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Testimony of Erik Blumenthal, Deputy Defender
HB 3206
House Judiciary Committee
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Chair Barker and Members of the Committee:

Thank you for the opportunity to provide information on HB 3206. The bill would modify the procedures and standards governing a post-conviction motion for DNA testing under ORS 138.690 through 138.698.

The Appellate Division of the Office of Public Defense Services (OPDS) represents indigent defendants in appeals from adverse trial court rulings in post-conviction deoxyribonucleic acid (DNA) testing proceedings under ORS 138.690 to ORS 138.698. As an attorney who has worked on these appeals, I have encountered several issues with the current statutory scheme that are addressed in HB 3206.

Until SB 42 (2013), a defendant could not appeal from a denial of counsel or testing in a DNA proceeding. SB 42 authorized such appeals, and retroactively authorized appeals from adverse DNA testing decisions over the past 10 years. Since the enactment of SB 42, OPDS has handled roughly two dozen appeals in DNA testing proceedings. Those cases are now reaching the Court of Appeals.

Our review of the cases so far has shown that the DNA statutes suffer from several serious problems. HB 3206 addresses some of those problems, and will make the post-conviction DNA testing process more straightforward, streamlined, and effective.

Issue with the current statutes	**HB 3206 solution**
A person must request testing of "specified" or "specific" evidence in the motion for testing. ORS 138.692(1)(a) ***et seq*****.** Requiring a defendant to identify "specific" evidence in a motion for testing is unnecessary and confusing. The motion for testing is the first stage of a DNA testing proceeding. A person seeking testing might not know whether	**HB 3206 eliminates the specificity requirement.** As modified, ORS 138.692 would require the person seeking testing to identify the general evidence to be tested and explain how testing of that evidence would establish the person's innocence. Once the court holds a hearing and orders testing, the parties will present more specific information to the court as it becomes available.

"specific" evidence is presently available for testing. For example, in a case presently on appeal, the defendant requested testing of "blood, saliva, and bodily fluids." Under the state's view of the current statute, that request was not sufficiently "specific."	
Evidence to be tested must be in the possession of the city, county, state, or court. ORS 138.692(2)(b). One of the biggest hurdles for persons seeking exoneration—especially those who could most benefit from DNA testing because their convictions occurred many years ago—is finding the evidence to be tested. If the evidence has been moved from state custody (even if it was collected as part of the police investigation), ORS 138.692 does not authorize testing it.	**HB 3206 eliminates the requirement that evidence to be tested must be in city, county, state, or court custody.** Under the modified statute, the court must examine the chain of custody of the evidence and find that it has not been altered in any material aspect. If a person seeking testing locates evidence that has been secured in such a way that it could not have been altered in a material aspect, the court may order testing of that evidence.
To obtain testing, a court must find that testing would establish the innocence of the person for the offense or a sentence enhancement. ORS 138.692(d) ORS 138.692 does not explain what constitutes sufficient proof of "innocence." "Innocence" is an unfamiliar legal standard and is difficult for courts and parties to understand and apply. Moreover, at the initial stage of filing a motion to allow testing, it is difficult to predict what the testing results will be, let alone how those results might fit with evidence from trial and evidence supporting exoneration. In several cases currently on appeal, the trial courts have struggled to determine the standard of proof the person is required to meet to establish innocence under the statute.	**HB 3206 requires a court to order testing only if it finds that the person seeking testing "would not have been convicted" or would have received a lesser sentence.** The proposed standard will be familiar to courts because it examines how evidence, or the lack thereof, might have affected a jury's verdict. Courts regularly apply similar standards, for example when hearing petitions for post-conviction relief, or evaluating harmless error on appeal.

The trial court does not currently need to state its reasons for denying a motion for testing. Litigating appeals when a trial court does not explain the reasoning behind its ruling is very difficult for appellate courts and parties alike. The parties and the court can only guess at the reasoning behind the decision being challenged on appeal. Motions for DNA testing require a trial court to make a series of specific factual findings and legal conclusions. Without a record of those findings, an appellate court does not know how the trial court viewed the evidence, and on what basis the court denied the motion. That problem impacts both the defendant and the state. Often courts are ruling as a matter of discretion. The court may have had good reason for exercising its discretion, but that reason is not known to the Attorney General's office defending the court's action on appeal.	**HB 3206 adds 138.692(8), which requires a trial court to "state on the record the reasons for the denial" of testing.** Requiring a trial court to state its reasoning on the record ensures that the appellate courts and the parties will fully understand why the trial court denied the motion. Appellate review will be more effective, because it will be more likely that salient aspects of the case are detailed in the appellate record.
The current statutory scheme provides only for the right to appointed counsel "to assist the person in determining whether to file a motion" for testing. ORS 138.694(1). If taken at face value, ORS 138.694 may not provide for counsel beyond advising a person whether to file a motion for counsel. In practice, most appointed lawyers represent their clients throughout a DNA testing proceeding. However, the phrasing of ORS 138.694(1) has led to some confusion about the scope and extent of the attorney's representation. Moreover, there have been several instances where the circuit courts have denied appointed counsel to individuals who otherwise	**HB 3206 adds ORS 138.694(1), which provides for "counsel during all stages of the proceedings."** HB 3206 ensures that persons without the means to hire an attorney, which includes nearly all inmates, can obtain counsel to assist them in pursuing DNA testing. A clear statement about a person's right to counsel would reduce the number of appeals from qualified individuals who were denied counsel because the circuit court misunderstood the right to counsel. The proposed subsection would both expedite the DNA testing process and make it more effective. It would also make it easier for appellate courts and counsel to process appeals from denials of motions for testing and denials of appointed counsel.

should have been entitled to it. Litigating motions for testing without the assistance of counsel is all but impossible for most people. Even if they had the requisite legal expertise, they cannot investigate whether evidence is available for testing, among other challenges. In addition, *pro se* litigation taxes circuit and appellate court resources. *Pro se* pleadings are often lengthy, difficult to follow, and unfocused. Qualified counsel distill the issues and facts for the court, and are invaluable to both the person applying for testing and the trial court evaluating the motion. And attorneys litigating an appeal from a *pro se* litigant must often expend more effort and resources than in cases where the client was represented by an attorney because the legal and factual issues were inadequately developed and presented to the court.	

Thank you for your consideration. Please feel free to contact me with any questions or concerns that you may have.