HOUSE FINANCE COMMITTEE
March 31, 2010
1:44 p.m.

1:44:14 PM

CALL TO ORDER

Co-Chair Stoltze called the House Finance Committee meeting to order at 1:44 p.m.

MEMBERS PRESENT

Representative Mike Hawker, Co-Chair
Representative Bill Stoltze, Co-Chair
Representative Bill Thomas Jr., Vice-Chair
Representative Allan Austerman
Representative Mike Doogan
Representative Anna Fairclough
Representative Neal Foster
Representative Les Gara
Representative Mike Kelly
Representative Woodie Salmon

MEMBERS ABSENT

Representative Reggie Joule

ALSO PRESENT

Quinlan Steiner, Director, Public Defender Agency, Department of Administration; Anne Carpeneti, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law; Richard Svobodny, Deputy Attorney General, Criminal Division, Department of Law; Orin Dym, Manager, Forensic Laboratory, Alaska Crime Laboratory, Department of Public Safety.

PRESENT VIA TELECONFERENCE

Robert Bundy, Attorney, Anchorage; Barbara Brink, Anchorage; Bill Oberly, Executive Director, Alaska Innocence Project, Anchorage; Jeffrey Mittman, Executive Director, American Civil Liberties Union-Alaska.

SUMMARY

HB 316 POST-CONVICTION DNA TESTING; EVIDENCE

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

#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."

1:45:21 PM RECESSED
1:46:27 PM RECONVENED

Vice-Chair Thomas invited public testimony.

QUINLAN STEINER, DIRECTOR, PUBLIC DEFENDER AGENCY, DEPARTMENT OF ADMINISTRATION, spoke to agency concerns regarding HB 316. He listed items he thought were vulnerable to interpretation and which could have a larger impact on the agency. The first concern was on page 9, line 5, a subsection of the bill requiring the petitioner to establish that the evidence had been obtained in the prosecution or investigation. He believed the section could be interpreted as meaning the investigation of the particular case; there are cases where evidence sought to be tested could be obtained from another investigation or from a third-party suspect.

Representative Gara believed that each item represented something that someone had to give approval for in order to get DNA testing. He queried possible circumstances under which an innocent person would not be able to get DNA testing under the provision. Mr. Steiner replied that the section (containing "the evidence sought to be tested was obtained as part of an investigation or prosecution described in subsection (1)") could potentially be interpreted to mean that the evidence sought to be tested had to be obtained in the particular investigation for which the person was convicted. He maintained that there are circumstances in which evidence obtained in other

prosecutions might establish someone's innocence; a person could be barred from obtaining it under a strict interpretation of the language. He continued that it is possible that the language could be interpreted as applying to anything, because later in the statute, the judge has authority to order testing from third-party suspects. For example, another prosecution could occur later in time that has the same modus operandi as the crime for which the person was convicted; that might bring in the relevance of the other person and the other case.

Representative Gara asked for an example of evidence that could be found in a different investigation that might prove a person's innocence. Mr. Steiner described a possible scenario with evidence connected to DNA samples (such as cigarette butts) in the original prosecution that was not tested for reasons of relevance; a third person could become a suspect in the original case, but there might not be a DNA sample from that person or from the other crime. Evidence would need to be obtained and tested from the other case and person to establish the innocence of the original case being petitioned for.

Representative Gara asked how the problem could be corrected in the legislation. Mr. Steiner opined that the section could be deleted without damaging the bill, or something could be added to the effect that the evidence sought to be tested would be relevant to the prosecution described in Section 1.

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Mr. Steiner addressed the agency's second concern: Page 9, lines 20 and 23 have a requirement of identifying a theory of defense that is not inconsistent with one presented at trial and also where identity was a contested issue at trial. He stated that the impact of the provision to the agency would involve the attorney's discretionary decisions with regard to what defense to select. He believed it was possible to have a situation in which self defense was selected rather than identity even though a client claimed they were not present. The decision would be considered a reasonable one by the attorney, and one for which the client would have no authority to insist upon; the person's opportunity to claim innocence would be foreclosed through no fault of their own. The attorney would then be placed in an ethical dilemma about whether to elect an identity

defense according to the client's wishes or to go with a viable defense at trial in favor of protecting a later post-conviction relief application. He was not sure how the issue would resolve at trial, but the attorney would be put into a dilemma that does not exist currently in statute.

Representative Gara summarized that an attorney, according to line 20, could proceed with a defense that turned out not to be accurate because of DNA evidence showing a person's innocence, but the evidence could not be used because of the defense chosen. He did not understand the concern regarding line 23. Mr. Steiner responded that line 23 says that the applicant was convicted after trial and the identity of the perpetrator was disputed. An attorney might run self defense and never dispute identity, even though it could potentially be contested. He pointed out that it was somewhat inconsistent to claim self-defense and also claim not to be there; many attorneys do not want to run conflicting defenses at the same time.

Mr. Steiner added as a technical matter that the beginning of the sentence on line 23 had deleted the word "if" from a prior section. He stated that the word "if" is necessary to ensure that relief could be obtained following a guilty or no contest plea. He believed the error was simply a drafting error.

Mr. Steiner turned to the agency's third concern, related to page 9, line 25; the standard by which the court would conclude whether or not the evidence would be helpful. He opined that it should be interpreted as if the evidence (the testing) were favorable, then it would support a theory of defense described in Section 8 that could establish innocence. He believed the language could be interpreted as saying that there is a reasonable probability of a favorable result; this could substantially increase litigations of post-conviction relief to no productive end. The cases involved are typically strong circumstantially, which is why the case is there in the first place. He noted that a correct reading, however, would have the potential to be ambiguous. He suggested a statement of legislative intent. He offered to work on language that could correct the situation without changing the substance of the section.

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Mr. Steiner informed the committee that the fourth agency concern about potential interpretation of the statute was on page 9, line 1, related to admissions of guilt in official proceedings. He argued that it was possible for an innocent individual to admit guilt. He referred to studies related to false confessions; the language would foreclose the possibility of relief under those circumstances.

Mr. Steiner concluded with the agency's final concern, found on page 9, line 15, regarding the level of the chain of custody. The language could be interpreted as requiring an absolutely secure chain of custody as a prerequisite. Typically, chain of custody goes to the weight of evidence; with a somewhat compromised chain of custody, a judge might be able to sort out whether it was so compromised that the evidence was made irrelevant. The language could be interpreted in a manner that could eliminate the possibility of relief.

Representative Gara asked for Mr. Steiner's recommendation for addressing contaminated or altered DNA evidence. Mr. Steiner suggested that one fix could be to delete the language; the concept could be could be subsumed in line 25, subsection (10) related to supporting an established defense. The requirement would not be established with evidence that was compromised to the point of irrelevance. He did not have language ready for the adjustment, but offered to think about how to separate the item from Section 10 and still achieve the same effect of ensuring the veracity of the evidence.

Representative Gara questioned leaving the substance of the subsection and cutting out the middle part. He suggested the language: "the evidence has been substituted, contaminated, or altered in any manner material to the proposed DNA testing." Mr. Steiner replied that he would have to think about it.

Mr. Steiner pointed to a minor technical correction needed on page 4, line 11, related to required notice before the destruction of evidence. He detailed that there could be a series of lawyers involved in a case, and that the trial attorney could be the least appropriate person to give notice to. The language could be interpreted as just requiring notice to the one attorney. He suggesting making the language plural to include any attorneys involved in the case. The defendant would be ensured of being provided

notice before destruction of the evidence, so that the most recent person involved in the case would have access.

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ROBERT BUNDY, ATTORNEY, ANCHORAGE (via teleconference), spoke to concerns regarding the legislation. He reported that he had been one of the attorneys of record for William Osborne in a case brought before the U.S. Supreme Court the previous year. He had experience with and interest in the topic that he thought could be helpful to the committee. He noted that he had practiced law for 38 years in Alaska and that he had been a prosecutor for about half that time.

Mr. Bundy pointed out that sometimes things go wrong for various reasons. He thought the bill intended to serve justice through preventing unusual occurrences, but that it had procedural problems that could make it much more difficult for someone who has been wrongfully convicted to demonstrate that fact. He stressed that the bill could make it almost impossible to rectify the situation.

Mr. Bundy opined that the three-year timeliness requirement contained in Section 12.73.020, subsection (8) was a problem. He believed that most of the time the issue would not be found out right away but years later. People who know right away take appropriate steps. In the Osborne case, the technology was not available at the time of the conviction; the short tandem repeat (STR) DNA testing used is now known as the "gold standard" of DNA testing.

Mr. Bundy's second concern related to the issue of the defense being inconsistent with that presented at the trial. He reported experience in Alaskan cases in which the defendant claimed not to remember what happened because of severe intoxication or other reasons. Someone still had to decide what defense to use. He referred to Mr. Steiner's statement about deciding self defense when the real issue was identity. He argued that in cases where the defendant does not remember, the lawyer might legitimately decide that self-defense was the right choice. Later on, biological evidence might emerge that could not be tested for DNA at the time but that could prove that someone else committed the crime. Under HB 316, the person whose lawyer claimed self-defense could never get relief. He did not think the legislation intended the outcome.

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Mr. Bundy opined that the procedural roadblocks being proposed were based on the idea that people would take advantage of the system. He referred to experience with the Osborne case. He did not believe the issue would be people trying to take advantage of the system. He argued that people should have a legitimate way to prove innocence using the gold standard of STR DNA testing. He urged the committee to look carefully at procedural roadblocks. He thought the courts could deal with the issues without the procedural and temporal roadblocks.

BARBARA BRINK, ANCHORAGE (via teleconference), spoke to concerns about HB 316. She informed the committee that she had previously been a public defender in Alaska and was currently an investigator for the federal public defender. She believed that it was essential to help people who are factually innocent but wrongly convicted.

Ms. Brink agreed with Mr. Bundy that the legislation had hurdles that could preclude an innocent person from obtaining DNA testing rather than helping them to prove innocence. She opined that some of the roadblocks in the bill would be more likely to keep an innocent person in jail. She noted that the state's record is not good: In the 50 years that Alaska has been a state, not one convicted person has been able to access post-conviction DNA for testing.

Ms. Brink stated that the first hurdle in the bill was requiring lawyers at trial to have pre-knowledge about what technologies might emerge in the future. The requirement of the theory of defense at trial is not inconsistent with what is currently being asserted or that the identity of the perpetrator was disputed at trial requires perfection. She referred to a recent Illinois study showing that in 21 percent of cases where a conviction was reversed (an actually innocent person was convicted and then let go), the cause was ineffective representation. She pointed out that 90 percent of criminal cases in Alaska are handled by appointed lawyers because the clients are poor. She commended the lawyers "in the trenches" who do the work, but argued that the resources of the system are stacked against those lawyers. An overworked attorney might fail to investigate some avenue, find a witness, or they might make an erroneous judgment under pressure at trial. Convictions

have been reversed in other states after lawyers were found sleeping or were disbarred after failing to investigate properly.

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Ms. Brink did not want to expect anyone in the system to be perfect, including eyewitnesses, police, prosecutors, judges, and juries who have to make decisions months and sometimes years after the occurrence. She suggested removing the timeliness hurdle, arguing that there is no connection between timeliness and innocence.

Ms. Brink suggested striking the section that prohibits individuals who admit guilt. She noted that in 25 percent of wrongful convictions, the defendants confess to things they did not do for a variety of reasons.

Ms. Brink also wanted to remove the burden of placing the costs of procuring the evidence and doing the initial testing from the person making the request. She did not think evidence gathered in an investigation belonged to one side or the other. She believed there was no basis to show that a person who can afford testing is more likely to be guilty.

Ms. Brink voiced concerns about the preservation of evidence requirements; page 3, line 16 does not require preservation when it is "impractical." She thought the term was too broad and vague and not appropriate for rural Alaska. Further, the language could allow for the destruction of evidence challenged and filed in federal district court. "Direct review" is defined in a limited way on page 9, lines 24 to 29 and could result in no obligation to save evidence.

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Ms. Brink summarized that the whole premise of the hurdles and roadblocks was the assumption that there are no innocent people in jail. She reported that 251 people in the U.S. had been exonerated by DNA testing, including people who were sentenced to death. The average sentence served by a person who was exonerated by DNA is 13 years; by the time the process works, the actual perpetrator has been free to commit other crimes. She reminded the committee that 70 percent of exonerated defendants are

members of minority groups. In 40 percent of the exonerated cases, the perpetrator was identified by DNA testing. There have been exonerations in 34 states and Washington D.C.; she looked forward to one in Alaska.

Representative Gara queried the number of people exonerated. Ms. Brink replied 251.

Representative Gara asked for proposed language to correct the three issues she had addressed (the word "impractical," the issue of attorneys of record, and judicial review). Ms. Brink answered that she would provide the committee with language. She noted that all of her concerns related to the preservation part of the bill.

Vice-Chair Thomas asked her to send the suggestions to Co-Chair Stoltze's office. Ms. Brink agreed to do so. (March 31, 2010 letter, copy on file.)

Representative Gara queried the size of her case-loads as public defender. Ms. Brink responded that when she was a public defender, Alaska exceeded the National Legal Aid and Defender Association case-load standards in every category, even though the standards were high (an attorney was not supposed to handle more than 150 felony cases per year).

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BILL OBERLY, EXECUTIVE DIRECTOR, ALASKA INNOCENCE PROJECT, ANCHORAGE (via teleconference), testified that there were three areas of great concern to his organization. He thought a number of the issues could be addressed by the task force that would be formed by the legislation. He underlined the importance of dealing with the issues sooner rather than later.

Mr. Oberly reported the first concern with the timeliness requirement, which he called "nonsensical." He stressed that an innocent person will bring a claim as soon as they have the information and can prepare. He underlined that DNA evidence is still reliable as time goes by, but that preparing the cases takes a lot of time.

Mr. Oberly continued that the second major concern of the Alaska Innocence Project was the section discussing the admission or confession of guilt as a basis of conviction in official proceedings. The issue was clarified somewhat

in the House Judiciary Committee, but he felt false confessions were still not addressed. His organization wanted the section deleted entirely; if not, there should be clarification that false confessions are not included in the restriction. He believed the practical effect would be to prevent people from bringing claims rather than balancing claims.

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Mr. Oberly turned to the organization's third major concern. He referred to a March 25, 2010 memo sent to the co-chair's office from the Alaska Innocence Project (copy on file). He directed attention to page 9, lines 25 to 30 of HB 316. He disagreed with Mr. Steiner's testimony that the language could be interpreted in a way that worked. He believed the language would put a judge in the untenable position of trying to guess the outcome. He referred to language that he had sent that was taken from other states with better language. The concept was that a judge making a determination would assume that the results would be favorable to the claimant (the standards set in the statute, such as a reasonable probability that they would not have been prosecuted or convicted). The language would be clearer and has been shown in other states to be a workable standard.

Mr. Oberly concluded that both nationally and locally there was not a threat of many cases if the right is given to some people to show innocence through the use of DNA testing. None of the states with the statute have experienced a "floodgate opening" of cases. He agreed with Mr. Bundy that the flood would have happened in Alaska when the federal court ruled that everyone has a constitutional right to have their DNA tested; that did not happen.

Representative Gara referenced the language on page 9, lines 25 through 30, and queried language used by other states. Mr. Oberly referred to language he had sent from the Kentucky statute. He had gone through every post-conviction DNA testing statute in the country; 18 states listed have language taking out lines 25 through 31 (page 9) and lines 1 and 2 (page 10) and replacing it with: "claimant must show a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA

testing." He believed the language had been working in the states listed.

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Representative Gara encouraged resolution of the language.

JEFFREY MITTMAN, EXECUTIVE DIRECTOR, AMERICAN CIVIL LIBERTIES UNION-ALASKA (via teleconference), testified that he agreed with comments by Mr. Oberly of the Alaska Innocence Project. He stated that for constitutional reasons, it is important that defendants have the right to appropriately defend themselves. The concerns of ACLU-Alaska are also that there are improper obstacles in the bill as currently drafted; they did not believe costs for retrieval of samples, improper presumptions of timeliness, and issues as to whether or not tactical decisions were made at trial should be obstacles to an individual being able to prove innocence.

Mr. Mittman spoke in support of including the Alaska Innocence Project on the task force that would be formed by the legislation.

ANNE CARPENETI, ASSISTANT ATTORNEY GENERAL, LEGAL SERVICES SECTION, CRIMINAL DIVISION, DEPARTMENT OF LAW, suggested looking at the big picture. She informed the committee that DNA testing is a new procedure used for the purpose of establishing identity. She stated that wanted to use HB 316 to balance allowing an innocent person bringing a claim for post-conviction DNA testing against a person who is not innocent bringing a cause of action because there is nothing left to do in their case. She assured the committee that guilty people would make claims for DNA testing.

Ms. Carpeneti noted that the department had worked with the Public Defender Office, the Office of Public Advocacy, and the Alaska Innocence Project, and had made many compromises.

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Ms. Carpeneti addressed the issue of timeliness. She reported that HB 316 did not have a statute of limitations, which is a date beyond which a claim cannot be made. She described timeliness as a presumption to encourage people to bring a claim as early as possible. She did not think an

innocent person should spend any time in jail if they can bring an application for post-conviction testing. She stressed that a person bringing an application would not get an automatic release from jail if the testing was awarded. The remedy may be a new trial; the victim would have to go through the trial again, and the whole criminal justice system would not work as well because of the passage of time. She defended the standard of expecting an early claim and pointed out that for any good reason, the bill would allow the claim to be brought after the three-year period. She acknowledged that the bar was low, but argued that there was good reason.

Representative Gara asserted that there would not automatically be a trial. There would only be a trial if the DNA evidence requested showed what was claimed. Ms. Carpeneti agreed. She emphasized the need to get the evidence and make application as soon as possible, so that whatever remedy was decided (including immediate release) could be applied. She underlined that the provision was just a presumption that could be overcome for any good reason.

Representative Gara argued that a standard requiring good cause for not bringing the request earlier could go against innocent people. He questioned why someone could be denied for waiting. Ms. Carpeneti replied that other people would be affected by the claim. She stressed that guilty people would bring claims; the idea was to bring a claim as soon as the person knows about it. The person in the scenario described would have good cause.

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Ms. Carpeneti addressed concerns regarding the concession of guilt. She noted that the House Judiciary Committee had specified that the entry of a plea of guilty or no contest at the trial level should not be considered an admission or concession of guilt. The bill would provide that a person admitting or conceding guilt in an official proceeding would be barred from bringing the application for DNA testing. She stressed that the provision did not apply to confessions to police or interrogators or to a plea, but to admissions made in official proceedings, defined by statute as proceedings in front of the legislature or a court. She suggested tightening the language by stipulating admissions or confessions made under oath at an official proceeding.

She believed that at a certain point, people have to be made responsible for things they say in official proceedings. She believed Mr. Osborne had conceded guilt to the parole board; she opined that allowing a person in that situation to proceed with application would make a mockery of the whole parole system.

Representative Kelly queried the cost to a guilty person making the request and abusing the system. Ms. Carpeneti replied that the bill would require an applicant to file an affidavit statement under oath that he or she is innocent of the convicted crime.

Representative Kelly asked whether the state would have to pay for the proceedings. Ms. Carpeneti responded that most people in the circumstance described would be represented by the Public Defender Agency; the vast majority will be public lawyers. The bill provides that a person who can afford to pay for gathering the evidence would pay for that, but the costs are generally negligible.

Representative Kelly expressed concerns.

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Representative Gara agreed that it should not be free for someone to abuse the system, but he did not want to prevent innocent people from getting evidence because of that. He suggested penalizing people who falsely file an application; the problem is that the person is probably already in jail for life. Ms. Carpeneti agreed; a perjury prosecution for someone in prison for life would not be discouraging.

Ms. Carpeneti referred to the test or standards found on page 9, lines 25 through 30. She reported that the standards were taken from federal law. In the Osborne case argument before the Supreme Court, the Innocence Project conceded that the federal law is the gold standard which states should aspire to in passing state legislation addressing post-conviction DNA testing. Other states such as Kentucky have different tests. She stated that the language on page 9, lines 25 through 30 means that a reasonable probability of new evidence that could establish innocence would be considered.

Ms. Carpeneti differentiated between speculation that courts do every day and Mr. Oberly's suggestion that other states have better laws. She maintained that determining whether a person would have been prosecuted or convicted was also a speculation. She stated that the department had chosen the test in HB 316 because it is a better test and follows the federal test.

Ms. Carpeneti responded to concerns about the impracticality of the evidence retention provisions in the bill. She stated that the provisions would represent new responsibility for workers in Alaska, including taking samples out of big pieces of evidence. She asserted that a small police department does not have space to adequately save a car, for example. Smaller communities would need to adopt written procedures in order to correctly preserve samples of evidence.

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Representative Fairclough asked whether there could be an alternative approach related to property being taken away from a person when doing so would create hardship. Ms. Carpeneti referred to legislation requiring police departments to notify parties about property they are holding at the request of the owners of the property. She thought it made sense to give police departments some ability to apply to the parties involved. She added that the provision requires personal notification, not just a letter, and allows the return of the evidence if it cannot be stored.

Ms. Carpeneti agreed with Mr. Steiner that the bill should say "attorneys" rather than "attorney" so that all the attorneys that represented a person would be notified.

Representative Fairclough relayed a story about a person who had property in the form of a vehicle taken away as evidence for a very long time. The person had to buy another vehicle that they could not afford. She wanted hardship to be considered.

Ms. Carpeneti addressed comments about tactical decisions, stating that the bill originally provided that a person could not obtain an order for post-conviction DNA testing if an attorney had made a tactical decision not to test; the House Judiciary Committee had removed the requirement.

Ms. Carpeneti agreed that lawyers are not perfect, but asserted that there were other means of post-conviction relief available for a claim of ineffective counsel. She pointed out that Alaska's laws allow attorneys at public expense to present an ineffective defense claim.

Representative Kelly asked whether the measure would be temporary.

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RICHARD SVOBODNY, DEPUTY ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF LAW, responded that he had hoped with the bill to get to a point where either the state or the defense would routinely ask for DNA testing before trial. He thought that removing the tactical decision issue would weaken the position because there would be no incentive; there is an incentive for not asking for the testing. He did not know the timeline; the faster and sooner DNA can be done, the sooner one side or the other would ask before trial. He could not speculate how long that would take.

Representative Kelly referred to previous discussion regarding a goal. He asked whether all questions had been considered and the department was holding the course. Ms. Carpeneti provided the example of timeliness. The original bill had two provisions regarding timeliness; it would have been presumed timely if brought within three years, except if the applicant was incompetent at a certain stage of the proceedings, or for good cause. She noted that Mr. Oberly had objected to the incompetence and the order because having the good cause following competence inferred too high a bar. The department took the provision out and said instead that any good cause could satisfy the presumption that the request is untimely after three years.

Representative Kelly asked whether the department had compromised where it wished to and was satisfied with the bill. Ms. Carpeneti responded that she and Mr. Svobodny had agreed [with Mr. Steiner] that page 9, lines 5 through 6 (regarding evidence sought being part of an investigation or prosecution) could be eliminated because the provision was covered in the chain of custody. They also agreed that all attorneys that represented a person should be notified (page 4, line 11). They also agreed that page 9, line 23

should read "if the applicant was convicted after a trial the identity of the perpetrator was disputed."

Ms. Carpeneti stated that aside from the issues listed, the department thought the bill was fair.

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Vice-Chair Thomas led a discussion clarifying the locations of the recommended changes in the legislation.

Representative Doogan asked what percentage of cases involved DNA that could be tested.

ORIN DYM, MANAGER, FORENSIC LABORATORY, ALASKA CRIME LABORATORY, DEPARTMENT OF PUBLIC SAFETY, responded that probably every case has biological evidence, although it may not be detected or the information obtained useful.

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Representative Doogan asked what percentage of cases would have evidence that was important to the case and would be affected by HB 316. Mr. Svobodny responded that given the the most liberal application of the legislation, every possible piece of evidence could apply; any DNA tested could result in establishing innocence.

Mr. Svobodny recalled that the Innocence Project has said that 250 people have been exonerated in the past 20 years throughout the country.

Representative Doogan wanted to know the costs of the legislation for the bill as it stood before the changes and the bill after the proposed changes. Mr. Svobodny answered that he could not give a number, but he could say that 46 states and the federal government have gone through the same process; every legislature has opted for a balance. For example: One state only allows post-conviction DNA testing in capital (death penalty homicide) cases and the federal government (or California) limits the testing to felonies where the person is incarcerated in another jurisdiction or still under the supervision of the courts by being on probation.

Mr. Svobodny continued that currently, since Alaska does not have statutes on the matter, the state is open [to

claims] on cases ranging from minor consuming to homicides. The bill would reduce the universe affected down to crimes against people. He reported that he had had a case of minor consuming where the jury wanted to know where the DNA was from the beer cans the kid had used. He emphasized that without legislation, the range of cases could be very broad.

Representative Doogan summarized that currently the state has a large universe of cases that the issue could apply to and that the department was trying to limit the universe by stipulating the kinds of cases post-conviction DNA testing would apply to, how long [after conviction] application could be made, and who would pay. He stated concerns. He thought the problem was that some of the procedural matters proposed in the bill would restrict people who might be innocence from proving the fact. He asked how to prevent restrictions from penalizing innocent people.

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Mr. Svobodny replied that currently the state does not have a procedural process that the legislature has reviewed for the courts. In one respect, to do nothing would be to keep the system wide open. He agreed that listing procedural requirements could restrict the ability of people to apply, but he thought the proposal in HB 316 represented a fair balance. He emphasized that legislators create perimeters in every piece of legislation.

Representative Doogan argued that there were few tests that provided scientifically accurate results like DNA testing. He did not think the state should put barriers in the way of such tests. He believed much of the testimony on the legislation was related to ways to write the law to prevent barriers. He expressed frustration.

Mr. Svobodny pointed out that prosecutors want to do their job and convict guilty people of crimes, not innocent people. He believed convicting innocent people of crime resulted in three tragedies: first, to the person convicted; second, to the victim; and third, to society, as the guilty person would still be at large. He agreed that the department was suggesting that procedures be put in place to make the system work in balance. He argued the system would not work if anyone who asked could get post-

conviction DNA testing for any crime, including drunk driving.

Mr. Svobodny stressed that context is everything in a DNA case; the fact that there was a murder in a room and a person's DNA was found in the same room does not mean the person was the murderer.

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Representative Gara believed the most important part of the bill was on page 9, line 10, regarding having to show that the DNA evidence is meaningful and could prove innocence; the problem was roughly 15 other roadblocks to go through before getting the right to do that. He wanted language that worked to show innocence without a person going through all the "hoops." He was offended by talk about the victim; he did not believe any victim wanted innocent people in jail.

Ms. Carpeneti responded that many of the hoops were procedural, such as filing papers. She thought it did make sense to require a person to file an affidavit stating their innocence. She argued that a person in the situation had had many opportunities while going through the process of the trial, and appeal, and beyond. She maintained that there are many protections in Alaska law to make sure a person is convicted of the right crime. She asked why society should spend resources if a person was not willing to swear that they were innocent. She detailed that paragraph 4 was removed, and paragraph 5 was changed by the House Judiciary Committee, so there were not a lot of standards. She defended the other standards as reasonable.

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Representative Gara stated that he would work on amendments because he felt some of the standards were unreasonable. For example (page 9), he protested the need for an appropriate chain of custody for evidence that was valid and had not been altered or contaminated. Ms. Carpeneti responded that a chain of custody evidence requirement is necessary because evidence unconnected to the crime could be brought in. She thought the word "ensure" could be changed to "show" to make it less difficult, but she stressed that there had to be some way to demonstrate that

evidence came from the crime and was preserved in a way that made it relevant.

Representative Gara disagreed. New DNA evidence could show up that could prove innocence, but could be made irrelevant by a bad chain of evidence; the evidence itself would still be good. Ms. Carpeneti responded that there would be chain of custody if there were testimony showing how the evidence was obtained.

Representative Gara asked whether there was a way to write the "reasonable probability" section (page 9, line 25) better. Ms. Carpeneti responded that she would think about it.

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

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ADJOURNMENT

The meeting was adjourned at 3:21 PM.