FORENSIC JUSTICE PROJECT
the science of justice

Senate Judiciary Hearing on Senate Bill 751

Written Testimony of Janis C. Puracal, Executive Director, Forensic Justice Project

March 24, 2021

Chair Prozanski, Vice-Chair Thatcher, and members of the Committee,

Thank you for the opportunity to present testimony in support of Senate Bill 751 with the workgroup proposal regarding discovery reform. The Forensic Justice Project (FJP) participated in the workgroup on discovery that resulted in the proposal. We believe this proposal is one small step toward transparency and equal access to information in criminal cases. We appreciate the commitment from Chair Prozanski and others to continue the work on discovery procedure in the interim to find a path toward more comprehensive and meaningful reform.

A. Background of the Forensic Justice Project

The Forensic Justice Project ("FJP") is a nonprofit organization that was created in Oregon to prevent wrongful convictions before they happen and correct them after they happen. We do that by focusing on forensic evidence. We work at all stages of the criminal process—from pretrial through post-conviction—to challenge the use of faulty forensic evidence and to find sound forensic evidence. We focus on getting good science into the courtroom and bad science out of the courtroom.

In FJP's experience, we often struggle to get access to information pre-trial, even though that information may reveal serious flaws in the forensic methods that should be challenged in the courtroom and may even render evidence inadmissible because it is unreliable and should not be used to convict.

In a number of post-conviction cases in Oregon, FJP has uncovered discovery violations years after a person was convicted. Those discovery violations had been hidden from view because of the limited right to discovery pre-trial,[1] as compared to the robust civil rules of discovery that apply in post-conviction.[2]

The sad irony cannot be ignored. Under Oregon law, we require that a person be convicted of a crime ***before*** we give that person a meaningful opportunity to access information in the hands of the police, the state lab, and prosecutors. The current procedure is costly and inefficient.

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[1] *See* ORS 135.805, *et seq*.
[2] *See, e.g., Ogle v. Nooth*, 365 Or. 771, 781, 453 P.3d 1274 (2019).

B. Discovery Violations are Rampant Across the Country

A recent report by the National Registry of Exonerations found that official misconduct, including discovery violations, contributed to wrongful conviction in 54% of exonerations across the country.[3] The report found that the most common type of official misconduct was concealing exculpatory evidence, which contributed to 44% of exonerations and was found to have been committed by both police and prosecutors across the country.[4]

B. Discovery Violations are Rampant in Oregon

The constitutional right to discovery in criminal cases has been well-established for almost sixty years.[5] Still, violations are rampant,[6] and several high-profile cases have brought to light an ongoing problem in Oregon.[7]

For example, in 2019, our client, Nicholas McGuffin, was exonerated after an Oregon post-conviction court found that the Oregon State Police crime lab ("OSP Lab") wrongly withheld exculpatory DNA evidence in a murder case.[8] The murder occurred in 2000, and Mr. McGuffin was wrongfully convicted in 2011. The OSP Lab knew since 2000, however, that there was DNA belonging to another man, and the lab did not report that exculpatory DNA evidence. An analyst, instead, told the jury that no such DNA existed. When confronted with the exculpatory DNA evidence in post-conviction, the OSP Lab explained that it did not report the DNA earlier because the lab had an internal policy that allowed the analysts the discretion to decide, on their own, whether to disclose or withhold "low level" DNA. That internal policy directly contradicts United States Supreme Court case law requiring disclosure of exculpatory evidence, and yet the policy was in place at the OSP Lab until at least 2010.

Even after that lab policy was changed, we have continued to see ongoing problems with discovery. For example, in 2014, state police discovered that an OSP Lab analyst, Jeff

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[3] Samuel Gross, *et al*, *Government Misconduct and Convicting the Innocent: The Role of Prosecutors, Police and Other Law Enforcement*, at iii and 11 (2020), https://www.law.umich.edu/special/exoneration/Documents/Government_Misconduct_and_Convicting_the_Innocent.pdf.

[4] *Id.* at 32, 75.

[5] *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963).

[6] *United States v. Olsen*, 737 F.3d 625, 626 (9th Cir. 2013) (Kozinski, J., dissenting) (Chief Judge Kozinski of the Ninth Circuit recognized that "[t]here is an epidemic of *Brady* violations abroad in the land.").

[7] *See, e.g.*, the case of Nicholas McGuffin, exonerated in Oregon in 2019. National Registry of Exonerations: https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5664.

[8] *Id.*

Dovci, failed to disclose exculpatory evidence in another criminal case.[9] Mr. Dovci was further found to have overstated the evidence during the criminal trial in that case.[10]

Most recently, FJP filed another post-conviction lawsuit on behalf of a young woman who was convicted as a juvenile in 2017 after the OSP Lab failed to disclose exculpatory DNA evidence. That case is still in litigation.

Larger investigations have uncovered a lack of *Brady* policies in law enforcement agencies across the state.[11] Without written discovery policies in place, it is unknown the current state of training and compliance from agency to agency. As it stands, individuals charged with a crime in Oregon may discover exculpatory information known to the State only ***after*** conviction and oftentimes only by chance. State and local agencies face unknown civil liability for violations that result in wrongful convictions.

C. At a minimum, there should be parity between criminal and civil discovery.

Oddly, in Oregon, a person accused of a crime is afforded a greater opportunity at discovery ***after*** he or she is convicted, than ***before*** he or she is convicted.

In post-conviction, the Oregon Rules of Civil Procedure apply, and a person convicted of a crime can subpoena records, take depositions, inspect and test physical evidence, request admissions, and is generally given the tools to uncover information.[12] The convicted person can even get access to expert discovery by way of statute,[13] and there are timelines that can modified by the parties and the court.

But that is only after conviction. The accused must go through the criminal trial and direct appeal before they are given a meaningful right to discovery in Oregon.

The workgroup proposal addresses only one part of the problem—the lack of any affirmative statutory duty by prosecutors to disclose evidence.

We expect to continue conversations with stakeholders about the other root causes of the problem in the interim, and we ask that the Committee voice strong support for meaningful reform.

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[9] *See* Michael Romano, *Forensic Felons: Criminals in the Oregon Crime Labs* (2016), available at https://romanolawpc.com/criminals-in-the-oregon-crime-labs/.
[10] *Id.*
[11] Wright Gazaway, *Oregon Law Enforcement Agencies Might No "Play by the Rules," Defense Attorney Says* (2020), available at https://katu.com/news/on-your-side/oregon-law-enforcement-agencies-might-not-play-by-the-rules-defense-attorney-says?fbclid=IwAR3faxO2KvQqKLjxZyrs4k5kNf5OSYG1JSlmRpakcNvwpLI_piOJJRwMjzU.
[12] *See*, *e.g.*, Oregon Rules of Civil Procedure 39, 43, 44, 45, and 55.
[13] ORS 138.615.

We support the Committee's efforts to reform discovery, and we look forward to ongoing conversations within the workgroup in the interim. Thank you.

Sincerely,

Janis C. Puracal
Attorney and Executive Director
jpuracal@forensicjusticeproject.org