

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE

February 25, 2009

1:37 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Kim Elton
Senator Lesil McGuire
Senator Gene Therriault

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

SENATE BILL NO. 110

"An Act relating to the preservation of evidence."

HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: SB 110

SHORT TITLE: PRESERVATION OF EVIDENCE

SPONSOR(s): SENATOR(s) FRENCH

02/17/09	(S)	READ THE FIRST TIME - REFERRALS
02/17/09	(S)	JUD, FIN
02/25/09	(S)	JUD AT 1:30 PM BELTZ 211

WITNESS REGISTER

CINDY SMITH, Staff
to Senator Hollis French
Alaska State Legislature
Juneau AK

POSITION STATEMENT: Introduced SB 110 on behalf of the sponsor.

ANNE CARPENETI, Assistant Attorney General
Criminal Division
Department of Law
Juneau AK

POSITION STATEMENT: Commented on SB 110.

BILL OBERLY, Executive Director
Alaska Innocence Project
Anchorage AK

POSITION STATEMENT: Testified in support of SB 110.

BARBARA BRICK, representing herself and board member
Alaska Innocence Project
Anchorage AK

POSITION STATEMENT: Testified in support of SB 110.

RICH NORGDARD, Board President and representing himself
Alaska Innocence Project
Anchorage AK

POSITION STATEMENT: Testified that SB 110 is needed.

REBECCA BROWN, Policy Analyst
Innocence Project

POSITION STATEMENT: Described SB 110 as a reform whose time has come.

ORIN DYM, Forensic Laboratory Manager
Department of Public Safety (DPS),

POSITION STATEMENT:

RODNEY DIAL, Lieutenant
Alaska State Troopers
Department of Public Safety (DPS)
Ketchikan AK

POSITION STATEMENT:

MIKE MOBERLY, representing himself
Anchorage AK

POSITION STATEMENT: Testified in support of SB 110.

ACTION NARRATIVE

[1:37:00 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:37 p.m. Present at the call to order were Senators Elton, Wielechowski, McGuire and French. Senator Therriault arrived soon thereafter.

SB 110-PRESERVATION OF EVIDENCE

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CHAIR FRENCH announced the consideration of SB 110. He informed the committee that Lieutenant Dial with the troopers, John Glass

and Orin Dym from DPS, and Rebecca Brown with the Innocence Project are online.

CINDY SMITH, Staff to Senator Hollis French, said the concept of SB 110, which is preserving biological evidence, was put forth for the first time last year. Reading from the sponsor statement she stated the following:

The American system of justice is founded on balancing the twin protections of the rights of those harmed by crimes, and the rights of the accused. Criminal convictions are guided by evidence of innocence or guilt, and no one in the criminal justice system wants innocent people to be convicted of crimes they did not commit. The availability and use of physical evidence at trials and during appeals is a critical part of a meaningful justice system.

The point of SB 110 is to address the issue by requiring that biological evidence in murder and sexual assault cases is properly retained while cases are unsolved and during the period after conviction that an offender is imprisoned or required to register as a sex offender. The bill does provide for police departments to return or dispose of evidence that's too large to keep after portions of the material that are likely to contain biological evidence have been removed. The bill asks that that evidence also be retained while cases are unsolved. It then provides a notice process for cases where evidence will be destroyed and establishes ... a temporary task force.

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MS. SMITH provided an explanation of the bill.

Section 1, page 1, requires the Department of Law, the Department of Public Safety, the Alaska Court System, or a municipal law enforcement agency to preserve all evidence that is related to unsolved cases of murder in the first degree, murder in the second degree, manslaughter, criminally negligent homicide, sexual assault in the first degree or child sexual assault in the first degree.

CHAIR FRENCH added that those crimes are listed on page 1, line 9.

MS. SMITH agreed; AS 11.41.100 - AS 11.41.130 are the murder crimes, AS 11.41.410 is sexual assault in the first degree, and AS 11.41.434 is child sexual assault in the first degree.

The bill requires preservation of biological evidence in an amount that is sufficient to develop a DNA profile in cases where the person convicted remains a prisoner in the custody of the state or is subject to registration as a sex offender. "Biological evidence" is defined on page 3, beginning on line 16. The sponsor worked with the Department of Law and the Department of Public Safety to develop a list of kinds of biological evidence including slides, swabs, and contents of forensic kits.

Then the bill provides two broad exceptions to the requirements for evidence preservation. One is if the physical evidence is "of a size, bulk, quantity, or physical character that renders preservation impracticable," it can be returned or disposed of after removal of materials that are likely to contain relevant evidence for DNA testing. The language is intentionally broad and allows agency discretion because of the different storage capabilities at different locations throughout the state. The situation in Nome, for example, may be very different than in the Anchorage area.

The agency may destroy biological evidence, but before doing so it must provide notice of intent to destroy the evidence. There is a list of parties to notify and a process for doing that.

Finally, SB 110 establishes a one-year task force to develop standards and best practices for collection, retention, and storage of evidence.

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CHAIR FRENCH asked when the task force will be created.

MS. SMITH said it will be named essentially at the passage of this Act. Page 4, line 19, states that the task force will deliver a report not later than [December 31,] 2010. The task force is repealed January 1, 2011.

ANNE CARPENETTI, Assistant District Attorney, Criminal Division, Department of Law (DOL), said testimony from the Department of Public Safety will probably be more helpful, but she has several things to mention.

CHAIR FRENCH said it's worth pointing out that the Department of Law will not have to store any evidence.

MS. CARPENETI agreed. Referring to subsection (b) on page 2, lines 2-7, relating to practicable preservation of physical evidence, she said DOL's only concern is that a small village police department not be held to the same standard of keeping large items as an agency in a larger community.

She pointed out that on page 2, all the standards for disposing of biological need to be met. Therefore, she believes that the word "and" needs to be inserted [at the end of] line 25.

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CHAIR FRENCH thanked her for bringing that to their attention.

SENATOR WIELECHOWSKI referred to page 3, lines 10-11, and asked if the state will be exposed to liability if there isn't preservation of evidence.

MS. CARPENETI said that was her third point. DOL would suggest the committee add a provision similar to the domestic violence statute, AS 18.66.180, which provides that state agencies and their employees will not be subject to civil liability.

CHAIR FRENCH said the bill will receive careful consideration and certainly won't move today.

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SENATOR THERRIAULT joined the committee.

SENATOR WIELECHOWSKI asked if a person who has been convicted would be able to file an appeal on the grounds that certain evidence wasn't considered and, under this law, that evidence wasn't preserved. "It's something to think about," he said.

MS. CARPENETI said that general statement you're describing has given DOL pause. [Subsection (g) on page 3] says that if the court finds that evidence was destroyed, it may order appropriate remedies. She would read that to mean remedies the court deems appropriate as provided in law so that you could file a post-conviction relief action or something similar. But it has to be some procedure that is available now, she added.

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SENATOR ELTON asked if there shouldn't be a provision that protects individuals from somebody who intentionally destroys evidence.

MS. CARPENETI said that could be part of the protection that's included. You could have some standard that everybody knows about such as recklessly or intentionally. She added that she believes they need to protect little police departments in small villages that are doing their best.

CHAIR FRENCH pointed out that a tampering with evidence crime is already in statute. It almost always applies to criminals, but once in awhile you could imagine a police officer tampering with evidence. The charge applies to any violator.

SENATOR WIELECHOWSKI asked if the provision on page 1, lines 11-13, increases the requirements for law enforcement agencies to retain biological evidence.

MS. CARPENETI said the statute doesn't state that this is what police departments have to do now, but she believes there will be testimony that this is what they actually do.

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SENATOR THERRIAULT asked how adjudicated minors are handled under this.

MS. CARPENETI said it might not apply to minors because this talks about convictions. Minors aren't convicted for an offense, they're adjudicated. It's something to think about.

SENATOR THERRIAULT asked Senator French if the split was purposeful.

CHAIR FRENCH said no, but it's a good point. Any 16-year-old or 17-year-old who is convicted of an adult crime would have the evidence preserved because it's a conviction, and an unsolved crime would have the evidence preserved. But under the strict reading of the bill, the evidence wouldn't be preserved in the case of a 14-year-old or a 15-year-old who committed an adult crime.

SENATOR THERRIAULT suggested the committee give that some thought.

CHAIR FRENCH said it's a good point because it would seem that the same principle would apply to adults and minors.

SENATOR THERRIAULT asked if there was any specific talk about what happens to the evidence after someone has served their time and is no longer on probation.

MS. CARPENETI said she assumes the evidence would not be retained as long as it isn't a sex crime - sexual abuse of a minor in the first degree and sexual assault of a minor in the first degree. SB 110 requires biological evidence to be retained if someone is indicted for those crimes, but subsequently convicted of a lesser crime. People who are convicted of a sex crime in the first degree have to register as a sex offender for life, and under the bill that means the police would have to retain the evidence for the life of that individual. DOL has concern with that because it could be a long time, but it only applies to biological evidence. Mr. Dym from the crime lab will probably testify that they keep that type of evidence anyway, but this may mean that they'll need more space.

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CHAIR FRENCH told her she'll hear the committee ask police officers and the folks who are testifying on behalf of law enforcement the extent to which current practices comport with the bill as written. He believes they'll say that the bill is fairly consistent with what they do now, but it is something they're a bit worried about.

SENATOR WIELECHOWSKI said he'll be interested in hearing about security measures to protect the victims of sexual violence because their DNA will be retained forever.

MS. CARPENETI said she believes Mr. Dym will say they keep that information in different databases.

SENATOR ELTON asked if the language on page 1, lines 8-10, means there is no need to retain evidence once there is a conviction.

MS. CARPENETI explained that paragraph (2) on line 13, talks about preservation of biological evidence if a person is convicted of a crime under [AS 11.41.100-11.41.130]. She believes the sponsor chose these because they are the type of crimes that you have by DNA evidence.

SENATOR ELTON asked what happens to biological evidence that's collected at the scene that doesn't belong to the person who was convicted.

MS. CARPENETI deferred the question.

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SENATOR THERRIAULT asked if paragraphs (1), (2) and (3) under subsection (d) on page 2, are connected with an "and" or an "or."

CHAIR FRENCH said Ms. Carpeneti highlighted that earlier and it's a crucial point to square away with the drafters.

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BILL OBERLY, Executive Director, Alaska Innocence Project, said he sees SB 110 as securing justice for Alaskans. Alaska needs this legislation because the state has no universal policy on evidence preservation. As it stands now, justice depends on where you live in the state. You're lucky if you live in Galena because as of February 2008 they retain evidence indefinitely as possible exculpatory evidence for potential future appeals and cold case investigations. According to Police Chief Rob Heun, Anchorage retains indefinitely evidence from homicides and sexual assault cases. From there evidence preservation drops precipitously, he said.

SB 110 is limited to evidence in cold cases and those involving homicides and the most serious sex crimes. It calls for retention of all evidence in cold cases and in post conviction cases it calls for retention of evidence likely to contain biological evidence. Referring to page 3, subsection (h)(2)(B), he suggested the committee insert the words "items containing" at the beginning of line 17. That would clarify that these are evidentiary items and not just test tubes and things like that. It certainly makes more sense when read with [subsection (b) on page 2] that talks about the size of evidence. He described the provision that calls for preservation of evidence as long as the person has to register as a sex offender appropriate and fair.

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MR OBERLY said the bill has practical safety valves related to evidence retention. If the evidence is too big, it allows removal of areas likely to contain relevant biological evidence. It also establishes a procedure for early destruction. Significantly, it provides the impact of destruction in violation of the statute as a remedy rather than a sanction. Hopefully that will address some of the concerns the state has. Finally, it creates a task force to review the standards and practices for collection, retention and cataloging of evidence. This will allow the state to look at how this law is working and

tweak it where necessary. The bill allows for extraction of portions of material likely to contain relevant evidence and he would suggest waiting for the task force report before placing further limitations on the size of items to be retained.

MR OBERLY said His final comments relate to the benefits of SB 110. First, it will improve and standardize cold case evidence retention, which doesn't currently exist. Second, it will ensure that individuals with viable claims of actual innocence will have the evidence that can establish their innocence. Third, this will help bring actual perpetrators to justice because when someone is wrongly convicted there is a perpetrator who has not been caught. Finally, there is a fiscal benefit. Justice For All grant money is available and could be used to upgrade DNA testing, help with the DNA work backlog and help identify and test claims of wrongful conviction. The money is available to states that have a statewide evidence retention statute, which is what SB 110 provides.

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BARBARA BRICK, representing herself and speaking as a board member of the Alaska Innocence Project, said she was a public defender in Alaska for 23 years. During that time there were huge increases in technology. In 1982 it was a big deal to get facsimile machines and word processors and today she can't imagine the practice of law without a computer. Similar advances have been made in scientific evidence including fingerprinting, firearm analysis, bite mark identification, blood spatter, hair analysis, and handwriting analysis. Each has been hailed as an advance and gave the sense that they were reliable and provided trustworthiness to jury decisions.

But last week the National Academy of Science issued findings and conclusions indicating that these items of evidence that had been used nationwide to convict or exonerate people were, for the most part, handled by poorly-trained technicians. Furthermore, their reports and testimony exaggerated the accuracy of their methodologies as well as their conclusions. A primary reason for drawing this conclusion was that none of the scientific laboratories were truly independent or objective. Instead they were closely affiliated with law enforcement and the prosecution and the work was done by human beings, all of whom are fallible. This isn't the first time that scientific evidence has been discredited, she said. In 2004 the FBI had to notify hundreds of potentially wrongfully convicted individuals because the reliability of chemical bullet analysis had been far overstated.

MS. BRICK said she provided the history lesson because most people today believe that DNA evidence is the be-all and end-all. It's true that 124 people who were on death row after they went through jury trials and lost their appeals have been exonerated and advances in DNA testing techniques have exonerated over 200 people nationwide. That's the state of the state today, but she would like a preservation of evidence bill to cover things that haven't been thought of.

Preservation of evidence is critical because it can help exonerate innocent people and help prosecute people who aren't identifiable at the time of the crime. Less than 10 percent of violent crimes involve DNA evidence so an evidence preservation bill like SB 110, which limits its approach to biological evidence, may be missing an opportunity for greater justice. It only applies to a narrow category of crimes and a narrow category of biological evidence if the case has been solved. It's a good start, but we don't know what advances in technology are going to be made in the future and it seems that we're doing ourselves a disservice as far as unsolved crimes and their consequences, she said. Every piece of preserved evidence has the potential to improve justice.

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MS. BRICK said it's been important to the people who work in criminal justice that there is just one standard of justice statewide and Alaska's preservation of evidence policies need reform to do the same. Procedures need to be standardize so that the amount of justice and public safety that's available does not depend on where a person happens to live or what the local police remember to put in the refrigerator. "We can do better than that," she said.

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RICH NORGDARD, Board President, Alaska Innocence Project, said he is also speaking on his own behalf as someone who has worked in the criminal justice system for 16 years. He said he echoes what Ms. Brink said. SB 110 is needed because we know that testing has changed dramatically over the years and we just don't know what we might be able to test tomorrow. DNA testing may be just the tip of the iceberg.

MR. NORGDARD urged the committee to pass SB 110 with the changes that the National Innocence Project submitted and those Mr. Oberly recommended. He cautioned against narrowing the bill and emphasized that it needs to say that items containing biological

evidence will be preserved - not just the biological evidence itself. He encouraged passing a strong bill that preserves evidence now and for the future.

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REBECCA BROWN, Policy Analyst, Innocence Project, described SB 110 as a reform whose time has come. She explained that the Innocence Project was founded in 1992 at the Benjamin Cardozo School of Law to exonerate the innocent through post-conviction DNA testing. Since that time forensic DNA testing has proven the innocence of 232 people and identified the real perpetrator in 100 of those cases. None of this would have been possible without the proper preservation of biological evidence. She cited the Ricky Johnson case, which shows the promise that new technology holds for solving long-forgotten cases. It's a testament to the crime-solving potential of modern DNA technology, she said.

MS. BROWN said that evidence rooms across the country have become crime solving gold mines and it's understandable that evidence custodians become concerned when legislation is considered that will require them to save evidence for which they have little room. But SB 110 is incredibly modest compared to other retention laws across the country. It only requires retention of evidence in a very narrow category of serious violent offenses. In fact the language in Section 1, subsection (b), is consistent with the federal standard. The federal government also issued regulations to make the law practicable and she would encourage Alaska to look at those federal regulations for guidance. There is no sanction identified in this law so no one is going to be liable in the small number of cases where a mistake might happen, she said.

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MS. BROWN said the creation of a task force will ensure that a range of stakeholders can take part in a deliberative process to consider the contours of the issue over time. This expert work will allow for reasoned refinements. It may narrow the concept of retention and it may consider expanded retention policies. The provision of guidance and direction to evidence custodians won't create an unfunded mandate and may well save money over time by creating space for future evidence through the identification of evidence that can be lawfully destroyed, she said.

Safeguarding biological evidence is in the interest of all members of the criminal justice community - from crime victims

to law enforcement to the wrongfully convicted. Often when the innocent are exculpated, the guilty are identified through CODIS hits, she said. Many states realize that their retention policies have not kept up with DNA advances. Just last year three states passed laws mandating the preservation of biological evidence in several crime categories. SB 110 promises to shape an evidence management policy that is respectful of Alaska's specific concerns articulated by a range of stakeholders. "I think this is a wonderful bill," she said.

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ORIN DYM, Forensic Laboratory Manager, Department of Public Safety (DPS), said he would first respond to some of the questions that have come up. First he clarified that victim DNA samples are not uploaded into the national CODIS database system. When a case comes in for analysis it may have from one to several hundred items of evidence. He and his staff first look at the most intimate and probative pieces of evidence and work out to the least intimate and least probative. Depending on what they find, not all the evidence will be analyzed.

If a piece of evidence is analyzed, a sample is obtained where biological evidence is expected to be present. Those samples are retained by the laboratory indefinitely. But if an item is not looked at in the laboratory - perhaps because they have body swabs that contain sufficient evidence - it will never be opened, looked at or sampled in the laboratory and nothing will be retained.

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MR. DYM commented that although people are very proud that DNA has exonerated 200 people in the last several years, he can say that exonerations are happening every day with DNA in the laboratory. Not every DNA exam identifies a suspect; more often than not it eliminates an individual as a suspect.

MR. DYM expressed concern about laboratory resources. They already retain many samples that technically belong to law enforcement agencies throughout the state because they recognize that most law enforcement agencies throughout the state do not have sufficient resources and expertise to store these samples properly. We are committed to retaining and storing these samples properly and that's what we've done, he said.

The existing crime laboratory has had 500 square feet of storage space for the last 22 years. It simply is not enough so there is a resource issue with the storage of samples, he said. The

laboratory also have a great number of biological samples that predate computerization and he recognizes that those have to be brought up to computer standards for easy tracking and ready preparation of lists of where evidence is located.

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SENATOR ELTON asked if some of the things that are collected at a crime scene that are not initially tested are, in fact, evidence.

MR. DYM said yes; evidence that is not analyzed the first time through may become highly probative later on.

SENATOR ELTON said that's what he wanted to hear because then the laboratory would be required to hold as evidence everything else that may have been collected but not tested.

MR. DYM said that's correct. He's looked at the possibility of screening more evidence when a case initially comes in, but there is absolutely no space in the existing laboratory to place an additional biological screener. The next issue that comes up relates to an agency that wants to dispose of the clothing or chair or jeep seat that hasn't been analyzed. He believes that it falls to the crime laboratory to evaluate and sample that item. That too impacts the laboratory.

SENATOR ELTON questioned adding \$40,000 in cost to the bill when the laboratory already needs more space to store evidence. "That's just a question that I might ask at finance," he said.

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MR. DYM said we'll address that there.

SENATOR WIELECHOWSKI asked if everything in a room that is splattered with blood is typically preserved as evidence.

MR. DYM said it depends, but potentially everything is submitted to the laboratory. In general they would not retain the entire item. Rather, they would swab blood samples or cellular material that might be present from the item and retain the swab. In the case of a picture that has 27 droplets of blood, they might photograph the document and only collect and retain 2 or 3 representative droplets.

SENATOR WIELECHOWSKI asked how he might examine this committee room; 17 people are present and DNA is everywhere.

MR. DYM said they rely on the investigators to apply good detective work to determine what might have scientific value and limit the number of samples collected.

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CHAIR FRENCH asked how full the 500 square foot crime laboratory evidence room is now, how long it has taken to get that full, and when it will be physically impossible to fit anything else in.

MR. DYM replied it's been full since he arrived 1.5 years ago. Recently they installed a CONEX container to hold non-evidentiary items to free closet space in the laboratory for evidence storage and they might be able to utilize a closet in the back of the boiler room to handle evidence overflow. Also, they've quadrupled the volume of evidence they ship back to agencies. Things that are not related to DNA are shipped back.

CHAIR FRENCH asked what in this bill is specifically different from current practice.

MR. DYM said the bill requires more evidence to be sampled and retained than current practice. Before agencies dispose of items that have been returned, they will probably send those items back to the laboratory for sampling or identification of potential biological evidence.

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JOHN GLASS, Deputy Commissioner, Department of Public Safety, said he is available to answer questions.

RODNEY DIAL, Lieutenant, Alaska State Troopers, Department of Public Safety (DPS), provided an overview of DPS evidence procedures at trooper posts across the state. Currently department evidence custodians are required to be knowledgeable of Alaska statutes that apply to evidence. Those include AS 12.36 and AS 34.45, which relate to disposal of evidence. They are also required to be knowledgeable of the department's operating procedures manual and the detachment SOPs. Before evidence is disposed of, the custodian must have one or more of the following: written authorization from the case officer, a court order, permission from the district attorney's office, or permission from the state medical examiner. Standard practice is to retain evidence from serious crimes for a significant amount of time. Retention is also dependent on factors such as statute of limitations, involved parties, whether or not appeals have

been exhausted, and if it's reasonably believed that there is no value in continuing to retain the evidence.

Referring to the question about exculpatory evidence, he explained that evidence in cases where a person was convicted of a crime is retained until the department obtains a release from the district attorney's office.

CHAIR FRENCH asked whether the DA's office allows evidence to be disposed of before a person is released from prison.

LIEUTENANT DIAL said yes, but generally not in murder cases or other serious violent offenses where appeals are expected.

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SENATOR ELTON asked what kind of training occurs now and what might be envisioned after the task force is finished.

LIEUTENANT DIAL explained that all academy recruits receive basic procedures and instructions on evidence handling, collection, and preservation techniques. Once they're in the field they go through additional field training. At most trooper posts primary and secondary evidence custodians are identified. They must be knowledgeable of the statutes relating to the collection of evidence as well as the department's operating procedures manual. Detachment commanders are also required to inventory evidence facilities on a regular basis to ensure that those standards are adhered to. It's an ongoing process of following rigid guidelines coupled with oversight, he said.

SENATOR ELTON asked if the current training procedures are good enough to assume that the task force wouldn't suggest more training.

LIEUTENANT DIAL said he believes more training would be required before taking steps to dispose of certain types of evidence in certain cases.

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MIKE MOBERLY, representing himself, Anchorage, said he works in the courts on a daily basis and believes that everyone in the process works hard to see that the right results occur. But it doesn't always happen. "One needs only to look at the disproportionate representation of minorities or economically disadvantaged peoples in custody to know that that just isn't the case." SB 110 is a modest effort to ensure that convictions that are obtained are sound and that we can have confidence in

the system. He said he supports legislation that reasonably preserves evidence to provide confidence in the outcome that's obtained through the justice system.

CHAIR FRENCH closed public testimony and held SB 110 in committee for further work.

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There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee at 2:45 pm.