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M E M O R A N D U M

TO: Honorable Sen. Prozanski, Chair

FROM: Aaron Knott, Policy Director

SUBJECT: Testimony in support of SB 321 -1

DATE: 3/21/2023

BACKGROUND:

The 2020 United States Supreme Court decision of *Ramos v. Louisiana* codified into Oregon law what had long been the practice in 48 states – that a felony conviction can only occur upon a finding of guilt made by a unanimous vote of the jury. In issuing this decision, the Supreme Court made explicit that the practice of allowing conviction by non-unanimous verdict was so tainted by a history of racial exclusion and discrimination that permitting it to continue was offensive to the requirements of the constitution. The *Ramos* decision ended the practice of allowing conviction by a non-unanimous jury, but both *Ramos* and a subsequent ruling in *Edwards v. Vannoy* left open the question of whether this ruling should apply retroactively to jury decisions made prior to the ruling. This question was resolved in late 2022 by our own Oregon Supreme Court in *Watkins v. Ackley*, which established conclusively that within certain procedural limitations, the holding in *Ramos* was indeed retroactive, and would apply to any criminal conviction where a petitioner could conclusively demonstrate that their conviction was non-unanimous. Like many court decisions, *Watkins* provided a broad articulation of legal doctrine but did not resolve every procedural or policy issue which resulted from that doctrine.

SB 321-1 HONORS THE RULING IN WATKINS WHILE PROVIDING FOR AN ORDERLY, EQUITABLE AND VICTIM CENTERED PROCESS

The introduced version of the bill requires amending. The introduced version of SB 321 was generated prior to the *Watkins* decision and therefore naturally contains language which has been rendered moot by that decision. Amendment language was posted to OLIS the day of the

hearing and we are still in the process of reviewing the sufficiency of the language proposed. Regardless, four separate policy refinements are still necessary and we urge their passage.

- 1. The Legislature Should Resolve the Relevant Statutes of Limitation.** The *Watkins* decision clarifies that any person convicted upon a non-unanimous verdict has the right to petition for post-conviction relief, but this right is not of unlimited duration. The typical statute of limitation for a newly formed basis for petition is two years. The legislature should clarify that the statute of limitation began with the issuance of the *Watkins* decision, roughly December 30th, 2022.
- 2. The Legislature Should Allow the Use of Transcripts When Evidence is Destroyed Due to the Passage of Time.** When murder cases are remanded for further proceedings, both the prosecution and defense are able to use transcripts from previous trials when relevant evidence has been lawfully destroyed due to the passage of time or otherwise rendered unavailable through the fault of either side, along with an instruction to the jury not to attribute blame to either side for the unavailability of the evidence. *Watkins* cases are generally very old, and both sides will experience evidence loss due to the natural passage of time. (Currently expressed in SB 321 at Sec. 1(9))
- 3. The Legislature Should Require Concrete Proof of Non-Unanimity.** While *Watkins* establishes that any petitioner who can demonstrate that their conviction was non-unanimous is entitled to post-conviction relief, the decision is silent on the specific form of proof that will be required. SB 321 would appropriately place the burden on the petitioner to demonstrate by clear and convincing evidence that the conviction was non-unanimous, as demonstrated by a verdict poll, written jury form, or audio or video recording of the trial or a transcript thereof. (Currently expressed in SB 321 at Sec. 1(3)(a))
- 4. Oregon's District Attorneys and Victims Assistance Programs Urgently Require Funding to Defray *Watkins* expenses.** *Watkins* cases are exceptionally difficult to prosecute. *Watkins* cases are generally older than the first wave of cases captured by *Ramos*. The victims in these cases are often years if not decades removed from the circumstances of their victimizations. They have often relocated, changed their names, and otherwise become difficult to locate. Our investigators and victim's advocates work in partnership to locate these victims, which often involves calling as many as 30 different phone numbers, including previous employers, landlords and family members, in an attempt to locate a victim. When a victim is finally located, they are given the traumatizing news that their case has been returned by the court. In these cases, victims are often told that because of the deterioration of evidence, their case is no longer able to be prosecuted. In those cases where the evidence still exists, they are asked to revisit their revictimization through an entirely new trial. All of this happens completely without notice. For our prosecutors, investigators and victim's advocates, these complex and difficult cases are simply added to the existing crush of business. An addendum

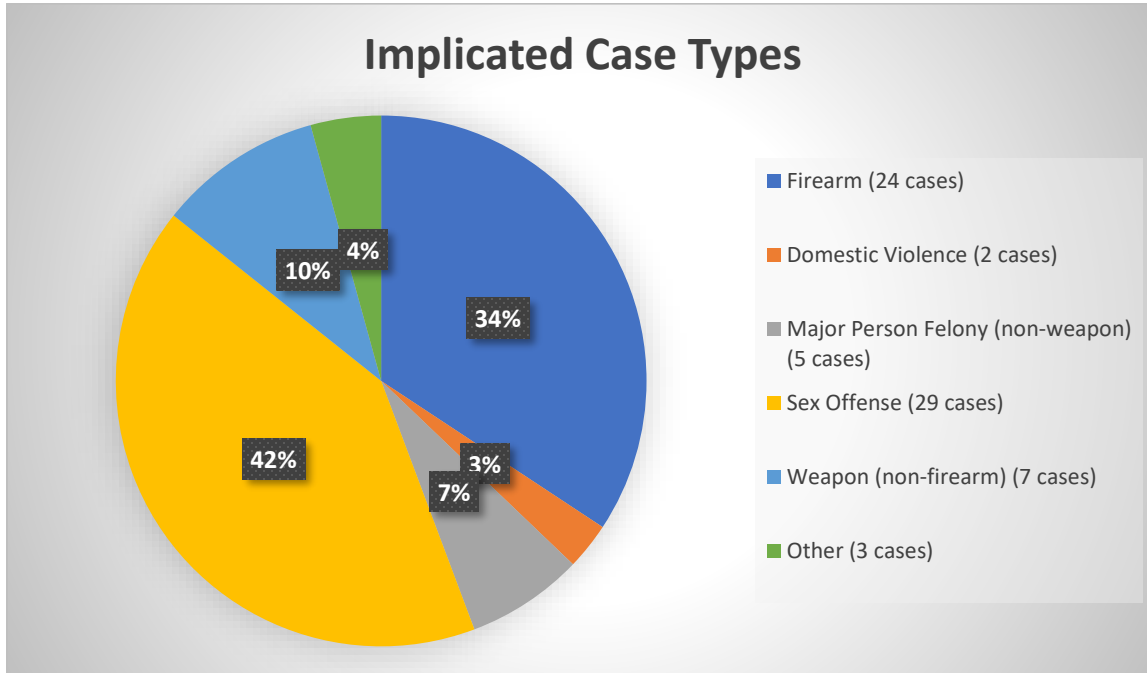
describing the composition of *Watkins* cases thus far returned to the Multnomah County District Attorney's Office is attached to this testimony, but the largest category by far to date has been sex crimes – particularly demanding cases in both their complexity and severity. It is worth noting that the Office of Public Defense Services recently received an allocation of approximately 1.1 million dollars from the legislative Emergency Board. While the allocation of that funds likely fills an urgent and real need for our defense colleagues, it underscores the need for a comparable investment in victim's services and prosecutorial efforts in managing these serious cases. (Currently expressed in SB 321 at Sec. 3)

Watkins is truly a landmark ruling, sweeping in scope and demanding to implement. These refinements and investments will allow Oregon's prosecutors to implement an equitable and victim centered approach which honors the court's ruling while protecting the integrity of the process. We urge their adoption.

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ADDENDUM: MULTNOMAH COUNTY WATKINS REFERRALS
(current as of 3/17/23)

Total cases implicated by *Watkins* (YTD): 70 cases



Case Age Data

Oldest Cases: 1987 / 36 years old

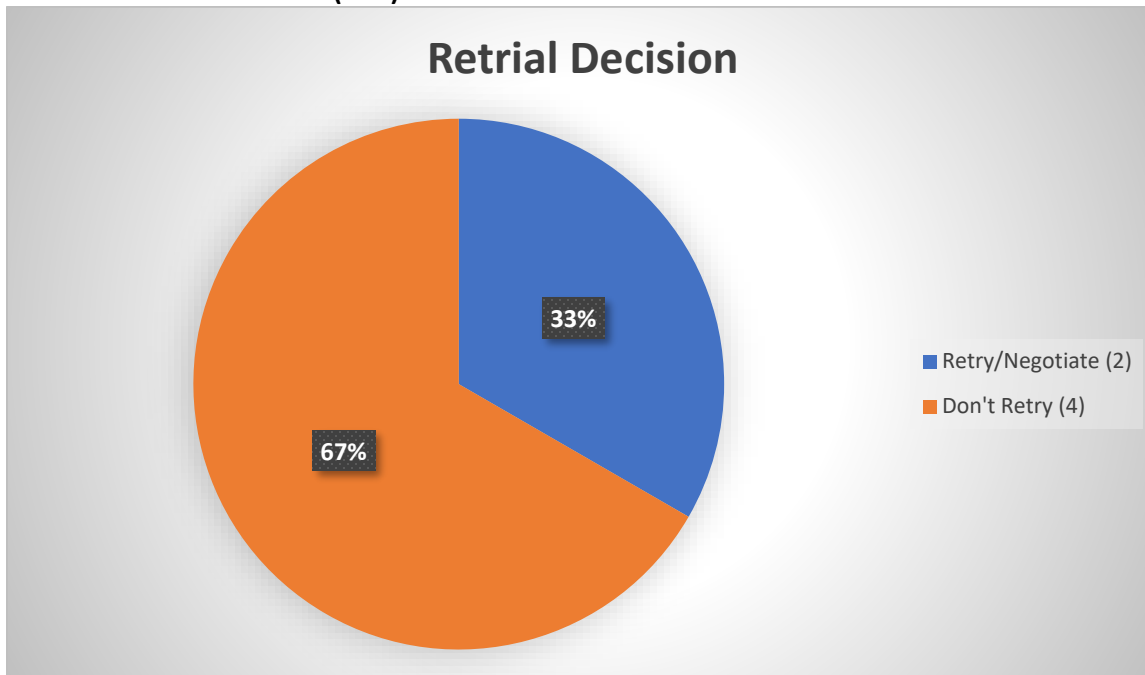
Most Recent Cases: 2015 / 8 years old

Median Case Age (by Case Type)

- 23 years Sex Offense
- 19 years Firearm
- 12 years Weapon (non-firearm)
- 22 years Major Person Felony (non-weapon)
- 12.5 years Domestic Violence
- 25 years Other

We are still extremely early in the retrial evaluation process, but early indications are that our office will be unable to try a significant percentage of referred cases due to evidence loss.

Cases evaluated for retrial (YTD): 6 cases



Cases unable to re-prosecute due to evidentiary loss/deterioration: 2

- Victim is unavailable / unwilling to participate in prosecution
- Critical witness is unavailable

Cases not re-prosecuting due to practical considerations (balancing of resources): 2

- The defendant is already at the highest possible sentencing grid block without this conviction
- The defendant is currently incarcerated on other convictions
- The defendant was convicted of the same offense in other counts by a unanimous jury in the same case (4 counts sex abuse – unanimous / 1 count sex abuse – non-unanimous)