



# Legislative Testimony

Oregon Criminal Defense Lawyers Association

February 4, 2013

The Honorable Jeff Barker, Co-Chair  
The Honorable Chris Garrett, Vice-Chair  
The Honorable Wayne Krieger, Vice-Chair  
House Judiciary Committee, Members

**RE: House Bill 2114**

Dear Chair Barker, Vice-Chairs and Members,

The Oregon Criminal Defense Lawyers Association is an organization of attorneys who represent juveniles and adults in delinquency, dependency, and criminal prosecutions and appeals throughout the state of Oregon. Thank you for the opportunity to submit the following comments regarding House Bill HB 2114.

1. HB 2114 is a resurrection of an effort made in 2011 HB 2142 to legislatively direct the judiciary to admit, in all instances, testimony of individual component tests and observations of an incomplete DRE exam. This evidentiary legal issue is exceptionally complicated: it involves the interplay between scientific evidence, scientific expert opinion testimony, non-scientific expert opinion testimony, and lay person observation testimony. OCDLA believes that the Legislature should defer to the judiciary' expertise in determining the admissibility of this evidence.

2. As a starting proposition, the judiciary is the traditional "gatekeeper" of scientific evidence, or evidence that masquerades as such. *Daubert v. Merrell Dow Pharmaceuticals*, 509 US 579 (1993); *State v. Brown*, 297 Or 404 (1984); *State v. O'Key*, 321 Or 285 (1995). The reason why was stated in *O'Key*,

"Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. The function of the court is to ensure that the persuasive appeal is legitimate." 321 Or at 291.

And as recently stated by the Court of Appeals in *State v. Aman*, 194 Or App 463, 472:

testimony which addresses, sounds like, masquerades as, or has the prejudicial effect of scientific testimony. As the recent Court of Appeals opinions in *State v. Rambo* and *State v. Beck* establish, Oregon courts are actively performing this function clearly, uniformly and well. OCDLA submits that the Legislature should defer to the judiciary's expertise in this regard.

Thank you for your consideration of these comments. Please let me know if I may answer any of your questions.

Respectfully submitted,

Neal Weingart,  
Oregon Criminal Defense Lawyers Association  
neal@nealweingartlaw.com