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The Honorable Representative Jeff Barker, Chair
House Committee on Judiciary
State Capitol, Room 343
Salem, OR 97301

Re: HB 3206 and Amendment to Oregon's Post-Conviction DNA test statute - OPPOSITION

Dear Chairman Barker and fellow Committee members:

I am writing to register the objections on behalf of the Oregon District Attorney's Association and the Multnomah County District Attorney Rod Underhill to HB 3206, whose Chief Sponsors are Representative Williamson , Representative Lininger and Regular Sponsors are Representative Barker, and Senator Prozanski.

HB 3206 will fundamentally alter Oregon's post-conviction DNA test statute. This change will alter and affect the conviction status of the most serious of cases, dangerous offenders, victims and community safety. The change will affect many other criminal cases. The total affect will be noticeable upon the courts and justice system. The change will carry financial and personal costs that need to be fully appreciated and reported because they are real, substantial and significant.

THE IMPORTANCE OF TESTING LIMITED TO SHOW ACTUAL INNOCENCE:

The current statute ORS 138.690 et seq places a logical allocation of the burden of proof and persuasion upon the petitioner who would seek post-conviction DNA testing of evidence to overturn a fair and lawful conviction otherwise entitled to finality of judgment. The amendment proposes opening all old criminal convictions to retrial not based on testing to reveal actual innocence and that the wrong person was in custody, but rather that the conviction was wrongful. Thus, as proposed a new trial could follow from DNA test even if its result does not establish factual innocence.

The amendment proposes post-conviction DNA testing when the reviewing court finds a "reasonable possibility" arises that testing would lead to finding the person "would not be convicted" ORS 138.6922)(d)(B). This highly deferential and non-specific criteria upon which final judgments of conviction could be undone years after the fact, is ill-advised. The proposed amendment changes the purpose for post-conviction DNA testing to a purpose which instead facilitates future re-litigation of the state's burden of proof to show legal guilt.

To this end it is significant to note what happens after testing has been authorized. ORS 138.696 currently provides that once the DNA result is obtained, the court must determine if the evidence is "inconclusive or unfavorable" to the person ORS 138.696(1) or if DNA testing produced "exculpatory evidence." In the event the court reaches this later conclusion, the petitioner may to file "a motion for a new trial based on newly discovered evidence" ORS 138.696(2). Thus under the present statute, a post-conviction DNA test which establishes the hypothetical link to actual innocence after testing, provides a right to a new trial consistent with that original actual innocence claim.

Oregon has a fundamentally sound criminal justice system which protects against wrongful conviction. It does not need to amend the DNA test statute. The proposed amendment confuses process to free those who didn't commit a crime with process to permit late-in-time challenges questioning whether then the state can still prove their guilt.

THERE ARE NO CURRENT DOCUMENTED PROBLEMS OR REASONS TO CHANGE THE CURRENT DNA TEST STATUTE

There are no examples of trial courts misunderstanding or misapplied the existing law, nor are there examples of trial court results under the statute which appear palpably wrong or unjust[i]. There are no Oregon examples of current DNA test statute's use or claimed mis-use, justifying the proposed amendment.

THE NEED TO SPECIFY EVIDENCE TO BE TESTED

Under Oregon's current DNA statute Chapter 138.692, a defendant must identify "specific evidence to be tested and a theory of defense that the DNA testing would support" ORS 138.692(1)(a)(B). And, the petitioner must also "present a prima facie showing that DNA testing of the specified evidence would, assuming exculpatory results, establish the actual innocence of the person" ORS 138.692(1)(b). The Court must be able to find that there's a reasonable possibility testing will reveal exculpatory evidence of innocence. ORS 138.692(2)(d). By requiring evidence specificity, evidence is connected to the theory of defense and next to tested to establish actual innocence. "Specificity" also provides the court with the ability to focus testing thereby limiting the expenditure of Crime Lab resources. This should not change.

THE CLASS OF CRIMES AND OFFENDERS AVAILED OF THE CURRENT STATUTE SHOULD NOT BE CHANGED.

The proposed expansion of the category of crimes and offenders eligible for the extraordinary right of post-conviction relief via DNA testing is not reasonable. ORS 138.690 currently permits motions for DNA tests without regard to time-limiting the request. This right to DNA tests and related later conviction challenge extends to:

(1) a person who is incarcerated convicted of aggravated murder, or a person felony and

(2) non incarcerated individuals convicted of aggravated murder, murder or a sex crime.

The proposed amendment drops the offender limitations of eligible serious felony crimes to instead permitting expansive DNA testing for a person convicted of "any" crime in which DNA test would provide relevant evidence ORS 138.390(2). This expansion would apply to all convictions no matter how old, and no matter what level of crime felony or misdemeanor. Given the extraordinary relief of the current statutory provision, the current limits to cases involving the most serious felony crimes are a reasonable limitation unless proven otherwise.

COURT HEARING OF MOTION AND STATEMENT OF RULING

The proposed amendment substitutes the current requirement of the court "hearing a motion" to instead require that the court "conduct a hearing." ORS 138.696(3). This change must be read in connection with the proposed amendment to ORS 138.692(8), which requires a court to state on the record the reason for the denial of a test. Nothing in the present statute denies a defendant from obtaining a court ruling, and if the basis is unclear for requesting clarification. Nothing stops an Oregon trial court from writing a detailed opinion explaining the basis for denial. The current DNA statute permits appeal and review of DNA test denials, or after tests are obtained, the grant or denial of new trial by the state and petitioner ORS 138.697.

There are no examples of trial court's failing or refusing to provide an explanation of denial of testing. The reason behind the proposed change appears self-serving to the defense bar, as the newly required statement of reasons only applies to DNA test "denials." The better approach would leave to the trial court to determine whether the motion and affidavit are sufficient for conduct of a hearing and in deciding the matter to the court's discretion to determine whether in open court or by written decision to test, or not.

THE LOCATION OF FORENSIC DNA TESTS SHOULD REMAIN WITH THE OREGON STATE POLICE.

The state should not permit release of criminal evidence for initial testing outside the State Police laboratory. The state must stand behind its prosecution. The state must test first. To the extent there are some who would claim OSP testing is "problematic" or that "the state police may not have the specialized technology or capacity to conduct testing in a timely manner in certain cases," these are unsubstantiated if not self-serving allegations. The proposal to amend ORS 138.692(4) would force evidence release from the state's possession and control. This is bad public policy and could easily contaminate evidence. This amendment proposal would be contrary to the concept and practice of criminal investigation, and prosecution responsibility.

APPOINTMENT OF COUNSEL SHOULD REMAIN IN THE FIRST INSTANCE WITH THE ATTORNEY WHO INITIALLY REPRESENTED THE PETITIONER.

The amendment proposes change to the existing provision regards court appointment of counsel. The amendment proposes to strike the current provision for appointment of the attorney who originally handled the defense. The proposed change would be inefficient, and time consuming and likely expensive given the request to expand DNA test for "any" crime.

In addition the amendment proposes in ORS 138.694 deleting the link to factual innocence by dropping the requirement that petitioner's affidavit requesting counsel include that the "identity of the perpetrator was at issue…" in the underlying conviction offense. This required assertion should remain because it is connected to the original requirement that the DNA test connect to establishing actual innocence.

The increase in post-conviction DNA test cases will be significance in the number and the cost to indigent services. There will be related legal costs beyond DNA test requests. There will be challenges including appeals of these test requests and result orders ORS 138.697, there will be motions for new trials that these too will be appealed. On occasion, there will be new trials. And trials of old cases will be complicated and costly.

The financial impact will be substantial and should be reviewed for effect on appointed criminal defense services, court, prosecution, police and Oregon State Police Crime lab resources. As summarized to date, these cost are under-represented if not also over-looked.

JUDGMENT FINALITY IS SUBSTANTIALLY ALTERED BY THE PROPOSED CHANGE.

Courts and our system of justice have long valued finality. Any process including the new proposed amendment permitting conviction challenge needs to consider the significant public policy issues raised by such a challenge. There are practical complexities involved in re-litigation of old cases, such as re-contact with witnesses, witnesses frailty, altered or false memory, perjury, false recantation, decayed or forgotten or lost evidence and purged public records and reports. The current statute provides the additional and exceptional rare late in time conviction challenges based on DNA tests as limited to the most serious felony cases and for those who have a colorable claim of actual innocence. This should not change.

The proposed amendment would impact (1) societal confidence in convictions, (2) legal and victim confidence in finality and (3) carry financial consequences which are unappreciated in the available materials reviewing the bill. Aside from the unfairness to the victim and participants and any civilian or officer person involved in the investigation and prosecution, aside from the loss of community safety, it is also likely to expect that petitioner will then claim to have been wrongfully convicted and then seek civil compensation.

CIVIL LIABILITY AND POTENTIAL FINANCIAL CONSEQUENCES OF WRONGFUL INCARCERATION

Across the nation there are stories regards the financial consequences of wrongful convictions. Some states utilize compensation formulas. Other states have seen "color of law" Title 18, U.S.C. Section 1983 civil judgments. Compensation is not part of the current legislative proposal but it is not realistic to not realize its connection. It would be incomplete thinking to not recognize that any alteration of the nature of case, offender, reason for test, proof, finding, challenge and consequence including new trial, needs recognize that it is one thing to provide relief to an actually innocent person and another to create another post-conviction process for challenge to the state's ability to prove its case, again.

CONCLUSION

If these complex post-conviction DNA test issues are limited to the existing un-amended statute, the focus will remain upon cases of the factually and actually innocent. This is right. The purpose behind the existing statute was to identify the actually innocent and provide a process to obtain exoneration. These are the people in need of appointed counsel, system expense and a statutory right of review. For these people, the costs and burdens of review are justified.

In contrast, the proposed amendment offers an end-run on otherwise valid convictions by seeking new trials on the counts based upon the discovery of non-actual innocence DNA test results. The proposed expansion of the statute to apply to any crime, permitting new DNA tests which lead to new trials under more permissive standards, and testing by agencies outside state government, creates a net result of significantly greater expense, more significant time demands and also represents an unjustified assault upon conviction finality.

On behalf of the Oregon District Attorney's Association and Multnomah County District Attorney Rod Underhill, I urge you to not pass House Bill 3206.

Regards,

ROD UNDERHILL
District Attorney
Multnomah County, Oregon

By: _____
J. Russell Ratto
Deputy District Attorney

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[i] One federal district court case denied Habeas relief arising from a Oregon trial court denial of post-conviction DNA tests. Jackson v. Nooth Slip Copy, 2014 WL 4983666 decided October 01, 2014. In Jackson, the Oregon trial court denied a request to test semen on the rape victim's dress because the evidence had been destroyed pursuant to police policy and Jackson admitted the semen was his during trial. Jackson appealed. The Oregon Court of Appeals granted the State's Motion to Dismiss, finding no justiciable controversy because the DNA evidence was no longer available for testing. The Oregon Supreme Court denied review. A federal magistrate concluded the Petition for Writ of Habeas Corpus was untimely, and that Jackson was unable to excuse that default, unable to show "actual innocence" recommending that the Petition be dismissed. On review, the federal district court by the Honorable Marco Hernandez agreed, and the Writ was dismissed, and the certificate of appealability denied.