

Requested by SENATE COMMITTEE ON JUDICIARY

**PROPOSED AMENDMENTS TO  
SENATE BILL 321**

1 On page 1 of the printed bill, line 3, after “138.692” delete the rest of the  
2 line and insert “, 138.694, 138.696, 138.697, 138.698 and 147.433.”.

3 Delete lines 5 through 30 and delete pages 2 and 3 and insert:

4 **“SECTION 1. Section 2 of this 2019 Act is added to and made a part**  
5 **of ORS 138.690 to 138.698.**

6 **“SECTION 2. As used in ORS 138.690 to 138.698:**

7 **“(1) ‘Accredited laboratory’ means a laboratory that does not par-**  
8 **ticipate in the National DNA Index System but that is accredited by**  
9 **a nonprofit organization and meets federal standards.**

10 **“(2) ‘CODIS’ means the Combined DNA Index System.**

11 **“(3) ‘DNA’ means deoxyribonucleic acid.**

12 **“(4) ‘Exculpatory results’ and ‘exculpatory evidence’ are limited to**  
13 **those DNA test results or evidence that are material to a determi-**  
14 **nation of the identity of the individual who committed the crime, or**  
15 **whether the crime was committed.**

16 **“(5) ‘Federal standards’ means the Federal Bureau of Investigation**  
17 **Quality Assurance Standards for Forensic DNA Testing Laboratories,**  
18 **as modified or amended by the Federal Bureau of Investigation, or any**  
19 **successor standards adopted by the Federal Bureau of Investigation.**

20 **“(6) ‘National DNA Index System’ or ‘NDIS’ means a national,**  
21 **searchable DNA database created and maintained by the Federal Bu-**

1 reau of Investigation where DNA profiles are stored.

2 “(7) ‘NDIS manual’ means the Federal Bureau of Investigation’s  
3 NDIS Operational Procedures Manual, as modified or amended by the  
4 Federal Bureau of Investigation, or any successor operational proce-  
5 dures manual.

6 “(8) ‘NDIS-participating laboratory’ means a forensic laboratory  
7 that has been designated to operate CODIS and participate in the Na-  
8 tional DNA Index System.

9 “(9) ‘State DNA index system’ means a statewide, searchable DNA  
10 database created and maintained by the Department of State Police  
11 where DNA profiles are stored.

12 “SECTION 3. ORS 138.690 is amended to read:

13 “138.690. (1) A person may file in the circuit court in which the judgment  
14 of conviction was entered a [*motion requesting*] **petition requesting the**  
15 **commencement of a DNA testing proceeding, and requesting that the**  
16 **court appoint an attorney for the purpose of determining whether to**  
17 **file a motion under ORS 138.692 for** the performance of DNA  
18 [*deoxyribonucleic acid*] testing on specific evidence, if the person has been  
19 convicted of aggravated murder or a felony in which DNA evidence could  
20 exist and is [*relevant to establishing an element of the offense*] **related to the**  
21 **investigation or prosecution that resulted in the judgment of con-**  
22 **viction.**

23 “(2) After proceedings have been commenced under subsection (1)  
24 of this section:

25 “(a) Upon motion of the person, the court shall order that the per-  
26 son be provided with a copy of property and evidence control and dis-  
27 position records for all evidence related to the investigation or  
28 prosecution that resulted in the judgment of conviction. If forensic  
29 testing on the evidence has previously occurred, the court shall fur-  
30 ther order that the person be provided with access to the results of the

1 testing and to any other written materials related to the testing, in-  
2 cluding reports, underlying data, notes and protocols.

3 “(b) Upon motion of the person and a showing that good faith ef-  
4 forts to obtain discovery materials from prior defense counsel were  
5 made and were unsuccessful, the court shall order that the person be  
6 provided reasonable access to discovery materials in the possession of  
7 the district attorney and law enforcement agencies that the person  
8 would have received under ORS 135.815 prior to trial.

9 “(3) At any time after a person files a petition under subsection (1)  
10 of this section, the person may file a motion to dismiss the proceeding  
11 on the grounds that the person does not wish to proceed with DNA  
12 testing. Upon receipt of the motion, the court shall dismiss the peti-  
13 tion without prejudice.

14 “(4) The court may not charge a fee for any filing under ORS 138.690  
15 to 138.698.

16 “(5) The State Court Administrator shall develop forms for pro-  
17 ceedings under ORS 138.690 to 138.698. The State Court Administrator  
18 shall provide the forms to the clerk of each circuit court, who shall  
19 make the forms available to the public.

20 “(6) ORS 138.690 to 138.698 are not the exclusive means by which a  
21 person convicted of a crime may obtain post-conviction DNA testing,  
22 and nothing in ORS 138.690 to 138.698 limits or affects any other means  
23 by which a person convicted of a crime may obtain post-conviction  
24 DNA testing.

25 “(7) If the victim did not request notification under ORS 147.433, the  
26 district attorney may provide notification upon the filing of a petition  
27 under this section if the name and address of the victim are known  
28 to the district attorney.

29 “**SECTION 4.** ORS 138.692 is amended to read:

30 “138.692. [(1)(a)] (1) [When] **After** a person files a [motion] **petition** under

1 ORS 138.690, **the person may file a motion** requesting the performance of  
2 DNA [(*deoxyribonucleic acid*)] testing on evidence[,]. The motion must be  
3 supported by [*an affidavit. The affidavit must*]:

4 “[*(A)*] **(a)** [*Contain a statement*] **A declaration by the person made**  
5 **under penalty of perjury** that the person is innocent of the offense for  
6 which the person was convicted; **and**

7 “[*(B)*] **(b)** **A statement that:**

8 **“(A)** [*Identify*] **Identifies** the evidence to be tested with as much  
9 specificity as is reasonably practicable [*and a theory of defense that the DNA*  
10 *testing would support*]. The evidence must have been secured in connection  
11 with the prosecution, including the investigation, that resulted in the con-  
12 viction of the person; [*and*]

13 “[*(C)*] **(B)** [*Include*] **Includes** the results of any previous DNA test of the  
14 evidence if a previous DNA test was conducted by either the prosecution or  
15 the defense[.];

16 “[*(b) Consistent with the statement of innocence described in paragraph*  
17 *(a)(A) of this subsection, the person must present a prima facie showing that*  
18 *DNA testing of the evidence would, assuming exculpatory results, lead to a*  
19 *finding that the person is actually innocent of the offense for which the person*  
20 *was convicted.*]

21 **“(C)(i) The identity of the individual who committed the crime or**  
22 **conduct was at issue in the underlying prosecution; or**

23 **“(ii) No crime occurred; and**

24 **“(D) Explains, in light of all the evidence, how there is a reasonable**  
25 **probability that, had exculpatory results been available at the time of**  
26 **the underlying prosecution:**

27 **“(i) The person would not have been prosecuted or convicted of the**  
28 **offense; or**

29 **“(ii) There would have been a more favorable outcome to the**  
30 **underlying prosecution.**

1       “(2) Concurrently with the filing of a motion under this section, the  
2 person shall serve the district attorney with:

3       “(a) A copy of any prior sworn testimony by the person concerning  
4 the underlying prosecution, including but not limited to affidavits,  
5 declarations, depositions and any testimony from the person in a prior  
6 post-conviction relief action challenging the conviction; or

7       “(b) A document affirming that there are no prior sworn state-  
8 ments.

9       “(3) A person may file a motion under this section notwithstanding  
10 the fact that the person pleaded guilty or no contest to the underlying  
11 conviction or, before or after conviction, made a confession or admis-  
12 sion.

13       “[(2)] (4) Upon being served as described in subsection (2) of this  
14 section, the state shall answer the motion requesting the performance of  
15 DNA testing and may refute the basis for the motion.

16       “[(3)] (5) Upon the motion of a party or the court’s own motion, the court  
17 may allow the testimony of witnesses if the testimony will assist the court  
18 in making its determination to grant or deny the motion requesting the  
19 performance of DNA testing. The court may not allow testimony from the  
20 victim of the offense without the consent of the victim.

21       “[(4)] (6) The court shall order the DNA testing requested in a motion  
22 under subsection (1) of this section if the court finds that:

23       “[(a) *The requirements of subsection (1) of this section have been met;*]

24       “[(b)] (a) Unless the parties stipulate otherwise, the evidence to be tested  
25 has been subject to a chain of custody sufficient to establish that the evi-  
26 dence has not been altered in any material aspect;

27       “[(c)] (b) The motion is made for the purpose of demonstrating the inno-  
28 cence of the person of the offense and not to delay the execution of the  
29 sentence or administration of justice; [*and*]

30       “(c)(A) The identity of the individual who committed the crime or

1 **conduct was at issue in the underlying prosecution; or**

2 **“(B) If the person alleges that no crime occurred, the testing could**  
3 **not have been obtained during the criminal proceedings with the ex-**  
4 **ercise of reasonable diligence; and**

5 *“(d) [There is a reasonable possibility, assuming exculpatory results, that*  
6 *the testing would lead to a finding that the person is actually innocent of the*  
7 *offense for which the person was convicted]* **In light of all the evidence,**  
8 **there is a reasonable probability that, had exculpatory results been**  
9 **available at the time of the underlying prosecution, the person would**  
10 **not have been prosecuted or convicted of the offense.**

11 **“(7) The court may order the DNA testing requested in a motion**  
12 **under subsection (1) of this section if the court finds that:**

13 **“(a) Unless the parties stipulate otherwise, the evidence to be tested**  
14 **has been subject to a chain of custody sufficient to establish that the**  
15 **evidence has not been altered in any material aspect;**

16 **“(b) The motion is made for the purpose of demonstrating the in-**  
17 **nocence of the person of the offense and not to delay the execution**  
18 **of the sentence or administration of justice;**

19 **“(c)(A) The identity of the individual who committed the crime or**  
20 **conduct was at issue in the underlying prosecution; or**

21 **“(B) If the person alleges that no crime occurred, the testing could**  
22 **not have been obtained during the criminal proceedings with the ex-**  
23 **ercise of reasonable diligence; and**

24 **“(d) In light of all the evidence, there is a reasonable probability**  
25 **that, had exculpatory results been available at the time of the under-**  
26 **lying prosecution, there would have been a more favorable outcome**  
27 **to the underlying prosecution.**

28 *“[(5)]* **(8) In granting a motion under this section, the court may impose**  
29 **reasonable conditions designed to protect the interests of the state in the**  
30 **integrity of the evidence and the testing process.**

1       “(9)(a) If a motion is granted under this section, the district attorney shall notify the victim if the name and address of the victim are  
2 known to the district attorney.  
3

4       “(b) The district attorney may notify the victim of the results of  
5 DNA testing ordered under this section.

6       “[(6)] (10) Unless both parties agree or the court finds compelling circumstances otherwise, the court shall order the Department of State Police  
7 to conduct the DNA testing. The court may order a second test upon a  
8 showing that the state police failed to follow appropriate DNA protocols and  
9 that failure reasonably affected the accuracy of the DNA test.  
10

11       “(11) A party seeking entry into the National DNA Index System  
12 or State DNA Index System of any unknown DNA profile generated  
13 through DNA testing ordered under this section shall comply with  
14 section 8 of this 2019 Act.

15       “[(7)] (12) The costs of DNA [*tests*] testing ordered under this section  
16 must be paid by:

17       “(a) The person making the motion for DNA testing if the person is not  
18 incarcerated or, if the person is incarcerated, if the person is financially able  
19 to pay; or

20       “(b) The state if counsel at state expense has been appointed under ORS  
21 138.694.

22       “[(8)] (13) The laboratory conducting the DNA test shall provide [*a copy*  
23 *of*] access to the results of the test and to any other written materials  
24 related to the testing, including reports, underlying data, notes and  
25 protocols, to the person filing the motion and to the state.

26       “[(9)] (14) Notwithstanding the fact that an appeal of the conviction or  
27 a petition for post-conviction relief in the underlying case is pending at the  
28 time a motion is filed under [ORS 138.690] this section, the circuit court  
29 shall consider the motion. If the court grants the motion, the court shall  
30 notify the court considering the appeal or post-conviction petition of that

1 fact. When a court receives notice under this subsection, the court shall stay  
2 the appeal or post-conviction proceedings pending the outcome of the motion  
3 filed under [ORS 138.690] **this section** and any further proceedings resulting  
4 from the motion.

5 “[~~(10)~~] **(15)** The court shall make **written** findings when issuing an order  
6 under this section.

7 **“SECTION 5.** ORS 138.694 is amended to read:

8 “138.694. (1) A person described in ORS 138.690 is entitled to counsel  
9 during all stages of the proceedings described in ORS 138.692, 138.696 and  
10 138.697 **and section 8 of this 2019 Act.**

11 “(2) A person described in ORS 138.690 may file a petition in the circuit  
12 court in which the judgment of conviction was entered requesting the ap-  
13 pointment of counsel at state expense to assist the person in determining  
14 whether to file a motion under ORS [~~138.690~~] **138.692**. The petition must be  
15 accompanied by:

16 “(a) A completed affidavit of eligibility for appointment of counsel at  
17 state expense; and

18 “(b) An affidavit stating that:

19 “(A) The person meets the criteria in ORS 138.690;

20 “(B) The person is innocent of the charge for which the person was con-  
21 victed; and

22 “(C) The person is without sufficient funds and assets, as shown by the  
23 affidavit required by paragraph (a) of this subsection, to hire an attorney to  
24 represent the person in determining whether to file a motion under ORS  
25 [~~138.690~~] **138.692**.

26 “(3) The court shall grant a petition filed under this section if:

27 “(a) The petitioner complies with the requirements of subsection (2) of  
28 this section; and

29 “(b) It appears to the court that the petitioner is financially unable to  
30 employ suitable counsel possessing skills and experience commensurate with



1 the nature and complexity of the matter.

2 “(4) An attorney appointed under this section:

3 “(a) If other than counsel provided pursuant to ORS 151.460, is entitled  
4 to compensation and expenses as provided in ORS 135.055; or

5 “(b) If counsel provided pursuant to ORS 151.460, is entitled to expenses  
6 as provided in ORS 135.055.

7 **“SECTION 6.** ORS 138.696 is amended to read:

8 “138.696. (1) If DNA [*(deoxyribonucleic acid)*] testing ordered under ORS  
9 138.692 produces inconclusive evidence or evidence that is unfavorable to the  
10 person requesting the testing:

11 “(a) The court shall forward the results to the State Board of Parole and  
12 Post-Prison Supervision; and

13 “(b) The Department of State Police shall compare the evidence to DNA  
14 evidence from unsolved crimes in the Combined DNA Index System.

15 “(2) If DNA testing ordered under ORS 138.692 produces exculpatory evi-  
16 dence, the person who requested the testing may file in the court that or-  
17 dered the testing a motion for a new trial based on newly discovered  
18 evidence. Notwithstanding the time limit established in ORCP 64 F, a person  
19 may file a motion under this subsection at any time during the 60-day period  
20 that begins on the date the person receives the test results.

21 “(3) Upon receipt of a motion filed under subsection (2) of this section  
22 and notwithstanding the time limits in ORCP 64 F, the court shall hear the  
23 motion pursuant to ORCP 64.

24 **“(4) If the court orders a new trial in response to a motion described  
25 in this section, the district attorney shall notify the victim.**

26 **“SECTION 7.** Section 8 of this 2019 Act is added to and made a part  
27 of ORS 138.690 to 138.698.

28 **“SECTION 8.** (1) If DNA testing ordered under ORS 138.692 produces  
29 an unidentified DNA profile, upon motion of a party the court may  
30 order an NDIS-participating laboratory within this state to:

1       “(a) Enter the DNA profile into the National DNA Index System;  
2 or

3       “(b) Enter the DNA profile into the State DNA Index System if the  
4 profile meets all applicable requirements.

5       “(2) Notwithstanding subsection (1)(a) of this section, the DNA  
6 profile shall only be compared to the National DNA Index System if  
7 the state administrator of the Combined DNA Index System deter-  
8 mines that:

9       “(a) The forensic sample has a nexus to the crime scene, is  
10 probative, and was suitable for analysis;

11       “(b) The DNA profile was generated through a technology that  
12 complies with all requirements in the NDIS manual and federal stan-  
13 dards; and

14       “(c) The DNA profile meets all requirements in the NDIS manual  
15 for entry.

16       “(3)(a) If a party to post-conviction DNA testing proceedings seeks  
17 to conduct the testing at an accredited laboratory and intends to have  
18 any DNA profile resulting from the testing submitted to the National  
19 DNA Index System or the State DNA Index System, the party may  
20 identify an NDIS-participating laboratory within this state and request  
21 the court, by motion, to order the NDIS-participating laboratory to  
22 evaluate whether the accredited laboratory is in compliance with fed-  
23 eral standards for the purpose of uploading DNA profiles to CODIS.  
24 The party shall provide notice of the requested order to the opposing  
25 party and to the NDIS-participating laboratory identified in the mo-  
26 tion.

27       “(b) The state may appear on the motion as a party to post-  
28 conviction DNA testing proceedings or on behalf of the  
29 NDIS-participating laboratory if the laboratory is a public entity.

30       “(4) The court may order the NDIS-participating laboratory to

1 **conduct an evaluation pursuant to subsection (3) of this section if the**  
2 **moving party demonstrates and the court finds that:**

3 **“(a)(A) The NDIS-participating laboratory is not able to, or for**  
4 **practical reasons has determined not to, perform the specific testing**  
5 **and analysis sought by the moving party;**

6 **“(B) The NDIS-participating laboratory’s testing and analysis would**  
7 **not be substantially equivalent to testing and analysis by the accred-**  
8 **ited laboratory; or**

9 **“(C) Testing and analysis by the NDIS-participating laboratory**  
10 **would not otherwise be appropriate;**

11 **“(b) The evaluation will not delay investigations or unduly burden**  
12 **the resources of the NDIS-participating laboratory; and**

13 **“(c) There is a reasonable likelihood that the evaluation would re-**  
14 **sult in a finding that:**

15 **“(A) The accredited laboratory is in compliance with federal stan-**  
16 **dards; and**

17 **“(B) If a DNA profile is generated from testing by the accredited**  
18 **laboratory, the profile would meet all requirements in the NDIS man-**  
19 **ual and federal standards.**

20 **“(5) If the court orders an evaluation of an accredited laboratory**  
21 **under subsection (4) of this section, within 120 days of receiving the**  
22 **court order, the NDIS-participating laboratory shall comply with the**  
23 **order as follows:**

24 **“(a) The NDIS-participating laboratory may conduct the evaluation**  
25 **by obtaining and reviewing the records of an on-site visit and assess-**  
26 **ment of the accredited laboratory previously conducted by the Federal**  
27 **Bureau of Investigation or an NDIS-participating laboratory.**

28 **“(b) If a previously conducted on-site visit and assessment were not**  
29 **conducted within a time frame required by federal law, the results of**  
30 **the previously conducted on-site visit and assessment are unavailable,**

1 or the accredited laboratory is not in compliance with other applicable  
2 standards, the NDIS-participating laboratory may:

3 “(A) Evaluate the accredited laboratory by conducting a new on-site  
4 visit and assessment, provided that:

5 “(i) The ability to conduct the new on-site visit and assessment is  
6 within the limits of available resources of the NDIS-participating lab-  
7 oratory;

8 “(ii) The accredited laboratory agrees to cooperate with the new  
9 on-site visit and assessment; and

10 “(iii) The moving party bears the costs associated with the new  
11 on-site visit and assessment; or

12 “(B) Notify the court of the inability to evaluate the accredited  
13 laboratory by conducting a new on-site visit and assessment due to the  
14 available resources of the NDIS-participating laboratory, a refusal by  
15 the accredited laboratory to cooperate with the on-site visit and as-  
16 sessment or the refusal by the moving party to bear the costs associ-  
17 ated with the new on-site visit and assessment.

18 “(6) A determination by the NDIS-participating laboratory as to  
19 whether the accredited laboratory is in compliance with federal stan-  
20 dards is not subject to judicial review.

21 “(7) Should any provision of a court order under this section be  
22 determined to violate federal law, the NDIS manual, or any memo-  
23 randum of understanding between the Federal Bureau of Investigation  
24 and the Department of State Police concerning forensic laboratories,  
25 that portion of the order shall be considered unenforceable and the  
26 remaining portions of the order remain in effect.

27 “SECTION 9. ORS 138.697 is amended to read:

28 “138.697. (1) A person described in ORS 138.690 may appeal to the Court  
29 of Appeals from a circuit court’s final order or judgment denying or limiting  
30 DNA [*deoxyribonucleic acid*] testing under ORS 138.692, denying appoint-

1 ment of counsel under ORS 138.694 or denying a motion for a new trial under  
2 ORS 138.696.

3 “(2) The state may appeal to the Court of Appeals from a circuit court’s  
4 final order or judgment granting a motion for DNA testing under ORS  
5 138.692 or granting a motion for a new trial under ORS 138.696.

6 “(3) The time limits described in ORS 138.071, the notice requirements  
7 described in ORS 138.081 and 138.090 and the provisions of ORS 138.225,  
8 138.227, 138.255 and 138.257 apply to appeals under this section unless the  
9 context requires otherwise.

10 “(4) A circuit court shall appoint counsel to represent a person described  
11 in ORS 138.690 on appeal in the same manner as for criminal defendants  
12 under ORS 138.500.

13 **“SECTION 10.** ORS 138.698 is amended to read:

14 “138.698. When a conviction has been set aside as the result of evidence  
15 obtained through DNA [*deoxyribonucleic acid*] testing conducted under ORS  
16 138.692, the prosecution of any offense that was dismissed or not charged  
17 pursuant to a plea agreement that resulted in the conviction that has been  
18 set aside may be commenced within the later of:

19 “(1) The period of limitation established for the offense under ORS 131.125  
20 to 131.155; or

21 “(2) Notwithstanding ORS 131.125 and 131.155, two years after the date  
22 the conviction was set aside.

23 **“SECTION 11.** ORS 147.433 is amended to read:

24 “147.433. (1) To accord crime victims due dignity and respect, a victim in  
25 a criminal proceeding described in subsection (2) of this section has, upon  
26 request to the district attorney before a judgment of conviction is entered,  
27 the following rights:

28 “(a) The right to be notified by the district attorney of the victims’ rights  
29 described in this section and ORS 138.627 and 144.750;

30 “(b) The right to reasonable, accurate and timely notice from the Attor-

1 ney General when an appeal is taken in the criminal proceeding;

2 “(c) The right to reasonable, accurate and timely notice from the counsel  
3 for the state when a conviction in the criminal proceeding is the subject of  
4 a petition for post-conviction relief filed under ORS 138.510 to 138.680 **or**  
5 **post-conviction DNA (deoxyribonucleic acid) testing under ORS 138.690**  
6 **to 138.698;**

7 “(d) The right to attend any public hearing related to the criminal pro-  
8 ceeding that is conducted by an appellate court; and

9 “(e) The right to be reasonably protected from the offender, if the offender  
10 is present, at any related appellate or post-conviction relief proceeding.

11 “(2) The provisions of this section apply only to criminal proceedings in-  
12 volving a defendant charged with or convicted of:

13 “(a) A person felony, as that term is defined in the rules of the Oregon  
14 Criminal Justice Commission;

15 “(b) A person Class A misdemeanor, as that term is defined in the rules  
16 of the Oregon Criminal Justice Commission;

17 “(c) Burglary in the first degree under ORS 164.225;

18 “(d) A sex crime as defined in ORS 163A.005; or

19 “(e) An attempt, conspiracy or solicitation to commit a crime described  
20 in paragraph (a) or (b) of this subsection.

21 “(3) As used in this section, ‘victim’ has the meaning given that term in  
22 ORS 131.007.”.

23

---