

CHAPTER 368

AN ACT

SB 321

Relating to post-conviction DNA testing; creating new provisions; and amending ORS 138.690, 138.692, 138.694, 138.696, 138.697, 138.698 and 147.433.

Be It Enacted by the People of the State of Oregon:

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

SECTION 2. As used in ORS 138.690 to 138.698:

(1) "CODIS" means the Combined DNA Index System.

(2) "DNA" means deoxyribonucleic acid.

(3) "Exculpatory results" and "exculpatory evidence" are limited to those DNA test results or evidence that are material to a determination of the identity of the individual who committed the crime, or whether the crime was committed.

(4) "Federal standards" means the Federal Bureau of Investigation Quality Assurance Standards for Forensic DNA Testing Laboratories, as modified or amended by the Federal Bureau of Investigation, or any successor standards adopted by the Federal Bureau of Investigation.

(5) "National DNA Index System" or "NDIS" means a national, searchable DNA database created and maintained by the Federal Bureau of Investigation where DNA profiles are stored.

(6) "NDIS manual" means the Federal Bureau of Investigation's NDIS Operational Procedures Manual, as modified or amended by the Federal Bureau of Investigation, or any successor operational procedures manual.

(7) "NDIS-participating laboratory" means a forensic laboratory that has been designated to operate CODIS and participate in the National DNA Index System.

(8) "Nonparticipating laboratory" means a laboratory that does not participate in the National DNA Index System but that is accredited by a nonprofit organization and meets federal standards.

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

SECTION 3. ORS 138.690 is amended to read:

138.690. (1) A person may file in the circuit court in which the judgment of conviction was entered a *[motion requesting]* **petition requesting the commencement of a DNA testing proceeding, and requesting that the court appoint an attorney for the purpose of determining whether to file a motion under ORS 138.692 for the perform-**

ance of DNA *[(deoxyribonucleic acid)]* testing on specific evidence, if the person has been convicted of aggravated murder or a felony in which DNA evidence could exist and is *[relevant to establishing an element of the offense]* **related to the investigation or prosecution that resulted in the judgment of conviction.**

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

(a) Upon motion of the person, the court shall order that the person be provided with a copy of property and evidence control and disposition records for all evidence related to the investigation or prosecution that resulted in the judgment of conviction. If forensic testing on the evidence has previously occurred, the court shall further order that the person be provided with access to the results of the testing and to any other written materials related to the testing, including reports, underlying data, notes and protocols.

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

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

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

(5) The State Court Administrator shall develop forms for proceedings under ORS 138.690 to 138.698. The State Court Administrator shall provide the forms to the clerk of each circuit court, who shall make the forms available to the public.

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

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

SECTION 4. ORS 138.692 is amended to read:

138.692. *[(1)(a)]* (1) *[When]* **After** a person files a *[motion]* **petition** under ORS 138.690, **the person may file a motion** requesting the performance of DNA *[(deoxyribonucleic acid)]* testing on evidence[.].

The motion must be supported by *[an affidavit. The affidavit must]*:

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

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

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

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

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

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

(ii) **No crime occurred; and**

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

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

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

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

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

(b) **A document affirming that there are no prior sworn statements.**

(3) **A person may file a motion under this section notwithstanding the fact that the person pleaded guilty or no contest to the underlying conviction or, before or after conviction, made a confession or admission.**

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

[(3)] **(5)** **Upon the motion of a party or the court's own motion, the court may allow the testimony of witnesses if the testimony will assist the court in making its determination to grant or deny the motion requesting the performance of DNA testing. The court may not allow testimony from the**

victim of the offense without the consent of the victim.

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

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

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

[(c)] **(b)** **The motion is made for the purpose of demonstrating the innocence of the person of the offense and not to delay the execution of the sentence or administration of justice; *[and]***

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

(B) **If the person alleges that no crime occurred, the testing could not have been obtained during the criminal proceedings with the exercise of reasonable diligence; and**

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

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

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

(b) **The motion is made for the purpose of demonstrating the innocence of the person of the offense and not to delay the execution of the sentence or administration of justice;**

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

(B) **If the person alleges that no crime occurred, the testing could not have been obtained during the criminal proceedings with the exercise of reasonable diligence; and**

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

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

(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 known to the district attorney.

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

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

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

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

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

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

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

[(9)] **(14)** Notwithstanding the fact that an appeal of the conviction or a petition for post-conviction relief in the underlying case is pending at the time a motion is filed under [ORS 138.690] **this section,** the circuit court shall consider the motion. If the court grants the motion, the court shall notify the court considering the appeal or post-conviction petition of that fact. When a court receives notice under this subsection, the court shall stay the appeal or post-conviction proceedings pending the outcome of the motion filed under [ORS 138.690] **this section** and any further proceedings resulting from the motion.

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

SECTION 5. ORS 138.694 is amended to read:

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

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

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

(b) An affidavit stating that:

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

(B) The person is innocent of the charge for which the person was convicted; and

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

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

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

(b) It appears to the court that the petitioner is financially unable to employ suitable counsel possessing skills and experience commensurate with the nature and complexity of the matter.

(4) An attorney appointed under this section:

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

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

SECTION 6. ORS 138.696 is amended to read:

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

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

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

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

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

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

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

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

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

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

(2) Notwithstanding subsection (1)(a) of this section, the DNA profile shall only be compared to the National DNA Index System if the state administrator of the Combined DNA Index System determines that:

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

(b) The DNA profile was generated through a technology that complies with all requirements in the NDIS manual and federal standards; and

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

(3)(a) If a party to post-conviction DNA testing proceedings seeks to conduct the testing at a nonparticipating laboratory and intends to have any DNA profile resulting from the testing submitted to the National DNA Index System or the State DNA Index System, the party may identify an NDIS-participating laboratory within this state and request the court, by motion, to order the NDIS-participating laboratory to evaluate whether the nonparticipating laboratory is in compliance with federal standards for the purpose of uploading DNA profiles to CODIS. The party shall provide notice of the requested order to the opposing party and to the NDIS-participating laboratory identified in the motion.

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

(4) The court may order the NDIS-participating laboratory to conduct an evaluation pursuant to subsection (3) of this section if the moving party demonstrates and the court finds that:

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

(B) The NDIS-participating laboratory's testing and analysis would not be substantially equivalent to testing and analysis by the nonparticipating laboratory; or

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

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

(c) There is a reasonable likelihood that the evaluation would result in a finding that:

(A) The nonparticipating laboratory is in compliance with federal standards; and

(B) If a DNA profile is generated from testing by the nonparticipating laboratory, the pro-

file would meet all requirements in the NDIS manual and federal standards.

(5) If the court orders an evaluation of a nonparticipating laboratory under subsection (4) of this section, within 120 days of receiving the court order, the NDIS-participating laboratory shall comply with the order as follows:

(a) The NDIS-participating laboratory may conduct the evaluation by obtaining and reviewing the records of an on-site visit and assessment of the nonparticipating laboratory previously conducted by the Federal Bureau of Investigation or an NDIS-participating laboratory.

(b) If a previously conducted on-site visit and assessment were not conducted within a time frame required by federal law, the results of the previously conducted on-site visit and assessment are unavailable, or the nonparticipating laboratory is not in compliance with other applicable standards, the NDIS-participating laboratory may:

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

(i) The ability to conduct the new on-site visit and assessment is within the limits of available resources of the NDIS-participating laboratory;

(ii) The nonparticipating laboratory agrees to cooperate with the new on-site visit and assessment; and

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

(B) Notify the court of the inability to evaluate the nonparticipating laboratory by conducting a new on-site visit and assessment due to the available resources of the NDIS-participating laboratory, a refusal by the nonparticipating laboratory to cooperate with the on-site visit and assessment or the refusal by the moving party to bear the costs associated with the new on-site visit and assessment.

(6) A determination by the NDIS-participating laboratory as to whether the nonparticipating laboratory is in compliance with federal standards is not subject to judicial review.

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

SECTION 9. ORS 138.697 is amended to read:

138.697. (1) A person described in ORS 138.690 may appeal to the Court of Appeals from a circuit court's final order or judgment denying or limiting

DNA [(deoxyribonucleic acid)] testing under ORS 138.692, denying appointment of counsel under ORS 138.694 or denying a motion for a new trial under ORS 138.696.

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

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

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

SECTION 10. ORS 138.698 is amended to read:

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

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

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

SECTION 11. ORS 147.433 is amended to read:

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

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

(b) The right to reasonable, accurate and timely notice from the Attorney General when an appeal is taken in the criminal proceeding;

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

(d) The right to attend any public hearing related to the criminal proceeding that is conducted by an appellate court; and

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

(2) The provisions of this section apply only to criminal proceedings involving a defendant charged with or convicted of:

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

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

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

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

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

(3) As used in this section, "victim" has the meaning given that term in ORS 131.007.

Approved by the Governor June 13, 2019

Filed in the office of Secretary of State June 13, 2019

Effective date January 1, 2020