

# INNOCENCE PROJECT

Contact: Rebecca Brown, Director of Policy, [rbrown@innocenceproject.org](mailto:rbrown@innocenceproject.org)

**Senate Bill 751A (Favorable)**  
**Improving Oregon's Discovery Framework**  
**Rebecca Brown, Innocence Project**  
House Committee on Judiciary  
May 18, 2021

The Innocence Project is a national organization dedicated to freeing the innocent and working on changes to law and policy to strengthen the justice system. Since 1992, the Innocence Project has worked to exonerate 375 innocent men and women through DNA evidence.

When the state takes an innocent person's liberty, the state has a responsibility to understand the causes of that wrongful conviction and take steps to prevent future miscarriages of justice. The National Registry of Exonerations, which maintains a database of all wrongful convictions since 1989, issued a recent report indicating that of the nearly 3000 documented cases of people exonerated of crimes they did not commit, 44% involved government concealing of exculpatory evidence. The concealment of that evidence is not limited to prosecutorial behavior but also can be attributed to the actions of other government officials, including law enforcement.

Oregon is to be commended for revisiting its discovery framework as a failure to share potentially exculpatory material with the defense is a leading contributing factor to wrongful conviction. There are a few aspects of a robust discovery framework that we are hopeful either become law or are placed in work group that will convene after to ensure that this foundational reform is meaningful:

1. **Ensuring that documentary evidence is provided to the defense**, with the exception of tangible evidence, as opposed to the current "inspect and copy" policy, which limits efficient case outcomes and is both onerous and unnecessary to enable justice. Under the current scheme, the defense is forced to hunt down discovery rather than receiving it in the natural course of their work, which causes inefficiencies and poor resource allocation, while also limiting the time the defense can dedicate to lawyering.
2. **Extending discovery obligations past the prosecution to include any State investigatory agency**. It is not uncommon, once a wrongful conviction is revealed, to learn that it was either a police agency or a crime lab that failed to provide proper discovery to the prosecution so that the prosecution could meet its discovery obligations. Making clear that discovery obligations extend to all relevant state agencies will ensure

that the defense is furnished with all of the information it needs to effectively advise clients in advance of a plea deal or trial.

3. **Articulating timelines for defense discovery.** Only sixteen states fail to articulate clear timelines for the disclosure of evidence to the defense. When there is loose language, i.e. when practicable or as soon as practicable, this leaves discretion to the prosecution about when to turn over evidence. Since there is a baked-in incentive for prosecutors to delay discovery to compel plea agreements, discretion should not be left to the prosecution. We also know from the nation's 375 DNA-based exonerations that more than 10% of these actually innocent people accepted pleas for the worst of all crimes, namely rapes and murders. It is only when the defense is made aware of the evidence that can be used against his or her client that decisions can be made that assure more fair and accurate outcomes.
4. **Assuring access to depositions to the defense.** Forty-one states already assure access to depositions to the defense.
5. **Ensuring compliance both through discovery colloquies and sanctions for discovery violations.** Nearly every state includes some form of a compliance mechanism; however, the ones with more teeth are more likely to assure broad and relevant discovery. Too often, information that is relevant to the defense theory of innocence is deemed immaterial by the prosecution, thus stymying both innocence claims and the ability to identify the actual assailant. Assuring compliance through a colloquy and sanctions will prevent avoidable miscarriages of justice, which would enable the innocent to effectively fight their case and identify the actual assailants of crime.
6. **Removing discovery fees that are assessed on the Office of Public Defense Services.** There should be no pricetag on justice. Given that defenders are already under-resourced with respect to caseloads and effective investigatory resources, it is alarming that the Office of Defense Services would be straddled with expenses and fees relating to adequate representation. While the counties may see this as a cost-saving measure, in actuality it places great burdens on the defense. Counties should be more concerned with the multi-million civil lawsuits that grow out of wrongful convictions enabled by poor discovery practices. The cost of just one civil settlement for a wrongful conviction will far outweigh any costs the county recoups from the defenders for discovery fees.
7. **Assessing the practicability of electronic discovery.** Some states that have promoted open file discovery have effectuated those reforms through electronic discovery, saving all parties from the logistics involved in a paper-based system. Oregon would do well to modernize its discovery practices, thereby providing efficiencies to all corners of the criminal justice community.

The Innocence Project applauds this committee for considering a comprehensive approach to discovery reform, both with respect to possible amendments to that framework through legislation and through further study in a work group. We remain committed to being a resource to Oregon as it continues to pursue this work and support consideration of all of the elements of a robust discovery framework that I described in my testimony. Please do not hesitate to contact me if I can be of assistance to lawmakers and the ongoing work of the work group at [rbrown@innocenceproject.org](mailto:rbrown@innocenceproject.org).