ALASKA STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
April 6, 2009
2:31 p.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

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 36
"An Act relating to ballot initiative proposal applications and to ballot initiatives."

- HEARD & HELD

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

<u>BILL: HB 36</u>
SHORT TITLE: INITIATIVES: CONTRIBUTIONS/PROCEDURES
SPONSOR(S): REPRESENTATIVE(S) JOHANSEN, MILLETT, WILSON

01/20/09	(H)	PREFILE RELEASED 1/9/09
01/20/09	(H)	READ THE FIRST TIME - REFERRALS
01/20/09	(H)	STA, JUD
03/25/09	(H)	SPONSOR SUBSTITUTE INTRODUCED

03/25/09	(H)	READ THE FIRST TIME - REFERRALS
03/25/09	(H)	JUD, FIN
04/06/09	(H)	JUD AT 8:00 AM CAPITOL 120
04/06/09	(H)	Heard & Held
04/06/09	(H)	MINUTE(JUD)
04/06/09	(H)	JUD AT 1:00 PM CAPITOL 120

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
03/23/09	(H)	Heard & Held
03/23/09	(H)	MINUTE(JUD)
03/23/09	(H)	JUD AT 1:00 PM CAPITOL 120
03/23/09	(H)	Heard & Held
03/23/09	(H)	MINUTE(JUD)
03/30/09	(H)	JUD AT 8:00 AM CAPITOL 120
03/30/09	(H)	-- MEETING CANCELED --
04/06/09	(H)	JUD AT 1:00 PM CAPITOL 120

WITNESS REGISTER

JASON BRUNE, Executive Director
Resource Development Council for Alaska, Inc. (RDC)
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SSHB 36.

JEANINE ST. JOHN, President
Alaska Support Industry Alliance ("the Alliance")
Anchorage, Alaska
POSITION STATEMENT: Testified in support of SSHB 36.

CHRISTINA ELLINGSON, Assistant Director
Alaska Public Offices Commission (APOC)

Department of Administration (DOA)
Anchorage, Alaska
POSITION STATEMENT: Responded to questions during discussion of SSHB 36.

GLENN M. PRAX
North Pole, Alaska
POSITION STATEMENT: Expressed concerns during discussion of SSHB 36.

SUSAN S. McLEAN, Chief Assistant Attorney General
Legal Services Section
Criminal Division
Department of Law (DOL)
Anchorage, Alaska
POSITION STATEMENT: Provided comments and responded to questions during discussion of proposed amendments to HB 9.

GERALD LUCKHAUPT, Attorney
Legislative Legal Counsel
Legislative Legal and Research Services
Legislative Affairs Agency (LAA)
Juneau, Alaska
POSITION STATEMENT: Speaking as the drafter, responded to questions during discussion of proposed amendments to HB 9.

ACTION NARRATIVE

2:31:45 PM

CHAIR JAY RAMRAS called the House Judiciary Standing Committee meeting to order at 2:31 p.m. Representatives Ramras, Lynn, Gruenberg, and Coghill were present at the call to order. Representatives Gatto and Holmes arrived as the meeting was in progress.

HB 36 - INITIATIVES: CONTRIBUTIONS/PROCEDURES

2:32:11 PM

CHAIR RAMRAS announced that the first order of business would be SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 36, "An Act relating to ballot initiative proposal applications and to ballot initiatives."

2:32:34 PM

JASON BRUNE, Executive Director, Resource Development Council for Alaska, Inc. (RDC), after mentioning that he would be testifying in support of SSHB 36, provided members with information about the RDC. He then said that although the RDC may question the appropriateness and the role of the initiative process as a means of governing, the RDC appreciates the democratic rights of Alaskans to change state law through the initiative process. Over the last few years, however, a number of of proposed initiatives have been brought forward that have not had the best interests of the state or its citizens in mind, and their sponsors have used tactics during the signature-gathering phase that mislead the public and misconstrued the issues and impacts at play, he opined. The RDC believes that openness and transparency must be at the forefront of good government, and SSHB 36 will require both public and legislative hearings for initiatives; this is a good idea, particularly given that the unintended consequences of laws the legislature attempts to pass are usually vetted during the numerous hearings, public testimony, and floor debates that are part of the legislative process.

MR. BRUNE noted that legislators, the people who are elected to pass state laws, are required to disclose how they raise and spend money. Why shouldn't those who are attempting to change state law through the initiative process also be subject to that same standard? Why shouldn't they, too, be required to disclose the source of their funding during the signature-gathering phase of the initiative process? "This" openness and transparency will bring to light the agendas of initiative sponsors, he remarked, adding that the RDC would very much oppose any amendment that would preclude "foreign" contributions for initiatives, because a number of foreign companies invest in Alaska and employ Alaskans and so should be allowed to participate in the initiative process. He suggested that in addition to requiring signature gatherers to carry the entirety of a proposed initiative with them, SSHB 36 should be amended such that signature gatherers would also be required to tell the truth.

MR. BRUNE opined, "We must bring openness and transparency back to this process," and noted that SSHB 36 would preclude signature gatherers from collecting signatures for more than one initiative at a time, adding that he's seen signature gatherers blur the lines between different initiatives for which they're collecting signatures, opining that such behavior is a disservice to the public; SSHB 36 would prevent intentional muddying of the waters. In conclusion, he said he is not

confident that signature gatherers will police themselves, opined that standards must be instituted to ensure a candid initiative process, characterized SSHB 36 as an important bill - both for the state and for the RDC's members - and urged the committee to support SSHB 36.

CHAIR RAMRAS, in response to comments about the 2006 ballot initiative regarding cruise ship taxation, regulation, and disclosure, offered his belief that when that initiative was approved for placement on the ballot, the lieutenant governor failed in his duty to restrict the initiative to a single subject, and that that's what lead to any confusion regarding what that initiative was about.

MR. BRUNE, in response to questions, reiterated his belief that foreign companies that invest in Alaska have a vested interest in the initiative process, and offered his understanding that currently foreign companies and their employees - regardless of where they reside - can contribute to initiatives.

2:39:23 PM

JEANINE ST. JOHN, President, Alaska Support Industry Alliance ("the Alliance"), provided information about the Alliance, and relayed that she would be speaking in support SSHB 36, and that the Alliance supports the constitutional right of Alaskans to utilize the initiative process when they believe they are not being effectively represented. However, members of the Alliance are quite concerned about what she characterized as the abusive use of the ballot initiative process. She offered her belief that SSHB 36 will strengthen that process by ensuring that the public is clearly aware of what she called "the true intent" and funding sources of any initiative. She said it's unfortunate that the initiative process has become a way for special interests to manipulate state law, and expressed appreciation for the joint prime sponsors' intent to "amend the process and provide a truly open and transparent initiative process."

REPRESENTATIVE GRUENBERG asked what effect Section 2 would have.

2:43:07 PM

CHRISTINA ELLINGSON, Assistant Director, Alaska Public Offices Commission (APOC), Department of Administration (DOA), offered her understanding that Section 2 just requires [initiative sponsors] to register as a group [with the APOC] prior to making an expenditure; currently initiative sponsors are already

required to register [with the APOC]. In response to another question, she offered her belief that Section 3 won't affect existing limitations or who can contribute to ballot initiative groups, and that AS 15.13.065 addresses ballot initiatives in municipal elections.

MS. ELLINGSON, in response to further questions, indicated that Section 5 simply mirrors language currently in AS 15.13.110(e) and speaks to the issue of quarterly reports, and that the proposed changes to the definitions of "contribution" and "expenditure" are intended to ensure that reporting occurs earlier in the ballot initiative process and shouldn't affect the nature of donations or spending.

The committee took an at-ease from 2:47 p.m. to 2:48 p.m.

MS. ELLINGSON, in response to a further question, offered her understanding that Section 1 pertains to when a person makes a contribution, whereas Sections 6 and 7, respectively, change the definitions of "contribution" and "expenditure".

2:50:01 PM

GLENN M. PRAX indicated that he has some concerns with SSHB 36, and opined that the recent changes to Alaska's ballot initiative laws have made the process much more difficult. He relayed that when he was actively involved in the initiative process a number of years ago, "citizen-driven groups" [were the primary participants], but such groups seem to be obsolete now. He cautioned the committee to be careful that the bill doesn't go further than necessary or make the initiative process only accessible to "the targeted groups." He surmised that requiring initiative sponsors to hold public hearings on initiatives would result in a perfunctory exercise that doesn't provide the value expected. In conclusion, he said he does think that there is some value in providing more transparency with regard to contributors, but again cautioned against going too far with SSHB 36 and implementing things that won't really work out as expected.

CHAIR RAMRAS closed public testimony on SSHB 36.

[SSHB 36 was held over.]

HB 9 - CAPITAL PUNISHMENT

2:53:46 PM

CHAIR RAMRAS announced that the final 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.]

CHAIR RAMRAS noted that public testimony on HB 9 had been closed [during a previous meeting on the bill].

CHAIR RAMRAS then turned the committee's attention to Amendment 1, labeled 26-LS0036\E.7, Luckhaupt, 3/23/09, which read:

Page 15, line 11, following "fire fighter,":
Insert "emergency medical technician, paramedic, ambulance attendant,"

2:57:16 PM

REPRESENTATIVE GATTO made a motion to adopt Amendment 1.

REPRESENTATIVE COGHILL objected for the purpose of discussion.

REPRESENTATIVE GATTO indicated that Amendment 1 would provide the same protection to emergency medical technicians, paramedics, and ambulance attendants as the bill currently provides to peace officers, firefighters, and corrections employees.

REPRESENTATIVE COGHILL removed his objection.

CHAIR RAMRAS announced that Amendment 1 was adopted.

2:58:11 PM

CHAIR RAMRAS then turned the committee's attention to Amendment 2, labeled 26-LS0036\E.6, Luckhaupt, 3/23/09, which read:

Page 1, line 4, following the first occurrence of "**Rules**":

Insert "**16,**"

Page 17, following line 29:
Insert new material to read:

"**Sec. 12.58.070. Discovery.** (a) Except as provided in (b) of this section, Rule 16, Alaska Rules of Criminal Procedure, applies to discovery in the penalty phase of a capital felony prosecution if the prosecution is seeking the death penalty.

(b) Thirty days before the guilt phase of a capital felony case is scheduled to begin, the prosecution and the defense shall provide to the opposing party a list of witnesses, other than expert witnesses, that the party is likely to call at the penalty phase if the defendant is found guilty of a charge that is the foundation for the death penalty. In addition to the witness lists, the parties shall include the witnesses' written or recorded statements, a summary of any other statements, and a summary of the testimony the witness will provide the court.

(c) Nothing in this section affects discovery related to expert witnesses under Rule 16, Alaska Rules of Criminal Procedure."

Page 23, following line 1:
Insert a new subsection to read:

"(c) AS 12.58.070, added by sec. 21 of this Act, has the effect of modifying Rule 16, Alaska Rules of Criminal Procedure, by providing for the exchange of the names of witnesses, their written or recorded statements, and summaries of their testimony by the prosecution and defense for the penalty phase of a capital felony death penalty prosecution."

The committee took an at-ease from 2:59 p.m. to 3:00 p.m.

CHAIR RAMRAS made a motion to adopt Amendment 2.

REPRESENTATIVE HOLMES objected.

3:00:20 PM

SUSAN S. McLEAN, Chief Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), explained that the purpose of Amendment 2 is to provide for reciprocal discovery 30 days before the penalty phase of a death penalty case. There is an exception, however, in that the rules

pertaining to expert witnesses would remain the same; currently, there is already reciprocal discovery regarding expert witnesses. Amendment 2 is necessary, she indicated, because under HB 9, or any capital punishment bill, the court must allow the jury to consider any potentially mitigating information, and this sometimes results in witnesses numbering in the hundreds; if a person is convicted of a capital crime, it is fairly ordinary to hear from everyone who's known the defendant from kindergarten on up. The purpose of [Amendment 2] is to speed the process along, and would pertain to the penalty phase of a capital case - the most significant phase of such a case - and both sides should be prepared to hear from witnesses.

MS. McLEAN said this is akin to current Rule 32.1 of the Alaska Rules of Criminal Procedure; this rule requires the defense to give notice of the evidence that it intends to produce in support of mitigating factors in the penalty phase. The State also has to give notice of the evidence it intends to produce in support of aggravating factors, and Amendment 2 provides for reciprocity in that arena. Noting that she's heard a couple of objections [to the concept of Amendment 2] based on the Alaska Supreme Court case, Scott v. State, 519 P.2d 774 (Alaska 1974), wherein the court said it is unconstitutional under the Alaska State Constitution to require a defendant to provide evidence which could bear on the question of his/her guilt, she pointed out that once the case has entered the penalty phase, the question of guilt has already been determined. She acknowledged, though, that it could be argued that requiring discovery 30 days before the guilt phase is over might bear on the defendant's guilt; similar arguments have been made in Washington and California wherein reciprocal discovery for the penalty phase is required prior to the penalty phase being over.

MS. McLEAN said that what's been determined by the courts in those states is that if the defendant has concern that what he/she is about to provide for discovery may bear on the issue of guilt, then he/she can be heard ex parte in camera, and the court could then withhold some of that discovery, reserve ruling until the guilt phase is over, and then, if the court decides that the defendant's witnesses can come in, the State would be entitled to a continuance in order to prepare to meet those witnesses. She characterized Amendment 2 as a practical amendment intended to move such cases along so as to get to the penalty phase with both the State and the defendant already preparing for the witnesses that will be heard in the penalty phase. As a practical matter, many of those witnesses will only

be speaking to the defendant's character rather than to his/her guilt.

MS. McLEAN offered her belief that there is nothing saying that Amendment 2 would be unconstitutional. Again, Amendment 2 tracks the aforementioned Rule 32.1.

3:05:34 PM

REPRESENTATIVE HOLMES said she is not convinced that Amendment 2 is constitutional, particularly given that the same jury would be seated for both the guilt phase and the penalty phase and discovery would be required while the jury is still debating guilt or innocence, and so she would therefore be voting "no" on Amendment 2.

REPRESENTATIVE GRUENBERG pointed out that Scott was followed by another Alaska Supreme Court case, State v. Summerville, 948 P.2d 469 (Alaska 1997), and that nothing in the intervening [23 years] changed the Alaska Supreme Court's opinion on this subject nor was there a dissenting opinion in either case. He said:

> I think that it's reading those cases too narrowly to say that it only applies prior to the issue of guilt or innocence. It would seem to me, particularly in a capital case, which may be the paradigm - hypothetical or factual situation - [that] the most serious consequence may very well be, if it's used or required - the waiver or the abrogation of that constitutional right - in the penalty phase, when the person may be put to death. I think that this is extremely serious, and I doubt whether the [Alaska] Supreme Court would change its mind just because guilt had already been established. I don't think our [Alaska] Supreme Court looks at things so technically; other supreme courts ... might do so, but I don't think ours would.

REPRESENTATIVE GRUENBERG then asked whether the DOL has prepared a fiscal note addressing the additional costs that would result from a legal challenge to the provision established via Amendment 2.

MS. McLEAN predicted that realistically, if HB 9 passes, the State would have to defend the entire bill as soon as its implementation is attempted.

A roll call vote was taken. Representatives Lynn, Coghill, Gatto, and Ramras voted in favor of Amendment 2. Representatives Gruenberg and Holmes voted against it. Therefore, Amendment 2 was adopted by a vote of 4-2.

3:10:30 PM

GERALD LUCKHAUPT, Attorney, Legislative Legal Counsel, Legislative Legal and Research Services, Legislative Affairs Agency (LAA), in response to a question, explained that Alaska's statute regarding the crime of murder in the first degree is slightly broader than that of other states in that it includes both murders committed with malice and other forms of murder such as those involving extreme indifference to human life. As a drafting matter, he indicated that he'd been instructed to start with the statute pertaining to the crime of murder in the first degree and then apply aggravating factors to it; this is a common approach in some states, even though not all states have a statute as broad as Alaska's.

MR. LUCKHAUPT, in response to comments and a question about safeguards to prevent innocent people from being executed, observed that Version E no longer requires a standard of proof higher than beyond a reasonable doubt, adding that no other state does either, nor does any other state currently require that specific types of evidence be present. Version E requires an appeal before the Alaska Supreme Court, and this is common in other states as well. Under Version E, a jury has to find aggravating factors that are not outweighed by mitigating factors, and that the death penalty is the appropriate sentence; he indicated that this "residual doubt standard" would allow a jury to refrain from imposing the death penalty even when there are aggravating factors that aren't outweighed by the mitigating factors.

MR. LUCKHAUPT, in response to another question, explained that there is language in Version E that implements the requirements the U.S. Supreme Court set out in Atkins v. Virginia, 536 U.S. 304 (2002), with regard to mental retardation; in that case, the court ruled that executing a mentally retarded defendant is unconstitutional. Both existing law and provisions of the bill address the issue of determining competency.

REPRESENTATIVE HOLMES offered her understanding that Version E would allow the State to execute minors.

MR. LUCKHAUPT indicated that it does not, and that such would be unconstitutional [under another U.S. Supreme Court ruling - Roper v. Simmons, 543 U.S. 551 (2005)]. In response to further questions, he reiterated that it would be unconstitutional to execute someone who's been found to be mentally incompetent, indicating that such would be determined on a case-by-case basis.

3:22:38 PM

CHAIR RAMRAS made a motion to adopt Amendment 3, labeled 26-LS0036\E.3, Luckhaupt, 3/18/09, which read:

Page 13, line 21, following "court.":
Insert "The attorney general may not elect to seek the death penalty under this section unless the state is prepared to present to the jury at trial
(1) biological evidence or deoxyribonucleic acid evidence that links the defendant to the act of murder;
(2) a videotaped voluntary confession by the defendant to the murder; or
(3) a video recording that conclusively links the defendant to the murder."

Page 14, line 13:
Delete "and"

Page 14, following line 13:
Insert a new paragraph to read:
"(3) that the state presented
(A) biological evidence or deoxyribonucleic acid evidence that links the defendant to the act of murder;
(B) a videotaped voluntary confession by the defendant to the murder; or
(C) a video recording that conclusively links the defendant to the murder;"

Renumber the following paragraph accordingly.

Page 14, line 29:
Delete "and"

Page 14, following line 29:
Insert a new paragraph to read:
"(3) that the state presented

(A) biological evidence or deoxyribonucleic acid evidence that links the defendant to the act of murder;

(B) a videotaped voluntary confession by the defendant to the murder; or

(C) a video recording that conclusively links the defendant to the murder;"

Renumber the following paragraph accordingly.

REPRESENTATIVE HOLMES objected.

CHAIR RAMRAS characterized Amendment 3 as instituting what he called an "irrefutable evidence standard," explaining that under Amendment 3, if no such evidence is present - that evidence being either biological evidence or 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 - then the State may not pursue the death penalty.

MS. McLEAN concurred.

REPRESENTATIVE HOLMES said she appreciates the intent of Amendment 3 but thinks it provides only a false sense of security, particularly given prior testimony indicating that there have been problems with maintaining the integrity of deoxyribonucleic acid (DNA) evidence and problems with false voluntary confessions, and that there could be problems with conclusively linking a defendant to a murder via a video recording.

MS. McLEAN suggested that if Amendment 3 is adopted, then the term "biological evidence" ought to be defined, adding that the DOL has provided possible language for such a definition.

The committee took an at-ease from 3:25 p.m. to 3:26 p.m.

3:26:37 PM

CHAIR RAMRAS - referring to a handout starting with the words, "From SB 110" - made a motion to amend Amendment 3 such that the term "biological evidence" would be defined as meaning: "(A) the contents of a sexual assault forensic examination kit; (B) semen, blood, hair, saliva, skin tissue, fingernail scrapings, bone, bodily fluids, or other identifiable human bodily material, collected as part of a criminal investigation".

REPRESENTATIVE HOLMES objected and then removed her objection to the amendment to Amendment 3.

REPRESENTATIVE GRUENBERG objected for the purpose of discussion. He asked what the term "sexual assault forensic examination kit" means.

MS. McLEAN explained that Title 18 contains statutes referring to sexual assault forensic examination kits, a term of art coined by the Department of Public Safety (DPS); such kits include all of the materials used to gather DNA, hair, and fiber evidence from sexual assault victims and suspects. In response to questions, she noted that [for some types of evidence], the evidence resides on the equipment used to collect it, such as swabs, for example.

REPRESENTATIVE GATTO suggested that the term "biological evidence" should instead be defined as "including" the aforementioned items, rather than as "meaning" the aforementioned items.

MS. McLEAN argued that such a change would make the definition too broad; the definition should instead remain narrow to reflect only "what it is that we are really looking for." In response to questions, she clarified that once evidence is collected via the equipment in a sexual assault forensic examination kit, that evidence then becomes part of the sexual assault forensic examination kit, and that the semicolon between subparagraphs (A) and (B) of the amendment to Amendment 3 is intended to mean and/or.

REPRESENTATIVE GRUENBERG, in response to a question, said he would not object to the amendment to Amendment 3 as long as that meaning was clear.

CHAIR RAMRAS surmised that the objection had been removed, and announced that the amendment to Amendment 3 was adopted.

3:31:17 PM

A roll call vote was taken. Representatives Coghill, Gatto, Lynn, and Ramras voted in favor of Amendment 3, as amended. Representatives Gruenberg and Holmes voted against it. Therefore, Amendment 3, as amended, was adopted by a vote of 4-2.

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

3:32:42 PM

ADJOURNMENT

There being no further business before the committee, the House Judiciary Standing Committee meeting was adjourned at 3:32 p.m.