ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 5, 2006
1:42 p.m.

MEMBERS PRESENT

Representative Lesil McGuire, Chair
Representative Tom Anderson
Representative John Coghill
Representative Pete Kott
Representative Peggy Wilson
Representative Les Gara
Representative Max Gruenberg

MEMBERS ABSENT

All members present

OTHER LEGISLATORS PRESENT

Representative Berta Gardner
Representative Ethan Berkowitz

COMMITTEE CALENDAR

OVERVIEW: ALASKA RURAL JUSTICE AND LAW ENFORCEMENT COMMISSION

- HEARD

HOUSE BILL NO. 325
"An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules of Criminal Procedure."

- HEARD AND HELD; ASSIGNED TO SUBCOMMITTEE

PREVIOUS COMMITTEE ACTION

BILL: HB 325
SHORT TITLE: POST-CONVICTION DNA TESTING
SPONSOR(S): REPRESENTATIVE(S) LEDOUX

01/09/06	(H)	PREFILE RELEASED 12/30/05
01/09/06	(H)	READ THE FIRST TIME - REFERRALS
01/09/06	(H)	JUD, FIN
03/22/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/22/06	(H)	<Bill Hearing Postponed to 03/24/06>

03/24/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/24/06	(H)	<Bill Hearing Postponed to 03/27/06>
03/27/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/27/06	(H)	<Bill Hearing Postponed to 03/29/06>
03/29/06	(H)	JUD AT 1:00 PM CAPITOL 120
03/29/06	(H)	Scheduled But Not Heard
04/05/06	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DEBORAH M. SMITH, Acting U.S. Attorney
District of Alaska
United States Attorney's Office (USAO)
U.S. Department of Justice (DOJ);
Federal Co-Chair
Alaska Rural Justice and Law Enforcement Commission
Anchorage, Alaska
POSITION STATEMENT: Assisted with the overview regarding the Alaska Rural Justice and Law Enforcement Commission.

DAVID W. MARQUEZ, Attorney General
Department of Law (DOL);
State Co-Chair
Alaska Rural Justice and Law Enforcement Commission
Juneau, Alaska
POSITION STATEMENT: Assisted with the overview regarding the Alaska Rural Justice and Law Enforcement Commission.

WILLIAM TANDESKE, Commissioner
Department of Public Safety (DPS);
Commissioner
Alaska Rural Justice and Law Enforcement Commission
Juneau, Alaska
POSITION STATEMENT: Assisted with the overview regarding the Alaska Rural Justice and Law Enforcement Commission.

WILSON JUSTIN, Executive Vice President and Acting President
Mount Sanford Tribal Consortium (MSTC);
Commissioner
Tribal Representative
Alaska Rural Justice and Law Enforcement Commission
Slana, Alaska
POSITION STATEMENT: Assisted with the overview regarding the Alaska Rural Justice and Law Enforcement Commission.

REPRESENTATIVE GABRIELLE LeDOUX
Alaska State Legislature

Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 325.

KIMBERLY WALLACE, Staff
to Representative Gabrielle LeDoux
House Special Committee on Fisheries
Alaska State Legislature
POSITION STATEMENT: Presented HB 325 on behalf of the sponsor, Representative LeDoux.

CLIFF STONE, Special Assistant
Office of the Commissioner
Department of Public Safety (DPS)
Juneau, Alaska
POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 325.

STEPHEN SALOOM, Policy Director
Innocence Project
New York, New York
POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 325.

HILLIARD H. "TRES" LEWIS, III, Private Investigator
Mendenhall Investigations, Inc.
Juneau, Alaska
POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 325.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section-Juneau
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 325, expressed concerns and responded to questions.

ACTION NARRATIVE

REPRESENTATIVE TOM ANDERSON, acting as chair, called the House Judiciary Standing Committee meeting to order at 1:42:25 PM. Representatives Anderson, Coghill, Gruenberg, Wilson, and Kott were present at the call to order. Representatives Gara and McGuire arrived as the meeting was in progress. Representative Berkowitz and Gardner were also in attendance.

Overview(s)

Alaska Rural Justice and Law Enforcement Commission

1:42:35 PM

REPRESENTATIVE ANDERSON announced that the first order of business would be the overview regarding the Alaska Rural Justice and Law Enforcement Commission ("the Commission").

1:45:12 PM

DEBORAH M. SMITH, Acting U.S. Attorney, District of Alaska, United States Attorney's Office (USAO), U.S. Department of Justice (DOJ); Federal Co-Chair, Alaska Rural Justice and Law Enforcement Commission, noted that committee members have copies of the Alaska Rural Justice and Law Enforcement Commission's 2006 report entitled, "Initial Report and Recommendations", and that the Alaska Native Justice Center has provided the Commission with a great deal of logistical support. In conjunction with a PowerPoint presentation, she provided a brief history of the Commission; outlined the makeup of the Commission and its staff; and explained that the Commission's mission was to study the following topics as they related to rural Alaska: law enforcement, judicial services, alcohol importation and interdiction, and domestic violence and child abuse.

MS. SMITH relayed that to accomplish this mission, the Commission established four working groups made up of professionals, experts, and officials working in fields related to the four topics; held meetings and public hearings; synthesized the input garnered from these meetings and hearings; and formulated the final recommendations outlined in the aforementioned report. She noted that the PowerPoint presentation provided details regarding the make up of the working groups, where the hearings were held, and which entities and individuals provided input.

1:50:33 PM

DAVID W. MARQUEZ, Attorney General, Department of Law (DOL); State Co-Chair, Alaska Rural Justice and Law Enforcement Commission, also referring to the PowerPoint presentation, relayed that the aforementioned working groups created over 100 options, and that those options the Commission adopted were subsequently organized into nine general recommendations: engage in more partnering and collaboration; make systemic changes to improve rural law enforcement; enlarge the use of

community-based solutions; broaden the use of prevention approaches; broaden the use of therapeutic approaches; increase employment of rural residents in law enforcement and judicial services; build additional capacity; increase access to judicial services; and expand the use of new technologies.

ATTORNEY GENERAL MARQUEZ then detailed, as did the PowerPoint presentation, what each of the nine general recommendations might entail. For example, referring to the recommendation to engage in more partnering and collaboration, he mentioned that this could include, among other things, developing a number of agreements to better coordinate law enforcement and judicial services in rural Alaska such as voluntary memorandums of understanding (MOUs) between tribes and the state regarding coordination and integration of child protection and domestic violence (DV) protective services; a state-tribal Indian Child Welfare Act (ICWA) agreement; and tribal-state partnerships on juvenile justice, which might result in Division of Juvenile Justice (DJJ) referral mechanisms.

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to make systemic changes to improve rural law enforcement, mentioned that this could include the expansion of police and public safety training so that further work can be done toward cooperation in alcohol interdiction, and the development of a statewide, uniform, and tiered system of certification and training for police and public safety officers so as to provide a reasonable opportunity for advancement that could culminate in obtaining the qualifications for full police certification by the Alaska Police Standards Council (APSC).

ATTORNEY GENERAL MARQUEZ mentioned that the state has made efforts to fund new state trooper and prosecutor positions; to establish a rural prosecution support team and domestic violence fatality review teams; to appoint a "cold-case" prosecutor; and to possibly implement a pilot project for village safety aides who would work with village health aides. He then relayed that the state has made efforts to address alcohol importation and interdiction by implementing legislation pertaining to local option and bootlegging laws and by discussing possible solutions with the U.S. Postal Service regarding increases in investigator staffing; he offered statistics about crimes involving alcohol consumption and the recent prosecution of bootlegging operations.

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to enlarge the use of community-based solutions, relayed that this

could include amending state statute to allow the DJJ to delegate its authority to tribes in order that they may share resources with respect to tribal juvenile offenders; amending state statute to permit tribes to participate in juvenile proceedings and delinquency treatment; expanding funding to nonprofit organizations and rural communities so that they may develop restorative justice re-entry programs and new programs to increase prevention, intervention, and treatment of domestic violence and child abuse; seeking alternatives to out-of-state prisons; and establishing alcohol distribution centers in "damp" hub communities.

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to broaden the use of prevention approaches, mentioned that this could include expanding culturally appropriate programs to reduce the demand for alcohol in rural Alaska, link youth with adults in healthy activities, and provide more information to schools for first-time misdemeanor alcohol/drug related offenders; expanding education, prevention, and early intervention programs targeting domestic violence and child abuse; and developing new prevention curricula to be implemented in grades K-8.

2:00:16 PM

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to broaden the use of therapeutic approaches, relayed that this could include expanding alcohol/drug abuse treatment programs in rural Alaska, with a system of longer-term residential care in hub communities matched with a network of aftercare services in rural villages; strengthening substance abuse, mental health, and dual diagnosis treatment options; strengthening therapeutic courts and group homes for children in need of aid; and changing regulations to allow close relatives caring for children in need of aid to receive the same level of financial reimbursement that non-relatives now receive.

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to increase employment of rural residents in law enforcement and judicial services' fields, indicated that this could include implementing a focused recruitment effort to bring more Alaska Natives - and other rural Alaskans - into the correctional, law enforcement, and public safety workforce; increasing the training and utilization of Village Public Safety Officers as probation officers in the villages; and contracting with tribes to oversee community service work.

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to build additional [law enforcement] capacity [to alleviate the current lack of supporting infrastructure], relayed that this could include improving and expanding housing for police and public safety officers; increasing availability of appropriate intra-community transportation; [constructing] more law enforcement offices and holding facilities in rural Alaska; improving law enforcement equipment; improving and expanding training; and developing a standardized statewide data system to document and monitor law enforcement investigations in rural Alaska. One possible method of accomplishing some of these goals, a method that the Department of Public Safety (DPS) is already starting to implement in a pilot project, is to construct multipurpose facilities with an apartment, an office, and a holding cell for the troopers in larger, underserved village locations, thereby allowing troopers to be reassigned to these new "sub-hub" posts on a rotating schedule; this concept exemplifies community-oriented policing and has many benefits, including reducing response times and providing a significantly enhanced law enforcement presence.

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to increase access to judicial services, indicated that this could include increasing funding for civil legal assistance pertaining to domestic violence and child abuse situations; asking the federal government to restore funding opportunities for tribal courts located within municipal boundaries; increasing videoconferencing capabilities and the use of tribal courts; and providing training and technical assistance to judges and support staff in the Alaska Court System and in tribal courts to inform and instruct participants in both systems to be aware of and value the cultural differences in rural Alaska.

2:05:50 PM

ATTORNEY GENERAL MARQUEZ, referring to the recommendation to expand the use of new technologies, mentioned that this could include increasing access to telecommunication networks; changing current regulations to allow law enforcement officers and court officers to utilize "already-in-place" bandwidths; exploring the use of new electronic monitoring technology for rural Alaskan probationers; and having the Alcohol Beverage Control Board ("ABC Board") develop a statewide database for all alcohol written orders for the aforementioned new community alcohol distribution centers.

ATTORNEY GENERAL MARQUEZ, in conclusion, asked for the legislature's support with regard to funding and any necessary legislative changes with which to institute the aforementioned recommendations, spoke of pending legislation and the Commission's support of that legislation, and offered the following additional suggestions for changes to current law: change the definition of alcohol manufacture and expand the forfeiture provisions; ban written order sales to dry towns; ban shipping plastic by air; and change the regulatory definition of a village from 1,000 individuals to 1,500 individuals.

2:09:29 PM

MS. SMITH relayed that the Commission has asked Congress to extend the Commission's life via continued funding, and is seeking permission from the U.S. Attorney General to expand its membership to also include the commissioner of the Department of Health and Social Services (DHSS), a representative of Alaska Native healthcare providers, and a non-voting state court representative who would be appointed by the chief justice of the Alaska Supreme Court. Furthermore, the Commission will continue the dialog among justice stakeholders, conduct additional research, monitor the development and implementation of the aforementioned recommendations, and evaluate the impact of any new and expanded activities.

MS. SMITH said that the Commission recognizes that in order to meet its objectives it must advocate at state and federal levels, educate and obtain buy-in from stakeholders and the public; advocate for expansion of innovative prevention, early intervention, and treatment programs; increase interest in recruitment, training and hiring of qualified Alaska Natives in the law enforcement and justice fields; further define the role of the Commission as necessary; and seek solutions, whenever possible, at the local level.

REPRESENTATIVE WILSON asked about the impact of changing the regulatory definition of a village from 1,000 to 1,500 individuals.

REPRESENTATIVE ANDERSON expressed appreciation for the detail of the report and characterized it as a critical component.

2:14:30 PM

WILLIAM TANDESKE, Commissioner, Department of Public Safety (DPS); Commissioner, Alaska Rural Justice and Law Enforcement

Commission, in response to Representative Wilson, offered his understanding that at present only Hooper Bay would be impacted; the rationale behind the requested change is that [the administration] doesn't want to start treating a community differently solely because of a population increase. Noting that he makes a distinction between public safety and law enforcement, he offered his belief that part of the aforementioned solutions really pertains more to public safety than to law enforcement; for example, there are many public safety activities that could improve the quality of life for rural residents and reduce incidences of suicide and accidental death. Of the recommendations involving collaboration with the U.S. Postal Service, he acknowledged that the DPS doesn't yet appear to have a very willing partner, though some steps are being taken.

COMMISSIONER TANDESKE referred to the aforementioned "sub-hub" [housing] pilot project, and relayed that this could involve [using preexisting] permanent structures or seeking federal funding to build facilities. He then mentioned some of the steps being taken, what the scheduling rotations might involve, and some of the locations being considered. He assured the committee that the DPS is seeking to become more effective without increasing costs, and mentioned federal appropriations, tiered training, continuity, and progression.

REPRESENTATIVE ANDERSON asked how the legislature might help at the state level.

COMMISSIONER TANDESKE mentioned the Village Public Safety Officer (VPSO) program, rural public safety as a whole, a possible pilot project to establish some form of public safety personnel in villages, and seeking latitude from federal authorities to invest federal funds in rural communities for public safety efforts that may not necessarily involve VPSOs. He relayed that the DPS would like to stay within the boundaries of state law even though there are some gray areas when dealing with tribes.

2:23:54 PM

WILSON JUSTIN, Executive Vice President and Acting President, Mount Sanford Tribal Consortium (MSTC); Commissioner, Tribal Representative, Alaska Rural Justice and Law Enforcement Commission, reiterated comments made by Ms. Smith and further detailed by the PowerPoint presentation, offered his belief that no one was left out of the Commission's process, and relayed

that the topic of tribal jurisdiction and sovereignty was specifically and intentionally left unaddressed.

[Representative Anderson turned the gavel over to Chair McGuire.]

MR. JUSTIN remarked that the Commission, by and large, focused on public safety issues and prevention issues; the prime concern in Alaskan communities, whether rural or not, is alcohol and substance abuse, because all other issues are tied to that. He expressed agreement with comments made by Commissioner Tandeske, but noted that the topic of a safety aide program was not actually discussed by the Commission yet would be easy to support as a pilot project. A critical component of any pilot program is that it fit the communities it is intended to serve. He remarked that a tremendous amount of money is returned from rural communities to Anchorage and Fairbanks, and thus tribal entities, organizations, and nonprofits are in essence pre-paying the cost of the aforementioned recommended programs. The issues being considered by the Commission can be viewed from an economic standpoint, a political standpoint, a social standpoint, a public safety standpoint, and a law enforcement standpoint, and this can result in outcomes not occurring automatically, particularly when long-term solutions are being sought; nonetheless, he opined, the Commission did an extremely good job of producing recommendations that will, in general, fit the times that Alaska is facing.

2:34:59 PM

REPRESENTATIVE WILSON commended the Commission for its focus on prevention.

REPRESENTATIVE GARA expressed appreciation for the Commission's work, but remarked on the lack of available treatment services statewide, possibly due to a lack of public education regarding the need for funding such services.

MR. JUSTIN pointed out that a restorative justice approach focuses on teaching a community how to make amends with itself and how to heal itself and its citizens, and should therefore be viewed as a valuable component of any programs that are put in place.

REPRESENTATIVE COGHILL expressed appreciation for the Commission's approach.

COMMISSIONER TANDESKE, in response to a question, relayed that although the DPS is not mandated to do so, it has been training VPSOs in "hub locations," and is also trying to be flexible with the aforementioned pilot projects in order to see what works.

MR. JUSTIN, in response to a question, noted that in Kake, for example, [law enforcement officials] work closely with the magistrate and train in aspects of healing as part of a restorative justice approach; this has had a high rate of success in reducing incidents of suicide and domestic violence.

2:45:17 PM

MS. SMITH, at the request of Representative Gruenberg, engaged in a discussion with members regarding the role of the U.S. Attorney's Office in Alaska and how the legislature might best assist the DOJ with its goals regarding antiterrorism, violence reduction, prosecutions of firearm- and gang-related crimes, [prosecution] of child enticement and child sexual abuse crimes, environmental issues, and drug prosecutions.

HB 325 - POST-CONVICTION DNA TESTING

3:01:13 PM

CHAIR McGUIRE announced that the final order of business would be HOUSE BILL NO. 325, "An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules of Criminal Procedure."

The committee took an at-ease from 3:02 p.m. to 3:04 p.m.

REPRESENTATIVE GABRIELLE LeDOUX, Alaska State Legislature, sponsor of HB 325, relayed that her aide, Kimberly Wallace, would introduce the bill.

KIMBERLY WALLACE, Staff to Representative Gabrielle LeDoux, House Special Committee on Fisheries, Alaska State Legislature, informed the committee that a committee substitute for HB 325 had been prepared.

3:05:37 PM

REPRESENTATIVE COGHILL moved to adopt the proposed committee substitute (CS) for HB 325, Version 24-LS1222\I, Mischel/Luckhaupt, 4/1/06, as the work draft. There being no objection, Version I was before the committee.

3:05:51 PM

MS. WALLACE paraphrased from her written testimony, which read in part [original punctuation along with some formatting changes provided]:

> Currently, 40 other states provide convicted persons access to DNA testing. The handout before you prepared by Legislative Research, dated February 1, 2006, shows a sample of states that have adopted legislation pertaining to post-conviction DNA testing within the past 5-6 years.
>
> The Innocence Project states that since 1989, over 170 people imprisoned in the U.S. have been proven innocent through post-conviction DNA testing.
>
> The intent of HB 325, is to improve the Alaska Criminal Justice system for all Alaskans by providing a statutory right to DNA testing.
>
> Specifically, this act establishes a procedure for application for DNA testing and the appointment of counsel. This legislation can help free an innocent person and let law enforcement and the public know that a guilty and dangerous person is still at large.
>
> One of the handouts in your committee packet is an article from the Ketchikan, "Stories in the News", dated March 6, 2006, by Representative Anderson. In the last paragraph, Representative Anderson states that one of his top priorities as a State Legislator is expansion of the DNA database. On page 4 of version I of HB 325, lines 9-11, the testing laboratory is ordered to make the DNA available to the DNA identification registration system and to any other law enforcement DNA databases.
>
> Our office has collaborated with the Department of Public Safety, the Department of Law, the Innocence Project and members of this committee to make HB 325 a better bill.
>
> I'd like to direct your attention to the format and content changes to HB 325, as outlined in the memo to

the committee members from Representative LeDoux, dated April 4th, 2006.

In conclusion, I'd like to mention the Scientific American Mind article that was also included in your packet. On page 26, in the bottom left-hand column, the article states that "Typically 20 to 25 percent of DNA exonerations had false confessions in evidence." This begs the question, "Why would anyone admit to something they haven't done?" The article continues on page 30 to note that psychologists categorize false confessions into three groups:

1) Voluntary false confessions
2) Compliant false confessions
3) Internalized false confessions

There have been cases where no physical evidence has linked a person to a crime, but due to a confession, they have been charged and convicted and even sometimes executed for a crime they did not commit.

If HB 325 can help just one person prove their innocence, and the real perpetrator to be identified by DNA testing, then we will have achieved what we set out to do.

Thank you again for the opportunity to testify before you today. I know there are others who wish to testify on-line and in the audience. This concludes my presentation.

3:09:18 PM

CLIFF STONE, Special Assistant, Office of the Commissioner, Department of Public Safety (DPS), relayed that the department [did have] a concern with [the original language of] proposed AS 12.72.230 - located on page 3 - because the drafter inadvertently stated that the deoxyribonucleic acid (DNA) testing itself would be performed at a law enforcement or correctional facility when, in fact, it's only the collection of samples for DNA testing that would be performed at these facilities. He noted that the language in proposed AS 12.72.240 and proposed AS 12.72.250 refers to the contracted, accredited laboratories where the DNA is actually tested. In response to a question from Chair McGuire, he said he is comfortable with the language currently in Version I.

REPRESENTATIVE GRUENBERG offered his understanding that the DNA collection would be performed at the correctional or law enforcement facilities and the testing done elsewhere. He then referred to [page 3], line 23, and suggested that using the word "done" instead of the word "performed" would more accurately describe the DNA sample collection process.

MR. STONE agreed. In response to further questions, he explained that the only other laboratory approved by the DPS to process DNA [samples] is a Washington State accredited laboratory, and suggested that someone else might be better able to answer questions regarding payment.

3:13:28 PM

STEPHEN SALOOM, Policy Director, Innocence Project, expressed his thanks to those involved in sponsoring and hearing the bill. He highlighted that court review of DNA evidence has proven the innocence 175 people incarcerated for serious crimes and that freeing [those falsely accused] has allowed the pursuit of the actual perpetrators of those crimes. He referred to Representative Anderson's work and support of using DNA sampling to "enhance the accuracy and effectiveness of the criminal justice system," and opined that [HB 325] would offer the same opportunity. He relayed that President George W. Bush; U.S. Senator Frist, President of the Senate; and U.S. Representative Hastert, Speaker of the House, also demonstrated their support of post-conviction DNA testing through passage of the congressional Justice for All Act of 2004, [H.R. 5107], which [provides financial incentives to those states] that allow the testing.

MR. SALOOM said, "The Innocence Project is extremely pleased to know that Alaska is considering legislation to join the other 40 states that have created statutory avenue for consideration of DNA evidence after a conviction." He expressed his belief that such legislation ensures public confidence in criminal conviction, public safety, and justice itself. No one benefits when an innocent person is convicted of a crime - not the victim, the police, the prosecutor, the legal system, or the public. The only person who wins is the real perpetrator who's protected from prosecution by the mistaken focus on an innocent person; HB 325 is a fantastic step towards providing exactly the justice that Alaska deserves and that is being adopted around the country, he remarked.

MR. SALOOM relayed, however, that whereas the Innocence Project endorses this bill, there is concern regarding the language used on page 4, lines 13-14, which says:

> (1) "actual innocence" means clear and convincing evidence such that no reasonable juror would have convicted the defendant;

MR. SALOOM opined that this provision could provide "a fatal flaw" to the bill, and recommended that it be changed to say, "'actual innocence' means that no reasonable jury would have convicted the defendant". However, he characterized even this suggested change as a "slight compromise." He relayed that most of the other states use a more ideal standard which takes into account that a jury, within "reasonable probability," might have provided a different verdict had they been able to consider [DNA] evidence. He explained that the issue is not about setting someone free but rather whether to test evidence that might then indicate that either a new trial should be granted or some other form of release be considered.

3:19:09 PM

REPRESENTATIVE GRUENBERG sought confirmation that Mr. Saloom was suggesting that the words, "clear and convincing evidence" be deleted from page 4, line 13.

MR. SALOOM concurred, and referred to the first mention of "actual innocence" found in proposed AS 12.72.210, which says in part:

> A court may not order DNA testing unless the petitioner shows, by a preponderance of the evidence, that
>
> (1) favorable results of the DNA testing could demonstrate the petitioner's actual innocence;

MR. SALOOM explained that "preponderance" already sets one standard and so adding another standard of "clear and convincing evidence" would not be [ideal].

REPRESENTATIVE GRUENBERG asked why "preponderance of the evidence" should be used as the standard.

MR. SALOOM relayed that the Innocence Project believes that "preponderance of the evidence" is the best standard to use at "this" point. He referred to the aforementioned 175 DNA

exonerations and noted that a jury had already found those people guilty beyond a reasonable doubt on all elements of the crime. He explained that once new evidence is obtained [through DNA testing], it is possible [though unintentional] to over-estimate the other, previously considered evidence.

REPRESENTATIVE GRUENBERG opined that this issue should be considered further.

3:26:06 PM

HILLIARD H. "TRES" LEWIS, III, Private Investigator, Mendenhall Investigations, Inc., provided some historical background of DNA testing in an effort to explain the importance of HB 325. He relayed that much of the collected evidence - such as a hair without a root from an arm - is not suitable for any kind of testing other than for mitochondrial DNA, which is DNA through the mother's side. He sited a former case of his where the individual was convicted though might not have been had this statute and mitochondrial DNA testing been available. He then referred to the earlier discussion of the dual standard [present in Version I] and opined that the "preponderance of the evidence" standard is more appropriate.

MR. LEWIS relayed that there are still hurdles convicted individuals must face before the biological samples can be tested, and that a somewhat lower standard would be appropriate in providing those convicted with the opportunity to prove their innocence through the DNA testing process. In researching test prices, he said he found the costs to be anywhere from $125 to $1,500 - with some tests going so far as to determine the eye color of the individual from which the biological sample originated. He expressed his belief that the state should consider these costs to be insignificant [compared to the benefit provided].

REPRESENTATIVE COGHILL asked Mr. Lewis whether he felt the science of DNA testing has become more reliable or whether bigger questions have simply been raised.

MR. LEWIS explained that advances in DNA testing have been made from the first-time testing through Restriction Fragment Length Polymorphisms (RFLP) - DNA fingerprinting - to Polymerase Chain Reaction (PCR), which now tests up to 13 positions of the DNA. He opined that DNA testing is becoming more discrete, more precise. He referred to the science of relying on matching the lead content in bullets to determine whether someone was guilty

or not - a science since determined to be unreliable by the National Academy of Science and no longer used by the Federal Bureau of Investigation (FBI). He expressed his belief that "the science involved in the early development of DNA testing was very fundamentally sound." Furthermore, he opined, DNA testing is reliable for both the conviction as well as the release of the innocent and has become more important in determining "who was present and who was not present [at the crime scene]."

3:34:21 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law (DOL), informed the committee that whereas the [department] agrees with Representative LeDoux that this is an important issue and bill, the DOL still has serious reservations about the substantive provisions of the bill in its present form. In noting that the bill would establish circumstances where a person convicted of a crime could obtain post-conviction DNA testing with the goal of undermining the conviction, she relayed that two important principles were involved. The first, she explained, deals with the importance of the finality of criminal convictions when the person asking for this testing was convicted by a jury "beyond a reasonable doubt," had the automatic right to an appeal, and had the conviction affirmed following the appeal.

MS. CARPENETI explained that the second principle pertains to the victim of a crime who is trying to put closure on the experience and move on. She informed the committee that the Alaska State Constitution now gives victims of a crime the right to timely disposition of the case following the arrest of the defendant, and therefore reopening the case for post-conviction procedures is hard on victims. Furthermore, she highlighted that the U.S. Supreme Court has found that finality in criminal convictions is essential to the operation of the criminal justice system because without finality, criminal law is deprived of much of its deterrent effect.

MS. CARPENETI, in noting that there are rare cases of truly innocent persons being wrongly convicted, posed the question of how the statute should be written to catch the truly innocent person without allowing a [convicted] defendant who should be serving his/her time from bringing repetitive requests for DNA [testing]. She also said that the "burden of proof" [in Version I] is not clear and that [the department's] position, unlike that of the Innocence Project, is that a person should prove, by

clear and convincing evidence, that post-conviction testing is appropriate.

REPRESENTATIVE GRUENBERG opined that there are two aspects to "burden of proof": the burden of going forward, which pertains to "who carries it," and the burden of persuasion, which refers to the level at which it must be proved. He said that although he recognizes the importance of not having a victim repeat the court experience, his belief is that this is far less important than determining whether someone is guilty or innocent.

MS. CARPENETI reiterated her earlier comments regarding those who've been convicted and said that at a certain point, one has to say that a person has had his/her chances [to prove innocence], and so if he/she wants to challenge a perfectly valid conviction, then he/she ought to bear a pretty high burden of proof to show that it's appropriate to challenge the conviction at that point in time. She highlighted that current Alaska statutes require "clear and convincing evidence" as the burden of proof for factual matters for all other post-conviction release cases, and therefore this should apply equally to those petitioning for DNA testing, which is merely another form of post-conviction release case.

3:40:42 PM

REPRESENTATIVE GRUENBERG referred to language on page 3, lines 6-10 - proposed AS 12.72.210(3) - which read in part:

> (3) conclusive DNA test results were not available before the petitioner's conviction, and the petitioner did not secure DNA testing before the petitioner's conviction because DNA testing was not reasonably available or for reasons that constitute justifiable excuse, ineffective assistance of counsel, or excusable neglect;

REPRESENTATIVE GRUENBERG suggested that this might be sufficient justification for not requiring "clear and convincing evidence." He expressed his belief that if DNA testing was not available, then a "preponderance of the evidence" should be sufficient.

MS. CARPENETI remarked that it is difficult to discuss these situations in a vacuum, and noted that there were very few cases in Alaska for which [DNA testing] was not available and this might be due to the fact that Alaska is a fairly new state. She highlighted that many of those convicted submit applications

requesting different or more sophisticated DNA testing than was available at the time of their conviction or they claim that their attorneys did not ask for the testing at the time of the trial when in fact there may have been a very good reason for not doing so.

REPRESENTATIVE GRUENBERG said such latter instances might come under the heading of "ineffective assistance of counsel," which is another matter.

MS. CARPENETI agreed.

3:42:46 PM

CHAIR McGUIRE announced that HB 325 would be assigned to a subcommittee made up of Representatives Gruenberg, Anderson, and Kott, with Representative Kott being chair of the subcommittee.

REPRESENTATIVE GRUENBERG, referring to page 3, noted that language on line 6 says, "results were not available", whereas language on line 8 says, "not reasonably available."

MS. CARPENETI agreed that this difference in language raises the issue of clarity, and relayed she would provide the subcommittee with a list of anything else in the bill that raises that same issue.

REPRESENTATIVE GRUENBERG then referred to page 3, lines 25-29, regarding payment of the cost, and requested that Mr. Saloom be available to provide the subcommittee with input regarding the language New York used in addressing this topic.

MS. CARPENETI relayed that one of the DOL's suggestions incorporated into Version I was the suggestion requiring that applicants for post-conviction DNA testing submit an affidavit swearing that they are "factually innocent" of the crimes for which they were convicted as well as of any lesser included offenses.

REPRESENTATIVE GRUENBERG opined that this process should provide for additional penalties to [be added to existing sentences] if applicants are found guilty of perjury.

MS. CARPENETI remarked that there ought to be some risk associated with filling out the affidavits. She explained that the purpose for wanting an affidavit of factual innocence is to have on record that a defendant is claiming true, "actual

innocence." She then noted that the Alaska Court of Appeals case, Osborne v. State, provides a good example of a defendant who should not be allowed post-conviction DNA testing, someone who at the time of the hearing admitted, both verbally and in writing, to participating in the crime. Because of those admissions, she relayed, the DOL's belief is that the defendant should not be allowed post-conviction DNA testing. She said she is aware of the belief held by the Innocence Project that factually innocent people do, under some circumstances, confess guilt; however, under those circumstances, there should be no reason why those convicted should not be willing to make an affidavit claiming they are factually innocent of the crime and explain why their prior admissions of guilt should not be believed.

3:53:06 PM

MR. SALOOM interjected to opine that the term "factual innocence" raises a separate issue than does the term "factually innocent of that or any lesser included crime."

REPRESENTATIVE GRUENBERG returned attention to the language on page 4, lines 13-14, referring to "would have convicted the defendant" and suggested that the subcommittee draft more specific language such as, "would have convicted the defendant of the crime for which the DNA sample is sought."

CHAIR McGUIRE concurred, and relayed her understanding of the challenges the DOL faces on this issue. She noted that [the DOL] also suggests that the bill include language requiring a defendant's attorney to submit an affidavit explaining his/her reasons for the particular "approach to DNA testing [chosen] at the trial level." She again referred to the Osborne case as an example, and surmised that the defendant's attorney made the tactical decision to not pursue "more sophisticated DNA testing at trial," even though it was available at that time, so as to not further implicate [his] client.

REPRESENTATIVE GRUENBERG remarked that all of the circumstances [of a case] should be known. He suggested that [Ms. Carpeneti] and Mr. Saloom each provide [the subcommittee] with more [information] on this issue so that both sides are represented.

MR. SALOOM agreed to do so.

MS. CARPENETI relayed that the biggest concern [the DOL] has with Version I pertains to the language of proposed AS 12.2.210 that reads:

> (1) favorable results of the DNA testing could demonstrate the petitioner's actual innocence;

MS. CARPENETI opined that the meaning of "could demonstrate" is not clear enough because [the DOL] believes that the petitioner requesting DNA testing should have to "conclusively prove" that he/she is innocent.

3:57:24 PM

REPRESENTATIVE COGHILL commented that changing the wording to "will [conclusively prove a person's innocence]" might be too "conclusive the other way." He suggested possibly "ratcheting up" [the standard to] "preponderance of the evidence." He then referred to the language on page 3, line 6, regarding test results not being available and opined that this could be a "technical snafu" as well.

REPRESENTATIVE GRUENBERG, referring to page 3, line 1, said he might support the word "could" because ultimately at trial, the prosecution has the burden of proving a fact beyond a reasonable doubt, yet [language in the bill] pertains to a civil action, and therefore the burden of persuasion shifts to the defendant to prove a fact by a preponderance of the evidence.

MS. CARPENETI concluded by saying that the DOL's stand is that the applicant for post-conviction testing should exercise due diligence in bringing forward his/her claim.

CHAIR McGUIRE concurred.

REPRESENTATIVE GRUENBERG sought confirmation regarding whether Alaska Rules of Civil Procedure Rule 35(b)(1) already contains a due diligence standard.

MS. CARPENETI explained that there are existing statutes that address "due diligence" and specify other requirements and exceptions regarding post-conviction requests (PCR).

CHAIR McGUIRE said that it is in everybody's interest to have certainty one way or the other.

CHAIR McGUIRE, after ascertaining that no one else wished to testify, closed public testimony on HB 325, reiterated that HB 325 [Version I] has been assigned to a subcommittee, and remarked on possibly hearing the bill again next week.

ADJOURNMENT

4:03:10 PM

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:03 p.m.