ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
April 2, 2010
1:32 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Dennis Egan
Senator John Coghill

MEMBERS ABSENT

Senator Lesil McGuire

COMMITTEE CALENDAR

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 101(JUD)
"An Act exempting the full value of life insurance and annuity contracts from levy to satisfy a debt, and amending the description of earnings, income, cash, and other assets relating to garnishment of life insurance proceeds payable upon the death of an insured."

- MOVED SCS CSHB 101(JUD) OUT OF COMMITTEE

SENATE BILL NO. 249
"An Act relating to official action by electronic transmission, to records, and to public records."

- HEARD AND HELD

SENATE BILL NO. 292
"An Act relating to the registration and operation of pawnbrokers and to the exemption for pawnbrokers under the Alaska Small Loans Act; and providing for an effective date."

- HEARD AND HELD

SENATE BILL NO. 241
"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 AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 101
SHORT TITLE: EXEMPTIONS: LIFE INSURANCE; ANNUITIES
SPONSOR(s): REPRESENTATIVE(s) COGHILL

01/30/09	(H)	READ THE FIRST TIME-REFERRALS
01/30/09	(H)	L&C, JUD
02/18/09	(H)	L&C AT 3:15 PM BARNES 124
02/18/09	(H)	Moved Out of Committee
02/18/09	(H)	MINUTE(L&C)
02/20/09	(H)	L&C RPT 3DP 3NR
02/20/09	(H)	DP: LYNN, CHENAULT, COGHILL
02/20/09	(H)	NR: BUCH, HOLMES, OLSON
03/02/09	(H)	JUD AT 1:00 PM CAPITOL 120
03/02/09	(H)	Heard & Held
03/02/09	(H)	MINUTE(JUD)
03/16/09	(H)	JUD AT 8:00 AM CAPITOL 120
03/16/09	(H)	Heard & Held
03/16/09	(H)	MINUTE(JUD)
03/19/09	(H)	JUD AT 1:00 PM CAPITOL 120
03/19/09	(H)	Moved CSHB 101(JUD) Out of Committee
03/19/09	(H)	MINUTE(JUD)
03/23/09	(H)	JUD RPT CS(JUD) NT 6DP
03/23/09	(H)	DP: LYNN, GRUENBERG, COGHILL, DAHLSTROM, GATTO, RAMRAS
04/03/09	(H)	TRANSMITTED TO (S)
04/03/09	(H)	VERSION: CSHB 101(JUD)
04/06/09	(S)	READ THE FIRST TIME-REFERRALS
04/06/09	(S)	L&C, JUD
04/14/09	(S)	L&C AT 1:00 PM BELTZ 211
04/14/09	(S)	Moved CSHB 101(JUD) Out of Committee
04/14/09	(S)	MINUTE(L&C)
04/15/09	(S)	L&C RPT 4DP 1NR
04/15/09	(S)	DP: PASKVAN, MEYER, THOMAS, DAVIS
04/15/09	(S)	NR: BUNDE
04/17/09	(S)	JUD AT 1:30 PM BELTZ 211
04/17/09	(S)	Heard & Held
04/17/09	(S)	MINUTE(JUD)
03/29/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/29/10	(S)	Scheduled But Not Heard
03/31/10	(S)	JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/31/10	(S)	Heard & Held
03/31/10	(S)	MINUTE(JUD)

BILL: SB 249
SHORT TITLE: PUBLIC RECORDS/ELECTRONIC TRANSMISSIONS
SPONSOR(s): SENATOR(s) ELLIS

02/01/10 (S) READ THE FIRST TIME-REFERRALS
02/01/10 (S) STA, JUD
03/23/10 (S) STA RPT 5DP
03/23/10 (S) DP: MENARD, FRENCH, MEYER, PASKVAN, KOOKESH
03/23/10 (S) STA AT 9:00 AM BELTZ 105 (TSBldg)
03/23/10 (S) Moved SB 249 Out of Committee
03/23/10 (S) MINUTE(STA)
03/31/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/31/10 (S) Heard & Held
03/31/10 (S) MINUTE(JUD)

BILL: SB 292
SHORT TITLE: PAWNBROKERS
SPONSOR(s): SENATOR(s) HUGGINS

02/24/10 (S) READ THE FIRST TIME-REFERRALS
02/24/10 (S) L&C, JUD
03/18/10 (S) L&C AT 1:30 PM BELTZ 105 (TSBldg)
03/18/10 (S) Moved CSSB 292(L&C) Out of Committee
03/18/10 (S) MINUTE(L&C)
03/22/10 (S) L&C RPT CS 3DP NEW TITLE
03/22/10 (S) DP: PASKVAN, DAVIS, BUNDE
03/22/10 (S) FIN REFERRAL ADDED AFTER JUD
03/29/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
03/29/10 (S) Heard & Held
03/29/10 (S) MINUTE(JUD)

BILL: SB 241
SHORT TITLE: POST-CONVICTION DNA TESTING; EVIDENCE
SPONSOR(s): RULES BY REQUEST OF THE GOVERNOR

01/27/10 (S) READ THE FIRST TIME-REFERRALS
01/27/10 (S) JUD, FIN
02/22/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/22/10 (S) -- MEETING CANCELED --
02/24/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)
02/24/10 (S) Heard & Held
02/24/10 (S) MINUTE(JUD)
04/02/10 (S) JUD AT 1:30 PM BELTZ 105 (TSBldg)

WITNESS REGISTER

MAX HENSLEY, Staff
to Senator Johnny Ellis
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: Offered to answer questions on SB 249.

ALAN BIRNBAUM, Assistant Attorney General
Information and Project Support Section
Civil Division
Department of Law (DOL
Anchorage, AK
POSITION STATEMENT: *Pointed out policy and legal issues on SB 249.

ANDREA MCLEOD, representing herself
POSITION STATEMENT: *Supported SB 249.

JOSH TEMPEL, Staff
to Senator Charlie Huggins
Alaska State Legislature
Juneau, AK
POSITION STATEMENT: *Provided a sectional analysis of SB 292.

BILL OBERLY, Executive Director
Alaska Innocence Project
Anchorage, AK
POSITION STATEMENT: *Suggested changes to SB 241.

BARB BRINK, representing herself
POSITION STATEMENT: *Testified on SB 241 from the perspective of 23 years as an Alaska public defender.

QUINLAN STIENER, Public Defender
Public Defender Agency (PDA)
Department of Administration
Anchorage, AK
POSITION STATEMENT: *Testified about the impact SB 241 would have on the PDA.

ANNIE CARPENETI, Assistant Attorney General
Criminal Division
Department of Law (DOL)
Juneau, AK
POSITION STATEMENT: *Provided the state's perspective on suggested changes to SB 241.

ORIN DYM, Forensic Laboratory Manager

Statewide Crime Lab
Department of Public Safety (DPS)
Anchorage, AK
POSITION STATEMENT: *Available for questions on SB 241.

ACTION NARRATIVE
1:32:00 PM

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:32 p.m. Present at the call to order were Senators Coghill, Egan and French.

HB 101-EXEMPTIONS: LIFE INSURANCE; ANNUITIES

CHAIR FRENCH announced the consideration of HB 101. [Version T Senate committee substitute (CS) had been adopted on 3/31/2010 and was before the committee] He found no further questions or amendments.

1:32:20 PM
SENATOR WIELECHOWSKI moved to report CS for HB 101, version T, from committee with individual recommendations, attached fiscal note(s) and accompanying title change.

1:33:06 PM
CHAIR FRENCH announced that without objection SCS CSHB 101(JUD) and title change resolution moved from the Senate Judiciary Committee.

At ease from 1:33 PM to 1:34 pm.

SB 249-PUBLIC RECORDS/ELECTRONIC TRANSMISSIONS

1:34:07 PM
CHAIR FRENCH announced the consideration of SB 249. The bill was heard previously.

MAX HENSLEY, Staff for Senator Johnny Ellis, sponsor of SB 249, offered to answer questions.

CHAIR FRENCH reported that he heard SB 249 in a previous committee and his questions were answered at that time.

SENATOR COGHILL referred to the fiscal note analysis that said there is no current method to automatically archive data transmitted on instant messages and asked if the sponsor has an answer for that.

MR. HENSLEY replied the bill drafter's explanation is that the language that currently exists would not require the Department of Administration (DOA) to make records available that are not currently being stored. But if instant messages were stored in the future, DOA would be required to make those records available.

SENATOR COGHILL commented that this will probably force the administration to have a discussion on whether or not to allow instant messages in any decision-making process.

1:37:34 PM
ALAN BIRNBAUM, Assistant Attorney General, Information and Project Support Section, Civil Division, Department of Law (DOL), reported that DOL supports what SB 249 attempts to do, but the bill raises significant policy and legal issues. DOL would like to work with the sponsor and the Judiciary Committee to resolve these issues which fall into four categories, he said.

MR. BIRNBAUM spoke to the 11 page letter he sent to Senator French on April 2, 2010 detailing these concerns. [A copy is in the bill file.] The first concern, which relates to Sections 4 and 5 of the bill, is that the bill might create substantial unfunded monetary burdens for state and municipal agencies. The second concern, which relates to Sections 1, 2, 3, and 7, is that the definitions in the bill are vague and overly broad. The third concern, which relates to Section 2, is that the intended scope is not clear, could substantially impede state business, and is not appropriate to include in the Alaska Executive Branch Ethics Act. The fourth concern, which relates to Section 6, is that the proposed amendment to the Ethics Act is critically vague.

1:48:08 PM
CHAIR FRENCH admonished Mr. Birnbaum for waiting 61 days after the bill was introduced to submit such an extensive, exhaustive letter pointing out problems. He added that if he were the sponsor he'd be smoking mad and asking for a face-to-face conversation with his boss to find out what took so long. "I'm just astonished that this is coming in front of the committee now with 17 days to go in the session," he concluded.

SENATOR WIELECHOWSKI noted that the packet did not contain a fiscal note for the exorbitant expenses that supposedly would be incurred by this bill.

MR. BIRNBAUM replied DOL is still analyzing the fiscal affects.

CHAIR FRENCH noted that the Department of Administration (DOA) submitted a zero fiscal note dated March 22.

ANDREA MCLEOD, representing herself, asked the committee to pass SB 249 to stop the practice of using private email accounts for conducting official state business. She said she also supports including any history of using private emails to conduct state business because doing so could correct and clarify ambiguities. She related her experience in making public records requests and finding that state business had been conducted on a private Yahoo account.

1:51:21 PM
MS. MCLEOD opined that when doing research and analyzing the legislative intent of a statute, it's important for the history to be concise and clear and to ignore the history does an injustice to the legislative record and Alaskans. She encouraged the committee to help preserve and protect the public's business by passing SB 249 from committee.

1:53:12 PM
CHAIR FRENCH asked Mr. Birnbaum by Monday to make concrete and written suggestions that would fix the issues he pointed out so that the committee could move the legislation forward.

SENATOR COGHILL said he'd also like to get clear information on private phone records that are digital in the event that they become as egregious as some emails have become

SENATOR EGAN expressed concern that DOL waited so long to raise these issues.

CHAIR FRENCH announced he would hold SB 249 in committee.

SB 292-PAWNBROKERS

CHAIR FRENCH announced the consideration of SB 292. It was heard previously.

1:55:48 PM
JOSH TEMPEL, Staff to Senator Charlie Huggins, sponsor of SB 292, provided a sectional analysis. Sections 1-4 separate pawnbroker regulations from those that apply to second hand stores and address electronic record keeping. Responding to a

question, he explained that the Department of Commerce, Community and Economic Development (DCCED) would provide regulatory oversight.

Section 5 adds new sections to AS 08.76. Sec. 08.76.100 and Sec. 08.76.110 relate to how pawnbrokers are licensed. Sec. 08.76.130 relates to withdrawal of a pawnbroker application and Sec. 08.76.140 relates to the duration and renewal of a pawnbroker license, including a penalty for late renewals. Sec. 08.76.160 maintains the current $500 limit on pawn transactions. Sec. 08.76.170 limits pawnbroker transactions to persons who are over 18 years of age, not under the influence of alcohol or a controlled substance, [and with valid identification.] Sec. 08.76.180 and Sec. 08.76.190 relate to the record requirements for pawnbroker transactions. Sec. 08.76.200 requires a pawnbroker to provide the seller with a receipt of the transaction. Sec. 08.76.210-76.230 relate to interest and fee restrictions on transactions.

CHAIR FRENCH asked if this would limit the amount of interest a pawnbroker could charge.

MR. TEMPEL replied the bill maintains the current limit, which is 20 percent for each 30-day period. The fee structure is changed slightly. A maximum $5 per transaction processing fee is allowed as is a $5 firearm processing fee.

1:59:15 PM
CHAIR FRENCH asked if the firearm processing fee is in addition to the interest charged on the loan.

MR. TEMPEL said that's correct.

SENATOR COGHILL asked why there's also a governmental fee on firearms.

MR. TEMPEL explained that the state doesn't currently license firearms but the governmental fee was included to accommodate that future eventuality.

Continuing with sectional analysis, he said that Sec. 08.76.240 deals with redeeming pledged property. Sec. 08.76.250 deals with extending pawn agreements if the pledgor isn't able to redeem their property after the agreed time. This provides an automatic 30-day extension with a negotiated agreement beyond that time. Sec. 08.76.260 deals with the safe and secure storage of property left in the pawnshop. Sec. 08.76.270 deals with the

redemption of property and paying the financed amount and the finance fee. Sec. 08.76.280 deals with the military exemption and aligns with the Civil Relief Act.

2:02:02 PM
CHAIR FRENCH added that this provision basically freezes the interest charges for military personnel who are called away to duty.

MR. TEMPEL agreed; when a service member deploys interest on the pawned item freezes until [60 days after] he or she returns, at which time the prior agreement is in effect.

Sec. 08.76.290-76.310 talks about who pawnshops can hire and prohibits waivers of consumer rights that are granted in statute. Sec. 08.76.320-76.400 talks about stolen property and hold orders that police and courts can issue. Sec. 08.76.410 requires pawnshops to report their inventory to local law enforcement on a weekly basis. Sec. 08.76.430 gives police the ability to inspect pawnshops and their books when deemed necessary. Sec. 08.76.440 provides disciplinary measures for pawnbrokers. Sec. 08.76.460 talks about how to bring municipal pawnbroker regulations into compliance with the new statutory requirements. [Sec. 08.76.590] contains definitions.

2:04:31 PM
Section 6 defines pawnbroker for the Uniform Commercial Code. Section 7 repeals the electronic recording requirements [in AS 08.76.010(b) and 08.76.040.] Section 9 talks about transitioning municipal licensing the state. Sections 11 and 12 establish an effective date of July 1, 2011.

CHAIR FRENCH recalled that during the 2007 crime summit the Wasilla police chief argued for electronic pawn reporting to help deal with stolen property issues. Noting that a bill instituting that was passed the next year, he asked what the feedback had been and why that should be rolled back.

MR. TEMPEL said the sponsor is willing to return to what this committee passed in 2007, but the bill was written to accommodate those pawnbrokers who run an honest business but quite simply don't like using computers and don't want to spend $7,000-$10,000 for an electronic system. He added that most pawnbrokers in the state already use electronic reporting and by most accounts the police are happy with the relationship.

2:07:28 PM

MR. TEMPEL noted that he contacted the Wasilla Police Department and the current investigator indicated that things are working fairly well in the Mat-Su Valley. The investigator supports electronic reporting in the future, but doesn't believe that it's essential right now.

CHAIR FRENCH asked what's included in an electronic report and if it's in spreadsheet format.

MR. TEMPEL said the report is a list of everything in the shop in a format similar to a spreadsheet. The program that tracks the items is expensive and it's necessary if the pawnbroker does electronic reporting.

SENATOR EGAN referenced Sec. 08.76.190 on page four and asked if pawnbrokers could record items electronically.

MR. TEMPEL replied it can be done either way right now.

2:10:06 PM
SENATOR WIELECHOWSKI observed that the language on page 2, lines 7-10, must be very old since it doesn't include any reference to TVs or computers. He asked if the sponsor had considered amending that language.

ME.TEMPEL agreed that it's old language, but it isn't exclusive so anything with an identifying number could be included. He noted that this section applies to second hand articles rather than pawned items.

SENATOR WIELECHOWSKI pointed out that there is similar language in Section 5 on page 4, lines 8-11.

MR. TEMPEL said the sponsor would be happy to add to the list, but it's difficult to know where to stop list. He reiterated that the current language isn't exclusionary.

SENATOR WIELECHOWSKI asked if it's common practice for pawnbrokers to record identifying numbers for the pawned item.

MR. TEMPEL answered yes.

SENATOR WIELECHOWSKI asked if pawnbrokers are legally required to record identifying numbers on all items because he doesn't read it that way.

MR. TEMPEL read the language on page 4, lines 8-11, and said it includes a firearm, a watch, a camera, or optical equipment, but it's not limited to those items.

2:13:29 PM
SENATOR EGAN agreed with Senator Wielechowski's interpretation.

MR. TEMPEL said the sponsor would be happy to add items if it's not clear.

CHAIR FRENCH said he sympathetic to people who don't want to work with computers, but he'd hate to go backwards on electronic reporting.

SENATOR EGAN asked for confirmation that Sec. 08.76.460 on page 12, line 24, says that municipal regulations can't be more restrictive than state regulations.

2:16:28 PM
MR. TEMPEL explained that this removes the licensing and regulating burden from municipalities and provides statewide uniformity.

SENATOR EGAN asked if municipalities would adopt this under ordinance.

CHAIR FRENCH said a municipality could elect to adopt an ordinance but it couldn't be more restrictive than the state statute.

SENATOR EGAN opined that including the section didn't make much sense.

SENATOR WIELECHOWSKI agreed that it's a little unusual.

2:19:16 PM
CHAIR FRENCH announced he would hold SB 292 in committee.

SB 241-POST-CONVICTION DNA TESTING; EVIDENCE

CHAIR FRENCH announced the consideration of SB 241. It was heard previously.

2:19:41 PM
BILL OBERLY, Executive Director, Alaska Innocence Project, said his testimony is supplementing the written testimony he submitted when bill was introduced. He described SB 241 as a

very important piece of legislation that does not do what the title indicates. As currently written the bill it is a post-conviction DNA restricting bill rather than a post-conviction DNA testing bill. It will hinder innocent people who are trying to use DNA testing to prove their innocence and it will hinder law enforcement because an innocent person in jail means the actual perpetrator is free to assault again, he said.

Page 10, lines 11-23, and page 16, line 28-30, which both address timeliness, shouldn't be in the bill, he said. Innocent people will bring their action for testing as soon as they are able to do so. [Sec. 12.73.040] speaks of presumptions of timeliness, but once in court the judge will look at it as a burden that the claimant has to overcome. He highlighted that of the 251 cases nationally where people have been exonerate using DNA evidence just one or two would have been brought within the three-year time restriction in the bill.

MR. OBERLY noted that the House deleted the provision on page 9, lines 3-5 and lines 10-13 and suggested this committee do the same. It says that if a person didn't test at the trial level they don't get to ask for DNA testing post conviction. He pointed out that failure to test at the trial level is often the attorney's decision so this provision simply adds to the misfortune of someone who has been misrepresented at the trial level.

2:25:10 PM
MR. OBERLY said the restriction relating to concession of guilt on page 8, lines 5-7 and lines 29-30 should be removed from the bill. It says that if a person admitted guilt in an official proceeding, he or she cannot request or get DNA testing post-conviction. This is an unfair restriction on people who confessed for reasons other than their guilt and are trying to undo their wrongful confession, he said.

MR. OBERLY suggested that the language on page 9, lines 24-29 relating to the standard required for post-conviction DNA testing orders should be replaced with the following language: "(10) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing." He related that twenty other states use that language and it's proven to be an effective standard.

Page 3, lines 29-31 and page 11, lines 17-18 the person who has been wrongfully convicted pay for the retrieval of the evidence

to prove his or her innocence. The practical effect is to prevent people from being able to make the claim. He pointed out that no other state has such a restriction.

MR. OBERLY highlighted his experience as a criminal defense attorney and familiarity with innocence work and concluded that this bill will weigh more heavily on people in Bush Alaska and among Alaska Natives.

2:28:47 PM
MR. OBERLY said his final point relates to expanding the task force to provide a more full perspective. The provisions on page 15, lines 16-24, should be expanded to deal with the issues of retention and disposal that are raised in the legislation and the membership should be expanded to include the criminal defense community, legislators, the Alaska Native Justice Center, and the Alaska Innocence Project.

MR. OBERLY said the Alaska Innocence Project believes that these changes are the absolute minimum needed to make the bill a post-conviction DNA testing bill. These changes would allow those with legitimate innocence claims to get testing and allow law enforcement to effectively identify and catch the real perpetrators. He asked the committee to consider making the suggested amendments and correct the restrictions that would keep people from making claims when they have a legitimate innocence claim.

2:31:02 PM
BARB BRINK, representing herself, said she is testifying from the perspective of 23 years as an Alaska public defender. She related that she appreciates that the bill was introduced, but she agrees with Mr. Oberly that the procedural and financial barriers that it sets up will preclude innocent people from obtaining DNA testing. In fact, it's more likely to keep an innocent person in jail than no bill at all. She highlighted the remarkable statistic that in the history of the state not even one convicted person has been able to access the evidence for post conviction DNA testing.

MS. BRINK said that while the proposed new section on preservation of evidence has some deficiencies that are cause for concern. Page 3, lines 14-17, says that a law enforcement agency does not have to preserve physical evidence if it's "impractical" or "hazardous" to do so. This creates lesser standards of due process for those citizens who are convicted of crimes in rural Alaska and it doesn't explain who decides what

is "impractical" or "hazardous." She asked the committee to remove all of subsection (b) on page 3, lines 14-24.

MS. BRINK suggested the committee remove subsection (e), page 4, lines 1-18 because it has serious constitutional deficiencies. It creates a presumption that evidence can be destroyed if nobody responds in writing within 120 days. This doesn't accommodate the convicted person who is illiterate, who doesn't speak English as their first language, or who has been moved out of state by the Department of Corrections and hasn't gotten their mail. She further pointed out that after one year a convicted person no longer has appointed counsel.

2:35:35 PM
MS. BRINK said page 2, lines 30-31, and page 3, lines 1-6, talk about preserving evidence through the state trial process but then allow it to be destroyed before the federal review. This doesn't make sense. She suggested amending subparagraph (C) on page 3, lines 3-6, to allow for a timely application for post-conviction release. Add the language "one year" after the word "paragraph" and add subparagraph (D) that states that "the timely petition for writ of habeas corpus is filed in federal court, the date that a judgment or order dismissing or denying the petition for writ of habeas corpus becomes final." This would allow a person to exhaust all remedies and doesn't create an arbitrary process for destroying evidence too soon, she said.

MS. BRINK said she also has concerns about the testing procedures. Of greatest concern is on pages 7-8, lines 11-17. Section 6 requires an affidavit by the trial lawyer about the efforts that were made to get DNA testing and why DNA testing was not sought at trial. Then the judge has to make a finding that the lawyer didn't forgo this testing for some tactical reason and that the theory of the defense at trial was not inconsistent with an innocence claim post-conviction. It also requires that the judge find that the identity of the perpetrator was disputed at trial. This is an insurmountable barrier for an innocent person because it requires perfection and prescience on the part of the defense attorney. This is unrealistic and discounts the reality that bad lawyering is one of the most prevalent reasons that innocent people get convicted. She cited a recent Illinois study that showed that bad lawyering accounted for 21 percent of death row exonerations. An overworked attorney can fail to investigate, fail to find a witness, or make an error in judgment. If an innocent person is convicted because of this they shouldn't stay in jail but that's what those sections require, she said.

2:38:58 PM
MS. BRINK said it doesn't make sense that the bill requires that the applicant has not admitted or conceded guilt in an official proceeding when the reality is that in 25 percent of the cases where people have been exonerated, they have been able to show that the defendant confessed or admitted to something that they did not do. It’s a poor system for the state to make an unbeatable hurdle that someone cannot overcome, she said.

MS. BRINK agreed with Mr. Oberly that the timeliness restrictions should be eliminated because timeliness is completely unrelated to guilt or innocence. She said she also agrees that there should be no requirement for a judge to find certainty as to what might happen in the DNA testing before testing is allowed to go forward. The worst thing that could happen is that the DNA would show that the person is guilty and they'd stay in jail. She said she also agrees that the cost of procuring evidence or additional testing should not be put on the person claiming innocence. She opined that these hurdles assume that there are no innocent people in jail, which ignores the reality of the system.

2:41:32 PM
MS. BRINK highlighted that of the 251 people in the country that have been exonerated, all had trials that were thought to be fair, they all had appeals that were thought to be complete, they all had petitions for review and post-conviction release that were thought to be adequate. Even so, they were still all wrong and those people were innocent.

She stated agreement with Mr. Oberly's suggestion to expand the task force and asked the committee to remember that the average innocent person who is exonerated by DNA has already lost 13 years of their life in jail. 70 percent of those who were exonerated are members of minority groups and in 40 percent of those cases DNA identified the actual criminal. In conclusion she asked the committee to draft a bill to make it easier for an innocent person to be exonerated and not more difficult.

CHAIR FRENCH confirmed that she is currently working in the federal system and asked if she knows what the federal provisions are with respect to post-conviction DNA testing.

MS. BRINK said that's a highly specialized area and there's just one lawyer in her office that is familiar with the writs of habeas corpus.

2:43:43 PM

QUINLAN STIENER, Public Defender, Public Defender Agency, Department of Administration, said he would focus on the impact that SB 241 would have on the agency.

Section 3, page 4, line 11, lists an attorney for the prosecution in the notice requirement. To ensure that notice is complete, he suggested making that reference plural or adding a separate list because there could be a series of attorneys in the case and the trial attorney may be the most removed at the time the evidence is considered for disposal.

Section 6, page 8, line 29, relates to the findings required for post-conviction DNA testing orders. Paragraph (3) prohibits relief for people who have falsely confessed in an official proceeding. That could be interpreted to apply to guilty or no contest pleas. He noted that guilty pleas were specifically excluded from that prohibition in the House bill. Studies indicate that people do falsely confess and it's clear that under pressure innocent people to plead no contest.

2:46:22 PM

Page 8, line 31, paragraph (4) prevents testing of evidence from another prosecution or third-party suspect. As written the language could be interpreted as being limited to the particular case where the evidence that might need to be tested could have been collected in another criminal prosecution or it might be required from another person, typically a suspect. That language conflicts with the language on page 10 line 31, which gives the judge broad authority to order testing. A narrow interpretation could prevent someone from bringing a claim even though the evidence exists.

Page 9, line 2, will have a large impact on the Public Defender Agency. It will foreclose the opportunity to obtain post-conviction DNA testing if somebody elected not to test the evidence at the original trial. That provision would put pressure on attorneys to test everything and would ultimately foreclose an opportunity for relief if an attorney elected not to test the evidence even when it might have been a reasonable decision. That section was removed from the House version.

On page 9, lines 19 and 22, paragraphs (8) and (9) would require someone to have contested identity at trial. There may be situations where the client says they weren't there, but the evidence establishes a legitimate self defense claim and a trial attorney could reasonably elect that defense over identity. The client has no control over that. A person could technically claim self defense and "I wasn't there" at the same time, but it

would be inconsistent and most people would choose not to do that.

2:50:12 PM
Page 9, lines 24-29, has a requirement of reasonable probability that conclusively establishes innocence This puts two standards together creating inconsistency and ambiguity. He suggested rewording the section to say that the DNA testing, if favorable, will produce new material evidence and noted that the House version deleted the word "conclusively" from line 29.
Page 10, lines 17-22, relating to timeliness. Subparagraph (A), lines 20-21 defines timeliness as the applicant was incompetent and that substantially contributed to the delay. Lines 22-23 have a broad good cause requirement, but there's also a definition of what will also constitute good cause. The risk is that a judge will interpret that as being some standard of what good cause might be, which limits the interpretation. In other areas of statute you start to limit once you start defining things so this could restrict the intent good cause requirement. Also, timeliness would likely lead to litigation about what good cause is.

2:56:45 PM
CHAIR FRENCH asked Ms. Carpeneti if she'd like to respond to the testimony that was given today.

ANNIE CARPENETI, Assistant Attorney General, Criminal Division, Department of Law (DOL), introduced herself.

ORIN DYM, Forensic Laboratory Manager, Statewide Crime Lab, Department of Public Safety (DPS), introduced himself.

MS. CARPENETI acknowledged the concern about the timeliness factor and noted that the House removed the paragraph about incompetence because it may set a bar for other good cause. She clarified that the intent is to say that there is a timeliness presumption to encourage people to bring the application sooner rather than later. "Good cause is not a very high standard to meet and for that reason we feel a timeliness requirement should remain in the bill," she said.

MS. CARPENETI said SB 241 generally follows federal law and the Innocence Project in the oral arguments in the Osborn case generally agreed that it was the gold standard for statutes dealing with post-conviction relief. She noted that the attorney decision at the trial level to test or not was removed from the House version and that's acceptable to the state.

With respect to the concession of guilt, the state understands that some people plead guilty or nolo contendere for reasons other than the fact that they are guilty. She noted that the House version specified that for purposes of this chapter, a plea of guilty or nolo contendere is not a concession or admission of guilt. She pointed out that the statutes do not define the police interrogation of a person as an official proceeding so a confession in that venue would not be an admission or concession of guilt.

MS. CARPENETI said she understands Mr. Oberly's concern about the standard required for post-conviction DNA testing orders, but it's fairly clear and is similar to the federal statutes. It doesn't require a judicial officer to make any greater speculation or guess than any other decision he or she makes every day, all day. she said.

She said she also understands Mr. Steiner's point but she believes that it's clear that the bill is talking about reasonable probability that this test, if ordered, would provide material evidence that could establish innocence. She noted that at the state's suggestion the word "conclusively" was removed from page 9, line 29, of the House version.

3:01:29 PM
MS. CARPENETI said that with respect to paying for retrieval of evidence, most of the people who will bring these applications will be represented by public lawyers and they won't have to pay. The House version added a specific provision that a person doesn't have to pay for retrieval of evidence if he or she can't afford to do so. She reported that this provision is the result of a question that came up in a certain case where retrieval was very expensive. The notion is that if the applicant can pay that might be better than the police department or the state having to paying.

MS. CARPENETI referred to Ms. Brink's testimony and explained that retention of evidence is new duty on police departments and some don't have the ability to save everything that is collected in connection with a prosecution or investigation. This provision specifically allows the police to save cuttings or samples when it's not reasonable or feasible to store the whole thing. The bill does require police departments to adopt and follow written procedures for doing so.

MS. CARPENETI said she would review the provision on the limits for keeping physical evidence because she understood that it covered all litigation in the federal arena as well. She added that there are other statutory remedies post-conviction for people who have been represented by ineffective lawyers.

3:04:53 PM

CHAIR FRENCH related that in 2004 the federal statutes were passed in a bipartisan effort and signed into law by President Bush. He said that he's leaning toward the federal model for this bill and before the next meeting he'd like to hear why the state shouldn't use that gold standard.

CHAIR FRENCH held SB 241 in committee.

There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee hearing at 3:05 p.m.