



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

MEMORANDUM

DATE: February 11, 2019

TO: Honorable Floyd Prozanski, Chair

FROM: Paul L. Smith, Deputy Solicitor General
Aaron Knott, Legislative Director
Oregon Department of Justice

SUBJECT: Senate Bill 321 – DNA modification

These observations are offered in regard to Senate Bill 321. Senate Bill 321 pursues a worthy policy objective by enhancing access to the vital remedy of DNA testing for individuals convicted of a felony. The incarceration of an individual actually innocent of the crime for which they are convicted is a profound injustice that must be avoided. The Oregon Innocence Project correctly identifies this issue as in need of focused legislative attention. While the Department of Justice supports the policy objective underpinning this legislative proposal, the language of the proposal itself uses sometimes untested language which has no equivalent in other jurisdictions and will have an unnecessarily unpredictable impact on Oregon's criminal justice system. The Department of Justice requests that the Judiciary Committee engage in a close, comparative analysis of various possible DNA testing language options and resist the temptation to use new terminology unnecessary to achieve the laudable goal of increased access to justice.

BACKGROUND ON POST-CONVICTION RELIEF (PCR) DNA STATUTES

Under Oregon law, everyone who is convicted of a crime has the opportunity to pursue post-conviction relief (PCR). In a PCR proceeding, a convicted person can allege that their conviction resulted from an illegality or a procedural deficiency, including prosecutorial misconduct, deficiencies in representation, or other serious procedural shortcomings.

The current post-conviction DNA statutes were originally enacted in 2001 in recognition of the promise of rapidly advancing DNA testing technology held for identifying individuals convicted when this technology was not widely available and testing was therefore impossible or severely limited. The PCR DNA statute, as originally enacted, limited the availability of testing to cases in which the identity of the perpetrator was an issue, a gatekeeping mechanism which is used in several other states. That limitation was removed in 2015 via legislation proposed by the Oregon

Innocence Project.

ORS 138.690-698 allows a person to file a request for a DNA test if they can establish that the DNA evidence could exist and is relevant to establishing an element of the offense. To do so, they must present a prima facie showing that DNA testing would, assuming exculpatory results, lead to a finding that the person is actually innocent of the offense for which the person was convicted.

While it is essential to fair access to justice that DNA testing process be made fairly and reasonably available, this process does not occur without costs, representing both the fiscal and personnel costs to law enforcement, and the emotional costs to victims who cannot achieve closure or finality with the criminal proceeding. Weighing these costs against one another has led every state with a DNA testing statute to require some degree of gatekeeping that must be satisfied prior to a test being provided.

In its current form, SB 321 deletes or severely curtails most gatekeeping of the gatekeeping language from ORS 138.690.

#1 – “Actual Innocence” Standard

- SB 321 would eliminate the requirement for petitioners to demonstrate that testing would lead to a finding that they are “actually innocent.” Instead, they would only have to show that “testing would lead to a finding of a more favorable outcome at a new trial.” By getting rid of the “actually innocent” requirement, SB 321 will greatly expand the availability of PCR DNA testing far beyond its current purpose and in a way that will undermine finality in a significant number of cases. People who are, in fact, guilty of the crime would be able to obtain DNA testing by showing only that the testing might cause a juror to view the evidence differently, which was not the original intent of the existing law. If the legislature chooses to amend the statute in such a manner, it should consider additional limitations or screening methods to ensure that only defendants with plausible claims of actual innocence are entitled to seek relief.
- The “more favorable outcome” standard is an exceedingly low threshold for testing to be ordered. This would require testing of evidence even if the petitioner believed that results would be only inconclusive, because that inconclusive result would allow the petitioner to make a new argument to a jury.
- The “more favorable outcome” standard would require testing in a case in which the defendant was convicted of a murder and a sexual assault, and the proposed testing would only tend to cast doubt on the sexual assault conviction, not the murder. In other words, it would require testing in cases where a “favorable” result would have minimal real-world impact on whether the defendant was in prison or not.

#2 – Statute of Limitations/Repeated Filings

- Unlike other forms of post-conviction relief, SB 321 contains no statute of limitations or limitations on filing successive petitions. If the legislature lowers the threshold for testing to be ordered, it should put other limits in place to diminish repeated, abusive

petitions. Judicial discretion to deny a claim as frivolous or repetitive is not permitted in this draft.

#3 – “Prima Facie” Requirement Replacement

- Some versions of the proposed bill have called for the replacement of the current requirement to establish a prima facie theory of innocence with language that would require only a “reasonable possibility” of innocence. This language does not appear in any state statute as far as we are aware, and we would caution strongly against using a completely untested and unprecedented standard when other established standards exist.

#4 – “Relevant to establishing an element of the offense.”

- Current law requires that a person demonstrate that the DNA evidence could exist and is relevant to establishing an element of the offense. This proposal would require that the DNA evidence is related to the investigation or prosecution that resulted in the judgment of conviction. This would seem to allow for the use of any aspect of the investigation, including matters that were ultimately dismissed or non-dispositive to any element at issue. This proposal requires careful exploration to determine the scope of the possible impact.

THERE IS WOULD BE AN INDETERMINATE FISCAL IMPACT TO THE DEPARTMENT OF JUSTICE

- SB 321 will result in more petitions for DNA testing, more appeals from the allowance or denials of those petitions, and more DNA tests. Depending on exactly how many more petitions/appeals are filed, the fiscal impact of this bill could be significant but this is beyond the ability of the Department of Justice to determine.

SB 321 is a bill with a laudable policy intention, but is a bill that introduces a series of new variables into the process of DNA testing. The Department of Justice sees merit in the overall proposal, but remains concerned that the bill may unnecessarily complicate these motions through the use of untested terminology when other established options are available.

DOJ CONTACT

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