

**SB**

**241**

## COMPARISON OF FEDERAL INNOCENCE PROTECTION ACT TO SB 241, SEC. 6

Most of the provisions of section 6 of SB 241 were drawn from the federal Innocence Protection Act (IPA), 18 U.S.C. § 3600. (A copy of the IPA is attached.) The following is a comparison of the provisions of the IPA and section 6 of SB 241, which would establish procedures for postconviction DNA testing.

*Innocence Protection Act – 18 U.S.C. § 3600**HB 241, sec. 6 – AS 12.73*

The IPA authorizes postconviction DNA testing for applicants who have been convicted of any federal crime and received a sentence of death or imprisonment. § 3600(a)(1)(A). (The IPA also applies (with some additional limitations) to a state conviction evidence of which was admitted at a federal death-sentencing hearing when exonerated of the state offense would entitle the applicant to a reduced sentence or resentencing. § 3600(a)(B)(i).)

HB 241 would apply only to persons who have been convicted of a felony offense against a person under AS 11.41. AS 12.73.010(a)

The IPA requires the applicant to assert under penalty of perjury that he is innocent of the offense for which he is imprisoned. § 3600(a)(1)(A).

HB 241 would require the applicant to attest that he did not (1) commit the offense for which he was convicted or any lesser included offense or (2) solicit another person to commit, or aid and abet another person in planning or committing the offense or any lesser included offense. AS 12.73.010(b)(1).

The IPA limits testing to only specific evidence obtained in relation to the investigation or prosecution of the offense for which the applicant claims to be innocent. § 3600(a)(2).

HB 241 would require that the evidence to be tested have been obtained as part of the investigation or prosecution of the offense for which the applicant claims to be innocent. AS 12.73.020(4).

## COMPARISON OF FEDERAL INNOCENCE PROTECTION ACT TO SB 241, SEC. 6

If the evidence to be tested was not previously subjected to DNA testing, the IPA requires that the applicant did not knowingly or voluntarily waive the right to request testing after the enactment date of the IPA or knowingly fail to request DNA testing of that evidence in a prior motion for postconviction DNA testing. § 3600(a)(3)(A).

If the evidence was previously subjected to DNA testing, the IPA requires that the testing currently sought be based on a new technology that is substantially more probative than the prior DNA testing. § 3600(a)(3)(B).

The IPA requires that the evidence to be tested must be in the government's possession, has been subject to a chain of custody, and retained under conditions that ensure the integrity of the evidence. § 3600(a)(4).

The IPA requires that the proposed testing be reasonable in scope and involves scientifically sound methods consistent with forensic practices. § 3600(a)(5).

If the evidence to be tested was not previously subjected to DNA testing, HB 241 would require that the applicant did not waive or that his lawyer did not forgo for tactical reasons the right to request DNA testing. AS 12.73.020(5)(A).

If the evidence was previously subjected to DNA testing, HB 241 would require that the testing currently sought be based on a method or technology that is substantially more probative than the prior DNA testing and that the applicant did not waive or that his lawyer did not forgo for tactical reasons the right to request DNA testing whose probative value was similar to the method to be used in the requested testing. AS 12.73.020(5)(B).

HB 241 would impose the same requirements of chain of custody and retention. AS 12.73.020(6). (HB 241 does not expressly require that the evidence be in the government's possession, but that requirement is implied by AS 12.73.020(4), which requires that the evidence to be tested must have been obtained as part of the investigation or prosecution of an offense.)

HB 241 has an identical requirement. AS 12.73.020(7).

The IPA requires the applicant to identify a theory of defense that is not inconsistent with an affirmative defense presented at trial and that would establish the applicant's actual innocence of the offense for which he seeks exoneration. § 3600(a)(6). HB 241 has an identical requirement. AS 12.73.020(8).

If the applicant was convicted after a trial, the IPA requires that the identity of the perpetrator must have been an issue at the applicant's trial. § 3600(a)(7). HB 241 would require that the identity of the perpetrator must have been a disputed issue at the applicant's trial. AS 12.73.020(9).

The IPA requires that the requested DNA testing of the evidence "may produce new material evidence" that would support the theory of defense identified by the applicant and would "raise a reasonable probability that the applicant did not commit the offense." § 3600(a)(8). HB 241 would require that the requested DNA testing of the evidence "will produce new material evidence" that would support the theory of defense identified by the applicant and "could conclusively establish that the applicant is innocent." AS 12.73.020(10).

The IPA requires that the applicant consent to provide a DNA sample for comparison purposes. § 3600(a)(9). The IPA also requires that any results of testing relating to the applicant's DNA be submitted to the National DNA Index System (NDIS). § 3600(e)(2). HB 241 would impose a similar requirement. HB 241 would require the defendant to consent to entering the results into the DNA identification registration system (AS 44.41.035) and any other law enforcement database. AS 12.73.020(11).

*Innocence Protection Act – 18 U.S.C. § 3600**HB 241, sec. 6 – AS 12.73*

The IPA requires that the request for testing be timely. § 3600(a)(10). Timeliness is determined by two rebuttable presumptions:

(1) a motion made within the later of 5 years after enactment of the IPA or 3 years after conviction is presumed to be timely; this presumption may be rebutted by showing (a) the motion is based solely on information used in a previously denied motion or (b) by clear and convincing evidence that the motion is solely for the purpose of delay or harassment;

(2) a motion filed after the above deadlines is presumed to be untimely; this presumption may be rebutted by showing (a) that the applicant is incompetent and that incompetence substantially contributed to the delay in filing, (b) the evidence to be tested is newly discovered evidence, (c) the motion is not based solely on the applicant's own assertion of innocence and, based on all relevant facts and circumstances surrounding the motion, denial of the motion would be manifestly unjust, or (d) "upon good cause shown." § 3600(a)(10).

When an applicant files a motion under the IPA, the court must notify the government, direct the government to preserve the specific evidence referred to in the motion, and may appoint a lawyer for the applicant. § 3600(b).

HB 241 would require that the request for testing be timely. AS 12.73.020(12). Timeliness would be determined by two rebuttable presumptions:

(1) an application filed within 3 years after the date of conviction would be presumed to be timely; this presumption may be rebutted by showing that the application is based solely on information used in a previously denied application;

(2) an application filed after the above deadline would be presumed to be untimely; this presumption may be rebutted by showing (a) that the applicant is incompetent and that incompetence substantially contributed to the delay in filing, or (b) "other good cause" for the delay. AS 12.73.040.

HB 241 would require an applicant to serve the application on "the prosecuting authority responsible for obtaining the conviction." AS 12.73.010(a).

The IPA requires that any DNA testing ordered by carried out by the FBI, but the court may allow testing by another qualified laboratory so long as integrity of the evidence and reliability of the testing is ensured. The cost of testing shall be borne by the applicant, but if the applicant is indigent, the government will bear the cost. § 3600(c).

Under the IPA, if the results of the new DNA testing are inconclusive or show that the applicant was the source of the evidence, then the applicant's sample may be retained in the NDIS. § 3600(e)(3)(A).

If the results of the new DNA testing exclude the applicant as the source, but the applicant's DNA matches evidence of another offense, then the Attorney General must notify the appropriate agency and preserve the applicant's sample. § 3600(e)(3)(B).

If the results of the new DNA testing exclude the applicant as the source and there exists no match with evidence of another offense, then the applicant's sample shall be destroyed and no information may be retained in the NDIS absent some other basis for retention. § 3600(e)(3)(C).

HB 241 would require that testing be performed at a laboratory operated or approved by the Department of Public Safety and at the state's expense. A court could order additional testing at the applicant's request, but that would be at the applicant's expense. In addition, the laboratory selected by the applicant would have to satisfy national quality-assurance standards. The applicant would also have to pay any reasonable costs for retrieving the evidence from storage before testing. AS 12.73.050(c).

HB 241 would require that results of any testing of the applicant's DNA be entered in the DNA identification registration system under AS 44.41.035. While HB 241 makes no provision for destruction of samples or retention of information, AS 44.41.035(i) authorizes a court to order destruction of DNA material included in the system.

Notwithstanding any other limitations that may exist, the IPA authorizes an applicant to file a motion for new trial if the new DNA testing excluded the applicant as the source of the evidence. § 3600(g)(1). The court must grant the motion if the DNA test results, “when considered with all other evidence in the case (regardless of whether such evidence was introduced at trial), establish by compelling evidence that a new trial would result in an acquittal of the offense for which the applicant is imprisoned. § 3600(g)(2)(A).

HB 241 does not address what would happen if new DNA testing were to exclude the applicant as the source of the evidence. However, a favorable test result would form the basis for an application for postconviction relief based on the existence of new, material facts “that requires vacation of the conviction . . . in the interest of justice,” AS 12.72.010(4).

Section 6 of SB 241 includes provisions that find no analogue in the IPA. Both the IPA and section 6 authorize postconviction DNA testing only when a court makes the specific findings set forth in the statutes. *See* § 3600(a); AS 12.73.020. Those findings implicitly establish the factual allegations an applicant must make in the motion under the IPA or the application under section 6. Section 6 goes a step further and requires an applicant to submit affidavits from (1) the applicant, attesting that he did not admit or concede guilt in any official proceeding for the offense that was the basis of the conviction or any lesser included offense, AS 12.73.010(b)(1)(C) (CSHB 316 (Jud) amended this provision by defining admission or concession of guilt to exclude the entry of a guilty or no contest plea); (2) the applicant or his lawyer, describing (a) the results of any DNA testing performed on evidence used in the prosecution and conviction of the applicant and (b) all previous efforts to obtain DNA testing and any previous application filed under AS 12.72 or AS 12.73, AS 12.73.010(b)(2), (3); and (3) the lawyer who represented the applicant in the criminal trial resulting in conviction, describing why DNA testing was not sought before or during the trial, AS 12.73.010(b)(4).

**Representative Jay Ramras**  
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# Alaska State Legislature



## House of Representatives

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**District 10**

### Fax

To: Jerry Luckhaupt  
Leg. Legal

Fax #: (907) 465-2029

Number of pages including cover:

From: Jane W. Pierson

Date: March 4, 2010

Re: HB316

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Jerry,

The House Judiciary Committee moved out HB316. The HJUD version of the bill will include the following amendments:

Amendment #2 – Amendment A.18

Amendment #3 DOL

Page 3, line 9, following “crime,”

Insert “the person is required to register as a sex offender

Amendment #4 – Amendment A.11

Amendment #5 – Amendment A.17

Amendment #7 – DOL As amended

Page 5, line 6:

Following “a”

Insert: "good faith" The amendment to this amendment is final sentence to read " The burden of proof to establish good faith shall be on the prosecution."

Amendment #9 – DOL

Page 8, line 7

Insert the following:

"for purposes of this section, the entry of a guilty or nolo contendere plea is not an admission or concession of guilt;"

Page 8, line 30

Following "conviction;"

Insert the following:

"for the purposes of this section, the entry of a guilty or a nolo contendere plea is not an admission of guilt;"

Amendment # 10 – Amendment A.8, as amended as follows, but in proper form:

Page 9, lines 3 – 5:

Delete ", and the applicant did not waive, or the applicant's lawyer did not forgo for tactical reasons, the right to request DNA testing"

Page 9, lines 6 – 13:

Delete all material and insert:

"(B) was previously subjected to DNA testing, and the applicant is requesting DNA testing using a method or technology that is substantially more probative than the previous DNA testing; or

(C) the court determines that granting the application is in the best interest of justice."

Amendment #12 – DOL

Page 9, line 29 delete "conclusively"

Amendment #15 – DOL

Page 10, lines 18-23:

Delete all material and insert:

"three years or more after conviction; this presumption may be rebutted if the court finds good cause for filing three years or more after conviction."

Amendment #16 – A.16

Amendment #17 – DOL

Page 15, between lines 24 and 25:

Insert the following:

"(9) the public defender;

(10) a member of the Alaska Senate appointed by the President of the Senate;

(11) a member of the Alaska House of Representatives appointed by the Speaker of the House."

Amendment #18 – A.19 as amended

After amendment 17 Insert:

(12) a representative of the office of public advocacy

(13) a representative of the Alaska Native Justice Center

Amendment #19 – A.13

Amendment #20 – A.14

Amendment #21 – DOL

Page 16, lines 28 -30

Delete all materials:

Insert the following:

“(c) Notwithstanding any other provision of this Act, a person whose conviction was entered before July 1, 2010, has until July 1, 2013 to file a claim under AS 12.73, or a later date if the court finds good cause for a later filing.”

Renumber the following sections accordingly.

	Alaska HB 316	Alaska HB 174	Miss. Code Ann. § 99-39-3, et al.	18 USC 3600	Other States' Statutes
Discovery of new evidence/DNA technology permits interruption of statute of limitations (or ability to rebut presumption of untimeliness)	No	No statute of limitations	Yes	Yes	Only 12 (of 47) states have any time limitations; 5 of those 12 allow for an interruption of the SOL
Potential applicants whose attorneys forewent testing for tactical reasons are explicitly barred	Yes	No	No	No	2
Requirement that trial attorney provide affidavit stating why he did not seek testing	Yes	Yes	No	No	0
Explicit outright bar to potential applicants who admitted guilt	Yes	No	No	No	2; 1 of which provided a date after which pleas would prevent an application
Court may entertain new evidence not introduced at trial to determine whether DNA would provide evidence of innocence*	Yes	No	No	No	0
Requirement that applicant pay for retrieval of evidence	Yes	No	No	No	0

\*This element of HB 316 is unheard of among post-conviction DNA testing access statutes. And rightly so, as it permits a judge to take into account any and all evidence of guilt in deciding a motion for mere testing, without requiring the judge to assume exculpatory results. In essence, the judge could cite "overwhelming evidence of guilt" in denying a motion for post-conviction DNA testing. This—despite the fact that appellate judges found harmless error in the appeals of ten percent of 133 DNA exonerees, citing overwhelming evidence of guilt.<sup>1</sup> Put differently, 13 exonerees in this cohort of 133 would likely still be in prison had they been subjected to this aberrant provision.

<sup>1</sup> Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107-09 (2008).

	<b>HB 316 Governor</b>	<b>SB 110 French</b>	<b>HB 174 Lynn</b>
Procedure for disposal of evidence or biological material before expiration of time period for preservation	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b> <b>AS 12.36.200(e)</b></p> <p>Allowed after notice to the parties and attorneys, if no party objects. If there is an objection, the agency can make a request to the court to allow disposal</p>	<p><b>Preservation of Evidence</b></p> <p><i>Section 1</i> <i>AS 12.36.200(d)</i></p> <p>Similar, but also includes notice to the Public Defender Agency</p>	
Remedies if evidence is destroyed in violation of this section	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b> <b>AS 12.36.200(h)</b></p> <p>The court may order the remedy it determines appropriate. However, the court may not reverse or vacate a conviction</p>	<p><b>Preservation of Evidence</b></p> <p><b>Section 1</b> <b>AS 12.36.200(g)</b></p> <p>The court may order the remedy it determines appropriate.</p>	
Civil immunity for failure to comply with this section	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b> <b>AS 12.36.200(i)</b></p> <p>A person may not bring civil action for damages for any good faith failure to comply</p>	<p><b>Preservation of Evidence</b></p> <p><b>Section 1</b> <b>AS 12.36.200(h)</b></p> <p>A person may not bring civil action for damages for any unintentional failure to comply</p>	
Disposal of DNA for persons not guilty	<p><b>DNA identification system</b></p> <p><b>Sections 9&amp;10</b> <b>AS 44.41.035(g)&amp;(i)</b></p> <p>Makes amendments to disposal of DNA for persons not guilty of offense for which arrested</p>	<p><b>DNA identification system</b></p> <p><b>Sections 2&amp;3</b> <b>AS 44.41.035(g)&amp;(i)</b></p> <p>Same</p>	
Creation and Repeal of Task Force		<p><b>Uncodified Law</b></p> <p><b>Section 5&amp;7</b></p> <p>Creates, then later repeals, a task force to address standards and practices for proper collection and preservation of evidence</p>	

	<b>HB 316 Governor</b>	<b>SB 110 French</b>	<b>HB 174 Lynn</b>
Conforming amendments	<p><b>Disposition of recovered or seized property</b></p> <p><b>Sections 1 &amp; 2</b>  <b>12.36.020 &amp; 12.36.090</b>  Clarifies that retention of evidence in this bill takes precedence over existing provisions that address disposition of evidence in various circumstances</p>		
Crimes covered under the retention requirements	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b>  <b>AS 12:36:200(a)(1)</b>  Homicide; sexual assault in first and second degree</p>	<p><b>Preservation of Evidence</b></p> <p><b>Section 1:</b>  <b>AS 12:36:200(a)(1)</b>  Same</p>	
Retention time for evidence (other than biological material)	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b>  <b>AS 12.36.200(a)(1)</b>  Until the expiration of the prosecution, including time for an appeal and any post-conviction DNA relief application</p>	<p><b>Preservation of Evidence</b></p> <p><b>Section 1</b>  <b>AS 12:36.200(a)(1)</b>  For the period of time that the crime remains unsolved</p>	
Retention of biological material or evidence	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b>  <b>AS 12:36:200(a)(2)</b>  Until a person is unconditionally discharged for crime; or until the retention periods for physical evidence expires, whichever is longer</p>	<p><b>Preservation of Evidence</b></p> <p><b>Section 1</b>  <b>AS 12.36.200(a)(2)</b>  While the person remains a prisoner in the custody of the Department of Corrections or subject to registration as a sex offender</p>	
Disposal of evidence that is that is of a size, bulk, quantity, or physical character that makes preservation impractical or hazardous	<p><b>Preservation of Evidence</b></p> <p><b>Section 3</b>  <b>AS 12.36.200(b)</b>  Agencies retain samples of evidence through written policies on removal and preservation of samples</p>	<p><b>Preservation of Evidence</b></p> <p><b>Section 1</b>  <b>AS 12.36.200(b)</b>  Similar, but does not include the word, "hazardous"</p>	

**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: 4/7/09  
Referred: Finance**

**Sponsor(s): SENATOR FRENCH**

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to the preservation of evidence and to the DNA identification system."**

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; SAI' SAH1'

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

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

23                   (i) In this section,

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

26                               (2) "biological evidence" means

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

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

31                                       (C) a slide, swab, or test tube containing material described in

1 (B) of this paragraph; and

2 (D) swabs or cuttings from items that contain material  
3 described in (B) of this section;

4 (3) "DNA" means deoxyribonucleic acid;

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

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

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

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

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

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

14 (i) The Department of Public Safety shall [, UPON RECEIPT OF A COURT  
15 ORDER,] destroy the material in the system relating to a person or minor on the  
16 written request of the person or minor, if the request is accompanied by a  
17 certified copy of a court order making the written findings required by this  
18 subsection. The court may [SHALL] issue an [THE] order under this subsection if  
19 the person's or minor's DNA was included in the system under

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

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

24 (B) the person

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

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

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

3 (A) the person arrested was released without being charged;

4 [OR]

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

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

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

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

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

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

26 (1) the attorney general;

27 (2) the public defender;

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

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

31 (5) the commissioner of public safety;

- 1           (6) a chief of a municipal police department;  
2           (7) a representative of the Alaska Innocence Project; and  
3           (8) a representative of the state crime lab.

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

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

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

9                 (3) the victims' advocate.

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

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

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

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

18           \* **Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to  
19 read:

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

24           \* **Sec. 7.** Section 5 of this Act is repealed January 1, 2012.

Proposed amendments to SB 241 recommended by the  
Alaska Innocence Project

I organized these proposed amendments in order of their appearance in the current bill. The number in parentheses is the order of importance of the amendment to the Alaska Innocence Project.

1. (3) Strike page 3 lines 29 – 31 deleting the language “(d) The person who requests evidence that has been preserved under this section shall pay reasonable costs incurred in the retrieval of the evidence from storage

This provision requires an inmate claiming innocence, who has likely been incarcerated for years, if not tens of years, to pay for a police evidence custodian to retrieve evidence. It makes no exception for indigency. The burden is even greater when the law enforcement department is inefficient in keeping its evidence. This term will, literally, restrict DNA testing access on the basis of poverty. In the very few cases where testing will occur the law enforcement agency should collect the evidence without cost to the petitioner, especially since that agency is required by this statute to provide an inventory of the evidence it has, which will undoubtedly require they confirm each piece of evidence exists. Not one other state in the nation charges petitioners to locate evidence. This term should be stricken from the bill.

2. (1) Strike page 8 lines 5 – 7 deleting the language “(C) the applicant did not admit or concede guilt in any official proceeding for the offense that was the basis of the conviction or any lesser included offense.”

Despite the state’s claim to the contrary, the language as drafted would include all those who pled guilty or confessed to a charge. The language “admit or concede guilt” would clearly cover a guilty plea, even if made through a lawyer and not out of the defendant’s mouth, and a change of plea hearing is clearly an official proceeding. Even if this were clarified to mean only admissions of guilt out of a defendant’s own mouth, this restriction turns a blind eye to the real life situation that admissions are made, especially by the younger or disabled defendants, to crimes they did not commit. Post-conviction DNA testing is the only opportunity for an individual to correct this wrong. If a person can meet the standard that evidence exists which, if it returned a favorable result, would create a reasonable probability that the person would not have been charged or convicted, they should not be prevented from obtaining testing because they admitted guilt. This term should be deleted. 45 of the 250 DNA exonerees across the nation confessed to crimes they did not commit. 19 plead guilty to crimes they did not commit. This amounts to 25% of those individuals proven innocent through DNA testing. Only one state explicitly excludes individuals who pled guilty from seeking testing. Not one state explicitly excludes individuals who confessed. This term should be deleted.

3. (4) At page 8 line 11, Strike "an affidavit by the applicant or the applicant's lawyer describing all previous efforts to obtain DNA testing and", add instead "**a statement describing**"

This removes a process which restricts DNA testing depending on tests performed or not performed at the trial level. Its removal correctly places the focus on the existence of DNA testing which could provide a reasonable probability of indicating the person would not have been charged or convicted. The language remaining in the statute informs the court of previous post-conviction actions filed by the applicant, consistent with current post-conviction procedures.

4. (2) Strike page 8 lines 14 – 17 deleting "(4) an affidavit by the applicant's lawyer in the criminal trial stating the reason that DNA testing was not sought before or during trial, or an affidavit by the applicant or the applicant's lawyer describing the efforts made to obtain the affidavit from the criminal trial lawyer and the reason the applicant was unable to obtain it.

As with the previous section, deletion of this section places attention on the proper information, the existence of evidence which could meet the standard set in this statute. The process contained in this section is terribly burdensome. It also allows a mistake made by trial counsel to be compounded by allowing the attorney to prevent post-conviction testing through this affidavit. This section should be deleted in its entirety.

5. (1) Strike page 8 lines 29 – 30 deleting "(3) the applicant has not in an official proceeding admitted or conceded guilt for the crime that was the basis for the conviction."

See # 2 above as it deals with essentially the same language and should be deleted in its entirety for the same reasons.

6. (1) Strike page 9 line 3 beginning with "and" deleting "and the applicant did not waive, or the applicant's lawyer did not forgo for tactical reasons, the right to request DNA testing."

This restriction prevents an innocent person from obtaining testing if their trial lawyer made a bad decision and didn't get testing at the trial level, or if the individual paid for his or her own defense and couldn't afford testing. An error by the trial attorney resulting in an innocent person being convicted would be multiplied by then denying that person access to the very evidence which could prove their innocence. In addition, if the evidence was not subjected to DNA testing at the trial level, it means the prosecution, in its search for the truth, also did not test the evidence. Rather than trying to parse out responsibility for the terrible oversight at the trial level, this statute should allow testing to those individuals who can meet the criteria. This language should be deleted.

7. (1) Strike page 9 line 9 beginning with "and" through line 13 deleting "and (ii) the applicant did not waive the right to request , or the applicant's lawyer did not forgo for tactical reasons, DNA testing using a method whose probative value was similar to the method to be used in the requested testing:

See # 6 above. The language restricting testing if it was not done at the trial level is basically the same in this section. The same reasoning applies. This section should be deleted in its entirety.

8. (2) Strike p. 9 lines 24 – 29 deleting "(10) there is a reasonable probability, in light of all available evidence, regardless of whether the evidence was introduced at the applicant's trial, that the requested DNA testing will produce new material evidence that (A) would support the theory of defense described in (8) of this section; and (B) could conclusively establish that the applicant is innocent;" and replace it with **"(10) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing."**

The deleted language removes the need for the trial judge to guess at what the testing results might be. The proposed language is the most common language used in other DNA testing statutes throughout the country and focuses, correctly, on what the effect would have been at the trial level if testing had been done with exculpatory results. That test properly focuses on the DNA evidence and its impact, not on a judge trying to guess what the DNA testing will produce. The existing language will be asking the impossible of judges. It should be replaced with the more common language.

9. (1) Strike p. 10 lines 11 – 23 deleting all of proposed "Sec. 12.73.040. Timeliness"

Innocence claims should not be subject to an arbitrary time limit. Incarcerating an innocent individual is no less wrong four years after conviction than three years. Or five years, or six. If an individual can meet the standard set out in # 8, and provides the other information in a reasonably drafted testing statute, that person should obtain testing of the evidence regardless of when the petition is brought. The finality argument put forward for time restrictions on testing statutes is really a red herring, since what finality is there for anyone if an innocent person is incarcerated and the actual perpetrator remains unidentified. Certainly the original victim would rather have the right person caught and convicted no matter when that happens. The people of the State of Alaska want the same. Such arbitrary time limitations should be deleted from the bill. Thirty-five of the nations 47 laws contain NO time bars. Most others focus on deadlines on the effective date and none contemplate anything this restrictive.

10. (3) Strike page 11 line 17 beginning with "The" through line 18 deleting "The applicant shall pay the reasonable costs incurred in the retrieval from storage of the material to be tested."

See # 1 above discussing an almost identical term. The same reasons for deletion apply here.

11. (5) On page 15 add after (8) on line 24
- (9) **A member of the Alaska Senate**
  - (10) **A member of the Alaska House of Representatives**
  - (11) **The Public Defender**
  - (12) **A representative of the Office of Public Advocacy**
  - (13) **A representative from the Alaska Native Justice Center**
  - (14) **A representative of the Alaska Innocence Project**

As set out in # 12, below, the charge of the task force set up by this bill should be expanded to address the real issue of evidence retention and preservation. When this is done, the membership of the task force should be expanded to include all groups that have an interest in the issue and likely have unique perspectives and expertise to contribute. The three groups proposed here certainly meet those criteria. Without this input, an incomplete report would be produced by an incomplete task force.

12. (5) At page 16 line 3 after "cataloging" add "**retention**", before retrieval delete "and" and after "retrieval" add "**and disposal**"

Much of what the task force created by the current language in HB 316 is asked to look at does not require a task force created by statute. They are law enforcement issues regarding the handling of evidence. The real questions raised by this bill are what collection, retention, retrieval and destruction issues will best carry out the intent of this bill. These are questions best addressed by a diverse group who all come to the table with significant and useful information impacting these important issues. Adding the words retention and destruction charge this task force with looking at what the real and significant impact of this statute is and how to best deal with those impacts.

13. (1) Strike page 16 line 28 - 30

See # 9 above, as this section also deals with an arbitrary time limit within which to bring a request for post-conviction DNA testing.

I would also urge the addition of language that addresses what happens after the test results are returned. This should include, at least, the following three sections.

## I. APPEAL

The applicant shall have the right to appeal a decision denying post-conviction DNA testing.

## II. ORDERS FOLLOWING TEST RESULTS

A. If the results of ordered DNA testing are favorable to the petitioner, the court shall schedule a hearing to determine the appropriate relief to be granted. Based on the result of the testing and any evidence or other matter presented at the hearing, the court shall thereafter enter any order that serves the interests of justice, including any of the following:

1. An order setting aside or vacating the applicant's judgment of conviction or adjudication of delinquency;
2. An order granting the applicant a new trial or fact-finding hearing;
3. An order granting the applicant a new sentencing hearing or dispositional hearing;
4. An order discharging the applicant from custody;
5. An order specifying the disposition of any evidence that remains after the completion of the testing;
6. An order granting the applicant additional discovery on matters related to DNA test results or the conviction or sentence under attack including, but not limited to, documents pertaining to the original criminal investigation or the identities of other suspects; and
7. An order directing the state to place any unidentified DNA profiles obtained from post-conviction DNA testing into state and federal databases.

B. If the results of the tests are not favorable to the petitioner, the court:

1. Shall dismiss the petition;
2. Provide that the parole board or probation department be notified of the test results;
3. Make any further order it deems appropriate.

## III. REACTIVATION OF VICTIMS SERVICES

When post-conviction DNA testing is being considered by the court, the State shall, upon request, reactivate victim services for the victim of the crime being reinvestigated during the reinvestigation of the case, the pendency of the

proceedings, and , as determined by the court after consultation with the victim and/or victim advocate, following final adjudication of the case.

# ALASKA INNOCENCE PROJECT

**ANALYSIS BY WILLIAM B. OBERLY,  
EXECUTIVE DIRECTOR ALASKA INNOCENCE PROJECT  
OF SB 241 – AN ACT RELATING TO POST-CONVICTION DNA TESTING  
FEBRUARY 19, 2010**

Post-conviction evidence preservation and access to post-conviction DNA testing are the two most important legislative issues for the Alaska Innocence Project at this time. We thank Governor Parnell for recognizing the importance of these issues by proposing a bill dealing with them. However, the Alaska Innocence Project cannot support SB 241 as it is currently written. The effect of SB 241 as currently written is to drastically limit access to DNA testing in Alaska. A number of modifications will need to be made before this bill is in line with the current approach to DNA testing accepted in the rest of the country.

The major concern of the Alaska Innocence Project with this legislation is the restrictive nature of the access to DNA testing provided in this bill. In its current form this bill would establish the most restrictive procedure to obtain post-conviction DNA testing in any state and would be more restrictive than the current process available in Alaska without a specific statute. It is particularly troubling to consider how this restrictive procedure would negatively impact rural Alaskans, especially Alaskan Natives seeking post-conviction DNA testing.

This analysis will try and describe the specific parts of SB 241 which serve to deny DNA testing to individuals with innocence claims in the state of Alaska. The sections of the bill will be addressed in the order of their significance and impact on innocence claims. If these sections are removed from the bill or amended, SB 241 will then provide a procedure for wrongfully convicted Alaskans to obtain post-conviction DNA testing to establish their innocence.

The first area of concern is the prohibitions on testing contained in this bill. I have included with this analysis a chart that compares this bill with other bills currently before the Alaska Legislature, the bill passed in recently in Mississippi, the federal post-conviction DNA testing bill, and bills from other states generally. The combined effect of these prohibitions is to deny virtually every person currently in prison who would seek DNA testing. This approach flies directly in the face of current thinking, which was described by Senator Patrick Leahy when he sponsored the federal Innocence Protection Act. "The criminal justice system should err on the side of permitting testing, in light of the low cost of DNA testing and the high cost of keeping the wrong person locked up."

The most serious prohibition on testing in HB 316 is contained on page 10, lines 11 through 23

of the bill in Sec. 12.73.040, entitled Timeliness. This section establishes a presumption of untimeliness if an application for post-conviction testing is not filed within three years. This restriction will prohibit most, if not all, innocent individuals who are currently incarcerated from obtaining the testing necessary to establish their innocence. This section would make post-conviction DNA testing claims in Alaska much more limited than under the current process of post-conviction claims based on newly discovered evidence. Time limitations ignore the fact that without proper preservation standards and requirements, as well as state of the art identification methods, exculpatory DNA evidence may only be located after years have elapsed. It should be remembered that, unlike other forms of evidence, DNA evidence is not less reliable as time goes by, one of the main reasons for limiting the time within which to bring new evidence motions based on other evidence. A workable solution to this concern is to differentiate between those convicted before the effective date of the statute and those convicted after. Those convicted before the effective date of the statute should not have an arbitrary time limit placed on their claims. The three year presumption could become effective for convictions arising after the date of this law.

Page 9 section (5) at lines 2 through 13. This section prohibits an individual from seeking testing if evidence was not subjected to DNA testing at the trial level or a more probative method of DNA testing was not used, and the applicant waived the testing or the applicant's lawyer did not test for tactical reasons. This section denies the reality of the real world that bad lawyering is one of the most common causes of wrongful convictions. Since we are dealing with claims of actual innocence, it would be improper to deny an individual the opportunity to perform the most accurate tests on evidence to establish innocence because a trial lawyer made a bad decision, or couldn't afford a test. The problem is compounded in this bill by allowing the trial lawyer to cover the bad decision by requiring an affidavit from the trial lawyer explaining their actions. It is presumed under this bill that if a lawyer chooses to spend the limited resources available in a defense case on other than DNA testing, this decision will preclude post-conviction testing to establish that an individual is innocent. In our system of justice, innocence should not be able to be waived.

Page 8 subsection (C) at lines 5 through 7 and section (3) at lines 29 through 30. These sections make post-conviction DNA testing unavailable to anyone who admits or concedes guilt in any official proceeding or whose statement of guilt was the basis of the conviction. This section, again, denies hard facts we have learned from the 250 DNA exonerations nationwide, that 25% of those exonerations have involved an innocent individual who admitted their guilt or pled guilty to the crime. This category of wrongfully convicted individuals is largely represented by the most vulnerable in society; young people, people with mental disabilities, those most susceptible to suggestion. Rather than protecting the vulnerable in our society, this bill aims to take advantage of them. The State has indicated its willingness to make a distinction between those who pled guilty or no contest, which they would exclude from this restriction, and those who admitted guilt in some official proceeding. A better distinction, and more the goal of the State's inclusion of this restriction, would be to say "the applicant did not admit or concede guilty in a parole hearing or the equivalent of a parole hearing."

Page 9 section (10) at lines 24 through 29. This section of the bill calls for the court considering a post-conviction DNA testing request to guess at the outcome of the requested

testing based on the court's view of other evidence. Other states and the federal government, when establishing a standard for the court to apply to the requested evidence, reasonably assume a favorable result of the testing for the petitioner, and then have the court decide if that would establish a reasonable probability that the petitioner would not have been convicted. This long established standard does not require a judge to try and guess what the result of the requested DNA testing might be. Rather, it reasonably asks a court to decide whether a favorable test result would be significant in the outcome of the case.

Page 3 section (d), lines 29 through 31. Also page 11, lines 17 through 18. This term of the bill calls for the person requesting evidence be tested pay for its retrieval. This is a concept totally unique to the Alaska post-conviction DNA testing process. Not one statute passed by any other state or the federal government imagines such a requirement. An irony in including this section where it is in the bill is that it follows a section which requires an agency holding preserved evidence to produce an inventory of that evidence. It must be presumed that the agency will actually confirm they have each of the items on the inventory before providing it. Under this bill, after physically confirming they have each piece of evidence, the holding agency will then get to turn around and charge for going back again and collecting it. A more reasonable approach would envision the agency putting the evidence in a convenient place at the time of preparing the inventory, thus performing their work more efficiently, while doing away with the need to charge to collect evidence. A serious impact of this section will be that some individuals will be precluded from obtaining the evidence due to an inability to pay this tax on their right to DNA testing. The section is particularly offensive since evidence does not belong to one side or the other, but rather to the people. Charging a person claiming innocence to collect the evidence is inconsistent with this concept.

Page 15 section (a) at lines 16 through 24. This section establishes a task force to recommend standards and protocols regarding evidence preservation issues. Unlike a similar section in SB110, this version excludes any representative from the criminal defense bar, like the public defender or office of public advocacy, or any member from the innocence community, like from the innocence project, or any member from the legislature. The task force established by this section would not receive a wide range of information in order to produce the most balanced report based on the best information. The task force created by this bill will be limited to information from one part of the criminal justice community and will thus produce a report that is less than complete and so will be that much less effective. The mandate for the task force should also be expanded to address the issues likely raised by this legislation. It should also look into "retention" and "disposal" of evidence.

Page 2 lines 25 through 31 through page 3 lines 1 through 6. This section sets deadlines for destruction of evidence obtained during the investigation of a case rather than allows the Task Force which is established at the end of the bill to study the issue and make recommendations. SB110 also established a task force with a wide ranging mandate to study evidence preservation issues, including the issue of proper retention. Reasonably, one of the issues that task force was to report back on was destruction deadlines. SB241 also establishes a task force but, without any study, also creates time limits for destruction. This does not seem to be making the best use of the task force created. As an example of why more study might be necessary, this section also seems to allow for destruction of evidence if a challenge to the

February 19, 2010

conviction is filed in federal district court. The section defining "direct review" mentions only judgment on appeal, petition for hearing and review by the United States Supreme Court. A task force studying this issue and making recommendations would most likely recommend evidence be retained during the pendency of a habeas action filed in federal district court.

The concerns listed above set out serious shortfalls in the contents of SB241. If these sections are allowed to remain in the bill, unchanged, not only would post-conviction DNA testing be more difficult for the wrongfully convicted in Alaska to obtain than it currently is, it would be more difficult than anywhere else in the country. I urge the committee to correct these problems by removing the language of SB241 set out above before the bill is passed out of committee. If the sections I have identified are removed from SB241, the bill will then actually provide innocent individuals with a procedure to obtain post-conviction DNA testing of potentially exculpatory evidence. Alaska will have a bill that works.

Thank you for allowing me to address this very important legislation. If the committee has any questions on any matters arising from SB241 which I might help answer, please don't hesitate to contact me.

William B. Oberly  
Executive Director  
Alaska Innocence Project

# INNOCENCE PROJECT



Benjamin N. Cardozo School of Law, Yeshiva University

**WRITTEN TESTIMONY OF REBECCA BROWN  
POLICY ADVOCATE, INNOCENCE PROJECT  
BEFORE THE ALASKA HOUSE JUDICIARY COMMITTEE  
RE: SB 241 – AN ACT RELATING TO POST-CONVICTION DNA TESTING  
FEBRUARY 22, 2010**

Thank you for the opportunity to speak before you today and submit written comments for your consideration of SB 241, which seeks to create statutory access to post-conviction DNA testing.

The Innocence Project assists persons in proving their innocence through post-conviction DNA testing. To date there have been 251 men and women exonerated by post-conviction DNA testing nationwide, one exonerated just yesterday. The emergence of forensic DNA technology changed the fabric of the criminal justice system. Whereas prior to the advent of forensic DNA there were few clear ways to assess prisoners' claims of wrongful conviction, DNA testing of crime scene evidence can provide the criminal justice system with significant and enduring proof of innocence or guilt, from the initial stages of an investigation to years after a conviction. With the ability to transcend fallible human judgment, DNA testing – and particularly post-conviction DNA exonerations – have proven the potential for error that exists in our criminal justice system, and that our appeals processes are not sufficient for identifying those errors.

Our policy agenda is a pro-law enforcement agenda, win-win reforms that protect the innocent and help identify the guilty. It is precisely because of the dual nature of our work – both the efforts to exonerate the innocent and the constructive efforts to strengthen the capacity of the criminal justice system to make more accurate guilt/innocence determinations – that we may be able to provide a somewhat unique and hopefully helpful perspective on the complicated issue you are addressing today.

Having worked in this field for thirty years, the co-founders of our organization often remark that perhaps the most significant lesson they have learned is that in matters of crime and justice humility is important because even the most experienced among us are often wrong. They have reviewed hundreds of cases. In most, they have pored over reams of court transcripts, scrutinized piles of police reports, dissected crime lab analyses, sifted through evidence and property logs, and studied scores of witness statements, and have strongly suspected some men's guilt, only later to discover they were wrong. No less often, someone they strongly suspect is innocent turns out to be guilty. Indeed, because every one of us is human and all of us are actors in a fact-finding mission, if just one of us makes an error, jumps to a conclusion, or acts on a false assumption, an innocent man can be condemned to a guilty man's fate.

Congress recognized DNA's potential for justice, and it was bi-partisan support that led to passage of the Innocence Protection Act contained in the Justice for All Act of 2004. Then-President George W. Bush noted in his 2005 State of the Union address: "In America we must make doubly sure no person is held to account for a crime he or she did not commit. So we are dramatically expanding the use of DNA evidence to prevent wrongful conviction."

The preservation of biological evidence and access to post-conviction DNA testing – fundamental elements of the IPA's innocence protections – are as important today as ever. The Innocence Project

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continues to unearth cases where post-conviction DNA testing proves the innocence of those convicted in both the relatively recent and distant past.

Unfortunately, when forensic DNA testing was first made available, it provided little help to the truly innocent who were facing charges like rape or murder, or who had been previously convicted. For these men and women, hope existed only later, with the potential of the performance of DNA testing on the crime scene evidence connected to their cases. For many, if not most of them, such testing represented a last chance to prove their innocence, as they had already exhausted all available state remedies, as well as federal habeas corpus relief. Yet without the benefit of state statutes providing access to post-conviction DNA testing, they faced daunting, if not unattainable, paths to such testing.

The scales of justice began to tilt when states started to pass laws allowing convicted persons access to post-conviction DNA testing. These laws not only allowed DNA testing to be performed on genetic material that was never tested at trial; it also allowed more modern, sophisticated technology to be utilized on previously tested evidence that had yielded inexact or unreliable conclusions.

Over time, newer DNA technologies have emerged, enabling us to create perpetrator DNA profiles from physical evidence that was previously useless. The amount of evidence items that are being successfully tested now, but could never have been tested successfully only a few years ago, is enormous. As DNA testing methods continue to emerge, they reveal new information about even those crimes committed in the distant past. Post-conviction DNA testing statutes have begun to contemplate these technological advances and many now include provisions that permit additional testing in cases where previous testing using older testing methods could not produce conclusive results.

The passage of post-conviction DNA testing statutes also explicitly exempted DNA testing motions and related proceedings from the procedural bars that govern other forms of post-conviction relief. Before the emergence of this discrete statutory avenue that allowed petitioners to seek post-conviction DNA testing, the innocent were forced to rely upon processes that put the burden on the petitioner to effectively solve the crime and prove that the DNA evidence promises to implicate another individual. In states without post-conviction DNA testing laws, many efforts to achieve testing were stymied, egregiously delayed or flatly denied.

Consider the following case of justice denied in the absence of a post-conviction DNA testing law. In March of 1989, New Jerseyan Larry Peterson was convicted of the sexual assault and murder of a woman in Burlington County. Although three men originally indicated to police that they were with Mr. Peterson at the time the murder took place, they later changed their accounts during interrogations and told law enforcement that Mr. Peterson confessed to them that he had indeed committed the crime. One forensic scientist testified at trial that her hair comparison analysis tied Mr. Peterson to the murder and another analyst with the New Jersey State Police testified that there was seminal fluid on the victim's jeans and sperm on her underwear. No seminal fluid or sperm was found in her rape kit. All tests on these items of evidence were inconclusive at the time of trial.

Mr. Peterson testified in his own defense at trial. Alibi witnesses supported his whereabouts during the time of the crime. Work records also showed that he did not work on the day that the victim was found – the day he supposedly confessed to the crime on his way to work. The jury convicted Mr.

Peterson of felony murder and aggravated sexual assault in March 1989. He was sentenced to life plus twenty years in prison.

Although there was no post-conviction DNA testing law in New Jersey, Mr. Peterson first sought access to DNA testing in 1994 under the state's existing post-conviction review process. When the court finally heard his motion in 1998, it denied his petition. In 2000, the Appellate Division affirmed the denial of his petition for post-conviction relief ruling that there was overwhelming evidence of guilt in his case. In March of 2001, the Supreme Court denied his Petition for Certification.

Mr. Peterson was without hope until New Jersey passed a statute granting access to post-conviction DNA testing. The law was made effective on July 7, 2002. On July 8, 2002, Larry Peterson became the first New Jerseyan to file a petition for post-conviction DNA testing under the new law and ultimately testing was granted, after an appeal of an initial denial.

In February of 2005, the Serological Research Institute (SERI) reported the results of testing: Mr. Peterson was excluded as a contributor of any and all of the biological evidence. Although the New Jersey State Police Laboratory had reported that there was no semen in the victim's rape kit, SERI identified sperm on her oral, vaginal, and anal swabs. Two different male profiles were found. One of the males was one of the victim's consensual partners, and his profile was also found on her underwear, jeans, and rape kit. The other unknown male was found on all of the swabs in her rape kit. Based on this evidence, Mr. Peterson's conviction was vacated in July 2005. On May 26, 2006, the prosecution decided to drop all charges against Mr. Peterson. Without the passage of New Jersey's post-conviction DNA testing law, Mr. Peterson would have perished in prison.

Today, 47 states have post-conviction DNA testing laws, which vary in substance and scope. In some states with laws, the "right" to DNA testing remains illusory for many categories of potentially innocent defendants. *That said, the proposal under consideration in SB 241 more affirmatively denies post-conviction testing than any other statute we have ever seen.*

We offer this perspective based on our breadth of experience litigating claims of innocence all across the nation. We have worked closely with legislatures around the country to establish meaningful post-conviction DNA access, most recently in South Carolina, Mississippi and Nevada, which chose last year to expand its statute to additional categories of deserving applicants. We have learned that seemingly innocuous provisions can spell a dead end for justice for many deserving applicants and wish to spare Alaska such a fate. While there are many provisions that create barriers to meaningful access to post-conviction DNA testing in this proposal, in the interest of time, I will focus on the most problematic areas.

#### ***Timeliness***

Perhaps the most restrictive provision in this proposal can be found in Section 12.73.040, which effectively puts a three year statute of limitations from the time of conviction on filing a post-conviction claim of innocence. As I mentioned earlier, nearly every single individual who was able to prove innocence through post-conviction DNA testing had already exhausted all available state remedies, as well as federal habeas corpus relief before seeking testing. Not one of these individuals would be eligible for testing under the framework contemplated in this proposal. *There is not one law in the*



*nation that includes such a restrictive timeliness provision. Indeed, 35 of 47 statutes possess no time limitation on the filing of a post-conviction DNA testing petition whatsoever. Perhaps more concerning, the inclusion of such a provision in a post-conviction testing law would make claims more difficult to bring than under the current post-conviction review process.*

#### ***Barring Testing to Individuals Whose Attorneys Did Not Previously Seek Testing***

Traditionally, a defendant seeking post-conviction DNA testing might be able to accomplish such testing under the post-conviction relief process. Unfortunately, though, that framework has proven illusory, given the fact that not a single Alaskan has achieved post-conviction DNA testing to date. If properly structured, a post-conviction DNA testing framework would correct this and allow an Alaskan access to testing under such a framework. Unfortunately, however, the framework proposed also effectively blocks access to post-conviction DNA testing.

A provision inserted into the existing post-conviction review law, located in Section 12.72.010(4), indicates that if an individual seeks post-conviction DNA testing to support his claim of innocence, the person's "exclusive method for obtaining that testing is an application under the post-conviction DNA testing statute," yet Section 12.73.020(5)(A), a provision in the proposed, new post-conviction DNA testing framework, bars an individual from seeking post-conviction DNA testing if the evidence "was not subjected to DNA testing, and the applicant did not waive, or the applicant's lawyer did not forego for tactical reasons, the right to request DNA testing." This provision is made worse by the requirement, in Section 12.73.010(4), which requires an affidavit by the applicant's lawyer stipulating to the reasons DNA testing was *not* sought before or during trial.

These sections effectively bar innocent individuals who were victimized by poor representation, a common cause of wrongful conviction, from post-conviction DNA testing. Put simply, this proposal requires an individual seeking DNA testing to abandon the post-conviction relief process for the purposes of accessing post-conviction DNA testing in favor of the newly created avenue for post-conviction DNA testing. Once the defendant seeks DNA testing under the post-conviction DNA testing framework, however, which is his "exclusive method for obtaining that testing," he is at the mercy of his trial attorney to disclose potential incompetence in order to be granted that post-conviction DNA testing. Therefore, he must rely upon his trial attorney, the same trial attorney who ineffectively represented him, to admit to his negligence or indolence to obtain access to post-conviction DNA testing under the post-conviction DNA testing framework.

It is improper to deny an individual the opportunity to test scientific evidence to establish innocence because a trial lawyer failed to explore DNA testing, made a poor decision, or could not afford a test. It is difficult to conceive that the same trial attorney who made a poor decision would be willing provide an affidavit to this effect. ***Put simply, these provisions deny the most vulnerable – those who were represented poorly or ineffectively – the ability of proving innocence through DNA testing.***

#### ***Barring Individuals Who Admitted Guilt***

There are three areas of the proposal that would foreclose the possibility of post-conviction DNA testing to an individual who admitted or conceded guilt to the crime for which he was convicted. Section 12.73.010(b)(1)(C); 12.73.020(3); and 12.73.020(9). While it is counterintuitive to most, the innocent, with great regularity, plead guilty, falsely confess and otherwise provide admissions to



crimes they did not commit.

Researchers who study this phenomenon have determined that the following factors contribute to or cause such admissions or false confessions:

- Real or perceived intimidation of the suspect by law enforcement
- Use of force by law enforcement during the interrogation, or perceived threat of force
- Compromised reasoning ability of the suspect, due to exhaustion, stress, hunger, substance use, and, in some cases, mental limitations, or limited education
- Devious interrogation techniques, such as untrue statements about the presence of incriminating evidence
- Fear, on the part of the suspect, that failure to confess will yield a harsher punishment

Some populations, including youth and individuals with mental limitations, are particularly vulnerable, but we have uncovered many cases that involve individuals who do not fall into these “at risk” categories. *Nearly 25% of the nation’s wrongful convictions proven through DNA testing reveal involved an admission or confession.* The proposal currently under consideration would have barred all of these people from seeking testing.

#### ***Requiring Courts to Anticipate the Outcome of Testing***

Section 12.73.020(10) requires the court to assess whether there is a reasonable probability, in light of all available evidence, including even evidence that was not introduced at trial, that the requested DNA testing would demonstrate innocence. In essence, this provision would allow the courts to guess the outcome of testing rather than to just accomplish that requested testing. We have learned in the course of our work, that only DNA can provide definitive answers about guilt or innocence. Time and again, we have uncovered cases which contain multiple elements seemingly pointing to the defendant’s guilt only to learn through DNA testing that the defendant is, in fact, innocent. As I described earlier, at our office, we have reviewed cases where we were fairly confident in a defendant’s guilt only to learn later of his innocence and vice versa. Therefore, it is simply irresponsible to place such a burden on the court, and it certainly sets the stage for irreparable mistakes that any one of us, placed in that same position, would make.

#### ***Requiring the Petitioner to Pay for the Retrieval of Evidence***

Section 12.36.200(d) of the proposal requires the defendant seeking biological evidence connected to his case to pay for its retrieval. *There is no other state in the country that places this burden on the defendant.* In light of all of the other barriers to meaningful post-conviction DNA testing contained in this proposal, this additional burden – particularly for an indigent defendant – could effectively bar deserving individuals from seeking testing.

We believe the Governor put forward this proposal in the hopes of helping the truly innocent who are languishing behind bars in the state of Alaska. Unfortunately there are many provisions in this bill



that would prevent access to post-conviction DNA testing from being meaningful. In essence, their hopes of demonstrating their innocence will be forever prohibited. Our office would appreciate the opportunity to offer our perspective to the Alaskan legislature with the goal of crafting a statute that provides meaningful access to testing in the way we believe Alaskans want.

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.

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	Alaska HB 316	Alaska HB 174	Miss. Code Ann. § 99-39-3, et al.	18 USC 3600	Other States' Statutes
Discovery of new evidence/DNA technology permits interruption of statute of limitations (or ability to rebut presumption of untimeliness)	No	No statute of limitations	Yes	Yes	Only 12 (of 47) states have any time limitations; 5 of those 12 allow for an interruption of the SOL
Potential applicants whose attorneys forewent testing for tactical reasons are explicitly barred	Yes	No	No	No	2
Requirement that trial attorney provide affidavit stating why he did not seek testing	Yes	Yes	No	No	0
Explicit outright bar to potential applicants who admitted guilt	Yes	No	No	No	2; 1 of which provided a date after which pleas would prevent an application
Court may entertain new evidence not introduced at trial to determine whether DNA would provide evidence of innocence*	Yes	No	No	No	0
Requirement that applicant pay for retrieval of evidence	Yes	No	No	No	0

\*This element of HB 316 is unheard of among post-conviction DNA testing access statutes. And rightly so, as it permits a judge to take into account any and all evidence of guilt in deciding a motion for mere testing, without requiring the judge to assume exculpatory results. In essence, the judge could cite “overwhelming evidence of guilt” in denying a motion for post-conviction DNA testing. This—despite the fact that appellate judges found harmless error in the appeals of ten percent of 133 DNA exonerees, citing overwhelming evidence of guilt.<sup>1</sup> Put differently, 13 exonerees in this cohort of 133 would likely still be in prison had they been subjected to this aberrant provision.

<sup>1</sup> Brandon Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 107-09 (2008).

**SENATE BILL 241  
EVIDENCE RETENTION AND  
POST-CONVICTION DNA TESTING  
Sectional Analysis**

**Sections 1 and 2** are conforming amendments to clarify that the evidence retention provisions in the bill take precedence over the provisions of AS 12.36.010 – 12.36.090 that address disposition of evidence in various circumstances, including disposal of unclaimed property.

**Section 3** proposes a new statute in AS 12.36, Preservation of Evidence, that would require municipal police departments, the Department of Public Safety, the Department of Law, and the Alaska Court System to preserve both physical evidence and biological evidence for the periods described below. The highlights include:

- The retention requirements apply to an investigation and prosecution of homicide (murder, manslaughter, and criminally negligent homicide), sexual assault in the first degree, and sexual abuse in the first degree.

Because this is a new (and unfunded) duty imposed on municipal agencies in addition to state agencies, the bill was drafted to apply to a limited number of offenses; the offenses are the most likely to include evidence with DNA as part of the investigation and prosecution.

- Requires evidence (not including biological material) to be retained until the expiration of the prosecution, including the time for completing an appeal (including time for applying for review to the United States Supreme Court) or the litigation of any post-conviction relief application.

The bill allows agencies to preserve samples of evidence if the item itself is impractical or hazardous to preserve. It recognizes that municipal police agencies will have varying storage capacity; that is, a rural agency will have a smaller storage ability than a larger municipality. The bill requires each agency to adopt written policies addressing removal and preservation of samples.

- Requires biological material to be retained by an agency until the defendant is unconditionally discharged for the crime (including any period of probation or parole), or until the period for retention of physical evidence have expired, whichever is longer.

Biological material is defined to include the contents of a sexual assault examination kit, all human bodily material collected in the investigation, slides, swabs, or test

tubes containing human bodily material, and swabs or cuttings from other evidence that contain human bodily material.

- The bill adopts a procedure for an agency, after notice to the parties and their attorneys, to dispose of or return evidence or biological material if no party objects to the disposal or return of the evidence or biological material. If there is an objection, it allows the agency to request the court to allow the disposal or return of evidence or biological material.
- The remedy for an agency's failure to preserve evidence and biological material is left to the court. However, a court may not reverse or otherwise vacate a conviction based solely on a violation of the new law.
- The bill prohibits a person from bringing a civil action against an agency for a good faith failure to abide by the new requirements.

**Section 4** requires that a person who seeks post-conviction DNA testing to support a claim of innocence bring the application for testing under AS 12.73, proposed in the bill.

**Section 5** clarifies practice in the area of post-conviction relief by putting in statute the common law rule that requires an applicant to plead a prima facie case for post-conviction relief, and the court make a finding that a prima facie case has been pled before the state responds. Then the parties may pursue discovery on the matter. *State v. Jones*, 759 P.2d 558, 565-566.

**Section 6** adopts procedures for post-conviction DNA testing. These include the following:

- **Sec. 12.73.010** sets out the information that must be included in an application for post-conviction DNA testing. The applicant must file
  - An affidavit by the applicant that states
    - that the applicant did not commit the crime for which he was convicted or any lesser included offense;
    - that the applicant did not solicit another person to commit, or aid or abet another person in planning or committing, the offense or any lesser included offense;
    - that the applicant did not admit or concede guilt for the offense in any official proceeding;

- An affidavit by the applicant or the applicant's lawyer stating the results of each DNA test already performed on evidence in the prosecution of the defendant;
  - An affidavit by the applicant or the applicant's lawyer describing previous efforts to obtain DNA testing;
  - An affidavit by the applicants trial lawyer stating the reason the DNA testing was not requested at the trial level, or a affidavit stating the efforts taken to obtain this affidavit.
- **Sec. 12.73.020** provides the standards for when a court may order post-conviction DNA testing. These include:
    - The applicant was convicted of a felony against a person (AS 11.41);
    - Completion of the affidavits required by AS 12.73.010 have been submitted;
    - The applicant has not admitted or conceded guilt in an official proceeding;
    - The evidence was obtained as part of an investigation of the crime;
    - Either
      - The evidence has not been tested or the right to test the evidence was not waived for tactical reasons; or
      - The evidence has been previously tested, the applicant is requesting a more probative test, and the applicant did not waive for tactical reasons a similarly probative test;
    - The evidence has been retained under conditions that ensure that it has not changed in a way that would undermine the accuracy of the test;
    - The applicant proposes a defense theory not inconsistent with the defense at trial, and that would establish innocence;
    - If the defendant was convicted at trial, the identity of the perpetrator was an issue;
    - There is a reasonable probability that the testing requested will produce new evidence that would support the new defense theory and could conclusively establish innocence;

- The applicant consents to give a DNA sample and to have that sample entered into the DNA identification registration system; and
- The application is timely.
- **Sec. 12.73.030** allows for summary dismissal by the court if the application does not include the information required. If the application is not summarily dismissed the prosecuting authority has 45 days to file a response.
- **Sec. 12.73.040** adopts presumptions regarding timeliness. There is a presumption that filed an application within three years after conviction is timely. There is a presumption that an application filed later is untimely; this may be rebutted by a finding that the applicant was incompetent or for any other good reason.
- **Sec. 12.73.050** adopts procedures for collecting DNA samples. It also provides that the testing must be performed at a laboratory operated by the state or approved by the state. The cost of testing will be paid for by the state; if the applicant requests additional testing, the applicant must pay for it, and it must be performed at an accredited laboratory or one approved by the Department of Public Safety.
- **Sec. 12.73.060** clarifies that the prosecution and an applicant may stipulate to DNA testing without following the procedures in the bill.
- **Sec. 12.73.070** includes definitions for the new chapter.

**Section 7** provides that an indigent applicant is entitled to representation by the Public Defender Agency in bringing an application for post-conviction DNA testing.

**Sections 8 – 12** make clarifying amendments to the DNA identification registration system statutes. The bill clarifies that a minor must be 16 years of age or older at the time of offense for the minor's DNA to be entered into the database. It also requires that the Department of Public Safety remove a DNA sample entered into the database if the individual was found not guilty for the offense that was the basis of the DNA entry. The bill also makes several draft changes to improve the readability of the law.

**Section 13** provides that a DNA sample from the registration system may be used in a criminal investigation if it was mistakenly in the system, if the error was made in good faith. Section 13 also clarifies that if a sample does not include sufficient material to obtain an accurate identification, another sample may be taken.

**Sections 14 and 15** note the effect the bill has on Rule 35.1, Alaska Rules of Criminal Procedure.

**Section 16** creates a task force to consider and recommend standards for preservation of evidence. The task force would consist of the attorney general, the commissioner of public safety, a chief of police from a community not on the state's road system, a chief of police from a municipal department, the state medical examiner, representatives from the crime laboratory and the court system, and the victims' advocate.

The task force's work would be to recommend standards for collection, storage, organization, cataloging, and retrieval of evidence; identify sources of financial help for implementing the standards; recommend minimum qualification and training of persons responsible for storing evidence. After completing its work, the task force will report its recommendations to the legislature.

**Sections 17 – 19** include applicability and effective date provisions.

# STATE OF ALASKA

**DEPARTMENT OF LAW**  
CRIMINAL DIVISION CENTRAL OFFICE

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January 27, 2010

Senator Hollis French  
Chair, Senate Judiciary Committee  
Alaska State Capitol, Room 417  
Juneau, Alaska 99801

Re: Senate Bill 241 – post-conviction DNA testing  
and evidence retention

Dear Senator French:

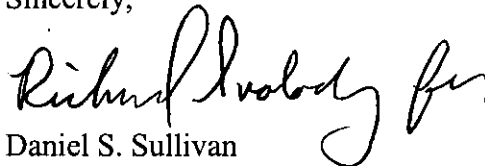
I am writing to respectfully request that you schedule Senate Bill 241 for a hearing in the Senate Judiciary Committee at your earliest convenience. SB 241 is one of several bills that the Governor has introduced to confront and help reduce crime in our state, and to provide for evidence retention and for post-conviction DNA testing.

The bill adopts standards for law enforcement agencies to retain evidence. This is important for later testing of the evidence for both cold case prosecutions and for people who claim they were wrongfully convicted. The bill adopts standards for post-conviction DNA testing. The bill also makes drafting and other minor changes to the DNA identification system.

Attached is a sectional analysis that explains the bill in detail.

Thank you for your consideration of this request.

Sincerely,



Daniel S. Sullivan  
Attorney General

DSS:ADC: sf