ALASKA INNOCENCE PROJECT

WRITTEN TESTIMONY IN SUPPORT OF ORAL TESTIMONY OF
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BEFORE THE ALASKA HOUSE JUDICIARY COMMITTEE
HB 316 – AN ACT RELATING TO POST-CONVICTION DNA TESTING
JANUARY 5, 2010

Thank you to the House Judiciary Committee for giving me the opportunity to give oral testimony and to submit this written document in support of those comments on HB 316.

Access to post-conviction DNA testing is among the most important issues for the Alaska Innocence Project. We thank Governor Parnell for recognizing the importance of this issue by proposing a bill dealing with this subject. However, the Alaska Innocence Project cannot support HB 316 as it is currently written. The effect of HB 316 as currently written is to drastically limit access to DNA testing in Alaska. A number of modifications will need to be made before this bill is in line with the current approach to DNA testing accepted in the rest of the country.

In this letter I will try and describe the specific areas of HB 316 which serve to deny DNA testing to individuals with innocence claims in the state of Alaska. I will discuss the sections of the bill in the order of significance and impact on innocence claims. If these sections are removed from the bill, HB 316 will then provide a procedure for wrongfully convicted Alaskans to obtain post-conviction DNA testing to establish their innocence.

The first area of concern is the prohibitions on testing contained in this bill. The combined effect of these prohibitions is to deny virtually every person currently in prison who would seek DNA testing. This approach flies directly in the face of current thinking, which was described by Senator Patrick Leahy when he sponsored the federal Innocence Protection Act. "The criminal justice system should err on the side of permitting testing, in light of the low cost of DNA testing and the high cost of keeping the wrong person locked up."

The most serious prohibition on testing in HB 316 is contained on page 10, lines 11 through 23 of the bill in Sec. 12.73.040, entitled Timeliness. This section establishes a presumption of untimeliness if an application for post-conviction testing is not filed within three years. This restriction will prohibit most, if not all, innocent individuals who are currently incarcerated from obtaining the testing necessary to establish their innocence. This section would make post-conviction DNA testing claims in Alaska much more limited then under the current process of

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post-conviction claims based on newly discovered evidence. Time limitations ignore the fact that without proper preservation standards and requirements, as well as state of the art identification methods, exculpatory DNA evidence may only be located after years have elapsed. It should be remembered that, unlike other forms of evidence, DNA evidence is not less reliable as time goes by, one of the main reasons for limiting the time within which to bring new evidence motions based on other evidence. Establishing that an incarcerated individual is actually innocent of the crime for which they have been convicted should not be limited by arbitrary time limits.

Page 9 section (5) at lines 2 through13. This section 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 applicant's lawyer did not test for tactical reasons. This section denies the reality of the real world that bad lawyering is one of the most common causes of wrongful convictions. Since we are dealing with claims of actual innocence, it would be improper to deny an individual the opportunity to perform the most accurate tests on evidence to establish innocence because a trial lawyer made a bad decision, or couldn't afford a test. The problem is compounded in this bill by allowing the trial lawyer to cover the bad decision by requiring an affidavit from the trial lawyer explaining their actions. It is presumed under this bill that if a lawyer chooses to spend the limited resources available in a defense case on other then DNA testing, this decision will preclude post-conviction testing to establish that an individual is innocent. In our system of justice, innocence should not be able to be waived.

Page 8 subsection (C) at lines 5 through 7 and section (3) at lines 29 through 30. These sections make post-conviction DNA testing unavailable to anyone who admits or concedes guilt in any official proceeding or whose statement of guilt was the basis of the conviction. This section, again, denies hard facts we have learned from the 249 DNA exonerations nationwide, that 25% of those exonerations have involved an innocent individual who admitted their guilt or pled guilty to the crime. This category of wrongfully convicted individuals is largely represented by the most vulnerable in society; young people, people with mental disabilities, those most susceptible to suggestion. Rather then protecting the vulnerable in our society, this bill aims to take advantage of them. Form is clearly more important then justice when a law takes advantage of our most vulnerable citizens.

Page 9 section (10) at lines 24 through 29. This section of the bill calls for the court considering a post-conviction DNA testing request to guess at the outcome of the requested testing based on the court's view of other evidence. Other states and the federal government, when establishing a standard for the court to apply to the requested evidence, reasonably assume a favorable result of the testing for the petitioner, and then have the court decide if that would establish a reasonable probability that the petitioner would not have been convicted. This long established standard does not require a judge to try and guess what the result of the requested DNA testing might be. Rather, it reasonably asks a court to decide whether a favorable test result would be significant in the outcome of the case.

Page 3 section (d), lines 29 through 31. Also page 11, lines 17 through 18. This term of the bill calls for the person requesting evidence be tested pay for its retrieval. This is a concept

totally unique to the Alaska post-conviction DNA testing process. Not one statute passed by any other state or the federal government imagines such a requirement. An irony in including this section where it is in the bill is that it follows a section which requires an agency holding preserved evidence to produce an inventory of that evidence. It must be presumed that the agency will actually confirm they have each of the items on the inventory before providing it. Under this bill, after physically confirming they have each piece of evidence, the holding agency will then get to turn around and charge for going back again and collecting it. A more reasonable approach would envision the agency putting the evidence in a convenient place at the time of preparing the inventory, thus performing their work more efficiently, while doing away with the need to charge to collect evidence. A serious impact of this section will be that some individuals 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. Charging a person claiming innocence to collect the evidence is inconsistent with this concept.

Page 15 section (a) at lines 16 through 24. 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 would not receive a wide range of information in order to produce the most balanced report based on the best information. The task force created by this bill will be limited to information from one part of the criminal justice community and will thus produce a report that is less then complete and so will be that much less effective.

Page 2 lines 25 through 31 through page 3 lines 1 through 6. This section sets deadlines for destruction of evidence obtained during the investigation of a case rather then allows the Task Force which is established at the end of the bill to study the issue and make recommendations. SB110 also established a task force with a wide ranging mandate to study evidence preservation issues, including the issue of proper retention. Reasonably, one of the issues that task force was to report back on was destruction deadlines. HB316 also establishes a task force but, without any study, also creates time limits for destruction. This does not seem to be making the best use of the task force created.

As an example of why more study might be necessary, 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. A task force studying this issue and making recommendations would most likely recommend evidence be retained during the pendency of a habeas action filed in federal district court.

The concerns listed above set out serious shortfalls in the contents of HB 316. If these sections are allowed to remain in the bill, unchanged, not only would post-conviction DNA testing be more difficult for the wrongfully convicted in Alaska to obtain then it currently is, it would be more difficult then anywhere else in the country. I urge the committee to correct these problems by removing the language of HB 316 set out above before the bill is passed

out of committee. If the sections I have identified are removed from HB 316, the bill will then actually provide innocent individuals with a procedure to obtain post-conviction DNA testing of potentially exculpatory evidence. Alaska will have a bill that works.

Thank you for allowing me to address this very important legislation. If the committee has any questions on any matters arising from HB 316 which I might help answer, please don't hesitate to contact me.

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