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DATE: February 7, 2016

TO: Hon. Floyd Prozanski and Members of the Senate Committee on Judiciary

FROM: Erin K. Olson

RE: SB 1553 Re: Criminal Statute of Limitations for First Degree Sex Crimes (Public Hearing - February 8, 2016 at 8:30 a.m.)

I regret that I am unable to testify at the February 8, 2016, hearing, and ask that you give my written testimony due consideration.

I am an attorney in private practice, and I represent crime victims in civil and criminal cases. I have practiced criminal law in some capacity in four states and for the U.S. Government, and was for ten years a prosecutor – in Oregon, Massachusetts, and for the federal government. I am past president and a current board member of the National Crime Victim Bar Association, and Deputy Chair of the Amicus Committee for the National Center for Victims of Crime.

I believe significant revisions are needed SB 1553, Section 1, for the following reasons:

Corroboration Requirement

I suggest the following amendments to Section 1(12)(b) for the reasons below:

> (b) The corroborating evidence described in paragraph (a) of this subsection must consist of one of the following:
>
> (A) **Documentary, electronically stored, or other p**~~P~~hysical evidence ~~other than a DNA sample~~, including but not limited to audio, video or other electronic recordings, text messages, guest book logs, telephone recordings, ~~and~~ photographs**, and scientific evidence**.
>
> (B) A**dmissions by the defendant, or a** confession to the crime made by the defendant.[1]

[1] The use of the word "defendant" is consistent with its use in provisions of chapter 132 to describe the person who is the subject of the grand jury investigation. However, a person does not become a defendant until he or she is a party to a criminal case. *See* ORS 131.025.

(C) An oral or written statement provided by the victim to another person, made or given to the other person **within reasonable temporal proximity** ~~contemporaneously~~ to the commission of the crime, corroborating the victim's report of the crime to a law enforcement agency.

(D) A report made by a different victim ~~to a law enforcement agency~~ alleging that the defendant committed ~~the~~ **a similar** crime.

First, the list excludes DNA evidence, which may well be corroborative independent of its potential role in identifying perpetrators. In fact, the list excludes any scientific evidence whatsoever.

Second, a defendant's admissions to some parts of the crime, or to circumstances that corroborate the victim's allegations, should be adequate corroboration to bring a crime within the extended statute of limitations. Sex offenders rarely confess to their crimes. Rather, they tend to minimize their actions in an effort to normalize their behavior. They may admit to touching but not penetration, or they may admit to penetration but claim it was consensual. The law distinguishes between confessions and admissions,[2] and if an admission is enough to corroborate a confession, it should also be enough to corroborate a victim's testimony. *See* ORS 136.425; *State v. Manzella*, 306 Or 303 (1988).

Third, the provision in 12(b)(C) referring to a victim making a statement about the crime "contemporaneously to the commission of the crime" would require that the victim describe the crime to a third person as it was happening. That cannot be what was intended.

Finally, the requirement in 12(b)(D) was presumably intended to refer to a different crime, and not "the crime" in which the victim was involved, so rewording is required to correct that. Also, the requirement that the other victim(s) reported to a law enforcement agency is too strict since many victims report to counselors, schools, parents, medical providers, and others, but not to law enforcement. Reports should not have to be made to law enforcement to be sufficient corroboration.

As a practical matter, few prosecutors are likely to pursue offenses that occurred many years ago without corroborative evidence, but I understand that a corroboration requirement was an attempt at a compromise of differing positions within the interim work group. However, I do not understand that the interim work group intended to limit what qualifies as corroborative evidence to what is listed in the bill.

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[2] An admission is an acknowledgment made by a party of the existence of facts that are relevant to the offense. *E.g. State v. Simons*, 214 Or App 675 (2007), *rev den*, 344 Or 43 (2008).

Exculpatory Evidence Provision

The exculpatory evidence provision presently reads as follows:

> (13)(a) A prosecuting attorney commencing a prosecution pursuant to subsection (12) of this section shall present any evidence reasonably tending to negate the guilt of the defendant to the grand jury considering the indictment for the offense.
>
> (b) The failure to present evidence reasonably tending to negate guilt as required by paragraph (a) of this subsection does not affect the validity of an indictment or prosecution

This bill is not the right place to impose a requirement on prosecutors to present exculpatory evidence to the grand jury, for the following reasons.

First, the exculpatory evidence provision is not "relating to crime," as the relating clause provides. Rather, it relates to either grand jury practice (ORS Chapter 132[3]) or obligations of prosecutors (ORS Chapter 8[4]).

Second, the requirement is, by its terms, precatory, since its violation "does not affect the validity of an indictment or prosecution." If the intent is for a violation to be sanctionable by the Oregon State Bar, then the appropriate mechanism is a change to the Rule of Professional Conduct that applies to prosecutors,[5] which per ORS 9.490, is a function of the Judicial Branch.[6]

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[3] Probably it belongs in or near ORS 132.320, where section (9) provides: "The grand jury is not bound to hear evidence for the defendant, but it shall weigh all the evidence submitted to it; and when it believes that other evidence within its reach will explain away the charge, it should order such evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses." *C.f.* ORS 132.190, which states, "The grand jury may find an indictment when all the evidence before it, taken together, is such as in its judgment would, if unexplained or uncontradicted, warrant a conviction by the trial jury."

[4] *E.g.* ORS 8.670, which provides, "The district attorney shall institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when the district attorney has information that any such offense has been committed, and attend upon and advise the grand jury when required."

[5] ORPC 3.8 provides, "The prosecutor in a criminal case shall:

Third, there is often considerable disagreement over what constitutes exculpatory evidence, and there is no mechanism for determining that at the grand jury phase. Must a suspect's self-serving statement to the media be presented to a grand jury when that same suspect has invoked her privilege against self-incrimination when questioned by law enforcement? Must evidence of a suspect's mental illness or possible intoxication at the time of the crime be presented to a grand jury? Also, Oregon law requires, with certain exceptions, that only admissible evidence be presented to the grand jury. Is the exculpatory evidence requirement in SB 1553 an exception? That is, will prosecutors have to present triple-hearsay that might arguably be exculpatory to grand juries?

Fourth, the requirement is not limited to exculpatory evidence known to the prosecutor.

Finally, the requirement would apply only to prosecutions that rely on the extension of the statute of limitations created by this bill.

The exculpatory evidence provision of this bill was not the purpose of the interim work group and was not the subject of meaningful debate. While there may be sound policy reasons for imposing such a requirement on prosecutors, this provision – which applies only to a small subset of offenses – does not effectuate the intended policy.

> (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; and
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> (b) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal."

[6] ORS 9.490 states:

> "(1) The board of governors, with the approval of the house of delegates given at any regular or special meeting, shall formulate rules of professional conduct, and when such rules are adopted by the Supreme Court, shall have power to enforce the same. Such rules shall be binding upon all members of the bar.
>
> (2) A court of this state may not order that evidence be suppressed or excluded in any criminal trial, grand jury proceeding or other criminal proceeding, or order that any criminal prosecution be dismissed, solely as a sanction or remedy for violation of a rule of professional conduct adopted by the Supreme Court."