STATE OF ALASKA

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CS FOR HOUSE BILL 316(JUD)
EVIDENCE RETENTION AND
POST-CONVICTION DNA TESTING
Sectional Analysis

Sections 1 and 2 are conforming amendments to clarify that the evidence retention provisions in the bill take precedence over the provisions of AS 12.36.010 – 12.36.090 that address disposition of evidence in various circumstances, including disposal of unclaimed property.

Section 3 proposes a new statute in AS 12.36, Preservation of Evidence, that would require municipal police departments, the Department of Public Safety, the Department of Law, and the Alaska Court System to preserve both physical evidence and biological evidence for the periods described below. The highlights include:

- The retention requirements apply to an investigation and prosecution of homicide (murder, manslaughter, and criminally negligent homicide), sexual assault in the first degree, and sexual abuse in the first degree.

  Because this is a new (and unfunded) duty imposed on municipal agencies in addition to state agencies, the bill was drafted to apply to a limited number of offenses; the offenses are the most likely to include evidence with DNA as part of the investigation and prosecution.

- Requires evidence (not including biological material) to be retained until the expiration of the prosecution, including the time for completing an appeal (including time for applying for review to the United States Supreme Court) or the litigation of any post-conviction relief application.

  The bill allows agencies to preserve samples of evidence if the item itself is impractical or hazardous to preserve. It recognizes that municipal police agencies will have varying storage capacity; that is, a rural agency may have a smaller storage ability that a larger municipality. The bill requires each agency to adopt written policies addressing removal and preservation of samples.

- Requires biological material to be retained by an agency until the defendant is unconditionally discharged for the crime (including any period of probation or parole), the period the person is required to register as a sex offender, or until the period for retention of physical evidence have expired, whichever is longer.

  Biological material is defined to include the contents of a sexual assault examination kit, all human bodily material collected in the investigation, slides, swabs, or test tubes containing human bodily material, and swabs or cuttings from other evidence that contain human bodily material.

- The bill adopts a procedure for an agency, after notice to the parties and their attorneys, to dispose of or return evidence or biological material if no party objects to the disposal or return of the evidence or biological material. If there is an objection, it allows the agency to request the court to allow the disposal or return of evidence or biological material.

- The remedy for an agency's failure to preserve evidence and biological material is left to the court. However, a court may not reverse or otherwise vacate a conviction based solely on a good faith violation of the new law.

- The bill prohibits a person from bringing a civil action against an agency for a good faith failure to abide by the new requirements.

Section 4 requires that a person who seeks post-conviction DNA testing to support a claim of innocence to bring the application for testing under AS 12.73, proposed in the bill.

Section 5 clarifies practice in the area of post-conviction relief by putting in statute the common law rule that requires an applicant to plead a prima facie case for post-conviction relief, and the court make a finding that a prima facie case has been pled before the state responds. Then the parties may pursue discovery on the matter. *State v. Jones*, 759 P.2d 558, 565-566.

Section 6 adopts procedures for post-conviction DNA testing. These include the following:

- **Sec. 12.73.010** sets out the information that must be included in an application for post-conviction DNA testing. The applicant must file

  - An affidavit by the applicant that states

        - that the applicant did not commit the crime for which he was convicted or any lesser included offense;

        - that the applicant did not solicit another person to commit, or aid or abet another person in planning or committing, the offense or any lesser included offense;

        - that the applicant did not admit or concede guilt for the offense in any official proceeding; the entry of a plea of guilty or nolo contendere is not considered an admission or concession of guilt for purposes of this requirement;

    - An affidavit by the applicant or the applicant's lawyer stating the results of each DNA test already performed on evidence in the prosecution of the defendant;

    - An affidavit by the applicant or the applicant's lawyer describing previous efforts to obtain DNA testing;

    - An affidavit by the applicant's trial lawyer stating the reason the DNA testing was not requested at the trial level, or an affidavit stating the efforts taken to obtain this affidavit.

- **Sec. 12.73.020** provides the standards for when a court may order post-conviction DNA testing. These include:

    - The applicant was convicted of a felony against a person (AS 11.41);

    - Completion of the affidavits required by AS 12.73.010 have been submitted;

    - The applicant has not admitted or conceded guilt in an official proceeding; again entry of a plea of guilty or nolo contendere is not considered an admission or concession for this sectional;

    - The evidence was obtained as part of an investigation of the crime;

    - Either

        - The evidence has not been tested;

        - The evidence has been previously tested, the applicant is requesting a more probative test; or

        - The court determines that granting the application is in the best interest of justice;

    - The evidence has been retained under conditions that ensure that it has not changed in a way that would undermine the accuracy of the test;

    - The applicant proposes a defense theory not inconsistent with the defense at trial, and that would establish innocence;

    - If the defendant was convicted at trial, the identity of the perpetrator was an issue;

    - There is a reasonable probability that the testing requested will produce new evidence that would support the new defense theory and could establish innocence;

    - The applicant consents to give a DNA sample and to have that sample entered into the DNA identification registration system; and

    - The application is timely.

- **Sec. 12.73.030** allows for summary dismissal by the court if the application does not include the information required. If the application is not summarily dismissed the prosecuting authority has 45 days to file a response.

- **Sec. 12.73.040** adopts presumptions regarding timeliness. There is a presumption that filing an application within three years after conviction is timely; this may be rebutted if the application is repetitive. There is a presumption that an application filed later is untimely; this may be rebutted for any good cause.

- **Sec. 12.73.050** adopts procedures for collecting DNA samples. It also provides that the testing must be performed at a laboratory operated by the state or approved by the state. The cost of testing will be paid for by the state; if the applicant requests additional testing, the applicant must pay for it, and it must be performed at an accredited laboratory or one approved by the Department of Public Safety.

- **Sec. 12.73.060** clarifies that the prosecution and an applicant may stipulate to DNA testing without following the procedures in the bill.

- **Sec. 12.73.070** includes definitions for the new chapter.

Section 7 provides that an indigent applicant is entitled to representation by the Public Defender Agency in bringing an application for post-conviction DNA testing.

Sections 8 – 12 make clarifying amendments to the DNA identification registration system statutes. The bill clarifies that a minor must be 16 years of age or older at the time of offense for the minor's DNA to be entered into the database. It also requires that the Department of Public Safety remove a DNA sample entered into the database if the individual was found not guilty for the offense that was the basis of the DNA entry. The bill also makes several draft changes to improve the readability of the law.

Section 13 provides that a DNA sample from the registration system may be used in a criminal investigation if it was mistakenly in the system, if the error was made in good faith. Section 13 also clarifies that if a sample does not include sufficient material to obtain an accurate identification, another sample may be taken.

Section 14 notes the effect the bill has on Rule 35.1, Alaska Rules of Criminal Procedure.

Section 15 creates a task force to consider and recommend standards for preservation of evidence. The task force would consist of the attorney general, the commissioner of public safety, a chief of police from a community not on the state's road system, a chief of police from a municipal department, the state medical examiner, representatives from the crime laboratory and the court system, the victims' advocate, the public defender, a member of the Alaska senate, a member of the Alaska house of representatives; a representative of the office of public advocacy, and a representative of the Alaska Native Justice Center.

The task force's work would be to recommend standards for collection, storage, organization, cataloging, disposal, return to owners, and retrieval of evidence; identify sources of financial help for implementing the standards; and recommend minimum qualification and training of persons responsible for storing evidence. After completing its work, the task force will report its recommendations to the legislature.

Sections 16 – 19 include applicability and effective date provisions.