ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
March 23, 2009
8:17 a.m.

MEMBERS PRESENT

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

MEMBERS ABSENT

Representative Nancy Dahlstrom, Vice Chair

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 & 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
02/25/09	(H)	Heard & Held
02/25/09	(H)	MINUTE(JUD)
03/02/09	(H)	JUD AT 1:00 PM CAPITOL 120

03/02/09	(H)	Heard & Held
03/02/09	(H)	MINUTE(JUD)
03/23/09	(H)	JUD AT 8:00 AM CAPITOL 120

WITNESS REGISTER

ART KOENINGER
Homer, Alaska
POSITION STATEMENT: Testified in opposition to HB 9.

AVERIL LERMAN
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 9.

CONNIE JONES, Reverend
St. Mary's Episcopal Church
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 9.

ERIC WOLHFORTH, Chancellor
St. Mary's Episcopal Church
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9.

JEFFREY A. MITTMAN, Executive Director
American Civil Liberties Union of Alaska (ACLU of Alaska)
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 9.

GLENDA KERRY, Attorney at Law
Anchorage, Alaska
POSITION STATEMENT: During discussion of HB 9, relayed that she is in opposition to the death penalty.

BARBARA BRINK
Anchorage, Alaska
POSITION STATEMENT: Provided comments during discussion of HB 9.

SETH CHURCH
Fairbanks, Alaska
POSITION STATEMENT: Testified in support of HB 9.

SHIRLEY DICKENS
Anchorage, Alaska
POSITION STATEMENT: Testified in opposition to HB 9.

BARBARA BACHMEIER
Juneau, Alaska
POSITION STATEMENT: During discussion of HB 9, provided comments and urged the committee to let HB 9 die.

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

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

ACTION NARRATIVE

8:17:25 AM

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 8:17 a.m. Representatives Ramras, Gruenberg, Holmes, Coghill, Gatto, and Lynn were present at the call to order.

HB 9 - CAPITAL PUNISHMENT

8:17:44 AM

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 had been adopted as the work draft on 2/23/09.]

8:19:15 AM

ART KOENINGER indicated that he would be speaking in opposition to HB 9. Although HB 9 purports to better protect society from the most heinous of crimes and impart a more perfect justice while protecting the rights of the innocent, goals he values and supports, he remarked, HB 9 will do little, he opined, that the existing system - via a life sentence without the possibility of parole - doesn't already offer at less expense and with less harm to society's collective psyche. It is not enough to appear to be tough on crime, and there are more effective ways to be smart on crime. Mentioning that he has known murderers and victims, and their families, he opined that more killing will not heal the pain of the victim's families, will create more pain for the perpetrator's families, and will not make people safer any more than it will bring back the dead. He said he is familiar with capital punishment and its effects on the communities in which it is carried out, because his father was a criminologist who worked for the Texas Department of Corrections, extensively researched death penalty issues and published his findings, and grew to oppose the death penalty when his research illustrated the many glaring racial and class discrepancies inherent in the application of the death penalty.

MR. KOENINGER noted that even today, the justice system is as imperfect as the humans administering it. He surmised that the Alaska Native Justice Center (ANJC) would be able to give convincing reasons why a death penalty will fall disproportionately on Alaska Natives. Furthermore, the irreversibility of capital punishment differentiates it radically from all other sentences, and future changes in law will be of no avail to those who will have already been executed. Other states are beginning to "rescind" State-sanctioned killing, with New Mexico being the most recent state to do so. Alaskans have done without the death penalty for decades, and will eventually rid themselves of this injustice again should HB 9 pass. No amount of "legal tweaking" or number of rationalizations can ensure that the innocent won't be executed. Delegating the responsibility of premeditatedly killing another human being is an abhorrent burden on State employees and medical personnel, and asks of the latter that they violate their oath to do no harm.

MR. KOENINGER, in conclusion, encouraged the committee to table the bill and instead focus on restorative justice with real solutions that address the root causes of crime.

8:22:59 AM

AVERIL LERMAN said she opposes HB 9, adding that she is a legal historian who's spent many years studying the history of the death penalty in territorial Alaska between 1900 and 1957. Her research, she relayed, has included extensive documentary review in archives and libraries, and more than 50 interviews with people who were present, active, and part of what happened during the executions that took place in Juneau, in particular, as well as in other locations. Her research, she said, illustrates that those communities that used the death penalty later came to reject it. For example, in Fairbanks, there were three hangings in the 1920s, but after that decade, not one more person was hanged, although homicides continued to occur; consider, it was a town full of young men and liquor – two factors that when put together resulted in homicides. Juneau, as well, was a town full of young men, men working in the fishing industry, and a lot of liquor; there were three hangings in Juneau between 1939 and 1950, and then no further hangings until 1957, when the territory's death penalty was abolished, though homicides in Juneau continued to occur. So why did the Alaska Territorial Legislature abolish the death penalty in Alaska, and why did the hangings stop? She ventured that it's because the reality of the death penalty is very different than what people think it will be when they enact it.

MS. LERMAN surmised that the people who don't personally experience all the special things that happen in the death penalty process often think that capital punishment is a good thing, that it will help reduce violent crime, that it represents justice, and that maybe it's somewhat fair to take a life for a life - after all, doesn't the bible speak to that issue? That's what she used to think, she relayed, before she got close enough to the death penalty "to actually get a good smell of it." Others who live with the death penalty system in their community start to change their minds after being exposed to it for a while. In territorial Alaska, it was ten years per town. Some people change their minds about the death penalty when they see that it's only the poor who are put to death. Rich men didn't hang in territorial Alaska; everyone who was executed in Alaska was completely poor, though there were many murders committed by men of means, many of whom were actually pardoned.

MS. LERMAN said some people change their minds about supporting the death penalty when they see that it is nonwhite people and ethnic minorities who are much more likely to be on death row

than white people are. In territorial Alaska, 75 percent of all murders were committed by white men, but the only people hanged after 1904 were either African American, Alaska Native, or, in one case, an immigrant from Montenegro who was referred to as a "bohunk" and a "black fella" in the newspaper. In the three Fairbanks hangings, one was the Montenegrin and two were Alaska Natives; in the three Juneau hangings, one was "Indian" and two were African Americans. Some people change their minds about the death penalty when they see that although it's intended for the most heinous of murderers, that's not who actually ends up dangling from the rope. For example, in Fairbanks in 1929, a young Alaska Native named Constantine Beaver was sentenced to die for killing his good buddy during a drunken brawl. Beaver loved his friend and was overwhelmed with remorse for what he'd done, and U.S. Deputy Frank T. Young described hanging Beaver as "the saddest affair I've had to witness," and resigned shortly thereafter; Beaver was the last person to be hanged in Fairbanks.

MS. LERMAN said that this pattern continued elsewhere as well. For example, she's spoken to a number of people who'd been drafted into participating in the hangings in Juneau, and 50 years later, their anger, bitterness, and resentment at having to recall those hangings was evident. With regard to the hurt that's inflicted on the people who've become involved with the death penalty, she noted that the wife of one of the city patrolman who'd been pulled into the Juneau death chamber to help hang Eugene LaMoore asked during her interview, "Doesn't anybody think about the people who have to do these things?" Some people change their minds about the death penalty when they see what participating in the process does to people. One of the other officers at that hanging, when asked whether Mr. LaMoore was shaking on his way to the gallows, responded, with great resentment, "Not any more than the rest of us," Ms. Lerman relayed, and surmised that such resentment and hurt feelings are common amongst people who get close to the death penalty.

MS. LERMAN noted that one person who changed his mind about the death penalty was U.S. Supreme Court Justice Harry A. Blackmun, who tried hard to make the death penalty constitutional and didn't have any opposition to it, but who eventually said in part [in Callins v. Collins]:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, ... and, despite the effort of the States and courts to devise

> legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. ... From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored ... to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved ..., I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies.

MS. LERMAN, in conclusion, surmised that this same decision had been reached by the Alaska Territorial Legislature in 1957, and characterized [the abolishment of Alaska's death penalty] as a good decision that shouldn't be changed.

8:31:09 AM

CONNIE JONES, Reverend, St. Mary's Episcopal Church, said she is strongly opposed to HB 9, and that her church, since its inception in 1958, has gone on record four different times – 1958, 1969, 1979, and 1991 - as being opposed to the death penalty. The Episcopal Church opposes the death penalty for theological reasons – that being that the life of an individual is of infinite worth in the sight of almighty god, and the taking of such a human life falls within the providence of almighty god and not within the right of man - she relayed, and indicated that she also opposes it because of its disproportionate effect on minorities, its cost, and the fact that if a person lives in certain areas of the country, he/she is more likely to be executed than if he/she lives somewhere else. At the end of the church's resolutions regarding the death penalty, the general convention calls upon all dioceses and members to work actively to abolish the death penalty in their states. In conclusion, she said that as long as she is able to breathe a breath on this earth, she would oppose the death penalty regardless of what amendments are made to any legislation [pertaining to it].

8:35:00 AM

ERIC WOLHFORTH, Chancellor, St. Mary's Episcopal Church, noted that New Jersey had the death penalty for 23 years, but recently repealed it; during those 23 years, there were 228 capital murder trials, only 60 convictions, and no actual exercise of the death penalty. New Jersey lawmakers amended the state's death penalty 42 times in an attempt to conform it to the state's constitution, and the state spent an average of $4.2 million on each of the aforementioned 60 convictions. Ultimately, New Jersey repealed its death penalty on the grounds that it simply did not work. He pointed out that other states are taking the same steps; for example, the governor of New Mexico signed the repeal of that state's death penalty just last week. The modern view, he surmised, indicates that a death penalty would be an impractical approach for Alaska to take. In conclusion, he suggested to members that they consider New Jersey's experience.

8:38:39 AM

JEFFREY A. MITTMAN, Executive Director, American Civil Liberties Union of Alaska (ACLU of Alaska) - after mentioning that the ACLU of Alaska is a nonpartisan organization that seeks to protect the rights of all Alaskans as guaranteed by the U.S. Constitution and the Alaska State Constitution, and seeks to preserve and expand civil liberties – relayed that the ACLU of Alaska strongly opposes HB 9, adding that the death penalty is the ultimate denial of civil liberties. Referring to Callins v. Collins, he noted that Justice Blackmun also said in part, "the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants".

MR. MITTMAN remarked that state commissions looking at factual data have found that capital punishment is absolutely linked to race and socioeconomic status. In December of 2008, the Maryland Commission on Capital Punishment, in its final report to the General Assembly, found that racial disparities existed in Maryland's capital sentencing system, and, that while there was no evidence of purposeful discrimination, the statistics examined from death penalty cases demonstrated racial disparities when the factors of the race of the defendant and the race of the victim are combined. Also in 2008, the California Commission on the Fair Administration of Justice found that overall, controlling for all other predictor variables, all those who kill African Americans, regardless of the ethnicity or race of the perpetrator, are 59.3 percent less likely to be sentenced to death than those who kill non-Hispanic whites.

MR. MITTMAN relayed that data gathered from around the country illustrate that defendants charged with killing victims high in socioeconomic status face a significantly higher risk of execution. The death penalty's historic racial and socioeconomic bias persists despite the best efforts of legislatures and judges to erect fair and equitable capital punishment procedures. With regard to how such information is pertinent to Alaska, he pointed out that in 2007, the U.S. Census Bureau estimated that Alaska Natives comprise 15.2 percent of the population, whereas the 2008 offender profile compiled by the Alaska Department of Corrections (DOC) illustrates that Alaska Natives comprise 35.8 percent of the offenders in institutions; in other words, the Alaska Native community is "more than twice overrepresented in the criminal justice system." People must acknowledge that the death penalty will, inevitably, be disproportionately applied against the state's Alaska Native population, and that such a result is unacceptable, he opined.

MR. MITTMAN questioned why, during this time of fiscal limitations, when resources could be used for more law enforcement officers, victims' services, education, and crime prevention programs, the legislature is debating committing resources to a system that's proven to have failed. Alaskans are unique and choose their own special paths, but can still learn from the experiences of New Jersey, Maryland, New Mexico, Montana, and Colorado. He noted that Reverend Carol J. Pickett, a witness to 95 executions in Texas, has pointed out that the death penalty is also extremely hazardous and hard on correctional system employees, who are negatively affected by having to participate in executions. In conclusion, Mr. Mittman asked members to vote "do not pass" on HB 9, and instead turn their attention to those matters that will benefit Alaskans.

8:43:12 AM

MR. MITTMAN, in response to a question, surmised that both race and a lack of financial resources are factors in the disproportionate number of minorities being sentenced to death. Studies indicate that at every point in the judicial system, factors of race – not necessarily via intentional discrimination or via a systemic problem – enter into the equation. For example: compared to a white person, a person of color is more likely to be stopped and to receive initial police contact, and following that first contact, a person of color is more likely to have his/her person or vehicle searched, and following that

search, a person of color is more likely to experience negative consequences in terms of sentencing and involvement in the justice system. Furthermore, factors of race can play a part in a person's socioeconomic status, which in turn can play a part in a person's ability to hire competent counsel. Both race and socioeconomic status must be recognized as factors, and underscore the fact that the justice system doesn't treat individuals fairly with regard to such an important decision [as whether to sentence someone to death].

MR. MITTMAN, in response to another question, relayed that the ACLU of Alaska's web site has additional information on this topic, and indicated that the [American Civil Liberties Union (ACLU)] has a death penalty project that has conducted research across the country. In response to further questions, he mentioned aspects and focuses of the ACLU of Alaska and the ACLU.

8:47:47 AM

CHAIR RAMRAS relayed that a forthcoming amendment would require that the death penalty could not be sought unless there was biological evidence or deoxyribonucleic acid (DNA) evidence linking the defendant to the murder, or a videotaped voluntary confession by the defendant to the murder, or a video recording conclusively linking the defendant to the murder. He characterized such items as irrefutable evidence.

MR. MITTMAN, on the issue of videotaped confessions, explained that he knows of a case – the name of which he would be providing the committee - involving a person who submitted a signed, written confession that was absolutely false, and so that person was exonerated and is no longer on death row. The idea of "irrefutable evidence," he opined, is a legal fiction; again, as Justice Blackmun stated, "no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies". Regardless that an appropriate constitutional balance is being sought via the forthcoming amendment, it is an impossibility. For example, eyewitness testimony has been accepted by juries as being the most reliable "irrefutable evidence," but there is now factual proof that eyewitness testimony can be wrong. Moreover, the fact that there are instances in which someone confesses to murder but his/her confession is then found to be factually incorrect when the real killer is discovered shows that such so-called irrefutable evidence does not constitute a reliable standard. In addition, he pointed out, DNA evidence can be

exclusionary but not inclusionary. Referring to the aforementioned forthcoming amendment, he characterized it as a stool the legs of which are not solid enough to support the concept of true irrefutable evidence.

MR. MITTMAN, in response to a question regarding what impact he thinks a severability clause would have on HB 9, remarked:

> The unconstitutionality of the death penalty rests on many issues that [have] ... to do with its application, that [have] ... to do with the standard of proof, [that have] ... to do with the ability to apply it fairly. There are many issues that challenge the constitutionality of the idea of the death penalty, the idea of capital punishment, so that I don't think that a severability clause or lack thereof would be a primary reason for challenging. The concern is that there are so many issues that raise problems: the way it's improperly applied, the way that the standards are incorrect, the way that the appeals process can or cannot be followed through with. So generally, the unconstitutionality really is to the principal of the system.

8:54:42 AM

REPRESENTATIVE GRUENBERG questioned whether the term "biological evidence" as used in the aforementioned forthcoming amendment could include a blood test that doesn't rise to the level of a DNA sample test, and whether such could potentially link a defendant to a murder.

MR. MITTMAN said that with regard to biological evidence and DNA evidence, it's important to remember the concept of "inclusionary versus exclusionary evidence." For example, there can be DNA evidence that proves the defendant could not have been the person involved who left the biological sample, but in many cases, there isn't any biological evidence, so there wouldn't be any opportunity to exculpate a person who could be innocent. The ACLU of Alaska sees the inclusion of such language as an effort to find some way to create rules, regulations, or procedures that protect the capital punishment system from its unconstitutional infirmities. He too pointed out that Justice Blackmun has noted that many states have attempted to create such rules and regulations but have always failed.

8:56:11 AM

GLENDA KERRY, Attorney at Law, said she is opposed to the death penalty based on a position of personal responsibility and accountability for one's actions. She personally is not willing to take the life of another person, she relayed, and offered her belief that anyone who supports the death penalty needs to be willing to personally snuff out the life of another person. She surmised that when it comes down to the details of putting someone to death, a lot of people wouldn't themselves be willing to take that action, and would therefore be opposed to the death penalty based on their unwillingness to do the dirty work. She offered her understanding that there is a movement amongst physicians to declare that it is against their ethical code to kill and so therefore they won't execute anyone. She said that based on her experience, the criminal justice system is not state of the art and is fraught with errors; therefore, if the death penalty is passed in Alaska, it will be imposed on minorities but not on those of equally culpable conduct who happened to be white, middleclass.

MS. KERRY, in response to a question, relayed that she has had a couple of clients whom she strongly doubted were guilty of the crimes they were charged with. There are a lot of instances involving false confessions, which occur for a variety of reasons, she remarked. Furthermore, some types of people are more likely to make false confessions, such as those who are not confident in engaging with law enforcement officers, those who are more timid in their interactions; such people can be led – even unintentionally - into making a confession. Such leading can occur when police are just trying to do their job and figure out what happened, but it creates a situation in which they reach the wrong conclusion. Such situations do occur in Alaska, she noted.

MS. KERRY, in response to a question, said she'd once had a client who was mentally ill and who confessed to a homicide after being involuntarily medicated by the State.

REPRESENTATIVE GRUENBERG mentioned that there is also a forthcoming amendment that would require what he termed "reciprocal discovery" during the penalty phase of a capital felony prosecution. He offered his belief that two Alaska Supreme Court cases - Scott v. State, 519 P.2d 774 (Alaska 1974), and State v. Summerville, 948 P.2d 469 (Alaska 1997) – have held that "this" would be an unconstitutional provision

because, among other things, it would require the defendant to waive his/her privilege against self-incrimination.

MS. KERRY offered her understanding that there are a lot of public policy reasons against providing for reciprocal discovery. For example, the defendant ought to be able to disclose everything to his/her attorney, knowing that it will be kept confidential. Therefore, she opined, [reciprocal discovery] must be guarded against, characterizing it as a wise decision to keep attorney-client communications confidential. In response to a question, she offered her belief that reciprocal discovery would impinge on the attorney-client privilege.

9:03:45 AM

BARBARA BRINK - after relaying that she was a public defender for the State of Alaska for 23 years, and that she had testified before but had limited her comments to the issues of cost and the danger of executing innocent people – indicated that today she would be addressing the testimony provided by a representative of the Department of Law (DOL) on [March 2, 2009], testimony which deeply upset and disturbed her because it appeared that the DOL representative, when speaking about the deterrent effect of the death penalty, was trying to leave the committee with the impression that if Alaska had had a death penalty, that it would have prevented additional murders in three specific instances, and that nothing short of the death penalty would have done so. Ms. Brink explained, however, that under the facts of the cases referred to by the DOL representative – Mr. Novak - nothing could have been further from the truth.

MS. BRINK said:

> [Mr. Novak] ... talked about the [Douglas] Gustafson and [Raymond] Cheely case, where Mr. Gustafson and [Mr.] Cheely were convicted of homicide after shooting into a moving car and killing a person; they then went on to plan further crimes and a homicide while they were in custody. [Mr. Novak] ... left you with the impression that had we had a death penalty, that couldn't have happened and this innocent life would not have been lost. But in fact, Mr. Gustafson and Mr. Cheely were acquitted of first degree murder – they were only convicted of second degree murder. [So] even if Alaska [had] had a death penalty, the

death penalty would not have applied to those gentlemen, and so having a death penalty or not having a death penalty would have made absolutely no difference in what happened after they were convicted. For the State [DOL] to claim the death penalty [would have been] a deterrent in that situation is false.

Secondly, [Mr. Novak] ... mentioned the case of Timothy Donnelly, who, in a fight in a jail, killed another person. But Mr. Donnelly was not convicted in the State of Alaska criminal justice system – he was convicted in federal court - [and so] An Alaska death penalty would not have applied to Mr. Donnelly and would not have prevented any killings, and, in fact, he was not only convicted in a federal court but he was doing his time in a federal prison in Georgia. An Alaska death penalty is not going to have any effect on whether or not the Georgia Federal Bureau of Prisons facility has adequate security in order to protect its inmates. And in fact, Mr. Donnelly himself was killed in that very same Georgia Federal Bureau of Prisons facility.

The third example that Mr. Novak gave us was that of Carl Abuhl, who was convicted of homicide in Ketchikan and then killed an inmate by the name of Gregory Beaudoin in a State facility here in Alaska. Mr. Novak again left us with the impression that had we had a death penalty in Alaska at the time, that Mr. Beaudoin would have not been attacked and killed. However, that, again, is a false assertion: Carl Abuhl, also, was not convicted of murder in the first degree – he was convicted of murder in the second degree. Even if we ... had a death penalty in the state of Alaska, he would not have been eligible for execution - he would not have faced it.

MS. BRINK continued:

So the ... State's argument that these deaths would have been prevented had we a death penalty is completely fallacious. I would ask this [committee] ... not to consider that testimony, and, in fact, I have looked for a case in Alaska where we had a person who was convicted of first degree murder who might have been prevented from doing further crimes had we had a death penalty, and I could not find one. I

assume the State could not find one either, or they would have brought it to our attention instead of these examples that were untrue. There is no deterrent effect ... with the death penalty.

Recent studies in Oklahoma and California failed to find that capital punishment had any deterrent effect on violent crimes, and, in fact, found that there were significant increases in stranger-killing and homicide rates after the death penalty was reinstated in ... 1976. In contrast, the murder rate in Canada dropped by 27 percent since the death penalty was abolished in 1976. And a New York Times survey recently demonstrated that homicide rates in states with capital punishment are 48 to 101 percent higher than those states without the death penalty. The death penalty has no individual deterrence, it has no general deterrence - it should not be employed in the state of Alaska. Thank you.

CHAIR RAMRAS said he is not the least bit interested in the death penalty as a deterrent, but rather simply believes that there are just some people who do crimes heinous enough to deserve the death penalty. He expressed an interest in moving forward with [adopting] the aforementioned forthcoming amendment pertaining to what he'd earlier characterized as irrefutable evidence, indicating his belief that it would narrow the scope of people to whom the bill would apply.

9:09:15 AM

MS. BRINK said that she doesn't believe that the goal of criminal justice systems is revenge; that she doesn't understand the concept of making a judgment regarding who deserves to die; that she doesn't think doing so is necessary; and that she thinks that sentencing people to serve long sentences – for example 99-year sentences – simply addresses a public safety concern, offering her belief that that's the point of a criminal justice system. She elaborated:

So it isn't a matter of judging or deciding who's deserving of a worse punishment or more infliction of pain. The reason we put somebody in jail for 99 years is because we need to protect the public from them forever, and I think that the idea that because of someone's acts they deserve a more heinous punishment, that doesn't compute to me in terms of criminal

> justice policy. Criminal justice policy is [meant] to protect the public and to punish heinous acts, and drawing a line between doing something worse to somebody because what they've done is even worse doesn't seem to me to satisfy any public interest that we have as a community or as a government.

REPRESENTATIVE GRUENBERG expressed concern regarding the fact that the DOL knew that the case examples Mr. Novak presented were not on point. He offered his understanding that under the Alaska Rules of Professional Conduct, Rule 3.3 requires candor towards a tribunal, in that a lawyer is not supposed to make a false statement of material fact of law to a tribunal. Acknowledging that a legislative committee is not technically a tribunal in the same sense as a court, he said he believes that a lawyer ethically has the same duty of candor in a legislative hearing that he/she would have in court – that being to not knowingly mislead.

MS. BRINK concurred.

9:13:45 AM

MS. BRINK, on the issue of "irrefutable evidence," offered her understanding that the National Science Foundation (NSF) has recently issued a report calling into question a lot of the forensic evidence that the criminal justice system has been using for years to convict people. She said that she appreciates the committee's concern and desire to have a requirement that there be so-called "irrefutable evidence" in order to impose a death penalty, but thinks that "we'll never know whether we have irrefutable science" - technology and science are changing so rapidly that evidence used in trials she participated in, such as fingerprints and blood spatter and blood testing, have since come into question though people thought that at the time that such were reliable forms of evidence. With the expansion of knowledge, problems with DNA evidence, for example, could be found, and this is evidence which is now thought of as irrefutable. She added, "So I'd simply urge caution because the state of science is always changing, and I don't know that we will ever have biological evidence that we can rely on 100 percent."

MS. BRINK, in response to a question regarding whether she thinks the bill is severable, said it would depend on what portion of the bill a particular case was being appealed on,

adding “you cannot tell whether its severable until you find out what the issue is and what part you’re trying to take out.”

9:15:44 AM

SETH CHURCH expressed support for HB 9, saying he believes that the victim deserves to have justice as much as the criminal deserves to get punishment - it’s not just a public safety issue, it’s repayment for what was done to the victim.

9:16:33 AM

SHIRLEY DICKENS said she is the mother of a son who was murdered in 1984, that he was found bludgeoned to death in Kincaid Park, and that her son’s murder has never been solved. In spite of this, she relayed, she would be speaking against HB 9 because when her son was murdered, she was so stricken by the horror of taking a human life that she came down morally on the side of being against the death penalty, and feels even more strongly about it now. She went on to say:

> We should put our effort, as I have tried to do ever since then, into preventing murder so that all of us know we are connected, [that] when we kill someone, we are hurting ourselves deeply, morally. It is wrong to kill, and if it’s wrong to take a human life, then it’s almost more abhorrent to me for the State, coldly, in the name of justice, to take a human life. Now, if someone has been convicted of murder, and their crime is heinous enough, lock them up for the rest of their life, but do not kill in my name, I beg you. This would be a step backwards for Alaska, it would be, I think, a black mark on our legislature and on you all down there.
>
> And as far your feelings [that] ... some crimes are so horrible that it isn’t enough to lock [the perpetrator] up forever, after my son was killed ... I had this strong feeling ... that said, “Vengeance is mine ... saith the lord,” [so] don’t you worry about it: you put energy into making this world a better place by supporting the children, the abused women, the neglected children, helping people to parent better, [and] to know that [it] ... is a great moral wrong to kill. So I urge you, “Not in my name.” Thank you.

9:21:01 AM

BARBARA BACHMEIER pointed out that Article I, Section 12, of the Alaska State Constitution mandates that criminal administration be based on the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation. The point of reformation, she opined, is to improve or rehabilitate the offender so that he/she, potentially, can cease to be a threat to the public. The Alaska State Constitution guarantees specific rights – including reformative services at State expense - to offenders following conviction and during incarceration, and there is no exception for those convicted of capital crimes, and [the legislature] has a duty to honor the constitution and all of its provisions. She offered her understanding, also, that the Alaska Supreme Court, in 1997, recognized rehabilitation as a fundamental right in Brandon v. State Department of Corrections. Moreover, although some would argue that reformative services offered to offenders on death row would be a waste of State time and money, she opined that people should be mindful of the fact that not all offenders on death row are actually put to death. For example, the Innocence Project has overturned convictions – including capital punishment convictions – by presenting DNA evidence that was unavailable at the time of the court proceedings.

MS. BACHMEIER surmised that the money wasted on those charged and convicted of capital offenses would be spent on salaries and benefits for additional prosecutors and public defenders, on long, protracted legal battles and appeals, on expensive court costs, and on other costs as well. Legislation reestablishing capital punishment in Alaska will deny offenders their constitutional right to rehabilitation. In conclusion, she urged the committee to let HB 9 die quickly and deliberately, not Alaskans convicted of capital crimes.

9:26:08 AM

DOUG WOOLIVER, Administrative Attorney, Administrative Staff, Office of the Administrative Director, Alaska Court System (ACS), said that the ACS is neutral on HB 9. In response to a question, he explained that there are two challenges to seating a jury in a death penalty case, one being the length of the trial - few people can commit to serving for such a long time - and the other being that a juror has to be "death qualified," meaning that he/she has to be willing to impose the death penalty should the case warrant it. In rural areas of Alaska,

for example, the ACS routinely calls 100 perspective jurors in an effort to get just 12 jurors and 2 alternates for regular felony cases; in rural Alaska, there are so many family relations and other connections that it can be difficult to get a jury. For capital crimes, he relayed, other states call between 200 and 1,700 prospective jurors, with Washington routinely calling 1,000 prospective jurors and Los Angeles County routinely calling 800 prospective jurors.

MR. WOOLIVER said he assumes that in Alaska, the ACS would have to call about 500 prospective jurors, though one of the factors that would determine how many people the ACS would have to call is the attitude about the death penalty held by the people in the community where the trial was taking place and from which the ACS would be pulling its jurors. Noting that testimony thus far has indicated that the Alaska Native population is substantially opposed to the death penalty, he surmised that seating a jury in rural hub communities such as Kotzebue, Bethel, Nome, or Barrow – all felony trial sites with superior court judges - would be a real challenge. He added that as a practical matter, if the ACS had to call 1,000 prospective jurors in Kotzebue, for example, he doesn't know how that would be accomplished. He mentioned that the DOL's fiscal note recognizes that the smaller and more remote the community in which a capital murder trial takes place, the more difficult it will become to hold that trial.

9:30:15 AM

REPRESENTATIVE HOLMES asked whether there would be any constitutional issues raised regarding only being able to try capital cases in Alaska's larger communities.

MR. WOOLIVER said there is both federal and state case law that says the State "can't just take a village murder outside of Kotzebue and try it in Anchorage," for example. The concept of "a jury of one's peers," he explained, means that ultimately, the goal is to try the case in the community in which the crime was committed, or, as a practical matter, if the community is just too small, then the case would be tried in the nearest venue site. In response to a question, he said there are logistical challenges to all major felony trials in small locations, and that this type of trial would be particularly challenging for a number of reasons, though the ACS would strive to meet those challenges. In response to another question, he reiterated his comment about the DOL's fiscal note.

REPRESENTATIVE COGHILL asked whether the ACS has been confronted with similar challenges in cases where the prosecution was seeking a 99-year sentence or similarly-long sentence.

MR. WOOLIVER offered his recollection that there was a very serious felony trial on Saint Paul Island, and that that trial did pose serious challenges. He said he would provide the committee with more information regarding other major felony trials occurring in small communities. In response to a further question, he too noted that the Alaska State Constitution states that criminal administration shall be based on the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation, and indicated that the ACS keeps this mandate in mind when handing out sentences.

REPRESENTATIVE GRUENBERG offered his understanding that the aforementioned requirement that in so far as possible, a trial take place in the community in which the crime occurred, or as close to it as possible, is the constitutional right of vicinage [referred to in] the Alaska Supreme Court case, Alvarado v. State, 486 P.2d 891 (Alaska 1971).

MR. WOOLIVER concurred.

9:38:15 AM

SUSAN S. McLEAN, Acting Deputy Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), in response to a question, also noted that the Alaska State Constitution states that criminal administration shall be based on the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation. She added that that provision of the Alaska State Constitution used to provide that the goals of criminal administration were protection of the public and rehabilitation of the offender, and that the addition of community condemnation and restitution was brought about by a constitutional amendment approved by the voters in 1994. These factors are considered during sentencing, and have been codified in case law and are known as the "Cheney (ph) criteria," she relayed, adding that community condemnation and the reaffirmation of societal norms is just one of the goals of sentencing.

CHAIR RAMRAS questioned whether the death penalty for heinous murders could be construed as satisfying the constitutional requirement of providing for community condemnation.

MS. McLEAN surmised that that argument might be raised in court, and offered her belief that such an argument does have some legal basis. The flip side of that argument, she added, is that the court could ignore the requirement to provide for rehabilitation, and that there is lot of case law "that says that as well." In response to a question, she said she doesn't yet know how many murder-in-the-first degree cases have been tried in courts located outside of Anchorage, Fairbanks, and Juneau, but relayed that Bethel is a Superior Court site, that it would be accurate to say that the presumption is in favor of the venue being where the crime was committed, and that whenever possible, first degree murders that occur in Bethel are tried in Bethel.

MS. McLEAN, in response to comments, said she does not believe that Alaska's justice system is a failure, as some have contended, but acknowledged that "we always have to say that there is no such thing as an infallible system." She offered her belief that Alaska's public defenders are expert defense attorneys, probably better qualified than many of the private defense attorneys trying serious cases. She said she knows of no case in which a defender was later exonerated on the basis of DNA evidence, or of any evidence showing that Alaska's justice system is a failure. Alaska has an extremely protective court system that is quick to overturn any case where it appears that the person wasn't afforded due process of law and all of the rights guaranteed under the constitutions.

9:45:16 AM

MS. McLEAN, in response to a request, relayed that during the past five years, 170 cases involving murder in the first degree were referred for prosecution, with an average of 34 such cases per year; of those 170 cases, there were 33 dismissed by the State, there were 25 reduced to a different charge, there were 18 that ended with a conviction for the crime of murder in the first degree, there were 14 in which the defendants "pleaded to" the crime of murder in the first degree, there were 5 that resulted in "not guilty" verdicts, there were 5 wherein the defendants were not indicted for the crime of murder in the first degree by the grand jury, there was 1 court trial wherein the defendant plead guilty to a lesser offense, there was 1 jury trial wherein the case went to trial but on a lesser charge, and

there was 1 acquittal. She said she would make those statistics available to the committee.

MS. McLEAN, in response to comments and a question, said she did not have statistics regarding the race or ethnicity of those charged with or convicted of murder in the first degree, but that in her experience, there has not been a disproportionate number of poor or minorities being so charged or convicted. She acknowledged, though, that there is a study indicating that there is a disproportionate number of Alaska Natives in prison. In response to a question, she offered to research those issues further.

9:53:08 AM

MS. LERMAN, in response to comments, relayed that she and others who've testified thus far today would be available during the afternoon meeting to address the aforementioned forthcoming amendments. She then suggested that the committee research via the Internet situations involving a scandal at the Houston Police Department (HPD) crime lab, and a scandal at the Federal Bureau of Investigation (FBI) crime lab; these situations speak volumes regarding the extent to which DNA and other forms of forensic evidence can't ever be considered "irrefutable."

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

9:55:16 AM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 9:55 a.m.