Oregon

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Testimony of Shawn Wiley, Chief Deputy Defender
Supporting SB 42 with Dash 1 Amendment
Senate Judiciary Committee
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Chair Prozanski and Members of the Committee:

Thank you for the opportunity to provide information in support of Senate Bill 42, as amended by the Dash 1 amendment. The bill, as amended, would create the right to appeal from a circuit court's decision to grant or deny a post-conviction motion for DNA testing under ORS 138.690 through 138.698.

One of the most dramatic developments in criminal law in the past 20 years is the use of DNA testing to exonerate wrongfully convicted people throughout the country. Hundreds of people who were wrongfully accused and convicted of horrific crimes, most often on the basis of faulty eyewitness identification procedures, have been freed after years, often decades, of imprisonment when DNA testing showed they did not commit the crime.

Oregon recognized the import of this development early, and in 2001 the legislature enacted a set of statutes under which a person incarcerated for aggravated murder or a person felony can request DNA testing to be conducted on evidence gathered during the investigation of the crime. DNA testing by that time had become relatively inexpensive, and this body recognized the potential for DNA testing to insure the integrity of Oregon's criminal justice system.

The legislation enjoyed wide support among both parties and among prosecutors and criminal defense attorneys, and was enacted as an inexpensive and important safeguard to insure the fairness and integrity of Oregon's criminal justice system. Simply put, the testing statute had something for everyone.

If the DNA testing shows that the person was wrongfully convicted:

- an innocent person is released from prison and vindicated
- the state saves the money that would have been spent on further incarceration
- the public is assured that the justice system is fair and works
- law enforcement knows that the true perpetrator needs to be identified and brought to justice, and now has the true perpetrator's DNA in hand to compare to databases.

On the other hand, if the DNA testing shows that the person in fact committed the crime, the testing statutes require the testing results and the person's genetic profile to be forwarded to law enforcement and the Board of Parole.

The problem, unanticipated at the time the DNA testing law was enacted, is that there was no provision for appeal included. The Oregon Court of Appeals issued an opinion last month, *State v. Stressla Johnson*, that confirmed that the general statutes authorizing criminal appeals do not authorize the appeal of a trial judge's order denying or allowing DNA testing under the testing law. The result is that if the judge denies the motion for testing for any reason, the person asking for the testing has no way to challenge that ruling in state or federal court. This obviously has great potential to frustrate the legislature's intent in enacting the testing statute, and could result in the continued incarceration of innocent people.

Judges have had wildly different interpretations of the testing statutes:

- in one case, the judge believed that only someone who had an ongoing appeal of the conviction could request DNA testing (which is not a requirement of the statute)
- another judge believed that the person's plea agreement precluded him from requesting DNA testing
- other judges have had different ideas about the requirements that a person requesting the testing had to meet, the burden of proof, etc.

A person denied DNA testing under such circumstances has no recourse and no way to have the judge's order reviewed. That frustrates the intent of the legislature in enacting the testing statutes and results in injustice. The statute has therefore been sparsely used and inconsistently applied.

In addition, the process of appellate review typically clarifies the statute's meaning and how the process is supposed to work. Without that review, trial courts are left without guidance, and the inevitable result is that the statute is inconsistently implemented – i.e., different results in different counties.

SB 42, as amended, would allow either side - the person asking for the testing or the state - to appeal the judge's order. If the state feels that the judge should not have allowed the testing or a new trial, it can appeal. If the person feels that the judge improperly denied DNA testing, he or she can appeal.

The fiscal impact of the bill is negligible. The Appellate Division of OPDS typically receives two or three of these cases per year, at most. Our office handles over 1,200 criminal appeals per year. Many of the DNA testing cases will not present significant issues and will not require extensive judicial resources. The DNA testing itself is not expensive, and has been estimated in the range of $30 to $50 per case.

Thank you for your consideration. Please feel free to contact me with any questions or concerns that you may have.