

SB

110

Senator Hollis French

Capitol Room 417
465-3892
465-6595 fax



Pages (including cover sheet): 4

Date: April 6, 2009

To: LAA Legal

From: Cindy Smith

RE: As passed CS for SB110

Please make the amendments, attached, to CSSB110 (LS0560\E). Please call me if you have any questions.

Cindy

SB 110

AMENDMENT # 1

moved

OFFERED IN THE SENATE BY

TO: SB 110

Page 4, following line 3:
~~Page 3, following line 25:~~

Insert new bill sections to read:

**** Sec. 2.** AS 44.41.035(g) is amended to read:

(g) A person from whom a sample has been collected under this section

(1) may inspect and obtain a copy of the identification data regarding the person contained within the DNA identification registration system; and

(2) may request the Department of Public Safety to destroy the material in the system regarding the person under the provisions described in (i) of this section.

*** Sec. 3 .** AS 44.41.035(i) is amended to read:

(i) The Department of Public Safety shall [, UPON RECEIPT OF A COURT ORDER,] destroy the material in the system relating to a person or minor upon the written request of the person or minor, if the request is accompanied by a certified copy of a court order indicating that [THE COURT SHALL ISSUE THE ORDER IF] the person's or minor's DNA was included in the system under

(1) (b)(1) or (2) of this section, and the court order establishes [DETERMINES]

that

(A) the conviction or adjudication that subjected the person to having a sample taken under this section was [IS] reversed; and

(B) the person

(i) was [IS] not retried, readjudicated, or convicted or adjudicated for another crime that requires having a sample taken under this section; or

(ii) after retrial, was [IS] acquitted of the crime or after readjudication for the crime was [IS] not found to be a delinquent, and was [IS] not convicted or adjudicated for another crime that requires a sample under this section;

(2) (b)(6) of this section and the court order establishes [DETERMINES] that

(A) the person arrested was released without being charged; [OR]

(B) the criminal complaint, indictment, presentment, or information for the offense for which the person was arrested was dismissed, and a criminal complaint, indictment, presentment, or information for an offense requiring submission of a DNA sample was [IS] not refiled; or

(C) the person was found by the trier of fact to be not guilty of the offense for which the person was arrested, and was not convicted of another offense requiring submission of a DNA sample under (b)(1) or (2) of this section.

* Sec. 4. AS 44.41.035 is amended to read by adding a new subsection to read:

(r) A DNA sample collected or placed in the DNA identification registration system, that was taken or retained in good faith, may be used as provided by law in a criminal investigation. Evidence obtained from a match from a data collection system may be used in a criminal prosecution if the DNA sample was taken or retained in good faith, even if the DNA sample is later removed from the DNA identification registration system.”

Renumber the following bill sections accordingly.

Offered in the Senate

#2 ✓

TO: CSSB 110 LS0560\E

By:

On page 3 at line 19, delete the language in (h) and replace with

A person may not bring a civil action for damages against the state or political subdivision of the state, their officers, agents, or employees, or a law enforcement agency, its officers, or employees for any failure to comply with the provisions of this section.

✓
unintentional

#4

Offered in the Senate

#3

TO: CSSB 110 LS0560\E

At page 4, line 18, insert:

(8) a representative of the State Crime Lab.

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355



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Joseph Young
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Wrangell
Pres. Wrangell Chapter

March 27, 2009

Senator Hollis French
Alaska State Senate
State Capitol
Juneau AK 99801-1182

Dear Senator French:

On behalf of the Alaska Peace Officers Association (APOA), I am writing regarding your introduction of SB 110, an act relating to the preservation of evidence.

The APOA State Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously oppose this bill. We believe this would be over burdensome for a number of agencies. Our suggestion would be amending the bill for time limits and/or storage options after all appeals are exhausted—maybe the Crime Lab.

We urge you to reconsider this legislation. Please contact the APOA office in Anchorage at 277-0515, if you have any questions.

Sincerely,

Angella Long
State President

26-LS0560\E
Luckhaupt
3/17/09

CS FOR SENATE BILL NO. 110(JUD)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATOR FRENCH

A BILL
FOR AN ACT ENTITLED

1 **"An Act relating to the preservation of evidence."**

2 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

3 *** Section 1.** AS 12.36 is amended by adding a new section to read:

4 **Article 2. Preservation of Evidence.**

5 **Sec. 12.36.200. Preservation of evidence.** (a) Notwithstanding AS 12.36.010 -
6 12.36.090, the Department of Law, the Department of Public Safety, the Alaska Court
7 System, or a municipal law enforcement agency shall preserve

8 (1) all evidence that is obtained in relation to an investigation or
9 prosecution of a crime under AS 11.41.100 - 11.41.130, 11.41.410, or 11.41.434 for
10 the period of time that the crime remains unsolved;

11 (2) biological evidence in an amount and manner that is sufficient to
12 develop a DNA profile from any material contained in or included on the evidence
13 that was obtained in relation to the prosecution of a person convicted of, or
14 adjudicated a delinquent for, a crime under AS 11.41.100 - 11.41.130, a person
15 convicted of a crime after being indicted under AS 11.41.410 or 11.41.434 while the

1 person remains a prisoner in the custody of the Department of Corrections or subject
2 to registration as a sex offender, or a person adjudicated a delinquent for a crime after
3 the filing of a petition alleging a violation of AS 11.41.410 or 11.41.434 while the
4 person remains committed to a juvenile facility or subject to registration as a sex
5 offender.

6 (b) Under (a) of this section, an agency is not required to preserve physical
7 evidence of a crime that is of a size, bulk, quantity, or physical character that renders
8 preservation impracticable. When preservation of evidence of a crime is impracticable,
9 the agency shall, before returning or disposing of the evidence, remove and preserve
10 portions of the material likely to contain relevant evidence related to the crime in a
11 quantity sufficient to permit future DNA testing. In making decisions under this
12 section, an agency shall follow written policies on evidence retention.

13 (c) Upon written request of a person convicted of a crime and a prisoner,
14 adjudicated delinquent for a crime and committed, or subject to registration as a sex
15 offender, an agency shall prepare or provide an inventory of biological evidence that
16 has been preserved under (a)(2) of this section in connection with the person's criminal
17 case.

18 (d) An agency required to preserve biological evidence under (a) of this
19 section may destroy biological evidence before the expiration of the time period in
20 (a)(2) of this section if

21 (1) the agency is not required to maintain the evidence under another
22 provision of state or federal law;

23 (2) the agency mails a certified delivery of notice of intent to destroy
24 evidence to

25 (A) each person who remains a prisoner or committed or
26 subject to registration as a sex offender for the crime for which the evidence
27 was preserved under (a)(2) of this section;

28 (B) the attorney of record for each person listed in (A) of this
29 paragraph;

30 (C) the Public Defender Agency;

31 (D) the district attorney responsible for prosecuting the crime;

1 and

2 (3) no person who is notified under (2) of this subsection, within 120
3 days after receiving the notice,

4 (A) files a motion for testing of the evidence; or

5 (B) submits a written request for continued preservation of the
6 evidence.

7 (e) Upon receipt of a request for continued preservation of biological evidence
8 under (d)(3)(B) of this section, an agency may petition the court for permission to
9 destroy the evidence. The court may grant the petition if the court finds that the
10 request is without merit or that the evidence has no significant value for biological
11 material.

12 (f) When an agency is required to produce biological evidence required to be
13 preserved under this section and the agency is unable to locate the evidence, the chief
14 evidence custodian of that agency shall submit an affidavit, executed under penalty of
15 perjury, describing the evidence that could not be located and detailing the efforts
16 taken to locate the evidence.

17 (g) If a court finds that evidence was destroyed in violation of the provisions
18 of this section, the court may order remedies the court determines to be appropriate.

19 (h) The unintentional failure of an agency to preserve evidence as required by
20 this section is not a basis for civil liability.

21 (i) In this section,

22 (1) "agency" means the Department of Law, the Department of Public
23 Safety, the Alaska Court System, or a municipal law enforcement agency;

24 (2) "biological evidence" means

25 (A) the contents of a sexual assault forensic examination kit;

26 (B) semen, blood, hair, saliva, skin tissue, fingernail scrapings,
27 bone, bodily fluids, or other identifiable human bodily material, collected as
28 part of a criminal investigation;

29 (C) a slide, swab, or test tube containing material described in
30 (B) of this paragraph; and

31 (D) swabs or cuttings from items that contain material

1 described in (B) of this section;

2 (3) "DNA" means deoxyribonucleic acid;

3 (4) "prisoner" has the meaning given in AS 33.30.901.

4 * **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to
5 read:

6 **TASK FORCE ON STANDARDS AND TRAINING OF EVIDENCE**
7 **TECHNICIANS.** (a) The Task Force on Standards and Training of Evidence Technicians is
8 created in the Department of Law. The task force consists of the following persons appointed
9 by the governor:

10 (1) the attorney general;

11 (2) the public defender;

12 (3) the director of the office of public advocacy;

13 (4) a chief of a municipal police department not on the state's interconnected
14 road system;

15 (5) the commissioner of public safety;

16 (6) a chief of a municipal police department; and

17 (7) a representative of the Alaska Innocence Project.

18 (b) There shall be three ex officio members of the task force as follows:

19 (1) a member of the House Judiciary Committee selected by the speaker of the
20 house of representatives;

21 (2) a member of the Senate Judiciary Committee selected by the president of
22 the senate; and

23 (3) the victims' advocate.

24 (c) Persons appointed under (a) of this section or identified under (b) of this section
25 may select a designee from the same agency or organization to act on the person's behalf as a
26 member of the task force.

27 (d) Not later than December 31, 2011, the task force shall

28 (1) devise standards regarding the proper collection, retention, and cataloging
29 of evidence, for ongoing investigations and prosecutions;

30 (2) recommend practices, protocols, models, and resources for the cataloging
31 and accessibility of preserved evidence.

1 * **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to
2 read:

3 **APPLICABILITY.** AS 12.36.200, enacted in sec. 1 of this Act, applies to all evidence
4 in the possession of an agency listed in AS 12.36.200(a) on the effective date of this Act for
5 crimes committed before the effective date of this Act and all evidence collected on or after
6 the effective date of this Act.

7 * **Sec. 4.** Section 2 of this Act is repealed January 1, 2012.

Alaska State Legislature

Senator Hollis French, Chair
State Capitol, Room 417
Juneau, Alaska 99801
Phone: (907) 465-3892
Fax: (907) 465-6595



Committee Members:
Senator Bill Wielechowski
Senator Kim Elton
Senator Lesil McGuire
Senator Gene Therriault

Senate Judiciary Committee

MEMORANDUM

March 10, 2009

TO: Jerry Luckhaupt, Leg Legal

From: Cindy Smith

RE: new CS for SB110 Preservation of Evidence 26-LS0560\A

Please prepare a Judiciary CS for SB110 with the following amendments:

1. Add language to include juveniles adjudicated for the offenses to the requirements in (2) on page one.
2. On page two in (b) please add language that says that in determining what evidence cannot be kept due to size etc., the agency will abide by its written policies on evidence retention.
3. On page 2 at line 25, after (d), the Department of Law and at least one committee member thought an "and" should be inserted, but we all defer to the wisdom the drafter as to whether this is correct!
4. After (g) on page 3, please add a provision like those developed in victims' rights that provides immunity to agencies from civil suits for unintentional loss or destruction of evidence.
5. Please eliminate the Supreme Court appointment on the task force (page 4 at line 10) and roll the dates back on the task force and the repealer by a year (lines 19 and 30).

6. Please add the provisions on DNA destruction, attached (Law drafted this language - feel free to redraft if/as needed. These are provisions needed to meet CODIS requirements - I don't know if you will need to make any changes to the bill's title or not...

Thanks, Jerry! Call me if you have any questions: 465-6641

ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE
February 25, 2009
1:37 p.m.

MEMBERS PRESENT

DRAFT

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 NORGARD, 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

1:37:16 PM

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.

1:39:14 PM

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.

1:42:45 PM

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 CARPENETI, 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.

1:45:18 PM

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.

1:47:55 PM

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.

1:49:23 PM

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.

1:51:24 PM

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.

1:54:17 PM

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.

1:57:42 PM

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.

1:59:19 PM

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.

2:03:21 PM

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.

2:07:50 PM

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.

2:13:22 PM

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 standardized 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.

2:14:32 PM

RICH NORGARD, 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. NORGARD 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.

2:17:47 PM

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.

2:22:13 PM

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.

2:23:49 PM

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.

2:26:19 PM

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.

2:28:14 PM

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.

2:32:04 PM

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.

2:34:31 PM

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.

2:37:25 PM

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.

2:40:21 PM

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.

2:43:16 PM

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.

2:45:25 PM

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



SENATOR FRED DYSON

February 25, 2008

Senator Hollis French
Alaska Senate
Juneau, AK 99801

Dear Hollis,

Further to our brief conversation about your bill on evidence SB110 I have two concerns that might be addressed in your bill.

RELEASE OF EVIDENCE TO THE VICTIM

I have a constituent who runs a boat building shop. Two "potential customers" visited his shop, looked around and left. That night \$35,000 worth of boxed marine electronics were stolen. The shop owner called APD filed a report and then got busy trying to locate his client's stolen equipment. He found most of it in local hock shops and some on Craig's list. He also got most of the information on the perpetrator's identities which he turned over to APD. The police probably had other priorities and I do not think that a trial has happened yet. Never the less, the boat builder has been forced to purchase identical equipment for his client because the police have not released the stolen evidence, even after 2+ years.

I have done some research and it appears that our state statues do a good job of authorizing the release of evidence after police have recorded it (generally photographs) and documented the chain of custody. The problem is that it largely doesn't happen. I talked with Walt Monegan and one prosecutor and it seems that the victim's property problem is not high priority for the overworked prosecutors and they have to get an approval form the defense attorney to release the stolen goods. Walt says the prosecutor could by-pass the defense attorney problem by going to a magistrate for release approval, but that is a bit of a hassle.

At Walt's suggestion, I am going to write to the State and local prosecutors offices, asking them to help these stolen property victims. I may also contact the Attorney General's office.

I would like you to consider adding a sentence or section to your bill making it very clear that police and prosecutors have a clear duty to get stolen material returned to the victims as soon as possible except in the rare cases when the properties appearance in court is essential to the prosecution's case.

Senator Hollis French

February 27, 2008

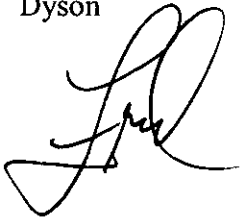
Page 2

RETENTION OF DNA FOR INNOCENT CITIZENS

I have a UofA professor in my area who is adamant that when a citizen's DNA is taken by law enforcement, it should be destroyed when the citizen is no longer being considered for criminal prosecution. The civil libertarian part of me is attracted to this issue but I understand the other considerations. Lt. Dave Parker of APD says that DNA often proves more people innocent than guilty. I am of two minds about this and I would appreciate your thoughts on it. I did tell my constituent Bill Kirk that I would talk to you about it.

I would greatly appreciate your consideration of both of these issues.

Dyson

A handwritten signature in cursive script, appearing to read 'H French', written in black ink.

INNOCENCE PROJECT



Benjamin N. Cardozo School of Law, Yeshiva University

**WRITTEN TESTIMONY OF REBECCA BROWN
POLICY ANALYST, INNOCENCE PROJECT
BEFORE THE ALASKA SENATE JUDICIARY COMMITTEE
RE: SB 110 – AN ACT RELATING TO THE PRESERVATION OF EVIDENCE
FEBRUARY 25, 2009**

Thank you for the opportunity to speak before you today and submit written comments for your consideration of SB 110, which would mandate the preservation of certain probative biological evidence and create a task force for the development of standards on the same.

In the emerging DNA era, preserving and readily retrieving evidence from adjudicated cases has clear benefits for all members of the criminal justice system. As we recognize the incredible identification power of DNA evidence, it has also become clear that amazing crime solving potential resides, latent, in biological evidence from crime scenes. Innocence claims can be settled. “No subject” cold cases can be solved. True culprits can be identified. In addition, crime scene DNA can provide “value added” by enabling us to link an unknown perpetrator of a given crime to other crimes - across time periods and across jurisdictions.

In the Justice for All Act of 2004, Congress recognized the importance of preserved biological evidence by strongly enhancing federal preservation of evidence policies and making hundreds of millions of dollars in authorized state grant programs contingent upon proper preservation practices. In doing so, Congress recognized that modernizing evidence retention practices not only benefits the potentially innocent; properly preserved biological evidence also allows law enforcement to solve decades-old, previously unsolvable cases.

Determining questions of fact in our criminal justice system is an unavoidably imperfect venture. While the system surely gets it right in the vast majority of cases, in an important minority of cases credible questions of innocence linger. Where that is the case, post-conviction DNA testing of biological evidence can also provide true finality in the face of lingering doubt by proving guilt or strong evidence of actual innocence. To be able to ensure justice, however, that biological evidence must have been preserved, and saved in such a way that it can be located when necessary.

A clear examination of all facets of this issue will show that the benefits of ensuring a comprehensive evidence preservation scheme far outweigh the costs, that it is an endeavor most efficiently and effectively undertaken statewide, and that changes to current practice will enhance Alaska’s crime-solving potential.

Technological advances make preserved evidence a critically important tool for justice

Modern DNA technology, coupled with today’s comprehensive information and communications technology, has exponentially increased the power of preserved evidence, to levels unimaginable just a generation ago. DNA found at crime scenes can now, with a simple keystroke, be compared to DNA found at other crime scenes as well as the DNA of millions of individuals, thereby linking previously un-linkable cases and perpetrators to one another. As a result, evidence preservation practices that may have seemed adequate – if still a bit disconcerting – in the early 1980’s are today an incredible waste of criminal justice potential. Our governments can be forgiven for their failure to

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anticipate the future power of preserved evidence, but there is no excuse for perpetuating this situation in light of preserved evidence's new power to provide justice in some of our most serious and violent cases.

Many of these serious and violent cases could not have been solved even a few years ago. A review of the National Institute of Justice's list of items where biological evidence can be found in criminal cases illustrates the variety of items that can be successfully tested with improved technology: fingernail scrapings analyzed with Y DNA tests; skins cells in the hinge of eyeglasses; dandruff, saliva, hair, sweat, and skin cells from hats, bandanas and masks; saliva cells on tape or ligatures; traces of blood on a bullet; traces of blood and/or hairs on, or in the crevices of, a variety of weapons used to inflict injury; or even blood and tissue cells swabbed from the bullet inside a gun, identifying the person who might have last loaded it.¹ The list of these evidence items that are being successfully tested now, but could never have been tested successfully only a few years ago, is enormous. I have attached an appendix to this statement in which I describe just a few cases where innocence was proven through more modern DNA testing methods.

Tapping this potential is as simple as properly identifying, collecting, preserving, storing, and organizing biological crime scene evidence. The task before Alaska is to undertake this process in order to make evidence— and in particular, biological evidence - readily accessible when it is sought to advance justice.

The alternative is for Alaska to fail to preserve evidence in a manner that allows its ready retrieval. This would needlessly result in failure to solve solvable crimes and denial of justice to victims. It would also prevent the wrongfully convicted from proving their innocence and leave the public at large vulnerable to previously unidentified offenders who are eminently identifiable.

SB 110: A Conservative Approach

As compared to other state laws mandating the preservation of evidence, SB 110 has a modest approach. While some states go so far as to require biological evidence retention in all crimes, or even all felony crimes, SB 110 defines a narrow category of crimes for which evidence must be preserved (e.g. A.S. 11.41.100- 11.41.130; 11.41.410; or 11.41.434). Further, while SB 110 requires the preservation of "all evidence" associated with certain unsolved crimes, it creates a restricted threshold for the retention of biological evidence associated with those cases in which an innocent person might seek to obtain postconviction DNA testing. For these cases, SB 110 only requires that biological evidence "in an amount and manner that is sufficient to develop a DNA profile" is retained.

Indeed, because the evidence that is preserved for the purposes of solving a cold case is no different from the type of evidence that is retained for the purposes of settling an innocence claim, I would

¹ In the 2002 report by the National Institute of Justice, "Using DNA to Solve Cold Cases" available at <http://www.ncjrs.gov/pdffiles1/nij/194197.pdf>, the authors identify "some common items of evidence that may have been collected previously but not analyzed for the presence of DNA evidence (Exhibit 4), p. 21.



recommend the following small changes to the proposed legislation:

- 1) In section (a)(2), I recommend changing the term "all evidence" to "biological evidence" so that the entire clause reads: "~~all~~ *biological* evidence that is obtained in relation to an investigation or prosecution of a crime under A.S. 11.41.100- 11.41.130, 11.41.410, or 11.41.434 for the period of time that the crime remains unsolved."

This recommendation is based on the idea that there should be no differentiation between evidence saved for the purposes of solving a cold case and evidence saved for the purposes of settling a claim of innocence. The guidelines defining what evidence should be retained should be the same in both scenarios. By making this change to the language, it will be made clear to evidence custodians that there is only one standard guiding what evidence needs to be retained.

- 2) In section (h)(2)(B), for the purposes of clarity, I would add the following clause: "*any physical item that contains* semen, blood, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or other identifiable human material, collected as part of the criminal investigation."

This recommendation is predicated on the notion that biological evidence itself is generally culled from physical items collected at crime scenes. In many cases, those physical items contain biological evidence that was never tested at trial. Under the framework currently contemplated in SB 110, a test tube containing an extract of what is believed to be probative biological material from trial may be preserved for posterity, while the physical item from which that extract was obtained and that may contain other additional evidence that would prove more probative, can be destroyed. Since this legislation already contains a clause aimed at addressing law enforcement concerns about the possible burden of saving unnecessary evidence (i.e. allowing a police agency to use its discretion in destroying bulk items of evidence), adding this language will clarify the desire to retain that evidence which has the ability to shed light on innocence and guilt.

These modest changes promise to bring clarity to the legislative intent of SB 110, ensuring that probative evidence in Alaska's most serious and violent crimes is retained for DNA testing using modern testing methods. In addition, SB 110 also creates a task force charged with the creation of standards and training for evidence custodians. Such an approach ensures that a range of stakeholders can take part in a deliberative process that considers all of the contours of the issue in a thoughtful way over time. The task force may decide that a narrower conception of evidence retention may be appropriate, and the creation of an expert work group will allow for reasoned refinements or, perhaps, the consideration of an expanded retention policy. In the following section, I humbly offer some ideas for consideration by the task force.

Recommended steps to properly store and organize preserved evidence in Alaska

Even the most well-intentioned evidence custodian can only do as good a job as the system allows. Systemic changes are needed. Order can only be brought to chaos through legislation such as this, which defines those crime categories for which evidence must be preserved and the manner in which

it should be retained. A law like this will also ensure uniformity of practice across jurisdictions statewide, so that the availability of evidence does not depend on the jurisdiction in which the crime was committed.

Other jurisdictions, recognizing the crime-solving potential of old evidence for cold cases and observing the miscarriages of justice likely to occur when innocence claims cannot be addressed, have undertaken just such a process. For instance, police officials in Charlotte, NC, America's 5th largest urban region, launched an initiative in 1995 to re-catalogue all of its evidence. In nine months, all of Charlotte's evidence was re-catalogued and placed in one 6,700 square foot storage space. Following the re-cataloguing of old evidence, Charlotte's Police Department formed a Homicide Cold Case Unit. To date, the Cold Case Unit has cleared fifteen cases, charged fourteen persons with murder and is actively investigating a dozen reopened cases. The re-cataloguing and bar-coding of old evidence, as was accomplished in Charlotte, is one method Alaska should consider, both statewide and/or in key jurisdictions. These are questions that are perhaps best answered by the task force which would be established by SB 110.

There are a number of steps that the task force established in this legislation might consider to effectively preserve, organize, and make accessible biological evidence in the state of Alaska. The expert task force that would be established by this legislation – representing key stakeholders from different corners of the criminal justice system – is well-positioned to study and discuss this issue thoroughly, and outside of the glare of the political spotlight. Evidence, after all, belongs to the People, and not any one side. The Task Force's recommendations for a comprehensive evidence preservation scheme for the state of Alaska could include consideration of the following:

- **Definition of the Proper Period of Preservation:** The Justice For All Act mandates the preservation of biological evidence connected to federal crimes for the period of time in which a defendant remains incarcerated in connection with that crime. It is the position of the Innocence Project that biological evidence should be preserved in all cases where it may be probative, for at least as long as a sentence or collateral consequence of a wrongful conviction is in effect. Biological evidence, as a general principle, should also be preserved as long as a case remains unsolved, so that it is readily available to law enforcement officers investigating old cases. Although if SB 110 were to become law, it would mandate the preservation of biological evidence in certain discrete crime categories, this Task Force should soberly assess the potential risks involved in destroying evidence associated with crime categories before the conclusion of a case resolution and/or the completion of a sentence, including the collateral consequences of a conviction.
- **The Manner in Which Evidence Should Be Preserved**
- **The Amount of Evidence Which Should be Preserved**
- **Determining Where Evidence is Kept:** Identification all of the facilities (courthouses; hospitals; laboratories; prosecutors' offices; etc.) where old evidence is currently stored.
- **Inventory of Evidence:** Provision of a brief description of the evidence located in each facility.
- **Repackaging Evidence:** The repackaging, as necessary, of all relevant biological evidence that may be vulnerable to degradation.
- **The Organization and Cataloguing of Evidence by Case:** The identification and inventorying of all voucher numbers associated with evidence, ensuring that all pieces of



evidence associated with a particular case are grouped together, and identifying a means through which that evidence can be readily located. This can be accomplished, as was done in Charlotte, through a bar coding system. Such automated systems have enabled jurisdictions such as Salt Lake City, UT, Phoenix and Tucson, AZ, and El Paso, TX to realize the full-scale crime-solving potential of biological evidence. Alaska might consider the jurisdictions in which such a system may be advisable and practicable.

- **Contemplation of Remedies That Should Be Offered If Evidence is Destroyed:** The task force may further consider the articulation of remedies for those whose innocence claims that can never be settled in the face of evidence destruction.
- **Clearly Articulated Policies and Procedures/Training:** Finally, the task force should consider the substance of uniform statewide policies directing the preservation and accessibility of biological evidence for all evidence custodians in the state. The task force will also need to address attendant training needs so that evidence custodians can ensure the proper implementation of such policies and guidelines.

Conclusion

With today's technology, preserved evidence is nothing less than a goldmine of potential justice. Crimes can be solved, thus enhancing public safety and serving the victims whose cases were never before solved; and the innocent and their families will no longer have to endure the terrible nightmare of a wrongful conviction.

But as long as this important issue is largely ignored, victims, the wrongfully convicted, and the public at large are denied access to this incredible crime solving potential that is in our possession, yet beyond access. Indeed, reforming evidence preservation policies are integral to a 21st century justice system in the state of Alaska.

The reliability of our criminal justice system cannot depend on the serendipitous discovery of evidence. By establishing a reasonable evidence preservation policy that is both comprehensive and provides ready access to those in need, Alaska will tap into the potential of preserved evidence – and more importantly, provide Alaskans with the quality of justice that it would be unconscionable to deny.

By empowering a cross-section of experts from throughout your criminal justice system to explore this subject and issue recommendations, you have greatly increased Alaska's ability to identify the most effective steps for enhancing the proper collection, retention, preservation, and cataloguing of biological evidence. And by conducting your business in the thorough and balanced manner which seems assured, you will provide other states with a model for addressing such questions, and ultimately improve the accuracy and justice of their systems as well.

Thank you for the opportunity to share these views with you. I hope you will contact me if there is any additional information that I can provide on the subject.

APPENDIX – Case Studies Demonstrating the Critical Need to Preserve Evidence and/or the Value of Subjecting Old Evidence to Modern DNA Testing Methods

Luis Diaz: Luiz Diaz's case involved multiple rapes. Although he was convicted in 1980, it wasn't until 2005 that Mr. Diaz was released from a Florida prison after DNA testing of a rape kit proved that he was not the notorious "Bird Road Rapist." This individual had been responsible for the attacks, and in some cases sexual assaults, of more than twenty-five women. By the time Mr. Diaz petitioned for testing in 2003, the only evidence that could be located was one rape kit, which was sent to a private lab in California. As the results were awaited, more evidence from the same case was located and sent to the Miami Dade Police Department Crime Lab. In June of 2005, testing results from both labs indicated that the male profile that was found did not match Mr. Diaz. Prosecutors then searched for evidence in all of the cases attributed to the Bird Road Rapist. Only one rape kit was located from an uncharged crime that occurred in August 1979. This kit was sent to the Miami Dade Police Department Crime Laboratory. The results indicated that, again, Luis Diaz was not the male contributor to the semen evidence. Further, the tests yielded evidence that the same unknown male had raped both victims, thereby providing investigators with important information with which to pursue the cold cases. Had the evidence in Mr. Diaz's case been lost or destroyed, he would have died in prison. None of the evidence in Mr. Diaz's case had previously been subjected to DNA analysis, as the technology was simply unavailable at the time of his conviction.

Chad Heins: Chad Heins, another Floridian, was convicted of the rape and murder of his sister-in-law. Several pieces of evidence had been collected at the crime scene, including hairs that excluded Mr. Heins, fingernail scrapings taken from under the victim's nails, and the bedsheet where the rape and murder took place. At the time of the trial in 1994, DNA testing methods were not advanced enough to identify any semen on the bedsheet or to yield a profile from the fingernail scrapings. As a result, the only biological evidence available at the time of trial was the hair evidence and prosecutors successfully argued that a stray hair from a stranger had accidentally ended up in the victim's bedroom. Mr. Heins first sought post-conviction DNA testing in 2001, and DNA tests that were eventually performed in 2003 using a more modern STR DNA testing method. The tests demonstrated that the hairs collected from the victim's bed matched to the fingernail scrapings, and that these pieces of evidence could not be tied to Mr. Heins. A more modern STR DNA testing method also demonstrated that there was, indeed, semen from the victim's bedsheet and that it also matched to the unknown man. Mr. Heins was released from prison 13 years after his conviction. This case study demonstrates the impact that modern DNA testing methods can have, teaching us that old evidence – such as the semen-stained bedsheet – that might never have been subjected to more than presumptive DNA testing could be tested today and yield a valuable crime-solving profile.

Scott Fappiano: Scott Fappiano was convicted of a rape in 1985 and consistently maintained his innocence throughout his incarceration. While a wealth of samples had been collected from the crime scene, DNA technology at the time was not sufficient to produce a result that would conclusively identify the perpetrator of the heinous crime for which he was convicted. Some exhibits containing biological evidence used at trial were returned to the DA's office; others

were vouchered and sent to New York Police Department evidence storage facilities. Two items of evidence – the rape kit and a pair of sweatpants containing semen stains—were sent in 1989 by the DA's office to a now-defunct DNA laboratory called Lifecodes, which at the time performed rudimentary DNA analysis for the state of New York. DNA in the late 1980's was limited, and although Lifecodes found semen to be present on the available evidence, they could not produce a conclusive result. In 1998, more advanced DNA testing methods had developed and a search for the original crime scene evidence was initiated. The DA's office fully cooperated with a search of its storage areas, but none of the original exhibits could be located. A similar search of NYPD storage facilities yielded nothing. After a long and uncertain search, Orchid Cellmark, a private DNA laboratory in Texas which had, after a series of mergers, taken over the Lifecodes lab, was contacted. Remarkably, in August of 2005, two test tubes containing biological samples from the crime scene were located. DNA testing of those extracts, using more progressive DNA testing methods, excluded Mr. Fappiano. He was freed from prison in October of 2006 – 21 years after his wrongful conviction. Had the liquid DNA material not been preserved by a private lab, Mr. Fappiano would still be in prison despite his actual innocence. Like Mr. Heins's case, Mr. Fappiano's case also demonstrates the value of subjecting preserved biological evidence to modern DNA testing methods.

Calvin Willis: Calvin Willis was convicted in 1982 of the brutal rape of a ten-year-old girl in Louisiana. Critical evidence had been collected, including a rape kit that contained fingernail scrapings, a bedspread, the victim's underwear and nightgown, and a pair of boxer shorts that were left on the couch at the crime scene. DNA testing wasn't yet available and so the state crime lab performed conventional serological testing on the rape kit evidence and blood typing on stains from the nightgown and bedspread. Because the victim is a type A secretor and Willis is an O secretor, he could not be excluded as the contributor to the stain. Perhaps even more troubling, Mr. Willis was identified through a flawed lineup procedure. In 1998, our office accepted his case and DNA testing was performed on the boxer shorts and the fingernail scrapings. Mr. Willis was excluded from being a contributor to any of the samples. He was released from prison in 2003, after having spent more than 21 years behind bars. Had it not been for the preserved evidence – which had not previously been subjected to DNA testing – Mr. Willis would still be in prison since he had been sentenced to life without parole.

Rickey Johnson: Rickey Johnson was convicted in 1983 of aggravated rape and was sentenced to life without parole in Louisiana's Angola Farm Prison. His conviction was secured based upon the strength of conventional serological testing and an eyewitness identification made by the victim. With the case going to trial years before DNA tests were to become a common law-enforcement tool, no DNA tests were performed on the evidence. Throughout his ordeal, Mr. Johnson maintained his innocence and held out hope that the truth would one day be discovered. In 2006, after the Innocence Project took on Mr. Johnson's case, the DA agreed to test vaginal swabs from the rape kit using conventional STR testing. The tests produced just three markers--enough to potentially exculpate Mr. Johnson, but not a sufficient number to help identify the perpetrator. In 2007, a new form of STR testing, minifiler-STR, was performed. Minifiler-STR makes possible the examination of badly degraded evidence. Through the use of this new technology, eight additional markers were found, yielding a full profile. That profile not only proved Mr. Johnson's innocence, thereby leading to his exoneration, but also enabled the



evidence to be run through CODIS. The process resulted in a CODIS hit and the true perpetrator, a man who was housed in the same prison as Mr. Johnson himself, was identified. Mr. Johnson's case shows the promise that new technology holds for solving long forgotten cases and is a testament to the crime solving potential of modern day DNA technology.

Alaska State Legislature



Senator Hollis French

Sponsor Statement Senate Bill 110 Preservation of Evidence

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 piece of a meaningful justice system.

Modern DNA technology, coupled with today's comprehensive information and communications technologies, has exponentially increased the power of preserved evidence. Preserved evidence can solve cold cases and prove or disprove claims of innocence in ways unimaginable just a few years ago. The problem is, however, that evidence collection and preservation policies have not always kept pace with these new technologies.

Senate Bill 110 begins to address this 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 still provides for police departments to return or dispose of evidence too large to keep after portions of the material likely to contain biological evidence have been removed and preserved. The bill provides for a notice process in cases where evidence will be destroyed, and it establishes a temporary task force to look at other issues involved in this emerging field of technology and make recommendations on standards and practices in cataloging and handling evidence.

Recently in Denver, Colorado a young man who had been convicted of murder at the age of 15 and who served over a decade in prison was released and his conviction was vacated as a result of DNA evidence that proved his innocence. And in cases closer to home, DNA was used after 13 years to identify a suspect in the murder of Bonnie Craig, a UAA student. The preservation of evidence is a vital and effective way to ensure the criminal justice system meets its goal of protecting the innocent and convicting the guilty. Join me in supporting this important bill.

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Anchorage Daily News

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Prison inmate charged in Bonnie Craig killing**DNA Database connects man held Outside to 1994 slaying of Anchorage teen.**

By MEGAN HOLLAND

Anchorage Daily News

(05/01/07 05:39:00)

A grand jury has charged a former Anchorage man with murder in the slaying of Bonnie Craig, an 18-year-old college student who was raped and savagely beaten before she toppled over a cliff into a creek in 1994.

Kenneth Dion, now 37 and in prison in New Hampshire for a series of armed robberies, has also been charged with rape in one of the most highly publicized and emotional slayings in Anchorage in recent decades.

DNA evidence that prosecutors say links Dion to the slaying was central to the solution, according to cold-case investigators.

"It's a major step in a case that was of significance to Anchorage and a burden to the family for years," prosecutor Pat Gullufsen said.

Dion was on probation on an Anchorage robbery conviction and had been out of prison for only a few months when Bonnie was killed.

"Just to know he's already in jail and there's no way he can hurt anyone else is a relief," said Bonnie's mother, Karen Foster, reached Monday morning. She said she had been told in January that charges could be coming in the slaying of her daughter, who had been a high school wrestler and had taught swimming to junior high kids.

Troopers were able to match semen found on Bonnie with Dion through a national computer database of DNA profiles. Dion was never known to troopers and wasn't a suspect in the case until the DNA match came back in November.

"There is no doubt about this one," trooper cold-case investigator Jim Stogsdill said of the match. "There's no confusion."

Dion likely did not know Bonnie, Stogsdill said, but apparently picked her up as she walked to a bus stop on Lake Otis Parkway on the way to an early-morning class on Sept. 28, 1994, at the University of Alaska Anchorage. Her body was found that afternoon by a hiker at McHugh Creek.

FORT RICHARDSON

Dion, originally from New Hampshire, came to Alaska as a soldier and was stationed at Fort Richardson, then stayed for a couple of years after he left the military. He did not have a job at the time of Bonnie's slaying and was in and out of jail on robbery and assault charges. He was 25 years old when Bonnie was killed.

He was in jail in Alaska at the end of July 1994, two months before Bonnie's death. And he

returned to jail on a probation violation about two months after the slaying.

Troopers say Bonnie was beaten and raped before she fell off a cliff near the Seward Highway. Her body was found floating in McHugh Creek near Mile 112.

Troopers have said she died of a head injury and hypothermia.

As to how Bonnie got to McHugh Creek, 10 miles from her home, or where she was raped, or whether she was struck in the head by her killer or she injured her head in the fall off the 30-foot cliff, "we can only surmise," Stogsdill said.

The hunt for her killer mesmerized Anchorage. Family and friends posted photocopies of the doe-eyed teenager who graduated from Service High School, asking for anyone with information about her killer to call troopers. She was not the kind of young woman to get in trouble. She lived with her parents and played the violin. She didn't drink.

Clues, though, were few and far between. And as the years passed, the crime remained unsolved and a reminder to young women walking alone that a brutal rapist had not been found.

As authorities kept looking, technology advanced to better match DNA, and more people were put into a national database.

DNA from Bonnie's case was put in the national database in 2000. New Hampshire authorities entered Dion's information in November 2006. Immediately, when workers with the Alaska state crime lab were conducting their weekly routine check of the database on Nov. 9, they had a hit.

Tammy Gregory, who was married to Dion at the time Bonnie was killed, broke down crying when reached Monday afternoon in Kenai. She said Dion was in and out of jail, on drugs, and generally abusive during those years. She hasn't seen or spoken to him in a decade. She doesn't want to remember that time in her life.

But still, she said, "I would never have thought he was capable of that. I would never have thought I was associated with someone like that."

NEW HAMPSHIRE RECORD

Dion, who left Alaska around 1996, made it back to New Hampshire, where he committed a series of robberies beginning in May 2002, according to authorities there and in Alaska. One robbery was of a pharmacy. He didn't have a weapon but, using his finger, pretended to, said Tom Velardi, deputy county attorney for Strafford County, N.H.

Dion ordered the pharmacy workers to give him OxyContin, a prescription painkiller similar to heroin that has become a popular street drug. "He had very serious addiction to it," Velardi said.

After the initial DNA match in November, authorities collected new DNA from Dion, which was taken back to Anchorage and matched again, Stogsdill said.

The grand jury in Anchorage indicted Dion on one count of first-degree murder, two counts of second-degree murder and one count of first-degree sexual assault. The two counts of second-degree murder are because it could have been a situation in which Dion didn't intend to kill Bonnie, Stogsdill said.

According to the New Hampshire Department of Corrections, Dion was sentenced to 15 years in

prison in February 2003 for five robberies that occurred from spring 2002 until he was incarcerated. Dion was living in Rochester, N.H., before he went to prison. According to the department's Web site, he is eligible for parole in August 2008.

Alaska troopers and New Hampshire authorities interviewed Dion recently, but Stogsdill said he revealed little information.

"This is a long-overdue resolution to the Bonnie Craig case," Stogsdill said.

Bonnie's mother said the news of the charges is a relief, but it also opens old wounds and memories of what happened to her little girl. She said she doesn't want a trial to deepen those wounds. She hopes Dion will admit to the crime and make a deal with prosecutors. That would be easier, she said.

Alaska authorities will try to have him extradited here to face the new charges, Gullufsen said. And, if he is convicted, he will likely finish out his sentence in New Hampshire, then transfer to an Alaska prison.

Daily News reporter Megan Holland can be reached at mrholland@adn.com.

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Family seeks to clear man who died in prison

STORY HIGHLIGHTS

- A Texas court will determine whether the state will exonerate Timothy Cole
DNA tests later showed Cole did not commit the crime
If exonerated, this would be first posthumous DNA exoneration in Texas
His greatest wish was to be exonerated, Cole's mother says

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DALLAS, Texas (CNN) -- The family of Timothy Cole, a Texas man who died in prison nearly a decade ago while serving a sentence for a rape he swore he did not commit, is hoping a court will issue the state's first posthumous exoneration.



Timothy Cole died in prison while serving a sentence for a rape DNA tests show he did not commit.

Cole was convicted and sentenced to 25 years in prison for the 1985 rape of 20-year-old Michele Mallin. He maintained his innocence, but it was not confirmed by DNA until years after his 1999 death, when another inmate confessed to the rape.

"Everybody thinks he died a felon, a hardened criminal," Cole's brother, Cory Session, told CNN. "That's what hurts."

The court hearing on the exoneration began Thursday afternoon, according to the Austin American-Statesman.

Mallin, who has spoken publicly about the case, will join Cole's family in the Austin, Texas, courtroom. They want a judge to clear Cole's name, according to the Innocence Project of Texas, a nonprofit organization that seeks to help the wrongfully convicted.

Among those expected to testify are Mallin and Jerry Wayne Johnson, her confessed rapist.

Watch Cole's mother make emotional plea »

Then a student at Texas Tech University in Lubbock, Mallin was walking to her car, intending to move it to another parking lot, when a man approached her asking about jumper cables, she told CNN. In a matter of seconds, he put her in a chokehold, a knife to her neck. He forced himself into her car and drove her to the outskirts of town, where he raped her.

The next day, police investigators showed Mallin pictures of possible suspects. She chose a picture of Cole and said he was her attacker. She later identified him in a physical lineup, according to the Innocence Project of Texas.

"I was positive," she told CNN. "I really thought it was him."

But there was one detail: Mallin told police her attacker was a smoker. "He was smoking the entire time."

And Cole, who suffered from severe asthma, "was never a smoker," Session said. "He took daily medications (for asthma) when he was younger."

"He was the sacrificial lamb. To them, my brother was the Tech rapist, there was no backtracking. It was the trial of the decade for Lubbock."

The "Tech rapist" attacked four women other than Mallin -- abducting them in parking lots near campus and driving them to a vacant location, where he would rape them and flee on foot, according to the Innocence Project of Texas. The rapist "terrorized" the Texas Tech campus in the mid-1980s, the organization said.

Cole, like Mallin, was a student at Texas Tech. He had finished two years of college previously and was returning to school after spending two years in the Army, his brother said.

But his dreams of getting married and having children never materialized. He was arrested and charged with Mallin's rape, declining a plea bargain offer that would have put him on probation. A jury convicted him and imposed a 25-year sentence.

That night, "he hugged my mother, and he said, 'Mother, why these people lie on me? Why they do this to me?' " Cole's brother Reggie Session recounted for the Lubbock Avalanche-Journal, which published a three-part series on the case in June.

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"He said, 'They know I ain't done nothing to that girl. I don't even know that girl. Why they do this to me, mother?' ... He cried in my mother's arms on the floor."

Later, while in prison, Cole rejected an offer of parole that would have required him to admit his guilt. "His greatest wish was to be exonerated and completely vindicated," his mother, Ruby Session, told CNN affiliate News 8 Austin.

But the asthma that plagued Cole throughout his life brought about his death on December 2, 1999. The cause was determined to be heart complications due to his asthmatic condition. He was 39.

It was 2007 when a letter addressed to Cole arrived at his family's home, written by Johnson.

 [Read the letter >](#)

"You may recall my name from your 1986 rape trial in Lubbock," says the letter, dated May 11, 2007. "Your Lubbock attorney, Mike Brown, tried to show I committed the rape.

"I have been trying to locate you since 1995 to tell you I wish to confess I did in fact commit the rape Lubbock wrongly convicted you of. It is very possible that through a written confession from me and DNA testing, you can finally have your name cleared of the rape ... if this letter reaches you, please contact me by writing so that we can arrange to take the steps to get the process started. Whatever it takes, I will do it."

Johnson did not know Cole had died. In fact, according to the Avalanche-Journal, he had been writing to court officials for years to confess to the rape, but got nowhere.

Upon finding out that Cole was dead, Johnson wrote he "cried and felt double guilty, even though I know the system's at fault," according to the Avalanche-Journal.


"A day later, I am still bothered, terribly, by the death revelation. Because, not knowing Mr. Cole at all, I wonder if the wrongful incarceration contributed to his death."

Johnson has been in prison since 1985 on two convictions for aggravated sexual assault, according to the Texas Department of Corrections. He was given a life sentence for the rape of a 15-year-old girl, and a jury later tacked on a 99-year sentence for another rape, according to the Avalanche-Journal. He cannot be charged with the Mallin case, as the statute of limitations has expired.

The Innocence Project became involved after Cole's family received Johnson's letter. DNA tests confirmed that Johnson was Mallin's attacker. Now, Cole's family hopes the court hearing will be the final step in clearing his name.

Mallin is helping them. "I was very traumatized," she told CNN. "I was scared for my life. I tried my hardest to remember what he looked like.

ADVERTISEMENT "I'm trying to get his name cleared. It's the right thing to do."

Cory Session said, "We don't blame Michele. She's very gracious." [E-mail to a friend](#)  | [Mix it](#) | [Share](#)

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Missing rape kits foil justice

Rape kits routinely vanish, infuriating victims and prosecutors alike. Even when evidence is intact, laws can keep suspects like William Harold Johnson walking free in our midst.

By Miles Moffeit and Susan Greene
Denver Post Staff Writers

Posted: 07/24/2007 01:00:00 AM MDT



Socorro, N.M. - Bruised and shaking, Joanna watched the doctor prepare the instruments that could cull traces of a gang rape from her body.

At a party the night before, three fellow New Mexico Tech students had drugged her, overpowered her and raped her, she told the hospital staff.

Now, she was lying unclothed on a cold table splashed with bright light, allowing another set of prying hands - a female physician's - to probe her body.

"Just please get it over with," the 19-year-old recalls saying to herself last November.

In the age of DNA and other forensic advances, victims endure the invasive rape evidence exam, knowing that one plucked hair or fluid specimen alone can seal a case against their attackers.

"The only way I can describe it is that I felt drunk but I hadn't had enough to feel drunk." That's how Joanna remembers the night she suspects she was slipped a date-rape drug while drinking with other New Mexico Tech students. Further testing of material from her rape evidence kit might have shed light on what was in her system, but the hospital discarded it and the case was never prosecuted. (Post / Helen H. Richardson)

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Joanna wouldn't be so lucky.

Only a week later, the Socorro County district attorney gave her a jolt: the hospital had thrown away biological evidence from her case, in violation of its own policy. Among the casualties: a urine specimen the doctor had characterized as containing a "date-rape drug," according to records.

Because of the lost evidence, the criminal charges against Depesh Patel, Ibrahim Hassan and Sandro Santos were dropped. None has responded to repeated interview requests from The Denver Post.

Today, eight months later, neither local authorities in the tiny town of 5,000 nor hospital officials have provided Joanna and her family a full explanation of how the evidence was destroyed - and by whom.

New Mexico statutes, like those in most states, do not require formal inquiries into the destruction of biological evidence in criminal cases. Nor do they require preservation of biological evidence at the outset of criminal investigations.

Joanna, whose full name is being withheld to protect her identity, said the evidence loss only compounds her personal anguish.

She has dropped out of school, and flashbacks still haunt her, including several words spoken by the physician.



"For the hospital not to hang onto the rape kit, the blood and the urine samples from the victim was really, really hard to deal with," said Deputy District Attorney Stacey Ward. The hospital investigated the disposal and said it found no wrongdoing. (Post / Helen H. Richardson)

"I know them," Joanna recalls the doctor saying before the exam, referring to her alleged attackers.

Rape evidence destruction, the most common evidence loss discovered by The Post, represents a hidden crucible for countless sex-assault victims in the U.S.

Behind 5,515 rape evidence kits destroyed or lost by authorities nationwide in the past decade are thousands of women like Joanna who endured the scraping of fingernails and the swabbing of their most private parts, only to be cheated of justice and, often, true healing.

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And behind those evidence purges are thousands of offenders who escaped prosecution.

The full scope of the lost specimens and their impacts may never be known because most state governments don't require that police, hospitals and other public agencies report the evidence they toss.



I THINK I VE BEEN TAKEN ADVANTAGE OF | Those were Joanna's words to her mother the morning after she says she was gang-raped by fellow students at a New Mexico college. She endured a rape exam, but the hospital threw the evidence kit away just days later, leaving the deputy district attorney no choice but to drop the case. (Helen Richardson | The Denver Post)

The problem flows from widespread ignorance, rape-crisis experts say. Ignorance about the kits' forensic value. Ignorance about rape trauma.

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Ignorance about the small spaces the kits consume. And ignorance about how DNA may render rape statutes of limitations obsolete.

"The destructions defy belief because (biological evidence) is the cleanest, least emotional, most unbiased and least politically fraught evidence there is," said Kim Tolhurst, a Washington, D.C., attorney.

Working as legal counsel for a coalition of victim advocacy groups, Tolhurst successfully pushed for a kit-preservation law in Iowa, ensuring they are kept for a decade. She had tape-measured her own shower to show lawmakers how hundreds of kits would easily fit in it.

While most of the rape evidence purges found by The Post were carried out by police agencies, untold numbers of kits also have been discarded by hospitals. Like law-enforcement agencies, medical facilities typically wield wide discretion to destroy samples. In many states, victims go through rape-kit exams but wait before approaching police - to work through their trauma - leaving the kits' fate up to the medical facilities.

Some hospitals in New York and Pennsylvania have disposed of kits as early as weeks to a month after the rape-kit exam is performed, foiling possible prosecutions, advocacy groups say.

In Joanna's case, the New Mexico hospital's procedures were to retain samples for seven days.

"If you destroy it, you not only destroy an option to prosecute but a sense of hope and justice," said Susan Lewis, spokeswoman for the National Sexual Violence Resource Center in Pennsylvania. "Generally, there's just no uniformity in the country for how hospitals deal with things like rape kits."

Such scenarios have played out along the West Coast, too.

"It's appalling to think of all the offenders we can't identify and who've gone free," said Terrence Newsome, a former analyst for the California governor's office who learned of thousands of rape-kit destructions in unsolved cases in the Golden State five years ago. These kits were never analyzed, thus never matched against offenders in the national FBI database.

Victims were outraged, and California later passed one of the few laws in the country requiring kits to be preserved.

But most destructions are carried out in the shadows, without accountability.

Drinks with acquaintances

Joanna's story, like so many rape cases, starts over drinks with someone she knew.

As recounted in police reports, the New Mexico Tech student took up Patel's offer of music and beers at Santos' apartment. Hassan was there. Santos arrived later in the evening.

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"It seemed innocent at the time, but I remember they kept moving the bottles closer to me," she recalls.

Though she's uncertain when it kicked in, she felt an unusual buzz, she told police. She remembers them playing with her jacket zipper, telling her "it wasn't Alaska" and that she should remove her coat. She remembers consuming several drinks, at one point leaving the apartment to get margarita mix.

Most of all, she remembers making decisions that evening she didn't want to make.

"The only way I can describe it is that I felt drunk but I hadn't had enough to feel drunk."

The evening blurred into numbness, dizziness, then blackouts. She awoke the next morning in her own apartment with bruises and a swollen lip, all documented on hospital reports. She also had memories of sex acts with the three men.

She rushed to the shower, letting the hot water flow over her for an hour.

"I think I've been taken advantage of," Joanna told her mother.

"We have to go to the police," her mom said.

Joanna, who began to believe she had been slipped a drug, was nervous about pursuing charges. "I knew there was so much blame put on the victim when this happens."

But she decided she needed medical attention.

At Socorro General Hospital, she agreed to a rape-evidence exam. The doctor, Susan Lewark, stepped into the exam room. Joanna told her the story, told her the names of her alleged attackers.

The doctor paused. She told Joanna she knew the men from the campus clinic, where she worked part time, Joanna recalls.

She then asked a couple of questions: "Do you still want me to do the exam? Do you want someone else to do it?"

Joanna didn't grasp the possible conflict. Didn't practically every one in Socorro know each other?

"If you're OK with it, I am," Joanna recalls saying.

Later that morning, after learning of Joanna's report, New Mexico Tech campus police officer Billy Romero stopped the three men as they were driving from the apartment complex's parking lot. He told the students he was investigating a rape case.

Patel, police reports show, had an immediate answer: He claimed he had been in Albuquerque the previous night. Romero arrested all of them.

Back at the hospital, Lewark found a barbiturate in Joanna's urine sample, according to hospital records.

In a conversation with Joanna and her mother,

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Lewark referred to it as a date-rape drug, Joanna said.

"That explained a lot," her mom said.

Lewark told police the same thing, according to Romero's report.

Meanwhile, the three suspects conceded that they had been with Joanna, contradicting Patel's initial account of his whereabouts that night. But they stressed that the sex was consensual. They said they even used their cellphones during the sex encounters to record her, asking whether she was having sex of her own free will.

They denied slipping her drugs.

After "three to five days," according to Deputy District Attorney Stacey Ward, Romero phoned the hospital from her office to make sure the staff had saved the rape specimens for further testing.

The hospital response: The small samples no longer existed. Ultimately, Ward said, they blamed the problem on lack of storage space.

Ward was astonished, she said. Without the specimens, more advanced testing to identify the drug and other substances in Joanna's system wouldn't be possible. "Their main problem was that they failed to recognize this was evidence," Ward said.

In interviews with police, Lewark also backed off her assertion that the drug could be a date-rape

drug, Ward and Romero said.

Barbiturates, indeed, are not common date-rape drugs, but rape-crisis experts say a variety of intoxicants are used to take advantage of women.

As a result of the evidence destruction, Ward felt the case was just too murky to pursue.

It was dead-ended.

"For the hospital not to hang onto the rape kit, the blood and the urine samples from the victim was really, really hard to deal with," Ward said. "I was excited about having a provable case. The problem is that we had a victim voluntarily drinking large amounts of alcohol with these guys, and at one point, leaving and coming back. We needed more evidence.

"As it is, a cloud hangs over everything."

Joanna, meanwhile, has never been told the full story, including who threw out her evidence. She wonders, was it simply an accident? Or was there more to it?

The last person she knew to have custody of the evidence was the doctor, Lewark.

Officer Romero said Lewark also told him that she knew the three suspects. The doctor, he said, works with international students at the college. At least two of the accused are international students. At one point, Romero said, Lewark told him the three "were real nice guys."

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Lewark declined interview requests and would not answer written questions from The Post.

In interviews in January, Ward said she found Lewark's reversal in characterizing the substance found in Joanna's urine as a date-rape drug unusual. Last week, however, she said had become convinced that the evidence destruction was simply a bureaucratic bungle.

Ward said the hospital told her that the person who disposed of the evidence was a technician.

Last week, Socorro hospital administrator Bo Beames released a statement to The Post. He declined to detail what happened or say who tossed the evidence.

He stressed that the hospital had reviewed the case carefully and found no wrongdoing. He also said that in a small town he would not be surprised if a caregiver at the hospital knew a suspect in a criminal case.

"We are confident that our employees involved acted ethically and honored their medical duty."

Evidence-handling practices are being revamped, he said. "We also know from recent events that we can improve - and are committed to improving - the cross-training and communication between law enforcement and our caregivers in matters of sample collections to be used as evidence."

That's little solace to Joanna's father. He said he has tried repeatedly through meetings with

hospital officials and law-enforcement authorities to find more answers.

"As a one-man task force, I've only hit walls," he said. "We deserve to know more."

Joanna said she's beginning to heal. But she is no longer attending classes, no longer pursuing her dream of being a veterinarian.

She is taking a year off from school to think about her future. During the break, she's joined AmeriCorps, helping teach art to the disabled.

And she's also working as a rape-crisis advocate in Albuquerque.

She recently answered a hotline call from a rape victim who had a familiar story: Her case evidence had been destroyed.

"Before she got off the phone, she told me, 'You've helped me so much,'" Joanna said. "At least something good has come out of this."

Staff writer Miles Moffeit can be reached at 303-954-1415 or mmoffeit@denverpost.com.

Staff writer Susan Greene and researcher Monnie Nilsson contributed to this report.

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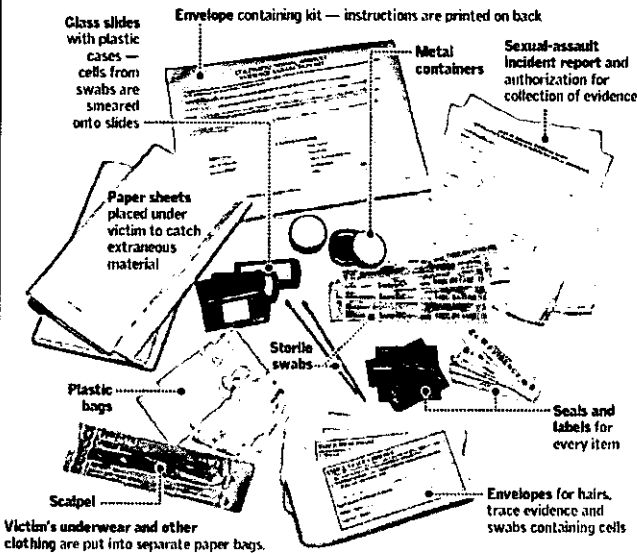
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The "black box" of sex-crime investigations

A rape kit can contain multiple pieces of evidence, primarily specimens carrying DNA and other biological information taken from the victim's body during a rape exam. The destruction of a single kit can mean multiple specimens with crime-solving value are lost. Contents of a rape kit:



What investigators look for

- Foreign material swabbed from patients' bodies, including blood, semen and saliva — often collected with swabs.
- Foreign material dislodged from mouth with dental floss.
- Loose hairs, possibly belonging to the assailant, captured by swabs, tweezers or a towel placed under the patient during the exam.
- Blood and urine samples from victims that may reveal traces of drugs or other substances slipped to the victim.

A genetic profile often can be extracted from many of these biological traces, then matched against the accused or other suspects. It also can be entered into the national FBI database of archived sex offenders and other criminals for a match.

Source: U.S. Department of Justice

Miles Moffett and Thomas McKay | The Denver Post

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Masters released from jail

By Howard Pankratz
The Denver Post
Posted: 01/22/2008 01:02:20 PM MST



Tim Masters leaves the Larimer County courtroom where he was released after serving nearly a decade of a life term in prison for the murder of Peggy Hettrick in 1987. (THE DENVER POST | CRAIG F. WALKER)

FORT COLLINS — Special prosecutors today said that DNA testing of murder victim Peggy Hettrick's clothing revealed the partial profiles of three men but that the profiles excluded Tim Masters as the source of the DNA.

Minutes after the prosecutors handed their

findings to Judge Joe Weatherby, Weatherby vacated the judgment of conviction and sentence against Masters, who was immediately released from custody on a \$200,000 personal recognizance bond.

Masters' next court date is Feb. 5, after the Larimer County district attorney assesses the status of the case.

A short time after Masters' release, longtime Colorado defense attorney David Wymore — who led the effort to free Masters for a crime Masters maintained he didn't commit — praised former employees of the Colorado Bureau of Investigation, the FBI and Fort Collins Police Department for their help in freeing Masters.

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Freedom

- Read the Larimer County DA's motion to dismiss charges against Masters.
- View the full multi-media special report on Masters' release, including exclusive photos.
- Follow the courtroom action, minute-by-minute
- Discuss freedom for Tim Masters, after more than nine years in prison. What should happen next?
- Watch video of what jurors and the public didn't know at the time of the Tim Masters trial.
- Moments to Freedom Read the live blog from the court hearing that ended Masters' incarceration
- Read The Denver Post's full series on the mishandling of criminal evidence, "Trashing the Truth."

and media jammed a conference room. "I want to thank my family and friends. I want to thank the media."

Weatherby presided over months of hearings in which Wymore and co-counsel Maria Liu argued that prosecutors in the original case had withheld evidence from Masters' defense team and had failed to look at alternate suspects.

Rather, they said, they focused solely on Masters.

The key alternate suspect, they claimed, was Dr. Richard Hammond, who lived near where Hettrick's body was found.

But special prosecutor Mike Goodbee made it clear today that the DNA of Hammond, who is now deceased, was not on Hettrick's clothing.

Goodbee said that he first became aware on Dec. 6 that CBI testing had revealed the partial profiles of the three men on Hettrick's clothing.

"The reason why we are here is because Tim is innocent," Wymore told a room packed with Masters supporters and press. "He remains the victim of an unfair conviction."

Masters, dressed in a new suit, was humble and appeared surprised by the attention, which included television cameras from at least 20 regional affiliates and national networks.

"I'm a little overwhelmed," he said as supporters

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Christy Peters holds onto her cousin, Tim Masters, at his release party in Fort Collins on January 22, 2008. (THE DENVER POST | HELEN RICHARDSON)

Then on Jan. 15, Goodbee said, the defense provided the special prosecutors a DNA profile developed in the Netherlands which the defense said belonged to a potential suspect in the early investigation of Peggy Hettrick's murder. The defense findings were presented to the CBI, which conducted its own tests.

"On Jan. 18, we learned (from the CBI) that the results of this new testing and comparison confirmed the presence of DNA on clothing of Hettrick at the time of her murder was consistent with the alternate suspect and inconsistent with Tim Masters," said Goodbee.

During the relatively short proceedings this morning, which were delayed because of paperwork, Weatherby's courtroom was packed.

More than 40 of Masters' relatives stood to the left of the judge and in front of Masters.

There were not, however, any of Hettrick's relatives present. Wymore specifically addressed the victim's family at the press conference, saying it had never been the defense's intention to open old wounds in trying to free Masters.

"We'd like to acknowledge Peggy Hettrick," said Wymore. "We are sorry if we have opened any wounds."

The murder of Hettrick on Feb. 11, 1987, sickened the city of Fort Collins. Her murder was particularly gruesome, and she was sexually mutilated.

Masters, who was 15 at the time of the murder, was convicted of the crime in 1999.

In the years that followed, both the Colorado Court of Appeals and then the Colorado Supreme Court upheld the conviction.

Much of the case was based on the testimony of Reid Meloy, a forensic psychologist.

In February 2001, in a precedent-setting ruling, the Colorado Court of Appeals said it is permissible for forensic psychologists to testify about "sexual homicides" in Colorado courts.

Masters' attorneys told the Court of Appeals that such testimony amounted to "impermissible psychological profiling."

But the judges rejected that argument.

They stated that there were fundamental

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differences between the psychological theories and analysis offered in the Masters case and impermissible profiling.

And in October 2002, the Colorado Supreme Court, again breaking new legal ground in Colorado, upheld the conviction in a 4-3 vote.

The majority of justices said that writings and drawings by men that depict hatred of women are admissible in court and forensic psychologists may testify about the traits that drive men to commit "sexual homicides."

The two appellate courts were presented with evidence uncovered by the Fort Collins Police Department.

When investigators searched Masters' bedroom, they found a large collection of knives with long blades, one containing a scalpel in its handle. Also found was a fillet knife, a machete, a ninja sword, a suitcase of pornographic depictions of the female anatomy and a large number of drawings and narratives.

The drawings were made by Masters and depicted surprise attacks, gruesome death scenes and scenes of violence and sex, authorities said.

The case languished for 10 years because police couldn't find Hettrick's blood on Masters' clothing or property.

But then a field of expertise in sexual homicides developed, and in 1997, the Fort Collins Police

Department contacted Meloy.

Meloy reviewed the drawings and narratives produced by Masters, together with other evidence in the case. He concluded that Masters killed Hettrick and in doing so, had symbolically killed his own mother. Masters' mother and Hettrick looked similar — including wavy red hair.

Meloy testified that a primary reason perpetrators of sexual homicides fantasize is to express deeply felt hostility toward women.

The majority of four justices said Meloy's expertise met court standards and the bulk of Masters' writings was properly admitted.

At the time of Hettrick's death, Masters was 15. He became a prime suspect because his window faced a field where he could see Hettrick's sexually mutilated body. Masters failed to report the body, later telling police he thought it was a mannequin.

Several detectives who worked on the case never believed that Masters committed the crime.

Former Fort Collins Detective Linda Wheeler, who has long believed that Masters was innocent, asked Masters' attorneys to submit Hettrick's clothing for advanced forensic analysis in the Netherlands.

There, scientists targeted spots where the killer, or killers, may have touched her forcefully,

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embedding skin cells in her clothes.

The Dutch lab found a full genetic profile last summer of a person who left DNA inside Hettrick's waistband.

That man, a former boyfriend who still lives in Fort Collins, told police he had seen her about a week earlier for dinner but did not reveal whether they had intimate contact since that date.

He denied any involvement in her death.

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