

March 21, 2023

Dear Senate Committee on Judiciary Chair Prozanski, Vice-Chair Thatcher, and Members Gelser Blouin, Linthicum, and Manning:

I respectfully submit the following testimony in opposition to 2023 Senate Bill 321 on behalf of myself and Michaela Gore. Ms. Gore and I were the two staff attorneys for the Ramos Project, part of the Criminal Justice Reform Clinic at Lewis & Clark Law School, from 2020 to 2022. In that capacity, we helped lead the effort to assist people impacted by Oregon's unconstitutional non-unanimous jury verdict system obtain post-conviction relief (PCR) in the wake of *Ramos v. Louisiana*. Specifically, we communicated with hundreds of Oregon prisoners; drafted model petitions, trial memoranda, issue briefings, and other pleadings; advised post-conviction attorneys across the state; collected and analyzed data proving the disproportionate impact of non-unanimous jury verdicts on defendants of color; and drafted amicus briefs to the Oregon Court of Appeals and Oregon Supreme Court regarding *Ramos's* retroactivity.

We also helped draft 2022 Senate Bill 1511, which provided a mechanism for post-conviction relief for people with known (provable) non-unanimous jury verdicts (NUJV), effectively making *Ramos* retroactive without waiting for the Oregon Supreme Court to decide the issue. We submitted written testimony and testified before this Committee in support of SB 1511 during the 2022 session. That bill did not pass.

However, in December 2022, the Oregon Supreme Court decided *Watkins v. Ackley*, 370 Or 604 (2022). The Oregon Supreme Court effectively applied *Ramos* retroactively, holding that petitioners who demonstrate that they were convicted pursuant to a NUJV are entitled to post-conviction relief. That ruling has allowed people with NUJVs to obtain post-conviction relief through the normal PCR process, without the need for legislation.

Since then, the Oregon Department of Justice, Office of Public Defense Services (OPDS), Oregon Post-Conviction Consortium, district attorneys, and other entities have been in negotiations regarding the existing PCR cases raising *Ramos* claims, most of which were pending on appeal awaiting the Supreme Court's decision in *Watkins*. They have organized those cases into five groups of priority, the first of which — nearly 100 cases where all convictions are non-unanimous — have had stipulated judgments filed, convictions vacated, and cases remanded back to the criminal trial court for relitigation. Those cases are now are back with the prosecutor's office for settlement or retrial. Prisoners are already being transferred to county jails for the remanded proceedings.

That background and context is necessary to understand the problems with SB 321. This legislation does not mirror last year's SB 1511, nor is it a codification of *Watkins*, nor will it streamline the relief contemplated in *Watkins*. Rather, it severely narrows the relief contemplated by last year's bill and ordered by the Oregon Supreme Court in *Watkins* by excluding NUJV petitioners with child victims and petitioners who are no longer in custody (sections 1(a) and (b)), among other issues laid out below.

Petitioners with child victims or who are out of custody would have to file for PCR pursuant to the Post-Conviction Hearings Act (PCHA). However, section 8(a) says the act does not preclude the filing of other PCR petitions claiming grounds for relief “*other than a conviction resulting from a NUJV*” if such petitions are otherwise permitted to be filed under the PCHA. This appears to be an attempt to make this new statute the exclusive cause of action for NUJV-based PCR claims, meaning excluded petitioners would have no mechanism for relief. In addition to being deeply unfair, that strikes us as a due process violation against petitioners who have already filed and/or been granted post-conviction relief, which would result in tons of litigation. The Oregon Supreme Court in *Watkins* did not exclude anyone with a known NUJV from eligibility for PCR, and neither should the Legislature.

In addition, the bill raises the standard of proof of having a NUJV from a “preponderance of the evidence” (just over 50%) to “clear and convincing evidence,” a much higher legal standard. SB 1511 and the PCHA generally require a preponderance standard (ORS 138.620(2)). Why should these claims be subject to a heightened standard? That only perpetuates the systemic racism of the non-unanimous jury scheme by making it harder for people to obtain a remedy for the violation of their constitutional rights.

Finally, as a practical matter, this bill is simply too late and will create a mess for the courts. As noted above, nearly 100 NUJV cases on PCR appeal are in the process of being remanded to the trial courts, with a larger group to follow in the coming months. Having some NUJV petitioners file or amend their petitions to be under this new statutory scheme and therefore subject to its differing limitations periods, evidentiary rules, standards of proof, special jury instructions, etc., will cause confusion and again result in more litigation rather than streamline relief. It may also worsen the already existing public defense crisis in Oregon, as attorneys appointed to represent indigent PCR petitioners are contracted through OPDS and there has been an ongoing backlog issue of PCR petitioners awaiting to be appointed counsel.

For those reasons, we respectfully ask that you oppose this bill. Thank you for the opportunity to share our concerns.

Sincerely,

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