Analysis of HB 316

Here is the initial analysis of HB 316 and the concerns with the bill. Citations are to the pages in the printed bill and to the section or subsection within which the language appears. Their order reflects the order in which the sections appears in the bill, and not a measure of the degree of concern with the contents.

p.2 "Sec. 12.36.200(a)(1)" this section sets deadlines for destruction of evidence rather then allow the Task Force which is established at the end of the bill to study the issue and make recommendations---When SB110 was drafted one of the reasons for establishing the Task Force was to allow for informed creation of destruction deadlines.

This section also seems to allow for destruction of evidence if a challenge to the conviction is filed in federal district court. The section defining "direct review" mentions only judgment on appeal, petition for hearing and review by the United States Supreme Court.

p.3 (d) at bottom of page. See also p.11, last line. This section calls for the person who requests evidence that has been preserved to pay for its retrieval. There is not one single statute passed by any other state or the federal government that even imagines such a requirement. An irony in including this section is that it follows a section which requires the agency holding the evidence to produce an inventory of the evidence. It must be presumed that the agency will actually confirm they have each of the items on the inventory before providing it. After physically confirming they have each piece of evidence they then get to turn around and charge for going back again and collecting it. Seems a reasonable solution would be to put it in a convenient place at the time of preparing the inventory.---The concern is that an individual will be precluded from obtaining the evidence due to an inability to pay this tax on their right to DNA testing. The section is particularly offensive since evidence does not belong to one side or the other, but rather to the people, and charging a person claiming innocence to collect the evidence passes a different message.

p.7 "Sec 5 AS 12.72.030" This section requires that an individual plead a prima facie case for relief and a court must find that a prima facie case for relief exists before any discovery related to the application can be pursued. This section hobbles claims for relief since discovery is often necessary to obtain facts which will establish a prima facie claim for relief. This requirement is materially more restrictive then the current procedure which only requires an individual plead material facts to go forward. This section will often create a catch 22 making claims for relief impossible.

p. 8 (C) at the top and (3) at the bottom. This makes post-conviction testing unavailable to anyone who admits or concedes guilt in any official proceeding or whose statement of guilt was the basis for the conviction. This section flat out

denies the real world fact that 25% of the known DNA exonerations involved an innocent individual who admitted or pled guilty to the crime. This category of wrongfully convicted are largely represented by the most vulnerable in society; young people, people with mental disabilities, those most susceptible to suggestion. Rather then protecting the vulnerable this section takes advantage of them. A section such as this is a clear demonstration that form is more important than justice in this bill.

p.8(4), in the middle of the page, allows a tactical mistake by a lawyer that results in an innocent individual being convicted be a bar to a later action proving that person's innocence. An innocent person in prison means the perpetrator is still at large and means the people of the state of Alaska are paying to house an innocent person. This system allows an innocent person who was convicted by their attorney's mistake no recourse to obtain testing of exculpatory evidence.

p.9, (5) at the top of the page, prohibits an individual from seeking testing if evidence was not subjected to DNA testing at the trial level or a more probative method of DNA testing was not used, and the applicant waived the testing or the applicants lawyer did not test for tactical reasons. This section again denies the reality of the real world that bad lawyering is one of the most common causes of wrongful convictions. Since we are talking claims of actual innocence, it would be improper to deny an individual the opportunity to test scientific evidence to establish innocence because a trial lawyer made a bad decision, or couldn't afford a test. This problem is compounded by allowing the trial lawyer to cover their mistake by requiring an affidavit from the lawyer explaining their actions on p. 8. In our system of justice, innocence should not be able to be waived.

p.9, (10) calls for the court to guess at the outcome of the requested testing based on its view of other evidence. Other states and the federal government, when dealing with this part of the process, provide a standard that, assuming a result favorable to the petitioner, there would be a reasonable probability that the petitioner would not have been convicted. The later standard does not require a judge to try and guess what result the requested DNA testing would produce, but rather whether a favorable result would be significant in the outcome of the case.

p.10, "Sec. 12.73.040 Timeliness" This section basically puts a three year statute of limitations on innocence. It is significant to know that few if any of the people who have been exonerated by DNA evidence in the U.S. to date would have been released from custody or from death row under such a time requirement. This section would make post-conviction DNA testing claims in Alaska more difficult to bring then under the current process where no specific time periods are set. Establishing that an incarcerated individual is actually innocent of the crime for which they have been convicted should not be limited by arbitrary time requirements.

p. 15 “Task Force” This section establishes a task force to recommend standards and protocols regarding evidence preservation issues. Unlike a similar section in SB110, this version excludes any representative from the criminal defense bar, like the public defender or office of public advocacy, or any member from the innocence community, like from the innocence project, Or any member from the legislature. The task force established by this section is not interested in obtaining a wide range of information to produce a balanced report to provide the best information from which to make decisions, but rather to produce a document that merely puts forward a position of one part of the legal community.

This legislation is also noticeably incomplete as it does not deal at all with what procedure should be followed after testing is completed. For instance, this bill does not provide a process for what happens when testing apparently excludes the petitioner as the source of the DNA.