Oregon Innocence Project

Senate Judiciary Hearing on Senate Bill 321
Written Testimony of Steven T. Wax
Legal Direction, Oregon Innocence Project
swax@oregoninnocence.info
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Thank you for the opportunity to speak before you in support of Senate Bill 321, which amends Oregon's post-conviction DNA testing law.

My name is Steven T. Wax. I have served as the Legal Director of Oregon Innocence Project since October 1, 2014. For the prior 31 years, I served as the Federal Defender for the District of Oregon. During that time, I represented and supervised the representation of thousands of people in Oregon prisons, who were challenging their convictions through federal habeas corpus petitions. Prior to my tenure at the Federal Defender Office, I spent eight years trying cases and handling appeals in the New York State courts, four as an assistant district attorney in Brooklyn, and four as Public Defender of Broome County.

To date, 362 people have been exonerated through post-conviction DNA testing nationwide. I am joined today by one of the 362, Michael Morton, who spent nearly 25 years in the Texas prison system for a crime he did not commit.

This body should note that not one of the 362 people exonerated using post-conviction DNA testing comes from Oregon. This is not because Oregon's criminal justice system is different. It is because our post-conviction DNA law is not working the way this legislature intended. Mr. Morton's case demonstrates the importance of improving Oregon's post-conviction DNA testing law because had he been convicted here, he likely would not have been granted DNA testing.

Oregon was once a nationwide leader in post-conviction DNA testing as one of the first states to pass a law in 2001. It recognized that our criminal justice system can make mistakes, and that those mistakes can be corrected. Since the law passed in 2001, a number of improvements have been made (e.g., a right to appeal, application to all felony convictions). Unfortunately, those improvements have not led to fair consideration of testing DNA motions. This body showed foresight and leadership in passing the post-conviction DNA testing law in 2001, and I hope it is able to do the same in passing Senate Bill 321.

Motion for Inventory of Evidence

Senate Bill 321 mirrors other state statutes by allowing motions for law enforcement to produce an inventory of existing evidence.

Under Oregon's current post-conviction DNA testing law, there is no discovery provision. The current law requires, however, that movants identify evidence to be tested, ORS 138.692(1)(a)(B), and a court must find that the evidence was subjected to a chain of custody "sufficient to establish that the evidence has not been altered in any material aspect." ORS 138.692(4)(b). Without a current inventory of evidence, a movant may not know whether items are still in government custody, disbursed to other entities, or have been destroyed. If movants

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are notified of items having been destroyed, it will save the movants, courts, and attorneys valuable time and resources. Additionally, in virtually every post-conviction DNA testing case where counsel is appointed or retained, the attorney was not the attorney on the underlying criminal action or any appeals thereafter. The new attorney will need the same information, and if current information is not known by the movant or their previous attorneys, a motion may be filed.

Motion for District Attorney Discovery

Senate Bill 321 allows a movant to obtain discovery of, for example, police and laboratory reports, from the prosecuting agency if they first seek production of trial discovery from prior attorneys.

A movant is required to establish a connection between the evidence to be tested and crime committed to obtain post-conviction DNA testing. Similar to the need for an inventory of evidence, a movant and their attorney cannot conduct this analysis or make this showing unless they have access to case materials. Movants and attorneys conducting this assessment with the proper information may determine that post-conviction DNA testing would not be able to show that the movant did not commit the crime. They may then decide not to file a motion, saving valuable time and resources.

Understanding the burden of production, under this provision, movants must first make good faith efforts to seek trial discovery from their prior attorneys.

DNA testing under the post-conviction DNA testing law is not the exclusive means to obtain DNA testing after a conviction.

Senate Bill 321 clarifies that the post-conviction DNA testing law is not the exclusive way to obtain DNA testing after a conviction.

Oregon's DNA testing law was created so that movants can prove they did not commit the crimes with which they were convicted. In filing a motion, a movant must state under penalty of perjury that they are innocent of the offense for which they were convicted. ORS 138.692(1)(a)(A). DNA testing in other contexts, however, may be used to pursue other defenses or claims, such as ineffective assistance of trial counsel in a post-conviction case. Oregon's DNA testing law was not created to prevent the use of DNA testing in other post-conviction contexts.

DNA testing must be related to the investigation or prosecution.

Senate Bill 321 would broaden the scope of persons eligible for post-conviction DNA testing to include those convicted of offenses where DNA testing was "relevant" to the crime investigated or prosecuted but was not "relevant" to the crime of conviction.

Under Oregon's current law, those eligible for testing are limited to cases where DNA testing is "relevant to establishing an element of the offense." ORS 138.690. Broadening the scope of persons eligible for testing is necessary because defendants may plead guilty to or be convicted by a judge or jury of another or lesser included offenses than the offenses originally investigated

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or prosecuted for the same crime. If DNA testing was "relevant" to the original charge, but not "relevant" to the ultimate crime of conviction, those defendants would not be eligible for DNA testing. An example is a defendant who plead guilty to the lesser included offense of attempt.

Movant's Required Showing and Court's Standard

Senate Bill 321 eliminates an inconsistency that exists in the current law and puts Oregon's rigorous testing standard more in line with the national norm.

First, Oregon's current law requires movants to make a "prima facie showing" of innocence, ORS 138.692(1)(b). This is inconsistent with and higher than what a court must employ to grant testing, which is a "reasonable possibility." ORS 138.692(4)(d).

Second, the standard is tethered to a showing of "actual innocence" which is virtually impossible to satisfy in advance of testing. "Actual innocence" is a term of art that is used in post-conviction, habeas corpus, and new trial motions that requires strong proof of innocence because the remedy is reversal of a conviction. To require a prima facie showing of that high standard before DNA testing, which is sought to provide that type of evidence, is illogical and renders it virtually impossible to obtain testing.

Senate Bill 321 retains strong filters. First, the requirement that a movant assert his innocence remains and means that the statute can only be used when innocence is in issue. ORS 138.692(1)(a)(A). Second, it continues to require movants to explain how DNA testing relates to their assertion of innocence.

Senate Bill 321 directs a forward-looking assessment of the impact of all presumptively available evidence. This is necessary to make the standard consistent with the legislature's addition of the phrase "lead to," ORS 138.692(1)(b), (4)(d), during the 2015 Legislative Session, which requires the court to consider presumptively exculpatory DNA testing results and other new evidence in deciding a testing motion.

Enhancing the Use of DNA Databases

Senate Bill 321 would enhance the use of the federal and state DNA databases by allowing a court to order preapproval of private laboratories and submission of eligible DNA profiles not matching the victim or defendant.

On December 14, 2018, Gerard Richardson, an exoneree from New Jersey, who was wrongfully convicted of murder, testified before a joint hearing of the Senate and House Judiciary Committees. In 2012, DNA testing of a bite mark swab revealed that Mr. Richardson was not the killer. The DNA testing was conducted at a private accredited laboratory that specialized in getting results from old, degraded evidence.

The private lab provided the developed DNA profile to the state laboratory, but red tape prevented the profile from being uploaded into the federal DNA database, which has over 13.6 million profiles of known offenders and could contain the profile of the victim's real killer. The FBI only allows submission of DNA profiles developed by private accredited laboratories if the facility is first reviewed by state forensic experts—either through a site visit or by obtaining a

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review conducted by the FBI or another state. The New Jersey lab did not conduct or obtain and review of the private lab before testing was conducted in Mr. Richardson's case.

While Mr. Richardson's innocence was firmly established when the bite mark swab was DNA tested and excluded him as the possible source, this bureaucratic roadblock stood in the way of justice by preventing the identification of the true perpetrator.

In less straightforward cases, like Mr. Morton's, it is only the identification of the true perpetrator of a crime—through a comparison of crime scene evidence to offender profiles in federal and state DNA databases—that will enable the exoneration of the innocent. Senate Bill 321 would address the bureaucratic roadblock that prevented justice from being done for Mr. Richardson and the victim's family by allowing a court to order the Oregon State Police Forensic Services Division to conduct a preapproval of a private accredited facility.

Senate Bill 321 would also give courts explicit authority to require Oregon State Police Forensic Services Division to submit eligible DNA profiles that do not match victims or defendants into the state and federal DNA databases.

Though this legislation would affect few cases, it could still have important implications for public safety. For every innocent person behind bars, there is a guilty person who has not been convicted, and who could be committing more crimes.

Defense Access to Written Materials Supporting Lab Findings

Senate Bill 321 would allow for movants who obtain DNA testing under the law to receive written materials that support the testing lab's conclusions, such as reports, data, notes, and protocols.

Under Oregon's current law, movants who obtain DNA testing receive only testing results. ORS 138. 692(8). While DNA is the most objective form of evidence available in criminal justice system, it requires subjective analysis. Thus, it is essential for the movant to know not just the results of DNA testing but also to have access to the underlying reports, data, notes, and protocols used by the testing laboratory so the movant may consult with their own DNA expert.

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