



**TO: Sen. Floyd Prozanski
Members of Senate Judiciary Committee**

FR: Oregon District Attorneys Association

RE: SB 1511 – Technical Concerns and Alternative Proposals

January 31, 2022

The ODAA has significant concerns with SB 1511 as introduced and believes that any bill of this significance would benefit from vetting by all stakeholders, including district attorneys and crime victim advocates. Unfortunately, the timeline available in this 35-day session will not allow SB 1511 the careful examination it needs from these important stakeholders to provide critical input on such an important issue. The ODAA urges the Committee to reset this conversation before retroactive policy that will affect the lives of thousands of crime victims is passed in this short session.

1. Technical Concerns with SB 1511

Unfortunately, there are too many technical concerns to address them all here. As a result, we have identified those technical concerns that we believe are most relevant for immediate consideration at this stage and welcome the opportunity to discuss in greater detail.

- SB 1511 is currently unclear about what happens in instances where there were multiple convictions in one case, some unanimous and others non-unanimous.¹ Without clarification, the bill results in two classes of defendants with one group getting broader

¹ Any bill must clarify that only non-unanimous convictions are to be retried and unanimous convictions from the same case remain undisturbed. Victims should not be forced to testify again on a count with a unanimous guilty verdict; but they should likewise not be prohibited from doing so. Clarifying that only non-unanimous counts are to be retried will limit the burden on the justice system because the remaining counts might carry enough of a penalty that victims and prosecutors would not pursue a retrial of the non-unanimous counts. Other concerns include: if a defendant was convicted of two crimes that were merged pursuant to ORS 161.067, what the effect would be if one of those convictions was unanimous and the other not unanimous; or if the state agreed not to retry the non-unanimous counts, would the defendant be re-sentenced on the remaining counts? Clarifying these issues now will save judicial resources, prosecutorial resources, defense resources, and the well-being of victims down the road.

relief than the other. Specifically, a defendant who is successful under this bill gets their entire case overturned, while a defendant whose case was reversed on direct appeal due to *Ramos* only gets a reversal of their nonunanimous counts.

- SB 1511 creates a very broad and potentially unverifiable level of what is deemed “evidence.” See Section 1(3).² The bill authorizes a judge to make the determination of whether a verdict was non-unanimous based on information well beyond any trial record.
- SB 1511 will provide defendants with an opportunity to raise PCR claims that were previously barred or untimely. Even if unsuccessful, costly litigation will occur.
- SB 1511 fails to address whether a defendant granted a new trial can then file a motion to dismiss based on constitutional speedy trial issues due to the passage of time, unavailability of witnesses, or degradation and/or loss of evidence.³
- SB 1511 provides relief even if there would be no difference in the defendant’s ultimate sentence. This can occur because a defendant’s entire sentence may be imposed on a single, unanimous count.
- SB 1511 does not even account for the most significant cost – the cost to victims. The bill fails to allocate *any* money for victim assistance programs or therapeutic services to address trauma that a retrial will necessarily cause, particularly for victims of child sexual and physical abuse, victims of adult sexual and physical abuse, and victims of other violent crimes. No matter the reason, it is beyond dispute that retrials are traumatic for victims of crime. Funding for DAVAP’s and victim notification must be included in any final bill.
- SB 1511 does not allocate any funding for district attorney, law enforcement, defense or court expenditures which will necessarily result from the passage of any *Ramos* retroactive legislation. Funding for all entities is fundamental and *must* be included in any final bill.
- SB 1511 does not express any right of the state to seek an appeal from a potentially incorrect ruling by a trial court.
- SB 1511 implies that a “guilty except for insanity” non-unanimous verdict is the same as a non-unanimous guilty verdict. That is not necessarily so, because insanity is an affirmative defense. By way of example: a non-unanimous “guilty except for insanity” verdict could be representative of 10 or 11 jurors believing the defendant proved the

² Distinct from what the *Ramos* direct appeal cases allow.

³ Most police agencies are at maximum capacity in their evidence rooms. Best practices *require* the periodic purging of evidence from old cases to make way for new evidence that must be properly maintained. Typically, a conservative timeline for the preservation of trial evidence is through the direct appeal and post-conviction proceeding. In situations where those timelines have long since passed, evidence will be unavailable.

affirmative defense of insanity by a preponderance of the evidence with 1 or 2 jurors rejecting that affirmative defense and believing the defendant should be convicted of the crime.

2. Modifications to SB 1511

There are modifications that could be made to SB 1511 that would help address the current concerns with the broad and sweeping retroactive proposal reflected in the current bill. Those recommendations include:

- Remove this from a post-conviction proceeding and classify it as its own proceeding, requiring that a petition be filed in the circuit court of conviction, applicable only to felonies, with the burden on the defendant by clear and convincing evidence based solely on the trial record.
- Limit this process to only those individuals who have no other felony convictions other than the conviction resulting from a non-unanimous verdict.
- Prohibit relief if any one or more of the verdicts in a case were unanimous. That is so because judges sentence on an entire trial record and not on individual convictions.
- Exclude any convictions that can be set aside under ORS 137.225.
- Limit the cases based on age of conviction (for example, only those within the last 10 years). Failure to do so makes it increasingly unlikely the state will have evidence or witnesses available to retry a case.
- Limit cases to only those offenders still on supervision, still incarcerated or still required to register as a sex offender.
- Exclude certain types of cases (i.e. where the victim was a child or elderly person).
- Explicitly address that all evidence from the previous trial record is admissible as substantive evidence in any retrial and may be considered by the jury (like a death penalty sentencing retrial).
- Dedicate funding to litigate petitions and retry cases.
- Exclude guilty except for insanity. (That verdict means that the Defendant convinced 10 or 11 jurors that he was insane by a preponderance of the evidence standard. Because the Defendant had to prove that affirmative defense, the verdict doesn't necessarily mean 1 or 2 jurors found the defendant not guilty.)

3. Alternative Proposals

Finally, ODAA suggests the following alternative paths to SB 1511. We believe these concepts would address the proponent's objectives – retroactive *Ramos* relief – while balancing the

impact full retroactive review and retrying of all non-unanimous cases places on crime victims and the system. We look forward to vetting these alternatives with you and urge an interim table to be set to consider them more fully.

Alternative proposals to consider include:

Proposal 1. Judge Determines Interest of Justice.

Rather than a costly retrial, simply erase a criminal conviction if a Defendant can show that their conviction was based on a non-unanimous verdict and it is in the interest of justice to do so, as determined by a judge.

This would allow a judge to consider the impact a nonunanimous verdict had within the defendant's trial, the impact the verdict had on a defendant, and the impact a retrial would have on the victim and public safety. This proposal would balance the true concern behind *Ramos* – potential racial bias – while allowing judges to determine whether there is a genuine concern in a specific case.

An initial framework could be as follows:

- A defendant who can establish beyond a reasonable doubt that the conviction was based on a non-unanimous verdict may apply to the original circuit court for expunction of the non-unanimous count.
- If the original trial judge is still an active circuit court judge, he/she shall conduct the hearing. If not, then another active circuit court judge shall conduct the hearing
- Upon receipt of the application, the court shall conduct a hearing. At the hearing, the court shall consider the record, input from the state, defendant and victim, and shall weigh the equities to determine whether expunction is in the interests of justice.
- If the judge determines beyond a reasonable doubt that expunction is in the interests of justice, the non-unanimous count shall be expunged.
- If within 180 days of the order to expunge the state files notice of an intent to retry the case, the expunction order shall be stayed pending retrial and the case shall be placed on the trial docket.

Proposal 2. Streamlining Eligibility and Retrial Process

SB 1511 in its present form has the potential to flood Oregon's criminal justice system with thousands of cases at a time when our system is already buckling under the weight of recent changes to criminal justice processes. A conscientious restructuring of SB 1511 would alleviate that burden while still extending the benefit of a second trial to appropriate defendants.

Specific Limitations May Include:

- (1) Charges with an incident date within the 10 years prior to the date of the petition;
- (2) Charges with non-unanimous convictions;

- (3) Charges where the victim is still living and has not suffered cognitive decline such that they are unable to testify;
- (4) Charges where the victim was an adult on the incident date; and
- (5) Charges where the defendant is still in custody, under supervision or has some other continuing legal obligation or requirement solely resulting from the non-unanimous conviction at the time they petition for a new trial.
- (6) If a new trial is granted, then the transcripts and audio recording of witness testimony from the first trial be allowed as substantive evidence in the new trial regardless of availability of the witness.

Proposal 3: Adequately Fund the Systems that Must Respond to Reversals.

Local criminal justice systems are still adjusting to recent, major changes to Oregon's criminal justice system and navigating an extensive backlog of criminal cases due to COVID-related delays. These changes include retroactive application of death penalty amendments; unprecedented numbers of clemency petitions; retroactive application of juvenile justice reform through clemency actions; *Ramos* reversals which are still on-going around the state; and prosecutorial integrity petitions (SB 819, 2021), among others.

None of these sea-changes allocated a single dollar to victim services, prosecution or defense attorney offices, or judicial systems.

SB1511 again increases the strain on these already taxed systems. ODA recommends that appropriate funding be allocated if potentially thousands of additional cases will be relitigated. That funding must include:

- **Victim Services.**
 - o Direct victim services through the Department of Justice and local District Attorney's office for notifications, explanation of rights, and victim advocacy;
 - o Additional dollars to community-based therapeutic programs to help victims deal with the trauma of having to potentially relitigate the worst thing that ever happened to them.
- **Additional Deputy District Attorneys and DA Investigators.**
 - o District Attorney's Offices around the state will need additional prosecutors to re-litigate these cases. Many are already facing serious hiring challenges.
 - o District Attorney Investigators are necessary to locate witnesses, reinterview witnesses, coordinate travel and testimony reimbursement, and essentially coordinate follow up investigations on potentially decades-old cases. Many of our rural offices don't have investigators at all, so supplemental law enforcement resources would be necessary.
- **Additional Public Defenders**
 - o Despite spending \$47 million dollars more than all District Attorney Offices combined, OPDS remains vastly ill equipped to incur additional clients that greatly increase their caseloads.

- **Additional Judicial Staff**
 - COVID backlogs and large dockets already exist around the state. Additional judicial staff will be required to expeditiously litigate these cases.

- **Local County Dollars**
 - Any successful inmate will be transferred from the Department of Correction, back to local jails already at capacity. Additional dollars must flow to counties to supplement additional staffing at facilities to accommodate these offenders.

- **Local Law Enforcement**
 - In addition to District Attorney investigators, old cases will need additional law enforcement investigation, including re-testing evidence (such as rape kits), re-interviewing witnesses, re-evaluating forensic examinations on electronic devices and other investigations that are costly and time consuming.