STATE OF ALASKA

DEPARTMENT OF LAW

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The Honorable Sean Parnell
Governor
State of Alaska
P.O. Box 110001
Juneau, Alaska 99811-0001

Re: HCS CSSB 110(FIN) -- relating to post-conviction DNA testing, to the preservation of certain evidence, and to the DNA identification registration system; relating to post-conviction relief procedures; relating to representation by the public defender; and amending Rule 35.1, Alaska Rules of Criminal Procedure
Our file: JU2010201341

Dear Governor Parnell:

At the request of your legislative director, we have reviewed HCS CSSB 110(FIN) (SB 110), relating to post-conviction DNA testing, to the preservation of certain evidence, and to the DNA identification registration system; relating to post-conviction relief procedures; relating to representation by the public defender; and amending Rule 35.1, Alaska Rules of Criminal Procedure.

SB 110 addresses evidence retention; its provisions are similar to those in your bills, HB 316 and SB 241. SB 110 also was amended to include the provisions addressing post-conviction deoxyribonucleic acid (DNA) testing from HB 316 and SB 241. SB 110 is the result of a cooperative effort by members of the legislature and the executive branch.

SB 110 requires that evidence in an investigation or prosecution for homicide, sexual assault in the first degree, and sexual abuse in the first degree be preserved by the Department of Law, the Department of Public Safety, the Alaska Court System, and municipal law enforcement agencies (law enforcement agencies). Traditional evidence must be preserved while the crime remains unsolved or for 50 years, whichever occurs first. Biological evidence must be

preserved for the period that the defendant remains in the custody of the Department of Corrections or committed to a juvenile facility or must register as a sex offender, whichever is longer.

The bill provides that a law enforcement agency may take cuttings and samples from evidence that is large or has a physical characteristic that makes preservation impractical. It requires an agency to adopt and follow written policies regarding evidence retention in taking the samples and cuttings from the evidence. This section impliedly recognizes that law enforcement agencies from communities in the state will have different capacities for evidence storage, and that an agency in a small village will probably need to take samples from evidence more readily than an agency in another community that may have greater storage capacity.

An agency may return or dispose of evidence otherwise required to be preserved if it notifies all concerned persons, and no objection to the disposal or return of property is raised. If an objection is raised, the agency may request permission of a court to dispose of or return evidence. A court may grant permission if it finds that the request to preserve evidence is without merit or that the evidence is not significant.

The bill provides that a court may determine the remedy appropriate for failure to preserve evidence as required. However, a person may not bring a civil action against the state, a political subdivision, a law enforcement agency or officers, agents, or employees of these agencies for an unintentional failure to comply with the new evidence preservation requirements.

SB 110 adopts procedures for a person who has been convicted of a felony against a person under AS 11.41 to apply for post-conviction DNA testing. The bill specifies the information that a person must include in an application. A court shall order the testing if it makes certain findings including:

- the applicant has submitted an affidavit claiming that the applicant did not commit the crime, a lesser included offense, or solicit, aid, or abet another in planning or committing the crime;

- the applicant did not admit or concede guilt under oath in an official proceeding; the court may in the interest of justice waive this requirement; further, the entry of a nolo contendere or guilty plea is not considered an admission or concession of guilt for this provision;

- the evidence was either not subject to DNA testing; or the applicant is requesting a substantially more probative testing method; the court may waive the second provision in the interest of justice;

- the evidence has been subject to a chain of custody;

- the proposed testing is reasonable and consistent with accepted forensic practices;

- the applicant identifies a theory of defense that would establish innocence;
- if the applicant was convicted after a trial, the identity of the perpetrator was an issue at trial;
- the proposed testing may produce new material evidence that would
    - support the defense theory identified; and
    - raise a reasonable probability that the applicant did not commit the crime;
- the applicant consents to giving a DNA sample and to entry of the sample in the DNA identification registration system; and
- the application is timely.

Generally, DNA testing will be performed at the state crime laboratory or a laboratory approved by the Department of Public Safety, and at the state's expense. Additional testing requested by the applicant must be paid for by the applicant and performed at a laboratory approved by the department.

SB 110 makes changes to AS 44.41.035, which established the DNA identification registration system. Some are drafting changes and others are substantive. The changes include the following:

- clarifies that the DNA of a juvenile may only be part of the system if the offense was committed when the juvenile was 16 years of age or older;
- requires DNA to be removed from the system if the person from whom it was collected was acquitted;
- provides that a DNA sample collected and included in the system in good faith may be used in a criminal investigation, even though it is later determined that the sample should have been removed; and
- allows a second or subsequent sample to be taken from a person if the first sample does not include the genetic material necessary to obtain an identification.

SB 110 adopts in uncodified law a task force to consider standards for evidence retention in the state. Members of the task force include the attorney general; the public defender; the director of the office of public advocacy; the commissioner of public safety; the chief of a municipal police department; representatives of the Alaska Innocence Project, the Alaska Native Justice Center, and the crime lab; a member of the House Judiciary Committee chosen by the speaker of the house of representatives; a member of the Senate Judiciary Committee chosen by

the president of the senate, and the victims' advocate. Persons on the task force may assign a designee to represent them.

Membership on this executive branch task force by legislators may violate art. II, sec. 5 of the Alaska Constitution, which precludes legislators from dual office-holdings. The rationale for this prohibition is to "guard against conflicts of interest, self-aggrandizement, concentration of power, and dilution of separation of powers. . . ." *Begich v. Jefferson*, 441 P.2d 27 (Alaska 1968). However, this is a temporary task force that makes advisory recommendations for evidence retention and storage. Under these circumstances, the task force membership is more likely to be upheld.

The task force is charged with devising standards for collection, retention, and cataloguing of evidence. It also must recommend practices, protocols, models, and resources for the cataloging and accessibility of evidence and the return of property to owners. The task force must complete its work by December 31, 2012.

Except as described above, the bill presents no legal problem or other concern.

Sincerely,

Daniel S. Sullivan
Attorney General

DSS:ADC:sf