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Luckhaupt
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HOUSE CS FOR CS FOR SENATE BILL NO. 110(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:

Referred:

Sponsor(s): SENATORS FRENCH, Wagoner, Dyson, Ellis, Paskvan, Menard, Wielechowski, Egan, Meyer, McGuire, Huggins, Stedman, Thomas, Stevens

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to post-conviction DNA testing, to the preservation of certain evidence,**
2 **and to the DNA identification registration system; relating to post-conviction relief**
3 **procedures; relating to representation by the public defender; amending Rule 35.1,**
4 **Alaska Rules of Criminal Procedure; and providing for an effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 *** Section 1.** AS 12.36.020(a) is amended to read:

7 (a) A law enforcement agency may

8 (1) not return property in its custody to the owner or the agent of the
9 owner, except as provided in AS 12.36.200, if

10 (A) the property is in custody in connection with a children's
11 court proceeding, a criminal proceeding, or an official investigation of a crime;
12 or

13 (B) the property in custody is subject to forfeiture under the
14 laws of the

(i) state; or

(ii) United States, and the United States has commenced forfeiture proceedings against the property or has requested the transfer of the property for the commencement of forfeiture proceedings; and

(2) with the approval of the court, transfer the property to another state or federal law enforcement agency for forfeiture proceedings by that agency; the court having jurisdiction shall grant the approval under this paragraph if the property

(A) will be retained within the jurisdiction of the court by the agency to which the property is being transferred; or

(B) is

(i) not needed as evidence; or

(ii) needed as evidence, and the property is fungible or the property's evidentiary value can otherwise be preserved without retaining the property within the jurisdiction of the court.

* **Sec. 2.** AS 12.36.090 is amended to read:

Sec. 12.36.090. Definitions. In AS 12.36.010 - 12.36.090 [THIS CHAPTER],

(1) "final disposition of a case" means the time when all appeals have been exhausted or the time when all appeals that could have been taken has expired;

(2) "law enforcement agency" means a public agency that performs as one of its principal functions an activity relating to crime prevention, control, or reduction or relating to the enforcement of the criminal law; "law enforcement agency" does not include a court.

* **Sec. 3.** AS 12.36 is amended by adding a new section to read:

Article 2. Preservation of Evidence.

Sec. 12.36.200. Preservation of evidence. (a) Notwithstanding AS 12.36.010 - 12.36.090, the Department of Law, the Department of Public Safety, the Alaska Court System, or a municipal law enforcement agency shall preserve

(1) all evidence that is obtained in relation to an investigation or prosecution of a crime under AS 11.41.100 - 11.41.130, 11.41.410, or 11.41.434 for the period of time that the crime remains unsolved or 50 years whichever ends first;

(2) biological evidence in an amount and manner that is sufficient to

1 develop a DNA profile from any material contained in or included on the evidence
2 that was obtained in relation to the prosecution of a person convicted of, or
3 adjudicated a delinquent for, a crime under AS 11.41.100 - 11.41.130, a person
4 convicted of a crime after being indicted under AS 11.41.410 or 11.41.434 while the
5 person remains a prisoner in the custody of the Department of Corrections or subject
6 to registration as a sex offender, or a person adjudicated a delinquent for a crime after
7 the filing of a petition alleging a violation of AS 11.41.410 or 11.41.434 while the
8 person remains committed to a juvenile facility or subject to registration as a sex
9 offender.

10 (b) Under (a) of this section, an agency is not required to preserve physical
11 evidence of a crime that is of a size, bulk, quantity, or physical character that renders
12 preservation impracticable. When preservation of evidence of a crime is impracticable,
13 the agency shall, before returning or disposing of the evidence, remove and preserve
14 portions of the material likely to contain relevant evidence related to the crime in a
15 quantity sufficient to permit future DNA testing. In making decisions under this
16 section, an agency shall follow written policies on evidence retention.

17 (c) Upon written request of a person convicted of a crime and a prisoner,
18 adjudicated delinquent for a crime and committed, or subject to registration as a sex
19 offender, an agency shall prepare or provide an inventory of biological evidence that
20 has been preserved under (a)(2) of this section in connection with the person's criminal
21 case.

22 (d) An agency required to preserve biological evidence under (a) of this
23 section may destroy biological evidence before the expiration of the time period in
24 (a)(2) of this section if

25 (1) the agency is not required to maintain the evidence under another
26 provision of state or federal law;

27 (2) the agency mails a certified delivery of notice of intent to destroy
28 evidence to

29 (A) each person who remains a prisoner or committed or
30 subject to registration as a sex offender for the crime for which the evidence
31 was preserved under (a)(2) of this section;

- (B) the attorneys of record, if known, for each person listed in
(A) of this paragraph;
(C) the Public Defender Agency;
(D) the district attorney responsible for prosecuting the crime;

and

(3) no person who is notified under (2) of this subsection, within 120 days after receiving the notice,

(A) files a motion for testing of the evidence; or

(B) submits a written request for continued preservation of the evidence.

(e) Upon receipt of a request for continued preservation of biological evidence under (d)(3)(B) of this section, an agency may petition the court for permission to destroy the evidence. The court may grant the petition if the court finds that the request is without merit or that the evidence has no significant value for biological material.

(f) When an agency is required to produce biological evidence required to be preserved under this section and the agency is unable to locate the evidence, the chief evidence custodian of that agency shall submit an affidavit, executed under penalty of perjury, describing the evidence that could not be located and detailing the efforts taken to locate the evidence.

(g) If a court finds that evidence was destroyed in violation of the provisions of this section, the court may order remedies the court determines to be appropriate.

(h) A person may not bring a civil action for damages against the state or political subdivision of the state, their officers, agents, or employees, or a law enforcement agency, its officers, or employees for any unintentional failure to comply with the provisions of this section.

(i) In this section,

(1) "agency" means the Department of Law, the Department of Public Safety, the Alaska Court System, or a municipal law enforcement agency;

(2) "biological evidence" means

(A) the contents of a sexual assault forensic examination kit;

(B) semen, blood, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or other identifiable human bodily material, collected as part of a criminal investigation;

(C) a slide, swab, or test tube containing material described in (B) of this paragraph; and

(D) swabs or cuttings from items that contain material described in (B) of this section;

(3) "DNA" means deoxyribonucleic acid;

(4) "prisoner" has the meaning given in AS 33.30.901.

* **Sec. 4.** AS 12.72.010 is amended to read:

Sec. 12.72.010. Scope of post-conviction relief. A person who has been convicted of, or sentenced for, a crime may institute a proceeding for post-conviction relief if the person claims

(1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;

(2) that the court was without jurisdiction to impose sentence;

(3) that a prior conviction has been set aside and the prior conviction was used as a statutorily required enhancement of the sentence imposed;

(4) that there exists evidence of material facts, not previously presented and heard by the court, that requires vacation of the conviction or sentence in the interest of justice; **if the person seeks post-conviction DNA testing to support a claim under this paragraph, the person's exclusive method for obtaining that testing is an application under AS 12.73;**

(5) that the person's sentence has expired, or the person's probation, parole, or conditional release has been unlawfully revoked, or the person is otherwise unlawfully held in custody or other restraint;

(6) that the conviction or sentence is otherwise subject to collateral attack upon any ground or alleged error previously available under the common law, statutory law, or other writ, motion, petition, proceeding, or remedy;

(7) that

(A) there has been a significant change in law, whether

1 substantive or procedural, applied in the process leading to the person's
2 conviction or sentence;

3 (B) the change in the law was not reasonably foreseeable by a
4 judge or a competent attorney;

5 (C) it is appropriate to retroactively apply the change in law
6 because the change requires observance of procedures without which the
7 likelihood of an accurate conviction is seriously diminished; and

8 (D) the failure to retroactively apply the change in law would
9 result in a fundamental miscarriage of justice, which is established by
10 demonstrating that, had the changed law been in effect at the time of the
11 applicant's trial, a reasonable trier of fact would have a reasonable doubt as to
12 the guilt of the applicant;

13 (8) that, after the imposition of sentence, the applicant seeks to
14 withdraw a plea of guilty or nolo contendere in order to correct manifest injustice
15 under the Alaska Rules of Criminal Procedure; or

16 (9) that the applicant was not afforded effective assistance of counsel
17 at trial or on direct appeal.

18 * **Sec. 5.** AS 12.72.030 is amended by adding a new subsection to read:

19 (b) A person who files an application for post-conviction relief under this
20 chapter or the Alaska Rules of Criminal Procedure may not pursue discovery related to
21 the application unless the applicant first pleads a prima facie case for relief and the
22 court finds that a prima facie case for relief has been established under this chapter or
23 the Alaska Rules of Criminal Procedure.

24 * **Sec. 6.** AS 12 is amended by adding a new chapter to read:

25 **Chapter 73. Post-Conviction DNA Testing Procedures.**

26 **Sec. 12.73.010. Application for post-conviction DNA testing.** (a) A person
27 convicted of a felony against a person under AS 11.41 who has not been
28 unconditionally discharged may apply to the superior court for an order for DNA
29 testing of evidence. The application must be filed in the court that entered the
30 judgment of conviction, and a copy shall be served on the prosecuting authority
31 responsible for obtaining the conviction.

(b) An application filed under (a) of this section must specifically identify the evidence sought to be tested and must include facts from which the court can make the findings required under AS 12.73.020. The application must also include

(1) an affidavit by the applicant that attests to the following:

(A) the applicant did not commit the offense for which the applicant was convicted or a lesser included offense;

(B) the applicant did not solicit another person to commit, or aid or abet another person in planning or committing, that offense or a lesser included offense; and

(C) the applicant did not admit or concede guilt under oath in an official proceeding for the offense that was the basis of the conviction or a lesser included offense except that the court in the interest of justice may waive this requirement; for the purposes of this subparagraph, the entry of a guilty or nolo contendere plea is not an admission or concession of guilt;

(2) an affidavit by the applicant or the applicant's attorney stating the results of each DNA test performed on the evidence in the prosecution that resulted in the applicant's conviction;

(3) an affidavit by the applicant or the applicant's attorney describing all previous efforts to obtain DNA testing and any previous application filed under AS 12.72 of this section.

(c) An attorney who represents an applicant under this section shall investigate and, if possible, confirm the accuracy of information provided by the applicant under (b)(2) and (3) of this section.

(d) If an applicant is indigent, filing fees must be paid under AS 09.19, and counsel shall be appointed under AS 18.85.100 to represent the applicant.

Sec. 12.73.020. Findings required for post-conviction DNA testing orders.

The court shall order post-conviction DNA testing of specific evidence if

(1) the applicant was convicted of a felony under AS 11.41;

(2) the applicant and, if represented, the applicant's attorney, have submitted the affidavits required by AS 12.73.010(b);

(3) the applicant has not, in an official proceeding, admitted or

1 conceded guilt for the crime that was the basis for the conviction unless the court in
2 the interest of justice waives this requirement; for the purposes of this paragraph the
3 entry of a guilty or nolo contendere plea is not an admission or concession of guilt;

4 (4) the evidence either

5 (A) was not subjected to DNA testing; or

6 (B) was previously subjected to DNA testing, and

7 (i) the applicant is requesting DNA testing using a
8 method or technology that is substantially more probative than the
9 previous DNA testing; or

10 (ii) the court determines that granting the application is
11 in the best interest of justice;

12 (5) the evidence to be tested has been subject to a chain of custody and
13 retained under conditions that ensure that the evidence has not been substituted,
14 contaminated, or altered in any manner material to the proposed DNA testing;

15 (6) the proposed DNA testing is reasonable in scope, uses scientifically
16 sound methods, and is consistent with accepted forensic practices;

17 (7) the applicant identifies a theory of defense that

18 (A) is not inconsistent with a defense presented at trial; and

19 (B) would establish the applicant's innocence;

20 (8) the applicant was convicted after a trial and the identity of the
21 perpetrator was a disputed issue in the trial;

22 (9) the proposed DNA testing of the specific evidence may produce
23 new material evidence that would

24 (A) support the theory of defense described in (7) of this
25 section; and

26 (B) raise a reasonable probability that the applicant did not
27 commit the offense;

28 (10) the applicant consents to provide a DNA sample for purposes of
29 comparison and to entry of the results into the DNA identification registration system
30 under AS 44.41.035 and into any other law enforcement database; and

31 (11) the application is timely as described in AS 12.73.040.

1 **Sec. 12.73.030. Summary dismissal and response.** (a) If an application under
2 AS 12.73.010(a) does not set out the specific facts necessary for the court to make the
3 findings required under AS 12.73.020 or does not comply with AS 12.73.010(b), the
4 court shall deny the application without further proceedings.

5 (b) If an application filed under AS 12.73.010(a) is not denied under (a) of this
6 section, the prosecuting authority shall file a response within 45 days after service of
7 the application. The court shall conduct an evidentiary hearing to resolve any disputed
8 facts.

9 **Sec. 12.73.040. Timeliness.** In determining whether an application is timely
10 under AS 12.73.020(11), there is a presumption of

11 (1) timeliness if the application is filed before three years after the date
12 of conviction; this presumption may be rebutted if the court finds that the application
13 is based solely upon information used in a previously denied application; and

14 (2) untimeliness if the application is filed three years or more after
15 conviction; this presumption may be rebutted if the court finds good cause for filing
16 three years or more after conviction.

17 **Sec. 12.73.050. Testing procedures.** (a) If the court grants the application and
18 DNA samples for comparison purposes are required, samples taken from the applicant
19 or a prisoner must be collected at a law enforcement or correctional facility. If the
20 DNA sample is being collected from a person other than the applicant or a prisoner,
21 the sample must be taken by a law enforcement officer or other authorized person at a
22 location that is convenient for the person from whom the sample is being collected and
23 the person collecting the sample.

24 (b) The court may not order that a person other than the applicant provide a
25 DNA sample for comparison purposes unless that person is first afforded notice and an
26 opportunity to be heard by the court. The results of DNA testing of a sample provided
27 by a person other than the applicant may not be made available to the DNA
28 identification registration system under AS 44.41.035 or to any other law enforcement
29 database unless specifically ordered by the court.

30 (c) DNA testing ordered under this section shall be performed at the state's
31 expense and at a laboratory operated or approved by the Department of Public Safety.

1 If, after completion of the testing ordered under this section, an applicant requests
2 additional testing, any additional testing ordered by the court at the applicant's request
3 must be at the applicant's expense. If the court orders additional testing by another
4 laboratory at the request of the applicant, the laboratory operated or approved by the
5 Department of Public Safety shall preserve a portion of the evidence for later testing.
6 A laboratory selected by the applicant to perform testing under this section must
7 comply with the quality assurance standards for DNA adopted by the United States
8 Department of Justice and be accredited by the American Society of Crime Laboratory
9 Directors Laboratory Accreditation Board or the accepted as equivalent by the
10 Department of Public Safety.

11 (d) Except as provided in (b) of this section, the results of testing ordered
12 under this section shall be entered into the DNA identification registration system
13 under AS 44.41.035 and into any other law enforcement database available to the
14 Department of Public Safety.

15 **Sec. 12.73.060. Post-conviction testing by stipulation.** The provisions of this
16 chapter do not prohibit an applicant and the prosecuting authority from agreeing to
17 conduct post-conviction DNA testing without the person's filing an application under
18 this chapter. The parties may also stipulate to the payment of costs for the DNA
19 testing and other costs associated with the terms of the agreement.

20 **Sec. 12.73.090. Definitions.** In this chapter, unless the context requires
21 otherwise,

22 (1) "DNA" means deoxyribonucleic acid;

23 (2) "innocence" or "innocent" means that the applicant was not a
24 perpetrator of or an accomplice to the offense or lesser included offense for which the
25 applicant was convicted;

26 (3) "prisoner" has the meaning given in AS 33.30.901;

27 (4) "unconditionally discharged" means that a defendant is released
28 from all disability arising under a sentence, including probation and parole.

29 * **Sec. 7.** AS 18.85.100 is amended by adding a new subsection to read:

30 (g) An indigent person is entitled to representation under (a) and (b) of this
31 section for purposes of bringing an application for post-conviction DNA testing under

AS 12.73.

* **Sec. 8.** AS 44.41.035(b) is amended to read:

(b) The Department of Public Safety shall collect for inclusion into the DNA identification registration system a blood sample, oral sample, or both, from (1) a person convicted in this state of a crime against a person or a felony under AS 11 or AS 28.35 or a law or ordinance with elements similar to a crime against a person or a felony under AS 11 or AS 28.35, (2) a minor [16 YEARS OF AGE OR OLDER,] adjudicated as a delinquent in this state for an act committed when the minor was 16 years of age or older, that would be a crime against a person or a felony under AS 11 or AS 28.35 if committed by an adult or for an act that would violate a law or ordinance with elements similar to a crime against a person or a felony under AS 11 or AS 28.35 if committed by an adult, (3) a voluntary donor, (4) an anonymous DNA donor for use in forensic validation, forensic protocol development, quality control, or population or statistical data bases, (5) a person required to register as a sex offender or child kidnapper under AS 12.63, and (6) a person arrested for a crime against a person or a felony under AS 11 or AS 28.35, or a law or ordinance with elements similar to a crime against a person or a felony under AS 11 or AS 28.35. The department also may collect for inclusion into the DNA identification registration system a blood sample, oral sample, or tissue sample from crime scene evidence or from unidentified human remains. The DNA identification registration system consists of the blood, oral, or tissue samples drawn under this section, any DNA or other blood grouping tests done on those samples, and the identification data related to the samples or tests. Blood samples, oral samples, and tissue samples not subject to testing under this section, and test or identification data related to those samples, may not be entered into, or made a part of, the DNA identification registration system.

* **Sec. 9.** AS 44.41.035(g) is amended to read:

(g) A person or minor from whom a sample has been collected under this section

(1) may inspect and obtain a copy of the identification data regarding the person or minor contained within the DNA identification registration system; and

(2) may request the Department of Public Safety to destroy the

material in the system regarding the person or minor under the provisions described in (i) of this section.

* Sec. 10. AS 44.41.035(i) is amended to read:

(i) The Department of Public Safety shall [, UPON RECEIPT OF A COURT ORDER,] destroy the material in the system relating to a person or minor on the written request of the person or minor, if the request is accompanied by a certified copy of a court order making the written findings required by this subsection. The court shall issue an [THE] order under this subsection if the person's or minor's DNA was included in the system under

(1) (b)(1) or (2) of this section, and the court order establishes [DETERMINES] that

(A) the conviction or adjudication that subjected the person to having a sample taken under this section was [IS] reversed; and

(B) the person

(i) was [IS] not retried, readjudicated, or convicted or adjudicated for another crime that requires having a sample taken under this section; or

(ii) after retrial, was [IS] acquitted of the crime or, after readjudication for the crime, was [IS] not found to be a delinquent, and was [IS] not convicted or adjudicated for another crime that requires a sample under this section;

(2) (b)(6) of this section, and the court order establishes [DETERMINES] that

(A) the person arrested was released without being charged;
[OR]

(B) the criminal complaint, indictment, presentment, or information for the offense for which the person was arrested was dismissed, and a criminal complaint, indictment, presentment, or information for an offense requiring submission of a DNA sample was [IS] not refiled; or

(C) the person was found by the trier of fact to be not guilty of the offense for which the person was arrested and was not convicted of

another offense requiring submission of a DNA sample under (b)(1) or (2) of this section.

* **Sec. 11.** AS 44.41.035(k) is amended to read:

(k) The provisions of this section apply to a person **or a minor** from another state that this state has accepted under any interstate corrections or probation agreement or compact, regardless of whether the person **or minor** is confined or released, if the person was convicted of **or the minor was adjudicated for** an offense that is similar to an offense described in (b) of this section.

* **Sec. 12.** AS 44.41.035(o) is amended to read:

(o) A person **or minor** may not bring a civil action against the state or a municipality, or their employees or agents, for actions arising out of DNA collection in conformity with this section.

* **Sec. 13.** AS 44.41.035 is amended by adding subsections to read:

(r) A DNA sample collected or placed in the DNA identification registration system that was taken or retained in good faith may be used as provided by law in a criminal investigation. Evidence obtained from a match from a data collection system may be used in a criminal prosecution or juvenile adjudication if the DNA sample was taken or retained in good faith, even if the DNA sample is later removed from the DNA identification registration system.

(s) If a sample collected under (b) of this section does not contain sufficient material necessary to obtain an accurate DNA identification authorized under this section, the Department of Public Safety or other agency authorized by the Department of Public Safety may collect another sample.

* **Sec. 14.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE CHANGE. AS 12.73, added by sec. 6 of this Act, has the effect of amending Rule 35.1, Alaska Rules of Criminal Procedure, relating to post-conviction relief procedure.

* **Sec. 15.** The uncodified law of the State of Alaska is amended by adding a new section to read:

TASK FORCE ON STANDARDS AND TRAINING OF EVIDENCE

1 TECHNICIANS. (a) The Task Force on Standards and Training of Evidence Technicians is
2 created in the Department of Law. The task force consists of the following persons appointed
3 by the governor:

- 4 (1) the attorney general;
- 5 (2) the public defender;
- 6 (3) the director of the office of public advocacy;
- 7 (4) a chief of a municipal police department not on the state's interconnected
8 road system;
- 9 (5) the commissioner of public safety;
- 10 (6) a chief of a municipal police department;
- 11 (7) a representative of the Alaska Innocence Project;
- 12 (8) a representative of the Alaska Native Justice Center; and
- 13 (9) a representative of the state crime lab.

14 (b) There shall be three ex officio members of the task force as follows:

- 15 (1) a member of the House Judiciary Committee selected by the speaker of the
16 house of representatives;
- 17 (2) a member of the Senate Judiciary Committee selected by the president of
18 the senate; and
- 19 (3) the victims' advocate.

20 (c) Persons appointed under (a) of this section or identified under (b) of this section
21 may select a designee from the same agency or organization to act on the person's behalf as a
22 member of the task force.

23 (d) Not later than December 31, 2012, the task force shall

- 24 (1) devise standards regarding the proper collection, retention, and cataloging
25 of evidence, for ongoing investigations and prosecutions;
- 26 (2) recommend practices, protocols, models, and resources for the cataloging
27 and accessibility of preserved evidence.

28 * **Sec. 16.** The uncodified law of the State of Alaska is amended by adding a new section to
29 read:

30 **APPLICABILITY.** (a) AS 12.36.200, enacted by sec. 3 of this Act, applies to all
31 evidence in the possession of an agency, as defined in AS 12.36.200(i), on or after January 1,

1 2011, for evidence collected before, on, or after the effective date of this Act.

2 (b) AS 12.73, enacted by sec. 6 of this Act, applies to offenses committed before, on,
3 or after the effective date of this Act.

4 (c) Notwithstanding any other provision of law, a person whose conviction was
5 entered before July 1, 2010, has until July 1, 2020, to file a claim under AS 12.73, enacted by
6 sec. 6 of this Act, or a later date if the court finds good cause for a later filing.

7 * **Sec. 17.** The uncodified law of the State of Alaska is amended by adding a new section to
8 read:

9 **CONDITIONAL EFFECT.** AS 12.73, added by sec. 6 of this Act, takes effect only if
10 sec. 14 of this Act receives the two-thirds majority vote of each house required by art. IV, sec.
11 15, Constitution of the State of Alaska.

12 * **Sec. 18.** Section 15 of this Act is repealed January 1, 2013.

13 * **Sec. 19.** This Act takes effect July 1, 2010.