



DEPARTMENT OF JUSTICE
APPELLATE DIVISION

MEMORANDUM

DATE: March 27, 2013

TO: Honorable Jeff Barker, Chair
House Judiciary Committee, Members

FROM: Aaron Knott, Legislative Director

SUBJECT: HB 3287

RECOMMENDED ACTION

This testimony is presented in support of HB 3287. We recommend that the Committee approve HB 3287 with a do pass recommendation.

BACKGROUND ON POST-CONVICTION RELIEF

- The Oregon Rules of Civil Procedure apply to actions for post-conviction relief, unless the Post-Conviction Hearings Act specifies otherwise. Under the rules of civil procedure, parties are not required to disclose the identity of their witnesses, or the content of their expert witnesses' expected testimony before trial.
- In *Stevens v. Czerniak*, the Supreme Court concluded that those provisions of the ORCPs apply to post-conviction relief proceedings as well. In particular, the court held that without a specific provision authorizing expert discovery, "the trial court lacked authority to require the parties to disclose that information in advance of trial." Under the rules of civil procedure, parties are not required to disclose the identity of their witnesses, or the content of their expert witnesses' expected testimony before trial. By contrast, in criminal cases, criminal discovery rules require parties to disclose the identities of their witnesses (including expert witnesses) prior to trial.
- Unlike traditional civil cases, in which the plaintiff and defendant both were involved in the incident that led to the lawsuit, in most post-conviction cases, only one party – the petitioner – was involved in the underlying criminal trial that is the subject of the post-conviction litigation. That imbalance distinguishes a post-conviction case from other civil litigation.
- The most typical claims are that a petitioner's criminal trial counsel was constitutionally inadequate for doing or failing to do something at the criminal trial. To prove a claim for inadequate assistance of counsel, a petitioner must prove that he or she was prejudiced by

counsel's deficient performance, which typically involves some level of re-litigation of the criminal trial and re-consideration of criminal law issue areas.

- Because a post-conviction case, although civil, uniquely involves the review of a criminal case, bringing the post-conviction discovery rules more into line with the criminal discovery rules is fairer and more equitable than the existing process.

HOW HB 3287 WILL MAKE POST-CONVICTION TRIALS MORE EFFICIENT AND MORE PRECISE

- This bill would exempt post-conviction relief proceedings from the non-disclosure provisions that apply to traditional civil cases.
- This bill would allow both the petitioner and the defendant (often the superintendent of the prison where the petitioner is incarcerated or sometimes the state) to more completely understand the issues to be litigated at the post-conviction trial and to be better prepared to address those issues.
- Specifically by requiring disclosure of expert opinions, this bill will reduce the “trial by ambush” that is an all-too-common occurrence in current post-conviction relief litigation practice.
- In addition to allowing the post-conviction defendant the ability to more thoroughly respond to post-conviction petitions, this bill would make such litigation more cost-effective. For instance:
 - Currently, counsel for the post-conviction defendant has to either hire multiple expert witnesses to be prepared to respond to the petitioner's experts (and make sure those multiple witnesses are available to testify at the post-conviction trial), or be prepared to defend against complex post-conviction claims without the benefit of expert testimony.
 - Regarding non-expert witnesses, the current scheduling order used by many post-conviction courts allows a party to wait until shortly before trial to turn over affidavits, which are allowed in post-conviction trials, to the other side. Moreover, under current rules, the party can decline to provide any contact information for those witnesses, which severely hinders preparation.

THERE IS NO KNOWN FISCAL IMPACT FOR DEPARTMENT OF JUSTICE

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