



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: September 24, 2024

TO: Chairs Prozanski and Kropf, Vice-Chairs Thatcher, Wallan and Andersen, and Members of the Senate and House Interim Committees on Judiciary

FROM: Kimberly McCullough, Legislative Director
Sheila Potter, Chief Trial Counsel
Oregon Department of Justice

SUBJECT: Wrongful Conviction Compensation

Thank you for inviting us here today to share more about DOJ's role in these civil cases. I will be providing you with a brief overview of the wrongful conviction compensation statute and then Sheila will provide an update on our work on these cases. Note that some of our presentation is repetitive of what we presented to the Senate Judiciary Committee in the Spring, but we want to ensure that the House Committee members present have the information they need to understand the discussion. We have shortened those comments that are repetitive and will provide the committee with our lengthier comments from the Spring for your reference.

As an initial matter, please note that we cannot discuss the specifics of any particular case. When it comes to active litigation, discussions about a case should happen either in the courthouse and through the court process or between the attorneys for each party. We hope you understand why this is not the appropriate venue for us discuss specifics of the cases.

The statute:

The legal structure for wrongful conviction compensation was established by SB 1584 in 2022. As you may recall, the Attorney General and Department of Justice supported that bill, after working collaboratively with the Forensic Justice Project and Innocence Project on its provisions. As we stated back then, we know that wrongful conviction occurs, and we believe that compensation is appropriate when Oregon has put the wrong person behind bars.

Under SB 1584 (now codified as ORS 30.657 and ORS 30.659), in order to receive compensation, three separate requirements must be met:

First, the person was convicted of one or more felonies and was imprisoned because of the conviction or convictions;

Second, the conviction has “gone away” in one of the following three ways:

The person’s conviction was reversed or vacated by an appellate court and the charges were then dismissed;

The person’s conviction was reversed or vacated and they were then tried again and acquitted; or

The person was pardoned by the governor;

Third, the petitioner must prove, by a preponderance of the evidence, that:

They did not commit the crime or crimes they had been convicted of;

They were not an accessory or accomplice to or otherwise involved in the acts that were the basis of the conviction; and

They did not commit perjury, fabricate evidence or by their own conduct cause or bring about the conviction. Note that perjury and fabrication of evidence does not include a false confession or guilty plea.

Importantly, unlike a criminal case, where the State has the burden of proving that the defendant *did* commit the crime, the petitioner here has the burden of providing they *did not* commit the crime.

The wrongful conviction compensation statute anticipates that a court will make the determination of whether a petitioner has met their burden of proof. If the court makes that determination, it will award compensation to the petitioner. It will also award attorneys fees to compensate the petitioner’s lawyers for their work on the case. Of course, there are always circumstances where the parties may agree to resolve a case prior to trial.

SB 1584 went into effect on March 23, 2022. For people with claims arising before the effective date of the legislation, it gave petitioners 180 days to provide DOJ with notice that they would be filing a petition for compensation, which was September 19, 2022, and two years to file their petition, which was March 23rd of this year. Moving forward, people with claims must file a notice within 180 days after the date on which their charges were dismissed, they were found not guilty

on retrial or they received a grant of pardon, and their petition must be filed within 2 years of that date.

Before I pass it over to Sheila, I want to acknowledge that we understand that the Forensic Justice Project and Innocence Project would like to make some changes to the statute, and while we can't commit the next Attorney General to any particular position, we have met with them to provide some technical feedback and appreciate their ongoing willingness to engage in productive conversations with us.

DOJ's Trial Division Work on these Cases

SB 1584 directs people seeking compensation to file a petition for compensation in court, and it directs the Attorney General's office to represent the state in all proceedings on the petition.

The Oregon Department of Justice Trial Division defends the State and state employees when they are sued, and under SB 1584 we also handle the defense of the State when it is sued for wrongful conviction compensation. The Trial Division was given position authority to hire two lawyers to review those petitions and handle the litigation outlined in the statute, along with one paralegal and one legal assistant. We also have several other lawyers and staff working on these petitions too, in addition to their other caseloads, due to the volume and complexity of the cases and claims filed so far.

The lawyers in the Trial Division who handle this important work are experienced professionals and longtime public servants, who have expertise in practicing civil law for the State. These petitions are not criminal cases, so the lawyers handling them are not prosecutors, nor were they involved in the criminal cases against the people now seeking compensation. They are coming to the cases with fresh eyes and neutral objectives. These cases are difficult for everyone involved, and often are deeply complex, with facts and evidence that are sometimes decades old. Our attorneys are dedicated to giving each claim and each case a careful, thorough, and thoughtful assessment, and they are working diligently to resolve each case in the most appropriate manner.

To date, we have received 31 petitions initiating litigation against the State, and 21 notices for which no petition has yet been received, for a total of 52 claims. (When we presented to the Senate Judiciary Committee in the Spring of this year, 14 petitions had been filed, and 20 notices, for a total of 34 claims.)

Of the 31 cases with filed petitions, 19 have resolved or are nearing resolution. Six cases have been dismissed by the courts or otherwise decided in the State's favor on motions. In three more cases,

we have filed motions to dismiss and have not yet received a decision. We have settled three cases and are actively working toward settlement in three more. We have had two trials: the State prevailed in one, and we are awaiting the court's decision in another. Three more cases are set for trial in the next six months.

As already noted, DOJ's role is to represent the State in the proceedings by assessing the evidence and the claims, and by ultimately bringing the case to a court for resolution if it cannot be resolved short of trial.

We take our call to public service seriously, and our lawyers at the Oregon Department of Justice are handling each case in a manner intended to reach a fair and just resolution of all cases, pursuant to the legal standard the Legislature has directed us to apply.



DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

DATE: February 29, 2024

TO: Chair Prozanski, Vice-Chair Thatcher, and
Members of the Senate Committee on Judiciary

FROM: Kimberly McCullough, Legislative Director
Sheila Potter, Chief Trial Counsel
Oregon Department of Justice

SUBJECT: Wrongful Conviction Compensation

Thank you for inviting us here today to share more about DOJ's role in these new civil cases. We first would like to acknowledge that these cases are difficult for everyone to revisit after so many years have passed. For that reason, the statute gives judges overseeing these cases a fair amount of discretion to address unique aspects of each case. At the same time, the statute clearly states that the petitioner, meaning the person bringing the compensation claim, has the legal burden of proving their case.

Please note that we cannot discuss the specifics of any particular case. When it comes to active litigation, discussions about a case should happen either in the courthouse and through the court process or between the attorneys for each party. We hope you understand why this is not the appropriate venue for us discuss specifics of the cases.

The statute:

The legal structure for wrongful conviction compensation was established by SB 1584 in 2022. As you may recall, the Attorney General and Department of Justice supported that bill, after working collaboratively with the Forensic Justice Project and Innocence Project on its provisions. As we stated back then, we know that wrongful conviction occurs, and we believe that compensation is appropriate when Oregon has put the wrong person behind bars.

Under SB 1584, in order to receive compensation, three separate requirements must be met:

First, the person was convicted of one or more felonies and was imprisoned because of the conviction or convictions;

Second, the conviction has “gone away” in one of the following three ways:

The person’s conviction was reversed or vacated (this would happen in the appellate court) and the charges were then dismissed; or

The person’s conviction was reversed or vacated, they were then tried again and acquitted; or

The person was pardoned by the governor;

Third, the petitioner must prove, by a preponderance of the evidence, that:

They did not commit the crime or crimes they had been convicted of;

They were not an accessory or accomplice to or otherwise involved in the acts that were the basis of the conviction; and

They did not commit perjury, fabricate evidence or by their own conduct cause or bring about the conviction. Note that perjury and fabrication of evidence does not include a false confession or guilty plea.

We want to focus in on the third requirement because that is where confusion may occur. To paraphrase that third requirement again, to qualify for compensation, the petitioner must prove that they did not commit the crime and had no other involvement in the commission of the crime.

Importantly, unlike a criminal case, where the State has the burden of proving that the defendant *did* commit the crime, the petitioner here has the burden of providing they *did not* commit the crime. The standard is “by a preponderance of the evidence,” meaning they must show the court that it is more likely than not that they did not commit the crime and had no other involvement in the commission of the crime.

We think what may cause confusion in these cases, is that a decision a District Attorney’s not to retry the case, an acquittal in a re-trial, or a decision by the Governor to pardon a defendant, does not automatically mean that the petitioner gets compensation under this law.

If the conviction is overturned by an appellate court and the DA decides not to retry the case, the petitioner may have met the second requirement, but not the third. It is important to understand that a DA will often decline to retry a case when the witnesses are no longer available (they have moved away or are deceased) or for other reasons that have nothing to do with innocence of the defendant.

Similarly, if a conviction is overturned by an appellate court and the DA does decide to retry the case and the defendant is acquitted on retrial, the petitioner must still prove the third requirement. This is because an acquittal in a re-trial means that the state could not prove “beyond a reasonable doubt” that the defendant was guilty. It does not mean that the defendant did not commit the crime.

Remember, in a criminal case, the state has a high burden to prove guilt: beyond a reasonable doubt. This burden is high to protect our constitutional rights. It also means there are cases where a person did in fact commit a crime, and yet the person is acquitted because the state could not meet that high bar in the particular case.

And finally, in the case of a pardon, a petitioner may have met the second requirement, but according to the law—petitioner also must prove the third requirement: that they did not commit the crime and had no other involvement in the commission of the crime.

The wrongful conviction compensation statute also anticipates that a court will make the determination of whether a petitioner has met their burden of proof. If the court makes that determination, it will award compensation to the petitioner. It will also award attorneys fees to compensate the petitioner’s lawyers for their work on the case. Of course, there are always circumstances where the parties may agree to resolve a case prior to trial. As we said in our testimony in support of SB 1584, after reviewing these cases, “The DOJ may then agree to the relief or take the case to court.”

SB 1584 went into effect a little less than two years ago, on March 23, 2022. For people with claims arising before the effective date of the legislation, it gave petitioners 180 days to provide DOJ with notice that they would be filing a claim, which was September 19, 2022, and two years to file petitions, which is March 23 of this year. Our review of these cases takes time, as does the court process. We are still quite early in the life of this statute, and some time passing and cases resolving is likely to be illuminating to this committee and your assessment of how the statute is working.

DOJ’s Trial Division Work on these Cases

SB 1584 directs people seeking compensation to file a petition for compensation in court, and it directs the Attorney General’s office to represent the state in all proceedings on the petition.

The Oregon Department of Justice Trial Division defends the State and state employees when they are sued, and we handle the wrongful conviction claims. The Trial Division was given position authority to hire two lawyers to review those petitions and handle the litigation outlined in the statute, along with one paralegal and one legal assistant. We also have several other lawyers and

staff working on these petitions too, in addition to their other caseloads, due to the volume of the cases and claims filed so far.

The lawyers in the Trial Division who handle this important work are experienced professionals and longtime public servants, that have expertise in practicing civil law for the State. These petitions are not criminal cases, so the lawyers handling them are not prosecutors, nor were they involved in the criminal cases against the people now seeking compensation. They are coming to the cases with fresh eyes and neutral objectives. These cases are difficult for everyone involved, and our attorneys are dedicated to giving each claim and each case a careful, thorough, and thoughtful assessment.

We have received 32 notices of claims so far, by my count as of yesterday evening; 16 claims and one petition were filed within the first four months. As of yesterday, 14 petitions have been filed in court. Of those 14 petitions, one has already been dismissed by the court, and 13 are under investigation by our team or are in litigation. There are 20 notices of claims where no petition has yet been filed. We expect that we will see a substantial number of new filings by the March 23 deadline for people with claims arising before the effective date of the litigation, which will increase the demand for attorney resources.

As already noted, the statute anticipates that a court will consider evidence submitted by the parties, and it advises courts on what they may consider in assessing that evidence, including that the court should exercise its discretion regarding the admissibility of evidence and the weight to give to the evidence submitted by the parties. And the statute sets out the petitioner's burden to prove by a preponderance of the evidence that the petitioner did not commit the crime and was not involved in the crime. So, under the statute, DOJ's role is to represent the State in the proceedings by assessing the evidence and the claims, and by ultimately bringing the case to a court for resolution if it cannot be resolved short of trial.

Just like when any new case is filed, our trial lawyers review the allegations made by the person bringing the litigation in their opening document. We also start working on obtaining the records that will allow us to assess the claims – trial transcripts, evidence from any post-conviction proceedings, witness statements – and once we have those records in hand, we review them carefully. We take every piece of evidence seriously. As the case develops, we consider whether to resolve the claim or to take it to trial.

A case may resolve early on if the petitioner's claim to have not committed the crime is clear and well established by the evidence. In two claims already submitted, the State has agreed that the claimant established the elements before the petition was filed, and those claims are resolved now.

We take our call to public service seriously, and our lawyers at the Oregon Department of Justice want a fair and just resolution of all cases, pursuant to the legal standard the Legislature has directed us to apply.