IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JESSE LEE JOHNSON,
Defendant-Appellant,

Appeal from the Judgment of the Marion County Circuit Court
The Honorable Channing J. Bennett, Judge

Marion County Circuit Court
98C46239

A167124

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC. IN SUPPORT OF APPELLANT JOHNSON

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I. INTEREST OF AMICUS CURIAE

Amicus curiae ACLU of Oregon Foundation, Inc. ("ACLU-OR") is a nonpartisan, nonprofit organization dedicated to defending and advancing civil rights through litigation, education, and legislative action. During ACLU-OR's nearly 60-year history, it has advanced numerous policies to promote integrity in the criminal justice system. The ACLU-OR has advocated for expanded rights to counsel for criminal defendants, drafted policies to reflect more equitable sentencing, and engaged in initiatives to increase transparency and accountability within district attorneys' offices.

One of the ACLU-OR's longstanding criminal justice objectives is to ensure that all Oregonians can access adequate post-conviction remedies. Since ORS 138.690, *et seq*, was adopted in 2001, the ACLU-OR has consistently assumed a leadership role in formulating, amending, and interpreting the statute. In 2001, it participated in an initial legislative work group with the Oregon State Police, the Oregon District Attorneys' Association, and other diverse stakeholders. It has subsequently offered testimony on proposed amendments to the law, and served as a trusted resource for legislators seeking guidance on how post-conviction DNA testing should be conducted. Consequently, the ACLU-OR is especially well-prepared to illustrate the ways in which the trial court disregarded relevant legislative history and applicable case law when evaluating Mr. Johnson's petition.

The ACLU-OR has a professional interest in this Court's consideration of the statutory and policy issues involved in this case, particularly in explaining the importance of post-conviction DNA testing to prove actual innocence.

II. INTRODUCTION

Perhaps the gravest fault of the criminal justice system is that sometimes innocent people are convicted of crimes that they did not commit. Though the system is an imperfect one, it is crucial that this fault be rectified whenever possible, lest the foundational tenant that the accused be presumed innocent until proven guilty be swept away under the growing piles of untested DNA samples.

The Oregon Legislature made sweeping reforms of the Oregon Penal Code to allow people convicted of certain crimes to petition the circuit courts for post-conviction testing of DNA evidence. ORS 138.690, *et seq*, is the result of years of legislative sessions aimed at achieving the appropriate balance between ease of access to testing and preventing a run on the state's laboratories. The Legislature ultimately determined that the imperative of providing wide access to DNA testing outweighed theoretical floods of petitions, and adopted a low standard for receiving DNA testing.

The low standard of ORS 138.692 allows petitioners access to DNA testing when they can show that exculpatory test results would lead to a finding

of actual innocence, but does not require the petitioner to prove his or her innocence. Here, the Circuit Court's decision turns this standard on its head and imposes a burden on petitioners, like Mr. Johnson, that the Legislature simply did not intend. *Amici* respectfully request that the Court return the standard to its feet and reverse the Circuit Court's decision.

III. STATEMENT OF THE CASE

Amicus the ACLU-OR adopts the Statement of the Case in the Opening Brief filed by Defendant-Appellant Jesse Lee Johnson.

IV. ARGUMENT

A. DNA testing is a crucial component of the criminal justice system

Since 1989, over 2,200 wrongfully convicted petitioners have been exonerated nationally.[1] Post-conviction DNA testing played a role in 359 of those exonerations.[2] In Oregon alone, sixteen people have been exonerated since 1989, and almost 20% were exonerated due to DNA testing.[3]

While all 50 states have adopted laws that provide for some type of post-conviction DNA testing, many individuals still face barriers to access. For example, some state laws only allow individuals who are still in custody to seek relief.[4] Others exclude individuals who plead guilty—even though roughly

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[1] Exonerations by Year, DNA and Non-DNA, National Registry of Exonerations.
[2] DNA Exonerations in the United States, The Innocence Project.
[3] Exonerations by State, National Registry of Exonerations.
[4] Access to Post-Conviction DNA Testing, The Innocence Project.

11% of exonerees originally entered guilty pleas.[5] And several create virtually insurmountable obstacles, requiring wrongfully convicted people to prove in advance that the evidence sought will implicate another individual—a nearly impossible task without initial access to testing.[6]

The Oregon state legislature has consistently sought to eliminate some of these potential barriers. For example, ORS 138.690, *et seq*, has always provided access to post-conviction DNA testing for individuals who are within and without custody. *See, e.g.*, ORS 138.692(7)(a). The legislature has also permitted individuals who pled guilty to seek DNA testing. ORS 138.698. And, in 2015, lawmakers relaxed the prima facie requirements for petitioners, mandating that DNA testing be granted when it could "lead to" a finding of actual innocence, rather than "establish" actual innocence. ORS 138.692(4)(d). Despite these indications that the legislature has intended to expand access to post-conviction DNA testing, the trial court below improperly disregarded relevant legislative history and case law when it denied Mr. Johnson's motion.

B. The Legislature intended motions for post-conviction DNA testing under ORS 138.690 to be granted freely

After a series of highly publicized exonerations of innocent people,[7] the Oregon Legislative Assembly adopted Senate Bill 667, the state's first post-

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[5] *Id.*
[6] *Id.*
[7] *See, e.g.*, Public Hearing on SB 667 before Senate Judiciary Committee, Mar. 13, 2001 (testimony of William Winner). Professor Winner notes that 87

conviction DNA testing statute, in 2001. The legislation was the result of collaboration among diverse stakeholders, including the ACLU, the Oregon State Police, and the Oregon District Attorneys' and Criminal Defense Attorneys' Associations—a coalition that, as Oregon DA Josh Marquis noted, probably otherwise could not "agree where to have lunch." Public Hearing on SB 667 before House Judiciary Subcommittee on Criminal Law, May 17, 2001 (testimony of Josh Marquis). SB 667 provided that convicted individuals asserting actual innocence could file for post-conviction DNA testing within 48 months of the law's passage. Ch. 697 §§ 1-4—SB 667.

Since the law's inception in 2001, legislators have simultaneously sought to limit access to post-conviction DNA testing to actually innocent petitioners; and have worked to ensure that every actually innocent person can access appropriate remedies. In a 2001 work session on SB 667, Oregon District Attorney Dale Penn emphasized the importance of narrowing the statute to the actually innocent, noting that after adopting similar law, Oklahoma received 125-150 petitions for DNA testing in four months. The Oregon statute, however, has never permitted equivalent volume. Public Hearing on SB 667 before House Judiciary Subcommittee on Criminal Law, May 17, 2001 (testimony of Ann Christian) (reporting on fiscal impact and concluding that the

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death row inmates were exonerated between 1973 and 2000, and that 73 of these exonerations were based on DNA evidence.

legislation would not encourage an overwhelming number of petitions). Additional safeguards, such as the mandatory role of counsel and the threat of criminal penalties for misrepresenting actual innocence, served to further limit the number of individuals eligible for testing under the statute. Public Hearing on HB 2312 before House Judiciary Subcommittee on Criminal Law, February 17, 2005 (testimony of John Hummel).

In addition to narrowing the law's application to actually innocent petitioners, these safeguards also caused the bill to be severely underutilized. Not one petitioner used the law to access post-conviction DNA testing between 2001 and 2005. Andrea Meyer, speaking on behalf of the ACLU-OR before the House Judiciary Committee in 2005, emphasized that "the very narrow scope of this law" was such that "[i]t hasn't been used." Public Hearing on HB 2312A before Senate Judiciary Subcommittee on Criminal Law, June 6, 2005 (testimony of Andrea Meyer). The legislature subsequently amended the law to ensure more inclusive access in several ways.

In 2005, the legislature amended the statute to apply to all individuals who pled guilty. This change was a response to Measure 11, a ballot initiative passed by Oregonians in 1994 that established mandatory minimum sentencing for several crimes. The legislature realized that the adoption of mandatory sentencing requirements would incentivize innocent people to plead guilty rather than risk conviction at trial. Public Hearing on HB 2312 before Senate

Judiciary Committee, June 15, 2005 (Commentary of Senator Ginny Burdick). This amendment represents another consensus among diverse advocates—it was supported in Conference Committee by representatives Krieger, Olsen, and Barker, all of whom had prior connections to law enforcement—and by the Oregon Criminal Defense Lawyers' Association. Public Hearing and Work Session on SB 244 before Senate Judiciary Committee, Jan. 29, 2007 (testimony of Andrea Meyer) (citing broad Committee support from law enforcement); Public Hearing on 2312 before House Judiciary Subcommittee on Criminal Law, February 17, 2005 (testimony of John Hummel) (discussing the many instances in which innocent individual may plead guilty.)

Legislators also worked to extend the life of the law. In 2007, the legislature abolished the law's sunset clause, which would have repealed the statute's provisions that same year. 2007 Oregon Laws Ch. 800 § 1. The legislature noted that because the law had been so underused, fears of overwhelming petitions in the absence of a sunset clause were probably unfounded. Public Hearing and Work Session on SB 244 before Senate Judiciary Committee, Jan. 29, 2007 (commentary of Senator Burdick).

In recent years, the legislature has further reduced barriers to access for petitioners asserting actual innocence. Prior to 2015, a person filing a motion for post-conviction DNA testing had to "present a prima facie showing that DNA testing of the specified evidence would, assuming exculpatory results,

establish the actual innocence of the person * * *." ORS 138.692(1)(b) (2007) (emphasis added). This standard created "a Catch-22, essentially requiring a person to prove their innocence before testing is granted." Written Testimony, House Judiciary Committee, Hearing on HB 3206, March 25, 2015 (Professor Aliza Kaplan). In the 14 years following the statute's enactment, only one motion for post-conviction DNA testing had been granted. Written Testimony, Senate Judiciary Committee, Public Hearing on HB 3206, June 1, 2015 (Oregon Innocence Project).

In 2015, Oregon legislators introduced HB 3206 to expand access to post-conviction DNA testing throughout the state. *See* Staff Measure Summary, HB 3206 (2015). As introduced, HB 3206 would have amended ORS 138.692 to require a person to "present a prima facie showing that DNA testing of the evidence would, assuming exculpatory results, *lead to* a finding that the person would not have been convicted * * *." HB 3206 – Introduced (2015) (emphasis added). This proposal reflected that "[i]t is often the case that DNA will lead to new avenues of investigation or cause reconsideration of existing that evidence," and the proposed "standard addresses that reality." Written Testimony, House Judiciary Committee, Hearing on HB 3206, March 25, 2015 (Steven T. Wax).

Multnomah County District Attorney Rod Underhill opposed the proposed standard on the grounds that "the amendment propose[d] opening all

old criminal convictions to retrial not based on testing to reveal actual innocence and that the wrong person was in custody, but rather that the conviction was wrongful." Written Testimony, House Judiciary Committee, Hearing on HB 3206, March 25, 2015 (District Attorney Rod Underhill). On his behalf, Post-Conviction Deputy District Attorney Russell Ratto testified that convicted defendants who had exhausted all other post-conviction appeals could and would use the loosened standard as a mechanism to gain additional process. Oral Testimony, House Judiciary Committee, Hearing on HB 3206, March 25, 2015, at 2:26:37. As an example, Ratto testified:

> "In 1981, we had a seven-year-old child who went to the park to pick up pop cans. He went into this offender's home on the ruse that he would receive some money * * * never to be seen again. The offender admitted that he sexually assaulted the child. The child's body was left in a dumpster, never to be recovered. Again: confession, no claim of actual innocence. But if you change the statute, that's the kind of case you open up."

Id. at 2:20:51.

To address this concern, Ratto requested the legislature amend the proposed bill to maintain language concerning actual innocence. "If you're going to conduct DNA testing by statute, it should be targeted to those who are factually innocent." *Id.* at 2:25:58. Ratto did clarify that "if there's an innocent person in custody, we want that person out." *Id.* at 2:17:16.

The legislature ultimately amended ORS 138.692 to provide that a person must "present a prima facie showing that the DNA testing of the evidence would, assuming exculpatory results, lead to a finding that the person is actually innocent * * *." ORS 138.692(1)(b).

The Oregon Innocence Project advocated for the finalized amendment on the grounds that it created "a more reasonable standard to access post-conviction testing." The group championed the engrossed bill, testifying that it:

> "creates a fairer standard * * * by permitting a court to grant testing if it would 'lead to a finding of actual innocence' rather than the current requirement to 'establish actual innocence.' This would permit testing in cases where DNA testing by itself would not necessarily prove innocence, but could be a part of the puzzle in proving innocence."

Written Testimony, Senate Committee on Judiciary, Public Hearing on HB 3206, June 1, 2015 (Oregon Innocence Project).

The legislative history behind ORS 138.692 demonstrates that the 2015 amendments served to expand access to post-conviction DNA testing. As the District Attorney's office made clear, post-conviction DNA testing should be readily available to those who maintain their actual innocence. Thus, the Circuit Court's interpretation and application of ORS 138.692 belies the clear legislative intent that the tests be made widely available, and impermissibly imposes additional burdens on the petitioner that were simply not contemplated or intended by the Legislature.

C. Oregon courts have never required a petitioner to demonstrate that DNA testing would change a factfinder's assessment of reasonable doubt

Not only has the Legislature clearly indicated that ORS 138.692 testing should be made readily available, subsequent case law demonstrates that the burden on the petitioner is lower than the one that the Circuit Court in the instant action imposed on Mr. Johnson.

In *State v. Romero*, 274 Or App 590, 599, 360 P3d 1275 (2015), the Oregon Court of Appeals court upheld the denial of a motion for post-conviction DNA testing on the grounds that the defendant did not sufficiently "establish a logical relationship between the presumed exculpatory DNA results and the defendant's theory of defense in the context of the underlying trial proceedings, as will be required for a later showing of actual innocence." While the court set forth the above standard, it did not require that the presumed results would change a reasonable juror's assessment of reasonable doubt. *Id.*; *see also State v. Jenkins*, 284 Or App 567, 572-73, 393 P3d 1184 (2017) (stating that *Romero* "did not establish the level of likelihood required to change the factfinder's assessment of reasonable doubt").

While the *Romero* and *Jenkins* courts analogized ORS 138.692 to the "more likely than not" standard required in federal habeas corpus proceedings, both courts explicitly denied holding that an affidavit filed under ORS 138.692

must meet that standard. Therefore, a trial court that holds a defendant's motion for DNA testing must meet the "more likely than not" standard does so in error.

The standard that *Romero* and *Jenkins* promulgated should be construed in light of the intervening legislative history. At the time they were decided, *Romero* and *Jenkins* could only grant access to testing if subsequent findings would "establish" a defendant's actual innocence. Oregon legislators amended ORS 138.692 in 2015 to expand access to post-conviction DNA testing to defendants asserting their actual innocence. Those amendments allowed subsequent courts to grant access to testing if such testing would "lead to a finding of actual innocence." As a result, any court should construe the *Romero* and *Jenkins* opinions liberally in favor of defendants.

V. CONCLUSION

The Oregon Legislature intended to create a broad and inclusive standard to ensure that post-conviction DNA testing would be granted whenever it could

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lead to a finding of actual innocence. This Court should uphold that intent and reverse the Circuit Court's narrow interpretation of ORS 138.692.

DATED this 6th day of July, 2018.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF OREGON, INC.

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CERTIFICATE OF FILING AND SERVICE

I certify that, on July 6, 2018, I electronically filed the foregoing **ACLU FOUNDATION OF OREGON, INC.'S BRIEF OF *AMICUS CURIAE*** with the State Court Administrator by using the Court's electronic filing system. I served the same on the following parties by using the Court's electronic filing system:

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