

HOUSE BILL NO. 174

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - FIRST SESSION

BY REPRESENTATIVES LYNN, Coghill, Muñoz, Keller, Chenault, Harris, Ramras

Introduced: 3/9/09

Referred: Judiciary, Finance

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to post-conviction DNA testing; and amending Rule 35.1, Alaska Rules**
2 **of Criminal Procedure."**

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

4 * **Section 1.** AS 12.72 is amended by adding new sections to read:

5 **Article 2. Post-Conviction DNA Testing.**

6 **Sec. 12.72.200. Procedure for application for DNA testing; appointment of**
7 **counsel.** (a) After conviction, an incarcerated person may apply under AS 12.72.200 -
8 12.72.250 to the superior court in the district where the person was convicted for an
9 order for DNA testing of biological evidence. The applicant shall serve a copy of the
10 application on the attorney general.

11 (b) An application filed under (a) of this section must include specific facts
12 sufficient to support a prima facie showing that DNA testing is warranted under the
13 criteria set out in AS 12.72.210. The application must also include

14 (1) the results of all prior DNA tests, regardless of whether a test was

1 performed by the defense or the prosecution;

2 (2) an affidavit sworn to by the applicant

3 (A) describing all prior efforts to obtain DNA testing;

4 (B) describing any prior application filed under this section;

5 and

6 (C) stating that the applicant was innocent of the crimes for
7 which the applicant was convicted and any lesser included offense;

8 (3) an affidavit from trial counsel stating the reasons DNA testing, or
9 more discriminating DNA testing, was not sought before trial, or a statement by the
10 applicant explaining why this affidavit was not obtained.

11 (c) If the application, files, and record of the case show to the satisfaction of
12 the court that the applicant is not entitled to relief based on the criteria specified in
13 AS 12.72.210, the court shall deny the application without a hearing and without
14 appointment of counsel.

15 (d) If the court does not deny the application for testing under (c) of this
16 section, the court shall appoint the public defender or the office of public advocacy if
17 the court determines the applicant is indigent and has requested counsel.

18 (e) Counsel for the applicant may file a supplement to the application and may
19 ask the court to set the matter for a hearing if, on investigation of the application for
20 testing, counsel believes sufficient grounds exist to support an order for DNA testing.
21 If the applicant is not represented by counsel, the court may set the matter for a
22 hearing on the applicant's request.

23 (f) Following a request for a hearing, the court shall allow the attorney general
24 a reasonable amount of time, but not less than 60 days, to respond to the application
25 and any supplement filed by the applicant's counsel and to prepare for the hearing.

26 (g) A court may not order DNA testing without a hearing, except on written
27 stipulation of the attorney general.

28 **Sec. 12.72.210. Standards for DNA testing.** A court may not order DNA
29 testing unless the applicant shows

30 (1) by clear and convincing evidence, that the results of the DNA
31 testing could establish a reasonable doubt as to the applicant's guilt of the crime for

1 which the applicant was convicted;

2 (2) that there is reason to believe that a law enforcement agency
3 collected biological evidence pertaining to the offense and retains actual or
4 constructive possession of the evidence that allows for DNA testing;

5 (3) that the applicant did not secure DNA testing before the applicant's
6 conviction because DNA testing was not reasonably available or for reasons that
7 constitute justifiable excuse, ineffective assistance of counsel, or excusable neglect;
8 and

9 (4) that the applicant consents to provide a biological sample for DNA
10 testing.

11 **Sec. 12.72.220. Preservation of evidence.** (a) An applicant is not entitled to
12 relief on an allegation that a law enforcement agency failed to preserve biological
13 evidence.

14 (b) A court granting a motion for hearing under AS 12.72.200 shall order the
15 appropriate law enforcement agency to preserve existing biological evidence for DNA
16 testing.

17 (c) This section does not create a duty to preserve biological evidence except
18 as ordered in (b) of this section and as provided in (d) of this section. This section does
19 not create a liability on the part of a law enforcement agency for failing to preserve
20 biological evidence.

21 (d) The investigating law enforcement agency shall preserve biological
22 material identified during the investigation of a crime or crimes for which the
23 applicant may file an application for DNA testing under AS 12.72.200 - 12.72.250.
24 The identified biological material shall be preserved for the period of time that person
25 is incarcerated in connection with that case.

26 **Sec. 12.72.230. Testing; payment.** (a) Samples for DNA testing ordered under
27 AS 12.72.210 from applicants for DNA testing shall be collected at a law enforcement
28 or correctional facility. DNA samples shall be tested at a laboratory operated or
29 approved by the Department of Public Safety. The applicant shall pay the costs of
30 collection and testing of the sample. If the applicant is indigent and represented by
31 court-appointed counsel, with the approval of that counsel, the costs of the testing

1 shall be paid by the Public Defender Agency or the office of public advocacy, as
2 appropriate.

3 (b) Evidence, other than samples collected under (a) of this section, ordered to
4 be tested under AS 12.72.210 shall be sent to a laboratory operated or approved by the
5 Department of Public Safety for testing at the state's expense. If the court orders the
6 evidence tested by an additional laboratory, the first laboratory shall preserve a portion
7 of the evidence for additional testing. The applicant shall pay the costs of the
8 additional testing.

9 **Sec. 12.72.240. Results of the DNA test.** (a) Notwithstanding any law or rule
10 of procedure that bars an application for post-conviction relief as untimely, an
11 applicant may use the results of a DNA test ordered under AS 12.72.200 as the
12 grounds for filing a motion for post-conviction review under AS 12.72.010 -
13 12.72.040 and the Alaska Rules of Criminal Procedure.

14 (b) The testing laboratory shall make the results of a DNA test ordered under
15 AS 12.72.200 available to the DNA identification registration system under
16 AS 44.41.035 and to any other law enforcement DNA databases.

17 **Sec. 12.72.250. Definitions.** In AS 12.72.200 - 12.72.250,

18 (1) "actual or constructive possession" means the biological evidence
19 is maintained or stored on the premises of the law enforcement agency or at another
20 location or facility under the custody or control of the law enforcement agency,
21 including under an agreement or contract with the law enforcement agency and a
22 third-party service provider, in this state or elsewhere;

23 (2) "DNA" means deoxyribonucleic acid;

24 (3) "incarcerated" means physically housed in a correctional facility
25 following a felony conviction.

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

28 **INDIRECT COURT RULE CHANGE.** AS 12.72.240, added by sec. 1 of this Act, has
29 the effect of amending Rule 35.1, Alaska Rules of Criminal Procedure, relating to the filing of
30 applications for post-conviction relief.