

## Rod Underhill, District Attorney

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The Honorable Senator Floyd Prozanski, Chair  
Senate Committee on Judiciary  
State Capitol, Room 343  
Salem, OR 97301

**Re: HB 3206 A Engrossed an Amendment to Oregon's Post-Conviction DNA test statute**

Dear Chairman Prozanski and fellow Committee members:

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

HB 3206-A which is before this committee contains positive changes to HB 3206 as originally proposed. House Judiciary Chair Barker, and the remaining House committee members were helpful in making profound changes, which reduced initial concerns. HB 3206-A provides a better approach to what is central to the statute: (1) a reasonable process for post-conviction DNA testing of evidence to establish actual innocence, and (2) if exculpatory results of DNA tests show that innocence then a motion for new trial may be filed. HB 3206-A provides the following changes to Oregon's post-conviction DNA test statute:

**1. EXPANDS THE CLASS OF PERSONS WHO MAY SEEK DNA TESTING.**

ORS 138.690 now provides a right to seek post-conviction DNA testing to persons "convicted of a felony". The existing statute limited motions for testing based upon custody status or seriousness of the felony. HB 3206-A permits any person convicted of a felony to file a petition.

The concern is that this increased class of petitioners will bring a corollary increase in investigation, and litigation costs. However, if a truly actually innocent person is revealed through testing, this will be a just result.

**2. REQUIRES AFFIDAVIT TO PROVIDE REASONABLE SPECIFICITY OF EVIDENCE TO BE TESTED.**

ORS 138.692(1)(a)(B) now requires the petitioner's affidavit to identify evidence "with as much specificity as is reasonably possible." The requirement of reasonable specificity will aid a court in review of motions, and District Attorney office responses. This change is supported.

**3. REQUIRES AFFIDAVIT TO STATE PRIMA FACIE CASE THAT DNA TEST WOULD ASSUMING EXCULPATORY RESULTS, LEAD TO FINDING THE PERSON IS ACTUALLY INNOCENT.**

ORS 138.692(1)(b) now requires the petitioner's affidavit to present "a prima facie showing that DNA testing of evidence would, assuming exculpatory results, lead to a finding that the person is actually innocent." With HB 3206-A retaining the term "actual innocent"--as in the current Oregon post-conviction DNA statute—it will work to exonerate the truly factually innocent. This change is supported.

A concern remains regarding the ambiguous phrase "lead to a finding." Read in context, logic would suggest that the "finding" is one that is made by the motion court. This meaning would be clarified by adding the words "by the motion court." To the extent that the phrase "lead to" is also ambiguous, it could permit attempt by a factually guilty person to seek DNA testing. This statute should not provide a right to re-litigate guilt under the guise of an ambiguous term. The operative and controlling words of this provision and of Oregon DNA test statutory scheme remain "actual innocence." Whereas HB 3206 originally attempted to remove the nexus to "actual innocence," HB 3206-A does not.

**4. PROVIDES STATE WITH RIGHT TO ANSWER AND REFUTE PETITIONER'S DNA TEST REQUEST.**

ORS 138.692(2) now permits the state to answer a motion for post-conviction DNA tests and where appropriate refute the request. This change clarifies the right of the state to be heard and to provide critical information to the court. This change is supported.

**5. PROVIDES THE MOTION COURT AUTHORITY TO ALLOW TESTIMONY.**

ORS 138.692(3) permits the motion court to receive testimony. This change clarifies the right of the court to obtain state or defense testimony to assist the court in its determination whether to grant DNA testing. This change is supported.

**6. LIMITS THE MOTION HEARING COURT TO ALLOW VICTIM TESTIMONY ONLY IF CONSENTED TO BY THE VICTIM.**

ORS 138.692(3) now protects victims from unwanted post-conviction participation in DNA testing. This change clearly limits the motion hearing court from requiring victim testimony "without the consent of the victim." This creation of a victim's right --to be left alone absent consent for contact -- is an important recognition of a victim right in Oregon. This change is supported.

**7. DELETES UNNECESSARY WORDS "OR OF THE CONDUCT".**

HB 3206-A contains the words "or of the conduct" within ORS 138.692(4)(c). These words were a vestige of the original statute also found in (Section 1) ORS 138.692 (1)(a)(A)(i). HB 3206-5 deletes these words. This deletion by HB 3206-A is supported.

**8. REQUIRES COURT TO ORDER DNA TESTING IF THERE IS A REASONABLE POSSIBILITY ASSUMING EXCULPATORY RESULTS THAT TESTING WILL LEAD TO FINDING THE PERSON IS ACTUALLY INNOCENT.**

ORS 138.692(4)(d) now requires DNA testing if the court finds "there is a reasonable possibility, assuming exculpatory results, that the testing would lead to a finding that the person is actually innocent

of the offense.” The inclusion of the term “actual innocent” is critical to the on-going value of Oregon’s post-conviction DNA statute. This provision of HB 3206-A is supported.

As with point 3, a concern remains regarding the phrase “lead to a finding”.

**9. PROVIDES DNA TESTS WILL BE PERFORMED BY THE OREGON STATE POLICE UNLESS THE COURT FINDS CAUSE OR THE PARTIES AGREE OTHERWISE.**

ORS 138.692(6) now reads consistent with the existing statute. HB 3206-5 returns the statute to the original approach of an OSP test-first approach, subject to the same alternate and additional test provisions. This provision of HB 3206-A is supported.

**10. REQUIRES MOTION HEARING COURT TO STATE DENIAL REASONS ON RECORD.**

ORS 138.692(6) now reads to require the court to state on the record the reasons for denial. This provision will assist the parties in understanding the reason of the motion hearing court. This provision of HB 3206-A is supported.

**11. PROVIDES A RIGHT TO COUNSEL AT ALL STAGES OF PROCEEDINGS.**

ORS 138.694 provides a right to counsel at all stages of proceedings. This addition will raise some cost to the state in the appointment of counsel. The motion court and District Attorney may be aided by the involvement of an attorney to help focus the fact and legal issues. This provision of HB 3206-A is supported.


**CONCLUSION:**

Though the Oregon District Attorney’s Association and Multnomah County District Attorney Rod Underhill remain neutral regards HB 3206-A, the bill is considered consistent with the original purpose behind the Oregon’s post-conviction DNA test 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.

Regards,

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By:

  
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