EXPLANATION OF AMENDMENTS FROM ODAA REDLINE DRAFT

Page 1, line 15: ODAA proposed to change the phrase "testimony, expert evidence or expert opinion" to "scientific testimony, scientific expert evidence or scientific expert opinion." **FJP accepted this change throughout the "change in science" portion of the bill.**

Page 2, lines 1–2: ODAA proposed to change the materiality standard**. FJP does not accept this edit, in order maintain DOJ's previously proposed language.** DOJ and FJP negotiated the materiality standard at length, and FJP accepted DOJ's proposed language because that language mirrors the federal standard for materiality as announced by the United States Supreme Court more than 40 years ago. *See United States v. Bagley*, 473 U.S. 667, 682 (1985) (For claims arising out of prosecutorial failure to disclose favorable evidence, the standard for materiality requires the petitioner to prove "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"; also recognizing that, for claims arising out of ineffective assistance of counsel, the standard is the same ("if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.")). FJP agreed to DOJ's proposed materiality standard because courts in Oregon are very familiar with its interpretation given that it has been in existence for so many years.

- ODAA also proposed to add a line that says "The fact that this testimony, evidence or opinion was offered in trial, without more, is insufficient to meet this standard." During discussions, ODAA clarified that it wants the statute to make clear that the petitioner must prove (1) that the improper testimony/evidence/opinion was offered at trial and (2) the materiality standard. The existing draft already makes clear that the petitioner must prove both by use of the word "and" at the end of (2)(a).

Page 2, lines 3–10, 24–25: ODAA proposed to remove any relief for individuals who pled guilty. **FJP did not agree to this edit.** There is abundant evidence of innocent individuals who accepted a guilty plea because the risk of trial was too great. That phenomenon is even more palpable in cases in which the government's evidence had the patina of science. It is well-recognized by the Oregon Supreme Court that "evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power," *State v. O'Key*, 321 Or 285, 291 (1995), which naturally factors into the decision of whether to accept a plea when the government presents what jurors may believe to be irrefutable evidence, even when it is not.

Amanda Hess: 651-353-8247

Page 2, line 7: ODAA proposed to allow the court to grant relief as appropriate under the usual post-conviction remedy statute. **FJP accepted this edit.**

Page 3, lines 29–31: ODAA proposed to delete language expressing legislative intent**. FJP did not accept this edit.** The legislative intent is important to ensure that the statute is interpreted in a manner that addresses the fundamental problem we are aiming to address—that the use of faulty and misleading forensic evidence has led to injustice.

Page 4, line 8: ODAA proposed to characterize bite mark comparison as a "scientific expert opinion." **FJP did not accept this edit.** Bite mark comparison, as defined in the bill, has been discredited and is not accepted as valid science.

Page 4, line 9: ODAA proposed to delete the phrase "all forms of." **FJP accepted this edit.**

Page 4, lines 17–19: ODAA proposed to delete a portion of the definition of "comparative bullet lead analysis." During discussions, ODAA clarified that the definition as written may unintentionally incorporate lay testimony stating that a lead bullet was found at a crime scene and lead bullets were found in the possession of a suspect. **FJP accepted the intent of this edit by clarifying the definition of CBLA** to specifically address the use of chemical analysis to compare the seven elements found in lead alloy. The language comes from the National Academy of Sciences report from 2004 titled "Forensic Analysis: Weighing Bullet Lead Evidence." This is the report on which the FBI relied when it made the decision to discontinue use of the technique. The FBI's press release referring to the NAS report is found here.

Page 4, line 26: **ODAA proposed to add the word "by." FJP accepted this edit.**

Page 6, lines 5–6: The Oregon State Police Crime Lab and ODAA proposed to remove the language that reads, "was consistent with a particular individual." Although the previous language aligned with FBI guidance, **FJP accepted this edit.** The remainder of the definition of "hair microscopy" (subsections (e)(A)(i) through (iii)) mirrors the language the FBI used to define "Type 1," "Type 2," and "Type 3" error types in its review of hair cases.

Amanda Hess: 651-353-8247

Page 8, line 4: ODAA proposed to add a "sunset clause" that repeals the Act in 2028. **FJP did not accept this edit.** The bill is written to apply to two categories of petitioners: (1) those who have already exhausted direct appeal and can, therefore, file for post-conviction relief and (2) those who are waiting to exhaust their direct appeal and cannot, therefore, file for post-conviction relief. Those individuals who fall within category no. 1 must file for relief under the bill within two years of the effective date of the bill. Those individuals who fall within category no.2 may file for relief under the bill **after exhaustion of direct appeal**, as required by ORS 138.550(1). A sunset clause could prevent relief for the category no. 2 individuals if direct appeal is not completed before the sunset date, a likely outcome. A sunset clause would create an untenable problem of precluding access for those petitioners, which may create a constitutional issue.

Furthermore, while the Oregon State Lab does not currently use these discredited scientific methods, outside "experts" very possible could (like in Scott Cannon's case) and a sunset clause would bar individuals from having their case reviewed in the more egregious cases of current or future use of discredited methods. The bill aims to ensure discredited forensic science is not used. Beyond the impact on innocent individuals, current or future use would add to post-conviction costs to the state.

Amanda Hess: 651-353-8247