MINUTES OF THE MEETING
OF THE LEGISLATIVE COMMISSION'S SUBCOMMITTEE TO STUDY THE
DEATH PENALTY AND RELATED DNA TESTING
(Assembly Concurrent Resolution No. 3
[File No. 7, *Statutes of Nevada 2001 Special Session*])
January 24, 2002
Las Vegas, Nevada

The second meeting of the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (Assembly Concurrent Resolution No. 3 [File No. 7, *Statutes of Nevada 2001 Special Session*]) was held on January 24, 2002, commencing at 9:35 a.m. The meeting was held in Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada, and videoconferenced to Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. Pages 2 through 4 contain the "Meeting Notice and Agenda."

SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:

Assemblywoman Sheila Leslie, Chairwoman
Senator Mark A. James
Senator Joseph M. Neal Jr.
Senator Maurice E. Washington
Assemblyman Bernie Anderson
Assemblyman Dennis Nolan
Assemblyman John Oceguera

SUBCOMMITTEE MEMBER PRESENT IN CARSON CITY:

Senator Mike McGinness

LEGISLATIVE COUNSEL BUREAU STAFF PRESENT:

Nicolas C. Anthony, Senior Research Analyst, Research Division
Risa B. Lang, Principal Deputy Legislative Counsel, Legal Division
Deborah Rengler, Senior Research Secretary, Research Division

MEETING NOTICE AND AGENDA

Name of Organization: Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (Assembly Concurrent

Resolution No. 7 [File No. 7, *Statutes of Nevada 2001 Special Session*])

Date and Time of Meeting: Thursday, January 24, 2002
9:30 a.m.

Place of Meeting: Grant Sawyer State Office Building
Room 4401
555 East Washington Avenue
Las Vegas, Nevada

Note: Some members of the subcommittee may be attending the meeting and other persons may observe the meeting and provide testimony through a simultaneous videoconference conducted at the following location:

Legislative Building
Room 4100
401 South Carson Street
Carson City, Nevada

If you cannot attend the meeting, you can listen to it live over the Internet. The address for the legislative Web site is http://www.leg.state.nv.us. For audio broadcasts, click on the link "Listen to Meetings Live on the Internet."

A G E N D A

I. Introduction and Opening Remarks
Assemblywoman Sheila Leslie, Chairwoman

*II. Approval of Minutes of the October 29, 2001, Meeting

*III. Presentation on the Impact of Race, Color, Religion, National Origin, Gender, Economic Status, and Geographic Location of Defendants on Decisions Concerning Charging, Prosecuting, and Sentencing in Capital Cases
Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau (LCB)
Joan Howarth, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas
Craig Haney, Professor of Psychology, University of California, Santa Cruz
Glen Whorton, Assistant Director of Operations, North, Nevada's Department of Corrections

*III. Presentation on the Impact of Race, Color, Religion, National Origin, Gender, Economic Status, and Geographic Location of Defendants on Decisions Concerning Charging, Prosecuting, and Sentencing in Capital Cases (*continued*)
Maizie W. Pusich, Chief Deputy Public Defender, Washoe County Public Defender's Office
Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada
David F. Sarnowski, Chief Deputy Attorney General, Office of the Attorney General
Victor-Hugo Schulze, Deputy Attorney General, Office of the Attorney General
Ben Graham, Chief Deputy District Attorney, Office of the Clark County District Attorney
Representative, Office of the Washoe County District Attorney

*IV. Presentation on Aggravating and Mitigating Circumstances in Capital Cases

Nicolas C. Anthony, Senior Research Analyst, Research Division, LCB
JoNell Thomas, Private Attorney, American Civil Liberties Union of Nevada
Howard Brooks, Deputy Public Defender, Clark County Public Defender's Office
Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada
Ben Graham, Chief Deputy District Attorney, Office of the Clark County District Attorney
Representative, Office of the Washoe County District Attorney

*V. Presentation on Competency of Counsel, Funding of Counsel, Adequacy of Resources Provided to Defendants in Capital Cases, and an Overview of Independent Public Defenders' Commissions
Nicolas C. Anthony, Senior Research Analyst, Research Division, LCB
Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada
Ben Graham, Chief Deputy District Attorney, Office of the Clark County District Attorney
Representative, Office of the Washoe County District Attorney

*VI. Presentation on Juror Understanding of the Application of the Law, Jury Instructions, and Selection of Jurors in Capital Cases
Nicolas C. Anthony, Senior Research Analyst, Research Division, LCB
Craig Haney, Professor of Psychology, University of California, Santa Cruz
Ron Dillehay, Professor of Psychology and Director of Grant Sawyer Center for Justice Studies, University of Nevada, Reno
Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada
Ben Graham, Chief Deputy District Attorney, Office of the Clark County District Attorney
Representative, Office of the Washoe County District Attorney

VII. Public Testimony
VIII. Adjournment

*Denotes items on which the subcommittee may take action.

Note: We are pleased to make reasonable accommodations for members of the public who are disabled and wish to attend the meeting. If special arrangements for the meeting are necessary, please notify the Research Division of the Legislative Counsel Bureau, in writing, at the Legislative Building, 401 South Carson Street, Carson City, Nevada 89701-4747, or call Deborah Rengler at (775) 684-6825 as soon as possible.

Notice of this meeting was posted in the following Carson City, Nevada, locations: Blasdel Building, 209 East Musser Street; Capitol Press Corps, Basement, Capitol Building; City Hall, 201 North Carson Street; Legislative Building, 401 South Carson Street; and Nevada State Library, 100 Stewart Street. Notice of this meeting was faxed for posting to the following Las Vegas, Nevada, locations: Clark County Office, 500 South Grand Central Parkway; and Grant Sawyer State Office Building, 555 East Washington Avenue. Notice of this meeting was posted on the Internet through the Nevada Legislature's Web site at www.leg.state.nv.us.

INTRODUCTION AND OPENING REMARKS

Chairwoman Leslie called the meeting to order. In her opening remarks, Chairwoman Leslie specifically referenced The Constitution Project report titled *Mandatory Justice, Eighteen Reforms to the Death Penalty* (Exhibit A), which was previously supplied to the subcommittee members. Copies of the report are available online at www.constitutionproject.org.

PRESENTATION ON THE IMPACT OF RACE, COLOR, RELIGION,

NATIONAL ORIGIN, GENDER, ECONOMIC STATUS, AND GEOGRAPHIC LOCATION OF DEFENDANTS ON DECISIONS CONCERNING CHARGING, PROSECUTING, AND SENTENCING IN CAPITAL CASES

Bryan Stevenson

Bryan Stevenson, Professor of Law, New York University School of Law, and Executive Director, Equal Justice Initiative of Alabama, testified via videoconference from New York, New York. Mr. Stevenson began his testimony with statistics:

- 1972—Two hundred thousand people were incarcerated in jails and prisons. The United States (U.S.) Supreme Court struck down the death penalty in *Furman v. Georgia,* 408 U.S. 238 (1972), because it was alleged that the death sentence was being applied in a discriminatory manner.

- 1976—The death penalty was restored. Numerous studies were commissioned to examine the death penalty concerning the question of race. Those studies concluded that race continues to be a factor.

- 1987—A study reviewed the death penalty in several states and concluded that it was five times more likely that an offender would be awarded the death penalty if the victim was white rather than African American.

- 1990—The U.S. General Accounting Office reviewed studies from all over the country and concluded that race was the greatest factor related to the death penalty sentence.

- 2001—Two million people are incarcerated in jails and prisons. One out of three African-American men between the ages of 18 and 29 are in jail or prison.

Professor Stevenson added that in the death penalty context, racial bias is largely seen in two areas:

1. Race of the offender—There is strong evidence that this is a problem in Nevada where 40 percent of Nevada's death row inmates are African American.

2. Race of the victim—The greatest evidence of bias is most often observed here.

Professor Stevenson said he was not aware of any conscious discrimination. He explained that the issue of racial bias in the capital punishment system is complex. There are many discretionary choices where race may be a factor, creating situations with strong evidence of racial bias. Because Nevada is one of the nation's leaders in imposing death sentences on a per capita basis, the risk of racial bias affecting these judgments is high. Professor Stevenson noted that while the racial bias problem appears significant, it could be solved. There are programs that should be initiated, but they will take time to implement.

Professor Stevenson noted that vast differences exist in the way people view the criminal justice system. There is distrust and fear of the criminal justice system and skepticism that a person can receive a fair trial. Professor Stevenson uncovered a perception among 12- and 13-year-old male African Americans that most of them will not live past the age of 18 years. He noted there is a sense of hopelessness and acceptance that the problem of bias cannot be overcome. The Illinois State Legislature's announcement that it would not allow executions energized those working in communities where despair and hopelessness hampered efforts to confront racial problems such as racial profiling and under-representation of people of color in decision-making roles, e.g., judges, juries, and prosecutors. Directly confronting racial bias relative to the imposition of the death penalty may facilitate progress on racial issues.

Continuing, Professor Stevenson reported that the U.S. Supreme Court decision in *McCleskey v. Kemp,* 481 U.S. 279 (1987), provided a significant study of racial bias. Since that decision was rendered, there has been a movement among states to create "racial justice acts." For instance, Kentucky's Racial Justice Act, Chapter 532 of the *Kentucky Revised Statutes* (KRS), "Classification and Designation of Offenses; Authorized Disposition," has increased efforts in communities of color to ensure a fair criminal justice system. Mr. Stevenson commended the subcommittee for addressing racial bias and advocated a moratorium on the death penalty in Nevada.

In response to Chairwoman Leslie's question relating to Kentucky's Racial Justice Act, Professor Stevenson said that in the 1980s, it was determined that discretionary decision makers were weighted against people of color. There was a presumption that a young person of color was more likely guilty than not—a presumption of guilt that was manifested in a number of ways. It was discovered that race played a role in every level of the criminal justice system including: arrests; how the life of victim was valued; and the decision to prosecute as a capital case, to seek the death penalty, and to impose a death sentence. The U.S. Supreme Court wanted local governing bodies to address the issue of racial bias, which led to the creation of state racial justice acts. Kentucky's Racial Justice Act, enacted three years ago, provides that if racial considerations played a significant role in the decision to seek the death sentence, the accused may present evidence of such facts. In essence, the Act shifted the burden of proof to prosecutors to establish that no bias exists. By shifting the burden of proof, Kentucky's Racial Justice Act provides for a direct determination as to whether actual racial bias exists.

Chairwoman Leslie inquired as to the effectiveness of Kentucky's Racial Justice Act and asked if Professor Stevenson was aware of any published articles relating specifically to the Act. Responding, Mr. Stevenson said there have not been enough cases to establish a representative sample to study how the Act has been applied. Studies have progressed recently, and it is expected that within the next two years, data should be available to measure the effectiveness of the Act.

Senator Neal asked for clarification regarding Professor Stevenson's statement that Kentucky's Racial Justice Act shifted the burden of proof to the prosecutor in capital cases to establish that no racial bias exists. Professor Stevenson commented that Nevada's death row population is disproportionately African American, and contemplating the reason for this state of affairs does not contribute to a solution. Pursuant to Kentucky's Racial Justice Act, if evidence of discrimination exists, the state would first have an opportunity to provide a race-neutral explanation for the apparent prejudice before a final determination of bias could be made. Continuing, Professor Stevenson stated that this process is similar to the one utilized in jury selection. Prior to 1986, prosecutors could use preemptory strikes to exclude all African Americans from serving as jurors, and it was difficult to prove the preemptions were racially biased. The Court in *Batson v. Kentucky,* 476 U.S. 79 (1986), stated if evidence of racial bias was found, the prosecution would be required to provide a race-neutral explanation for the apparent prejudice. Further, if the race-neutral explanation was insufficient, the case would not be allowed to proceed. Professor Stevenson further explained that the Racial Justice Act requires explicit evidence of intentional discrimination. When there is evidence of racial bias, the burden shifts to the prosecutor to prove that such bias does not exist. If the prosecutor is unable to satisfactorily explain the apparent bias, the state cannot seek the death penalty.

Continuing, Senator Neal asked how Kentucky's Racial Justice Act operates in situations involving misapplication of the law. Mr. Stevenson said it would be the petitioner's responsibility to make that assessment. In his view, the Racial Justice Act is not a sufficient control for bias, and a broader solution is needed. The Act has forced focused discussion on overt evidence of discrimination; however, it has been less effective in addressing discretionary decisions beyond the prosecutorial level, such as the appellate and judicial levels, where those judgments are not reviewed. He pointed out the Racial Justice Act is not a solution but rather a tool to address racial bias in the capital punishment system.

Senator Neal questioned the effectiveness of Kentucky's Racial Justice Act with respect to preemptory challenges. Professor Stevenson reported the *Batson* standard is employed to control preemptory challenges. However, a prosecutor who has a history of using preemptory challenges in a racially discriminatory manner might be subject to a challenge under the Racial Justice Act based on his or her prior efforts to minimize the participation of certain racial minorities. Similar to the Racial Justice Act analysis, the *Batson* standard would reveal a history of exclusion in the jury selection process and show that preemptory strikes were exercised in a discriminatory manner.

Senator James asked how and when a defendant presents evidence of bias under Kentucky's Racial Justice Act (during the indictment, after extraneous decisions, or when the proceeding is charged as a capital case). He also questioned whether bias that was evident within the system could be presented as well as any prejudice associated with the particular case. Mr. Stevenson explained that evidence of bias would not have to pertain expressly to the case, and he offered examples of prejudice based on the racial backgrounds of the offender and victim. Continuing, he stated that the Racial Justice Act attempts to prevent future problems. The petitioner could submit a motion to the court to bar the prosecution from seeking the death penalty unless the alleged bias could be explained in a racially neutral manner. To support a claim of racial bias, evidence that the community is being undermined by the racial concerns could be submitted at the time the charging decision is made. This challenge does not preclude presentation of certain

evidence during the defendant's case, such as discriminatory comments, evidence of bias in the crime, or racial slurs made during the arrest.

Assemblyman Anderson asked if Mr. Stevenson was aware of instances where the death penalty was not sought because of Kentucky's Racial Justice Act. Professor Stevenson said few capital cases have been prosecuted in Kentucky, either before or after the enactment of the Racial Justice Act, so it has been difficult to gather data as to whether or not the death penalty is not being sought because of the Act. He is of the opinion that the issue of racial bias should not be addressed in an adversarial manner. The criminal justice system must be fair, nondiscriminatory, and reliable and cannot be manipulated by issues pertaining to a particular capital case. It is necessary to minimize any sense of undue manipulation of capital prosecutions in light of the Racial Justice Act. Mr. Anderson asked what motivated the Kentucky Legislature to shift the burden of proof to prosecutors. Mr. Stevenson reiterated that racial bias in the administration of the criminal justice system is a significant issue, and responsible policy makers have an obligation to address it.

Senator Washington asked if data was available regarding the actual crimes, the races of both the offender and victim, whether the death penalty was sought, and who received a death sentence. Professor Stevenson replied in the affirmative, reporting that studies have been conducted detailing racial combinations. Senator Washington then asked if age, gender, and region were included in the studies. Mr. Stevenson said 230 variables were identified in the study "Equal Justice and the Death Penalty" (1990), conducted by David C. Baldus, et al., with race remaining the greatest predictor of possible error.

Joan Howarth

Joan Howarth, Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas, stated that she is one of very few legal scholars who study the issue of gender as it relates to imposition of the death penalty. Professor Howarth shared her views and expertise regarding the relationship between gender and capital punishment as follows:

$ Gender and racial bias are interrelated and imbedded within the capital punishment regimens.

$ Unconscious bias and racism have a significant impact on the decision-making process. Unlike most legal decisions, the determination as to whether to seek the death penalty in potential capital cases is inherently discretionary. There are no offenses for which the death penalty must be sought; hence, there is always the potential for life.

$ In deliberations concerning whether or not to seek the death penalty, certain factors must be considered, including the individual who allegedly committed the offense and the nature of the crime.

$ According to social scientists, discriminatory decisions are based on individual experiences, identities, and values.

$ One reason that discretion relative to capital offenses is open to unconscious bias is because decision makers are reaching determinations relative to individual criminal proceedings without comparison to similar cases. Since unconscious racism and gender bias most often occur when comparisons are not made, testing and comparison are the most effective tools for exposing such bias.

$ Bias occurs at all levels of the criminal justice system, including arrest, charging, trial, and the appeals process. In the absence of a mandated proportionality review, a determination must be made as to whether the decision to seek the death penalty was influenced by passion, prejudice, or any arbitrary factor.

Senator James asked for clarification of a mandated proportionality review. Responding, Professor Howarth explained that certain jurisdictions view their obligations with respect to proportionality review differently. In many areas, the appellate court cannot affirm a capital sentence without first undertaking an investigation, or proportionality review, to compare the proceeding before them with other cases in the same jurisdiction. Professor Howarth stated it is her understanding that Nevada law does not require the performance of a mandated proportionality review in capital cases.

Continuing, Senator James questioned whether there is a proportionality review that includes both normative concepts such as those addressed by Professor Howarth along with an intrinsic analysis of the retributive aspects of a penalty as mandated by U.S. Supreme Court jurisprudence with regard to the *8th Amendment* of the *United States Constitution*. Professor Howarth explained that the Court has allowed individual states the flexibility to incorporate the proportionality requirements of the *8th Amendment* within their respective procedures and rules. She noted there is a significant difference among states as to the expansiveness, and therefore the effectiveness, of that type of proportionality review at the appellate level.

Senator James referenced Professor Stevenson's remarks regarding a defendant's right to challenge a decision to seek the death penalty based upon the alleged prior discriminatory acts of the prosecutor, thereby shifting the burden of proof to the state to establish that bias was not a factor in the decision-making process. He expressed uncertainty about how such a process would work in Nevada. Further, he noted that because proportionality review is best conducted on a case-by-case basis, implementing such a mechanism in Nevada would require imposition of a moratorium on capital punishment until such time as the state could prove that decisions to seek the death penalty were not racially based.

Continuing, Senator James asked for clarification on Professor Howarth's suggestion that legislation be enacted mandating proportionality analysis of each death penalty case. He pointed out that if the proportionality standard is not met—regardless of the racial issues involved at the prosecutorial level—then the death penalty would not stand on appeal. In his view, adhering to the proportionality analysis standard suggested by Professor Howarth would be simpler than complying with the provisions of legislation such as Kentucky's Racial Justice Act. Professor Howarth acknowledged that complying with a proportionality analysis standard would be less complex administratively. She stressed that she was not suggesting that an appellate proportionality review would be sufficient for the State of Nevada to have confidence that death penalty decisions were being made without bias in a nondiscriminatory manner.

Senator James suggested that a moratorium on the death penalty be imposed until such time as the cause of the discriminatory effect can be determined. He conceded that a proportionality analysis applied in every case would eliminate the need to make assumptions as to whether a person had experienced discrimination. Rather, a determination could be made as to whether the case on its facts merited the death penalty under both intrinsic and normative concepts of retribution. Professor Howarth agreed, suggesting that such a mechanism should be considered as a possible reform to address issues of bias.

Senator Washington asked how a proportionality review process might affect prosecutors' ability to utilize the death penalty as a plea bargaining tool for other crimes or for offenses involving multiple perpetrators. Responding, Professor Howarth stated that a fundamental issue the subcommittee must consider is the goal of the capital punishment system, including a prosecutor's use of a possible death sentence as a plea bargaining tool. As many commentators have suggested, utilization of the death penalty as a bargaining tool in plea negotiations raises fairness issues. A federal study on death penalty cases in the federal system between the years 1988 and 2000 was recently completed by the U.S. Department of Justice. Between the years 1995 and 2000, white defendants were twice as likely to receive a plea agreement with a sentence less than death than African-American defendants. Another area for potential racial bias in capital punishment proceedings is prosecutorial discretion used in plea negotiations.

Continuing with her original presentation, Professor Howarth said she is one of four law professors in the country who study gender bias and capital punishment. It is recognized that many more men than women are sentenced to death. Nationally, 1.5 percent of inmates on death row are women. In comparison, women represent 1.1 percent of Nevada's death row inmates, with 1 woman and 87 men. She explained that patterns of criminality are also gendered, but there are fewer women on death row than there are females convicted of murder. In Nevada, 6.4 percent of all inmates incarcerated for first- and second-degree murder are women. Professor Howarth questioned how the case of the one death row female inmate differs from those of the 59 women currently serving time for first- and second-degree murder. Further, she questioned whether the decision to seek the death penalty is defensible.

Professor Howarth stated that significant issues appear because crime is gendered. Men and women statistically do not commit the same types of murder. It is not known why fewer women than men are on death row; however, evidence suggests it relates to the types of murder committed. Women tend to kill people they know, and felony

murder is more likely to be committed by males. The perception of which murders are most culpable is in itself gendered. The victims and surviving family members of those murdered experience significant loss whether the crime is one that is traditionally associated with women in the domestic context or typically a male crime, which under the system of capital punishment is considered to be more culpable. Even if it is assumed there are differences between male and female murderers and who receives the death penalty—not simply bias or cultural discomfort with executing women—consideration should be given to the kinds of murders men and women commit.

Once sentenced to death, women statistically are more likely than men to escape execution. Nationally, between the years 1977 and 1998, approximately one-third of the men and 59 percent of women on death row have been removed through executive clemency or judicial decision. This is a result of societal issues regarding the execution of women; there are imbedded cultural morays and stereotypes that affect the decision to impose the death penalty on women. One explanation documented by Professor Howarth suggests that appropriate candidates for execution should be frightening and easily dehumanized. Issues of gender related to our expectations for women and ideas regarding how females should be treated are relevant when discussing capital punishment. While statistics show gender issues are relevant, they are irrelevant under current legal principles.

Further, Professor Howarth commented on the execution of Carla Faye Tucker in Texas in 1998. The execution and its national publicity significantly reduced public support for the death penalty. In addition, during the late 1990s, more information was made available about wrongful executions and innocent people being executed. Professor Howarth acknowledged Carla Faye Tucker was not innocent, and she made no claim of innocence. Ms. Tucker was convicted of a heinous double murder and acknowledged her guilt. Because the public perceived Ms. Tucker as an articulate, attractive, feminine, pious, white woman facing death, her case influenced national opinion. Americans do not envision a capital offender who possesses these qualities when they anticipate an execution.

Professor Howarth concluded her testimony with an offer to provide copies of death penalty studies conducted in recent years related to geographic differences, gender, and race. She pointed out that when the issues of bias are studied, it is important to recognize that the percentage of death-eligible murders in Nevada is high compared to other states. In addition, a recent study that identified racial disparities of prosecutors and district attorneys found that Nevada has no African-American county prosecutors at the district attorney level. Another recent study from Pennsylvania addresses racial bias related to preemptory challenges. Professor Howarth concluded by commending the subcommittee's efforts to address these issues.

Assemblyman Anderson expressed concern regarding the 59 percent of female death row inmates who received clemency between 1977 and 1998, and he requested information on the age of the women, the commuted sentences, and length of remaining time in prison. Professor Howarth reported that detailed data is not available. She noted that these inmates were removed from death row through a combination of clemency and judicial decisions, and the resulting sentences included continued incarceration and life in prison without the possibility of parole. She noted if the reversal of the death row sentence was based on the question of guilt, the subsequent sentence would be different. Mr. Anderson asked Ms. Howarth to share her opinion regarding a prosecutor's jury selection process when prosecuting a female defendant compared to a male defendant. He also asked if in her opinion juries are less willing to impose capital punishment on women. Ms. Howarth said social science data is not available to answer the question. She speculated that gender bias is relevant to both a prosecutor's decision regarding which cases are charged and the discretion of the jury to impose the death sentence.

Senator Washington cautioned that bias exists in the jury selection process and is used by both the defense and prosecution to influence the case and persuade jurors to reach a certain conclusion. The current system is not perfect but it is effective within the criteria set for capital cases. Professor Howarth shared her concern relating to eliminating bias. Within the jury selection process, there is an additional phase in capital cases—the death qualification stage. Data suggests that death qualification procedures, which exclude persons who are unable to impose a death penalty, disproportionately eliminate women and people of color from the pool of jurors for capital cases. In her view, utilizing the death qualification process has an unintended consequence of changing the pool of people who decide capital cases. In response to Senator Washington's comment regarding persuasion of jurors, Professor Howarth related how preemptory challenges are exercised to discriminate based on race. She stated that even though racial discrimination during jury selection in capital cases is illegal, it does occur.

At both the federal and state levels, Senator Washington commented that the highest standard of jurisprudence must be exercised to determine guilt; but this does not eliminate gender or racial bias. Professor Howarth said that while

requiring the prosecution to establish guilt beyond a reasonable doubt should act as a safeguard to eliminate prejudice, social science data suggests that legal professionals blind themselves to the amount of bias that intrudes in criminal and capital cases. She further commented that even the physical appearance or attractiveness of the defendant may affect the outcome of a jury's decision.

Senator McGinness queried if the competency or lack of training of the prosecutors and public defenders in rural areas due to the smaller number of cases in those areas is a factor that can contribute to bias. Professor Howarth replied in the affirmative. Studies conducted in Nebraska and Virginia identified the geographical location of the crime (urban vs. rural); lack of counsel expertise; economics of the community; and cultural differences between the focus on crime and the meaning of crime as factors relevant to charging capital cases and imposing death sentences.

Chairwoman Leslie asked Professor Howarth to suggest the best way to approach the issues involved in the subcommittee's study. Professor Howarth observed that the proportionality review is difficult when discussing a small number of cases. Additionally, issues related to gender bias are intractable. While most people would not admit to race bias, they would acknowledge and defend a position that gender is relevant to whether an offender should be executed. She observed that with these perceptions, eradication of gender disparity in the imposition of the death penalty would be difficult.

Nicolas C. Anthony

Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, commented on the topic of bias and drew attention to a document titled "The Death Penalty in 2001: Year End Report" (Exhibit B), which was released after the subcommittee's last meeting. Mr. Anthony further clarified The Constitution Project's recommendations to address bias in the capital punishment system as follows:

- Engage in a rigorous gathering of data on the operation of the capital punishment system and the role of race as a factor in it.
- Include members of all races at every level of the decision-making process within the criminal justice system; i.e., the judiciary, juries, and trial teams.
- Adopt proportionality review procedures to ensure that the death penalty is being administered in a rational, nonarbitrary, and even-handed manner; provide a check on broad prosecutorial discretion; and prevent discrimination from playing a role in the capital punishment decision-making process.
- Perform a proportionality review that compares each case to other cases in which the death penalty was imposed.
- Compare the case to the entire pool of death-eligible cases, including cases where the death penalty was not sought.
- Limit by statute potential death-eligible cases to those that are especially heinous, premeditated, and unmitigated.

Glen Whorton

Glen Whorton, Assistant Director of Operations, North, Nevada's Department of Corrections, Carson City, provided general statistics (Exhibit C) related to death row inmates, including those convicted of murder that did not receive the death penalty and the general population. He offered to answer questions and provide information as requested. In response to Chairwoman Leslie's query regarding economic status of offenders, Mr. Whorton said that the information contained in Exhibit C was based on whether the inmate was employed or in school at the time of his arrest.

Referring to the fact that 63 out of 87 death row inmates were unemployed at the time of their arrest, Assemblyman Anderson asked if an assumption could be made that these 63 offenders relied upon public defenders to represent them at trial. Mr. Whorton was reluctant to make such an assumption but offered to provide that information to the subcommittee. Mr. Anderson stated that in his view, the information is relevant if it led to possible economic

discrimination.

Maizie W. Pusich

Maizie W. Pusich, Chief Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada, voiced her opposition to the death penalty. Her background includes working as a supervisor in the intensive trial unit of the Washoe County Public Defender's Office for seven years, the last five of which she served in the capacity of chief. Ms. Pusich referenced a 90-page document containing capital punishment data she provided to the subcommittee before the meeting. She submitted a summary of that data (Exhibit D) as part of her testimony. Ms. Pusich explained that the information contained in Exhibit D was obtained from the Division of State Library and Archives, Nevada's Department of Cultural Affairs; Nevada's Department of Corrections; Washoe County District Court files; some Washoe County Public Defender files; and newspaper reports. She reported that the information was incomplete and asked that data collection requirements be included in Nevada Supreme Court Rule (S.C.R.) 250 so that future information will be complete. The information presented concerns 303 homicide complaints filed in Washoe County, Nevada, since 1977; racial information was unavailable on 36 homicides. The death penalty was sought in 55 cases, or 18 percent of homicides. Ms. Pusich read selected statistics from Exhibit D.

Continuing, Ms. Pusich responded to questions posed by subcommittee members to previous speakers. She cited statistics regarding codefendants and discussed how their testimony affected the imposition of the death penalty. Referring to Kentucky's Racial Justice Act and proportionality review, Ms. Pusich suggested that both concepts could be important mechanisms to address bias problems in Nevada. She reported that in the Washoe County case *Lane v. State of Nevada*, 110 Nev. 1156, 881 P.2d 1358 (1994), it was suggested that racial minorities were being targeted. A motion was brought before the court to preclude presentation of the death penalty for jury consideration; the motion failed, but the information was heard. In her view, it is far more efficient to use a racial justice act to present objections at the beginning of a trial than to wait until the Nevada Supreme Court conducts a proportionality review at the end of the process.

Referencing a newspaper article that appeared in the *Reno Gazette-Journal* titled "High Court Reduces Death Sentence in Sparks Slaying" involving Robert Servin, Senator Washington asked Ms. Pusich to share her opinion on the case. Ms. Pusich, who represented Mr. Servin, said his sentence was deemed excessive and thus reduced based on two factors: (1) Mr. Servin was 16 years old at the time of the murder; and (2) critical testimony against Mr. Servin came from an accomplice.

Michael Pescetta

Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada, Las Vegas, appeared as a private citizen and not in his capacity as an assistant federal public defender. Mr. Pescetta said that unlike Washoe County, Clark County, Nevada, was unable to obtain similar statistics regarding bias and the death penalty. He provided the subcommittee with a memorandum regarding racial and economic bias relative to imposition of the death penalty (Exhibit E). He also discussed three-judge panels (Exhibit E, page 4). Continuing, Mr. Pescetta commented on a number of cases where the Nevada Supreme Court considered alleged bias and prejudice during its review of the capital sentence, and the Court took no action. In his view, the capital punishment system cannot adequately address such questions even in cases where there appears to be clear evidence of racial bias influence.

Senator James asked how the three-judge panel operates in the federal capital punishment system. Mr. Pescetta explained that within the federal system, a jury always imposes the death penalty. If the penalty jury cannot reach a unanimous decision, the offender is sentenced to life in prison without the possibility of parole. Nevada is the only state in the country where a hung jury results in reference of the sentencing decision to a three-judge panel. In some states, the trial judge is either responsible for imposing the sentence after considering a recommendation verdict by the penalty jury or assumes sole responsibility for imposing sentence. Senator James asked if national data was available regarding racial bias in the death penalty decisions made by judges. Mr. Pescetta said he was unaware of any study that had been conducted.

Assemblyman Nolan asked for clarification on the history of judgments rendered by three-judge panels. Mr. Pescetta reported that three-judge panels consisting solely of white judges imposed the death sentence in 75 percent of capital punishment cases. In comparison, three-judge panels that included an African-American judge imposed the death

sentence in only 20 percent of such cases. Assemblyman Nolan asked if the inclusion of the African-American judge on the three-judge panel created an alternative bias. Mr. Pescetta replied that in his view, the issue is not if African-American judges are consciously biased. Rather, the issue in all capital punishment proceedings is whether the individual or group responsible for imposing sentence can view the defendant as fully human.

In response to a question from Assemblyman Anderson regarding economically disadvantaged offenders, Mr. Pescetta said he was aware of one defendant who was represented by retained counsel. In every other case, appointed counsel represented the defendant.

Mr. Pescetta shared his personal views and recommendations as follows:

1. The only practical way to ensure that race does not affect imposition of the death penalty is to eliminate the practice of capital punishment.

2. A less complete mechanism to address bias in the capital punishment system would be to enact a racial justice act modeled on Kentucky's statute (KRS 532.300), a copy of which is included in Exhibit E.

3. The Legislature should strengthen the mandatory review of capital sentences for the influence of prejudice to include requirements that the court identify and address the following:

   a. The race of the defendant and the victim;

   b. Identity and race of all individuals involved in the capital charging decision, including police officers, the victim's family members, or others consulted by prosecutors;

   c. Racial composition of the jury, including the effect of preemptory challenges; and

   d. Evidence of other homicide cases comparable to the proceeding in which the death penalty was or was not sought.

   (Copies of *Revised Codes of Washington Annotated* [West] 10.95.120 and 10.95.130 are included as part of Exhibit E.)

4. At a minimum, the subcommittee should consider recommending that the Legislature enact legislation requiring reporting of statistical information on all homicide cases so an attempt can be made to understand why some cases result in capital charges and others do not. This information should include the following:

   a. Age, gender, and race of the victim and defendant;

   b. Identities of prosecutors making the charging and subsequent decisions in prosecuting the case;

   c. The identities of all individuals with whom the prosecutors or their agents discussed the appropriate charge or potential evidence in the case;

   d. Racial composition of the jury, including the race of any individuals challenged by the prosecutors; and

   e. Result of the prosecution.

Senator Neal asked for verification that a constitutional requirement for a 12-member jury does not exist. Mr. Pescetta responded that the issue is currently pending before the U.S. Supreme Court, including questions regarding judges imposing sentences in capital cases. Senator Neal asked if resolution of those issues would resolve the problems with hung juries. Mr. Pescetta pointed out that when a jury cannot reach a penalty decision, the impasse is not necessarily related to a death sentence. Problems with procedures need to be addressed for both capital and criminal case juries.

Assemblyman Anderson commented that in the past, both the Senate and Assembly Committees on Judiciary have asked for statistical data relative to capital punishment from the courts. However, the courts have been unwilling to

provide any information.

Assemblyman Nolan asked Mr. Pescetta to provide backup data associated with his testimony. Mr. Pescetta agreed to provide that information to the subcommittee.

Chairwoman Leslie recognized the presence of Nevada Senator Valerie Wiener.

Victor-Hugo Schulze

Victor-Hugo Schulze, Deputy Attorney General, Office of the Attorney General, Las Vegas, reported that David F. Sarnowski, Chief Deputy Attorney General, Office of the Attorney General, was not present but had submitted the "Nevada Attorney General Monthly Death Row Status Report" (Exhibit F) for the subcommittee. Mr. Schulze reviewed his background over the last seven years in the special prosecutions and habeas corpus unit in Las Vegas. He stated that the current capital punishment system is effective, and he is unaware of any cases where bias and prejudice influenced the sentences in capital or noncapital offense cases. In support of his advocacy of capital punishment, Mr. Schulze cited *Weems v. United States,* 217 U.S. 349 (1910), wherein the Supreme Court stated that it is a precept of justice that punishment for crime should be graduated and proportioned to each offense. In his view, Americans support capital punishment because it is the only proportional punishment that can be handed down in certain cases.

Mr. Schulze discussed two U.S. Supreme Court cases: (1) *Gregg v. Georgia*, 428 U.S. 153 (1976); and (2) *McCleskey v. Kemp*, 481 U.S. 279 (1987). The issue in *Gregg* was whether the discretion of the sentencer was limited. The U.S. Supreme Court found that Georgia's bifurcated system, which considered both aggravating and mitigating circumstances, limited the discretion of the sentencer and formed a rational distinction between those for whom death is appropriate and not appropriate, thus creating categories. In *McCleskey*, evidence of bias in the system based on information contained in the national Baldus study was presented by Mr. McCleskey, and the Court ruled that Mr. McCleskey had not experienced any prejudice in his own case.

Senator James asked if there was any constitutional impediment that would prevent the Legislature from enacting legislation requiring the state to prove there was no bias in a death penalty case, provided the defendant was able to offer evidence of discrimination in the capital punishment system. Mr. Schulze indicated he was not aware of an impediment and stated that the Legislature has the ability to abolish capital punishment. He noted that within any such statute, a distinction should be drawn between racial bias in a particular case and a claim of racial discrimination that may or may not exist based solely on statistics without any further analysis.

Senator Neal asked if an African-American defendant could assert a claim of racial prejudice if he knew that the presiding judge in his case was a member of the Klu Klux Klan. Mr. Schulze replied in the affirmative and clarified that this fact would be viewed as probable bias in his case. He pointed out that a judge's professional affiliation with members of a group or acquaintance with a certain individual is not necessarily indicative of his or her personal attitudes or willingness to discriminate.

Referencing *McCleskey,* Mr. Schulze reiterated that the precept of that case is fundamental to the American system of law in that every murder case is different, each defendant has his or her own diverse background, and each murder is committed in a unique way with its own factual circumstances. He commented that defense attorneys raise this argument when they want to humanize a defendant in front of a jury. The defense attempts to present the unique characteristics of an individual's background to guide the jury away from group characteristics and decision-making and to individualize the case. Mr. Schulze noted that in criminal law, it is important to individualize cases. The difficulty in using studies is that counsel must provide evidence that the individual has suffered discrimination in his own case.

Senator James questioned the responsibilities of legislators with respect to apparent disparities in the imposition of the death penalty. Mr. Schulze said focus must be placed on individual cases. Nevada's bifurcated capital punishment system provides guidance and direction for the sentencer, but the process as currently structured will always involve the use of discretion in sentencing determinations. The failsafe mechanism in Nevada's system is the consideration of aggravating and mitigating circumstances. Mr. Schulze pointed out that because each offense is unique, statistics cannot properly compare cases. Senator James commented that if the bias occurs before the offender is charged, the jury does not utilize the safeguards. Mr. Schulze said a number of subjective issues contribute to discretionary

decisions of both the defense and prosecution.

Senator Neal said the issue under discussion is the subtleties that have contributed to the Nevada's capital punishment system. Mr. Schulze commented that in his experience, the defense bar is adept at identifying bias issues in the jury selection process. Defense attorneys and judges are aware of bias, and the defense bar ensures adequate investigation of the issues. He urged the subcommittee not to recommend elimination of capital punishment based on a possibility of bias.

Referring to the statistical charts regarding Nevada's death row (Exhibit C), Assemblyman Anderson said that it appeared an offender is statistically more likely to receive the death penalty if he or she lacks the economic resources to retain counsel to participate in the initial contact with the prosecutor's office. He stated if Nevada continues to practice capital punishment, it must be able to ensure that the death penalty is administered fairly and without bias. In response, Mr. Schulze noted a review of the statistics and studies may reveal whether such information is relevant to Nevada.

Kevin Tate

Kevin Tate, Chairman, Las Vegas Reorganization Committee, National Association for the Advancement of Colored People (NAACP), Las Vegas, expressed his opposition to the death penalty and provided a position paper (Exhibit G) to the subcommittee. Until the issues concerning racial disparities in the application of the death penalty are addressed, the NAACP recommends a moratorium on all executions in Nevada.

Howard Brooks

Howard Brooks, Deputy Public Defender, Office of the Clark County Public Defender, Las Vegas, stated that in the course of conducting 37 trials, it was his experience that Clark County prosecutors routinely use preemptory challenges to remove minority jurors. Typically, the prosecution offers a race-neutral reason for the challenge, the judge allows the preemption, and the Nevada Supreme Court upholds the lower court's decision. In two death penalty cases with African-American defendants, the state removed all the African-American jurors. In Mr. Brooks' view, it is wrong to remove minorities from juries.

Assemblyman Anderson asked Mr. Brooks to provide an example of a race-neutral preemptory challenge. Mr. Brooks said any reason could become a race-neutral basis for a preemptory challenge, and judges allow the prosecution a great deal of discretion in their efforts to remove possible jurors. When asked by Mr. Anderson if preemptory challenges should not be allowed, Mr. Brooks said he preferred to retain the ability to remove people who might not to be fair to his client. Mr. Anderson agreed that preemptory challenges are advantageous to both the prosecution and the defense.

Glenda White

Glenda White, Professor of Law, Department of Business Administration, Community College of Southern Nevada, and Vice President, American Civil Liberties Union (ACLU) of Nevada, Las Vegas, stated it is the ACLU's position that capital punishment violates the constitutional prohibition on cruel and unusual punishment as well as equal protection under law. The goal of the ACLU nationally, as well as in Nevada, is to achieve abolition of the death penalty in the United States at both the federal and state levels through advocacy, litigation, and public education in appropriate forums. According to the report "Death Penalty in Black and White: Who Lives, Who Dies, Who Decides" issued by the Death Penalty Information Center in June 1998 (www.deathpenaltyinfo.org), the prosecution has "unfettered" discretion in making the decision to seek the death penalty. Continuing, Professor White reported that in the 38 states that now impose the death penalty, 98 percent of the prosecutors are white. Further, 1 percent of the 1,838 district attorneys in the United States are African American, and Hispanic attorneys comprise less than 1 percent of that total. Ms. White concluded that a moratorium on administration and application of the death penalty must be implemented until such time as a well-developed, systematic mechanism is established that ensures fair and equitable treatment of all alleged offenders, regardless of gender, race, or religious convictions.

Senator Washington asked Professor White to expand on her statement that prosecutors have unfettered discretion in deciding whether to seek the death penalty and to share her views regarding bias in the decision-making process. Responding, Professor White stated that she would be interested to know if prosecutors are using standard criteria in

determining whether to charge an offense as a capital crime. She noted that if prosecutors utilize standard criteria in the decision-making process, it is important that these criteria be objective. In her view, any such criteria should be made available to the public and utilized in a fair manner. Continuing, Professor White reiterated her opinion and the position of the ACLU that the death penalty should be abolished. In her view, the death penalty does not serve as a deterrent to crime.

Senator Washington acknowledged the ACLU's position on the death penalty. He pointed out that others, including families of victims, advocate the death penalty. Senator Washington indicated it is his sense that capital punishment cannot be abolished. He asked Professor White to suggest areas where Nevada could eventuate the capital punishment system to ensure the absence of bias in the process and provide equal treatment to offenders while at the same time offer justice to victims. Responding, Professor White suggested that areas of particular concern that could be addressed are: (1) the availability of adequate resources to conduct an effective defense; and (2) the provision of proficient defense counsel with expertise in the jury selection process. She pointed out that these factors often determine whether a defendant will be convicted.

APPROVAL OF MINUTES OF THE OCTOBER 29, 2001, MEETING

The Chairwoman called for approval of the minutes of the subcommittee=s first meeting.

ASSEMBLYMAN NOLAN MOVED TO APPROVE THE MINUTES OF THE SUBCOMMITTEE=S MEETING HELD ON OCTOBER 29, 2001, IN CARSON CITY, NEVADA. ASSEMBLYMAN ANDERSON SECONDED THE MOTION, WHICH PASSED UNANIMOUSLY. SENATORS NEAL AND SENATOR WASHINGTON WERE ABSENT FOR THE VOTE.

PRESENTATION ON AGGRAVATING AND MITIGATING CIRCUMSTANCES IN CAPITAL CASES

Nicolas C. Anthony

Nicolas C. Anthony, previously identified on page 13 of these minutes, stated that Nevada law predicates that the death penalty may only be sought where the underlying crime is that of first-degree murder with one or more aggravating circumstances. Under *Nevada Revised Statutes* (NRS) 200.033, "Circumstances aggravating first-degree murder," there are 14 statutorily defined aggravating circumstances for first-degree murder. Please see Exhibit H. These circumstances include:

1. Commission of the murder by a person under sentence of imprisonment;
2. Previous conviction of certain crimes;
3. Risk of death to more than one person;
4. Connection with certain felonious acts;
5. Avoidance or prevention of lawful arrest;
6. If the murder was committed to receive money or another thing of monetary value;
7. The murder of a peace officer or fireman under certain circumstances;
8. Torture or mutilation of the victim;
9. Random commission of murder without motive;
10. The commission of murder upon a person less than 14 years of age;
11. Commission of murder because of the race, color, religion, national origin, physical or mental disability, or sexual orientation of the victim;
12. Simultaneous conviction of multiple murders;

13. Sexual penetration of the victim; and
14. Commission of the murder on school property, at a school-sponsored activity, or on a school bus.

Comparing Nevada's list of aggravating circumstances to those of other death penalty jurisdictions, Mr. Anthony presented to the subcommittee a bulletin published by the Bureau of Justice Statistics, U.S. Department of Justice, titled "Capital Punishment 2000" (Exhibit I), which delineates capital offenses by state.

Mr. Anthony explained that in terms of mitigating circumstances, a capital defendant may present, and each juror must consider, any mitigating evidence. *Nevada Revised Statutes* 200.035, "Circumstances mitigating first degree murder" (Exhibit J), provides that first-degree murder may be mitigated by certain circumstances, even though the mitigating circumstance may not be sufficient to constitute a defense or reduce the degree of the crime, and includes a list of mitigating circumstances. Comparing Nevada's list of mitigating circumstances with those of other states is difficult since each jurisdiction may employ mitigating circumstances in different manners.

Concluding his remarks, Mr. Anthony noted The Constitution Project recommends a proportionality review and suggests the statutory limitation of death-eligible cases to those that are especially heinous, premeditated, and unmitigated.

JoNell Thomas

JoNell Thomas, private attorney, representing the Nevada Attorneys for Criminal Justice and American Civil Liberties Union of Nevada, Las Vegas, stated she currently represents eight death row inmates as well as other offenders who have been removed from death row. Ms. Thomas provided the subcommittee with a memorandum (Exhibit K) regarding aggravating and mitigating circumstances in capital punishment cases.

Ms. Thomas reported that the U.S. Supreme Court has dictated that not all first-degree murderers should be eligible for imposition of capital punishment and that states are obligated to narrow the class of such offenders who might be eligible for the death penalty. In her view, Nevada has not met this requirement—particularly with respect to the number and scope of aggravating circumstances and the interpretation of statutory aggravators by the Nevada Supreme Court. She opined that there would be far less leeway for discretion and bias in the system if the aggravating circumstances were limited.

Assemblyman Nolan queried Ms. Thomas regarding alleged discrepancies in the level of professionalism and quality of representation between private practitioners and public defenders. Ms. Thomas said the attitude and expertise of counsel varies from one individual to another. She pointed out that capital defense is not a lucrative area of practice. In her view, minimum qualifications should be established for both private and public defense counsel. In addition, public defenders' offices may have greater monetary resources available than a private attorney whose budget may be limited depending on the presiding judge's discretion.

Senator Washington asked Ms. Thomas to share her views regarding Nevada's aggravating and mitigating circumstances. Ms. Thomas outlined her recommendations as to which aggravating circumstances should be eliminated or limited (pages 11 through 17, Exhibit K):

- Murder committed by a person under sentence of imprisonment;
- Previous conviction of certain crimes;
- Risk of harm to more than one person;
- Murder committed during commission of a felony;
- Avoiding arrest;
- Killing for pecuniary gain;

- Torture and mutilation; and

- Random and motiveless murder.

Senator Washington expressed concern about the constitutionality of such changes. Ms. Thomas remarked that the U.S. Supreme Court has not reviewed Nevada's death penalty scheme; however, in her opinion, it could be ruled unconstitutional. She pointed out that the Nevada Supreme Court has not yet completed a comprehensive review of the state's capital punishment system as required by the U.S. Supreme Court. Ms. Thomas advocated scrutiny of the capital punishment system as a whole. Continuing, she noted that if the goal of the death penalty scheme, according to the U.S. Supreme Court, is to narrow the class of first-degree murderers who are eligible for the death penalty, then the discretion rests with the Legislature, not with juries or prosecutors, to decide who might receive the death penalty. In her view, this goal cannot be achieved with the 14 existing aggravators. Senator Washington asked Ms. Thomas if in her view the existing aggravators need to be reassessed or remodified. Ms. Thomas replied in the affirmative, adding that the subcommittee has the authority to recommend to the full Legislature that Nevada follow the *United States Constitution* and the dictates of the U.S. Supreme Court to focus on who should be eligible for the death penalty.

Referencing Table 1 of Exhibit I, Senator James asked if those states that only mention first-degree murder have no aggravating circumstances. Ms. Thomas replied that she was not familiar with the aggravating circumstances of other states but offered to research the issue and submit additional information to the subcommittee at a later date. Senator James explained that the subcommittee would not be abolishing the death penalty; rather, the subcommittee will attempt to ensure compliance with U.S. Supreme Court dictates and to develop a mechanism to address racial bias in the capital punishment system. Senator James offered three recommendations that might facilitate achievement of that goal: (1) limit discretion by narrowing the aggravating circumstances; (2) reduce unconscious prejudice by addressing racial bias in the decision-making and charging phases of capital cases; and (3) require proportionality analysis of each capital punishment case. Ms. Thomas voiced support for Senator James' recommendations.

Mr. Anthony responded to Senator James' question regarding the absence of any reference to aggravating circumstances by certain states in Table 1 of Exhibit I. He reviewed Oregon's and Utah's terminology and noted that both states use "aggravated murder" with a definition that incorporates Nevada's aggravating circumstances. Senator James commented that Florida, Louisiana, Missouri, North Carolina, and Wyoming only listed "first-degree murder."

Howard Brooks

Howard Brooks, previously identified on page 19 of these minutes, suggested that establishing a clear delineation between first- and second-degree murder would limit the number of capital punishment cases. He reported that data on Clark County murder cases prosecuted over the last four years revealed that juries in 90 percent of those proceedings returned a verdict of first-degree murder. In his view, rather than expanding the interpretation of aggravating circumstances, the aggravators need to be limited and used in a restrictive way.

Michael Pescetta

Michael Pescetta, previously identified on page 15 of these minutes, opined the Legislature needs to define and narrow aggravating factors to avoid expansion of prosecutorial discretion. He provided a memorandum (Exhibit L) outlining aggravating factors that in his view need limiting language. Continuing, he reported that the Nevada Supreme Court has never invalidated a statutory aggravator unless the federal court has done so first.

Mr. Pescetta discussed the possible addition of mitigating factors related to: (1) a defendant who suffers from mental illness; and (2) lingering doubt of guilt or an aggravator. He also suggested that the court list as part of the verdict form to be submitted to the jury all other potential mitigating factors individually. In addition, Mr. Pescetta proposed amending subsection 4 of NRS 200.030, "Degrees of murder penalties," to provide that aggravating factors must outweigh mitigating circumstances in order for the jury to consider the death penalty as a sentencing option. He announced that he would provide recommendations to narrow aggravating factors before the subcommittee's work session.

Senator James asked if a "lingering" doubt is the same as a "reasonable" doubt. Responding, Mr. Pescetta indicated that they are not the same. Continuing, he explained that if a jury—after concluding beyond a reasonable doubt that a defendant is guilty of committing a capital offense or that a certain aggravating factor is present—has remaining or "lingering" doubts, then this factor could be considered in the penalty phase of the trial. He pointed out that this scenario most often occurs in crimes involving multiple perpetrators. In such cases, the jury may be certain of one defendant's guilt but unsure of the level of participation of another defendant, particularly when one of the offenders agrees to testify for the prosecution in return for a negotiated sentence. Mr. Pescetta stated that federal law does not require states to allow defense counsel to argue or jurors to consider lingering doubt.

Referring to a question posed earlier in the meeting by Senator James, Mr. Pescetta explained that some states have responded in different ways to the aggravating and narrowing concerns set forth in the U.S. Supreme Court's *Gregg* decision. For instance, Louisiana addressed the issues raised in *Gregg* by defining the highest class of murder with the use of aggravating factors. In comparison, Nevada chose to define first-degree murder and then require post-conviction consideration of aggravating and mitigating factors. The U.S. Supreme Court upheld Louisiana's death penalty scheme in *Lowenfield v. Phelps*, 107 S.Ct. 3221 (mem) U.S. (1987), stating that its concerns were satisfied so long as narrowing of the pool of potential capital cases was accomplished.

Ben Graham

Ben Graham, Chief Deputy District Attorney, Office of the Clark County District Attorney, Las Vegas, acknowledged the views of those who had testified in support of abolishing the death penalty. He referenced Professor White's comment that if efforts to abolish the death penalty are unsuccessful, issues relative to bias within the capital punishment system should be addressed.

Mr. Graham disagreed with Mr. Brooks' view that aggravating circumstances serve to expand prosecutorial discretion in capital cases. Mr. Graham said that first-degree murder is not eligible for a death penalty unless there are aggravating circumstances. He shared his views on the "no motive" aggravating circumstance, recounting experiences with drive-by shootings and thrill killings. Mr. Graham stated that the "felony murder" aggravator developed out of inherently dangerous felonies (rape, robbery, pillage, or arson) resulting in a murder.

Chris Owens

Chris Owens, Chief Deputy District Attorney, Office of the Clark County District Attorney, Major Violators Unit, Las Vegas, discussed the committee review process utilized by the Office of the Clark County District Attorney in capital offense proceedings, including case assessment and consideration of aggravating circumstances. He reported that all homicides featuring at least one aggravating circumstance are processed through the committee for review. The committee has screened 120 cases since 1996, only 65 cases received recommendations to file for the death penalty. Mr. Owens also provided the subcommittee with raw statistical data spreadsheets and limited interpretation of that information in a cover letter (Exhibit N). Mr. Owens offered the assistance of the Office of the Clark County District Attorney.

Mr. Owens said his office provided assistance in the initial construction of S.C.R. 250 but was not given an opportunity to comment on the final draft. The Office of the Clark County District Attorney readdressed issues with the Nevada Supreme Court, and a decision was reached not to require portions of the statistical record keeping.

Chairwoman Leslie asked for clarification regarding the costs associated with collecting data as initially outlined in S.C.R. 250. Mr. Owens said, given an example of the data needed, he could provide the subcommittee with an estimate of the time and costs associated with such as effort. He noted that historical data is located in a warehouse and is not currently available in electronic form. This circumstance impedes historical data collection efforts.

Assemblyman Anderson reported that in 1995, a study was conducted on recidivists in the prison system. In the course of conducting the study, the Legislature requested data relative to the nature of the offenders' initial crimes and truth-in-sentencing information. Mr. Anderson noted that it was and remains difficult to gather this type of historical data. However, he anticipates the compilation of data will become less burdensome as each jurisdiction stores its historical data on computers.

Responding to a question from Assemblyman Anderson, Mr. Graham affirmed that the Clark County District

Attorney's Office respects the rule of law relative to application of the death penalty. Mr. Anderson commented that while debating death penalty issues in the Assembly during the 2001 Legislative Session, he learned that certain district attorneys' offices did not share this view. Continuing, he reported that one district attorney views the death penalty as society's right to vengeance rather than the rule of law.

Mr. Graham observed that each person's opinions and motives are influenced by his or her own life experiences. He commented that if Mr. Anderson were to again pose the question to the same prosecutor, the response would likely be ameliorated. Continuing, Mr. Graham indicated that years ago, he supported abolition of capital punishment, but he is now of the opinion that there are times when it is appropriate. He offered to review the cases of each Clark County death row inmate with the subcommittee to provide a clear understanding of the verdict and the penalty.

Senator James stated that he has defended capital punishment legislatively for over ten years, but he is concerned about fair application of the death penalty. He questioned how racial bias can exist in the capital punishment system and whether certain cases should have been charged as capital crimes but were not. Senator James stated that if Nevada is to continue administering capital punishment, it must first address the disproportionate application of the death penalty to African-American males of low socioeconomic status. Mr. Graham said there are situations with aggravating circumstances where it is not mandatory to seek the death penalty, and in such cases, an offer may be made to plead to life without the possibility of parole. Senator James observed that there are 937 people serving sentences for first-degree and second-degree murder in Nevada, and he asked to review other first-degree murder cases with aggravating circumstances that were not charged as capital crimes.

Senator Washington expressed interest in obtaining data regarding the gender, race, and socioeconomic status of death row inmates since the enactment of capital punishment in 1960. He also asked for Mr. Graham to share his opinion on Nevada's aggravating and mitigating circumstances. Mr. Graham reminded the subcommittee that constitutional decisions are made by the courts, and his personal opinion was not relevant. Mr. Graham provided the subcommittee with a document titled "Capital Murder Conflict Cases" (Exhibit N) without further testimony.

PRESENTATION ON COMPETENCY OF COUNSEL, FUNDING OF COUNSEL, ADEQUACY OF RESOURCES PROVIDED TO DEFENDANTS IN CAPITAL CASES, AND AN OVERVIEW OF INDEPENDENT PUBLIC DEFENDERS' COMMISSIONS

Mr. Anthony provided the subcommittee with a copy of S.C.R. 250, "Procedure in capital proceedings" (Exhibit O) and a copy of NRS 7.125, "Fees of appointed attorney other than public defender" (Exhibit P).

Michael Pescetta

Relating to the question of funding, Michael Pescetta, previously identified on page 15 of these minutes, said there is a notable difference in the outcome of a proceeding when a defendant is represented by court-appointed counsel or a fully funded private attorney. Unlimited funding can affect whether a defendant will receive the death penalty or accept a plea bargain offer. He reported there are not enough defense attorneys available in Nevada. For example, approximately six attorneys in Nevada are willing to represent offenders in state post-conviction proceedings. He noted that it is becoming increasingly difficult to secure effective counsel to represent offenders in state post-conviction proceedings, particularly in view of the fact that funding for these cases is disbursed from the State Public Defender's fund, which is currently about six months in arrears in disbursing payments to counsel.

In Mr. Pescetta's view, the fundamental problem in Nevada with respect to counsel issues is the fact that there are too many capital punishment cases. While Nevada has the largest per capita death row population in the nation, the state also has one of the smallest bars in the nation and the smallest ratio of licensed practitioners to death penalty cases. The availability of attorneys competent to conduct post-conviction proceedings is of equal importance to counsel funding. Continuing, Mr. Pescetta recommended the subcommittee mandate minimum qualifications for state habeas counsel. Nevada's S.C.R. 250 requires that post-conviction counsel must have completed two habeas cases. He pointed out there is no qualitative review of counsel's performance. In addition, each district judge has his or her own procedure for choosing an appointed attorney, without any oversight or consideration of alternative means from an external source. In state court, the situation is worse; there simply are not enough lawyers.

Senator James questioned whether the reason Nevada has a large number of death row inmates per capita is because

the state rarely carries out executions. Mr. Pescetta replied in the negative. He reported that Texas has executed more inmates than any other state and has carried out half of the executions in the country. Even when those executed were still on Texas' death row, Nevada still had the highest number of death row inmates per capita. California has executed only 4 of its 600 inmates on death row since reinstatement of the death penalty. Florida has carried out a number of executions and has 500 inmates on death row.

Continuing, Senator James asked how many inmates Nevada has executed. Mr. Pescetta reported that Nevada has executed eight or nine inmates. Further, Nevada leads the nation in the number of executions carried out even though all but one death row inmate asked to be put to death. In his opinion, Nevada's criminal justice system is archaic in addressing capital cases. Senator James said an examination of crimes per capita—the number of crimes reported and charged, convictions achieved, and death penalty sentences meted out—would be useful. Mr. Pescetta said he would provide what information could be gathered to the subcommittee.

Assemblyman Anderson commented on the need for adequate counsel in an effort to avoid appeals. Mr. Anderson asked for guidance from Mr. Pescetta as to how a legislative solution to this issue could be attained. Mr. Pescetta suggested prompt payment of defense fees and higher remuneration rates may encourage more attorneys to enter this area of practice. He also emphasized the importance of establishing minimum qualification standards for defense counsel.

Ben Graham

Ben Graham, previously identified on page 25 of these minutes, said the Nevada District Attorneys' Association has supported an increase in the quality of defense counsel. He pointed out that if defense counsel received adequate compensation and training, fewer issues would be appealed to the federal courts. Mr. Graham referred to Exhibit N, "Capital Murder Conflict Cases," and funds being spent for criminal defense attorneys where public defenders have not been available.

Senator McGinness suggested the subcommittee determine if payments to the public defenders' offices are six months behind, and if so, encourage expedited processing.

Willard Ewing

Willard Ewing, Deputy Public Defender, Office of the Clark County Public Defender, Las Vegas, stated he has served on the capital murder team in the Public Defender's Office for a number of years. He acknowledged that it is difficult for attorneys to become death-qualified under S.C.R. 250; however, he does not favor minimizing qualifications in order to expedite capital cases through the system. Mr. Ewing reported in 1995, the Nevada Supreme Court commissioned a study of S.C.R. 250 to determine if it satisfied procedural due process requirements on behalf of the state and the defendant. The Fondi Death Penalty Commission was created, and specific recommendations were suggested to make S.C.R. 250 more effective. A report was submitted, and S.C.R. 250 was subsequently amended. Mr. Ewing made several recommendations related to S.C.R. 250:

- Increase the qualifications for prior experience of trial counsel, appellate counsel, and post-conviction relief counsel;
- Require a minimum of eight hours of continuing legal education within a set period for counsel as well as district court judges; and
- Increase counsel compensation and limits on expenses.

Mr. Ewing submitted Exhibit Q for the subcommittee's consideration.

PRESENTATION ON JUROR UNDERSTANDING OF THE APPLICATION OF THE LAW, JURY INSTRUCTIONS, AND SELECTION OF JURORS IN CAPITAL CASES

Nicolas C. Anthony

Nicolas C. Anthony, previously identified on page 13 of these minutes, presented a copy of NRS 175.161, "Instructions," to the subcommittee (Exhibit R). *Nevada Revised Statutes* 175.161 requires the judge to state all matters of law necessary to determine a verdict. The Constitution Project recommendations on jury issues include the following:

1. A judge in a death penalty trial should instruct the jury at sentencing that if any juror has a lingering doubt about the defendant's guilt, that doubt may be considered a mitigation circumstance that weighs against a death sentence; and

2. The judge must ensure that each juror understands his or her individual obligation to consider mitigating factors in deciding whether a death sentence is appropriate under the circumstances.

Ron Dillehay

Ron Dillehay, Professor of Psychology and Director of the Grant Sawyer Center for Justice Studies, University of Nevada, Reno, related his expertise in jury selection in capital cases. He reported that five years ago, the Center for Justice Studies considered conducting a study of discretionary decisions in capital cases connected with race and socioeconomic status, which would have coincided with the Nevada Supreme Court task force's review of prejudice and the socioeconomic and racial aspects of capital cases. It was revealed there was no data available for analysis of factors that were influencing charging and sentencing decisions. A study was conducted, and 16 district attorneys were surveyed to determine what factors influenced charging decisions. That data is available and can be submitted to the subcommittee. Because of the amendments to S.C.R. 250, the data has not been collected since that study was completed. Regarding racial composition of the jury, Professor Dillehay averred it is not difficult for prosecutors to provide racially neutral reasons for dismissing African Americans.

Professor Dillehay explained that a capital case is a bifurcated proceeding conducted in two phases. Phase one establishes guilt and convicts the defendant, and the penalty phase determines the sentence. During the penalty phase in Nevada, the jurors have a choice of sentencing the defendant to life imprisonment with the possibility of parole, life imprisonment without the possibility of parole, or death. To be qualified to serve, prospective jurors must be able to consider the full range of possible penalties. The judge would dismiss persons who would never choose capital punishment regardless of the facts and circumstances and those who would always impose death for defendants convicted of capital murder, and all remaining potential jurors would be qualified. Professor Dillehay observed that the death qualification process tends to eliminate certain categories of prospective jurors, particularly African Americans and women.

Senator James expressed concern regarding the death qualification process and asked Professor Dillehay if he had statistics to support his statements. Also of concern to Senator James was Professor Dillehay's statement that prosecutors know African Americans are less likely to impose the death penalty so they ask other racially neutral questions that can be used as a pretext for dismissing prospective jurors for cause. Senator James observed that this assertion constitutes a serious accusation of racial discrimination. Professor Dillehay reiterated his statements regarding his experience with prospective minority jurors, particularly African Americans, and indicated that statistics would need to be gathered from court files. Senator James requested that Professor Dillehay provide supporting documentation to the subcommittee.

Professor Dillehay disclosed that his experience did not include involvement with Nevada cases. He stressed he was not accusing anyone of prejudice, but in his view, there is a strategic advantage to excluding African Americans on juries. Senator James said he was interested in information pertinent to death penalty issues in Nevada.

Assemblyman Anderson, referring to Mr. Stevenson's and Ms. Howarth's testimony, commented that the death qualification process could be used to the advantage of both the defense and prosecution.

Senator Neal asked how many preemptory challenges are allowed in a criminal case. Mr. Dillehay said that in Nevada capital cases, the prosecution and defense are allowed eight preemptory challenges each for the first 12 jurors with additional challenges for alternates. Senator Neal pointed out that bias occurs as soon as a decision has been made based on race.

Michael Pescetta

Michael Pescetta, previously identified on page 15 of these minutes, reported that Nevada has no standard set of jury instructions for capital proceedings. The jury instructions used in Clark County were developed by the Clark County District Attorney's office in 1976 and have been revised over the years on a case-by-case basis. He noted that a systematic renovation of those instructions has not been done. Continuing, he pointed out that vague instructions confuse jurors. Mr. Pescetta suggested that the parties involved in capital punishment proceedings address this issue. Mr. Pescetta provided a list of recommendations concerning jury issues (Exhibit S) without further testimony.

Ben Graham

Ben Graham, previously identified on page 25 of these minutes, stated that prosecutors have sworn to uphold the law, and while the trial by jury process and the three-judge panel review procedures are not perfect, they are the best mechanisms currently available.

Daniel J. Greco

Daniel J. Greco, Chief Deputy District Attorney, Criminal Division, Office of the Washoe County District Attorney, Reno, submitted a sample of penalty phase jury instructions (Exhibit T) and provided a brief explanation of several of the instructions.

In a comparison of jury selection in capital punishment proceedings and noncapital cases, Mr. Greco said the processes are similar with two key exceptions: (1) the extended voir dire process in questioning prospective jurors; and (2) the Witherspoon/Witt standard, which refers to two U.S. Supreme Court cases: (a) *Witherspoon v. Illinois*, 391 U.S. 510 (1968); and (b) *Wainwright v. Witt*, 469 U.S. 412 (1985). These cases set the standard a trial judge must use in determining whether a particular juror should be excluded based upon a challenge for cause made by one of the attorneys in a death penalty case. That standard is as follows:

> Are the juror's views on the death penalty such that they would prevent or substantially impair the juror from performing its duties as a juror in accordance with the instructions of the court?

In other words, if a juror says, suggests, or hints that he or she would vote for the death penalty in every case where a first-degree murder verdict is returned, that juror would be removed for cause based upon the Witherspoon/Witt standard. When a potential juror is removed for cause, the defense does not have to use one of its eight preemptory strikes to excuse that individual later. Conversely, if a juror says or suggests that he or she would never vote for the death penalty regardless of how egregious the facts of the murder are, how strong the penalty phase evidence, or how lengthy the conviction record of the accused, that person also would be removed for cause based upon the Witherspoon/Witt standard.

Chairwoman Leslie questioned whether similar jury instructions are used in rural and southern Nevada. Mr. Greco indicated he has received requests for copies of instructions in the past. Chairwoman Leslie asked if there might be interest in creating a standard set of jury instructions to be used throughout the state. Mr. Greco reiterated that there have been attempts in the past to develop a statewide pattern set of jury instructions for all criminal cases; however, each attempt has failed.

Mr. Graham reiterated that Clark County has shared copies of jury instructions with other jurisdictions.

PUBLIC TESTIMONY

Sandy Viau

Sandy Viau, a member of Families of Murder Victims, Henderson, Nevada, said her son was murdered on August 14, 1998, at the age of 20. She reported that one of the murderers received the death penalty; two are serving life without the possibility of parole. She referred to the Web site www.ProDeathPenalty.com. Ms. Viau provided the

subcommittee with a written copy of her statement (Exhibit U).

Ron Cornell

Ron Cornell, a member of Families of Murder Victims, Las Vegas, said his son was murdered on July 16, 1998. Mr. Cornell reported that of the 25 members of his group, only two offenses were charged as capital punishment cases. The proceeding regarding his son's murder was not a capital case.

Annie Griego

Annie Griego, a member of Families of Murder Victims, Las Vegas, said her daughter was murdered on October 6, 1999, and shared particulars of the case with the subcommittee.

Philip J. Kohn

Philip J. Kohn, Special Public Defender, Clark County Special Public Defender's Office, Las Vegas, reported that he has worked solely on murder cases for the last eight years. It has been his experience that the only way to determine whether prospective jurors are biased is through the voir dire process. A problem in Clark County is that judges strive to complete the voir dire process in one day, and no judge in Clark County allows either the defense or prosecution to conduct individual voir dire. Mr. Kohn recommended that the subcommittee consider allowing individual voir dire in capital punishment proceedings. He noted that certain judges do not permit questionnaires, and prospective jurors are not allowed to answer questions in the privacy of the jury room or at home. In addition, some judges do not allow open-ended questions or permit counsel to ask jurors factual questions. Further, some judges will not allow the defense or prosecutor to ask jurors individualized questions; rather, they require that each prospective juror be asked the same questions.

In response to Assemblyman Anderson's comments relating to race-neutral questions as a pretext for preemptory challenges, Mr. Kohn shared personal experiences. He noted that the criminal justice system is adversarial, and attorneys are attempting to win their cases.

Continuing, Mr. Kohn reported that he participated on the Fondi Commission. The Commission participants agreed that on February 1 of each year, prosecutors would report to the state the age, gender, and race of each defendant and victim in a murder case, not just capital punishment cases. Prosecutors were not required to report information prior to April 1, 2002. When S.C.R. 250 was finalized, some prosecutors readdressed issues with the Nevada Supreme Court, and a decision was reached not to require portions of the statistical record keeping. Mr. Kohn said that data collection and record keeping is necessary in order to properly evaluate whether the system is functioning properly.

Assemblyman Anderson questioned whether a prospective juror's difficulty in filling out a questionnaire form could become an opportunity for possible discrimination. Mr. Kohn stated that in his experience, attorneys do not exclude prospective jurors based on how they complete a questionnaire. The form offers jurors an opportunity to present personal answers. Assemblyman Anderson asked if Mr. Kohn expected such a piece of legislation could be successfully enacted and subsequently carried out. Mr. Kohn said if the Legislature passed legislation requiring individual voir dire of prospective jurors, the law would be enforced.

Nancy Hart

Nancy Hart, a concerned citizen, a member of Amnesty International, and acting chairwoman of the Nevada Coalition Against the Death Penalty, Reno, read into the record a prepared statement (Exhibit V) in which she expressed her opposition to the death penalty.

Senator Washington observed that while weighing issues of gender and racial bias, the fairness of the judicial system, and capital punishment, victims' issues must also be considered. He asserted if capital punishment is the tool that curbs escalating violence and provides the justice that victims seek, then the Legislature and the judicial system need to act appropriately.

Ms. Hart agreed that the debate on capital punishment must include consideration of victims' issues. She observed that western civilized society has always placed reasonable and constitutional limits on society's response to crime and

opined that our criminal justice system is not based on providing victims with closure, but rather the appropriate response given the facts of the offense.

Due to time restraints, some witnesses submitted prepared statements without testimony as follows:

- Elmer R. Rusco of Reno provided the subcommittee with his written prepared statement (Exhibit W) advocating the abolition of the death penalty.

- Mercedes Maharis of Las Vegas provided the subcommittee with a copy of memorandum she received from Paul L. Browning dated January 13, 2002, (Exhibit X), relating to poor medical assistance for inmates.

- Mercedes Maharis of Las Vegas also provided the subcommittee with a copy of a memorandum she received from Christopher A. Jones dated January 20, 2002, (Exhibit Y), regarding a shooting of an inmate in Ely, Nevada, on January 19, 2002.

Chairwoman Leslie drew attention to Exhibit Z which provides information on the conference "The Law and Politics of the Death Penalty: Abolition, Moratorium or Reform?" She announced that the conference will be held at the University of Oregon in Eugene, Oregon, on March 1 and 2, 2002. Chairwoman Leslie mentioned a number of the well-known speakers scheduled to appear at the conference, encouraged members of the subcommittee to attend, and said that staff would be attending the event.

Ms. Leslie announced the subcommittee's next meeting would be held on February 21, 2002, in Carson City with videoconferencing to Las Vegas. The topics for that meeting will be judicial issues and procedures; three-judge panels; and appeals, costs, deterrents, and victims' rights.

ADJOURNMENT

There being no further business, the meeting was adjourned at 4:40 p.m.

Exhibit AA is the "Attendance Record" for this meeting.

Respectfully submitted,

_____
Deborah Rengler
Senior Research Secretary

_____
Nicolas C. Anthony
Senior Research Analyst

APPROVED BY:

_____
Assemblywoman Sheila Leslie, Chairwoman

Date _____

LIST OF EXHIBITS

Exhibit A is a report issued by The Constitution Project titled *Mandatory Justice, Eighteen Reforms to the Death Penalty*, provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau,

Carson City, Nevada.

Exhibit B is a document titled "The Death Penalty in 2001: Year End Report," Death Penalty Information Center, December 2001, provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit C consists of a number of statistical charts pertaining to death row, provided by Glen Whorton, Assistant Director of Operations, North, Nevada's Department of Corrections, Carson City, Nevada.

Exhibit D consists of Washoe County statistics regarding capital offenses and death row, provided by Maizie W. Pusich, Chief Deputy Public Defender, Washoe County Public Defender's Office, Reno, Nevada.

Exhibit E is a memorandum dated January 22, 2002, to the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing from Michael Pescetta, Las Vegas, Nevada. The document was provided by Mr. Pescetta as an individual and not in his capacity as Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada.

Exhibit F is a document dated January 23, 2002, titled "Nevada Attorney General Monthly Death Row Status Report," provided by David F. Sarnowski, Chief Deputy Attorney General, Office of the Attorney General, Carson City, Nevada.

Exhibit G is a document dated January 24, 2002, titled "Position Paper of the National Association for the Advancement of Colored People, Reno-Sparks Branch #1112, Regarding Bias in the Death Penalty," provided by Kevin Tate, Chairman, Las Vegas Reorganization Committee, National Association for the Advancement of Colored People, Las Vegas, Nevada.

Exhibit H is a copy of *Nevada Revised Statutes* (NRS) 200.033, "Circumstances aggravating first degree murder," provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit I is a bulletin dated December 2001 issued by the Bureau of Justice Statistics, U.S. Department of Justice, titled "Capital Punishment 2000," provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit J is a copy of NRS 200.035, "Circumstances mitigating first degree murder," provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit K is a memorandum dated January 24, 2002, to the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing from JoNell Thomas, a private attorney and representative for the American Civil Liberties Union of Nevada and the Nevada Attorneys for Criminal Justice, Las Vegas, Nevada, provided by Ms. Thomas.

Exhibit L is a memorandum dated January 24, 2002, to the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing from Michael Pescetta. The document was provided by Mr. Pescetta as an individual and not in his capacity as Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada, Las Vegas, Nevada.

Exhibit M is a letter dated January 24, 2002, to the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing from Chris Owens, Chief Deputy District Attorney, Office of the Clark County District Attorney, Major Violators Unit, Las Vegas, Nevada, provided by Mr. Owens.

Exhibit N is a chart titled "Capital Murder Conflict Cases," provided by Ben Graham in his capacity as Chief Deputy District Attorney, Office of the Clark County District Attorney, and as a representative of the Nevada District Attorneys' Association, Las Vegas, Nevada.

Exhibit O is a copy of Nevada Supreme Court Rule 250, "Procedure in capital proceedings," provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit P is a copy of NRS 7.125, "Fees of appointed attorney other than public defender," provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit Q is a memorandum dated January 24, 2002, to Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing from Willard Ewing, Deputy Public Defender, Office of the Clark County Public Defender, Las Vegas, Nevada, provided by Mr. Ewing.

Exhibit R is a copy of NRS 175.161, "Instructions," provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit S is a list of recommendations provided by Michael Pescetta, Las Vegas, Nevada. The document was provided by Mr. Pescetta as an individual and not in his capacity as Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada.

Exhibit T is a copy of sample jury instructions, provided by Daniel J. Greco, Chief Deputy District Attorney, Criminal Division, Office of the Washoe County District Attorney, Reno, Nevada.

Exhibit U is a written copy of the prepared statement of Sandy Viau, a member of Families of Murder Victims, Henderson, Nevada, dated January 24, 2002, provided by Ms. Viau.

Exhibit V is a copy of a prepared statement read into the record by Nancy Hart, a concerned citizen, a member of Amnesty International, and acting chairwoman of the Nevada Coalition Against the Death Penalty, Reno, Nevada, provided by Ms. Hart.

Exhibit W is a copy of a written statement provided by Elmer R. Rusco, Reno, Nevada, without public testimony due to time restraints.

Exhibit X is a copy of memorandum dated January 13, 2002, from Paul L. Browning to Mercedes Maharis, Las Vegas, Nevada, provided by Ms. Maharis without public testimony due to time restraints.

Exhibit Y is a copy of memorandum dated January 20, 2002, from Christopher A. Jones to Mercedes Maharis, Spartacus Project, Las Vegas, Nevada, provided by Ms. Maharis.

Exhibit Z is a conference outline and schedule titled "The Law and Politics of the Death Penalty: Abolition, Moratorium or Reform?" This document was provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit AA is the "Attendance Record" for this meeting.

Copies of the materials distributed in the meeting are on file in the Research Library of the Legislative Counsel Bureau, Carson City, Nevada. You may contact the Research Library at (775) 684-6827.