

Senate Bill 257

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SUMMARY

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

Narrows right to appointed counsel in post-conviction relief cases.

A BILL FOR AN ACT

1
2 Relating to the right to appointed counsel in post-conviction relief cases; amending ORS 138.310,
3 138.500, 138.590, 161.327, 161.385 and 161.665.

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

5 **SECTION 1.** ORS 138.590 is amended to read:

6 138.590. *[(1) Any petitioner who is unable to pay the expenses of a proceeding pursuant to ORS*
7 *138.510 to 138.680 or to employ suitable counsel possessing skills and experience commensurate with*
8 *the nature of the conviction and complexity of the case for the proceeding may proceed as a financially*
9 *eligible person pursuant to this section upon order of the circuit court in which the petition is filed.]*

10 **(1) Any petitioner may proceed as a financially eligible person under this section upon**
11 **order of the circuit court in which the petition is filed, if the petitioner:**

12 **(a) Is unable to pay the expenses of a proceeding pursuant to ORS 138.510 to 138.680 or**
13 **to employ suitable counsel possessing skills and experience commensurate with the nature**
14 **of the conviction and complexity of the case for the proceeding;**

15 **(b) Has been sentenced to death or to life imprisonment without the possibility of release**
16 **or parole; and**

17 **(c) Is challenging the judgment or the proceedings upon which the sentence of death or**
18 **life imprisonment without the possibility of release or parole is based.**

19 (2) If the petitioner wishes to proceed as a financially eligible person, the person shall file with
20 the petition an affidavit stating inability to pay the expenses of a proceeding pursuant to ORS
21 138.510 to 138.680, including, but not limited to, the filing fee required by ORS 138.560, or to employ
22 suitable counsel for such a proceeding. The affidavit shall contain a brief statement of the
23 petitioner's assets and liabilities and income during the previous year. If the circuit court is satisfied
24 that the petitioner is unable to pay such expenses or to employ suitable counsel, it shall order that
25 the petitioner proceed as a financially eligible person. If the court finds that a petitioner who has
26 been sentenced to death is not competent to decide whether to accept or reject the appointment of
27 counsel, the court shall appoint counsel to represent the petitioner. However, when a circuit court
28 orders petitioner's case transferred to another circuit court as provided in ORS 138.560 (4), the
29 matter of petitioner's proceeding as a financially eligible person shall be determined by the latter
30 court.

31 (3) If a petitioner who has been sentenced to death qualifies for the appointment of counsel un-

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

1 der this section but rejects the appointment, the court shall determine, after a hearing if necessary,
2 whether the petitioner rejected the offer of counsel and made the decision with an understanding
3 of its legal consequences. The court shall make appropriate findings on the record.

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

9 (5) If counsel appointed by the circuit court determines that the petition as filed by petitioner
10 is defective, either in form or in substance, or both, counsel may move to amend the petition within
11 15 days following counsel's appointment, or within a further period as the court may allow. The
12 amendment shall be permitted as of right at any time during this period. If appointed counsel be-
13 lieves that the original petition cannot be construed to state a ground for relief under ORS 138.510
14 to 138.680, and cannot be amended to state a ground for relief, counsel shall, in lieu of moving to
15 amend the petition, inform the petitioner and notify the circuit court of counsel's belief by filing an
16 affidavit stating the belief and the reasons therefor with the clerk of the circuit court. This affidavit
17 does not constitute a ground for denying the petition prior to a hearing upon its sufficiency, but the
18 circuit court may consider the affidavit in deciding upon the sufficiency of the petition at the
19 hearing.

20 (6) When a petitioner has been ordered to proceed as a financially eligible person, the expenses
21 [which] **that** are necessary for the proceedings upon the petition in the circuit court and the com-
22 pensation to appointed counsel for petitioner as provided in this subsection shall be paid by the
23 public defense services executive director from funds available for the purpose. At the conclusion
24 of proceedings on a petition pursuant to ORS 138.510 to 138.680, the public defense services execu-
25 tive director shall determine and pay, as provided by the policies, procedures, standards and guide-
26 lines of the Public Defense Services Commission, the amount of expenses of petitioner and
27 compensation for the services of appointed counsel in the proceedings in the circuit court.

28 (7) If the public defense services executive director denies, in whole or in part, expenses and
29 compensation submitted for review and payment, the person who submitted the payment request may
30 appeal the decision to the presiding judge of the circuit court. The presiding judge or the designee
31 of the presiding judge shall review the public defense services executive director's decision for abuse
32 of discretion. The decision of the presiding judge or the designee of the presiding judge is final.

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

35 (b) When a petitioner is allowed to file a petition without payment of the fee required by ORS
36 138.560 due to inability to pay, the fee is not waived but may be drawn from, or charged against,
37 the petitioner's trust account if the petitioner is an inmate in a correctional facility.

38 (9) Notwithstanding any other provision of this chapter, a court may not appoint as counsel for
39 a petitioner who has been sentenced to death a counsel who previously represented the petitioner
40 at trial or on automatic and direct review in the case resulting in the death sentence unless the
41 petitioner and the counsel expressly request continued representation.

42 **SECTION 2.** ORS 138.500 is amended to read:

43 138.500. (1) **As used in this section, "petitioner" means a petitioner in a proceeding pur-**
44 **suant to ORS 138.510 to 138.680 who has been sentenced to death or to life imprisonment**
45 **without the possibility of release or parole and who is challenging the judgment or the pro-**

1 **ceedings upon which the sentence of death or life imprisonment without the possibility of**
 2 **release or parole is based.**

3 [(1)] (2) If a defendant in a criminal action or a petitioner [*in a proceeding pursuant to ORS*
 4 *138.510 to 138.680*] wishes to appeal from an appealable adverse final order or judgment of a circuit
 5 court and if the person is without funds to employ suitable counsel possessing skills and experience
 6 commensurate with the nature and complexity of the case for the appeal, the person may request
 7 the circuit court from which the appeal is or would be taken to appoint counsel to represent the
 8 person on appeal. The following apply to a request under this subsection:

9 (a) The request shall be in writing and shall be made within the time during which an appeal
 10 may be taken or, if the notice of appeal has been filed, at any time thereafter. The request shall
 11 include a brief statement of the assets, liabilities and income in the previous year of the person
 12 unless the court already determined the person to be financially eligible for appointed counsel at
 13 state expense for purposes of the specific case, in which instance, the written request need only so
 14 indicate. However, if a request relies on a court's previous determination that the person is finan-
 15 cially eligible, the court, in its discretion, may require the person to submit a new statement of as-
 16 sets, liabilities and income.

17 (b) If, based upon a request under paragraph (a) of this subsection, the court finds that petitioner
 18 or defendant previously received the services of appointed counsel or currently is without funds to
 19 employ suitable counsel for an appeal, the court shall appoint counsel to represent petitioner or
 20 defendant on the appeal.

21 [(2)(a)] (3)(a) Notwithstanding subsection [(1)] (2) of this section, when a defendant has been
 22 sentenced to death, the request for appointed counsel shall be made to the Supreme Court. The Su-
 23 preme Court shall appoint suitable counsel to represent the defendant on the appeal.

24 (b) After the notice of appeal has been filed, the Court of Appeals has concurrent authority to
 25 appoint or substitute counsel or appoint or substitute a legal advisor for the defendant under ORS
 26 138.504.

27 (c) The Supreme Court has concurrent authority to appoint or substitute counsel or appoint or
 28 substitute a legal advisor for the defendant under ORS 138.504 in connection with review of a Court
 29 of Appeals decision under ORS 2.520.

30 (d) Neither the Court of Appeals nor the Supreme Court may substitute one appointed counsel
 31 for another under paragraph (b) or (c) of this subsection except pursuant to the policies, procedures,
 32 standards and guidelines of the Public Defense Services Commission.

33 [(3)] (4) Whenever a defendant in a criminal action or a petitioner [*in a proceeding pursuant to*
 34 *ORS 138.510 to 138.680*] has filed a notice of appeal from an appealable adverse final order or
 35 judgment of a circuit court and the person is without funds to pay for a transcript, or portion
 36 thereof, necessary to present adequately the case upon appeal, the person may request the public
 37 defense services executive director to have the transcript, or portion thereof, furnished to the per-
 38 son. The following apply to a request under this subsection:

39 (a) The request shall be in writing and, shall include a brief statement of the assets, liabilities
 40 and income in the previous year of the person.

41 (b) If, based upon a request under paragraph (a) of this subsection, the public defense services
 42 executive director finds that the person is unable to pay for the transcript, the public defense ser-
 43 vices executive director shall have furnished to the person that portion of the transcript as may be
 44 material to the decision on appeal, if the public defense services executive director finds that the
 45 transcript or portion thereof is necessary.

1 (c) The cost of the transcript under paragraph (b) of this subsection shall be in the amount
 2 prescribed in ORS 21.470 and paid for as provided by the policies, procedures, standards and guide-
 3 lines of the Public Defense Services Commission.

4 [(4)] (5) After submission of the original brief by counsel, the public defense services executive
 5 director shall determine the cost of briefs and any other expenses of appellant, except transcripts,
 6 necessary to appellate review and a reasonable amount of compensation for counsel appointed under
 7 this section. Compensation payable to appointed counsel shall be as established under ORS 151.216.
 8 On any review by the Supreme Court of the judgment of the Court of Appeals a person for whom
 9 counsel has been appointed shall by similar procedure recover the cost of briefs, any other expense
 10 of the review and compensation for counsel. **As used in this subsection, "counsel" includes a**
 11 **legal advisor appointed under ORS 138.504.**

12 [(5)] (6) Costs, expenses and compensation determined by the public defense services executive
 13 director under subsection [(4)] (5) of this section shall be paid by the public defense services exec-
 14 utive director from funds available for that purpose.

15 [(6)] (7) If the public defense services executive director denies, in whole or in part, costs, ex-
 16 penses and compensation submitted for review and payment, the person who submitted the payment
 17 request may appeal the decision to the Chief Judge of the Court of Appeals, if the appeal is in the
 18 Court of Appeals, or to the Chief Justice of the Supreme Court, if the appeal is in the Supreme
 19 Court. The Chief Judge, Chief Justice or the designee of the Chief Judge or Chief Justice, as ap-
 20 propriate, shall review the public defense services executive director's decision for abuse of dis-
 21 cretion. The decision of the Chief Judge, the Chief Justice or the designee of the Chief Judge or
 22 Chief Justice is final.

23 [(7)] (8) The provisions of this section [shall] apply in favor of the defendant in a criminal action
 24 or the petitioner [in a proceeding pursuant to ORS 138.510 to 138.680] when the person is respondent
 25 in an appeal taken by the state in a criminal action or by the defendant in a proceeding pursuant
 26 to ORS 138.510 to 138.680.

27 [(8) As used in subsection (4) of this section, "counsel" includes a legal advisor appointed under
 28 ORS 138.504.]

29 **SECTION 3.** ORS 138.310 is amended to read:

30 138.310. When the public defense services executive director pays costs, expenses or compen-
 31 sation under ORS 138.500 [(4)] (5) on appeal in a criminal action, the public defense services exec-
 32 utive director shall notify the court below of the costs, expenses and compensation paid in order
 33 that the court below may exercise its discretion under ORS 151.505 or 161.665 (2).

34 **SECTION 4.** ORS 161.327 is amended to read:

35 161.327. (1) Following the entry of a judgment pursuant to ORS 161.319 and the dispositional
 36 determination under ORS 161.325, if the court finds that the person would have been guilty of a
 37 felony, or of a misdemeanor during a criminal episode in the course of which the person caused
 38 physical injury or risk of physical injury to another, and if the court finds by a preponderance of
 39 the evidence that the person is affected by mental disease or defect and presents a substantial
 40 danger to others requiring commitment to a state mental hospital designated by the Department of
 41 Human Services or conditional release, the court shall order the person placed under the jurisdic-
 42 tion of the Psychiatric Security Review Board for care and treatment. The period of jurisdiction of
 43 the board shall be equal to the maximum sentence provided by statute for the crime for which the
 44 person was found guilty except for insanity.

45 (2) The court shall determine whether the person should be committed to a state hospital des-

1 ignited by the Department of Human Services or conditionally released pending any hearing before
2 the board as follows:

3 (a) If the court finds that the person presents a substantial danger to others and is not a proper
4 subject for conditional release, the court shall order the person committed to a state hospital des-
5 ignated by the Department of Human Services for custody, care and treatment pending hearing be-
6 fore the board in accordance with ORS 161.341 to 161.351.

7 (b) If the court finds that the person presents a substantial danger to others but that the person
8 can be adequately controlled with supervision and treatment if conditionally released and that nec-
9 essary supervision and treatment are available, the court may order the person conditionally re-
10 leased, subject to those supervisory orders of the court as are in the best interests of justice, the
11 protection of society and the welfare of the person. The court shall designate a person or state,
12 county or local agency to supervise the person upon release, subject to those conditions as the court
13 directs in the order for conditional release. Prior to the designation, the court shall notify the per-
14 son or agency to whom conditional release is contemplated and provide the person or agency an
15 opportunity to be heard before the court. After receiving an order entered under this paragraph, the
16 person or agency designated shall assume supervision of the person pursuant to the direction of the
17 Psychiatric Security Review Board. The person or agency designated as supervisor shall be required
18 to report in writing no less than once per month to the board concerning the supervised person's
19 compliance with the conditions of release.

20 (3) For purposes of this section, a person affected by a mental disease or defect in a state of
21 remission is considered to have a mental disease or defect requiring supervision when the disease
22 may, with reasonable medical probability, occasionally become active and, when active, render the
23 person a danger to others.

24 (4) In determining whether a person should be conditionally released, the court may order
25 evaluations, examinations and compliance as provided in ORS 161.336 (4) and 161.346 (2).

26 (5) In determining whether a person should be committed to a state hospital or conditionally
27 released, the court shall have as its primary concern the protection of society.

28 (6) Upon placing a person on conditional release, the court shall notify the board in writing of
29 the court's conditional release order, the supervisor appointed, and all other conditions of release,
30 and the person shall be on conditional release pending hearing before the board in accordance with
31 ORS 161.336 to 161.351. Upon compliance with this subsection and subsections (1) and (2) of this
32 section, the court's jurisdiction over the person is terminated and the board assumes jurisdiction
33 over the person.

34 (7) An order of the court under this section is a final order appealable by the person found
35 guilty except for insanity in accordance with ORS 19.205 (5). Notwithstanding ORS 19.255, notice
36 of an appeal under this section shall be served and filed within 90 days after the order appealed from
37 is entered in the register. The person shall be entitled on appeal to suitable counsel possessing
38 skills and experience commensurate with the nature and complexity of the case. If the person is fi-
39 nancially eligible, suitable counsel shall be appointed in the manner provided in ORS 138.500 [(1)]
40 (2), and the compensation for counsel and costs and expenses of the person necessary to the appeal
41 shall be determined and paid as provided in ORS 138.500.

42 (8) Upon placing a person under the jurisdiction of the board, the court shall notify the person
43 of the right to appeal and the right to a hearing before the board in accordance with ORS 161.336
44 (7) and 161.341 (4).

45 **SECTION 5.** ORS 161.385 is amended to read:

1 161.385. (1) There is hereby created a Psychiatric Security Review Board consisting of five
2 members appointed by the Governor and subject to confirmation by the Senate under section 4,
3 Article III of the Oregon Constitution.

4 (2) The membership of the board shall not include any district attorney, deputy district attorney
5 or public defender, but the membership shall be composed of:

6 (a) A psychiatrist experienced in the criminal justice system and not otherwise employed on a
7 full-time basis by the Department of Human Services or a community mental health and develop-
8 mental disabilities program;

9 (b) A licensed psychologist experienced in the criminal justice system and not otherwise em-
10 ployed on a full-time basis by the Department of Human Services or a community mental health and
11 developmental disabilities program;

12 (c) A member with substantial experience in the processes of parole and probation;

13 (d) A member of the general public; and

14 (e) A lawyer with substantial experience in criminal trial practice.

15 (3) The term of office of each member is four years. The Governor at any time may remove any
16 member for inefficiency, neglect of duty or malfeasance in office. Before the expiration of the term
17 of a member, the Governor shall appoint a successor whose term begins on July 1 next following.
18 A member is eligible for reappointment. If there is a vacancy for any cause, the Governor shall make
19 an appointment to become immediately effective for the unexpired term.

20 (4) A member of the board not otherwise employed full-time by the state, shall be paid on a per
21 diem basis an amount equal to \$212, adjusted according to the executive pay plan for the biennium,
22 for each day during which the member is engaged in the performance of official duties, including
23 necessary travel time. In addition, subject to ORS 292.220 to 292.250 regulating travel and other
24 expenses of state officers and employees, the member shall be reimbursed for actual and necessary
25 travel and other expenses incurred in the performance of official duties.

26 (5) Subject to any applicable provision of the State Personnel Relations Law, the board may hire
27 employees to aid it in performing its duties.

28 (6)(a) The board shall select one of its members as chairperson to serve for a one-year term with
29 such duties and powers as the board determines.

30 (b) A majority of the voting members of the board constitutes a quorum for the transaction of
31 business.

32 (7) The board shall meet at least twice every month, unless the chairperson determines that
33 there is not sufficient business before the board to warrant a meeting at the scheduled time. The
34 board shall also meet at other times and places specified by the call of the chairperson or of a ma-
35 jority of the members of the board.

36 (8)(a) When a person over whom the board exercises its jurisdiction is adversely affected or
37 aggrieved by a final order of the board, the person is entitled to judicial review of the final order.
38 The person is entitled on judicial review to suitable counsel possessing skills and experience
39 commensurate with the nature and complexity of the case. If the person is financially eligible, suit-
40 able counsel shall be appointed by the reviewing court in the manner provided in ORS 138.500 [(1)]
41 (2). If the person is financially eligible, the public defense services executive director shall deter-
42 mine and pay, as provided in ORS 138.500, the cost of briefs, any other expenses of the person nec-
43 essary to the review and compensation for counsel appointed for the person. The costs, expenses and
44 compensation so allowed shall be paid as provided in ORS 138.500.

45 (b) The order and the proceedings underlying the order are subject to review by the Court of

1 Appeals upon petition to that court filed within 60 days of the order for which review is sought. The
2 board shall submit to the court the record of the proceeding or, if the person agrees, a shortened
3 record. The record may include a certified true copy of a tape recording of the proceedings at a
4 hearing in accordance with ORS 161.346. A copy of the record transmitted shall be delivered to the
5 person by the board.

6 (c) The court may affirm, reverse or remand the order on the same basis as provided in ORS
7 183.482 (8).

8 (d) The filing of the petition shall not stay the board's order, but the board or the Court of
9 Appeals may order a stay upon application on such terms as are deemed proper.

10 **SECTION 6.** ORS 161.665 is amended to read:

11 161.665. (1) Except as provided in ORS 151.505, the court, only in the case of a defendant for
12 whom it enters a judgment of conviction, may include in its sentence thereunder a provision that
13 the convicted defendant pay as costs expenses specially incurred by the state in prosecuting the
14 defendant. Costs include a reasonable attorney fee for counsel appointed pursuant to ORS 135.045
15 or 135.050 and a reasonable amount for fees and expenses incurred pursuant to preauthorization
16 under ORS 135.055. A reasonable attorney fee is presumed to be a reasonable number of hours at
17 the hourly rate authorized by the Public Defense Services Commission under ORS 151.216. Costs do
18 not include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures
19 in connection with the maintenance and operation of government agencies that must be made by the
20 public irrespective of specific violations of law.

21 (2) Except as provided in ORS 151.505, the court, after the conclusion of an appeal of its initial
22 judgment of conviction, may include in its general judgment, or enter a supplemental judgment that
23 includes, a requirement that a convicted defendant pay as costs a reasonable attorney fee for
24 counsel appointed pursuant to ORS 138.500, including counsel who is appointed under ORS 151.216
25 or counsel who is under contract to provide services for the proceeding under ORS 151.219, and
26 other costs and expenses allowed by the public defense services executive director under ORS
27 138.500 [(4)] (5). A reasonable attorney fee is presumed to be a reasonable number of hours at the
28 hourly rate authorized by the commission under ORS 151.216.

29 (3) For purposes of subsections (1) and (2) of this section, compensation of counsel is determined
30 by reference to a schedule of compensation established by the commission under ORS 151.216.

31 (4) The court may not sentence a defendant to pay costs under this section unless the defendant
32 is or may be able to pay them. In determining the amount and method of payment of costs, the court
33 shall take account of the financial resources of the defendant and the nature of the burden that
34 payment of costs will impose.

35 (5) A defendant who has been sentenced to pay costs under this section and who is not in
36 contumacious default in the payment of costs may at any time petition the court that sentenced the
37 defendant for remission of the payment of costs or of any unpaid portion of costs. If it appears to
38 the satisfaction of the court that payment of the amount due will impose manifest hardship on the
39 defendant or the immediate family of the defendant, the court may remit all or part of the amount
40 due in costs, or modify the method of payment under ORS 161.675.

41 (6) Except as provided in subsection (7) of this section, all moneys collected or paid under this
42 section shall be paid into the General Fund and credited to the Criminal Fine and Assessment Ac-
43 count.

44 (7) All moneys collected or paid under this section as costs for expenses incurred by the state
45 in extraditing the defendant to this state shall be deposited into the Arrest and Return Account

1 established in ORS 133.865.

2