

## **SB 321 -2 STAFF MEASURE SUMMARY**

### **Senate Committee On Judiciary**

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**Meeting Dates:** 2/11, 4/4, 4/8

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#### **WHAT THE MEASURE DOES:**

Modifies procedures by which a person who is eligible under ORS 138.690, commences post-conviction DNA testing. Directs the State Court Administrator to develop forms for petitions, orders, and other documents required for post-conviction DNA testing proceedings. Permits the court to not charge a filing fee. Allows a person who is eligible under ORS 138.690, to a petition to commence post-conviction DNA testing in the circuit court in which the judgment of conviction was entered. Directs the court, after a petition to commence proceedings has been filed and upon motion of the petitioner, to order that the petitioner be provided an inventory of, and documentation of the chain of custody for, all evidence related to the investigation or prosecution that resulted in the judgment of conviction; and if forensic testing previously occurred, be provided with access to the results and to any other written materials related to that testing. Directs the court, after a petition to commence proceedings has been filed and upon motion of the petitioner that includes a showing of good faith efforts to obtain discovery materials from prior defense counsel were unsuccessful, to order that the person be provided reasonable access to discovery materials in the possession of the district attorney and law enforcement agencies. Clarifies that other avenues of post-conviction relief may provide a means by which an individual can obtain post-conviction DNA testing and that ORS 138.690 to ORS 138.698 do not affect individual's ability to otherwise obtain post-convicting DNA testing.

Changes who is eligible to file a motion for post-conviction DNA testing to persons convicted of aggravated murder or a felony in which DNA evidence "is related to the investigation or prosecution that resulted in the judgment of conviction." Directs court to dismiss the proceedings without prejudice if, after filing a petition to commence the post-conviction DNA testing proceedings, the petitioner notifies the court that they do not wish to proceed.

Requires that a motion for post-conviction DNA testing be supported by a sworn declaration (removing the requirement of an affidavit) regarding the petitioner's innocence. Removes the requirement that the petitioner present a prima facie showing that DNA testing would, assuming exculpatory results, lead to a finding that the person is actually innocent. Directs the laboratory conducting the DNA research to provide the petitioner and the state with access to all written materials related to the DNA testing conducted as a result of these proceedings, including reports, underlying data, notes and protocols, in addition to the actual test results. Directs the court to make written findings when issuing an order.

Directs the court to order the Department of State Police to compare the DNA profile to profiles in the Combine DNA Index System and any other DNA database the department maintains, if the ordered DNA testing produces an unidentified DNA profile and meets the applicable database submission requirements. Directs the department to provide any results obtained from the comparison to the person who requested the testing and to the state.

#### **ISSUES DISCUSSED:**

#### **EFFECT OF AMENDMENT:**

-2 Replaces measure. Provides key definitions. Creates new process to initiate a petition for post-conviction DNA testing. Assigns the Judicial Department responsibility for creating forms for use by petitioners in these

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proceedings. Assures that pro se litigants will proceed by and through appointed counsel. Provides the petitioner with the ability to obtain a copy of property and evidence control and disposition records. Provides the petitioner access to the results and written materials of any previous forensic testing. Provides the petitioner reasonable access to discovery materials, if good faith efforts to obtain discovery from previous defense attorneys were unsuccessful. Provides process for petitioner to dismiss the proceeding. Prevents the court from charging filing fees. Allows the victim to opt into notification that a motion for post-conviction DNA testing has been filed under ORS 147.433 and provides the district attorney discretion to notify the victim if they have not opted in under that statute.

Requires that a declaration that the person is innocent of the offense be included in a motion for post-conviction DNA testing. Requires that the motion include 1) a statement that identifies the evidence to be tested with as much specificity as practicable; 2) the results of any previous DNA testing; 3) whether at issue is the identity of the individual who committed the crime or conduct or that no crime occurred; and 4) an explanation, in light of all the evidence, as to how there is a reasonable probability that had exculpatory results been available at the time of the underlying prosecution the person would not have been prosecuted or convicted or there would have been a more favorable outcome. Requires that the person concurrently serve the district attorney with a copy of any prior sworn testimony by the petitioner concerning the underlying prosecution or a document affirming that there are no prior sworn statements.

Clarifies that a person may file a motion under this section notwithstanding the fact that the person pleaded guilty or no contest to the underlying conviction. Requires the court to issue written findings when deciding on a petitioner's motion.

Requires the court to order post-conviction DNA testing when at issue in the underlying prosecution was the identity of the individual who committed the crime or if the person alleges no crime was committed testing could not have been obtained with the exercise of reasonable diligence and that in light of all evidence there is a reasonable probability that, had exculpatory results been available at the time of the underlying prosecution the person would not have been prosecuted or convicted of the offense.

Permits the court to order post-conviction DNA testing when at issue in the underlying prosecution was the identity of the individual who committed the crime or if the person alleges no crime was committed testing could not have been obtained with the exercise of reasonable diligence and that in light of all evidence there is a reasonable probability that, had exculpatory results been available at the time of the underlying prosecution there would have been a more favorable outcome.

Requires the district attorney to notify the victim if post-conviction DNA testing is ordered and if a new trial is ordered in light of the post-conviction DNA testing results..

Establishes procedures to be undertaken in advance of testing by an accredited non-NDIS laboratory (i.e., a private laboratory) so that it's test results may be entered into the National DNA Index System in the aftermath of testing. Gives a court authority to order that an unidentified DNA profile be compared against DNA profiles in the State DNA Index System and/or the National DNA Index System when certain standards have been met.

### **BACKGROUND:**

Oregon law provides everyone convicted with a crime the opportunity to seek post-conviction relief.

Post-conviction relief allows an individual to make a collateral challenge to a judgment of conviction which may otherwise be final. Under Oregon law, these challenges can include allegations that the conviction was a product

of illegal or procedural deficiencies. See ORS 138.510-138.686. In 2001, the legislature created statutes to allow individuals to seek post-conviction relief by moving the court for additional or new DNA testing of evidence used in the trial that led to their conviction. ORS 138.690-138.698 govern this process. As initially written, post-conviction DNA testing was only available where the identity of the perpetrator was at issue in the case, in 2015 the legislature expanded the statute to allow for a request for testing where DNA evidence could exist and is relevant to the establishment of any element of the offense for which the person was convicted. Thus, as currently written ORS 138.690 provides that a person may file a motion requesting the performance of DNA testing on specific evidence in the circuit court in which the judgment of conviction was entered if the person has been convicted of aggravated murder or a felony in which DNA evidence could exist and is relevant to establishing an element of the offense.

Per ORS 138.692, a motion for post-conviction DNA testing must be supported by an affidavit containing a statement that the person is innocent of the offense for which the person was convicted, identify the evidence to be tested with as much specificity as is reasonably practicable and a theory of defense that the DNA testing would support, and include the results of any previous DNA test of the evidence if a previous DNA test was conducted. Along with this statement of innocence, the person must present a prima facie showing that DNA testing of the evidence would, assuming exculpatory results, lead to a finding that the person is actually innocent of the offense for which the person was convicted. The court shall order the DNA testing if all of the above requirements are met, and unless stipulated otherwise, the evidence to be tested has been subject to a chain of custody sufficient to establish that the evidence has not been altered in any material aspect. The motion must have been made for the purpose of demonstrating the innocence of the person, not to delay the execution of the sentence or administration of justice. There must also be a reasonable possibility, assuming exculpatory results, that the testing would lead to a finding that the person is actually innocent of the offense for which the person was convicted. Absent agreement by both parties or the court finding compelling circumstances otherwise, the court shall order the Department of State Police to conduct the DNA testing. The court may order a second test upon a showing that the state police failed to follow appropriate DNA protocols and that failure reasonably affected the accuracy of the DNA test.

The costs of DNA tests ordered under this section must be paid by the person making the motion for DNA testing if the person is not incarcerated, or the incarcerated person who is financially able to pay. The expense falls to the state if counsel has been appointed at state expense. The laboratory conducting the DNA test shall provide a copy of the results of the test to the person making the motion and to the state. In the event of an appeal of the conviction or a petition for post-conviction relief in the underlying case is pending, the circuit court shall notify the court considering the appeal or post-conviction petition of that fact. The court shall stay the appeal or post-conviction proceedings pending the outcome of the motion filed under ORS 138.690 and any further proceedings resulting from the motion. The court shall make findings when issuing an order under this section. A person described in ORS 138.690 is entitled to counsel during all stages of the proceedings.

If DNA testing ordered produces inconclusive evidence or evidence that is unfavorable to the person requesting the testing, the court shall forward the results to the State Board of Parole and Post-Prison Supervision and the Department of State Police shall compare the evidence to DNA evidence from unsolved crimes in the Combined DNA Index System. If DNA testing produces exculpatory evidence, the person who requested the testing may file in the court that ordered the testing a motion for a new trial. A person may file a motion under this subsection at any time during the 60-day period that begins on the date the person receives the test results, and the court shall hear the motion. When a conviction has been set aside as the result of evidence obtained through DNA testing conducted under ORS 138.692, the prosecution of any offense that was dismissed or not charged pursuant to a plea agreement that resulted in the conviction that has been set aside may be commenced within the later of the period of limitation established for the offense or two years after the date the conviction was set aside.

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Senate Bill 321 creates a process by which a person can initiate post-conviction DNA testing, provides a manner through which petitioner can access the discovery and inventory of evidence from the initial conviction, protects individual's ability to request DNA testing through other means of post-conviction relief, provides a process by which the proceeding can be dismissed without prejudice, removes the requirement that a motion for post-conviction relief include a prima facie showing of actual innocence, requires written findings from the court, and directs the Department of State Police to compare any unidentified DNA profile discovered by post-conviction testing with the Combined DNA Index System and provide those findings to the petitioner.