



**DEPARTMENT OF JUSTICE**  
APPELLATE DIVISION

**MEMORANDUM**

DATE: May 9, 2013

TO: Honorable Floyd Prozanski, Chair  
Senate Judiciary Committee, Members

FROM: Aaron Knott, Legislative Director

SUBJECT: HB 3287A

**RECOMMENDED ACTION**

This testimony is presented in support of HB 3287A. We recommend that the Committee approve HB 3287A with a do pass recommendation.

**BACKGROUND ON POST-CONVICTION RELIEF**

- The Oregon Rules of Civil Procedure apply to actions for post-conviction relief, unless the Post-Conviction Hearings Act specifies otherwise.
- Under the rules of civil procedure, parties are not required to disclose the identity of their witnesses, or the content of their expert witnesses' expected testimony before trial.
- In *Stevens v. Czerniak*, the Supreme Court concluded that those provisions of the ORCPs apply to post-conviction relief proceedings as well. In particular, the court held that, without a specific provision authorizing expert discovery, "the trial court lacked authority to require the parties to disclose that information in advance of trial." 336 Or 392, 404-05.
- By contrast, in criminal cases, criminal discovery rules require parties to disclose the identities of their witnesses (including expert witnesses) prior to trial.
- Unlike traditional civil cases, in which the plaintiff and defendant both were involved in the incident that led to the lawsuit, in most post-conviction cases, only one party – the petitioner – was involved in the underlying criminal trial that is the subject of the post-conviction litigation. That imbalance distinguishes a post-conviction case from other civil litigation.
- In addition, post-conviction relief cases often become a re-litigation of at least parts of the underlying criminal case.
  - The most typical claims are that a petitioner's criminal trial counsel was constitutionally inadequate for doing or failing to do something at the criminal

trial. To prove a claim for inadequate assistance of counsel, a petitioner must prove that he or she was prejudiced by counsel's deficient performance, which typically involves some level of re-litigation of the criminal trial.

- Other post-conviction claims include claims, which could not have been raised on direct appeal, that the trial court committed constitutional error. This type of claim also generally involves some level of re-litigation of the underlying criminal case.
- Because a post-conviction case, although civil, uniquely involves the review of a criminal case, bringing the post-conviction discovery rules more into line with the criminal discovery rules makes sense.

### **HOW HB 3287 WILL MAKE POST-CONVICTION TRIALS MORE EFFICIENT AND MORE PRECISE**

- This bill would exempt post-conviction relief proceedings from the non-disclosure provisions that apply to traditional civil cases.
- This bill would allow both the petitioner and the defendant (often the superintendent of the prison where the petitioner is incarcerated or sometimes the state) to more completely understand the issues to be litigated at the post-conviction trial and to be better prepared to address those issues.
- Specifically by requiring disclosure of expert opinions, this bill will reduce the "trial by ambush" that is an all-too-common occurrence in current post-conviction relief litigation practice.
- In addition to allowing the post-conviction defendant the ability to more thoroughly respond to post-conviction petitions, this bill would make such litigation more cost-effective. By knowing the identity of expert witnesses ahead of time, counsel for both parties can focus their preparation accordingly. This saves resources for both sides in a post-conviction case.
- This bill allows the trial court flexibility to set disclosure timelines to ensure fairness to all parties.

### **THERE IS NO KNOWN FISCAL IMPACT FOR DEPARTMENT OF JUSTICE**

### **DOJ CONTACT**

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