

House Bill 2670

Sponsored by COMMITTEE ON JUDICIARY

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**.

Creates procedure for defendant convicted of aggravated murder to assert that defendant is person with mental retardation and may not be sentenced to death.

A BILL FOR AN ACT

1
2 Relating to the death penalty; creating new provisions; and amending ORS 137.463, 138.012, 138.530
3 and 163.150.

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

5 **SECTION 1. (1) A person with mental retardation is not eligible for the death penalty.**

6 **(2) A defendant who intends to assert that the defendant is not eligible for the death**
7 **penalty because the defendant is a person with mental retardation shall file notice with the**
8 **court of that intention at least 90 days before trial, or if the defendant has pleaded guilty,**
9 **at least 90 days before the sentencing proceeding described in ORS 163.150, unless the court**
10 **allows a later filing date for good cause. The notice shall include a designation of whether**
11 **the defendant intends to introduce any evidence as mitigation under ORS 163.150 (1)(c)(D)**
12 **that will also be used for the purpose of determining whether the defendant is eligible for the**
13 **death penalty under this section. Upon the filing of the notice:**

14 **(a) The state has the right to obtain an independent medical, psychiatric or psychological**
15 **examination of the defendant; and**

16 **(b) The defendant waives any claim of confidentiality or privilege applicable to medical,**
17 **psychiatric, psychological, correctional, educational, employment, military or other records**
18 **that are relevant to the determination of whether the defendant is a person with mental**
19 **retardation and that were in existence on the date of the offense is alleged to have been**
20 **committed. The waiver described in this paragraph applies only to a sentencing proceeding**
21 **conducted under ORS 163.150, a death warrant hearing described in ORS 137.463, a post-**
22 **conviction relief hearing conducted under ORS 138.510 to 135.680 and any hearing on an ap-**
23 **plication for a writ of habeas corpus.**

24 **(3)(a) A medical, psychiatric or psychological examination of the defendant under this**
25 **section that is conducted by a person who will testify on the issue of mental retardation**
26 **must be recorded. The recording must contain both audio and video. Unless disclosure is**
27 **necessary to conduct a proper examination, the person conducting the examination and any**
28 **person to whom disclosure is necessary to conduct a proper examination may not disclose**
29 **any information obtained in connection with the examination to any person other than the**
30 **defendant or the defendant's attorney.**

31 **(b) Upon the completion of the state's examination of the defendant, the person con-**

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 ducting the examination shall prepare a report that describes the conclusions reached by the
 2 person and the basis for those conclusions. The report and the recording described in para-
 3 graph (a) of this subsection shall be provided to the defense and filed with the court. The
 4 court shall seal the materials.

5 (c) No more than 24 hours following the conviction of the defendant, the court shall de-
 6 termine whether the defendant intends to introduce expert testimony on the issue of
 7 whether the defendant is eligible for the death penalty under this section. If the defendant:

8 (A) Elects not to present expert testimony, except as provided in paragraph (d) of this
 9 subsection, the materials described in paragraph (b) of this subsection shall remain sealed,
 10 the court shall order a permanent prohibition on the disclosure of information described in
 11 paragraph (a) of this subsection and the state shall be barred from using the materials or
 12 information obtained in connection with the examination against the defendant.

13 (B) Elects to present expert testimony, the court shall provide the materials described
 14 in paragraph (b) of this subsection to the state and shall order an end to the prohibition on
 15 disclosure described in paragraph (a) of this subsection. The state may use the materials and
 16 any information obtained in connection with the examination solely to rebut expert testi-
 17 mony offered by the defendant to prove that the defendant is a person with mental retarda-
 18 tion.

19 (d) If the defendant places the defendant's mental state in issue in any subsequent pro-
 20 ceeding related to the offense for which the defendant was convicted, the court shall disclose
 21 any relevant portions of the materials described in paragraph (b) of this subsection and au-
 22 thorize the disclosure of relevant information described in paragraph (a) of this subsection.

23 (e) Except as provided in paragraphs (b) to (d) of this subsection, the provisions of ORS
 24 135.805 to 135.873 apply to material and information pertaining to the issue of mental retar-
 25 dation. The obligations to disclose imposed by this paragraph shall be performed as soon as
 26 practicable following the filing of the notice described in subsection (2) of this section.

27 (4) As used in this section:

28 (a) "Classes of adaptive functioning" means the following skill areas:

29 (A) Communication.

30 (B) Self-care.

31 (C) Home living.

32 (D) Social and interpersonal.

33 (E) Use of community resources.

34 (F) Self-direction.

35 (G) Functional academic.

36 (H) Work.

37 (I) Leisure activities.

38 (J) Health.

39 (K) Safety.

40 (b) "Mental retardation" means significantly subaverage intellectual functioning existing
 41 concurrently with substantial impairment in at least two classes of adaptive functioning,
 42 that:

43 (A) Originates before a person reaches 18 years of age; or

44 (B) Was caused by dementia or a traumatic brain injury and was in existence at the time
 45 the offense was alleged to have been committed.

1 (c) **“Significantly subaverage intellectual functioning” means an intelligence quotient that**
 2 **is at least two standard deviations below the mean on a standardized intelligence test.**

3 **SECTION 2.** ORS 163.150 is amended to read:

4 163.150. (1)(a) Upon a finding that the defendant is guilty of aggravated murder, the court, ex-
 5 cept as otherwise provided in subsection (3) of this section, shall conduct a separate sentencing
 6 proceeding to determine whether the defendant shall be sentenced to life imprisonment, as described
 7 in ORS 163.105 (1)(c), life imprisonment without the possibility of release or parole, as described in
 8 ORS 163.105 (1)(b), or death. The proceeding shall be conducted in the trial court before the trial
 9 jury as soon as practicable. If a juror for any reason is unable to perform the function of a juror,
 10 the juror shall be dismissed from the sentencing proceeding. The court shall cause to be drawn the
 11 name of one of the alternate jurors, who shall then become a member of the jury for the sentencing
 12 proceeding notwithstanding the fact that the alternate juror did not deliberate on the issue of guilt.
 13 The substitution of an alternate juror shall be allowed only if the jury has not begun to deliberate
 14 on the issue of the sentence. If the defendant has pleaded guilty, the sentencing proceeding shall
 15 be conducted before a jury impaneled for that purpose. In the proceeding, evidence may be presented
 16 as to any matter that the court deems relevant to sentence including, but not limited to, victim im-
 17 pact evidence relating to the personal characteristics of the victim or the impact of the crime on
 18 the victim’s family and any aggravating or mitigating evidence relevant to the issue in paragraph
 19 [(b)(D)] **(b)(E)** of this subsection[;]. **If the defendant has filed the notice described in section 1**
 20 **of this 2009 Act, evidence relevant to whether the defendant is a person with mental retar-**
 21 **dation shall be admitted in accordance with paragraph (b) of this subsection.** [However,] Nei-
 22 ther the state nor the defendant shall be allowed to introduce [repetitive] evidence that has
 23 previously been offered and received during the trial on the issue of guilt. The court shall instruct
 24 the jury that all evidence previously offered and received may be considered for purposes of the
 25 sentencing [hearing] **proceeding.** This paragraph shall not be construed to authorize the introduc-
 26 tion of any evidence secured in violation of the Constitution of the United States or of the State of
 27 Oregon. The state and the defendant or the counsel of the defendant shall be permitted to present
 28 arguments for or against a sentence of death and for or against a sentence of life imprisonment with
 29 or without the possibility of release or parole.

30 **(b) If a defendant files the notice described in section 1 of this 2009 Act and the notice**
 31 **indicates that the defendant:**

32 **(A) Does not intend to introduce any evidence as mitigation under paragraph (c)(D) of**
 33 **this subsection that will also be used for the purposes of determining whether the defendant**
 34 **is eligible for the death penalty under section 1 of this 2009 Act, the court shall conduct a**
 35 **hearing prior to the sentencing proceeding described in this section. The defendant shall bear**
 36 **the burden of proving that the defendant is not eligible for the death penalty by a prepon-**
 37 **derance of the evidence. If the court finds that the defendant:**

38 **(i) Is eligible for the death penalty under section 1 of this 2009 Act, the court shall con-**
 39 **duct a sentencing proceeding in accordance with this subsection and subsection (2) of this**
 40 **section; or**

41 **(ii) Is not eligible for the death penalty, the court shall conduct a sentencing proceeding**
 42 **in accordance with subsection (3) of this section.**

43 **(B) Intends to introduce evidence as mitigation under paragraph (c)(D) of this subsection**
 44 **that will also be used for the purposes of determining whether the defendant is eligible for**
 45 **the death penalty under section 1 of this 2009 Act, the court shall conduct a sentencing**

1 **proceeding in accordance with this subsection, except that, upon the conclusion of the pres-**
 2 **entation of evidence, the court shall determine whether the defendant is eligible for the**
 3 **death penalty under section 1 of this 2009 Act. If the court finds that the defendant:**

4 (i) **Is eligible for the death penalty under section 1 of this 2009 Act, the court shall submit**
 5 **the issues described in paragraph (c) of this subsection to the jury and instruct the jury in**
 6 **accordance with this subsection and subsection (2) of this section; or**

7 (ii) **Is not eligible for the death penalty under section 1 of this 2009 Act, the court shall**
 8 **instruct the jury in accordance with subsection (3) of this section.**

9 [(b)] (c) Upon the conclusion of the presentation of the evidence, the court shall submit the
 10 following issues to the jury:

11 (A) Whether the conduct of the defendant that caused the death of the deceased was committed
 12 deliberately and with the reasonable expectation that death of the deceased or another would result;

13 (B) Whether there is a probability that the defendant would commit criminal acts of violence
 14 that would constitute a continuing threat to society;

15 (C) If raised by the evidence, whether the conduct of the defendant in killing the deceased was
 16 unreasonable in response to the provocation, if any, by the deceased; and

17 (D) Whether the defendant should receive a death sentence.

18 [(c)(A)] (d)(A) The court shall instruct the jury to consider, in determining the issues in para-
 19 graph [(b)] (c) of this subsection, any mitigating circumstances offered in evidence, including but not
 20 limited to the defendant's age, the extent and severity of the defendant's prior criminal conduct and
 21 the extent of the mental and emotional pressure under which the defendant was acting at the time
 22 the offense was committed.

23 (B) The court shall instruct the jury to answer the question in paragraph [(b)(D)] (c)(D) of this
 24 subsection "no" if, after considering any aggravating evidence and any mitigating evidence con-
 25 cerning any aspect of the defendant's character or background, or any circumstances of the offense
 26 and any victim impact evidence as described in paragraph (a) of this subsection, one or more of the
 27 jurors believe that the defendant should not receive a death sentence.

28 [(d)] (e) The state must prove each issue submitted under paragraph [(b)(A)] (c)(A) to (C) of this
 29 subsection beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no"
 30 on each issue considered.

31 [(e)] (f) The court shall charge the jury that it may not answer any issue "yes," under paragraph
 32 [(b)] (c) of this subsection unless it agrees unanimously.

33 [(f)] (g) If the jury returns an affirmative finding on each issue considered under paragraph
 34 [(b)] (c) of this subsection, the trial judge shall sentence the defendant to death.

35 (2)(a) Upon the conclusion of the presentation of the evidence, the court shall [*also*] instruct the
 36 jury that if [*it*] **the jury** reaches a negative finding on any issue under subsection [(1)(b)] (1)(c) of
 37 this section, the trial court shall sentence the defendant to life imprisonment without the possibility
 38 of release or parole, as described in ORS 163.105 (1)(b), unless 10 or more members of the jury fur-
 39 ther find that there are sufficient mitigating circumstances to warrant life imprisonment, in which
 40 case the trial court shall sentence the defendant to life imprisonment as described in ORS 163.105
 41 (1)(c).

42 (b) If the jury returns a negative finding on any issue under subsection [(1)(b)] (1)(c) of this
 43 section and further finds that there are sufficient mitigating circumstances to warrant life
 44 imprisonment, the trial court shall sentence the defendant to life imprisonment in the custody of the
 45 Department of Corrections as provided in ORS 163.105 (1)(c).

1 (3)(a) When the defendant is found guilty of aggravated murder, and ORS 137.707 (2) applies, **the**
 2 **court finds under subsection (1)(b) of this section that the defendant is not eligible for the**
 3 **death penalty under section 1 of this 2009 Act** or the state advises the court on the record that
 4 the state declines to present evidence for purposes of sentencing the defendant to death, the court:

5 (A) [*Shall*] **May** not conduct a sentencing proceeding as described in subsection (1) of this sec-
 6 tion, and a sentence of death [*shall*] **may** not be ordered.

7 (B) Shall conduct a sentencing proceeding to determine whether the defendant shall be sen-
 8 tenced to life imprisonment without the possibility of release or parole as described in ORS 163.105
 9 (1)(b) or life imprisonment as described in ORS 163.105 (1)(c). If the defendant waives all rights to
 10 a jury sentencing proceeding, the court shall conduct the sentencing proceeding as the trier of fact.
 11 The procedure for the sentencing proceeding, whether before a court or a jury, shall follow the
 12 procedure of subsection (1)(a) of this section, as modified by this subsection. In the proceeding, ev-
 13 idence may be presented as to any matter that the court deems relevant to sentence, including, but
 14 not limited to, victim impact evidence relating to the personal characteristics of the victim or the
 15 impact of the crime on the victim's family.

16 (b) Following the presentation of evidence and argument under paragraph (a) of this subsection,
 17 the court shall instruct the jury that the trial court shall sentence the defendant to life
 18 imprisonment without the possibility of release or parole as described in ORS 163.105 (1)(b), unless
 19 after considering all of the evidence submitted, 10 or more members of the jury find there are suf-
 20 ficient mitigating circumstances to warrant life imprisonment with the possibility of parole as de-
 21 scribed in ORS 163.105 (1)(c). If 10 or more members of the jury find there are sufficient mitigating
 22 circumstances to warrant life imprisonment with the possibility of parole, the trial court shall sen-
 23 tence the defendant to life imprisonment as described in ORS 163.105 (1)(c).

24 (c) Nothing in this subsection [*shall preclude*] **precludes** the court from sentencing the defendant
 25 to life imprisonment, as described in ORS 163.105 (1)(c), or life imprisonment without the possibility
 26 of release or parole, as described in ORS 163.105 (1)(b), pursuant to a stipulation of sentence or
 27 stipulation of sentencing facts agreed to and offered by both parties if the defendant waives all
 28 rights to a jury sentencing proceeding.

29 (4) If any part of subsection (2) of this section is held invalid and as a result thereof a defendant
 30 who has been sentenced to life imprisonment without possibility of release or parole will instead be
 31 sentenced to life imprisonment in the custody of the Department of Corrections as provided in ORS
 32 163.105 [(2)] (1)(c), the defendant shall be confined for a minimum of 30 years without possibility of
 33 parole, release on work release or any form of temporary leave or employment at a forest or work
 34 camp. Subsection (2) of this section [*shall apply*] **applies** only to trials commencing on or after July
 35 19, 1989.

36 (5) Notwithstanding subsection (1)(a) of this section, if the trial court grants a mistrial during
 37 the sentencing proceeding, the trial court, at the election of the state, shall either:

38 (a) Sentence the defendant to **life** imprisonment [*for life*] in the custody of the Department of
 39 Corrections as provided in ORS 163.105 (1)(c); or

40 (b) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding
 41 to determine if the defendant should be sentenced to:

42 (A) Death;

43 (B) **Life** imprisonment [*for life*] without the possibility of release or parole as provided in ORS
 44 163.105 (1)(b); or

45 (C) **Life** imprisonment [*for life*] in the custody of the Department of Corrections as provided in

1 ORS 163.105 (1)(c).

2 **SECTION 3.** ORS 137.463 is amended to read:

3 137.463. (1) When a sentence of death is pronounced, the clerk of the court shall deliver a copy
 4 of the judgment of conviction and sentence of death to the sheriff of the county. The sheriff shall
 5 deliver the defendant within 20 days from the date the judgment is entered to the correctional in-
 6 stitution designated by the Director of the Department of Corrections pending the determination of
 7 the automatic and direct review by the Supreme Court under ORS 138.012.

8 (2) If the Supreme Court affirms the sentence of death, a death warrant hearing shall take place
 9 in the court in which the judgment was rendered within 30 days after the effective date of the ap-
 10 pellate judgment or, upon motion of the state, on a later date. The following apply to a death war-
 11 rant hearing under this subsection:

12 (a) The defendant must be present; and

13 (b) The defendant may be represented by counsel. If the defendant was represented by appointed
 14 counsel on automatic and direct review, that counsel's appointment continues for purposes of the
 15 death warrant hearing and any related matters. If that counsel is unavailable, the court shall ap-
 16 point counsel pursuant to the procedure in ORS 135.050 and 135.055.

17 (3)(a) If the defendant indicates the wish to waive the right to counsel for the purpose of the
 18 death warrant hearing, the court shall inquire of the defendant on the record to ensure that the
 19 waiver is competent, knowing and voluntary.

20 (b) If the court finds that the waiver is competent, knowing and voluntary, the court shall dis-
 21 charge counsel.

22 (c) If the court finds on the record that the waiver of the right to counsel granted by this sec-
 23 tion is not competent, knowing or voluntary, the court shall continue the appointment of counsel.

24 (d) Notwithstanding the fact that the court finds on the record that the defendant competently,
 25 knowingly and voluntarily waives the right to counsel, the court may continue the appointment of
 26 counsel as advisor only for the purposes of the death warrant hearing.

27 (4) At the death warrant hearing, the court:

28 (a) After appropriate inquiry **in accordance with subsection (5) of this section**, shall make
 29 [*findings*] **a finding** on the record whether [*the defendant suffers from a mental condition that prevents*
 30 *the defendant from comprehending the reasons for the death sentence or its implication. The defendant*
 31 *has the burden of proving by a preponderance of the evidence that the defendant suffers from a mental*
 32 *condition that prevents the defendant from comprehending the reasons for the death sentence or its*
 33 *implication.*] **any condition or circumstance exists that would render the execution of the de-**
 34 **endant's sentence of death unconstitutionally cruel and unusual.**

35 (b) Shall advise the defendant that the defendant is entitled to counsel in any post-conviction
 36 proceeding and that counsel will be appointed if the defendant is financially eligible for appointed
 37 counsel at state expense.

38 (c) Shall determine whether the defendant intends to pursue any challenges to the sentence or
 39 conviction. If the defendant states on the record that the defendant does not intend to challenge the
 40 sentence or conviction, the court after advising the defendant of the consequences shall make a
 41 finding on the record whether the defendant competently, knowingly and voluntarily waives the
 42 right to pursue:

43 (A) A petition for certiorari to the United States Supreme Court;

44 (B) Post-conviction relief under ORS 138.510 to 138.680; and

45 (C) Federal habeas corpus review under 28 U.S.C. 2254.

1 **(5)(a) A defendant who intends to assert that a condition or circumstance exists that**
 2 **would render the execution of the defendant’s sentence of death unconstitutionally cruel and**
 3 **unusual shall file a notice with the court of that intention at least 14 days before the**
 4 **scheduled death warrant hearing. Notwithstanding the failure of the defendant to file the**
 5 **notice, on motion of the state or the court’s own motion, the court may order an inquiry into**
 6 **whether a condition or circumstance exists that would render the execution of the defend-**
 7 **ant’s sentence of death unconstitutionally cruel and unusual if there is a substantial reason**
 8 **to believe that the condition or circumstance exists.**

9 **(b) Notwithstanding paragraph (a) of this subsection, if a court has previously found that**
 10 **the condition or circumstance at issue does not exist or does not render the execution of the**
 11 **defendant’s sentence of death unconstitutionally cruel and unusual, the court may not in-**
 12 **quire as to the existence of the condition or circumstance unless the court finds by clear and**
 13 **convincing evidence that a material change in the condition or circumstance has occurred**
 14 **since the previous finding became final.**

15 **(c) In an inquiry conducted under this subsection:**

16 **(A) The state and the defendant each have the right to obtain an independent medical,**
 17 **psychiatric or psychological examination of the defendant for purposes of the hearing;**

18 **(B) Section 1 (2)(b) and (3) of this 2009 Act apply; and**

19 **(C) The defendant has the burden of proving by a preponderance of the evidence that the**
 20 **condition or circumstance exists.**

21 *[(5) Following the death warrant hearing, a death warrant, signed by the trial judge of the court*
 22 *in which the judgment was rendered and attested by the clerk of that court, shall be drawn and de-*
 23 *livered to the superintendent of the correctional institution designated by the Director of the Department*
 24 *of Corrections. The death warrant shall specify a day on which the sentence of death is to be executed*
 25 *and shall authorize and command the superintendent to execute the judgment of the court. The trial*
 26 *court shall specify the date of execution of the sentence, taking into consideration the needs of the De-*
 27 *partment of Corrections. The trial court shall specify a date not less than 90 days nor more than 120*
 28 *days following the effective date of the appellate judgment.]*

29 *[(6)(a) Notwithstanding any other provision in this section, if the court finds that the defendant*
 30 *suffers from a mental condition that prevents the defendant from comprehending the reasons for the*
 31 *sentence of death or its implications]*

32 **(6)(a) If the court finds that a condition or circumstance exists that would render the**
 33 **execution of the defendant’s sentence of death unconstitutionally cruel and unusual,** the court
 34 may not issue a death warrant until such time as the court, after appropriate inquiries, finds that
 35 the *[defendant is able to comprehend the reasons for the sentence of death and its implications.]*

36 *[(b)(A) If the court does not issue a death warrant because it finds that the defendant suffers from*
 37 *a mental condition that prevents the defendant from comprehending the reasons for the sentence of*
 38 *death or its implications,]* **condition or circumstance no longer exists.** The court shall conduct
 39 subsequent hearings on the issue on motion of the district attorney or the defendant’s counsel or
 40 on the court’s own motion, upon a showing *[that there is substantial reason to believe that the de-*
 41 *fendant’s]* **by clear and convincing evidence that there has been a material change in the**
 42 **condition or circumstance** *[has changed].*

43 *[(B)]* **(b)** The court may hold a hearing under this *[paragraph]* **subsection** no more frequently
 44 than once every six months.

45 *[(C)]* **(c)** The state and the defendant may obtain an independent medical, psychiatric or psy-

1 chological examination of the defendant in connection with a hearing under this *[paragraph]* **sub-**
 2 **section.**

3 *[(D)]* **(d)** In a hearing under this *[paragraph]* **subsection**, the defendant has the burden of prov-
 4 ing by a preponderance of the evidence that *[the defendant continues to suffer from a mental condition*
 5 *that prevents the defendant from comprehending the reasons for the sentence of death or its*
 6 *implications]* **a condition or circumstance exists that renders the execution of the defendant's**
 7 **sentence of death unconstitutionally cruel and unusual.**

8 **(e) Section 1 (3) of this 2009 Act applies to a hearing under this subsection.**

9 **(7) Except as provided in subsection (6) of this section, following the death warrant**
 10 **hearing, a death warrant, signed by the trial judge of the court in which the judgment was**
 11 **rendered and attested by the clerk of that court, shall be drawn and delivered to the super-**
 12 **intendent of the correctional institution designated by the Director of the Department of**
 13 **Corrections. The death warrant shall specify a day on which the sentence of death is to be**
 14 **executed and shall authorize and command the superintendent to execute the judgment of**
 15 **the court. The trial court shall specify the date of execution of the sentence, taking into**
 16 **consideration the needs of the Department of Corrections. The trial court shall specify a date**
 17 **not less than 90 days nor more than 120 days following the effective date of the appellate**
 18 **judgment.**

19 *[(7)]* **(8)** If for any reason a sentence of death is not executed on the date appointed in the death
 20 warrant, and the sentence of death remains in force and is not stayed under ORS 138.686 or other-
 21 wise by a court of competent jurisdiction, the court that issued the initial death warrant, on motion
 22 of the state and without further hearing, shall issue a new death warrant specifying a new date on
 23 which the sentence is to be executed. The court shall specify a date for execution of the sentence,
 24 taking into consideration the needs of the Department of Corrections. The court shall specify a date
 25 not more than 20 days after the date on which the state's motion was filed.

26 *[(8)]* **(9)** No appeal may be taken from an order issued pursuant to this section.

27 **SECTION 4.** ORS 138.530 is amended to read:

28 138.530. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the
 29 court when one or more of the following grounds is established by the petitioner:

30 (a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appel-
 31 late review thereof, of petitioner's rights under the Constitution of the United States, or under the
 32 Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

33 (b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's con-
 34 viction.

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

37 (d) Unconstitutionality of the statute making criminal the acts for which petitioner was con-
 38 victed.

39 **(e) Unconstitutionality of a sentence of death under section 1 of this 2009 Act.**

40 (2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680
 41 shall not be construed to deny relief where such relief would have been available prior to May 26,
 42 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive
 43 clemency or pardon provided by law.

44 (3) ORS 138.510 to 138.680 shall not be (3) construed to limit the original jurisdiction of the Su-
 45 preme Court in habeas corpus as provided in the Constitution of this state.

SECTION 5. ORS 138.012 is amended to read:

138.012. (1) The judgment of conviction and sentence of death entered under ORS 163.150 [(1)(f)] **(1)(g)** is subject to automatic and direct review by the Supreme Court. The review by the Supreme Court has priority over all other cases and shall be heard in accordance with rules adopted by the Supreme Court.

(2) Notwithstanding ORS 163.150 (1)(a), after automatic and direct review of a conviction and sentence of death the following apply:

(a) If a reviewing court finds prejudicial error in the sentencing proceeding only, the court may set aside the sentence of death and remand the case to the trial court. No error in the sentencing proceeding results in reversal of the defendant's conviction for aggravated murder. Upon remand and at the election of the state, the trial court shall either:

(A) Sentence the defendant to imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c); or

(B) Impanel a new sentencing jury for the purpose of conducting a new sentencing proceeding to determine if the defendant should be sentenced to:

(i) Death;

(ii) Imprisonment for life without the possibility of release or parole as provided in ORS 163.105 (1)(b); or

(iii) Imprisonment for life in the custody of the Department of Corrections as provided in ORS 163.105 (1)(c).

(b) The new sentencing proceeding is governed by the provisions of ORS 163.150 (1), (2), (3) and (5). A transcript of all testimony and all exhibits and other evidence properly admitted in the prior trial and sentencing proceeding are admissible in the new sentencing proceeding. Either party may recall any witness who testified at the prior trial or sentencing proceeding and may present additional relevant evidence.

(c) The provisions of this subsection are procedural and apply to any defendant sentenced to death after December 6, 1984.

SECTION 6. (1) The amendments to ORS 163.150 by section 2 of this 2009 Act apply to sentencing proceedings conducted on or after the effective date of this 2009 Act.

(2) The amendments to ORS 137.463 by section 3 of this 2009 Act apply to death warrant hearings conducted on or after the effective date of this 2009 Act.