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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 also have 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. LC 2740 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, through 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 likely would 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 LC 2740 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).

It 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. 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* discussion regarding continuation of Work Group to focus on "special statutory proceedings," page 4.

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.

TABLE OF STATUTES IN ORS CHAPTERS 40, 136, 137, & 138 AMENDED, RECODIFIED & REPEALED

ORS Chapters 4, 136, 137

40.460	Amended by Section 21.
136.120	Amended by Section 5.
136.130	Repealed; *but see* Section 5.
136.140	Repealed; *but see* Section 5.
136.434	Amended by Section 22.
137.020	Amended by Section 23.
137.079	Amended by Section 24.

ORS Chapter 138

138.005	Amended by Section 1.
138.010	No change.
138.012	No change.
138.020	No change.
138.030	No change.
138.040	Repealed; *but* for subsection (1) *see* Sections 3(1)(a), (3), and (5) as well as Section 13(3) and (7); for subsection (2), no replacement.
138.050	Repealed; *but* for subsection (1), *see* Section 6(1)(a) and (b), and (3); for subsection (2)(a), *see* Section 3(1)(a), and for (2)(b), no replacement (*but see* ORS 157.010 and 221.359); for subsection (3), *see* Section 13(7); for subsection (4), no replacement.
138.053	Repealed; *but* for subsection (1), *see* Section 3(1)(a)(A)-(C) and (3); for subsection (2), no replacement; for subsection (3), *see* Section 6(2)(a).
138.057	No change.

138.060	Amended by Section 4; for subsection (3), *see* amendment to ORS 138.261(6) by Section 17.
138.071	Amended by Section 7.
138.081	Amended by Section 8.
138.083	Repealed
138.090	No change.
138.110	Repealed; *but see* Section 8.
138.120	Repealed; *but see* Section 8.
138.125	No change.
138.135	No change.
138.160	No change.
138.185	Amended by Section 9; *but* for the scope of review provision in subsection (2), *see* Section 13(3).
138.210	Amended by Section 11.
138.220	Repealed; *but see* Sections 13(2) and 14(2).
138.222	Repealed; *but* for subsections (1)-(4) *see* Section 13(7)-(9) and Section 14(5)-(7); for subsection (5), *see* Section 15(4); for subsection (6), no replacement; for subsection (7), *see* Sections 3(3), 4(1)(f), and 6(2).
138.225	No change.
138.227	Amended by Section 16.
138.230	Repealed; *but see* Section 15(2).
138.240	Repealed; *but see* Section 15(1).
138.250	Repealed; for new trial provision, *see* Section 15(3); for release from custody provision, *see* Section 15(5).
138.255	No change.
138.261	Amended by Section 17.
138.300	Repealed; no replacement.
138.310	No change.

Table Correlating Substantive Provisions of SB 896 to Current Statutes

Section 1	Amends ORS 138.005; subsection (1), no change; subsections (2)-(4) new; subsection (5) new, *but see* ORS 138.071(2)(g), 138.053(1)(a)-e), and 138.222(7)(b).
Section 3	Subsection (1) derived in part from ORS 138.050(2)(a) and 138.081(2)(a); subsection (1)(a)(A)-(C) derived in part from ORS 138.040 and 138.053(1)(a); subsection (1)(b) is new; subsection (2)(a) derived from 138.083(2)(a); subsection (2)(b), *see* ORS 138.083(3)(a); subsection (3) derived from ORS 138.053(1)(b)-(e) and 138.222(7)(b); subsection (4), *see* ORS 138.083(1)(b) and (3)(a); subsection (5) derived from ORS 138.040.
Section 4	Amends ORS 138.060; amendment to new subsection (1)(f) derived in part from ORS 138.222(7); provisions of subsection (3) being deleted are recodified at ORS 138.261(6) as amended by Section 17 of the Act.
Section 5	Amends ORS 138.120; new subsection (2) derived from ORS 136.130 and 136.140.
Section 6	Subsection (1)(a) derived from ORS 138.050(1); subsection (1)(b) substantially modifies provisions of ORS 138.050(1)(a) and (b) and 138.222(7)(a); subsection (2)(a) derived in part from 138.053(3) and 138.222(7)(b); subsection (2)(b) derived from ORS 138.222(7)(c).
Section 7	Amends ORS 138.071; new subsection (4) derived from ORS 138.071(4) and ORS 138.083.
Section 8	Amends ORS 138.081; new subsection (2) derived from ORS 138.110 and 138.120; subsection (3) derived from 138.081(2).
Section 9	Amends ORS 138.185; deleted provisions of subsection (1) are subsumed by the amendments to subsection (2); deleted provision of subsection (2) as applicable to State appeals is recodified at Section 14(3).
Section 10	Derived from ORS 183.083(1)(b), (2)(c), and (4).
Section 11	Amends ORS 138.210; *see* ORS 138.185(2) making ORS 19.270 applicable to criminal appeals, and ORS 19.270(3).
Section 12	Codifies case law applying ORS 19.205(5) to proceedings in criminal cases.
Section 13	Subsection (2) derived from ORS 138.220; subsection (3) derived from ORS 138.040(1)(a); subsection (4) derived from case law; subsection (5)(a), *see* ORS 138.050(1) and 138.222(7)(a); subsection (6) derived from

case law; subsection (7), *see* ORS 138.222(4)(a); subsection (8)(a) derived from ORS 138.222(2)(a)-(c); subsection (8)(b) derived from ORS 138.222(3); subsection (8)(c) derived from ORS 138.222(4)(b) and (c); subsection (9) derived from ORS 138.222(2)(d); subsection (10), *see* ORS 18.107; subsection (11)(a) derived from case law.

Section 14 Subsection (2) derived from 138.220; subsection (3) derived from ORS 19.425, made applicable to criminal cases by ORS 138.185(2); subsection (4)(a) derived from ORS 138.060(1)(e) and 138.222(7); subsection (5) derived from ORS 138.222(4)(a); subsection (6)(a) derived from ORS 138.222(2)(a)-(c); subsection (6)(b) derived from ORS 138.222(3); subsection (6)(c) derived from ORS 138.222(4)(b) and (c); subsection (7) derived from ORS 138.222(2)(d); subsection 8, *see* ORS 18.107.

Section 15 Subsection (1) derived from ORS 138.240; subsection (2) replaces ORS 138.230; subsection (4) is derived from ORS 138.222(5); subsection (5) is derived from ORS 138.250.

Section 16 Amends ORS 138.227.

Section 17 Amends ORS 138.261; new subsection (6) derived from ORS 138.060(3).

Section 19 Derived from ORS 138.083(2)(b) and (c).

Section 20 Derived from ORS 138.083(1)(a) and (b).

Section 21 Amends ORS 40.460; amendment to subsection (18a)(b) conforms to the amendment of ORS 138.060 by Section 4 of the Act.

Section 22 Amends ORS 136.434; amendment to subsection (3) conforms to the amendment of ORS 138.060 by Section 4 of the Act.

Section 23 Amends ORS 137.020; amendment to subsection (5)(b) relates to the repeal of ORS 138.050 and 138.222 and the adoption of Section 13 of this Act.

Section 24 Amends ORS 137.079; amendment to subsection (5)(f) relates to the repeal of ORS 138.222 and the adoption of Sections 13 and 14 of this Act.

Section 25 Amends ORS 138.697; relates to the repeal of ORS 138.240 and 138.250 and the adoption of Section 15 of this Act.

Section 26 Repeals ORS 136.130, 136.140, 138.040, 138.050, 138.053, 138.083, 138.110, 138.120, 138.220, 138.222, 138.230, 138.240, 138.250, and 138.300.

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