ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 10, 2010
1:08 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Nancy Dahlstrom, Vice Chair
Representative Carl Gatto
Representative Bob Herron
Representative Bob Lynn
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 319
"An Act relating to firearms."

- MOVED CSHB 319(JUD) OUT OF COMMITTEE

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."

- HEARD & HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 319
SHORT TITLE: FIREARMS
SPONSOR(S): REPRESENTATIVE(S) HAWKER

01/29/10	(H)	READ THE FIRST TIME - REFERRALS
01/29/10	(H)	JUD, FIN
02/10/10	(H)	JUD AT 1:00 PM CAPITOL 120

BILL: HB 316

SHORT TITLE: POST-CONVICTION DNA TESTING; EVIDENCE
SPONSOR(S): RULES BY REQUEST OF THE GOVERNOR

01/27/10	(H)	READ THE FIRST TIME - REFERRALS
01/27/10	(H)	JUD, FIN
02/05/10	(H)	JUD AT 1:00 PM CAPITOL 120
02/05/10	(H)	-- MEETING CANCELED --
02/08/10	(H)	JUD AT 1:00 PM CAPITOL 120
02/08/10	(H)	Heard & Held
02/08/10	(H)	MINUTE(JUD)
02/10/10	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

REPRESENTATIVE MIKE HAWKER
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Sponsor of HB 319.

DAVID SCHADE, Director
Division of Statewide Services
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 319.

RODNEY DIAL, Lieutenant, Deputy Commander
A Detachment
Division of Alaska State Troopers
Department of Public Safety (DPS)
Ketchikan, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 319.

AUDIE HOLLOWAY, Colonel, Director
Central Office
Division of Alaska State Troopers
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: Responded to a question during discussion of HB 319.

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska

POSITION STATEMENT: Presented HB 316 on behalf of the administration.

REBECCA BROWN, Policy Advocate
Innocence Project
New York, New York
POSITION STATEMENT: Expressed concerns with the current version of HB 316.

MICHAEL J. WALLERI, General Counsel
Tanana Chiefs Conference (TCC)
Fairbanks, Alaska
POSITION STATEMENT: Testified in opposition to the current version of HB 316.

WILLIAM B. OBERLY, Executive Director
Alaska Innocence Project
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with the current version of HB 316.

JEFFREY A. MITTMAN, Executive Director
American Civil Liberties Union of Alaska (ACLU of Alaska)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 316, concurred with the remarks of testifiers who'd expressed concerns with the current version of the bill.

ACTION NARRATIVE

1:08:37 PM

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:08 p.m. Representatives Ramras, Gruenberg, Herron, and Gatto were present at the call to order. Representatives Lynn, Holmes, and Dahlstrom arrived as the meeting was in progress.

HB 319 - FIREARMS

1:08:54 PM

CHAIR RAMRAS announced that the first order of business would be HOUSE BILL NO. 319, "An Act relating to firearms."

1:09:51 PM

REPRESENTATIVE MIKE HAWKER, Alaska State Legislature, sponsor, characterized HB 319 as another opportunity to reaffirm the Second Amendment rights of Alaska's citizens, adding that it cleans up some sections of statute pertaining to concealed handgun permits. Specifically, [Section 1] clarifies that when a concealed handgun permit expires or a permit holder leaves the state, the holder doesn't need to surrender the permit; [Section 2] provides that an expired concealed handgun permit may be displayed as long as the permit holder doesn't represent it as being valid; [Section 1] requires that the Department of Public Safety (DPS) send permit holders a letter, at least 90 days before their permit expires, notifying them that their permit is about to expire; and [Section 3] requires the chief law enforcement officer in a jurisdiction to execute, within 30 days, the federal firearms forms required for the transfer of certain types of firearms. A copy of those forms is included in members' packets, and the forms, in part, require the chief law enforcement officer to certify that he/she has no information that the transferee of the firearm will use the firearm for other than lawful purposes, and no information that the receipt or possession of the firearm by the transferee would place him/her in violation of state or local law. He offered his belief, however, that some law enforcement officers who don't approve of firearms transfers simply refuse to fill out their portion of these forms. In conclusion, he characterized HB 319's proposed changes as important to Alaska's law-abiding citizens, and asked for the committee's favorable consideration of the bill.

1:18:25 PM

REPRESENTATIVE HOLMES asked whether Section 3 would allow a chief law enforcement officer to refuse to sign the federal firearms forms if he/she does have reason to believe that the transferee would use the firearm unlawfully.

REPRESENTATIVE HAWKER relayed that that would be the case.

REPRESENTATIVE HOLMES questioned whether the title warranted narrowing.

REPRESENTATIVE HAWKER indicated that it did not.

REPRESENTATIVE GRUENBERG noted that there is a typographical error in the law enforcement certification section of the aforementioned federal firearms forms.

REPRESENTATIVE HAWKER acknowledged that point.

REPRESENTATIVE GRUENBERG asked how proposed AS 18.65.725(e), which requires the DPS to provide notice that a person's permit is going to expire, would be effectuated, what the cost would be, and whether permit holders would have a duty to keep the DPS informed of any address changes.

REPRESENTATIVE HAWKER said that permit holders already have a statutory duty to inform the DPS of address changes, and surmised that all which could be asked of the DPS is to send the notification to the permit holder's last known address; and that the fiscal note provided by the DPS outlines approximately $900 in yearly ongoing costs and approximately [$37,000] in one-time computer programming costs.

REPRESENTATIVE HAWKER, in response to a question, explained that the federal Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) requires the aforementioned federal firearms forms to include the law enforcement certification section, but a chief law enforcement officer is under no obligation to fill it out, and Section 3 of HB 319 is intended to ensure that he/she does do so. In response to another question, he said that when a chief law enforcement officer refuses to certify that he/she has no information that the transferee of the firearm will use the firearm for other than lawful purposes, and no information that the receipt or possession of the firearm by the transferee would place him/her in violation of state or local law, then the transferee has no legal recourse and cannot take possession of the firearm in question. He characterized such refusals as interfering with people's Second Amendment rights. He mentioned that currently, the Anchorage Police Department (APD) conducts extensive background checks on transferees before the chief law enforcement officer fills out the certification section.

REPRESENTATIVE GRUENBERG expressed favor with addressing this issue, characterizing it as a serious problem.

REPRESENTATIVE GATTO questioned whether such refusals would be in violation of [the Second Amendment].

REPRESENTATIVE HAWKER declined to venture a response.

REPRESENTATIVE GRUENBERG offered his understanding that such refusals would be in violation of the Civil Rights Act and therefore actionable. In response to a question, he indicated

that he supports Section 3. He then, again, questioned how proposed AS 18.65.725(e) would be effectuated.

1:37:32 PM

DAVID SCHADE, Director, Division of Statewide Services, Department of Public Safety (DPS), explained that as outlined in the DPS's fiscal note, the DPS intends to automate the notification process such that the database would systematically identify permits expiring within 90 days, and then generate, print, and save notices of expiration; those notices would then be mailed to permittees. In response to further questions, he said that the DPS would send the notices to the addresses on file, that permittees are required to notify the DPS of address changes, and that the DPS would send the notices but would have no way of knowing whether the permittees actually received them.

REPRESENTATIVE GATTO - noting that the language of proposed 18.65.725(e) says in part, "The department shall provide a permittee with notice" - surmised that Mr. Schade's comment indicates that the department, under certain circumstances, would be unable to comply with the proposed statute.

MR. SCHADE acknowledged that that could potentially be the case.

REPRESENTATIVE GATTO indicated that perhaps that language should be changed such that the department would only be required to send the notice of expiration.

REPRESENTATIVE GRUENBERG asked whether Section 3 would create compliance problems for the DPS.

1:41:16 PM

RODNEY DIAL, Lieutenant, Deputy Commander, A Detachment, Division of Alaska State Troopers, Department of Public Safety (DPS), indicated that it would not.

1:42:47 PM

AUDIE HOLLOWAY, Colonel, Director, Central Office, Division of Alaska State Troopers, Department of Public Safety (DPS), concurred, adding that it would be an exception if the DPS were unable to meet the proposed 30-day deadline.

REPRESENTATIVE GRUENBERG asked whether any police chiefs have expressed concern [about Section 3].

REPRESENTATIVE HAWKER said he has not heard any such concerns expressed. He mentioned that the turnaround time for the APD has generally been between 4-10 days, and that he does not believe that the bill would put any undue burden on law enforcement.

CHAIR RAMRAS, after ascertaining that no one else wished to testify, closed public testimony on HB 319.

REPRESENTATIVE GRUENBERG asked Representative Hawker whether he would be interested in narrowing the title.

REPRESENTATIVE HAWKER indicated that he would not.

1:46:39 PM

REPRESENTATIVE GATTO made a motion to adopt Conceptual Amendment 1, to delete the term, "provide a permittee with" from page 1, line 4, and insert the term, "mail a".

REPRESENTATIVE GRUENBERG objected, and suggested that instead the language being inserted should read, "mail the permittee a".

REPRESENTATIVE GATTO indicated that he would be amenable to such a change to Conceptual Amendment 1. [Although no motion was stated, Conceptual Amendment 1 was treated as having been so amended.]

REPRESENTATIVE GRUENBERG removed his objection.

CHAIR RAMRAS announced that Conceptual Amendment 1, as amended, was adopted.

1:47:31 PM

CHAIR RAMRAS made a motion to adopt Amendment 2, labeled 26-LS1273\E.1, Luckhaupt, 2/4/10, which read:

Page 2, line 8:
Delete "a new section"
Insert "new sections"

Page 2, following line 16:
Insert a new section to read:
"**Sec. 18.65.820. Checks on firearms while firearm secured by peace officer during certain contacts.** A

peace officer may not conduct a check of the serial number of a firearm being legally carried by a person when the firearm has been secured by the peace officer under the authority of AS 11.61.220(a)(1)(A)(ii)."

REPRESENTATIVE GRUENBERG objected.

CHAIR RAMRAS indicated that Amendment 2 addresses concerns expressed to him regarding a situation in which a person is stopped by a law enforcement officer who then takes the person's firearm away to check the serial numbers on it. He asked the DPS to explain why Amendment 2 is not necessary.

LIEUTENANT DIAL attempted to reassure the committee that as a routine practice, DPS personnel are not seizing or retaining the firearms of Alaskans who are otherwise committing only minor offenses or who are engaged in lawful outdoor activities. He offered his understanding that the statute pertaining to the crime of misconduct involving weapons in the fifth degree gives law enforcement officers the authority to seize a firearm during contact or to ask the person to secure the firearm. At the time of contact, it's a judgment call that the law enforcement officer has to make regarding which approach to take. He recounted that on rare occasion, he himself choose to seize the firearm because he felt that the actions of the individual indicated that it would be better for that firearm to be in the possession of law enforcement. For example, if he were to stop someone who'd reportedly appeared to be casing a neighborhood, he would want to take the person's firearm and check its serial number because, in many cases, it could link the person to a burglary, and sometimes multiple burglaries are solved in this fashion. He noted also that it is not uncommon for law enforcement to take possession of firearms that turn out to have been stolen in the Lower 48.

LIEUTENANT DIAL characterized checking the serial numbers of firearms as somewhat low on the intrusiveness scale, since, if a serial number doesn't match anything on the database, the number is not then linked to either a firearm or a person in the database. He indicated a willingness to research the policy issue raised by Amendment 2 further, to perhaps provide that law enforcement officers use discretion in situations where there is no other outside indicator suggesting that the person is involved in illegal activity, but he would like to retain the authority to seize a firearm and check its serial number because that allows law enforcement officers to solve a number of crimes every year.

LIEUTENANT DIAL, in response to comments and a question, said that as a routine policy, DPS personnel are not taking the firearms of those they stop; instead, law enforcement officers have become somewhat immune to the fact that most people have firearms. He added that he has never met a trooper that doesn't support the Second Amendment 100 percent. He acknowledged, though, that because academy graduates are currently coming into the field with a higher level of officer safety in mind, perhaps training issues with regard to making judgment calls at routine stops could be addressed.

CHAIR RAMRAS asked that the DPS's policy on this issue be clarified in writing and provided to the committee.

LIEUTENANT DIAL agreed to do so.

CHAIR RAMRAS then withdrew Amendment 2.

1:55:52 PM

REPRESENTATIVE DAHLSTROM moved to report HB 319, as amended, out of committee with individual recommendations and the accompanying fiscal notes. There being no objection, CSHB 319(JUD) was reported from the House Judiciary Standing Committee.

The committee took an at-ease from 1:56 p.m. to 2:01 p.m.

HB 316 - POST-CONVICTION DNA TESTING; EVIDENCE

2:01:11 PM

CHAIR RAMRAS announced that the final order of business would be 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."

2:03:58 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), proffered that HB 316 attempts to find a balance, and that it addresses two important issues of law: one, evidence retention, and, two,

post-conviction deoxyribonucleic acid (DNA) testing. Both of these issues have countervailing considerations. The evidence retention provisions of the bill would adopt new requirements for law enforcement in Alaska, and the DOL is proceeding cautiously in this regard because law enforcement agencies across the state, in both large and small communities, would be asked to retain evidence for significant periods of time. The bill, therefore, addresses only the most serious of crimes and the crimes most likely to have evidence that could be needed at a later date for purposes of cold case prosecution or post-conviction DNA testing. Currently, the bill's evidence retention provisions would apply to homicides, sexual assault in the first degree crimes, and sexual abuse of a minor in the first degree crimes.

MS. CARPENETI relayed that the bill divides evidence into two groups: physical evidence, such as cars, watches, money, and other similar items; and biological material, which is defined in proposed AS 12.36.200(k)(2) as:

> (A) the contents of a sexual assault forensic examination kit;
> (B) semen, blood, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or other identifiable human bodily material, collected as part of a criminal investigation;
> (C) a slide, swab, or test tube containing material described in (B) of this paragraph; and
> (D) swabs or cuttings from items that contain material described in (B) of this paragraph;

MS. CARPENETI, with regard to proposed subparagraph (D), explained that this provision addresses, for example, a cutting from the seat of a car where a rape occurred; in such an instance, it would be the cutting that would be retained and not the car itself. The periods of retention and the treatment of evidence would be different for the two types of evidence. Physical evidence pertaining to crimes against the person would be kept until such time as the appeal process has run its course. Biological material would be kept until the defendant has been unconditionally released - after probation and/or parole has been served.

2:07:36 PM

MS. CARPENETI said that HB 316 generally tracks federal law, and is somewhat more limited than other, similar legislation

currently moving through the process. One aspect of the bill is that it specifically provides that each law enforcement agency shall adopt written policy pertaining to evidence collection and retention, though the various law enforcement agencies will have different procedures depending on their size and capabilities.

REPRESENTATIVE GRUENBERG said he strongly supports the retention of evidence, but is concerned about the fiscal implications for law enforcement agencies.

MS. CARPENETI relayed that over the years, the DOL has had discussions [with municipal law enforcement agencies] regarding other iterations of this bill, and when a similar measure was heard in the Senate last year, such agencies expressed no opposition. In response to a question, she offered her belief that Village Public Safety Officers (VPSOs) are certainly capable of preserving evidence in a safe way so that it isn't tampered with, and she sees no reason why VPSOs couldn't take good care of evidence. She noted that the task force the bill proposes to create would address the specifics of preserving evidence in a safe manner so that it could be of use in 20 years, for example.

MS. CARPENETI explained that HB 316 also provides procedures allowing for a law enforcement agency to return evidence. For example, if a car hits another car that in turn hits a third car and a death results, the car in the middle of the accident needn't be kept for purposes of prosecution, and people want to get their property back whenever possible. Currently, however, such would be difficult because prosecutors would be concerned about authorizing the return of property, but under the proposed procedures, if everyone is notified and nobody objects, the property can be returned. Furthermore, the bill adopts a procedure for notifying those convicted as a result of the evidence, their attorneys, and the prosecuting authority, and provides a judicial procedure for those objecting to the return of property.

MS. CARPENETI said that the bill also provides that if a law enforcement agency does not follow the procedure adopted, the court may order the remedy it determines to be appropriate; however, the bill does provide that the court can't reverse a conviction based solely on a violation of evidence retention standards.

2:14:32 PM

MS. CARPENETI said that although Alaska's existing post-conviction relief procedures were upheld by the U.S. Supreme Court, it's probably a good idea to set out statutes dealing with post-conviction DNA testing. House Bill 316 sets standards, and balances the right of a person, in the unlikely event that he/she has been wrongfully convicted, to bring an application for post-conviction DNA testing, against the rights of victims and others to depend on perfectly good convictions that were fairly found. The bill requires an applicant to file an affidavit stating that he/she is not guilty, did not commit the offense he/she was convicted of or any lesser-included offense, was not an accomplice, and no had other relationship to the crime.

MS. CARPENETI went on to explain that the bill provides that someone who has been convicted, that has had an opportunity for an appeal, and that has had an opportunity for post-conviction applications on other bases, should not get another opportunity to fine tune the legal basis for his/her conviction. The bill, instead, is intended to allow a person who is actually innocent of the charges to have another opportunity to raise that point in front of the court. She surmised that some people would prefer that the bill open up convictions in order to fine tune what charge the person was convicted of or in order to fine tune a sentence in particular, but HB 316 doesn't do that. Again, instead, the bill sets up a procedure for people who did not commit the crime to then bring an application and have the issue heard in front of the court.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

MS. CARPENETI said that an applicant, under those circumstances, must file an affidavit saying, under penalty of perjury, that he/she did not commit the crime, thereby exposing himself/herself to further prosecution if it is found that post-conviction DNA testing confirms that that person committed that crime and is guilty of the offense. So there is a risk, she added.

2:17:09 PM

REPRESENTATIVE HERRON asked about those who plead guilty but are actually innocent.

MS. CARPENETI noted that the language of proposed AS 12.73.020(9) says that one of the things that the court must find [before it orders post-conviction DNA testing] is that if

the applicant was convicted after a trial, that the identity of the perpetrator was a disputed issue at trial. She offered her belief that this language recognizes that innocent people do plead guilty for reasons other than that they are guilty. A person could not, however, testify in court that he/she killed someone in self-defense and then later bring an application for post-conviction relief claiming to actually be innocent of the crime altogether.

REPRESENTATIVE HERRON expressed an interest in amending the bill [to address this issue further].

REPRESENTATIVE LYNN offered his understanding that the term, "lesser-included offense" means that if someone were convicted of homicide, then the lesser-included offenses would be manslaughter and other, lesser degrees of killing, not, for example, the crimes of burglary or speeding or any other thing that he/she could also be charged with under the particular facts of the case.

MS. CARPENETI concurred, and again noted that the post-conviction relief application provisions of the bill only apply to felony crimes against a person: homicides, sexual assault in the first degree crimes, and sexual abuse of a minor in the first degree crimes.

2:21:36 PM

REPRESENTATIVE GRUENBERG, referring to proposed AS 12.73.020(9), said he could envision a situation in which a defendant might not have disputed the issue of identity due to ineffective counsel, and expressed an interest in amending the bill to address that point.

MS. CARPENETI, mentioning that post-conviction relief is a very complicated area of law, pointed out that ineffectiveness of counsel is another basis for bringing an application for post-conviction relief. In response to a question, she offered her belief that if ineffectiveness of counsel were the basis for an application, then DNA testing could be ordered if the court found it appropriate.

MS. CARPENETI noted that the provisions pertaining to post-conviction DNA testing are based largely on federal law, and [under proposed AS 12.73.020,] also require, among other things, that the evidence to be tested was subject to a chain of custody such that it was preserved in a way that it could be tested and

the results relied upon; and that the defendant requesting the testing identify a theory of defense that is not inconsistent with the theory of defense posed at trial. This latter requirement is intended to ensure that a defendant doesn't claim during the trial that the person he/she killed was killed in self defense, for example, but then, for testing purposes, claim that he/she wasn't at the scene at all and is therefore totally innocent. The DOL is trying to, in a fair way, draw lines with regard to who could qualify for post-conviction DNA testing under the bill.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

REPRESENTATIVE GRUENBERG said he could see a situation in which a defendant didn't raise a particular theory at trial because there wasn't yet any scientific evidence to support it.

2:26:12 PM

MS. CARPENETI went on to explain that in applying for post-conviction DNA testing under the bill, the defendant must submit an affidavit - a sworn statement - that he/she did not commit the offense for which he/she was convicted, or any lesser included offense, did not solicit another person to commit the offense, did not aid or abet in the planning or commission of the offense, and did not admit or concede guilt for the offense in any official proceeding. On that latter requirement, she said that the DOL believes that people should be responsible for the statements they make during such proceedings, and that people should be required to declare that they are innocent in order to obtain post-conviction DNA testing. The application must also contain a description of the prior testing conducted on a particular piece of evidence.

REPRESENTATIVE LYNN questioned why a person in jail for life for killing someone would be concerned about being found guilty of perjury.

MS. CARPENETI acknowledged that for some people, the risk of being found guilty of perjury would not necessarily have any measurable deterrent effect. She mentioned that lawyers, however, as officers of the court, are responsible [for ensuring that their clients don't commit perjury]. In response to a question, she recounted that in [the U.S. Supreme Court case, [District Attorney's Office for the Third Judicial District v. Osborne], Mr. Osborne refused to say that he was innocent and instead only stated that he would be either guilty or innocent

based upon the results of DNA testing. She again opined that this proposed procedure should be limited to only those who are willing to say they are innocent, particularly given that at the point in time that they would apply for post-conviction DNA testing, they would have already had a trial, gone through the appeal process, had an opportunity to petition a higher court, and had other post-conviction relief remedies available to them.

REPRESENTATIVE GRUENBERG noted that a person could enter what he called a "guilty but not mentally responsible" plea. He asked whether entering such a plea would preclude the defendant from applying for post-conviction DNA testing under the bill.

MS. CARPENETI indicated that such a plea would preclude the defendant from applying, but asked to be allowed to research the issue further to confirm that point.

2:30:53 PM

MS. CARPENETI then reiterated that under the bill, in order for a judge to order post-conviction DNA testing, the crime the person is convicted of has to be a felony crime against a person under AS 11.41; the aforementioned required affidavit must be submitted; and the person must not have admitted or conceded guilt in an official proceeding. Furthermore, the evidence must have been obtained as part of the investigation of the crime, and the evidence must either not have been tested and the right to testing not waived, or was tested but the applicant wants more sophisticated DNA testing to be conducted. Again, the evidence must have been subject to a chain of custody such that it has been preserved in a way that any testing results would be accurate; the defendant requesting the testing must identify a theory of defense not inconsistent with the theory of defense posed at trial, [and claim that] the testing would establish his/her innocence; and if the applicant was convicted after a trial, the identity of the perpetrator has to have been a disputed issue at trial. Under the bill, there is also a requirement that there be a reasonable probability that the requested testing will produce new evidence that would support the new defense theory and could establish the defendant's innocence.

MS. CARPENETI mentioned that HB 316 also contains a provision addressing timeliness; under that provision, there is a presumption that an application brought before three years after the date of conviction is timely, and a presumption that an application brought three or more years after conviction is not

timely but is not necessarily precluded as long as any good cause can be shown for the delay in applying. The bill sets out fairly complicated testing procedures for when post-conviction DNA testing is ordered; does not prohibit the prosecutor and the defendant from agreeing to conduct post-conviction DNA testing without the defendant filing an application; and makes corrective changes to [AS 44.41.035], which pertains to the Department of Public Safety's (DPS's) DNA database.

REPRESENTATIVE HOLMES noted that although proposed AS 12.73.040(1) says that a timely application for post-conviction DNA testing is one that is filed before three years after the date of conviction, proposed AS 12.36.200(a)(1)(A) says that agencies shall preserve evidence for 18 months after the entry of a judgment of conviction.

MS. CARPENETI indicated that agencies shall preserve evidence for at least the later of the various periods of times listed in the bill, and that those periods of time listed are minimums, not maximums. She reiterated that under the bill, biological evidence shall be retained until the defendant has been unconditionally released from probation and/or parole. Again, the timeliness provision was taken from federal law, and establishes a presumption, rather than a statute of limitations, and provides that the presumption may be rebutted for any good cause if the filing occurred three or more years after conviction. She characterized the [timeliness] provision as pretty liberal.

2:35:45 PM

REBECCA BROWN, Policy Advocate, Innocence Project, relayed that nationally, 250 individuals have been exonerated by DNA testing, with the latest exoneration taking place just last week. Nearly all of the exonerations were made possible by the presence of a state-level post-conviction DNA testing law. Many, if not most of the exonerated had to languish in prison, waiting until their state passed a post-conviction DNA testing law, thus enabling them to prove they were innocent. Many innocent men and women across the country are still incarcerated, subject to the daily torture of prison life. This seems incomprehensible, she remarked, given that 47 states have passed DNA testing laws, but [her organization] has come to learn that many of the innocent are barred from seeking testing because the laws in their states are structured in a way that denies the very testing that was initially sought via the passage of those laws. The current situation demonstrates the fallibility of human judgment; over

and over, people, some who even seemed guilty when the Innocence Project reviewed their petitions [for assistance], turned out to be innocent, and vice versa, and this is due to the fact that in any system created by humans, errors are made.

MS. BROWN stated that the Innocence Project's agenda is a pro-law enforcement agenda that seeks reforms which protect the innocent and identify the guilty. In more than 40 percent of the Innocence Project's cases, forensic testing that excluded its clients led to the eventual detection of the true perpetrators of the heinous crimes the innocent people were convicted for. A robust DNA testing law that ensures access to all deserving applicants, therefore, will help Alaska not only exculpate and free the innocent but also identify criminals. She then indicated that the Innocence Project is troubled by some of the provisions of HB 316. For example, the bill would require individuals seeking testing under the existing but insufficient post-conviction relief process to forego that process in favor of a DNA testing framework that denies nearly every, if not all, deserving applicants.

MS. BROWN relayed that the Innocence Project thinks that the most restrictive provision of the bill is that which pertains to timeliness; it would effectively establish a three-year statute of limitations from the time of conviction on filing a post-conviction claim of innocence, and yet nearly every single individual who was able to prove innocence through DNA testing had already exhausted every available state remedy as well as federal habeas corpus relief before he/she sought testing, as had nearly all of the Innocence Project's clients. Under the bill as currently written, none of these individuals would have been eligible for post-conviction DNA testing, and neither would nearly every exonerated person in the country. There are many reasons why a person would not file a DNA test application within three years of conviction, including, for example, poor legal advice, illiteracy, a belief that the evidence was not collected or that it was not preserved, a mistrust of the criminal justice system, or a lack of knowledge about the ability to perform testing. Again, as currently written, the timeliness requirement would have barred almost all of the individuals around the country who've proven their innocence, and there is not one law in the nation that includes such a restrictive timeliness provision. Indeed, 35 of the 47 existing statutes have no time limitation whatsoever.

2:40:01 PM

MICHAEL J. WALLERI, General Counsel, Tanana Chiefs Conference (TCC), said that currently, the TCC is opposed to [HB 316] in its existing form based on a number of issues. One issue is that under the TCC's interpretation of the Osborne case, there is no constitutional right to prove innocence and it's up to the states to develop their own standards. The science pertaining to DNA is very accurate, and DNA testing can establish identity beyond a reasonable doubt. Mr. Walleri went on to say:

> We see the tension here a little differently between two interests: one is ... the interest that the innocent should not be punished, as opposed to the administrative expense and inconvenience of retaining evidence - biological evidence - and having to deal with redundant or frivolous testing requests. ... I think the committee is quite well aware that ... the Native people of Alaska are highly disproportionately represented in the incarcerated population. ... The balance for the Native community really tips heavily in favor of protecting the ... [innocent] because of the concern over ... the proportionality and what many [people] believe to be a ... disparate treatment of Native American people in the Alaska criminal justice system - which has been documented over and over.
>
> [In] ... that regard, it's our position that a person should have a right to prove [his/her] innocence, somewhat at odds with the recent decision of the [U.S.] Supreme Court, ... and consistent with that view is that the procedural barriers in state statute should not limit the right of people to prove their innocence. We believe that this bill, in several instances, actually does that; it creates procedural barriers that would prevent truly innocent people from coming forward to ... [show] that.

MR. WALLERI relayed that another of the TCC's concern pertains to the destruction of evidence, with particularly serious concern over the language of proposed AS 12.36.200(e). The TCC's view is that this provision is backwards, that if an agency is going to destroy biological evidence, that instead there should really be a court procedure involved so that the court can ensure protections for the innocent. Another of the TCC's major concerns pertains to the provision related to the findings [outlined in proposed AS 12.73.020] required for post-conviction DNA testing orders. A number of those findings, he opined, are really barriers to obtaining post-conviction relief,

and the TCC disagrees with the DOL's characterization of [these findings].

MR. WALLERI mentioned that within the Native community, the TCC is constantly hearing concerns regarding ineffectiveness of counsel, and although most times people's lawyers do a good job, there are cases wherein things just slip through the cracks. There is also the whole issue of whether a person's attorney decides to take a "Cooksey appeal" [Cooksey v. State, 524 P.2d 1251, 1255-57 (Alaska 1974)]; under the bill, anyone who does so would be precluded from seeking post-conviction relief based upon innocence. In addition, there are issues regarding the standard that [there be a reasonable probability that post-conviction DNA testing] will show conclusively that the applicant is innocent, compared to just establishing that reasonable doubt exists.

MR. WALLERI indicated that the TCC has concerns regarding [proposed AS 12.73.020 as it pertains to] the issue of effectiveness of counsel, and about [proposed AS 12.73.020(6)] in that it requires that the evidence must have been subject to a chain of custody such that it could be relied upon. On the latter point, he opined that if an error in the chain of custody occurred - even though the evidence would have been fully within the government's control - the burden of that error would be placed on the applicant and could be used as the basis for denying post-conviction relief. He said that the TCC would agree with the earlier comments regarding timeliness, in that if an incarcerated person is innocent and can prove it, [an application filed three years or more from conviction] should not be deemed untimely as a matter of legal presumption.

MR. WALLERI urged the committee to give the provisions establishing a task force to address the specifics of preserving evidence more consideration because currently the proposed membership doesn't include a member of the defense bar. "This is a highly biased task force designed to advance the ... interest of prosecution, and that is greatly disturbing to us, and we'd like to see a little bit more balanced ... representation within that task force," he added in conclusion.

CHAIR RAMRAS ventured that the bill is just a beginning and warrants amending so that it doesn't overwhelm existing State resources.

REPRESENTATIVE GRUENBERG asked Mr. Walleri and Ms. Brown to provide their testimony and any suggested changes to the committee in writing.

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WILLIAM B. OBERLY, Executive Director, Alaska Innocence Project, said that legislation pertaining to evidence preservation and post-conviction DNA testing is very important to the Alaska Innocence Project. Evidence preservation and post-conviction DNA testing allow his organization to carry out its mission. However, a bill that restricts post-conviction DNA testing or gives only illusory access condemns the innocent to no relief and makes justice in Alaska illusory. Although there is a need for post-conviction DNA testing in Alaska, as currently written, HB 316 does not provide reasonable access to post-conviction DNA testing. If passed, it would instead be the most restrictive DNA testing law in the country, and more restrictive than Alaska's current process. In other words, as currently written, an individual attempting to prove his/her innocence would be better of without HB 316 becoming law.

MR. OBERLY offered his belief that proposed AS 12.73.040 institutes a three-year time limitation, and said he disagrees with the DOL's assertion that an application could be accepted for any good cause, because the language of proposed AS 12.73.040(2)(B) instead uses the term, "other good cause". That is a significant linguistic difference, he opined, because if the court were to interpret proposed AS 12.73.040(2), it would first look to proposed AS 12.73.040(2)(A) - which indicates that an [untimely] application could be accepted if the applicant was incompetent and that incompetence substantially contributed to the delay. Applicant incompetence and its resulting substantial contribution to a delay is a serious situation, and, therefore, any other good cause would have to be just as serious, he predicted. If the State means for any good cause to be sufficient for rebuttal of the presumption of untimeliness, then that language needs amending, because otherwise it would bar a number of people from bringing an [application].

MR. OBERLY ventured it is likely that there are currently innocent men and women in prison in Alaska, with their cases "undiscovered and undeveloped." "This" is a long process, he remarked; for example, the first case the Alaska Innocence Project filed for testing - which is currently still working its way through the courts - was filed nine years after the [defendant's] last court hearing. He said he just doesn't

understand a deadline on innocence being put into the bill, particularly given that 35 of the 47 states that have passed similar legislation don't have a time limitation. If an innocence claim meets the standard and evidence can be located to be tested, what does Alaska gain by putting arbitrary time limits on such actions?

MR. OBERLY referred to proposed AS 12.73.020(5), and said he finds the restriction on post-conviction DNA testing for evidence that wasn't tested at the trial level to be particularly troubling, because it makes a person pay the price for a bad decision on the part of his/her lawyer or due to a lack of funds for testing, and because it also allows the prosecution, the holder of the evidence, to choose not to test the evidence at the time of the trial and then later deny a request for post-conviction DNA testing. If a criminal trial is truly a search for the truth and evidence that might contain DNA exists, then failure to test is as much the fault of the prosecution as of the defense, perhaps more so since, again, the prosecution holds the evidence.

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MR. OBERLY also indicated concern regarding the provisions of the bill that preclude post-conviction DNA testing for anyone who has admitted or conceded guilt in an official proceeding, and suggested that those provisions should be clarified, particularly given that those who [falsely] admit guilt in official proceedings are overrepresented by the vulnerable: the young, the disabled - the very individuals the government should protect. Of particular concern to the Alaska Innocence Project is the real and significant impact the aforementioned restrictions are going to have on Native Alaskans' just claims of innocence. There are likely to be a number of Native Alaskans who are innocent of the charges for which they were convicted who have not yet been identified, and given the relationship of Native Alaskans to the criminal justice system, a high percentage of such cases will involve pleas or admissions of guilt, and due to financial restrictions and remote representation in the Bush, such criminal defendants are likely to not have had DNA testing. He said he doesn't believe that the provisions of HB 316 are race neutral, and, as a result, will therefore have a much greater negative impact on Native Alaskans.

MR. OBERLY observed that HB 316 also contains indirect restrictions such as the one requiring the applicant to pay for

the retrieval of evidence, found in proposed AS 12.36.200(d) and proposed AS 12.73.050(c), and likened this requirement to that of requiring a rape victim to pay for her own rape exam. He surmised that this requirement would bar many potential applicants. There is also a requirement [via proposed AS 12.73.020(10)] that a court guess at the outcome of post-conviction DNA testing before it orders that testing; no other [post-conviction DNA testing] law in the nation has such a requirement, which he characterized as perplexing.

MR. OBERLY referred to the provisions establishing the aforementioned task force, and opined that they should also include guidelines regarding the retention of evidence, and stipulate that the membership shall include a member of the defense bar and a member of what he called the "innocence community." He offered his belief that the DOL's approach via HB 316 is to restrict the number of cases wherein a defendant can seek post-conviction DNA testing. This is in contrast with the Alaska Innocence Project's approach of seeking those Alaskans who've been wrongfully convicted and then, hopefully, identifying the real perpetrators of the crimes. This, however, requires a statute without significant restrictions such as those included in HB 316, he opined. In conclusion, he offered his belief that HB 316 can still be salvaged as long as it is amended to truly allow innocent individuals access to post-conviction DNA testing that may prove their case.

REPRESENTATIVE LYNN, in response to a comment, argued that his goal is to get the guilty in jail, noting that if there is an innocent person in jail, then that means that there is still a guilty person running around free. "We want to do whatever we can to get the guilty folks in jail, and, as a corollary, get the innocent folks out of jail - that's the direction [that] we ought to be going; to me, it's ... a public safety issue as well as an issue of justice for the person who's wrongfully in jail," he concluded.

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JEFFREY A. MITTMAN, Executive Director, American Civil Liberties Union of Alaska (ACLU of Alaska), said that the ACLU of Alaska would be providing written testimony, and concurs with the remarks of Mr. Oberly and Mr. Walleri and their analyses [of HB 316].

[HB 316 was held over.]

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ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:01 p.m.