

Innocence Project Testimony for Senate Bill 554 (2023): SUPPORT
Oregon Senate Committee on Judiciary
February 6, 2023

The Innocence Project is a national organization dedicated to exonerating wrongfully convicted people through postconviction DNA testing and reforming the criminal justice system to prevent future injustice. We work with our local partners across the country on policies that prevent and address wrongful conviction. We would like to thank Senators Thatcher and Gorsek for their leadership in sponsoring SB 554, and their dedication to the wrongfully convicted.

Misapplied Forensic Science is Sending Innocent People to Prison

As forensic science advances and specific disciplines are more extensively studied and tested, some forensic disciplines that used to be widely accepted have come under increased scrutiny and in some cases have been completely invalidated. Some examples of discredited forensic disciplines include:

- **Microscopic Hair Comparisons:** Microscopic hair analysis involves comparing hair found at a crime scene with the hair of the defendant or victim. A 2009 National Academy of Sciences report stated that microscopic hair comparisons could not be used to match hair with a specific individual. In 2015, the FBI announced that its hair microscopy experts made erroneous statements in describing the probability of a match between hair evidence and the defendant's hair in at least 90 percent of the 268 cases it had reviewed.
- **Arson:** Two decades of fire research has debunked evidence that was used to convict people of arson. The 1992 publication of National Fire Protection Association (NFPA) 921 noted that many of the physical artifacts previously thought to occur only in intentional fires—such as “alligating” of wood, crazed glass, and sagged furniture springs—could actually occur in accidental fires. NFPA 921 only became generally accepted by the relevant scientific community in the early 2000's.
- **Comparative Bullet Lead Analysis:** Comparative Bullet Lead Analysis (“CBLA”) was believed to be able to link bullets found at a crime scene to bullets possessed by a suspect based on the assumption that the lead composition in a bullet was unique and limited to the batch that it came from. Since the early 1980's, the FBI conducted bullet lead examination in over 2,500 cases. The FBI stopped using CLBA in 2005 after a 2002 National Academy of Sciences (NAS) report found problems with interpretations of the results of these analyses.

Inability for Oregonians to Prove Innocence

Oregon lacks a clear mechanism for wrongfully convicted people to prove their innocence in cases where misapplied forensic science was central at the original trial. **The misapplication of forensic**

science contributed to 44% of wrongful convictions in the United States proven through DNA testing. The National Registry of Exonerations, which tracks known wrongful convictions nationwide, has found that **more than 20% of people wrongfully convicted because of false or misleading forensics actually pled guilty to crimes they didn't commit.** If forensic science can send people to prison, then Oregon must have an avenue for relief when that science is wrong or outdated. Because shifts in scientific understanding often take decades to emerge, Oregonians whose wrongful convictions were based on misapplied science face difficulties in proving their innocence due to time limitations and high evidentiary standards. In addition, Oregon courts do not recognize discredited scientific evidence as new evidence of a wrongful conviction. It is critical that there be a mechanism for the wrongfully convicted to get back into court to prove their innocence if the forensic evidence used to convict them is undermined by new scientific advancements, guidelines, or repudiation of expert testimony.

Changed standards and practices in the areas of arson, composite bullet lead analysis, forensic odontology and hair microscopy, to name a few, have garnered national attention. But often the individuals convicted under these unreliable methods remain incarcerated with no legal remedy to address this injustice. DNA exonerations have shed light on instances where outdated science has contributed to wrongful convictions. Often these exonerations were made possible through statutory access to post-conviction DNA testing. For instance, Virginian Keith Harward had been convicted after a bite mark left on the victim of the crime was visually compared to Mr. Harward's dental impression. However, when the saliva surrounding the bite mark was DNA-tested years later, Mr. Harward was excluded as the source of the saliva. In the absence of DNA evidence, Mr. Harward would still be behind bars and the evolution in scientific thinking about bitemark evidence would have never been considered by the court. In many instances where the very same flaws in science have led to wrongful conviction but there is no DNA evidence that is probative of innocence or guilt, innocent people may continue to suffer injustice. For this reason, a mechanism must exist to allow innocent individuals the opportunity to prove their innocence on the basis of a shift in the acceptance of the scientific methods used at trial.

The American Legislative Exchange Council (ALEC) has issued model legislation in support of creating a clear mechanism for potentially innocent people to gain access to relief on the basis of changed science. ALEC notes that an additional benefit of remedying the injustice for the innocent person is the possible identification of the true perpetrator of the offense. Over the past several years seven states have passed legislation or implemented a court rule addressing changes in scientific understanding and the need for a clear mechanism for such cases to access relief.

Seven States Already Have Law on the Books

Two of the country's most populous states - Texas and California - were among those to pass legislation. Texas passed the first law in the nation in 2013 allowing people to challenge their convictions based on new or discredited scientific evidence. Since enacted, the Texas Court of Criminal Appeals, which handles all of these petitions, received only a total of 25 petitions under this new statute. No state has ever amended these laws to reduce the scope of the language, even when stakeholders expressed concerns before passage that a "change in science law" would be unnecessary, overly burdensome, or expensive. In other words, **these laws work and stakeholder concerns have not come to pass in any state where a law has been**

implemented. We anticipate that Oregon could expect a similar minimal increase in petitions with adoption of this proposal, both based on the real world Texas example and because in Oregon cases are currently already being filed – however they are caught up in procedural debate rather than following a clear path for consideration of merit by the court.

- California: In 2014, California enacted a law that allows convicted people to seek relief based on flawed forensic evidence used in their convictions.
- Connecticut: In 2018, Connecticut enacted a law removing the 3-year time limit in the motions for new trial law to permit the introduction of new, non-DNA evidence after conviction. The new law includes a provision to clarify that new evidence may include new scientific research, guidelines, or expert recantation.
- Michigan: In 2018, Michigan amended its court rule that dictates post-appeal relief. The changes now allow a person to file a post-conviction motion for relief based on new scientific evidence, including but not limited to: shifts in a field of scientific knowledge, changes in expert knowledge or opinion, and shifts in a scientific field used in a conviction.
- Nevada: In 2019, Nevada passed a law creating an avenue for people to present new, non-DNA evidence of factual innocence beyond two years after a conviction. The law clarifies that new evidence may include relevant forensic evidence that was not available at trial or that materially undermines forensic evidence presented at trial.
- Texas: In 2013, Texas passed the first law in the nation allowing people to challenge their convictions based on new or discredited scientific evidence.
- West Virginia: In 2021, West Virginia passed a law creating an avenue for people to present new forensic or scientific evidence that provides a reasonable probability of a different result at trial. The law clarifies that this new evidence includes evidence that was not available at the time of trial, or which undermines forensic scientific evidence relied upon by the state at trial.
- Wyoming: In 2018, Wyoming enacted a ‘factual innocence’ law to remove the state’s two-year time limit for introducing new, non-DNA evidence. The law includes a provision which clarifies that new evidence may include new scientific research, guidelines or expert recantations that undermine forensic evidence used for convictions.

The Innocence Project strongly supports this important legislation, and we are happy to answer any questions for the committee.

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