondent files with the justice an undertaking, with one or more sureties, to the effect that if the judgment is changed or modified on the appeal the respondent will make such restitution as the appellate court may direct. This undertaking must be taken by the justice on not less than two days' notice to the other party.

53.090. Within 30 days next following the allowance of the appeal, the appellant must cause to be filed with the clerk of the appellate court a transcript of the cause. The transcript must contain a copy of all the material entries in the justice docket relating to the cause or the appeal and any transcript or audio record made under ORS 51.105, and must have annexed thereto all the original papers relating to the cause or the appeal and filed with the justice. Upon the filing of the transcript with the clerk of the appellate court, the appeal is perfected. Thenceforth the action shall be deemed pending and for trial therein as if originally commenced in such court, and the court shall have jurisdiction of the cause and shall proceed to hear, determine and try it anew, disregarding any irregularity or imperfection in matters of form which may have occurred in the proceedings in the justice court. If the transcript and papers are not filed with the clerk of the appellate court within the time provided, the appellate court, or the judge thereof, may by order extend the time for filing the same upon such terms as the court or judge may deem just. However, such order shall be made within the time allowed to file the transcript.

53.100. The appellate court may, in furtherance of justice and upon such terms as may be just, allow the pleadings in the action to be amended so as not to change substantially the issue tried in the justice court or to introduce any new cause of action or defense.

53.110. The appellate court may dismiss an appeal from a justice court if it is not properly taken and perfected. When an appeal is dismissed the appellate court must give judgment as it was given in the court below, and against the appellant for the costs and disbursements of the appeal. When judgment is given in the appellate court against the appellant, either with or without the trial of the action, it must also be given against the sureties in the undertaking of the appellant, according to its nature and effect.

53.120. An appeal cannot be dismissed on the motion of the respondent on account of the undertaking therefor being defective, if the appellant before the determination of the motion to dismiss will execute a sufficient undertaking and file it in the appellate court, upon such terms as may be deemed just.

53.125. The appellate court may give a final judgment in the cause, to be enforced as a judgment of such court; or the appellate court may give such other judgment or order as may be proper, and direct that the cause be remitted to the court below for further proceedings in accordance with the decision of the appellate court.

53.130. No provision of ORS 53.005 to 53.125, in relation to appeals or the right of appeal in civil cases, shall be construed to prevent either party to a judgment given in a justice court from having it reviewed in the circuit court for errors in law appearing upon the face of the judgment or the proceedings connected therewith, as provided in ORS 34.010 to 34.100.

Appeals in Misdemeanor Cases

53.135. (1) In an action charging a misdemeanor, an appeal of a decision of a justice court:

(a) That has not become a court of record under ORS 51.025 shall be taken to the circuit court for the county in which the justice court is located as provided in ORS 53.135 to 53.170.

(b) That has become a court of record under ORS 51.025 shall be taken to the Court of Appeals as provided in ORS chapter 138 for appeals from decisions of circuit courts.

53.140. (1) The defendant may appeal a judgment of conviction regardless of whether the judgment requires the defendant to pay a fine or be imprisoned.

(2) If the defendant pleaded guilty or no contest to an offense, as to that offense, the appellate may review only whether the sentence:

(a) Exceeds the maximum allowable by law; or

(b) Is unconstitutionally cruel and unusual.

53.145. The plaintiff may appeal:

(1) An order made before jeopardy attaches dismissing the accusatory instrument;

(2) An order arresting the judgment;

(3) An order made before jeopardy attaches suppressing evidence; or

(4) An order made before jeopardy attaches for the return or restoration of things seized.

53.150. The appeal is taken in the same manner and within the same time as in an appeal from a judgment in a civil action, except that:

(1) If the defendant is the appellant, the appellant must serve a copy of the notice of appeal on the district attorney for the county or on the private prosecutor in the action. Failure to serve notice of appeal on the

appropriate attorney shall not preclude jurisdiction in the appellate court;

(2) When the notice of appeal has been filed with the court from which the appeal is being taken, the appellate court shall have jurisdiction of the action; and

(3) No undertaking providing for the payment of costs and disbursements shall be required.

53.155. If the defendant is in custody at the time the appeal is taken, the justice shall make the proper transcript and deliver it to the clerk of the appellate court within 10 days from the date the appeal is filed.

53.160. A defendant filing an appeal does not stay the proceedings on the judgment unless the defendant:

(1) Makes a release agreement or a security release deposit as provided in ORS 135.230 to 135.290; or

(2) Gives the security required by ORS 810.300 to 810.330 as an undertaking on appeal.

53.165. From the filing of the transcript with the clerk of the appellate court the appeal is perfected and the action is deemed pending therein for trial upon the issue tried in the justice court. The appellate court has the same authority to allow an amendment of the pleadings on an appeal that it has on an appeal in a civil action.

53.170. The appellate court may give a conclusive judgment in the action, to be enforced as a judgment of such court; or the appellate court may give such other judgment or order as may be proper, and direct that the cause be remanded to the court below for further proceedings in accordance with the decision of the appellate court.

53.175. No provision of ORS 53.135 to 53.170, in relation to appeals or the right to appeal in criminal actions, shall be construed to prevent either party in a justice court from having an interlocutory order involving the constitutionality of a statute or of the proceedings that may affect the judgment reviewed in the circuit court for errors in law appearing upon the face of the judgment or the proceedings connected therewith, as provided in ORS 34.010 to 34.100.

Appeals Involving Violations

53.180. (1)(a) If a justice court has become a court of record under ORS 51.025, an appeal from a decision involving a violation shall be as provided in ORS chapter 19 for appeals from decisions of the circuit court, except that the standard of review is the same as for an appeal from a judgment in a proceeding involving a misdemeanor or felony.

(b) If a justice court has not become a court of record under ORS 51.025, the appeal from a decision involving a violation may be taken to the circuit court for the county in which the justice court is located. An appeal to a circuit court must be taken in the manner provided in ORS 53.180 to 53.215.

53.190. Within 30 days after the entry of the judgment by the justice court in the docket, a party who wishes to appeal the decision must:

(1) File the original notice of appeal with the justice court along with proof of service on the adverse party or an acknowledgment of service signed by the adverse party; and

(2) **Serve a copy of the notice of appeal on the adverse party. If the appeal is filed by the defendant, the defendant must serve a copy of the notice of appeal on the district attorney for the county.**

53.195. No undertaking shall be required of the party filing a notice of appeal under the provisions of this subsection.

53.200. Upon filing of the notice of appeal, the justice court shall forward all files relating to the case to the circuit court to which the appeal is taken.

53.205. The circuit court shall treat a matter appealed as though the action had been originally filed with the circuit court and shall try the case anew, disregarding any irregularity or imperfection in the proceedings in the justice court.

53.210. Upon entry of a judgment in the action, the judgment may be appealed as provided in this section.

(1) Subject to the provisions of this section, an appeal from a judgment involving a violation entered by a circuit court may be taken as provided in ORS chapter 19.

(2) For the purpose of meeting the requirements imposed by ORS 19.240, the copy of the notice of appeal must be served on the district attorney for the county.

(3) Notwithstanding ORS 19.270, timely service on the district attorney under the provisions of this section is not jurisdictional and the Court of Appeals may extend the time for that service.

(4) Notwithstanding any provision of ORS chapter 19, an undertaking on appeal is not required for an appeal from a judgment involving a violation.

(5) The filing of a notice of an appeal from a judgment involving a violation does not act to automatically stay the judgment.

(6) The standard of review for an appeal under this subsection is the same as for an appeal from a judgment in a proceeding involving a misdemeanor or felony.

53.215. In any action in which only a violation is charged, the state may not appeal from an order dismissing the action by reason of a police officer's failure to appear at the trial of the matter.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Adams and Huddleston Cases Research

Prepared by Ernest Lannet

November 10, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

When considering Jennifer Lloyd's concerns regarding the scope of review in state's appeals from supplemental judgments (post-judgment of conviction), I found that I needed to correct an impression I may have created in regard to the scope of review as to sentencing in state's appeals. I commented several times that the legislature may have inadvertently eliminated review of misdemeanor sentences in state's appeals when adopting the sentencing guidelines had been adopted. I was completely wrong, as a quick review of *State v. Nix*, 356 Or 768 (2015), established.

Before the legislature's 1989 adoption of the felony sentencing guidelines, the state had *no* authority to appeal from a judgment of conviction *of any type*. ORS 138.060 (1987); *see also* Oregon Criminal Justice Counsel, *Oregon Sentencing Guidelines Implementation Manual* 159 (Sept 1989) ("[The 1989 Legislative Assembly] also established for the first time in Oregon history the state's right to appeal a sentence."). I have included a copy of the pertinent explanatory pages from the Oregon Sentencing Guidelines Implementation Manual.

When the legislature adopted the sentencing guidelines system, it allowed the state to appeal a judgment of conviction for a felony for review of a discrete number of felony guideline sentencing determinations.

As a result, in adopting the felony sentencing guideline system, the legislature decided to allow the state to appeal from a judgment of conviction to seek review for only issues arising under the implementation of the sentencing guidelines. At that point, a "sentence" was either a term of imprisonment, a fine, discharge, and—under the guidelines—a term

of probation or post-prison supervision. ORS 137.010(6) (imprisonment, fine, discharge) (1987); OAR 253-05-001 (1989) (prison); OAR 253-05-002 (1989) (post-prison supervision); OAR 253-05-007 (1989) (probation); OAR 253-05-013 (jail as a part of a probationary sentence).

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

Adams and Huddleston Cases Research

Prepared by Matt Shoop

November 18, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

In terms of cases citing *Adams*, the large majority of cases cite *Adams* for the proposition that a criminal defendant may not appeal from a plea agreement. There was significant litigation over how that applied to various types of plea agreements, but that was largely resolved in *State v. Kephart*, 320 Or 433.

The part of *Adams* that matters here is the part that says that ORS 138.222(4)(a) only applies through ORS 138.222(2)(e), and that subsection (4)(a) does not apply when the other subsections in ORS 138.222(2) apply. The first case we talked about was *State v. Sanchez*, 160 Or App 182 (1999). In *Sanchez*, the appellant assigned error to the trial court's failure to use a translator during the sentencing, but did not assign error to any part of the sentence itself. The court focused on interpreting subsection (4)(a) and concluded that it applied to the failure of the sentence itself to comply with the requirements of law, not the procedure for imposing the sentence. The court also explained that the assignment of error would be reviewable on mandamus or PCR. In another case, the court gave a good concise summary of *Sanchez*: "In construing ORS 138.222(4)(a), we recently noted [in *Sanchez*] its narrow application and concluded that it applies only to errors of law in imposing or failing to impose the *sentence itself*, not to

procedures that in one way or another precede the actual imposition of the sentence." *State v. Lavitsky*, 171 Or App 506 (2000).

In *State v. Casiano*, 214 Or App 509 (2007), the court concluded that the applicability of ORS 137.635, which has to do with defendant's eligibility for sentence modifications, was reviewable under ORS 138.222(2)(e) and 222.(4)(a).

In *State v. Arnold*, 214 Or App 201 (2007), the court concluded: "We thus conclude, after considering the statutory text in context, that the application of the "failing to impose" provision of ORS 138.222(4)(a) to these circumstances is unambiguous: That provision permits this court to review a sentencing issue when the sentence that was imposed was an authorized sentence, but the trial court is asserted to have erroneously determined that the defendant was not eligible for a different, also authorized, sentence."

Finally, in *State v. Lavitsky*, 171 Or App 506 (2000), the court concluded that the state could seek review of an assignment of error that the trial court did not comply with ORS 138.083 in entering a amended judgment. The state argued that the imposition of the amended sentence was beyond the trial court's authority under the statute and thus was "squarely within the terms of what [the court] may review under 138.222(4)(a)."

This last case is a pre-*Adams* case that articulates the relevant rule in *Adams*. Even if it doesn't have much force after *Adams*, it provides slightly more explanation. In *State v. Henderson*, 116 Or App 604 (1992), the Court of Appeals said:

> "Defendant first argues that the court was without authority to vacate the original sentence. That issue is not reviewable on direct appeal. Defendant pleaded guilty. His argument does not come within the scope of our review. Under ORS 138.222(4)(a), in any appeal we may review a claim that the sentencing court failed to comply with the sentencing requirements. However, that subsection is subject to the general provision that a *sentence* may be reviewed under the provisions of ORS 138.222. ORS 138.222(1)."

Regarding *Huddleston*, much of the effect of the reviewability parts of *Huddleston* were blunted by the adoption of ORS 138.222(4)(c) which authorized review of a failure to impose an ORS 137.700 sentence. Also most of the *Huddleston* cases focus on issues not relevant here.

OREGON LAW COMMISSION

DIRECT CRIMINAL APPEALS WORK GROUP

ORS 138.060(1)(e) Legislative History

Prepared by Matt Shoop

December 5, 2016

Disclaimer: Any legal analysis or expression of opinion is that of the author of the memorandum and do not necessarily reflect the views of the Oregon Law Commission, the Work Group as a whole or its members.

I looked at the legislative history from the 1989 statutes enacting the sentencing guidelines as well as other legislative history related to restitution. I began with ORS 138.060(e) which the state relies on to argue that a supplemental judgment imposing restitution is appealable under current law. The legislative history is silent as to the appealability of restitution judgments, but it does address the state's right to appeal a guidelines sentence.

In 1989 the sentencing guidelines were enacted by HB 2250. However, HB 2250 only became the relevant bill after the legislature "gutted" it and "stuffed" it with the language from SB 1073. By the time SB 1073 became HB 2250 the majority of the amendments were already made.[1] The legislative history that is relevant here occurred during the hearings and work sessions on SB 1073.

The sentencing guidelines legislation was created by the Oregon Criminal Justice Council (OCJC).[2] The section that would become ORS 138.060(e) was not part of the original draft bill. After the bill was submitted to the legislature, various parties offered amendments to the bill. Amendment A12 proposed adding the current ORS 138.060(e) language to the bill. The amendment was proposed by committee counsel after discussions with the OCJC and Court of Appeals Chief Judge Joseph. Among other changes, A12 proposed to add section 21a to the bill which would amend ORS 138.060 to say that the state may appeal from:

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[1] There were a few later amendments to HB 2250, but none of them are relevant to our purposes.

[2] Unfortunately, I have not been able to locate any documents from the Oregon Criminal Justice Council relating the sentencing guidelines. The archives do not have anything relevant.

> "A judgment of conviction based on the sentence as provided in section 21 of this 1989 Act."[3]

Many of the proposed amendments, including A12, were considered and voted on by the Senate Judiciary Committee at a hearing on June 2, 1989.

Much of the discussion regarding A12 focuses on changes other than section 21a, but discussion of those other changes included a broader discussion of the state's right to appeal under the bill. The discussion begins on page 21 with the remarks by Kathleen Bogan.[4] Ms. Bogan begins by discussing proposed language that would have allowed the state to "only appeal on the basis that the sentence imposed was improper."[5] In the course of that discussion, Ms. Bogan made other statements that are generally applicable to the state's right to appeal under SB 1073.

> "Secondly, the OCJC position is that the rights to appeal of the defense and the state should be co-equal. There is no lesser of the two. I am hesitant to have any language that says the state may only appeal that makes it look as if their appellate rights are somehow less than the defendants. Our intention was that the state can appeal for any reason that the defense can appeal, and basically they are all appealing that the sentence is improper."[6]

In summary, the legislative history shows that the legislature intended that both the defendant and the state have equal appellate rights from a guidelines sentence. Unfortunately, this does not go directly to the issue of appealability of restitution, and I did not find anything to show that the legislature considered the issue of the state's ability to appeal restitution and supplemental judgments.

I also looked into the legislative history of ORS 137.106 (authorizing the court to impose restitution). I have not listened to the tapes, but review of meeting minutes suggests that the issue of the state's ability to appeal was not considered by the legislature. The discussions appeared to focus on the circuit court level.

I also looked at the legislative history of ORS 138.083(3) and 138.071(4) which discuss the procedure for a "party" or "appellant" to file an amended notice of appeal after entry of a corrected or supplemental judgment. The relevant language was adopted in 2013 following a

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[3] Section 21 was codified as ORS 138.222.

[4] Kathleen Bogan appeared as a witness on behalf of the OCJC.

[5] Thankfully everyone agreed that they did not know what "improper" meant and that language was not included in the bill.

[6] Ms. Bogan's comments are only partially captured in the minutes. This is a complete transcript of her comments.

proposal by OPDS after discussions with DOJ. The changes to 138.083 and 138.071 were intended to remedy the problem of the trial court entering an amended or supplemental judgment, that judgment never being sent to appellate counsel, and the appellant subsequently losing the ability to file an amended notice of appeal because of expiration of the 30-day appeal period. The legislative history does not address the issue of the state's ability to appeal from a supplemental judgment imposing restitution.

Victim's Direct Appeal of Judgment Denying Restitution in Whole or in Part

I have not found any cases in which a crime victim filed a direct appeal from a judgment of conviction or a supplemental judgment in which the victim was awarded no restitution or less restitution than requested. Prior to *State v. Algeo*, 354 Or 236 (2013), I would have said that a victim could vindicate the denial of their statutory right to restitution through the procedures in ORS 147.500 to 147.550 and obtain direct review of a denial of those rights from the Oregon Supreme Court. But, *Algeo* foreclosed that option, in part because the Oregon Supreme Court assumed that the state could take a direct appeal to the Court of Appeals under ORS 138.060(e).[7] Victims have used the procedure to obtain direct Supreme Court review in other cases, but none of those cases involved restitution. *See State v. Bray*, 352 Or 809, 291 P3d 727 (2012); *State v. Bray*, 352 Or 34, 279 P3d 216 (2012); *State v. Barrett*, 350 Or 390, 255 P3d 472 (2011).

Review of the Appellate Case Management System shows 15 cases direct review cases involving victim's rights. However, only five of them are relevant to the issue of restitution.[8]

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[7] But, the Court did not engage in any analysis to come to that conclusion and the issue was not directly before the court.

[8] The cases that are not relevant to restitution are as follows:

In *State v. Carter*, S063871, was an attempt by the *pro se* defendant to obtain direct review of his motion to quash the charging instrument. The Supreme Court denied review.

In *State v. Steele*, S062900 and S062955 the victim sought review of a trial court order denying his claim that his right to address the trial court prior to resentencing was denied. Case S062900 was a petition for discretionary review which was dismissed on the victim's motion. Case S062955 was a request for mandatory interlocutory appeal, and the Supreme Court dismissed because it was not subject to interlocutory appeal under ORS 147.537.

In *State v. Cox*, S062480 and S062404, the victim, *pro se*, sought review of his claim that his various notification rights were violated. The Supreme Court denied discretionary review in both cases.

The Supreme Court issued opinions in *State v. Bray*, 352 Or 809, 291 P3d 727 (2012) and *State v. Bray*, 352 Or 34, 279 P3d 216 (2012), both of which are focused on the procedure for victim's right review.

Finally, there were two cases in *State v. Barrett*. In case S059297 the court dismissed due to issues with the service of the petition. The court issued an opinion in S059423, in *State v. Barrett*, 350 Or 390, 255 P3d 472 (2011).

State v. Algeo, 354 Or 236 (2013), is the only published opinion in a victim's appeal from a restitution issue. As discussed in the case, the appellate procedure in ORS 147.535 to 147.539 is only available to the victim to vindicate the constitutional right to "prompt restitution," not to vindicate the statutory right to complete restitution.

Two direct review cases arose from State v. Garcia, S060423 and S061110. In both cases the victim sought to an ordering direct that the payments from the defendant's PERS be paid to the victim to pay restitution. The trial court denied the motion ruling that the PERS non-assignment provision outweighed the victim's right to prompt restitution. In case S060423, the victim appealed from the supplemental judgment awarding restitution, however, the Court dismissed the petition because the victim failed to timely file the petition. The victim subsequently filed a claim in the trial court. The trial court ruled that the victim's constitutional right to prompt restitution was violated, but that the court could not order a remedy due to the anti-assignment provision. The victim then petitioned for review of the denial of her claim in S061110. The Supreme Court denied review without explanation.

In *State v. Schlunt* the district attorney sought review in S061167, and the victim sought review in S061168. The issue in *Schlunt* was whether the victim's right to prompt restitution included payment of a compensatory fine that defendant was ordered to pay the victims. In both cases the Supreme Court denied review.

We have not been able to find any other cases involving an appeal by the victim to the Supreme Court, nor have we found any victims appeals to the Court of Appeals.