Oregon Innocence Project

House Judiciary Hearing on House Bill 3206
Testimony of Steven T. Wax, Legal Director, The Oregon Innocence Project
wax@oregoninnocence.org
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My name is Steven T. Wax. I have served as the Legal Director for Oregon's new Innocence Project since October 1, 2014. For the prior 31 years, I served as the Federal Defender for the District of Oregon. During that time I represented, and supervised the representation of, thousands of prisoners serving sentences in the Oregon State Prisons who were challenging their convictions in federal habeas corpus petitions. Prior to my tenure in the Federal Defender Office, I spent eight years trying cases and handling appeals in the New York State courts, four as an assistant district attorney in Brooklyn, N.Y., and four as Public Defender of Broome County.

I am here to testify in support of HB 3206. Other witnesses will be providing the Committee background on DNA testing, the importance of such testing, and the number of cases in which such testing has led to exoneration of people who had been wrongly convicted and incarcerated. My focus will be on some of the practical aspects of the current legislation and the proposed amendments.

Oregon was a leader in the nationwide recognition that our criminal justice system, on occasion, makes mistakes that can be corrected through forensic science and that scientific advances can open up avenues of investigation that might not have been available when a crime was committed. I applaud this body for the foresight it showed in 2001 when the current DNA testing statute was passed.

Experience in Oregon, and in other states that have subsequently enacted DNA testing statutes, has shown, however, that the standards contained in the current statute are difficult to work with. Indeed, it appears that only two motions for testing have been granted since the statute was enacted. Perhaps of more significance, the statute has spawned a host of appellate cases as judges, defense attorneys, and prosecutors have grappled with its terms. The proposed revisions are intended to clarify some of the confusing provisions and bring the statute in line with those in other states.

Specific or specified evidence. ORS 138.692(1)(a) currently requires a person seeking testing to identify "the specific evidence" to be tested. That is an unworkable standard and currently the subject of litigation. A prisoner will rarely know what "specific" evidence exists. The amendment removes the term "specific." A movant will still need to identify the evidence he wants tested.

> For example, the current statute would require a movant to state that he wanted to have the "third cue tip swab taken from the victims thigh" tested. Under the new statute, he would say, "the rape kit." The parties would then determine what the rape kit contains and what makes sense to test.

Crime of Conviction. O.R.S. 138.690 currently authorizes testing for many more crimes for who are incarcerated than for those who have been released. It allows testing for incarcerated persons for a long list of crimes defined as "person felonies" by the Oregon Criminal Justice Commission. It does not allow testing for persons convicted of other felonies or of any misdemeanors. The amendment

eliminates the distinction between persons who are incarcerated and those who are not. It eliminates reference to the long list of felonies the Crime Commission identified for other purposes.

The proposed change will have minimal impact. Evidence from which DNA can be obtained is not relevant in many crimes. It may, on rare occasions, be relevant in some non-enumerated felonies or misdemeanor cases, for example Burglary II or misdemeanor assault. The proponents of the legislation believe that a standard that permits testing in any case in which the requisite showing of relevance and potential exoneration can be made should be permitted.

In order to obtain a testing order, a movant will need to make a prima facie showing that evidence, if tested and assuming exculpatory results, would lead to a finding that he would not have been convicted. This will severely limit the number of motions in non-person felonies and misdemeanors because identification will rarely be at issue.

Actual innocence versus finding a person would not have been convicted.
The current statute, in O.R.S. 138.690 (d), requires a finding that test results would "establish the actual innocence of the person." That standard ignores the realities of investigation of crime. DNA itself will only establish actual innocence on some occasions. It is often the case that DNA will lead to new avenues of investigation or cause reconsideration of existing evidence. The new standard addresses that reality.

In some cases, for example, the absence of a defendant's DNA from a crime scene may not, in and of itself, overcome other evidence that was presented by the prosecution at trial. It may, rather, be necessary to conduct other investigation of the original evidence or investigate another person who can be identified as having deposited the DNA.

The new standard remains stringent. In order to obtain testing under the proposed amendments, a movant must still submit an affidavit, the affidavit must still contain an assertion of innocence, it must still assert a theory of defense related to the testing, and show how the testing would lead to a different result at trial. The reviewing court is still required to find that the movant has satisfied those statutory requirements.

Actual innocence of conduct versus lesser sentence. The current statute, in O.R.S. 138.692(b), requires a finding of "actual innocence" of "conduct" that would result in a mandatory sentence reduction. The proposed amendment with respect to sentencing tracks the amendment with respect to innocence and changes the standard to require a finding that a lesser sentence would have resulted.

With respect to sentencing, DNA results could be relevant in a capital sentencing or a dangerous offender finding based on prior conduct, or with respect to the degree of a crime or personal culpability.

Statement of Reasons. The current statute does not require the court to explain why it denied a motion for testing. Proposed new subsection 138.692 (8) would require the court to do so.

The current statute has spawned unnecessary appellate litigation. A statement of the reasons why a motion was denied may well avoid appeals if the movant sees, for example, that his motion was denied because no evidence exists.

Clarification of appointment of counsel. The current language regarding the appointment of counsel in O.R.S. 138.694(1) is confusing. It can be read to limit counsel to advising on whether a person should file a motion. The proposed amendment would clarify that a person should have counsel throughout any DNA proceedings.

> The reality is that very few prisoners are equipped to handle a DNA motion and the investigation it will often require while in prison and without the assistance of counsel. The presence of counsel should streamline proceedings and lead to dismissal of motions that cannot succeed.

Chain of Custody. The current statute in, O.R.S. 138.692(2)(b), permits testing only if there is a sufficient "chain of custody" AND if the evidence to be tested is in the possession of a city, county, state, or court. The proposed amendment maintains the chain of custody requirement but eliminates the provision on possession.

> The critical issue in any case is "chain of custody." It should make no difference who has been in actual possession of the evidence if the chain can be established. In one case subject to litigation, the state argued against testing based on the possession element. The court has, so far, rejected that argument. The amendment would keep the focus on the relevant issue.

Testing Laboratory. The current statute, in O.R.S. 128.692 (4), requires that testing be performed by the Oregon State Police Crime Laboratory. The proposed amendment would permit testing on agreement of the parties, or if the court finds good cause, by other accredited laboratories.

> At times, the nature of the testing required may be beyond the capabilities of the State Crime Law. At times, the issues involved in a motion for testing may involve, or have involved, the activities of the State Crime Lab. In those circumstances the proponents of the amendments believe that the court should have the authority to order independent testing.

Thank you for your consideration of these issues.