TESTIMONY OF ANDREA MEYER
LEGISLATIVE DIRECTOR

IN SUPPORT OF
SB 731: DNA PRESERVATION LAW

BEFORE THE SENATE COMMITTEE ON JUDICIARY

MARCH 24, 2011

The ACLU of Oregon is pleased to bring forward to this committee and testify in support of SB 731, a DNA preservation law. SB 731 is the result of a workgroup effort that originated when the ACLU of Oregon introduced SB 310 in the 2009 legislative session. The final version of SB 310 provided that biological evidence related to certain serious crimes is retained until January 1, 2012 allowing for a workgroup of stakeholders to bring forward a proposal before the 2011 legislature. This is an important next step on Oregon's path to provide the necessary safeguards in the criminal justice system in light of the increasing use of DNA technology for purposes of criminal investigation, prosecution and exoneration.

At the behest of Senator Prozanski and with the assistance of the Judiciary Committee staff, a workgroup of all the stakeholders was formed and met over a number of months in 2010. The result of those efforts is SB 731. The workgroup consisted of the following organizations and interested parties: evidence custodians from the cities of Lake Oswego, Medford, Eugene and Portland, the Oregon Association of Chiefs of Police, the Oregon State Sheriffs' Association, the Oregon District Attorneys Association, the Oregon Criminal Defense Lawyers Association, the Association of Oregon Counties, the League of Oregon Cities, the Oregon State Police Forensic Services Division, the Oregon Justice Department, the Oregon Sexual Assault Task Force, the Innocence Project and the American Civil Liberties Union of Oregon. In addition Rep. Jeff Barker attended many of the meetings.

I want to particularly thank Cheyenne Ross. She did more than organize the meetings – she helped guide this process, navigating the differences, and identifying solutions and agreements along the way.

## Oregon DNA Innocence Law: Background

In 2001, this legislature first passed SB 667, known as the Post-Conviction Motion for DNA Testing law. This law, now codified in ORS 138.690 to ORS 138.698 provides for post-conviction motion for DNA testing of evidence that was secured in the original investigation of the case. This law is quite limited in scope and there are a number

required procedural safeguards. To invoke the provisions for testing, a defendant files a motion to the court along with an affidavit that must contain: a statement of innocence; identification of the specific evidence to be tested; a theory of defense that DNA testing would support; the results of previous DNA testing if conducted; and presentation of a prima facie showing that testing of the specific evidence, assuming exculpatory results, would establish actual innocence. The testing is for already secured evidence, not newly discovered evidence. The court may also review whether or not the motion is being used for purposes of establishing innocence and can only order testing if all those conditions are satisfied.

DNA technology has been rapidly improving in recent years. Originally DNA innocence laws were thought to be necessary only for those who were convicted prior to the existence of DNA testing. But across the country those who previously had access to DNA testing have established innocence. In some cases, the science has improved and in other cases, improper testing was originally done. That means that in Oregon we need to develop a scheme that takes into account the technology we don't know will exist in 5, 10, 20 or even 30 years. There are too many stories across this country of the use of DNA to exonerate persons incarcerated, including some sitting on death row. Since its inception in 1992, the Innocence Project has helped exonerate 267 individuals.

## Oregon DNA Preservation Law: The Next Step

SB 731 continues Oregon's recognition of the importance of DNA in our criminal justice system and makes uniform our evidence preservation practices to address the power of DNA to exonerate as well as to convict.

In 2004 Congress passed the Justice for All Act codified in 18 USC § 3600A recognizing the need to preserve biological evidence for federal offenses. 28 CFR § 28.21 provides detailed federal regulations to implement retention policies. More than two-dozen other states have already enacted legislation requiring the preservation of DNA evidence in the criminal justice system. Oregon would be joining these efforts underway to provide new safeguards in our criminal justice to prevent an innocent person from continued incarceration while the real perpetrator is never sought, leaving the public at large vulnerable. And, the same is true that in some cases, it may substantiate a person's guilt.

## Specifics about SB 731

SB 731 provides for the preservation of biological evidence secured in the course of specific investigations, for both solved and unsolved crimes, means for addressing bulk items and a process for requesting early destruction if appropriate.

**Section 1:** This updates the version passed in 2009 (SB 310 as amended), which enacted a moratorium on the destruction of biological evidence in certain cases. It requires the preservation of evidence collected in a criminal investigation of a covered offense or is otherwise in the possession of the custodian and may be used to

incriminate or exculpate any person. It then sets forth the following retention requirements:

> 1) For murders and first degree sex crimes 60 years from date of conviction or until all persons convicted have died, whichever occurs first.
> 2) For aggravated vehicular homicide or manslaughter in the first or second degree until each person convicted has served his or her sentence.
> 3) For unsolved crimes of covered offenses, until the expiration of the statute of limitations.

This section does not require the custodian to preserve evidence if it is of such size, bulk or physical characteristic as to render retention impracticable. In those cases, the custodian is authorized to remove and preserve portions likely to contain biological evidence in a quantity sufficient to permit future DNA testing.

The next part of Section 1 (the definition provisions) is removed and placed in Section 2.

Section 1 also sets up the mechanism for handling the evidence after trial and addresses situations where the evidence is requested in the future. In those cases, if the evidence cannot be found, the custodian must sign an affidavit setting forth the steps taken to locate. Only if the court finds the evidence was destroyed *maliciously* may it impose appropriate sanctions and remedies. No matter the reason for lost evidence, the court may not, based solely on those grounds, order reversal of a prior conviction.

Finally, Section 1 requires the Attorney General to adopt rules establishing the proper collection, retention, preservation, and cataloging of biological evidence in consultation of the Department of State Police and custodians. This leaves the necessary flexibility because the means of retaining biological evidence are not only changing, but are becoming easier for property custodians. Rather than place any requirement in law, this leaves the state with the ability to update best practices as they evolve.

**Section 2**
This is the definition section.

**Section 3**
This section allows the custodian to seek authorization for early destruction of biological evidence before the times specified in Section 1. It requires the custodian to provide written notice to the district attorney having jurisdiction in the original prosecution. Upon notice, the district attorney may choose to reject or accept the request. If the district attorney rejects the request, the custodian shall preserve the evidence until the time specified in the law.

If the district attorney does not object, this section sets forth the process to be followed, including providing notice to the defendant, most recent attorney of record, and the Department of Justice. The -1 Amendments remove the Public Defense Service Commission from receiving notice. They expressed some concern about the limited

authority they would have to handle a notice without additional statutory requirements. We agreed this was confusing and at this point, recommend removing them. Likewise, this law gives the victim the right to request the return of property that belongs to the victim and sets forth the same notice process above.

Finally, if the defendant fails to file a motion to preserve the evidence within 120-days after the notice was mailed, the law sets forth a process for the court to enter an order authorizing disposal.

**Section 4**
This section sets forth the process in a situation when the district attorney has filed a motion for early destruction and the defendant files a timely motion to preserve. It establishes a process for the courts to conduct a hearing or enter an order to require preservation. It sets forth specific factors the court must consider (whether identification of the offender was disputed, whether the evidence contains DNA in amount sufficient to develop a DNA profile, if it is possible to perform testing on the evidence, whether defendant has served all of the sentence, whether the defendant has exhausted appellate or post-conviction rights) while allowing the court to consider other factors it considers appropriate.

If the court orders disposal, it prohibits disposal sooner than 45 days after the court order and gives both the state and the defendant the right to appeal.

**Section 5**
Upon written request, this provision allows the defendant to obtain an inventory of biological evidence that has been preserved and allows the defendant or the defendant's attorney the right to review biological evidence if there is a request to dispose prior to the specified time in law for purposes of preparing a motion to preserve the evidence.

**Section 6**
If the custodian requests early destruction and if the district attorney does not object, this section sets forth the process for which the district attorney shall provide notice to the defendant.

**Sections 7-8**
This is to bring SB 731 in line with SB 310 (2009), which was limited to a moratorium of this evidence until 2012.

**Section 9 & 10**
These sections allow for state to proceed immediately with the adoption of rulemaking, while tying the implementation date of the rest of the law to the expiration of the current moratorium law (January 2, 2012).

**Conclusion**
We again appreciate the extensive work and commitment by all the stakeholders and urge this committee to move SB 731 forward with the -1 Amendments.