ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 15, 2010
1:09 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

OTHER LEGISLATORS PRESENT

Representative Bill Stoltze

COMMITTEE CALENDAR

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 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
02/10/10	(H)	Heard & Held
02/10/10	(H)	MINUTE(JUD)
02/15/10	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

ANNE CARPENETI, Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Juneau, Alaska
POSITION STATEMENT: Responded to questions and provided comments during discussion of HB 316.

ORIN DYM, Crime Lab Supervisor
Scientific Crime Detection Laboratory
Office of the Commissioner
Department of Public Safety (DPS)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 316, testified in support, provided comments, and responded to questions.

DENISE MORRIS, President/CEO
Alaska Native Justice Center (ANJC)
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with HB 316 and responded to questions.

JOSEPH AUSTIN, Member
Board of Directors
Alaska Innocence Project
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns with the current version of HB 316.

DOUGLAS MOODY, Deputy Director
Criminal Division
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Expressed concerns and responded to questions during discussion of HB 316.

RACHEL LEVITT, Director

Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 316.

ACTION NARRATIVE

1:09:49 PM

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:09 p.m. Representatives Ramras, Dahlstrom, Herron, Gatto, Lynn, and Gruenberg were present at the call to order. Representative Holmes arrived as the meeting was in progress. Representative Stoltze was also in attendance.

HB 316 - POST-CONVICTION DNA TESTING; EVIDENCE

1:14:26 PM

CHAIR RAMRAS announced that the only 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."

1:17:07 PM

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), in response to a question, indicated that she is continuing to dialog with the Alaska Innocence Project to address concerns expressed regarding HB 316. Referring to testimony heard at the bill's last hearing, she relayed that the DOL is committed to creating a mechanism by which an innocent person can bring a claim to have his/her evidence looked at again; if a person is innocent, he/she shouldn't spend a single day in jail, and that's why there is some urgency with regard to bringing such a claim forward. The goal of HB 316 is to strike a balance between those who have been wrongfully incarcerated and those who simply want another chance to have the courts address their case without any reasonable basis for doing so.

1:24:11 PM

ORIN DYM, Crime Lab Supervisor, Scientific Crime Detection Laboratory, Office of the Commissioner, Department of Public Safety (DPS), stated that the Scientific Crime Detection Laboratory ("Crime Lab") supports HB 316, and feels strongly that any post-conviction deoxyribonucleic acid (DNA) testing be performed at the Crime Lab because such testing pertains to criminal proceedings and involves criminal evidence, and the Crime Lab has the necessary experience to handle such evidence. Furthermore, at the Crime Lab, unknown DNA profiles can be entered into [the federal] DNA database in order to see if there are any potential matches, whereas private laboratories wouldn't be able to do so.

MR. DYM explained that Section 10 clarifies that a person who's been acquitted can have his/her biological sample removed from the database. This is a [federal] requirement, but was inadvertently left out [of State statute]. [Another section of HB 316] stipulates that enough of a DNA sample be collected so that the Crime Lab can develop a profile for entering into the database. He indicated that the legislation pertaining to a new Scientific Crime Detection Laboratory addresses the bill's biological evidence retention provisions and any potential resulting workload.

MR. DYM, in response to a question, explained that removal of a biological sample, as provided for via Section 10, occurs at the national level, and so any such sample would be expunged entirely. In response to other questions, he explained that although the bill does provide that testing can occur at private laboratories, the Crime Lab would prefer that it do any such testing; that no prisoners would be transported to the Crime Lab for testing; and that the cost of an oral swab is $5.50, and the cost of analyzing such a swab is about $25; that funding for the cost of entering samples into the database has already been appropriated; that the Crime Lab processes about 7,000 samples per year; and that a person's DNA profile constitutes a series of numbers - markers in the DNA chain.

REPRESENTATIVE LYNN asked whether a representative of the defendant could oversee the analysis of the DNA sample.

MR. DYM said that for purposes of safety and maintaining confidentiality, the Crime Lab's policy prohibits anyone who doesn't work at the Crime Lab from being present in the laboratory, and ventured that the same is probably true at private laboratories for similar reasons. The Crime Lab engages

in quality assurance measures, and to date no one has raised questions about the quality or integrity of the work conducted at the Crime Lab. Key for an accurate evaluation of a DNA sample is access to the database, but a private lab won't have such access, and so any DNA sample that's sent to a private lab must still come back to the Crime Lab.

1:36:04 PM

CHAIR RAMRAS asked how long it takes for post-conviction DNA testing to be completed.

MR. DYM said that once the DOL notifies the Crime Lab that post-conviction testing is required and the Crime Lab identifies what evidence needs to be analyzed, the Crime Lab allows up to 30 days for the evidence to be screened, and up to another 30 days for that evidence to be "worked for DNA" and for profiles to be developed. The Crime Lab's goal is for no case to take longer than 30 days for each phase. In response to comments and questions, he explained that the Crime Lab is already conducting DNA testing, and that some evidence is being flagged so that when new technology is developed, that evidence can be retested.

MS. CARPENETI added that although she doesn't have an estimate of how many cases will result from the passage of HB 316, the Alaska Innocence Project has indicated that there are lots of people who will need their cases reexamined under the new procedure provided by the bill. She indicated that she would attempt to research this issue further by looking at the types of cases - those involving felony offenses against a person - for which the provisions of the bill would apply.

MR. DYM, in response to further questions, relayed that the Crime Lab is currently receiving an average of 35 requests for DNA [testing] per month; that it is reducing its backlog - of approximately 200 cases - every month, and should be caught up in about a year; that it can handle more requests than it's currently receiving; that it should have the capacity to handle 70 samples per month once all the analysts are fully trained; that any given case could contain up to five samples; that once the current backlog is addressed, the Crime Lab should be well able to meet any incoming caseload; and that he doesn't anticipate passage of HB 316 resulting in enough extra work to warrant requesting funding for an additional person.

1:47:12 PM

MS. CARPENETI, in response to comments and questions, again explained that HB 316 contains a rebuttable presumption that an application brought before three years after the date of conviction is timely, and a rebuttable presumption that an application brought three or more years after conviction is not timely but is not necessarily precluded as long as good cause can be shown for the delay in applying. She mentioned that she has drafted a proposed amendment stipulating that the presumption that an application is untimely could be rebutted for any good cause; this should address concerns expressed by the Alaska Innocence Project that there are existing Alaska cases for which the proposed three-year threshold is inadequate. She also acknowledged that it would be reasonable for the bill to include "a savings clause" - a provision stipulating that for those who are currently incarcerated, the three-year threshold would begin on the date the bill passes. It is important, however, to have time limits regarding post-conviction DNA testing, because the sooner such is applied for, the better it is for everyone, including the defendant who may be wrongfully incarcerated and the victims of the crime.

MS. CARPENETI relayed that there would also be a forthcoming amendment to clarify that even someone who pleads guilty or nolo contendere "at the trial court" could still bring an action for post-conviction [DNA testing] depending on the facts of the particular case. This should address the concern that some people do plead guilty even when they aren't, and the DOL is happy to clarify that point in the bill. She indicated that after the bill's new procedure has been in effect for a while, the DOL might be amenable to expanding the list of who could qualify for post-conviction DNA testing.

1:51:15 PM

DENISE MORRIS, President/CEO, Alaska Native Justice Center (ANJC), relayed that the ANJC has three concerns with HB 316. Alaska's proposed procedure would be more restrictive than that of any of the other 47 states that provide for [or are considering providing for] post-conviction DNA testing. One of the ANJC's concerns pertains to the bill's current preclusion of those who have pled guilty, because there are a lot of individuals, particularly within the Native community, who make plea agreements. According to a recent report provided by the Alaska Judicial Council (AJC), the number of Alaska Natives that plead guilty during the court process is alarming; these individuals do not go to trial and they do not avail themselves of legal resources for a number of reasons, such as cultural

barriers, misunderstandings, and a lack of attorneys and law enforcement in rural Alaska.

MS. MORRIS explained that another of the ANJC's concerns pertains to what she called the three-year time limit. Trying to find an attorney or anyone to even review one's case within a three-year timeframe is problematic at best; furthermore, it can take a long time to conduct such a review once someone is found. She said she doesn't understand why there should be any time limit if there is a possibility that an innocent person has been wrongfully convicted. The ANJC's third concern pertains to the provision that precludes post-conviction DNA testing if the person didn't [provide certain evidence] at the time of trial, because this would penalize the person for following his/her lawyer's bad advice. She pointed out that during the trial process, it's hard to understand what's going on, even for educated individuals, much less for someone who doesn't understand the process.

MS. MORRIS opined that a person who is wrongfully convicted should have the ability to have his/her situation corrected. She noted that the ANJC sees both sides of the issue, because Alaska Native women are more likely to be murder victims or rape victims. At the same time, however, the ANJC wants to ensure that prosecuted individuals are treated fairly and retain the ability to correct wrongful convictions.

MS. CARPENETI, in response to a question regarding the three-year threshold, explained that if a person is convicted and a DNA sample has been taken from him/her in compliance with the requirements outlined in the DNA database statute, that sample is entered into the National Crime Information Center (NCIC) database, which is available to prosecutors and law enforcement across the country. She said she views the aforementioned three-year threshold as a guideline, and again opined that it's better to bring applications for post-conviction DNA testing earlier rather than later. Even under the bill as currently written, a person, for good cause, could still bring such an application after three years.

MS. MORRIS pointed out, however, that the burden would be on the wrongfully-convicted individual to prove that good cause exists; as currently written, the bill adds one more burden on the person attempting to prove his/her innocence. Regardless of how long it's been since conviction, she opined, there shouldn't be a threshold at all.

CHAIR RAMRAS asked Ms. Morris what she would propose for allocating resources if removing the three-year threshold results in a Crime Lab backlog of 1,000 cases.

MS. MORRIS acknowledged that cost and a lack of State resources for post-conviction DNA testing is of concern to some, but pointed out that it's not likely that removing the three-year threshold would increase the Crime Lab's existing backlog to 1,000 cases, particularly given that the Alaska Innocence Project currently has only 141 requests from individuals regarding post-conviction DNA testing.

MS. MORRIS, in response to a question, surmised that it would be worth looking at what other states have done with regard to restricting post-conviction DNA testing.

MS. CARPENETI provided members with a 2008 comparison compiled by the National Conference of State Legislatures (NCSL) regarding some states' post-conviction DNA-testing laws, and relayed that she disagrees with Ms. Morris's comment that Alaska's proposed law would be the most restrictive.

2:05:20 PM

JOSEPH AUSTIN, Member, Board of Directors, Alaska Innocence Project, after noting that he is a former law enforcement officer and has been involved in the criminal justice system for over 35 years, said he supports the Crime Lab conducting all the post-conviction DNA testing so that the results could be entered into the national Combined DNA Index System (CODIS). He expressed concern, however, with what he characterized as the restrictiveness of HB 316, and offered his understanding that if New York had had a post-conviction DNA law as restrictive as what's being proposed for Alaska, in one case involving rape, five innocent people would still be in jail with the real perpetrator remaining free.

2:08:10 PM

DOUGLAS MOODY, Deputy Director, Criminal Division, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), said that post-conviction DNA testing is a good idea if there is any chance that an innocent person is in jail and the guilty person is still running around loose. Post-conviction DNA testing would give the State the chance to put the right person in jail. Because the entire criminal justice system is run by human being, errors are made, and so the idea

of having post-conviction DNA testing is entirely appropriate and would ensure that guilty people are put in jail, albeit belatedly due a lack of adequate technology at the time of the original trial. In response to a question regarding the bill's current provisions that preclude a person who pleads guilty from seeking post-conviction DNA testing, he offered his understanding that the DOL no longer accepts nolo contendere pleas or plea bargaining. So although the DOL has stated that it is not its intention for those provisions, which he characterized as restrictive, to bar those who've felt pressured, for any number or reasons, into pleading guilty when they weren't, that's not what the bill says; instead, those provisions would preclude any reevaluation down the road of anyone who plead guilty even if he/she did so for some reason other than that he/she was actually guilty.

MR. MOODY, in response to a question, also characterized as restrictive the provisions that preclude a person who did not have DNA testing conducted at trial, and that stipulate that the applicant not identify a theory of defense inconsistent with that presented at trial, because those situations are the result of the applicant's lawyer's decision at trial rather than the applicant's. In response to further questions, he indicated that the bill also contains other provisions that would preclude a person from post-conviction DNA testing as a result of decisions made at trial by his/her lawyer, and predicted that the three-year threshold would be interpreted by the courts as a statute of limitations regardless that the DOL intends for it to only be a rebuttable presumption. He pointed out that three years is a very short time, particularly given that it can take up to at least a couple of years for a direct appeal to go through the Alaska Court of Appeals - and longer through the Alaska Supreme Court - and about that long for regular post-conviction relief applications to go through.

REPRESENTATIVE HOLMES questioned whether the entirety of proposed AS 12.73.020 - findings required for post-conviction DNA testing orders - presents too much of a burden for an applicant.

MR. MOODY surmised that proposed AS 12.73.020(5) would be difficult to comply with since it requires that an affidavit be signed by the applicant's trial lawyer; that proposed AS 12.73.020(6) would be difficult to comply with because a person without a lawyer wouldn't be able to confirm that the evidence to be tested had been subject to a chain of custody under conditions sufficient to ensure its reliability; that proposed

AS 12.73.020(7) - which states that the proposed DNA testing is reasonable in scope, uses scientifically sound methods and is consistent with accepted forensic practices - would be difficult for most pro se applicants to comply with; that proposed AS 12.73.020(8) and (9) are problematic because, again, they outline situations that are the result of the applicant's lawyer's decision at trial rather than any decision made by the applicant.

REPRESENTATIVE LYNN, in response to comments and questions, pointed out that regardless of a person's decisions made at trial, post-conviction DNA testing might show whether the person was at the scene of the crime.

MS. CARPENETI in response to comments and a question, acknowledged that the State has the burden of proving guilt beyond a reasonable doubt, and that there are a lot of cases wherein DNA evidence is not present.

2:29:09 PM

REPRESENTATIVE HOLMES, referring to Section 16, which establishes the task force on standards for the preservation of evidence, asked Mr. Moody whether the PDA feels that the inclusion of a member of the defense bar or a representative of the PDA or the Office of Public Advocacy (OPA) would be appropriate.

MR. MOODY remarked that although the PDA and the OPA always have something to contribute to conversations about evidence, it is up to the legislature to determine who should be included on the task force. In response to a further question, he explained that the PDA has submitted a zero fiscal note, and that he does not anticipate that HB 316, as currently written, would increase the PDA's workload substantially.

REPRESENTATIVE GRUENBERG questioned that assertion and whether it means that the PDA doesn't anticipate filing even a single case as the result of passage of the bill.

MR. MOODY offered that [the last paragraph on page 2 of] the PDA's fiscal note says:

> The new appointments could increase costs due to attorney review and paralegal resources that must be applied to process the cases. It is difficult to predict how many cases or the level of review that

> will be required, but the Agency does not predict a significnat [sic] increase and therefore submits a zero fiscal note.

MR. MOODY added, "I think we're going to be able to absorb the ones that come through under the current bill without adding new staff, because I don't believe it's going to be very many."

REPRESENTATIVE GRUENBERG asked whether that's because the bill is so restrictive that the proposed post-conviction DNA testing procedure can't be used at all.

MR. MOODY surmised that the PDA is going to be appointed in the vast majority of cases involving post-conviction relief, and noted that it is currently being appointed to such cases now. So, to an extent, the PDA is already getting appointed and dealing with such cases within the existing post-conviction-relief timeframe. Under the bill, the PDA would be dealing with cases in the future, and, again, the PDA is not anticipating getting very many. In response to a further question, he said he is unable to calculate how much it would cost to handle a case under the bill, but acknowledged that there is a cost associated with filing an application for post-conviction relief or a petition for DNA testing, and a fee for the application, and that that would take some attorney time. Again, the PDA anticipates being able to absorb any forthcoming workload created by passage of the bill.

REPRESENTATIVE HERRON asked whether the language, "did not forgo for tactical reasons", as used in proposed AS 12.73.020(5), is used elsewhere in statute.

MS. CARPENETI indicated that it isn't, adding that the bill provides for a remedy that's outside the "regular criminal prosecution," and this new procedure is not intended to provide a person with an opportunity to try out different defenses. The bill is instead meant to be an extraordinary remedy for people who are mistakenly convicted. Again, though, there will be an amendment to clarify that a person can bring an application for post-conviction DNA testing even if he/she pled guilty at the trial court, because people do plead guilty for a number of reasons [other than that they are guilty]. Referring to an earlier comment, she clarified that the DOL still accepts nolo contendere pleas - they just don't happen very often. Currently, applications for post-conviction relief generally require an affidavit signed by the trial lawyer explaining what he/she did in the lower court and why. Such affidavits don't

preclude a person from bringing a petition for post-conviction relief, nor will they preclude a person from bringing an application under the bill. Furthermore, federal law also requires such affidavits.

2:40:01 PM

REPRESENTATIVE GRUENBERG noted that it can be difficult to evaluate conflicting testimony; for example, eye witnesses can see things and all be testifying in good faith, truthfully from their point of view, and their testimonies can be absolutely accurate [and yet conflict]. He questioned whether, if, in the future, a scientific advancement were made that could determine what had really happened in a particular case, it would be fair to require a person, now, at the time of his/her trial, to make decisions in anticipation of that as yet unforeseeable scientific advancement, and then deny him/her the ability to bring an application for post-conviction relief when he/she doesn't do so.

MR. MOODY acknowledged that such wouldn't be fair, but asserted that the development of new technology would certainly be considered "good cause" for seeking post-conviction relief, and so would not necessarily have to have been foreseeable within three years of the date of conviction.

REPRESENTATIVE GRUENBERG questioned, however, whether that isn't already the case with the bill as it relates to DNA testing - an innocent person convicted years ago won't have anticipated the current advancements in DNA testing and so might have made decisions at trial that would now preclude him/her from applying for post-conviction DNA testing.

MR. MOODY acknowledged that blood testing back in 1994, for example, was much less discriminatory and so may not have been of any help to the defense. The problem with HB 316 isn't that a person could argue that DNA testing has vastly improved since the time of conviction; rather, the problem is that the proposed remedy hinges in part on a tactical decision made by a lawyer at the time of trial regarding whether to introduce the results of any blood testing conducted back then.

REPRESENTATIVE GRUENBERG in response to a comment, argued that regardless that flaws in the proposed statutes could be fixed at a later date, the time an innocent person loses in prison can never be retrieved, and that's what makes [proposed AS 12.73.020(5)] unfair.

2:47:37 PM

RACHEL LEVITT, Director, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), in response to a question, said she agrees with Mr. Moody's testimony. With regard to a question posed earlier, she indicated that proposed AS 12.73.020(5)(A) could have an impact on the OPA's current practice in that an OPA attorney must keep this provision in mind when he/she goes to court on behalf of a client; proposed AS 12.73.020(5)(A) reads in part:

> (5) the evidence either
>
> (A) was not subjected to DNA testing, and the applicant did not waive, or the applicant's lawyer did not forgo for tactical reasons, the right to request DNA testing; or

REPRESENTATIVE HOLMES asked whether that provision could put the attorneys at the OPA in a bind when they are working a case and perhaps thereby, depending on the defense strategy chosen at the original trial, cause a client to be barred from applying for post-conviction DNA testing in the future.

MS. LEVITT said yes, adding that it will be an additional consideration that OPA attorneys will have to have in mind when looking at whether or not to request resources for DNA testing in a case, but the OPA doesn't, at present, have a clear picture of what impact that will have. It might result in OPA attorneys requesting DNA testing when they wouldn't ordinarily have done so otherwise.

REPRESENTATIVE HOLMES surmised that such a change in the OPA's procedure as a result of retaining that provision in the bill might also add to the Crime Lab's current backlog.

REPRESENTATIVE GRUENBERG - referring to proposed AS 12.36.200(d) and the last sentence of proposed AS 12.73.050(c), both of which state that the applicant shall pay the cost of retrieving the material to be tested - questioned what that cost would be and how those provisions would affect the OPA's budget and its ability to represent other clients.

MS. LEVITT indicated that because the bill as currently written is fairly restrictive, the OPA does not anticipate receiving a large number of these cases and so would just be absorbing them under its current budget. The OPA currently, though, has some

post-conviction relief cases in which evidence issues have arisen. She added that she doesn't have information regarding the cost of evidence retrieval.

REPRESENTATIVE GRUENBERG asked Ms. Levitt whether she thinks that amending the bill to address the concerns expressed by the Alaska Innocence Project, the PDA, and others would significantly increase the bill's usefulness to the OPA.

MS. LEVITT indicated that any such changes might result in more post-conviction DNA testing cases being referred to the OPA.

REPRESENTATIVE GRUENBERG pointed out that in order for the OPA to then properly utilize the bill if it's so amended, the OPA must receive more funding.

2:55:50 PM

MS. LEVITT said she would need to look at the specific language of any such amendments in order to determine their impact on the OPA.

MS. CARPENETI, in response to comments and questions, explained that HB 316 addresses the issues of evidence retention and DNA testing, and that the DNA testing provisions were modeled after federal law; that she disagrees with the assertion that HB 316 is more restrictive than other pieces of legislation currently going through the process; and that the DOL thinks this bill is clearer than those other pieces of legislation.

CHAIR RAMRAS closed public testimony on HB 316, and relayed that the bill would be held over.

3:02:36 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:02 p.m.