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### M E M O R A N D U M

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**TO:** Honorable Sen. Prozanski, Chair

**FROM:** Aaron Knott, MCDA Policy Director

**SUBJECT:** Testimony in support of SB 554

**DATE:** 2/6/23

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We offer this testimony in support of Senate Bill 554. While the technical language of the bill would benefit from additional refinement, the overall premise of the bill is sound and will advance justice for the wrongfully convicted throughout Oregon.

#### BACKGROUND

Forensic science is a rapidly evolving area. With each passing year, new scientific innovations are developed with the ability to greatly assist in the conviction – or exoneration – of a person charged with a crime. However, with these new developments comes the inevitable obsolescence of previous forensic techniques, which are later exposed as inaccurate, imprecise or simply wrong. Bite mark evidence, shoe print evidence, hair follicle evidence and the use of polygraph machines to evaluate the truthfulness of confessions are only a few examples of forensic science which was at one point presented to juries as scientifically sufficient to justify a conviction. While some of these techniques are capable of providing relevant evidence when appropriately contextualized, their importance can easily be overweighted and their shortcomings minimized in the context of a criminal prosecution. Because juries are often highly swayed by evidence which purports to be scientifically sound, it is no surprise that roughly a quarter of wrongful convictions are estimated to be driven by faulty forensic analysis.

Oregon presently has no centralized system for evaluating the trustworthiness of any given method of forensic science. This leaves both the prosecution and defense largely on their own to make independent determinations of what forensic evidence should be considered trustworthy. Even for well-resourced law enforcement offices, the frequent absence of staff with any scientific background leaves the prosecution with very little ability to independently assess claims that any given scientific technique is reliable.

Nor is the more recently created prosecutor driven remedy for resentencing under Senate Bill 819 (2021) sufficient to address this issue. While SB819 did provide a mechanism for adjusting a sentence in clear cases where the injustice is manifest and the remedy clear, it did nothing to provide prosecutors with the ability to draw complex scientific conclusions across a large number of convictions. Prosecutors are not scientists, and are not resourced to effectively audit the scientific assumptions made within our own cases. These conclusions are better drawn at the state level.

## **RECOMMENDED CHANGES**

That said, we do offer several recommendations that we believe would improve the bill prior to passage. If a workgroup is convened to address these issues, we would ask to be included.

- 1. “Relevant forensic evidence” is not effectively defined within the bill.** While we agree that credible, peer-reviewed challenges to the integrity of forensic science should be taken seriously both by prosecutors and Department of Justice post-conviction relief attorneys, we are concerned that this bill fails to draw a sufficient incentive between the reconsideration of forensic science that has been credibly called into question by the scientific community versus attacks by individual retained expert witnesses offering comparatively unsubstantiated theories. We would recommend a higher threshold for establishing that a forensic theory has been discredited.
- 2. The retroactivity provisions of the bill, combined with its current breadth, will allow for broad collateral attacks on old convictions.** SB 554 would allow a conviction to be vacated in post-conviction not just when there is reason to believe that the forensic evidence underlying the conviction has been discredited in subsequent years but also because a forensic technique didn’t exist at the time of the conviction. Given that forensic science is constantly changing, this means that every new scientific achievement will serve to reopen every old case to which it had any theoretical evidence. We would recommend narrowing the bill

to cases where the new forensic science acts to affirmatively discredit the evidence relied on to reach the conviction.

**3. We would recommend consideration of an independent forensics commission.**

Several states have moved to create independent forensic commissions to help guide law enforcement determinations of what evidence is suitable for introduction, and to provide guidance outside of the adversarial system of post-conviction relief to identify and remedy shortfalls in forensic science. We believe that this has tremendous potential to provide a more holistic way of moving the state forward in unwinding investigations and convictions based on bad science. This approach will carry a fiscal, but we expect SB 554 will likewise do so. Scientific questions are expensive to resolve.

Despite these concerns, the larger contention of the bill is sound: Oregon currently lacks sufficient protections to guard against the misuse of forensic science and to address convictions which are based, in whole or in part, on scientific techniques which are later credibly discredited by the scientific community. While the exact language of SB 554 does require some refinement, the larger issue remains deeply deserving of urgent legislative attention.

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