ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
February 25, 2009
1:26 p.m.

MEMBERS PRESENT

Representative Jay Ramras, Chair
Representative Nancy Dahlstrom, Vice Chair
Representative John Coghill
Representative Carl Gatto
Representative Bob Lynn
Representative Max Gruenberg
Representative Lindsey Holmes

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

HOUSE BILL NO. 9
"An Act relating to murder; authorizing capital punishment, classifying murder in the first degree as a capital felony, and allowing the imposition of the death penalty for certain murders; establishing sentencing procedures for capital felonies; and amending Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, and Rules 204, 209, 210, and 212, Alaska Rules of Appellate Procedure."

- HEARD AND HELD

PREVIOUS COMMITTEE ACTION

BILL: HB 9
SHORT TITLE: CAPITAL PUNISHMENT
SPONSOR(S): REPRESENTATIVE(S) CHENAULT

01/20/09	(H)	PREFILE RELEASED 1/9/09
01/20/09	(H)	READ THE FIRST TIME - REFERRALS
01/20/09	(H)	JUD, FIN
02/23/09	(H)	JUD AT 1:00 PM CAPITOL 120
02/23/09	(H)	Heard & Held
02/23/09	(H)	MINUTE(JUD)
02/25/09	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

DIXIE A. HOOD, M.A.
Juneau, Alaska
POSITION STATEMENT: Urged the committee to [defeat] HB 9.

SUSAN S. McLEAN, Acting Deputy Attorney General
Criminal Division
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 9.

DOUG WOOLIVER, Administrative Attorney
Administrative Staff
Office of the Administrative Director
Alaska Court System (ACS)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 9.

DWAYNE PEEPLES, Deputy Commissioner
Office of the Commissioner - Juneau
Department of Corrections (DOC)
Juneau, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 9.

QUINLAN G. STEINER, Director
Central Office
Public Defender Agency (PDA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of HB 9.

RACHEL LEVITT, Director
Anchorage Office
Office of Public Advocacy (OPA)
Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Responded to a question during discussion of HB 9.

RICK SIKMA
North Pole, Alaska
POSITION STATEMENT: During discussion of HB 9, provided comments in favor of the death penalty.

THOMAS WEISE, Pastor
Cathedral of the Nativity of the Blessed Virgin Mary
Juneau, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9 and urged the committee to defeat the bill.

RICHARD DIETER, Executive Director
Death Penalty Information Center (DPIC)
Washington D.C.
POSITION STATEMENT: Provided comments and responded to questions during discussion of HB 9.

DAVID TOWNSEND (ph)
Healy, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9.

SOPHIE CLARK (ph)
Klawock, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9.

CHARLES ROHRBACHER, Deacon
Cathedral of the Nativity of the Blessed Virgin Mary;
Roman Catholic Diocese of Juneau
Juneau, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9 and urged the committee to vote against it.

TOM WRIGHT, Staff
House Majority Office
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 9, responded to questions on behalf of the sponsor, Representative Mike Chenault.

DENISE MORRIS, President/CEO
Alaska Native Justice Center (ANJC)
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 9, testified in opposition to the death penalty.

ROBERT C. BUNDY, Attorney at Law
Dorsey & Whitney, LLP
Counsel

Alaska Native Justice Center (ANJC)
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9.

SUE JOHNSON, Executive Director
Alaskans Against the Death Penalty
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9.

ALFRED McKINLEY, SR.
Alaska Native Brotherhood (ANB) Grand Camp
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 9, testified in opposition to the death penalty.

ACTION NARRATIVE

1:26:16 PM

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 1:26 p.m. Representatives Ramras, Dahlstrom, Gatto, and Lynn were present at the call to order. Representatives Gruenberg, Holmes, and Coghill arrived as the meeting was in progress.

HB 9 - CAPITAL PUNISHMENT

1:34:49 PM

CHAIR RAMRAS announced that the only order of business would be HOUSE BILL NO. 9, "An Act relating to murder; authorizing capital punishment, classifying murder in the first degree as a capital felony, and allowing the imposition of the death penalty for certain murders; establishing sentencing procedures for capital felonies; and amending Rules 32, 32.1, and 32.3, Alaska Rules of Criminal Procedure, and Rules 204, 209, 210, and 212, Alaska Rules of Appellate Procedure." [Before the committee was the proposed committee substitute (CS) for HB 9, Version 26-LS0036\E, Luckhaupt, 2/18/09, which was adopted as the work draft on 2/23/09.]

1:35:02 PM

DIXIE A. HOOD, M.A., after recounting some personal history, said she considers it to have been an enlightened move when

Alaska abolished the death penalty, and considers the effort to reestablish the death penalty to be irrational, fiscally irresponsible, and morally reprehensible. She shared that in the mid-'80s she'd developed a substance abuse treatment program for inmates of the Lemon Creek Correctional Center, which, at the time, was the only facility in the state that housed those convicted of the most serious and violent crimes. One thing that disturbed her, she relayed, was the attitude of the guards, who, in general, seemed to scorn the idea of rehabilitation and interfered with rehabilitation efforts made by teachers, counselors, and chaplains. Also disturbing, however, was the disproportionate number of Alaska Native inmates - approximately 40 percent, even though statewide Alaska Natives constitute only about 17 percent of the population.

MS. HOOD - after sharing some information about some of the inmates she'd met, including that alcohol abuse seemed to be at the root of their experiences - opined that life sentences without possibility of parole would be sufficient to keep the public safe. Noting that as a family counselor she has worked with residents in halfway houses, co-led mens' anger management groups, worked with substance abuse clients, counseled perpetrators and victims of domestic violence (DV), and worked with dropouts and runaways, she opined that there is a great need for additional funding of educational and social services, and preventative and rehabilitative programs. Alaska's public funds should be used for more such services and programs instead of for hiring the additional staff and constructing the execution facility required with the institution of a death penalty. In conclusion, she urged the committee to kill HB 9, not human beings.

MS. HOOD, in response to questions, said punishment seems to be the justification used for putting people in prison, and clarified that one of her points is that if more funding had been provided for educational and social services, and for preventative and rehabilitative programs, particularly in rural areas of the state, then a lot of the crimes that have occurred, and the substance-abuse related problems that have arisen, would have been prevented.

1:44:54 PM

SUSAN S. McLEAN, Acting Deputy Attorney General, Criminal Division, Department of Law (DOL), in response to a question, relayed that members' packets now include statistics from the Department of Corrections (DOC) illustrating the number of

inmates convicted of the crime of murder in the first degree from 1972 through 2008; a breakdown of that number indicates that 105 inmates received sentences of between 90 and 99 years, and 12 inmates received sentences of over 100 years.

REPRESENTATIVE COGHILL indicated interest in obtaining statistics regarding how many of those inmates were found to be mentally retarded.

REPRESENTATIVE HOLMES referred to the list of mitigating factors in proposed AS 12.58.050, and questioned whether Fetal Alcohol Spectrum Disorder (FASD) ought to be included as a mitigating factor.

MS. McLEAN indicated that if FASD is defined by the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (DSM-IV), as a mental disease or defect, then it would qualify as a mitigating factor [under proposed AS 12.58.050(9)], which read:

> the capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired as a result of mental disease or defect; however, a person found to be mentally retarded under AS 12.58.060 may not be sentenced to death;

REPRESENTATIVE HOLMES noted that under [proposed AS 12.58.100], the Alaska Supreme Court has 60 days to review the judgment of conviction of a capital felony.

1:51:06 PM

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), in response to a question, said that that 60-day timeframe isn't realistic, though the court can extend that timeframe for good cause. The national average for resolving an appeal before a state supreme court in a capital [punishment] case is 699 days, and a recent study conducted by the State of Arizona indicated [an average] of 870 days. The ACS estimates that a capital punishment case - assuming a three-month trial - will probably generate about 24,000 pages of transcripts; in Arizona, it takes about five months to get transcripts to its supreme court, and in another state, it takes about a year to get transcripts to its supreme court. He surmised that the

review timeframe would be extended in every case, as allowed under the bill.

REPRESENTATIVE HOLMES noted that [proposed AS 12.58.100 also] mandates that the review by the Alaska Supreme Court has priority over all other cases, and asked whether there are other types of supreme court cases that have been given specific priority in the law.

MR. WOOLIVER said that as a practical matter, election challenges follow a fast track. However, under the bill, death penalty cases will trump all other cases, and one way the ACS will attempt to offset the impact of death penalty cases on the Alaska Supreme Court will be through the use of an appellate staff attorney with expertise in [death penalty cases]; Arizona has done this, New York did it before its death penalty statutes were found to be unconstitutional, and Illinois [is] recommending doing it as well.

REPRESENTATIVE HOLMES asked whether the timeframe outlined in proposed AS 12.58.110 - Issuance of a death warrant - is sufficient.

1:55:15 PM

MR. WOOLIVER said that that timeframe won't trump what's required by the [U.S. Constitution], that being extensive review by all levels of courts.

REPRESENTATIVE HOLMES asked whether the court would have the ability to extend the timeframe [outlined in proposed AS 12.58.010] that the attorney general would have to seek the death penalty.

MR. WOOLIVER said he doesn't know. In response to another question, he relayed that the ACS has not taken a position on HB 9.

MS. McLEAN relayed that the DOL has not taken a position on HB 9.

DWAYNE PEEPLES, Deputy Commissioner, Office of the Commissioner - Juneau, Department of Corrections (DOC), relayed that the DOC has not taken a position on HB 9.

1:58:19 PM

QUINLAN G. STEINER, Director, Central Office, Public Defender Agency (PDA), Department of Administration (DOA), relayed that the PDA has not taken a position on HB 9.

1:58:32 PM

RACHEL LEVITT, Director, Anchorage Office, Office of Public Advocacy (OPA), Department of Administration (DOA), relayed that the OPA has not taken a position on HB 9.

MS. McLEAN, in response to another question, clarified that under the bill, a person who commits the crime of murder of an unborn child would be exempted from a sentence of death.

REPRESENTATIVE GATTO observed that language on page 9, lines 1-3, says in part: **A defendant convicted of murder of an unborn child under AS 11.41.150(a)(1) shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years**."

REPRESENTATIVE LYNN shared his belief that the death penalty should also apply to the crime of murder of an unborn child because a life is a life.

MR. PEEPLES, in response to questions, said that the DOC is assuming it would not have to house someone sentenced to death until 2012; that until someone is sentenced to death, the DOC would handle inmates charged with a capital felony the same way it handles all other inmates charged with murder; that the DOC is assuming that death penalty cases would involve a very long appeals process - the national average being up to 13 years; that the DOC anticipates reserving one unit at the Spring Creek Correctional Center for housing inmates who've been sentenced to death; that in anticipation that there would at some point in time be some death sentences to be carried out, the DOC would build a small "death house" out of view of the rest of the aforementioned correctional facility; and that most of the time that death house would be kept in a state of readiness but not staffed.

MR. PEEPLES indicated that once a death sentence is to be carried out, that death house would be staffed with people on overtime until after the execution, and that the DOC would address any additional staffing needs via the regular budget process. He surmised that the DOC would work with the ACS and the DOL to come up with an anticipated rate of accrual of those

sentenced to death, and then make adjustments to the DOC's fiscal note for HB 9.

REPRESENTATIVE DAHLSTROM asked whether states with a death penalty offer specialized training or psychological evaluations for those responsible for carrying out the executions.

MR. PEEPLES said, "We are aware of that; we would be walking through the psychological." He indicated that the DOC would not have the same staff in the death house for every execution, and that such staff would be chosen on a volunteer basis, and would not be the same people as would be managing the remainder of the unit's population. In response to another question, he said he is not familiar with any studies regarding the effects on staff of having to execute someone, but surmised that such studies have been conducted. In response to a further question, he indicated that the DOC anticipates taking extra steps to comply with the enactment of HB 9 and to deal with the effects of executing people - including increased stress levels associated with the approach of an execution date - and that those extra steps are outlined in the DOC's fiscal note.

REPRESENTATIVE GATTO questioned whether those sentenced to death are typically kept sedated prior to execution.

MR. PEEPLES said he would research that issue.

MS. McLEAN, in further response to an earlier question, clarified that HB 9 would not change the current penalty for the crime of murder of an unborn child.

2:16:58 PM

REPRESENTATIVE LYNN referred to proposed AS 58.060(5), and asked which test would be used to determine whether a person has an IQ of 70 or below, and whether the issue of which test would be used ought to be clarified, particularly given that different tests could result in different IQ scores.

MS. McLEAN relayed that the U.S. Supreme Court Case, Atkins v. Virginia addresses the issue of mental retardation and capital punishment; that the language [in the bill] was taken directly from that case; and that in that case the court took its language directly from the DSM-IV, which, she surmised, is what would be used by licensed clinicians when making a diagnosis of mental retardation. In response to a question, she acknowledged

that the issue of who would be making such a diagnosis could be further clarified in the bill.

MR. WOOLIVER, in response to a question regarding testing of deoxyribonucleic acid (DNA) evidence, offered his understanding that nationally such testing has resulted in a number of people on death row being exonerated.

CHAIR RAMRAS pointed out, though, that Alaska currently doesn't require post-conviction testing of DNA, and surmised that that issue would probably have to be revisited should HB 9 become law.

2:24:00 PM

MR. STEINER, in response to a question, said he is not aware of any case occurring in Alaska in which a person convicted of [murder] was later exonerated because of DNA testing.

REPRESENTATIVE HOLMES asked what percentage of violent crimes actually have DNA evidence associated with them.

MS. McLEAN offered her understanding that DNA evidence is more often a deciding factor in sexual assault cases then it is in homicide cases. It would be the rare homicide case that rested solely upon DNA evidence, she added.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

MR. STEINER concurred that DNA evidence is more commonly used in sexual assault cases than in murder cases.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

MR. STEINER, in response to comments, pointed out that the methods for testing DNA evidence have changed over the years - and that relates directly to whether post-conviction "retesting" is appropriate - and that recently there has also been wide criticism of the techniques used to process DNA and other scientific evidence as creating potential unreliability. That is an issue that remains subject to litigation, and can thus drive up the cost of cases [reliant upon such evidence].

REPRESENTATIVE HOLMES noted that a study conducted by the National Academy of Sciences appears to be questioning the reliability of DNA evidence, and offered her recollection that the Department of Public Safety (DPS) had recently relayed to

the committee that some of the DNA samples it had sent out of state had been contaminated.

2:29:44 PM

RICK SIKMA observed that society's increasing tolerance for just about everything has carried over into not having consequences for wrongdoing. He said he has been involved in prison ministry for about 30 years and has counseled those who have committed murder, and relayed that when he's asked such convicts why they killed someone, their response has been that they knew they could get away with it, and when he's asked them whether they would still have committed murder if they'd known they would face the death penalty, they've said that that would have prevented them from committing the murder. He therefore disagrees with the argument that instituting the death penalty won't have a deterrent effect, he remarked, adding, "I believe that there should be a death penalty; however, if we have the death penalty, ... we have to make certain that the person is guilty of what they've ... [been accused of doing], and that we don't make any mistakes, because death is very final." He mentioned that he's also counseled those whose loved ones were murdered, and they've been concerned that the person who killed their loved one won't face any consequences other than a prison sentence that ends after [several] years. In conclusion, he said he thinks that the death penalty should be passed into law.

2:33:55 PM

THOMAS WEISE, Pastor, Cathedral of the Nativity of the Blessed Virgin Mary, after mentioning that the pastor who's witnessed 95 executions at Huntsville Unit in Texas would be speaking in Juneau next month, read a paragraph from a document pertaining to the use of Centering Prayer in Folsom State Prison. Father Weise said he believes strongly that society needs to be protected from dangerous people, and surmised that what's being debated are the differences between a life sentence and the death penalty. In conclusion, he urged the committee to defeat HB 9.

2:38:53 PM

RICHARD DIETER, Executive Director, Death Penalty Information Center (DPIC), noting that he is also an adjunct professor teaching a course on the death penalty at the Catholic University of America Columbus School of Law, explained that the DPIC is a nonprofit organization that conducts research,

releases reports, and provides a national perspective on death penalty issues. He went on to say:

> Around the country, the death penalty has become both unwieldy and a liability to many states. What we're seeing is a declining use in the death penalty, a dramatic 60 percent drop in death sentences and [a] 50 percent drop in executions. Fewer states now have the death penalty - New York and New Jersey recently dropped it - [and there is] less public support for the death penalty. And I think the reason why this decline in the use is occurring is because of the cases of innocence. There's now been 130 people who have been freed from death row since the death penalty came back in the 1970s. It's not the fact that these cases are all old ones; more than half of them occurred since 1995, and there were four more last year.
>
> The most prominent ones are the ones with DNA testing, and I think those are significant because they indicate that sometimes the system - the trials, the appeals, the commutations, even - miss the innocent people, and it takes something outside the system, namely science or sometimes journalists or sometimes volunteer lawyers, to find out who is innocent. That has shaken the public's confidence in the death penalty, so support has dropped, and what we're seeing around the country is states actually reconsidering ... [whether to] have the death penalty. There are now eight states that have legislation to abolish the death penalty; they are finding that [the death penalty is] ... not producing what they expected.
>
> A typical example would be New Jersey, which had the death penalty for 25 years [but] no executions; they estimated their expenses were $253 million over those years. And now in the state of Kansas, actually, where they're also considering a bill to abolish it, again, 15 years of the death penalty [but] no executions and, frankly, none on the horizon. The death penalty is becoming harder to implement because our whole system has been shaken ... by the revelations of the mistakes, and that has ... [resulted in] a tighter scrutiny on this. It is also increased the time between sentencing and execution. It is now at its longest time - close to 13 years -

between ... when the average person is sentenced, to when they're executed.

MR. DIETER, in conclusion, said he thinks that there are a lot of reasons for a state to think twice about both the practical costs and the judicial costs associated with the death penalty. In response to questions, he explained that since 1973, there have been 130 people on death row who were either acquitted of all charges or had all charges dropped by the prosecution - 17 of those 130 people were freed as a result of DNA testing; that from 1973 to present, approximately 8,000 people have been sentenced to death; and that in that time, there have been about 1,100 executions. So for every nine people who have been executed, another one person has been freed as innocent.

MR. DIETER, in response to another question, said that approximately 15,000 murders are committed every year in the U.S.; that 115 people received the death sentence [in 2007]; and that 37 people were executed in 2008. He surmised that if the people on death row hadn't gotten the death sentence, they would have instead gotten the maximum penalty that a state had to offer. In response to a further question, he said those states that are considering abolishing their death penalty are now also citing costs as a factor. If the goal is to prevent innocent people from even being convicted to begin with, then money must be spent on a quality defense program, on training for judges and prosecutors, and on a full appeals process, because costs and innocence, and costs and representation are related. States with the death penalty are now questioning what they are actually getting for all the money they are spending on the death penalty. Almost all states with a death penalty have no more than one execution in a year, though last year and the year before most states with the death penalty had no executions. Also, the amount of time before an execution actually occurs is getting longer.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

2:49:23 PM

MR. DIETER, in response to a question, surmised that two expectations of a death penalty are retribution and deterrence. He's heard testimony, however, indicating that the "victims' community" is becoming frustrated because although retribution is promised, it doesn't actually happen; not only do death penalty cases take 13-15 years to conclude, most death penalty cases are overturned for reasons other than innocence, and so

only about one-fourth of those sentenced to death are actually executed. Furthermore, because the death penalty is rarely applied, it doesn't send much of a deterrence message; the states with the death penalty have higher murder rates then those states that have abolished the death penalty.

REPRESENTATIVE HOLMES questioned how long appeals take for cases involving death sentences compared to cases involving life-in-prison sentences.

MR. DIETER relayed that the big difference is that the death sentence is not carried out for 15 years, if ever, whereas someone sentenced to life in prison is actually serving that sentence even through the appeal process. Another difference is that for a death sentence case, a lawyer - sometimes more than one - is assigned to the case for the entire appeal process, and that's not true for cases involving a life-in-prison sentence. Yet another difference is that a death penalty case will likely be overturned - about 68 percent of such cases are overturned - whereas a life-in-prison case, in addition to being less controversial, will likely never be overturned - less than 10 percent of "other criminal" cases are overturned.

2:53:59 PM

REPRESENTATIVE GRUENBERG asked whether there is a trend in legal decisions from federal courts towards expanding the scope of the death penalty.

MR. DIETER said that during the past 10 years there has been a clear tendency towards narrowing it; for example, the mentally retarded and juveniles are now excluded from receiving the death penalty, the death penalty now no longer applies to crimes other than murder, and states are now required to spend more money on defense in death penalty cases.

REPRESENTATIVE GRUENBERG questioned how many of the 1,100 people who've been executed since 1973 would [still be alive] because of changes in the law had they not been executed when they were.

MR. DIETER, remarking that that would be hard to determine, surmised that there are probably eight executed persons who might have been exonerated had DNA testing been available.

REPRESENTATIVE GRUENBERG clarified that he wants statistics detailing how many [would not have been executed] due to changes in the law as opposed to scientific advances. For example, how

many were mentally retarded, and how many were guilty of rape rather than murder.

MR. DIETER acknowledged that all who were executed before they turned 18 years of age would not have been executed because of a change in the law, as would all who were mentally retarded - and some estimate that to be about 10 percent of those on death row. And although no one has been executed for the crime of rape recently, there were people on death row for that crime. He surmised, therefore, that perhaps hundreds of the people who were executed would today have been spared. In response to a question, offered his recollection that approximately 35 people under the age of 18 were executed. In response to another question, he offered to research the issue further and provide the committee with more statistics.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

3:02:33 PM

DAVID TOWNSEND (ph) said he has mixed feeling about the death penalty. If one of his family members were to be harmed in such a way as to warrant the death penalty for the perpetrator, then that's what should happen, he opined, but surmised that the costs associated with instituting the death penalty would be too great.

3:04:01 PM

SOPHIE CLARK (ph) explained that a teacher at her school whom she knew was murdered, and so she is familiar with how that can affect everyone who knows a murder victim. She said she doesn't really know if a death sentence is an appropriate punishment, particularly given that it's often said that one should treat others how one would like to be treated, and given that it is incongruent to kill people for their crimes while admonishing others not to kill.

3:06:38 PM

CHARLES ROHRBACHER, Deacon, Cathedral of the Nativity of the Blessed Virgin Mary; Roman Catholic Diocese of Juneau, said that as a catholic, he is pro-life and believes that as a society, people have a duty to protect human life from conception to natural death. In keeping with the church's magisterial teaching, as a matter of faith and as a matter of principle, he relayed, he is opposed to capital punishment in every

circumstance. Offering his personal experience with the death penalty, he said:

> In 1977, I was ... [a] journalist, and I became involved in the case of a young Korean immigrant named Chol Soo Lee. He'd been wrongfully convicted in 1973 of a gang slaying in San Francisco, and while he was in prison he was attacked by another inmate and, in self defense, he killed his attacker. But having been convicted as a gang killer already, his plea of self defense was quickly pushed aside, and in short order he was convicted and sentenced to death and put on death row in San Quentin [State] Prison. Now, as a journalist, I helped in the investigation of the circumstances of that first degree murder conviction that landed Chol Soo Lee in prison in the first place.
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> We discovered that he'd been convicted on the basis of being identified as the murderer by white tourists in [San Francisco's] China Town who'd witnessed the crime from a distance, and, unfortunately, for them, all Asians seemed to look alike. He barely spoke English, his public defender got a change of venue and then pulled out of the case two weeks before trial, and then he was defended by a pro bono attorney who was appointed by the court at the last minute with no investigation. In addition, there was a tremendous amount of political pressure from the public and from municipal authorities to get a conviction.

MR. ROHRBACHER continued:

> Years later, it was even discovered that police and prosecutors had suppressed important exculpatory evidence; they failed to inform his defense attorney that the police had statements from other witnesses to the crime who had told police that he wasn't the gunman or who identified an entirely different person as the killer. In 1982, after he spent eight years of solitary confinement on death row in San Quentin [State Prison], Chol Soo Lee was granted a new trial, was completely exonerated, was acquitted by a jury, and released from prison.
>
> Now, my involvement in the struggle to save this innocent young man from execution taught me this: that human beings are inherently fallible; human

> beings can be relied on to make mistakes from time to time; they can be relied on to get things wrong; [and] they can be relied on to even act carelessly and sometimes even unjustly. Our institutions, including our judicial system, are human institutions and, therefore, they're inherently fallible.
>
> Now ordinarily, when our courts make mistakes - inevitable mistakes - it's possible to rectify the wrong done and restore a wrongfully convicted person's liberty to them. But the death penalty is irrevocable - it's beyond the powers of limited and fallible human beings to bring a wrongfully executed person back from the dead. And because of [the] fallibility of human beings and of human institutions, one thing is certain: innocent men and women have and will be condemned to death, and they have and will be executed.

MR. ROHRBACHER went on to say:

> My son used to introduce me to people [as], "This is my dad, he works for the Pope" - which is true, except he doesn't sign my paycheck. And the person I work for, the Pope, is infallible, but only in matters of faith and morals; even he would be the first to say that he's not infallible when it comes to matters of life and death and of criminal justice. I think that the possibility, even the probability, that despite whatever safeguards may be in place, that innocent persons might die at the hands our State authorities should deter us, should deter you, from restoring the death penalty in our state. And so for this reason I urge you to vote against this.

3:11:31 PM

MR. ROHRBACHER, in response to a question, explained that the Catholic Church - "from the Pope on down" - is opposed to the death penalty; it would be gravely sinful to inflict death on anyone for the purpose of retribution or revenge, and there are now less severe, less violent, ways of protecting society, and so those in public leadership positions have a moral obligation to choose those less violent ways when seeking societal self-protection.

3:17:23 PM

TOM WRIGHT, Staff, House Majority Office, Alaska State Legislature, in response to a question, relayed that when discussing the bill with the drafter, Mr. Luckhaupt explained that no other state's death penalty law provides a sentence of death for the murder of an unborn child, and neither does the federal Unborn Victims of Violence Act of 2004. This is why HB 9 provides that the crime of murder of an unborn child won't be subject to the death penalty.

[Chair Ramras turned the gavel over to Vice Chair Dahlstrom.]

REPRESENTATIVE LYNN noted that he's received a memorandum from the drafter addressing that issue, and mentioned that he may propose an amendment [altering that provision].

MS. McLEAN, in response to a question, surmised that the court would decide what level of practitioner would be administering the test regarding mental retardation; that it would be left to that person to decide which test to use; and that the outcome of that test will be subject to litigation.

MR. WRIGHT reiterated that proposed AS 12.58.010 of Version E - which incorporates changes suggested by the DOL and complies with new U.S. Supreme Court findings - now authorizes the attorney general, rather than the district attorney, to determine whether to seek the death penalty; now has a notice period of 120 days instead of 10 days; and now provides that that notice period may be extended by the court.

MS. McLEAN added that the longer notice period is a more reasonable amount of time in which to determine whether a case warrants pursuit of the death penalty.

MR. WRIGHT reiterated that proposed AS 12.58.020 now provides that a separate sentencing procedure shall be conducted before the same jury that determined guilt. At the suggestion of the DOL, that proposed section also now provides a standard of "beyond a reasonable doubt" - the highest standard available and already defined; contains language stating that the jurors need not agree on the specific aggravating factor; and now provides that the jury must find that death is the appropriate sentence for the defendant.

REPRESENTATIVE HOLMES asked whether the standard of "no reasonable doubt" is used by other states [with a death penalty].

MR. WRIGHT said no. He then indicated that proposed AS 12.58.030 now contains conforming language.

MS. McLEAN added that the changes made in Version E's proposed AS 12.58.030 simply clarify that the jury must make findings.

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MR. WRIGHT mentioned that proposed AS 12.58.040, which lists the aggravating factors that may be considered, now addresses serial killing via language that says:

> (3) the defendant has been convicted of murdering two or more individuals under AS 11.41.100, or a similar law of this or another jurisdiction, regardless of whether the deaths occurred as the result of the same act or of several related or unrelated acts;

REPRESENTATIVE HOLMES surmised that that aggravating factor would apply to someone being sentenced after just being convicted of murdering more than one person.

MR. WRIGHT concurred. He then explained that proposed AS 12.58.050 now pertains to "relevant" mitigating factors; the addition of the word "relevant" was made to conform to a U.S. Supreme Court ruling.

REPRESENTATIVE HOLMES asked who determines relevancy.

MS. McLEAN said the court would. In response to a question, she explained that the defined body of law regarding that issue indicates that the court should not exclude any possible mitigating factors, and defines "relevance" as anything that tends to make a fact more likely than not.

MR. WRIGHT relayed that under Version E, proposed AS 12.58.100(b)(3) now says that on review, the court shall determine whether the sentence is excessive compared to the penalty imposed in similar cases, considering both the crime and the defendant; this language change gave rise to the inclusion language regarding excessive review found in Section 27.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

MR. WRIGHT relayed that Version E's proposed AS 12.58.310(b) now ensures that a person who is found incompetent to be sentenced

to death will still receive a sentence commiserate with the crime he/she committed; this addresses a concern expressed by the DOL.

MS. McLEAN, in response to a question, said that under current statute, the court - at the time of sentencing - has the ability to restrict discretionary-parole eligibility.

MR. WRIGHT relayed that Section 27 was included in Version E to address the fact that Alaska doesn't currently have a death penalty, and so the first death penalty case may end up setting the standard for reviewing whether a sentence of death is excessive.

MS. McLEAN, to correct an answer she gave earlier, explained that the administration, in concept, supports capital punishment but has not yet decided exactly which statutory changes it would support.

MR. WRIGHT, referring to the 60-day review period for the Alaska Supreme Court stipulated in proposed AS 12.58.100, indicated that [the sponsor] is aware that that review will take longer than 60 days and so will get that issue clarified with the drafter.

CHAIR RAMRAS turned the gavel over to Vice Chair Dahlstrom.

3:34:25 PM

DENISE MORRIS, President/CEO, Alaska Native Justice Center (ANJC), said she would be speaking in opposition to the death penalty, and mentioned that other [testifiers] have already expressed some of her concerns. She went on to say:

> The death penalty is racially and economically [biased]. It claims innocent [lives]. It is not a deterrent. The cost is [significantly] greater than life in prison without parole. In addition, it appears that the national trend is to [abolish] the death penalty, and yet we are thinking of ... reinstating the death penalty in Alaska. And I want to give a little history about the disparate treatment in Alaska. When Alaska was a territory, there were six individual men that were hanged under the territorial legislation; of those men, three were Alaska Native, two were African American, one was another person of color, yet most of the capital

crimes and murders committed were committed by non-minority individuals.

And then, after a prolonged debate, the death penalty was abolished, and the two individuals that sponsored that measure were Warren Taylor and Vic Fischer, and Vic Fischer stated that one factor motivating abolishing the death penalty was apparent racial bias in the application of the death penalty. Today, the Alaska Native community is extremely concerned because Alaska Natives currently, today, represent over 36 percent of the incarcerated population across the state, yet we only represent 16 percent of the population as a whole and only 13 percent of those old enough to be imprisoned.

MS. MORRIS continued:

As indicated by the status report of the Alaska Supreme Court [Advisory Committee] on Fairness and Access ..., on average, Alaska Natives receive longer sentences and more severe or harsh sentences in addition. Native defendants spend 26 [percent] more time incarcerated during the total span of their cases. [For] ... violent offenses, Alaska Natives spend 58 percent more time incarcerated, and for drug cases, Alaska Natives spent 139 percent more time incarcerated. The report highlighted other unwarranted disparities such as having a public attorney versus a private attorney. Defendants with private attorneys spent 55 percent less time [incarcerated] pre-disposition; they spent 56 [percent] less [time] ... incarcerated, post-disposition; and 93 percent overall less time incarcerated during their case.

And, unfortunately, Alaska Native youth in the justice system aren't faring any better; they comprise 20 percent of the juvenile justice population, but 30 percent of the juveniles within the Division of Juvenile Justice, 30 percent of the referrals from the Department of Law, 39 percent of the youths detained in detention facilities, and over 40 percent of the youth in (indisc.) Division of Juvenile Justice treatment provisions.

> And there's a lot of reasons cited for those basic disparities, and some of those ... factors leading to this are: inadequate legal representation; police and prosecutorial misconduct; perjured testimony and mistaken eyewitness testimony; suppression or misinterpretation [of] ... evidence [and], in rural Alaska, lack of evidence; law enforcement has been underfunded in rural Alaska; [Village Public Safety Officer (VPSOs)] have been ... underfunded in rural Alaska - as I sit here today, there's probably 60 to 65 communities that have absolutely no law enforcement present whatsoever; and also ... there's a tremendous amount of community pressure to solve cases.

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MS. MORRIS also said:

> In addition, there's already ... mistrust ... [in] Alaska by the minority community, not only the Alaska Native community, but I also know that the [National Association for the Advancement of Colored People (NAACP)] also opposes the death penalty or the reinstatement of the death penalty in Alaska. And it will divide residents of Alaska versus uniting us as citizens. It's also against traditional Alaska Native values and, [as indicated by] other people that have testified here today, it's also against other Alaskans' values and belief systems.
>
> There's already tremendous mistrust as it relates to Alaska Natives' confidence in the fairness of the justice system. ... I think it's important to know [that] as an Alaska Native woman, I am four and a half times more likely to be a homicide victim, [and] African American women are more likely to be homicide [victims] - we are going to be the victims - and yet we are the groups that oppose reinstatement of the death penalty because we will also be those that are disparately treated by the death penalty. We know a lot of people here today talked about accountability, ... [but] we need to hold ourselves accountable. As Alaskans, we can't simply say we live in a country that offers equal justice, when racial and economic disparities plague the system by which our society imposes the ultimate punishment.

MS. MORRIS, in closing, relayed that according to a bibliography of rural justice studies compiled by the University of Alaska Anchorage (UAA) Justice Center, there is not even one report/study that says instituting the death penalty in Alaska will be a deterrent to crime; every one of those studies/reports says exactly the opposite. She added:

> We need to spend more dollars [on] ... treatment programs, prevention programs, boys and girls [clubs], and those [kinds] of programs that have a proven record of preventing crime and deterring crime in our communities, and not [spend] ... limited resources on a program that other states have already proven doesn't work and doesn't deter crime.

REPRESENTATIVE HOLMES, remarking that justice is not colorblind in Alaska, asked whether there are any statistics regarding the types of charges being brought, for commensurate crimes, against Alaska Natives versus other groups of people, or regarding whether the sentences being handed out for the crime of murder in first degree are longer for certain groups of people.

MS. MORRIS relayed that national statistics indicate that 55 percent of the people on death row are African Americans, and there is no reason, she opined, to believe that Alaska Natives and African Americans would fair any better in Alaska should the death penalty be reinstituted.

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MS. MORRIS, in response to another question, pointed out that the justice system is a human system and, as such, is subject to fallacies; so if an individual is [wrongfully] serving a sentence of life in prison, [the courts] have the ability to correct that mistake, but with the death penalty, once a person is [wrongfully] executed, the option of correcting that mistake is no longer available - all that can be done is to offer apologies to that person's family.

MS. MORRIS, in response to a further question, offered her belief that there are economical biases [within the justice system]. For example, when faced with being incarcerated even for a misdemeanor and deciding whether to accept a plea agreement, people consider the economical factors of doing so, such as whether they have the money to pay for a private attorney, and if the answer is no, the perception then is that if they are then assigned a public defender, they will simply be

getting what they paid for. Furthermore, the ANJC receives calls from people from small, rural communities seeking travel funds because they don't have the economic resources necessary to go to trial in the larger cities where the courts are located. These people don't have the financial resources, or anybody to watch their children, or money for airfare, or, when they are employed, the ability to get time off from work, and there is no guarantee that they will be successful in court should they choose to fight the charges against them.

REPRESENTATIVE LYNN agreed, but noted that a person's ability or inability to pay a lot for a defense lawyer would still be a factor regardless of the crime he/she is charged with or the sentence he/she faces. Explaining that he'd once served as a law enforcement officer in the "ghetto areas" of Tucson, Arizona, he recalled that most of the [violent] crimes committed by members of a minority were committed on other members of that same minority. What justice is afforded those victims, he queried, since it's the minorities who are victims of a preponderance of the crimes committed.

MS. MORRIS relayed that the Alaska Federation of Natives (AFN) has adamantly come out in opposition and has an affidavit in opposition to the death penalty, and that the NAACP has a legal defense fund for assisting individuals who've been sentenced to death. She surmised, therefore, that minority groups across the nation oppose the death penalty even though they are overrepresented as victims of crimes subject to the death penalty, because when the gallows swing, there is no question for whom they swing.

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ROBERT C. BUNDY, Attorney at Law, Dorsey & Whitney, LLP, Counsel, Alaska Native Justice Center (ANJC), relayed that almost half of his 35-year career has been spent as a prosecutor; that he was the district attorney in Nome and covered many of the villages in the Nome and Kotzebue areas; that he was the assistant district attorney and chief assistant district attorney in Anchorage for a number of years; and that he was the U.S. Attorney for the District of Alaska for a number of years. He concurred with the comments made by Ms. Morris, adding that statistics illustrate that the death penalty is imposed disproportionately when the victim is white and the perpetrator isn't. He also relayed that he was counsel of record in the U.S. District Court case and the 9th Circuit Court of Appeals case involving defendant William G. Osborne; the U.S.

Supreme Court is scheduled to hear this case [on 3/2/09] as it pertains to DNA testing. In working on Mr. Osborne's case, he explained, he worked closely with the Innocence Project, and became interested in what it is about the justice system that would allow for all the wrongful convictions seen via Innocence Project exonerations.

MR. BUNDY went on to explain that Innocence Project exonerations pertain to actual, factual innocence, wherein DNA testing has excluded the person as the perpetrator of the crime after he/she has been convicted. The testing of DNA evidence came into its own in the mid-1990s with what's known as the [y-STR] method, and although this testing method can eliminate a person to the exclusion of everyone else, it can't absolutely include a person. One point to be gleaned from that DNA exclusion process and the Innocence Project cases is that there have been about 220 men and women that have been exonerated, factually, via the use of post-conviction DNA testing; 17 of those had been sentenced to death and 30 more had been sentenced to life in prison without parole in those states that didn't have the death penalty. Furthermore, 85 percent of convictions on serious charges - rapes, serious assaults, homicides - do not involve biological evidence suitable for DNA testing, and the Federal Bureau of Investigation (FBI) has also indicated that in 24 percent the cases in which it does get DNA evidence to analyze, the person identified as the principal suspect was excluded.

MR. BUNDY pointed out that in rural Alaska in particular, there isn't the ability to collect [biological] evidence in an appropriate manner because of a lack of law enforcement presence - either at all or immediately - or because of the many things that can happen during the evidence-gathering process between the time a victim is murdered or seriously injured and the time a case gets to trial. Furthermore, even the crime labs in urban areas of the state such as in Anchorage are overloaded. The experience regarding DNA evidence, he continued, has pointed out a problem which he referred to as the "tunnel vision" of those working in the justice system; regardless that law enforcement officers/investigators, judges, prosecutors, and jurors are trying to do a good job in an honorable fashion, they are still human beings, and once they focus on a particular person as being the guilty party, it becomes very difficult for them to then accept evidence to the contrary. In case after case after case, the Innocence Project has shown that even appellate judges have said things along the lines of, "On review of this record, the evidence of guilt is overwhelming." These are the very cases that result in even the supporters of the death penalty

wanting assurance that it will only be applied to the truly guilty. But it's very, very difficult to ensure that, and that's been illustrated, he said in conclusion, adding that the written summary of his testimony cites an article on the psychological phenomenon of tunnel vision.

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REPRESENTATIVE COGHILL surmised that tunnel vision increases the lack of credibility in the justice system, and although a death penalty sentence provides strong incentive for trying to protect against tunnel vision, people who've simply received some of the longer sentences available "never get that second look."

MR. BUNDY concurred, reiterating that about 85 percent of cases don't have the kind of biological evidence that's suitable for DNA testing. Furthermore, there is no way to test against all the other forms of evidence which, when combined, can result in a wrongful conviction, such as eyewitness testimony, "jailhouse snitches," and microscopic comparisons.

REPRESENTATIVE COGHILL surmised that a lot of work is still going to have to be done to address the credibility of the justice system and to move forward with post-conviction DNA testing.

MR. BUNDY explained that [some of what] contributes to tunnel vision is that the types of crimes that would be subject to the death penalty are generally the most heinous crimes and are [therefore] highly publicized; so there is a tremendous amount of pressure on everybody in the system to "solve the case and see justice done," thus increasing the probability that a mistake will be made [and an innocent person will be executed], because no one wants to be the one that delays the case. He said that he's been involved in four death penalty cases, and characterized them as the most excruciating and difficult cases he's ever seen, adding that there is very little satisfaction to be obtained from [the death penalty process].

REPRESENTATIVE HOLMES, explaining that she did not mean to impugn anyone's integrity with her comment that justice is not colorblind, concurred with Mr. Bundy that everyone involved in such cases is a human being and is therefore fallible.

[Vice Chair Dahlstrom returned the gavel to Chair Ramras.]

3:59:29 PM

SUE JOHNSON, Executive Director, Alaskans Against the Death Penalty, noted that she became involved with Alaskans Against the Death Penalty when then Senator Robin Taylor introduced a death penalty bill [during the Twentieth Alaska State Legislature], and that since the introduction of HB 9, membership in Alaskans Against the Death Penalty has grown exponentially. The importance of personal education about the death penalty cannot be overstated, she remarked, and noted that when she'd first become involved with this issue, she'd been reluctant to believe that the [alleged] unfairness associated with all aspects of the death penalty was actually occurring in this country, and so she'd conducted her own independent research.

MS. JOHNSON said that in addition to reading books, watching films, and interviewing exonerated people, law enforcement personnel, murder victims' family members, and others with firsthand knowledge of death-penalty intricacies, she's read about governors in states that have the death penalty who continue to be haunted by the people they've executed and who've said that that was the absolute worst part of their job. She said she's also read about politicians who've regretted having supported death penalty legislation - especially when they've discovered that that legislation may have resulted in the execution of innocent people. She said she's learned about states that have spent millions of dollars building death houses that were never used. She offered her belief that if the State builds a death house here in Alaska, it won't be used, and if it is used, it won't be for another 20-25 years and thus any executions that do occur will be the responsibility of future legislators.

MS. JOHNSON relayed that after all her research, she has concluded that the death penalty is wrong for hundreds of reasons. Alaskans Against the Death Penalty, she added, believes that the majority of Alaskans support its side of the issue and oppose the death penalty. She then explained that she'd had a friend - the mother of three [small children] - who was murdered by her friend's husband, that she sat through the trial in an effort to support her friend's parents, and that while watching them go through the gory details of their only daughter's murder, she was very happy that there wasn't a death penalty in Alaska because she couldn't bear the thought of seeing her friend's parents go through all of the trials and delays that are the norm with death penalty cases - not to mention dealing with all of the media exposure a death penalty

case can result in. In closing, Ms. Johnson said that if the morality of this issue is not enough to persuade anyone who is undecided on this issue, then the cost issues - during these economic times - should be; reliable data illustrates that the State would face far greater costs in litigating a death penalty case through the appellate levels than it would face for litigating a sentence of life in prison.

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ALFRED McKINLEY, SR., Alaska Native Brotherhood (ANB) Grand Camp, noted that when Alaska was a territory, only minorities were being executed - the last one being an African American who was executed by hanging right here in Juneau - and that that is one of the reasons why the people of Alaska, not just Alaska Natives, were opposed to the death penalty - it was discriminatory. He then indicated that discrimination is still a problem. Referring to the case in which an 11-year-old child shot his father and father's girlfriend, Mr. McKinley questioned whether that child would be executed [under HB 9]. The death penalty was abolished in Alaska because it was discriminatory, he reiterated, and relayed that he'd spoken to a judge about the inordinately longer sentences that those who are not white receive, and the judge indicated that work is being done to address that issue.

MR. McKINLEY, mentioning that he is a retired auditor, observed that information in members' packets indicates that the cost associated with sentencing a person to death will be greater than the cost of incarcerating that person for 99 years - which he characterized as more of a punishment. In conclusion, he indicated that the ANB Grand Camp is against capital punishment and has submitted resolutions to that effect, and expressed his hope that legislators will make the right the decision and not allow the death penalty to become law.

[HB 9, Version E, was held over.]

4:14:40 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 4:15 p.m.