

HOUSE FINANCE COMMITTEE
March 25, 2010
9:23 a.m.

[9:23:06 AM](#)

CALL TO ORDER

Co-Chair Stoltze called the House Finance Committee meeting to order at 9:23 a.m.

MEMBERS PRESENT

Representative Mike Hawker, Co-Chair
Representative Bill Stoltze, Co-Chair
Representative Allan Austerman
Representative Mike Doogan
Representative Anna Fairclough
Representative Neal Foster
Representative Les Gara
Representative Reggie Joule
Representative Mike Kelly
Representative Woodie Salmon

MEMBERS ABSENT

Representative Bill Thomas Jr., Vice-Chair

ALSO PRESENT

Dan Sullivan, Commissioner, Department of Law; Richard Svobodny, Deputy Attorney General, Criminal Division, Department of Law; Anne Carpeneti, Assistant Attorney General, Legal Services Section-Juneau, Criminal Division, Department of Law

PRESENT VIA TELECONFERENCE

Bill Oberly, Executive Director, Alaska Innocence Project;
Denise Morris, Alaska Native Justice Center

SUMMARY

HB 316 POST-CONVICTION DNA TESTING; EVIDENCE

HB 316 was HEARD and HELD in Committee for further consideration.

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#hb316

HOUSE BILL NO. 316

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

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DAN SULLIVAN, COMMISSIONER, DEPARTMENT OF LAW presented the overview of the bill. The bill included four main elements: new standards for the preservation of evidence by all state law enforcement agencies, new procedures for post-conviction DNA testing, amendments to the DNA identification registration system to comply with federal procedures, and the creation of a task force to adopt standards for evidence preservation. He remarked that the bill fits into the broader context of reducing sexual assault and domestic violence in the state. The governor had a 10 year plan to help address and pose no harm to any citizen. This plan had five key strategic objectives: to break the cycle of abuse using a comprehensive public education and prevention campaign, to promote a culture of respect and awareness; to deter, segregate, and treat offenders so they pose no risk of harm to women and children; to establish a law enforcement presence in every community that desires one; to increase victim services, so more have a safe sanctuary; and to coordinate and streamline efforts among all stakeholders to effectively combat violence against women and children. He believed the governor's plan, though imperfect, was a good foundation with many different perspectives. He spoke of leaders on this issue, specifically Representative Joule and Representative Fairclough who worked hard to make improvements to this plan. He believed the legislative plan was working. The legislature was already addressing improvements to the governor's plan, and felt confident

that the broader strategy of tackling domestic violence and sexual assault was poised to be stronger. He also remarked that he had presented this plan to senior officials in Washington at the Department of Justice, including the attorney general and the Vice President of the United States. The presentation in Washington was a part of the plan to raise awareness of this cultural issue. The Vice President gave a personal commitment to help Alaska address this challenge. On March 31, 2010 marches all over the state would focus on the issue of violence against women and children.

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He commented that there were a number of bills regarding the governor's plan: one pertained to sexual assault and domestic violence issues; one pertained to bail reform; and HB 316, which pertained to post-conviction DNA testing. He post-conviction DNA testing issues were critical components to the broader comprehensive strategy. He maintained that these were grass-roots bills, in that they were developed from looking at ways to make Alaskans safer. Prosecutors should be given the tools to put offenders behind bars, and also be sure they have prosecuted the right offender. The state of Alaska won a US Supreme Court case: the Osborne case. This case was argued by the Alaska DOL, and they reversed the ninth circuit. The Supreme Court agreed that post conviction issues are better left to the states instead of the federal courts. The bill would set out procedures and standards on how a convicted felon can apply for DNA testing. It would also set up procedures for the preservation of DNA evidence, which would help the cold case unit crack more cases. While it is known that criminals and crime should be dealt with seriously, and victims should be given as much protection from dangerous criminals as allowed under the law, it is also believed that procedures should be in place to enhance the opportunity for fair trials. He addressed the four elements of the bill: it set new standards for the preservation of evidence by all law enforcement agencies, evidence must be preserved until time of appeal or post-conviction relief has expired, biological material must be preserved until the person is unconditionally discharged of the crime, and implement new procedures for post-conviction DNA testing. The bill also had amendments to the DNA identification registration system, to comply with federal procedure.

Finally, the bill would create a task force to adopt standards for evidence preservation.

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Representative Fairclough queried the impact on the crime lab in Anchorage, regarding the governor's proposed plan.

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Commissioner Sullivan mentioned there were four bills that focus on finance and aspects of the crime lab, and without all four it will limit what is trying to be achieved. He commented that about 50 percent of the cases that the crime lab examines relate to sexual assault and domestic violence.

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RICHARD SVOBODNY, DEPUTY ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF LAW, added that with the passing of this bill, he hoped that all DNA testing would occur before a trial. He noted that the work load in the crime lab will increase, but would presumably take place before the trial. This may make DNA evidence retention less problematic. The bill does include provisions for evidence retention, which would keep the burden of evidence storage at a minimum. He added that the task force would deal with evidence retention issues, for example: how to return property to victims.

Representative Fairclough wondered how quickly the collected DNA was entered into the national DNA database (CODAS). She also queried the protocol for entering DNA into CODAS.

Mr. Svobodny explained that he believes it took about three or four days for DNA to enter CODAS, but remarked that the Alaska Department of Public Safety (DPS) could give a more accurate answer. He continued that the DNA goes directly into CODAS when there is no suspect, in order to compare DNA to other cases and felons. He stated that there are several different databases that are used to determine a possible subject. He specified that there is no wait until someone is convicted, in order for their DNA to get entered into the system. He furthered that there was a portion of the bill that would require removal of DNA from the database, if that person had been exonerated.

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ANNE CARPENETI, ASSISTANT ATTORNEY GENERAL, LEGAL SERVICES SECTION-JUNEAU, CRIMINAL DIVISION, DEPARTMENT OF LAW, mentioned that the drafters of the bill were two lawyers from the Office of Special Prosecutions and Appeals (OSPA) who represented Alaska in the Osborne case at the Supreme Court.

Ms. Carpeneti explained that the bill was divided into two major parts: evidence retention, and post-conviction DNA testing. The bill specified two different types of evidence: physical and biological. The bill would require state law enforcement agencies to retain physical evidence for the entire litigation period in cases involving homicides, first degree sexual assault, and first degree sexual abuse. It would recognize that law enforcement agencies are different sizes, remarking that a rural police department might have less storage capacity than a large urban center. The bill required that each law enforcement agency establish written protocols and standards for how cuttings and samples would be taken from bulkier pieces of physical evidence. She continued that biological evidence is defined as the contents of a rape kit: human bodily material; slides and swabs from the human bodily material; and swabs or cuttings from evidence that contained the biological material. The biological material must be kept for the period of time that a sex offender is required to register for the sex offence; and for homicides, it is kept until the person is unconditionally released from that crime. The bill would adopt a procedure to dispose of or return evidence to the owner. If law enforcement agencies do not abide by the rules and procedures, there are remedies provided according to Supreme Court rulings. As legislation has passed, the task force related to the bill had expanded to include representatives of evidence custodian agencies. The duty of the task force was to recommend standards and protocols for evidence collection, storage, organization, and return to owner.

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Representative Gara requested a comparison between the current evidence retention standards, and the proposed legislation. Mr. Svobodny responded that there were

currently no state-wide standards pertaining to evidence retention.

Representative Gara queried the length of time evidence is kept post-conviction. Ms. Carpeneti replied that the bill would allow traditional physical evidence to be returned to the owner upon incarceration, and biological evidence would be kept for the period of time that the person is incarcerated, fulfilled probation or parole, and the length of time they are registered as a sex offender.

Representative Gara asked if there would be a situation where retention of evidence is unnecessary, as to accommodate a victim's needs. Ms. Carpeneti replied that the legislation would provide a procedure where the police would ask the parties involved if they object to the returning of evidence.

Representative Gara remarked that the procedures are too rigid for the convicted persons, who are innocent, to obtain DNA testing.

[9:53:06 AM](#)

Representative Fairclough asked why a Sexual Assault Nurse Examiner (SANE) was not a member of the task force. She spoke in favor of the Alaska Native Justice Center inclusion in the task force, because it is a good representation of rural voices. Ms. Carpeneti replied that she did not believe a SANE was ever considered. She pointed out that they had tried to keep the task force small, because the vision of the task force was originally based on basic storage and retention procedures. The members of the task force are mostly people who professionally collect and store evidence. Commissioner Sullivan added that the DOL would have no objection to the addition of a SANE to the task force. Representative Fairclough reiterated the importance of a SANE on the task force.

[9:55:54 AM](#)

Co-Chair Stoltze added that the Alaska Native Justice Center has a broader mission than rural Alaska, although a chunk of victimization is in rural Alaska.

[9:56:07 AM](#)

Representative Austerman queried the state's current evidence retention standard. Mr. Svobodny stated that each individual police department set its own standards. He related that one police department might require all photographs to be maintained, while another department might require all specifically clear photographs be maintained. He stated that there are federal standards regarding DNA collection, but the task force would be set up to deal with all evidence.

Representative Austerman wondered why the bill states that each police department would develop their own standards, when the intent is to create a state standard. Mr. Svobodny responded that the local police departments have limits to what they can do. The bill would not establish state standards. He reiterated that there are broad differences between departments across the state, but the task force would impose a requirement on municipalities to specifically retain biological evidence.

[9:59:41 AM](#)

Representative Austerman wondered if the task force would present their findings to the governor, and if so, would DOL write a new bill with their standards written in statute. Mr. Svobodny replied that the task force may or may not present their findings to the governor. He furthered that if the task force was unsuccessful, standards may need to be written in statute.

[10:00:37 AM](#)

Ms. Carpeneti continued with post-conviction DNA testing standards. She believed that the standards outlined in the bill would be short-lived, in the hopes that DNA testing would occur for all cases where DNA evidence was available and relevant. She remarked that sophisticated DNA testing already existed in Alaska. In cases where DNA testing did not occur, the bill attempts to attain a balance. The two sides of the balance address helping those who were wrongly-convicted and discourage those who were justly convicted to challenge a fair conviction. The bill specified findings that a court must make before the judge can order post-conviction DNA testing: 1) The applicant must be convicted of a felony for a crime against a person under Alaska law; 2) The applicant must submit an affidavit swearing that he/she is innocent of the crime they were

convicted of, and any lesser included offenses, attempts, or aiding/abetting; 3) The applicant must not have conceded or admitted guilt in an official proceeding. She remarked that a guilty or nolo contendere plea at the trial level should not be considered concession or admission of guilt; 4) The applicant must submit an affidavit describing previous efforts to obtain DNA testing; 5) The evidence must be obtained as part of an investigation and prosecution, and subject to a chain of custody to ensure its reliability; 6) The applicant must seek reasonable testing which is consistent with forensic practices that employ scientifically sound methods; 7) The applicant must propose a defense theory; 8) Lastly, the bill encourages applicants to apply as soon as the applications are made available.

[10:07:17 AM](#)

Co-Chair Stoltze appreciated the section of the bill that would remove DNA from the database, if the person is found innocent. He remarked that one of his constituents was very concerned with that particular issue.

[10:07:36 AM](#)

Representative Foster requested an explanation of the section of the bill regarding those that plead guilty in preliminary hearings. Ms. Carpeneti explained that the bill provides that a person who has admitted or conceded guilt in an official proceeding, which is defined in statute, may not be granted post-conviction DNA testing. A guilty or nolo contendere plea at the trial level is not considered an admission or concession of guilt, for purposes of an application for post-conviction DNA testing.

[10:09:42 AM](#)

Representative Gara urged the committee to consider the perspective of the Alaska Innocence Project (AIP). He pointed out that there was a memo in the bill packet from the AIP, and hoped the organization would be a part of future discussions regarding post-conviction DNA testing.

Co-Chair Stoltze agreed with Representative Gara.

Representative Gara commented that there are some circumstances when an innocent person may admit guilt, and the bill limits that person's ability to further prove

their innocence through post-conviction DNA testing. He remarked that in parole hearings, convicts are often asked if they concede to guilt. Many times the convict will concede, in order to be granted parole early. Mr. Carpeneti agreed that Representative Gara's concerns are valid, but furthered that people need to be held accountable for what they say under oath.

[10:13:13 AM](#)

BILL OBERLY, EXECUTIVE DIRECTOR, ALASKA INNOCENCE PROJECT (via teleconference), testified that the current language of the bill restricts access to post-conviction DNA testing. He pointed out that there is a zero fiscal note attached, because DOL did not anticipate many cases. He suggested significant changes to the bill, specifically the removal of the time restriction in the application process. He assured the committee that no innocent person would wait to make a request for testing. With the difficulty in identifying cases and locating evidence, the practical effect of the time limitation could prohibit most applications. The AIP was concerned about restriction in testing, if the person admitted guilt in an official proceeding. There should be no restriction on innocent claims due to an admission of guilt, if it could be proved that their innocent. He added that requiring someone to pay for own DNA testing would greatly restrict the innocent. He referred to the written testimony (copy on file), which addressed a procedure that requires a judge to guess an outcome of DNA testing before ordering it. The combined effects of the current restrictions in the bill would burden rural communities. He urged the committee to remove the restrictive language in the bill.

[10:19:25 AM](#)

Representative Gara wondered if Mr. Oberly preferred the current Senate version of the bill, because it does not contain as much restrictive language. Mr. Oberly stated that SB110 specifically dealt with evidence preservation, and does not deal with post-conviction DNA testing.

[10:22:07 AM](#)

Representative Gara queried the standards judges use in order to grant DNA testing. Mr. Oberly explained the standard in Alaska requires the judge to guess what DNA

testing would show before ordering the test. Most states would allow for a test only if the evidence still exists.

Representative Gara requested exact language that other states use regarding that issue of judges ordering DNA testing. Mr. Oberly agreed to provide that information.

[10:25:33 AM](#)

DENISE MORRIS, ALASKA NATIVE JUSTICE CENTER (via teleconference), expressed concern about the section of the bill restricting DNA testing because of an admission of guilt. She remarked that there may be a large number of innocent individuals among the native community, who may have admitted guilt. This would prevent them from applying for post-conviction DNA testing. She recommended that section of the bill be removed. She also suggested a representative from AIP join the task force.

Co-Chair Stoltze stated that he understood the sensitivity of the issues in the bill, and apologized that some people would not get the chance to testify during the meeting.

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ADJOURNMENT

The meeting was adjourned at 10:29 AM