

Enrolled Senate Bill 244

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CHAPTER

AN ACT

Relating to DNA tests; creating new provisions; amending ORS 192.531 and sections 1, 2 and 4, chapter 697, Oregon Laws 2001; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 1, chapter 697, Oregon Laws 2001, as amended by section 1, chapter 759, Oregon Laws 2005, is amended to read:

Sec. 1. [(1)] A person may file in the circuit court in which the judgment of conviction was entered a motion requesting the performance of DNA (deoxyribonucleic acid) testing on specific evidence if the person:

[(a)] (1) Is incarcerated in a Department of Corrections institution as the result of a conviction for aggravated murder or a person felony as defined in the rules of the Oregon Criminal Justice Commission; or

[(b)] (2) Is not in custody but has been convicted of aggravated murder, murder or a sex crime as defined in ORS 181.594.

[(2) A motion requesting the performance of DNA testing under this section must be filed in the circuit court no later than 24 months after the effective date of this 2005 Act.]

SECTION 2. Section 2, chapter 697, Oregon Laws 2001, as amended by section 2, chapter 759, Oregon Laws 2005, is amended to read:

Sec. 2. (1)(a) When a person files a motion under section 1, chapter 697, Oregon Laws 2001, requesting the performance of DNA (deoxyribonucleic acid) testing on specified evidence, the motion must be supported by an affidavit. The affidavit must:

(A)(i) For a person described in section 1 [(1)(a)] (1), chapter 697, Oregon Laws 2001, contain a statement that the person is innocent of the offense for which the person was convicted or of the conduct underlying any mandatory sentence enhancement; or

(ii) For a person described in section 1 [(1)(b)] (2), chapter 697, Oregon Laws 2001, contain a statement that the person is innocent of the offense for which the person was convicted;

(B) Identify the specific evidence to be tested and a theory of defense that the DNA testing would support. The specific evidence must have been secured in connection with the prosecution, including the investigation, that resulted in the conviction of the person; and

(C) Include the results of any previous DNA test of the evidence if a previous DNA test was conducted by either the prosecution or the defense.

(b) The person must present a prima facie showing that DNA testing of the specified evidence would, assuming exculpatory results, establish the actual innocence of the person of:

(A) The offense for which the person was convicted; or
(B) Conduct, if the exoneration of the person of the conduct would result in a mandatory reduction in the person's sentence.

(2) The court shall order the DNA testing requested in a motion under subsection (1) of this section if the court finds that:

(a) The requirements of subsection (1) of this section have been met;

(b) Unless the parties stipulate otherwise, the evidence to be tested is in the possession of a city, county, state or the court and has been subject to a chain of custody sufficient to establish that the evidence has not been altered in any material aspect;

(c) The motion is made in a timely manner and for the purpose of demonstrating the innocence of the person of the offense or of the conduct and not to delay the execution of the sentence or administration of justice; and

(d) There is a reasonable possibility that the testing will produce exculpatory evidence that would establish the innocence of the person of:

(A) The offense for which the person was convicted; or

(B) Conduct, if the exoneration of the person of the conduct would result in a mandatory reduction in the person's sentence.

(3) In granting a motion under this section, the court may impose reasonable conditions designed to protect the interests of the state in the integrity of the evidence and the testing process.

(4) Unless both parties agree otherwise, the court shall order the Department of State Police to conduct the DNA testing. The court may order a second test upon a showing that the state police failed to follow appropriate DNA protocols and that failure reasonably affected the accuracy of the DNA test.

(5) The costs of DNA tests ordered under this section must be paid by:

(a) The person making the motion for DNA testing if the person is not incarcerated or, if the person is incarcerated, if the person is financially able to pay; or

(b) The state if counsel at state expense has been appointed under section 4, chapter 697, Oregon Laws 2001.

(6) The results of a DNA test ordered under this section must be disclosed to the person filing the motion and to the state.

(7) Notwithstanding the fact that an appeal of the conviction or a petition for post-conviction relief in the underlying case is pending at the time a motion is filed under section 1, chapter 697, Oregon Laws 2001, the circuit court shall consider the motion. If the court grants the motion, the court shall notify the court considering the appeal or post-conviction petition of that fact. When a court receives notice under this subsection, the court shall stay the appeal or post-conviction proceedings pending the outcome of the motion filed under section 1, chapter 697, Oregon Laws 2001, and any further proceedings resulting from the motion.

SECTION 3. Section 4, chapter 697, Oregon Laws 2001, is amended to read:

Sec. 4. (1) A person described in section 1 (1), **chapter 697, Oregon Laws 2001**, [(1)(a) of this 2001 Act] may file a petition in the circuit court in which the judgment of conviction was entered requesting the appointment of counsel at state expense to assist the person in determining whether to file a motion under section 1, **chapter 697, Oregon Laws 2001** [of this 2001 Act]. The petition must be accompanied by:

(a) A completed affidavit of eligibility for appointment of counsel at state expense; and

(b) An affidavit stating that:

(A) The person meets the criteria in section 1 (1), **chapter 697, Oregon Laws 2001** [(1)(a) of this 2001 Act];

(B) The person is innocent of the charge for which the person was convicted or of the conduct that resulted in a mandatory sentence enhancement;

(C) The identity of the perpetrator of the crime or conduct was at issue in the original prosecution or, if the person was documented as having mental retardation prior to the time the crime was committed, should have been at issue; and

(D) The person is without sufficient funds and assets, as shown by the affidavit required by paragraph (a) of this subsection, to hire an attorney to represent the person in determining whether to file a motion under section 1, **chapter 697, Oregon Laws 2001** [of this 2001 Act].

(2) The court shall grant a petition filed under this section if:

(a) The petitioner complies with the requirements of subsection (1) of this section; and

(b) It appears to the court that the petitioner is financially unable to employ suitable counsel possessing skills and experience commensurate with the nature and complexity of the matter.

(3) When a court grants a petition under this section, the court shall appoint the attorney originally appointed to represent the petitioner in the action that resulted in the conviction unless the attorney is unavailable.

(4) An attorney appointed under this section:

(a) If other than counsel provided pursuant to ORS 151.460, is entitled to compensation and expenses as provided in ORS 135.055; or

(b) If counsel provided pursuant to ORS 151.460, is entitled to expenses as provided in ORS 135.055.

SECTION 4. Section 5 of this 2007 Act is added to and made a part of ORS 192.518 to 192.526.

SECTION 5. (1) Notwithstanding ORS 192.537 (3), a health care provider may retain genetic information of an individual without obtaining an authorization from the individual or a personal representative of the individual if the retention is for treatment, payment or health care operations by the provider.

(2) Notwithstanding ORS 192.539 (1), a health care provider may disclose genetic information of an individual without obtaining an authorization from the individual or a personal representative of the individual if the provider discloses the genetic information in accordance with ORS 192.520 (3).

(3) As used in this section, “retain genetic information” has the meaning given that term in ORS 192.531.

SECTION 6. ORS 192.531 is amended to read:

192.531. As used in ORS 192.531 to 192.549:

(1) “Anonymous research” means scientific or medical genetic research conducted in such a manner that any DNA sample or genetic information used in the research is unidentified.

(2) “Blanket informed consent” means that the individual has consented to the use of the individual’s DNA sample or health information for any future research, but has not been provided with a description of or consented to the use of the sample in genetic research or any specific genetic research project.

(3) “Blood relative” means a person who is:

(a) Related by blood to an individual; and

(b) A parent, sibling, son, daughter, grandparent, grandchild, aunt, uncle, first cousin, niece or nephew of the individual.

(4) “Clinical” means relating to or obtained through the actual observation, diagnosis or treatment of patients and not through research.

(5) “Coded” means identifiable only through the use of a system of encryption that links a DNA sample or genetic information to an individual or the individual’s blood relative. A coded DNA sample or genetic information is supplied by a repository to an investigator with a system of encryption.

(6) “Deidentified” means lacking, or having had removed, the identifiers or system of encryption that would make it possible for a person to link a DNA sample or genetic information to an individual or the individual’s blood relative, and neither the investigator nor the repository can reconstruct the identity of the individual from whom the sample or information was obtained. Deidentified DNA samples and genetic information must meet the standards provided in 45 C.F.R. 164.502(d) and 164.514(a) to (c), **as in effect on the effective date of this 2007 Act.**

(7) "Disclose" means to release, publish or otherwise make known to a third party a DNA sample or genetic information.

(8) "DNA" means deoxyribonucleic acid.

(9) "DNA sample" means any human biological specimen that is obtained or retained for the purpose of extracting and analyzing DNA to perform a genetic test. "DNA sample" includes DNA extracted from the specimen.

(10) "Genetic characteristic" includes a gene, chromosome or alteration thereof that may be tested to determine the existence or risk of a disease, disorder, trait, propensity or syndrome, or to identify an individual or a blood relative. "Genetic characteristic" does not include family history or a genetically transmitted characteristic whose existence or identity is determined other than through a genetic test.

(11) "Genetic information" means information about an individual or the individual's blood relatives obtained from a genetic test.

(12) "Genetic privacy statutes" means ORS 192.531 to 192.549, 659A.303 and 746.135 and the provisions of ORS 659A.300 relating to genetic testing.

(13) "Genetic research" means research using DNA samples, genetic testing or genetic information.

(14) "Genetic test" means a test for determining the presence or absence of genetic characteristics in an individual or the individual's blood relatives, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to diagnose or determine a genetic characteristic.

(15) "Health care provider" has the meaning given that term in ORS 192.519.

(16) "Identifiable" means capable of being linked to the individual or a blood relative of the individual from whom the DNA sample or genetic information was obtained.

(17) "Identified" means having an identifier that links, or that could readily allow the recipient to link, a DNA sample or genetic information directly to the individual or a blood relative of the individual from whom the sample or information was obtained.

(18) "Identifier" means data elements that directly link a DNA sample or genetic information to the individual or a blood relative of the individual from whom the sample or information was obtained. Identifiers include, but are not limited to, names, telephone numbers, electronic mail addresses, Social Security numbers, driver license numbers and fingerprints.

(19) "Individually identifiable health information" has the meaning given that term in ORS 192.519.

(20) "Obtain genetic information" means performing or getting the results of a genetic test.

(21) "Person" has the meaning given in ORS 433.045.

(22) "Research" means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalized knowledge.

(23) "Retain a DNA sample" means the act of storing the DNA sample.

(24) "Retain genetic information" means making a record of the genetic information.

(25) "Unidentified" means deidentified or not identifiable.

SECTION 7. Section 8 of this 2007 Act is added to and made a part of ORS 746.600 to 746.690.

SECTION 8. (1) Notwithstanding ORS 192.537 (3), a health insurer may retain genetic information of an individual without obtaining an authorization from the individual or a personal representative of the individual if the retention is for treatment, payment or health care operations by the insurer.

(2) Notwithstanding ORS 192.539 (1), a health insurer may disclose genetic information of an individual without obtaining an authorization from the individual or a personal representative of the individual if the insurer discloses the genetic information in accordance with ORS 746.607 (3).

(3) As used in this section, "retain genetic information" has the meaning given that term in ORS 192.531.

(4) As used in this section, "health care operations" does not include underwriting activities.

(5) Nothing in this section shall be construed to interfere with or limit the requirements of ORS 746.135.

SECTION 9. Sections 5 and 8 of this 2007 Act apply to genetic information obtained before, on or after the effective date of this 2007 Act.

SECTION 10. This 2007 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2007 Act takes effect on its passage.

Passed by Senate March 12, 2007

Received by Governor:

Repassed by Senate June 18, 2007

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Approved:

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Secretary of Senate

.....M,....., 2007

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President of Senate

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Governor

Passed by House June 5, 2007

Filed in Office of Secretary of State:

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Speaker of House

.....M,....., 2007

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Secretary of State