



**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*])  
June 14, 2002  
Carson City, Nevada**

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The sixth and final 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 June 14, 2002, commencing at 11:25 a.m. The meeting was held in Room 4100 of the Legislative Building, 401 South Carson Street, Carson City, Nevada, and videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Pages 2 and 3 contain the "Meeting Notice and Agenda."

**SUBCOMMITTEE MEMBERS PRESENT IN CARSON CITY:**

Assemblywoman Sheila Leslie, Chairwoman  
Senator Mike McGinness  
Senator Maurice E. Washington  
Assemblyman Bernie Anderson  
Assemblyman Dennis Nolan

**SUBCOMMITTEE MEMBERS PRESENT IN LAS VEGAS:**

Senator Joseph M. Neal Jr.  
Assemblyman John Ocegüera

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

Date and Time of Meeting: Friday, June 14, 2002  
11 a.m.

Place of Meeting: Legislative Building  
Room 4100  
401 South Carson Street  
Carson City, 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:

Grant Sawyer State Office Building  
Room 4412  
555 East Washington Avenue  
Las Vegas, 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 March 18, 2002, and April 18, 2002, Meetings

### III. Public Testimony

### \*IV. Work Session—Discussion and Action on Recommendations (See "Work Session Document" for a summary of recommendations)

*The Work Session Document will be available Friday, June 7, 2002, on the Nevada Legislature Web site ([www.leg.state.nv.us](http://www.leg.state.nv.us)) at the subcommittee [home page](#), or it may be obtained by contacting Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, at (775) 684-6825.*

### V. 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](http://www.leg.state.nv.us).

## **INTRODUCTION AND OPENING REMARKS**

Chairwoman Leslie called the meeting to order. In her opening remarks, Chairwoman Leslie welcomed all those in attendance in Carson City, Las Vegas, and listening to the audio broadcast over the Internet.

## **APPROVAL OF MINUTES OF THE MARCH 18, 2002, AND APRIL 18, 2002, MEETINGS**

The Chairwoman called for approval of the minutes of the subcommittee's fourth and fifth meetings held on March 18, 2002, and April 18, 2002, both in Las Vegas.

**ASSEMBLYMAN ANDERSON MOVED TO APPROVE THE MINUTES OF THE SUBCOMMITTEE'S MEETINGS HELD ON MARCH 18, 2002, AND APRIL 18, 2002, IN LAS VEGAS, NEVADA. ASSEMBLYMAN NOLAN SECONDED THE MOTION, WHICH PASSED UNANIMOUSLY AMONG THOSE PRESENT. SENATOR WASHINGTON WAS ABSENT FOR THE VOTE.**

## **PUBLIC TESTIMONY**

Chairwoman Leslie emphasized that public testimony is encouraged, but would be limited to no more than five minutes. Continuing, Chairwoman Leslie announced that after public testimony she would only recognize those in the audience to clarify an issue or at the request of a subcommittee member. If anyone in the audience wished to make a general comment that would assist in the deliberations of the subcommittee, Chairwoman Leslie asked that they sign in, as well as state their name and affiliation for the record.

### ***Daniel J. Greco***

Daniel J. Greco, Chief Deputy District Attorney, Office of the Washoe County District Attorney, Reno, Nevada, reading from prepared testimony (Exhibit A), stated that the position of the Office of the Washoe County District Attorney is that legislation enacting the recommendations contained in the Work Session Document (Exhibit B) is not necessary. Mr. Greco remarked that the Nevada capital punishment system is not broken. Technical errors have occurred in some cases in Nevada, but those errors have been caught and corrected at the appellate level. Concluding, Mr. Greco said the system works as it is designed to work.

Senator Neal queried whether Mr. Greco was referring to all the recommendations listed in the Work Session Document (Exhibit B). Mr. Greco replied in the affirmative. Senator Neal asked whether Mr. Greco was opposed to Recommendation No. 3, which is the adoption of a racial justice act that would be modeled after the Kentucky law (*Kentucky Revised Statutes* [KRS] 532.300). Mr. Greco reiterated that the Office of the Washoe County District Attorney opposes all of the recommendations. Washoe County has not seen significant or any claims of the racial use of the death penalty against minorities. Senator Neal surmised that in order for the Office of the Washoe County District Attorney to favor any of the recommendations, a person would have to be executed and subsequently found to be innocent. Mr. Greco remarked that situation has not occurred in Washoe County or elsewhere in Nevada because there are numerous safeguards built into the system already. Continuing, Mr. Greco noted that there are ways in which this racial issue is already addressed. If the defense attorney or defendant deems that the death penalty is being applied in a racially discriminatory manner, there are various equal protection and other challenges that could be raised under present Nevada law. Mr. Greco said he could not recall such challenges occurring in Washoe County.

Further, Senator Neal asked Mr. Greco to discuss his position on Recommendation No. 6, which seeks to amend Nevada's list of 14 aggravating circumstances for first-degree murder. Mr. Greco replied it is the position of the Office of the Washoe County District Attorney that the current list of aggravators (*Nevada Revised Statutes* [NRS] 200.033, "Circumstances aggravating first-degree murder") is adequate. Asked which aggravator causes prosecutors the most trouble, he commented that based on his experience, the "random and without apparent motive" (NRS

200.033(9)) aggravator is more difficult than others to apply. In his view, it was the intent of the Legislature to cover situations that might involve a person standing over a freeway overpass who hates the world, is having a bad day, and decides to fire a gun at whoever is down below. Those would be good examples where that aggravator would withstand appellate scrutiny. Mr. Greco voiced his opinion that there are no problems with any of the other aggravators under current law.

Continuing, Senator Neal questioned Mr. Greco regarding Recommendation No. 9, which seeks to create an independent authority to recruit, select, train, monitor, support, and assist attorneys who represent defendants charged with a capital crime. Expressing his personal opinion, Mr. Greco replied that he favored having qualified and capable defense counsel in every death penalty case. He had no personal problem with the general nature of that recommendation. Referring to Recommendation No. 10, which seeks to adopt guidelines and minimum qualifications for counsel participating in capital cases, based on his experience in Washoe County handling capital cases, the public defenders and/or the experienced private attorneys almost always meet those criteria set forth in Option A, paragraph 1. Since he did not handle appellate work, he said he could not comment on paragraphs 2 and 3. He did foresee that Recommendation No. 10 could cause financial problems in the smaller counties, but not in Clark and Washoe Counties. Mr. Greco noted that he had already presented the position of the Office of the Washoe County District Attorney.

In closing, Senator Neal concluded that Mr. Greco would not reject all the recommendations, and as the subcommittee reviews the Work Session Document (Exhibit B), there may be some agreement. Mr. Greco did not know whether it would be characterized as agreement. He said he and Senator Neal would need to “agree to disagree.”

### ***Ron Cornell***

Ron Cornell, President, Families of Murder Victims, Las Vegas, read from prepared testimony (Exhibit D) as he spoke in his own behalf. He presented a number of recommendations and comments for the record:

1. A larger dollar amount for the defense attorney should be established so the accused can receive a fair trial the first time around;
2. A review board for all capital case defense counsel should be created consisting of at least two defense and two prosecuting attorneys and one judge who have experience with death penalty trials;
3. In regards to mental capacity (an intelligence quotient [IQ] of 70 or less), those who do not understand the consequences of their actions should not be eligible for the death penalty;
4. Referring to age, 16-year-olds understand the difference between right and wrong, life and death; and
5. In an effort to reduce the length of time a convicted murderer sits on death row, an automatic appeal should be heard within a two-year period, allow only two additional appeals—each to be heard within two years of the ruling of the previous appeal, and the sentence must be carried out within one year from the date of the final appeal ruling.

He thanked the subcommittee for the opportunity to speak. In closing, he asked that the subcommittee not forget the victims and their families.

### ***Reverend Dr. Jane Foraker-Thompson***

The Reverend Dr. Jane Foraker-Thompson, Episcopal Diocese of Nevada, Las Vegas, and a representative of the Religious Alliance in Nevada (RAIN), complimented the subcommittee on the work that had been done accumulating information on this topic. She remarked that RAIN includes the mainline churches of the Episcopal, Lutheran, Methodist, Presbyterian, and Roman Catholic denominations. Continuing, Rev. Dr. Foraker-Thompson made the following statements based on her readings of the New Testament Bible:

- Jesus was nonviolent, teaching forgiveness, redemption, and reconciliation—those concepts should be carried out

in the law;

- Nevada's capital punishment system is flawed;
- The death penalty system is not accountable in many ways due to the lack of adequate recordkeeping;
- Costs of the death penalty system are unknown;
- Deoxyribonucleic acid (DNA) is an absolute necessity for those accused of capital crimes if the system is to be just;
- Care and concern should be shown for the victims of any violent crime; and
- The death penalty is an antiquated process in current civilization.

In her personal opinion, Rev. Dr. Foraker-Thompson said the death penalty is unchristian, uncivilized, unproductive, and discriminatory on racial as well as socio-economic bases. In closing, Rev. Dr. Foraker-Thompson said the United States is the last western industrialized nation to still allow the death penalty.

### *Nancy Hart*

Nancy Hart, President, Nevada Coalition Against the Death Penalty (Coalition), Reno, stated the subcommittee has done a commendable job of studying a difficult topic and has received testimony from both national and local experts on the many issues involved in capital punishment in Nevada. The subcommittee has not only gathered a large amount of information but has also uncovered many serious issues and problems within Nevada's death penalty. In complete contrast to what was stated by Mr. Greco, Ms. Hart said the Coalition considers the death penalty system in Nevada to be broken—and too broken to be fixed. As you know, the Coalition itself advocates the abolition of the death penalty, which is Recommendation No. 1. Ms. Hart acknowledged that the Coalition realizes that while many Nevadans may not agree, testimony and information provided to the subcommittee has suggested a number of possible reforms. The Work Session Document (Exhibit B) contains many modest reforms that would enhance the fairness and the rationality of Nevada's death penalty, which the Coalition understands are supported by a broad range of Nevadans including victims' family members.

Exhibit E, a letter to Sheila Leslie, Chairwoman, Subcommittee to Study the Death Penalty and Related DNA Testing, dated June 6, 2002, with attached letters and petitions in support of the Nevada Coalition Against the Death Penalty's recommendations for reforming Nevada's death penalty, was provided by Ms. Hart without further testimony.

### **WORK SESSION—DISCUSSION AND ACTION ON RECOMMENDATIONS**

Chairwoman Leslie drew attention to the Work Session Document (Exhibit B) and the Appendix to the Work Session Document (Exhibit C). She announced it was her intention to work through the Work Session Document as items were listed, although she might suggest combining some recommendations. Staff prepared the Work Session Document and supporting Appendix from the recommendations made during the entire course of the study. The recommendations were presented in the chronological order of the hearings. Staff and counsel would be asked to clarify any questions the subcommittee might have. In addition, Chairwoman Leslie said she might call for limited testimony if the members had questions on a particular recommendation. However, if she did call on someone to provide additional clarification, testimony would only be allowed relative to that particular item.

Continuing, Chairwoman Leslie pointed out that the A.C.R. 3 legislation states, "any recommended legislation proposed by the committee must be approved by a majority of the members of the Senate and a majority of the members of the Assembly appointed to the committee." This requirement applies to both recommended legislation and resolutions. She noted she was informed by the Legislative Counsel Bureau, that since former Senator Mark A. James has officially resigned from legislative office, the majority voting requirements now require two out of three

Senators and three out of four Assembly members. In addition, since legislation requires a certain majority from each house and two members were attending in Las Vegas, a roll call vote may be utilized as necessary.

Further, Chairwoman Leslie stated as the subcommittee progresses through the Work Session Document, members will notice that there may be several choices presented including the option of drafting a letter on behalf of the subcommittee. In addition, the subcommittee has the option of including a statement in the final report in support of a particular recommendation.

Senator Neal questioned who determined the voting requirements for the subcommittee. Chairwoman Leslie replied that legal counsel had obtained the ruling.

Assemblyman Anderson reminded the subcommittee members that the purpose of the work session was to provide an opportunity to create bill draft requests (BDRs) for further discussion based upon the work that has already taken place. This does not necessarily indicate support of the legislation when it comes to the floor or to a particular committee during the 2003 Legislative Session.

Chairwoman Leslie noted that it is important to remember that the subcommittee is not voting to make laws today; it is simply making recommendations for the report that will go to the entire Legislature.

Senator McGinness queried how many BDRs the subcommittee has available. Chairwoman Leslie replied that the subcommittee is allowed five BDRs, and a resolution does count as a BDR. Senator McGinness noted that the subcommittee would need to be judicious in its consideration of the 32 recommendations relative to creating five BDRs. Chairwoman Leslie clarified that since the topic is confined to one area of the NRS, there would be an opportunity for creative combining under the regular legislative rules.

At this point, the Chairwoman stated she would reserve discussion on Recommendation No. 1, which seeks to abolish the death penalty in Nevada, and Recommendation No. 2, which seeks to impose a moratorium on all executions and to allocate resources to further study the capital punishment system in Nevada, for the latter part of the meeting. Therefore, the subcommittee would begin discussion with Recommendation No. 3.

### *Nicolas C. Anthony*

Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, pointed out that the Work Session Document (Exhibit B) was compiled as a list of the recommendations provided during the course of the study. The recommendations do not necessarily have the support or opposition of the subcommittee; rather, these possible actions are merely presented to provide discussion for the members.

The recommendations contained in the Work Session Document appear below in italics and precede the actions of the subcommittee.

## ***RACIAL/BIAS/GENDER/ECONOMIC DISCRIMINATION***

***RECOMMENDATION NO. 3—Adopt a “Racial Justice Act” (modeled after Kentucky law) to prohibit a death sentence being sought or given on the basis of race.***

***OPTION A—Draft legislation to enact the Kentucky racial justice act (Kentucky Revised Statutes [KRS] 532.300). (Proposed by Bryan Stevenson, Professor of Law, New York University School of Law)***

***OPTION B—Draft legislation to adopt a racial justice act modeled after Kentucky law (KRS 532.300) but strengthening the statutory requirement to add if “race was any factor” in the decision to seek the sentence of death. (Proposed by Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada, testifying as a private citizen)***

### **Background Information for Recommendation No. 3**

**Tab A** — *Kentucky Revised Statutes 532.300.*

**Tab B** — Draft language submitted by Michael Pescetta on creating a racial justice act.

**Tab C** — Memorandum by Michael Pescetta on racial and economic bias in the imposition of the death penalty.

Mr. Anthony said a racial justice act would allow a defendant at a pretrial conference to claim that racial considerations played a significant role in the decision to seek the death penalty. The court would then hold a hearing on the claim, and the burden would be on the defendant to prove by clear and convincing evidence that race did, in fact, play a part in the decision to seek the death penalty.

### **SENATOR NEAL MOVED TO ADOPT RECOMMENDATIONS 3, 4, AND 5.**

Chairwoman Leslie expressed her opinion that the motion may be premature, but asked for a second to the motion. There being none, the motion died for the lack of a second.

Assemblyman Nolan opined that everyone would agree that race and racial issues should not be bases for consideration of the death penalty. After reading the Kentucky Racial Justice Act, he expressed concern over what he considered to be inherent problems. He said a racial justice act could create an opportunity in every single case for a defendant who belongs to a minority ethnical background to claim that the death penalty was sought because of his or her race. In the majority of cases that is not going to be the case, but invariably it will be taken advantage of. A racial justice act will create a backlog and an additional burden on the court over this issue. Mr. Nolan said of particular concern was provision 3 of the Kentucky Racial Justice Act that states that “evidence relevant to establish a finding that race was the basis of the decision to seek a death sentence may include statistical evidence or other evidence . . . .” This evidence may not necessarily pertain to that individual’s trial, but an individual or his counsel could suspend an entire case based upon statistics that may or may not be relevant to that individual.

Chairwoman Leslie concurred with Assemblyman Nolan’s concerns and noted that she was uncertain the basic statistical evidence of any case is available. Such information would be further discussed relative to Recommendation No. 5, which relates to reporting of statistical information. She stated that Nevada would be hard pressed to create a racial justice act because the basic information needed is not being collected.

***RECOMMENDATION NO. 4—Draft legislation to strengthen the mandatory review by the Nevada Supreme Court of capital sentences for the influence of prejudice and to impose a proportionality review of similar cases in which the death penalty was and was not sought. (Proposed by Michael Pescetta and The Constitution Project)***

#### **Background Information for Recommendation No. 4**

This proposal would strengthen the mandatory review by the Nevada Supreme Court and would also require a “proportionality review” by the Court to determine specifically whether the death sentence is proportional in light of similar cases in which the death penalty was not sought or was not imposed. According to The Constitution Project, “Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision making process.”

Testimony further indicated the mandatory review should include an evaluation of statistical information. **See Recommendation No. 5** for further discussion of statistical reporting.

**See Tab C** — Memorandum by Michael Pescetta on racial and economic bias in the imposition of the death penalty.

**Tab D** — Draft language submitted by Michael Pescetta on adequate mandatory review (including proportionality review). **See also Recommendation No. 19** (elimination of waiver of appeals under NRS 177.055).

***RECOMMENDATION NO. 5—Draft legislation to require reporting of statistical information in all death penalty and homicide cases.*** *This recommendation contains two parts: (1) the first proposal requires that the trial court submit a report in all first-degree murder cases where a penalty hearing is conducted; and (2) the second proposal requires an annual reporting by the district attorney for all non-negligent homicides. The reporting required by the trial court is modeled after the Revised Code of Washington Annotated 10.95.120, and the reporting for homicide cases is similar to the reporting suggested by the Fondi Commission and briefly adopted by the Nevada Supreme Court in Rule 250. (Proposed by Michael Pescetta and The Constitution Project)*

#### **Background Information for Recommendation No. 5**

This recommendation contains two parts: (1) the first proposal requires that the trial court submit a report in all first-degree murder cases where a penalty hearing is conducted; and (2) the second proposal requires an annual reporting by the district attorney for all non-negligent homicides. The reporting required by the trial court is modeled after the *Revised Code of Washington Annotated* 10.95.120, and the reporting for homicide cases is similar to the reporting suggested by the Fondi Commission and briefly adopted by the Nevada Supreme Court in Rule 250.

Under the reporting required by the trial court, the trial court would be required to report within 60 days to the Nevada Supreme Court, the defendant and his attorney, and the prosecuting attorney specific information about the defendant, the trial, the sentencing proceeding, the victim, the representation of the defendant, general background information, and the chronology of the case.

Under the homicide reporting requirement, the district attorney in each county would be required to submit to the Nevada Supreme Court on April 1 of each year a report identifying: the age, sex, and race of the defendant, the victim, and any other codefendants or coparticipants; the date of the homicide and of the filing of the complaint or indictment; the courts in which the case was prosecuted, whether a notice to seek the death penalty was filed, and the final disposition of the case; the racial and gender composition of the jury; and the identity of any individuals involved in making the capital charging decision (including any law enforcement officers, victim's family members, or others consulted by prosecutors in making that decision).

**Fiscal Note** — It can be presumed that the proposed recommendation will have a fiscal impact, which has not been determined. If the bill is introduced, a fiscal note will be requested.

**Tab E** — Draft language submitted by Michael Pescetta on reporting of statistical information in death penalty cases (identified as new section NRS 177.0551) and in all homicide cases (identified as new section NRS 177.0552).

**Tab F** — *Revised Code of Washington Annotated* 10.95.120.

Assemblyman Ocegüera agreed with both previously stated concerns. He supported Recommendation No. 5 because both statistical reporting requirements would be necessary before Nevada could analyze the information. He opposed Recommendation No. 4, and noted that Option B of Recommendation No. 3 goes too far. In relation to Recommendation No. 5, Mr. Ocegüera questioned the various types of burden of proof: (1) clear and convincing; (2) preponderance; and (3) beyond a reasonable doubt. Assemblyman Ocegüera said he was undecided on Recommendation No. 3 but noted that it hinged on the implementation of Recommendation No. 5.

Senator Neal said that Mr. Nolan's objection seems to suggest that because there might be a backlog, there should be some deference to that over the application of the death penalty. Restating his concern, he said he found it strange that Mr. Nolan seems to be saying that if a racial justice act is going to create a backlog, then Nevada should have the death penalty.

Senator McGinness said he agreed with Assemblyman Ocegüera that there has been a common thread throughout the testimony heard on this topic that information is needed to progress in many areas. Even Recommendation No. 4 hinges on Recommendation No. 5. He expressed support for Mr. Ocegüera to make a motion on Recommendation No. 5.

Senator Washington also concurred with Mr. Ocegüera. Recommendation No. 5 seems to be a pivotal point to gather information. Recommendation Nos. 3 and 4 would not be effective without Recommendation No. 5. His only concern with Recommendation No. 5 relates to the fiscal note, and he suspected that the financial responsibility to gather and disseminate such statistical information would be passed onto the district attorneys' offices and/or the Office of the Attorney General. Further, the fiscal note would not be determined until this recommendation is presented to the Legislature. Senator Washington said he could support Recommendation No. 5 but noted that he would not vote for Recommendation Nos. 3 or 4.

Chairwoman Leslie also expressed her support of Recommendation No. 5. She asked the subcommittee to seriously consider Recommendation No. 4. She stated she did not consider Nevada ready for Recommendation No. 3.

Assemblyman Anderson said he feared that Recommendation No. 3 would not achieve its desired goals. Recommendation No. 5 is something Nevada's court system has struggled with relative to gathering statistical data pertaining to all types of court cases. He said he supports Recommendation No. 5; gathering such information is necessary. Mr. Anderson said he has strong opinions about the strengthening of mandatory review by the Nevada Supreme Court, and Recommendation No. 4 would ensure that takes place. Regarding Recommendation No. 3, he opined that Nevada would not be willing to adopt the criteria of the Kentucky law. Mr. Anderson noted that Kentucky has a different set of circumstances that Nevada statutes may already have addressed.

Senator Neal asked the legal counsel whether Recommendation Nos. 3, 4, or 5 have any relationship to proportionality review.

Risa B. Lang, Principal Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau, Carson City, replied that the statistical information gathered in Recommendation No. 5 might be required for the mandatory review suggested in Recommendation No. 4. She noted that the recommendations overlapped in that the information to conduct the proportionality review could come from the statistics collected under Recommendation No. 5.

Senator Neal reminded the subcommittee that proportionality review had been in statute and was amended out. He did not anticipate any problems to reconsider such a review and bring it back as part of the racial bias question. He did not understand some of the objections that were expressed regarding Recommendation No. 3 when it attempts to eliminate race as a consideration in the application of the death penalty. To avoid the question altogether would suggest that race does not play a part in the application of the death penalty—he disagreed.

Ms. Lang said it might be possible to adopt Recommendation No. 4 without Recommendation No. 5, but certain information may not be available.

Chairwoman Leslie said it was her understanding that Recommendation No. 5 enters the gray area of separation of powers between the Legislature and the Nevada Supreme Court. She suggested that the subcommittee might approve conceptual legislation that outlines the statistics that should be collected and then allow the Nevada Supreme Court to ascertain how to collect that data.

Assemblyman Anderson said that even being overly concerned and cautious relative to the number of BDRs available and addressing the separation of powers issue, this is clearly information that the Legislature requires in terms of court processing on a regular basis. Although it is a key element in this discussion, it is only part of the puzzle considering the workload and the process of the Court. In the past, the Legislature has requested this kind of statistical information from the Court. It is his understanding that the Nevada Supreme Court and the Legislature have moved to equitable ground where the Court has agreed that some of the information would be provided. Mr. Anderson said he did not want to take a step backwards in gathering statistical information from the Court, but a mechanism is necessary to answer the questions that have been raised regarding:

- Economics—Whether the presence of a defendant's attorney when he or she is first arrested prevents

consideration to seek the death penalty; and

- Racial Bias—The alleged disproportionate use of the death penalty based on ethnic background.

Mr. Anderson said that while he is sensitive to Senator Neal's concerns, at the same time he recognizes that the Nevada Supreme Court and the Legislature have addressed the separation of powers issue repeatedly relative to needing information. Mr. Anderson conceded it might be better for the subcommittee to consider sending a letter to the Nevada Supreme Court, unless it is decided a heavier statement is necessary.

Chairwoman Leslie said she was still leaning toward draft legislation on this issue and asked Ms. Lang to present some general information on the separation of power issue.

Senator Neal asked the subcommittee to consider what it is doing and what it is asking for—statistical information on all death penalty and homicide cases after the fact, not before. Those statistics are already available; a review of death row will reveal who is there. The information also exists in terms of the people who were allegedly killed by those death row inmates. Senator Neal stated that Recommendation No. 3 eliminates the consideration of race in the application of the death penalty. He expressed his opposition to Recommendation No. 5 because it does nothing. Continuing, he said the separation of powers should not be a factor since the information would be gathered after the death penalty has been imposed.

Chairwoman Leslie agreed that the information is available and that the Legislature needs to review those statistics. She did not understand why the Nevada Supreme Court included the Fondi Commission recommendation in Supreme Court Rule (SCR) 250 and then deleted it later. This basic information is not being compiled and additional information is now needed. That is why she supported Recommendation No. 4. Chairwoman Leslie said she did not agree with Senator Neal that Recommendation No. 5 does nothing.

Ms. Lang stated the separation of powers issue is raised in several of the recommendations. Nevada has three branches of government, and within the authority of the judiciary is the power to govern its procedures. Anytime the Legislature asks the Nevada Supreme Court to conduct its courts in a certain manner, that request could potentially affect the separation of powers. There have been cases where the Nevada Supreme Court has stated that there may be overlapping jurisdictions, occasionally permitting the Legislature to make suggestions. Those are gray areas where ultimately it is the Nevada Supreme Court that will decide whether the Legislature has overstepped the boundaries. In addition, if the Nevada Supreme Court passes a rule that conflicts with what the Legislature has done, that ruling would prevail. Consequently, the subcommittee has three options when addressing Court issues:

1. Enact legislation putting into statute specifically how the Legislature expects the Nevada Supreme Court to proceed;
2. Pass a resolution urging the Nevada Supreme Court to implement certain procedures and stating the reasons for these changes; and
3. Send a letter from the subcommittee informing the Nevada Supreme Court that this issue has been studied, which has led to the conclusion that changes are necessary.

Specifically regarding Recommendation No. 5, Chairwoman Leslie stated that if the Legislature enacted a statute related to the collection of this basic information, the Nevada Supreme Court would need to amend SCR 250, its rule that addresses procedures for capital cases. If the Nevada Supreme Court chose not to comply with such legislation, then it could overrule the statute. Ms. Lang said there was a potential that if the Nevada Supreme Court did not want to accept the legislation, it could be held as unconstitutional, it could be ignored, or the Court could handle it in a different manner.

Assemblyman Nolan noted that Ms. Lang had addressed some of his concerns, but he wanted to respond to comments made by Senator Neal. Mr. Nolan stated that the most pertinent and relevant data available must be gathered. Counting the number of death row inmates is not going to provide the information needed, especially relative to race since most are of Caucasian descent. The real issue of race as a determining factor in a case would not be answered. A determination as to why the death penalty was sought in each case is required. Mr. Nolan remarked that Recommendation No. 5 would answer that question.

Chairwoman Leslie referenced Tab E of the Appendix (Exhibit C), which lists the information under discussion for Recommendation No. 5.

Assemblyman Anderson acknowledged that Senator Neal presents a strong case that Recommendation No. 5 by itself might not obtain the desired results. That is the reason why Recommendation No. 4 is necessary. The Chairwoman has already indicated a preference to include the provisions of Recommendation No. 4, which would incorporate the proportionality review question related to instances where the death penalty was not sought. Mr. Anderson admitted that consensus on Recommendation No. 3 was not apparent, but the proportionality review question is an essential element if the statistical data is to prove meaningful. While Senator Neal expects that counting death row inmates will provide the information, it may not be as obvious as anticipated. As the Chairwoman has already pointed out, there is an extensive list in Tab E of the Appendix (Exhibit C) beyond the simple question of race. The action of this subcommittee could send a strong message to the Court. As a history and government teacher, Mr. Anderson remarked that the separation of power question has always perplexed him—the Jeffersonian dilemma that makes the court the strongest of the three powers. Personally, he said he has always rejected that concept since the Legislature still remains the voice of the people and the key to American democracy.

Senator McGinness said he still had concerns. While some may consider that Recommendation No. 5 does not go far enough, there is no compilation of information to analyze unless you start collecting the data. He expressed concern that Recommendation No. 4 may be too broad when comparing “similar cases.” He stated that Recommendation No. 5 proposed gathering the information that is needed and then either Recommendation No. 3 or 4 could be implemented utilizing the information that has been collected.

Senator Neal asked if Senator McGinness was suggesting the adoption of Recommendation No. 5 and then returning to adopt Recommendation No. 4. Senator McGinness replied, “Someday.”

Chairwoman Leslie said she was not willing to sacrifice Recommendation No. 4, personally. Looking for a middle ground, she said that proportionality review is important. She agreed it is difficult to conduct such a review without having a history of the basic information that exists. In the past, the Legislature has experienced resistance to obtaining the information in a useable form. From a practical standpoint, she remarked that she is sensitive to the judicial separation of powers. She emphasized that the Legislature did not want to pass laws that would be rejected by the Court. At the same time, she expected the subcommittee to make a strong statement to the Nevada Supreme Court regarding some sort of proportionality review. Noting hesitation to support legislation on Recommendation No. 4, Chairwoman Leslie queried whether the members might have an interest in a resolution or a letter on this topic.

In an effort to proceed to the other recommendations and to find a compromise position, Assemblyman Anderson suggested that the subcommittee combine Recommendations 4 and 5, which would provide the opportunity for the proportionality review to be discussed in the legislative process. If the subcommittee were to proceed with Recommendation No. 5 alone, the issue of proportionality review would be questioned when the list of informational elements was discussed. However, if the Chairwoman would accept a letter addressing concern for proportionality review in Recommendation No. 4 and the passage of Recommendation No. 5, Mr. Anderson said he was willing to make that motion.

Assemblyman Ocegüera supported Mr. Anderson’s suggestion.

Senator Washington said he supported Recommendation No. 5 but was uncertain whether the proportionality review by the Nevada Supreme Court in Recommendation No. 4 would contribute towards obtaining the desired results. Recommendation No. 5 proposed to gather and disseminate the information that is needed. Senator Washington agreed with Senator McGinness that the proportionality review issue would return.

Chairwoman Leslie referred to Tab E of the Appendix (Exhibit C) and the specific proposed language by Michael Pescetta. She noted that it is always preferred that legislators approve concepts, allowing the bill drafters to ensure that the actual language is consistent with Nevada law.

Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, District of Nevada, Las Vegas, remarked that the first piece of information in Tab E of the Appendix (Exhibit C) is an additional provision

for NRS 177, "Appeals and Remedies After Conviction," essentially the *Revised Code of Washington Annotated* 10.95.120 with minor changes. The provision stipulates a trial court report for every death penalty sentence to be submitted to the Nevada Supreme Court for the purposes of its review, for either excessiveness or proportionality. Mr. Pescetta said that in his experience, there has never been a separation of powers claim made against a requirement such as this. As was pointed out, the original Nevada statute between 1977 and 1985 included proportionality review. The second set of information in Tab E of the Appendix (Exhibit C) is the homicide reporting requirement that has been submitted by habit to the Nevada Supreme Court. Any problem with separation of powers could be eviscerated by having district attorneys' offices make this report to the Legislature.

Mr. Pescetta remarked that the reporting requirement created by the Fondi Commission was slightly different than that in Recommendation No. 5. When the Fondi Commission requirement was added to SCR 250 and then deleted by the Nevada Supreme Court, some members of the Court expected the Legislature to replace it, but that never occurred. Recommendation No. 5 proposes a statistical report that could be made by district attorneys' offices, and the purpose is to provide the Court and the Legislature with the information on the entire range of homicide cases, including the economic, ethnic, and racial composition of the people who receive the death penalty. The report would also provide similar information on those who did not receive the death penalty. Mr. Pescetta respectfully disagreed with Senator Neal, claiming that the information is not available and it would be difficult to backtrack and collect the vast quantity of historical information. In closing, Mr. Pescetta said it is for perspective purposes that this recommendation has been presented.

Senator McGinness said that was one of the reasons why he considers that Recommendation No. 4 is not crucial right now. If a BDR on Recommendation No. 5 is requested and passes in the next session, it would be October 1, 2003, before it would take effect, if that early. Information might not be returned until October 2004. An opportunity for the Senate or Assembly Judiciary Committee to ask for a BDR for legislation similar to what is suggested in Recommendation No. 4 is years away. Senator McGinness asked Mr. Pescetta if a report was ever submitted based on the previous proportionality review statute. Mr. Pescetta responded that there was never any reporting requirement of that information. The Nevada Supreme Court vacated two death sentences while the pre-1985 statute was in effect on disproportionality grounds. The Nevada Supreme Court essentially created a "seat-of-the-pants" type of disproportionality analysis by reviewing other cases it identified. Recommendation No. 5 attempts to provide details on the assumption that there would be considerable more information. Mr. Pescetta emphasized that proportionality analysis can be mandated as it was in the pre-1985 statute even without any specification of what particular information the Court has to review. It may be a clumsy way to proceed, but it is possible. Senator McGinness said he was not adamant about proceeding with Recommendation No. 4 since there is no assurance that it would occur. Senator McGinness insisted that the first step is to obtain the information.

**SENATOR NEAL MOVED THAT THE SUBCOMMITTEE ADOPT RECOMMENDATION NO. 5 WITH THE PROPOSED LANGUAGE PRESENTED IN TAB E OF THE APPENDIX TO THE WORK SESSION DOCUMENT TO BE USED BY THE BILL DRAFTER AS A GUIDELINE ONLY. SENATOR MCGINNESS SECONDED THE MOTION, WHICH PASSED UNANIMOUSLY.**

Chairwoman Leslie entertained a motion on Recommendation No. 4:

**ASSEMBLYMAN ANDERSON MOVED THAT THE SUBCOMMITTEE DRAFT A LETTER TO THE NEVADA SUPREME COURT URGING THE COURT TO CONSIDER THE ISSUES OF PREJUDICE AND ECONOMIC BIAS IN CAPITAL CASES AND TO CONSIDER IMPOSING A PROPORTIONALITY REVIEW OF SIMILAR CASES IN WHICH THE DEATH PENALTY WAS AND WAS NOT SOUGHT. SENATOR NEAL SECONDED THE MOTION.**

Assemblyman Anderson said he felt strongly that this question of bias must be kept in front of the Court because if there is a possibility that it exists, the Nevada Supreme Court should be concerned.

Chairwoman Leslie supported the motion. She agreed it is important to present the proportionality review issue to the Nevada Supreme Court; consideration of such matters may take a long time. She also concurred with Senator McGinness that gathering information is required to perform a good proportionality review. Chairwoman Leslie called for the vote.

## THE MOTION PASSED UNANIMOUSLY.

Chairwoman Leslie returned discussion to Recommendation No. 3. She said she sensed there was no consensus to proceed with a racial justice act. She entertained a motion on Recommendation No. 3. There being none, no action was taken on Recommendation No. 3.

### AGGRAVATING AND MITIGATING CIRCUMSTANCES

**RECOMMENDATION NO. 6** — *Draft legislation to amend Nevada’s list of 14 aggravating circumstances for first-degree murder under NRS 200.033.*

**OPTION A** — *Draft legislation to replace the current list of 14 aggravating circumstances under NRS 200.033 with the five aggravating circumstances recommended by the Illinois Report of the Governor’s Commission on Capital Punishment. (Proposed by JoNell Thomas, private attorney, and Michael Pescetta)*

#### Background Information for Recommendation No. 6 (OPTION A)

**Tab G** — Draft language (entitled “Proposal 1”) submitted by JoNell Thomas and Michael Pescetta specifically listing the five proposed new aggravating circumstances recommended by the Illinois Commission on Capital Punishment.

**Tab H** — Memorandum by JoNell Thomas providing additional information on aggravating and mitigating circumstances.

**Tab I** — NRS 200.033 (current Nevada law on circumstances aggravating first-degree murder).

**OPTION B** — *Draft legislation to narrow the scope of the current aggravating circumstances under NRS 200.033. (Proposed by JoNell Thomas and Michael Pescetta)*

#### Background Information for Recommendation No. 6 (OPTION B)

OPTION B suggests limiting language and the deletion of certain aggravators (including the deletion of the following aggravators: more than one person, felony murder, avoiding arrest, random and without motive, and nonconsensual sexual penetration) but does not rise to the level of the suggested changes under OPTION A.

**Tab J** — Draft language (entitled “Proposal 2”) submitted by JoNell Thomas and Michael Pescetta proposing limiting language under NRS 200.033.

**OPTION C** — *Draft legislation to delete the aggravating circumstances identified as the most deficient during testimony. (Proposed by JoNell Thomas and Michael Pescetta)*

#### Background Information for Recommendation No. 6 (OPTION C)

OPTION C is a modification to remove some of the aggravating factors identified as the most deficient including: the deletion of the “at random and without apparent motive” circumstance; limiting the torture factor to instances in which actual torture has occurred in the course of an intentional killing; and limiting the scope of the felony-murder and other factors to apply only to actual killers who intended to kill the victim.

During testimony on the issue of Nevada’s aggravating circumstances, much discussion centered

on the deletion of the following two aggravators: murder committed by a person who knowingly created a great risk of death to more than one person [NRS 200.033(3)] and murder committed upon one or more persons at random and without apparent motive [NRS 200.033(9)].

**Tab K** — Draft language (entitled “Proposal 3”) submitted by JoNell Thomas and Michael Pescetta proposing limiting language under NRS 200.033.

Mr. Anthony remarked that the subcommittee is not limited to the three options. They are presented for discussion. Information related to Option A is found under Tab G in the Appendix (Exhibit C); information related to Option B is found under Tab J in the Appendix; and information related to Option C is found under Tab K in the Appendix.

Continuing, Mr. Anthony reminded the subcommittee that considerable testimony was heard on two aggravators in particular: (1) the murder was committed by a person who knowingly created a great risk of death to more than one person (NRS 200.033(3)); and (2) the murder was committed upon one or more persons at random and without apparent motive (NRS 200.033(9)).

Senator Neal asked if Mr. Anthony was suggesting that Nevada does not have an intense standard in the law as it relates to capital murder. Mr. Anthony replied he was not suggesting any specific intent. He was merely presenting proposed language made during the hearings.

Senator Washington asked for further clarification on Options B and C. Mr. Anthony said that Option B suggests limiting language and the deletion of certain aggravators. Drawing attention to the list of current aggravators in NRS 200.033 included under Tab I in the Appendix (Exhibit C), Option B proposes to eliminate Aggravators 3, 4, 5, 9, and 13, with amending language to 1, 2, 8, 10, and 14. Option C proposes to delete Aggravators 4, 8, and 9.

Chairwoman Leslie encouraged discussion among the subcommittee related to whether Nevada should amend or eliminate current aggravators, consider utilizing Illinois’ five aggravators, or delete the two aggravators (3 and 9) that Associate Justice Robert E. Rose, Nevada Supreme Court, considered the most problematic.

Senator Washington concurred with Associate Justice Rose’s position to eliminate Aggravators 3 and 9.

Assemblyman Nolan said he understood Aggravator 3. Commenting on Aggravator 9, Mr. Nolan said he was concerned there might be a loophole providing an opportunity for an offender to escape just because he or she does not admit to a motive for killing the victim.

Chairwoman Leslie said she was uncertain that the prosecution depended on the defendant to establish motive. There are other methods to make that determination. Further, she said she supported eliminating Aggravators 3 and 9 based on the testimony heard during the hearings.

Senator Neal said he disagreed with Assemblyman Nolan’s comments relative to Aggravator 9. In any crime that is committed, one of the key elements is the motive. If the prosecuting attorney cannot establish a motive, it is left to the discretion of others to determine. Senator Neal said the jury should not be required to uncover the motive of any particular crime. The motive should be determined at the onset by the investigative officer and should be included in the charge. Senator Neal said he heard Mr. Nolan suggesting that in order to put a person to death, a motive would not be necessary; just the crime itself would be sufficient. French author Victor Hugo believed if a person violated the law, he was guilty. Senator Neal remarked that today’s society has progressed beyond that particular point. It should be necessary to determine the motivation of a person committing certain acts and to provide society an opportunity to attempt to address those motives.

Assemblyman Nolan noted that he and Senator Neal were saying the same thing. For every crime there is a motive, and in this case, the crime of murder where somebody has taken the life of another human being is being discussed. This particular provision would suggest that the death penalty could be sought in a case where “murder was committed upon one or more at random without an apparent motive.” Mr. Nolan questioned what kind of person would murder other human beings without any motivation. In his personal opinion, if someone is murdering people

without any motive, just to be killing them, then that individual falls right in line with these other factors.

Senator Neal said if Aggravator 9 is removed from statute, then the converse becomes true. Right now it is “without an apparent motive” that someone can be convicted of a random slaying. When Aggravator 9 is removed, a motive is required.

Assemblyman Nolan said the subcommittee was not discussing convicting a person; the individual was already convicted. This discussion related to whether the death penalty could be imposed on a person who killed without a motive.

Assemblyman Anderson commented that the prosecutor initially determines the aggravating circumstances before charges are filed and the death penalty is sought. It is not presented in the secondary trial (penalty hearing), but rather in the primary trial (guilt phase). Therefore, by reducing the number of aggravating circumstances, it lessens the number of cases that are death eligible. He said he did not follow Senator Neal’s argument on Aggravator 9.

Senator Neal clarified his opinion. If the “without an apparent motive” aggravator were removed, every circumstance would require a motive. To require a motive, there are fewer chances that the person would be charged with a capital offense.

Assemblyman Anderson restated his understanding of Senator Neal’s comments. By removing Aggravator 9, the district attorney would be required to identify a specific motive. Senator Neal responded in the affirmative. Mr. Anderson stated that currently, with this aggravator in statute, the district attorney does not have the burden of identifying a specific reason unless it is readily apparent to him. Senator Neal agreed.

Chairwoman Leslie pointed out that the death penalty is intended as punishment for the most heinous and egregious crimes. The testimony heard disclosed how almost any felony murder could be considered eligible for capital punishment. She queried whether this gave too much discretion to the prosecuting agency, which returns to the question of proportionality review. Eligibility for the death penalty depends on where the murder is committed and how the defendant is charged. Excluding prosecutors, the majority of those who testified agreed Nevada should reduce the number of aggravators. The Illinois Commission, after much study, came up with five aggravators (Tab G of the Appendix [Exhibit C]). Nevada has 14 aggravators under current law (Tab I of the Appendix).

In an effort to refocus the discussion, Chairwoman Leslie questioned whether the subcommittee’s recommendation to the full legislative body should: (a) address this area in Nevada law; (b) eliminate Aggravators 3 and 9; or (c) change other aggravators. Personally, she remarked she would like to reduce the number of aggravators by at least the two—Aggravators 3 and 9. She said she supported Option B, which goes further than Option C in deleting aggravators. This issue will be fully debated by both judiciary committees during the session, where all 14 aggravators will probably be reviewed.

Assemblyman Anderson agreed that if the subcommittee recommends eliminating Aggravators 3 and 9, the members have attempted to clarify the statute and have presented the issue for the judiciary committees. In addition, examination of the whole question of which aggravators are appropriate could lengthen the list.

**SENATOR WASHINGTON MOVED THAT THE SUBCOMMITTEE ADOPT OPTION C, RECOMMENDATION NO. 6.**

Chairwoman Leslie questioned whether Senator Washington wanted to adopt the specific language under Tab K of the Appendix (Exhibit C) or conceptually eliminate Aggravators 3 and 9. Senator Washington said he would leave it to the legal staff to draft the correct language; he wished to adopt conceptually.

Ms. Lang asked if the language under Tab K of the Appendix (Exhibit C) was to be used or if language was to be used to specifically remove Aggravators 3 and 9. Ms. Lang noted that Option C does not eliminate Aggravator 3. She would require further detail to ascertain whether to modify the existing aggravators or eliminate the two previously mentioned aggravators. Senator Washington clarified that he wanted to eliminate Aggravator 9 and modify Aggravator 3. Chairwoman Leslie emphasized that his intent should be the elimination of both aggravators.

Senator Washington restated his motion:

**SENATOR WASHINGTON MOVED TO DRAFT LEGISLATION TO AMEND NEVADA'S LIST OF 14 AGGRAVATING CIRCUMSTANCES FOR FIRST-DEGREE MURDER BY ELIMINATING THE TWO AGGRAVATORS AS STATED IN NRS 200.033(3) AND NRS 200.033(9). SENATOR MCGINNESS SECONDED THE MOTION.**

Senator Neal asked, in light of the discussion on Aggravator 3, whether Senator Washington would want to eliminate Aggravator 11, "The murder was committed upon a person because of the actual or perceived race, color, religion, national origin, physical or mental disability or sexual orientation of that person." Senator Washington replied that was not his intent, and he wished to retain his original motion.

Assemblyman Anderson, looking at the original list of aggravators in NRS 200.033, asked for further clarification of the motion. Chairwoman Leslie replied that the motion before the subcommittee was the deletion of Aggravators 3 and 9.

Senator Neal asked whether this motion was made at the suggestion of Associate Justice Rose. Chairwoman Leslie recollected that as correct.

Senator McGinness reiterated that when this recommendation comes before the judiciary committees, all the aggravators would be discussed. Chairwoman Leslie said she supported Senator Washington's motion since she knew the judiciary committees would give it a full hearing and debate during the session.

Chairwoman Leslie restated the motion and called for the vote.

**THE MOTION FAILED FOR LACK OF A MAJORITY OF THE ASSEMBLY MEMBERS BY A 5 TO 2 VOTE WITH ASSEMBLYMEN NOLAN AND OCEGUERA VOTING NO.**

Chairwoman Leslie entertained a second motion.

**ASSEMBLYMAN ANDERSON MOVED TO DRAFT LEGISLATION TO AMEND NEVADA'S LIST OF 14 AGGRAVATING CIRCUMSTANCES FOR FIRST-DEGREE MURDER BY DELETING THE AGGRAVATOR AS STATED IN NRS 200.033(9). SENATOR WASHINGTON SECONDED THE MOTION.**

Assemblyman Nolan reiterated his concern relative to retaining Aggravator 9. The prosecutors need the latitude in murder cases whether or not a motive was demonstrated.

Chairwoman Leslie commented that Mr. Nolan was in favor of eliminating Aggravator 3 but not Aggravator 9. Mr. Nolan replied in the affirmative.

Based on his personal experience, Assemblyman Oceguela said his position is clear; he did not favor changing any of the aggravators. Chairwoman Leslie noted that Mr. Oceguela was opposed to any modification whatsoever.

**ASSEMBLYMAN ANDERSON WITHDREW THE MOTION.**

Chairwoman Leslie acknowledged Mr. Anderson's withdrawal and went on to make another motion.

**ASSEMBLYWOMAN LESLIE MOVED TO TO DRAFT LEGISLATION TO AMEND NEVADA'S LIST OF 14 AGGRAVATING CIRCUMSTANCES FOR FIRST-DEGREE MURDER BY ELIMINATING THE AGGRAVATOR AS STATED IN NRS 200.033(3). SENATOR NEAL SECONDED THE MOTION.**

Chairwoman Leslie commented that this is an important topic that needs legislative review. However, the national debate on the death penalty considers that the number of aggravators in the NRS contribute to the fact that Nevada has the highest per capita rate of capital punishment in the country.

**THE MOTION PASSED BY A VOTE OF 6 TO 1 WITH ASSEMBLYMAN OCEGUERA**

**VOTING NO.**

Senator Neal noted that for those subcommittee members still concerned about the current list of aggravators, use of a personal BDR could address their concerns. Assemblywoman Leslie agreed that any individual legislator or committee Chairwoman could submit a BDR.

***RECOMMENDATION NO. 7 — Draft legislation to amend the current list of mitigating factors under NRS 200.035. (Proposed by Michael Pescetta)***

- *By adding a specific mitigating factor to NRS 200.035 that the defendant suffers from mental illness or has a history of psychological disturbance.*
- *By adding a specific mitigating factor to NRS 200.035 for the existence of lingering doubt by a juror as to the guilt of the criminal offender or of any aggravating factor. (Proposed by Michael Pescetta and The Constitution Project, which recommended a jury instruction on lingering doubt)*
- *By adding a requirement that the court list all of the “other” mitigating factors under NRS 200.035(7) individually and submit them to the jury as part of the verdict forms.*

**Background Information for Recommendation No. 7**

The mitigating factor for the existence of lingering doubt may state “If you have any lingering doubt as to the defendant’s guilt of the crime or any element of the crime, even though that doubt did not rise to the level of a reasonable doubt when you found the defendant guilty, you may consider that doubt as a mitigating circumstance weighing against a death sentence for the defendant.”

**Tab L — NRS 200.035 (current Nevada law on circumstances mitigating first-degree murder).**

Mr. Anthony read Recommendation No. 7, noting that NRS 200.035, “Circumstances mitigating first degree murder,” was included in the Appendix (Exhibit C) under Tab L.

Senator Washington asked for clarification as to what effect the addition of each proposed factor would have on the current list of mitigators if adopted, and how the prosecution or defense could use them. Ms. Lang commented that NRS 200.035 lists the mitigating circumstances that a jury may look at when rendering the sentence. Each bullet point would add an additional consideration for the jury in determining if the mitigating circumstances outweigh the aggravating circumstances.

Senator Neal asserted it was permissive rather than mandatory.

Chairwoman Leslie stated that mental illness can currently be considered under the “other” mitigating factors (NRS 200.035(7)). The recommendation proposes to create a separate mitigating circumstance for mental illness. Ms. Lang noted that the jury has the opportunity to consider any “other” mitigating circumstances under NRS 200.035(7). In addition, NRS 200.035(2) stipulates “extreme mental or emotional disturbance” which could arguably include mental illness.

Pertaining to lingering doubt of a juror, Ms. Lang said this would allow jurors to consider any lingering doubt as a mitigating circumstance regarding the sentencing of the defendant. It is different than the other mitigating factors, which look at the circumstances of the crime.

Senator Washington asked for clarification regarding a juror’s lingering doubt relative to whether the defendant committed the crime. Ms. Lang stated the crime must be proven beyond a reasonable doubt; this recommendation does not change that standard. Presumably it allows the jurors with lingering doubt as to the guilt of the defendant to consider that as a mitigating factor.

Chairwoman Leslie expressed concern since the other mitigators go to the defendant, while this pertains to the jury.

Ms. Lang agreed. The current seven mitigators pertain to the defendant and the circumstances surrounding the act of the crime; this recommendation goes to the juror's state of mind.

Assemblyman Anderson stated that the jury has already determined that the defendant is guilty; however, they do not agree with the prosecution as to whether the death penalty should be applicable. That creates a lingering doubt. This proposal does not change the standard to establish guilt beyond a reasonable doubt. If there is a "lingering" thought, the juror should have voted no regarding the defendant's guilt.

Senator Neal said he was prepared to make a motion to adopt the first and third bullet points. Chairwoman Leslie asked Senator Neal to reserve that motion until Senator Washington's questions were answered.

Regarding listing "other" mitigating factors under NRS 200.035(7), Ms. Lang said this recommendation would require the court to list other mitigating circumstances individually and submit them to the jury. Chairwoman Leslie queried whether this would be a jury instruction. Ms. Lang replied it would not be a jury instruction, although the background information is presented in that form.

Senator Washington questioned who would be making the list, the jury or the court for the jury. Ms. Lang said the court—the judge—would create the list, and it would be presented to the jury. Ms. Lang said she was uncertain how the current practice is carried out, whether it is presented by the court to the jurors or if it is open for the jurors to decide in their debate of the sentence. The proposed language would clarify that the court would create the list so that anybody reviewing the particular case would know specifically what mitigating circumstances were considered.

Assemblyman Nolan said it is important to have a clear understanding of this practice. He asked that a member of the audience be questioned regarding his experience with this procedure.

Mr. Greco, previously identified on page 4 of these minutes, said that under current Nevada law, there is no requirement that the verdict form filled out by the jury specifically list which, if any, mitigating factors it found. The answer is that the jury does not have to list it now; this proposal would require the jury to make that list. Neither the U.S. Supreme Court nor the Nevada Supreme Court ever stated that the jury must give a complete listing of the mitigating factors that it found.

To clear up any confusion regarding mental illness, Mr. Greco remarked that NRS 200.035(2) is limited to the time of the murder. In order for this mitigator to be applicable, the murder had to be committed "while the defendant was under the influence of extreme mental or emotional disturbance." The first bullet point in the recommendation suggests that a history of mental illness or psychological disturbance existed that could include mental illness at the present time. This would not change current standards in a capital case; this portion of the recommendation is unnecessary. In every capital penalty hearing, if there is any evidence of mental illness or disturbance, it is included under NRS 200.035(7).

In terms of lingering doubt as proposed in the second bullet point, Mr. Greco said this concept is very confusing for the lay individual. On the issue of guilt, it must be proven beyond a reasonable doubt that the defendant committed first-degree murder in order to be eligible for the death penalty. That does not mean to an absolute certainty or beyond all doubt, which is rare unless the defendant confesses to the crime. Continuing, Mr. Greco stated that when determining the penalty, the jury could consider lingering doubt in rendering that sentence. In Washoe County, whenever the defense attorney asks for lingering doubt instructions at the penalty phase, it is given; no judge has rejected that request. The U.S. Supreme Court recognizes the lingering doubt concept. In closing, Mr. Greco remarked that when the jurors are not certain, consideration of lingering doubt in rendering the penalty is appropriate.

Senator Neal voiced his concern at the explanation of the last bullet point regarding creating a list of "other" mitigating circumstances. Senator Neal remarked it seemed to suggest that the Legislature could only legislate public policy at the direction of the Court. In Senator Neal's opinion, that is totally erroneous. Mr. Greco shared a current case situation and went on to say that the courts have been free in allowing the Washoe County defense attorneys to argue almost any "other" mitigating circumstance in an attempt to avoid reversal on appeal.

**SENATOR NEAL MOVED TO DRAFT LEGISLATION TO AMEND THE CURRENT LIST OF MITIGATING FACTORS UNDER NRS 200.035 BY ADDING SPECIFIC MITIGATING**

**FACTORS TO NRS 200.035 THAT: (1) THE DEFENDANT SUFFERS FROM MENTAL ILLNESS OR HAS A HISTORY OF PSYCHOLOGICAL DISTURBANCE; AND (2) THE COURT LIST ALL OF THE "OTHER" MITIGATING FACTORS UNDER NRS 200.035(7) INDIVIDUALLY AND SUBMIT THEM TO THE JURY AS PART OF THE VERDICT FORMS. ASSEMBLYMAN ANDERSON SECONDED THE MOTION. THE MOTION PASSED 6 TO 1 WITH ASSEMBLYMAN NOLAN VOTING NO.**

***RECOMMENDATION NO. 8—Draft legislation to amend NRS 200.030(4)(a) to provide that aggravating factors must outweigh mitigation in order for the jury to consider the death penalty as a sentencing option. (Proposed by Michael Pescetta)***

#### **Background Information for Recommendation No. 8**

According to testimony, current Nevada law provides that the jury may find the defendant eligible to receive the death penalty if mitigating factors do not outweigh aggravating ones, and proponents of the recommendation argued that there may be constitutional problems with imposing a burden on the defense to avoid the death penalty.

**Tab M —** NRS 200.030 (current Nevada law on degrees of murder and penalties).

Assemblyman Anderson said the recommendation was unnecessary.

Senator Neal asked for clarification as to whether aggravating factors outweigh mitigation by the numbers. Ms. Lang said it is her understanding that it is not done by the numbers; the jury decides whether mitigators outweigh the aggravators.

Continuing, Senator Neal remarked there would be 12 aggravators (if Recommendation No. 6 is passed) and only 8 mitigators (if Recommendation No. 7 is passed) and queried how the process is carried out. Mr. Greco agreed with Ms. Lang that consideration of mitigators and aggravators is not a number calculation. The jury looks at the aggravating factors in totality, looks at the mitigating factors in totality, and then weighs them. How many there are of one or the other does not matter. It is the total weight of the aggravators and mitigators that are balanced against one another.

In conference with Ben Graham, Chief Deputy District Attorney, Office of the Clark County District Attorney, Mr. Greco, previously identified on page 4 of these minutes, stated that specific aggravators must be listed and not all 14.

Senator Neal stated that specific aggravators are listed by the prosecution, the mitigating circumstances are presented by the defense, and the jury makes a judgment as to one outweighing the other and makes their decision based upon that information. Mr. Greco agreed that is a factual finding that is left to the province of the jury.

Chairwoman Leslie entertained a motion on Recommendation No. 8. There being none, no action was taken on Recommendation No. 8.

#### ***COMPETENCY AND FUNDING OF COUNSEL***

***RECOMMENDATION NO. 9 — Draft legislation to create an independent authority to recruit, select, train, monitor, support, and assist attorneys who represent defendants charged with a capital crime. (Proposed by The Constitution Project and the Justice Project)***

#### **Background Information for Recommendation No. 9**

The recommendation states that the independent authority should be composed of attorneys knowledgeable about criminal defense in capital cases and who will operate independent of conflicts of interest with judges, prosecutors, or any other parties. This authority should adopt and enforce minimum standards for appointed counsel at all stages of capital cases, including

state or federal post-conviction and certiorari. An existing statewide public defender office or other assigned counsel program should meet the definition of a central appointing authority.

**Fiscal Note** — It can be presumed that the proposed recommendation will have a fiscal impact, which has not been determined. If the bill is introduced, a fiscal note will be requested.

**Tab N** — The Constitution Project recommendation on the creation of an independent appointing authority.

Chairwoman Leslie noted that this is an area where the Nevada Supreme Court has authority.

Assemblyman Anderson said in fairness to everyone concerned in a death penalty case, both the defense and prosecution should have the best counsel and the most complete preparation possible. He suggested sending a letter to the Nevada Supreme Court. Mr. Anderson expressed concern as to whether the Legislature would desire to address this proposal and how it could mandate this concept. Certainly, competency of counsel should be a concern for the Court and the legal bar.

Assemblyman Nolan concurred with Mr. Anderson and noted that Recommendations 9, 10, and 11 all attempt to ensure the competency of the defense counsel. He stated there are some very good proposals contained therein. He expressed his desire to do more than urge the adoption of these recommendations. Acknowledging that he did not know what the appropriate method is to address this topic, he suggested drafting the subcommittee's intent to the public defenders' offices in the respective counties, requesting their assistance.

Chairwoman Leslie agreed that Recommendations 10 and 11 should be part of the current discussion. One option available is a legislative resolution, which would include the subcommittee's intent and its justification. She stated she hesitated doing nothing since these issues have been presented repeatedly in the hearings.

Assemblyman Anderson asked to include discussion on Recommendations 10 and 11.

***RECOMMENDATION NO. 10—Adopt guidelines and minimum qualifications for counsel participating in capital cases. (Proposed by Willard Ewing, Deputy Public Defender, Office of the Clark County Public Defender)***

***OPTION A—Draft a resolution urging the Nevada Supreme Court to amend Supreme Court Rule 250 by adopting the recommended minimum qualifications of counsel in capital cases to:***

- *Require that trial counsel meet the following minimum requirements: has (1) acted as defense counsel in no less than seven felony trials, at least two of which involved violent crimes and including one open murder case tried before a jury; (2) acted as defense cocounsel in at least two death penalty trials to verdict; (3) been licensed to practice law for at least three years and within the previous eighteen months; and (4) completed a minimum of eight hours of continuing legal education on the subject of defending capital cases.*
- *Require that appellate counsel meet the following requirements: has (1) acted as defense counsel in no less than seven felony appeals, at least two of which involved violent crimes and including one murder case; (2) acted as defense counsel in at least one death penalty case; (3) been licensed to practice law for at least three years; and (4) completed a minimum of eight hours of continuing legal education on the subject of defending capital cases.*
- *Require that post-conviction relief counsel meet the following requirements: has (1) acted as defense counsel in no less than seven post-conviction proceedings, at least two of which involved violent crimes and including one murder case; (2) previously acted as defense cocounsel in at least one death penalty trial, on appeal, or in post-conviction proceedings; (3) conducted at least two evidentiary hearings in post-conviction proceedings; (4) been licensed to practice law for at least three years; and (5) completed a minimum of eight hours of continuing legal education on the subject of defending capital cases.*

***OPTION B—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to amend Supreme Court Rule 250 by adopting the recommended minimum qualifications of counsel (described under OPTION A) in capital cases.***

### **Background Information for Recommendation No. 10**

**Tab O** — Memorandum by Willard Ewing regarding recommendations on competency of counsel, funding of counsel, and adequacy of resources.

**Tab P — Nevada Supreme Court Rule 250.**

Providing a brief explanation, Mr. Anthony noted that background information was included in Tabs O and P of the Appendix (Exhibit C).

***RECOMMENDATION NO. 11—Adopt changes to procedural default rules in capital cases. (Proposed by Willard Ewing)***

***OPTION A—Draft a resolution urging the Nevada Supreme Court to amend Supreme Court Rule 250 by adding “Due to the unique severity of capital sentences and the complexity of capital litigation, the Nevada Supreme Court shall not apply procedural default rules to bar consideration of constitutional issues on direct appeal or in collateral proceedings.”***

***OPTION B—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to amend Supreme Court Rule 250 by adding “Due to the unique severity of capital sentences and the complexity of capital litigation, the Nevada Supreme Court shall not apply procedural default rules to bar consideration of constitutional issues on direct appeal or in collateral proceedings.”***

**Background Information for Recommendation No. 11**

**See Tab O — Memorandum by Willard Ewing regarding recommendations on competency of counsel, funding of counsel, and adequacy of resources.**

Chairwoman Leslie suggested that a letter be sent to the Nevada Supreme Court urging its consideration of all three recommendations (9, 10, and 11).

Assemblyman Anderson agreed, stating that Recommendation No. 9, the creation of an independent authority, is a concept that the Court and the Legislature may want to consider in the future. Considering current fiscal restraints, it might not be judicious to move in that direction at this time. Clearly, the question is raised. Recommendation No. 10, increasing the requirements, would assure the people of Nevada that if Nevada continues executions, the defense was provided with as many opportunities as possible to ensure proper counsel. In closing, Mr. Anderson said that while the costs may increase up front, the number of appeals would be reduced in the long run.

Chairwoman Leslie noted that a motion was not needed to send a letter. She asked if there were any objections to sending such a letter. There being none, she directed staff to write a letter on Recommendations 9, 10, and 11.

***RECOMMENDATION NO. 12—Adopt a new standard for ineffective assistance of counsel at the trial level. (Proposed by Willard Ewing and The Constitution Project)***

***OPTION A—Draft legislation to adopt a new standard for ineffective assistance of counsel stating “Counsel should be required to perform at the level of an attorney reasonably skilled in the specialized practice of capital representation, be zealously committed to the capital case, and possess adequate time and resources to prepare.” (Note: These are standards from the National Legal Aid and Defenders Association [NLADA].)***

***OPTION B—Draft a resolution urging the Nevada Supreme Court to appoint a committee to explore adopting a Supreme Court rule outlining the standard for ineffective assistance of counsel as defined by the NLADA (in OPTION A).***

***OPTION C—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to appoint a committee to explore adopting a Supreme Court rule outlining the standard for ineffective assistance of counsel as defined by the NLADA (in OPTION A).***

**Background Information for Recommendation No. 12**

The Constitution Project recommendation urges the replacement of the current *Strickland v.*

*Washington* standard (which requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence) for ineffective assistance of counsel with the NLADA standards (described above). The recommendation further states that “Once a defendant has demonstrated that his or her counsel fell below the minimum standard of professional competence in death penalty litigation, the burden should shift to the state to demonstrate that the outcome of the sentencing hearing was not affected by the attorney’s incompetence.”

**See Tab O** — Memorandum by Willard Ewing regarding recommendations on competency of counsel, funding of counsel, and adequacy of resources.

**Tab Q** — The Constitution Project recommendation to replace the *Strickland v. Washington* standard for ineffective assistance of counsel.

Mr. Anthony said The Constitution Project recommendation urges the replacement of the current *Strickland v. Washington* (466 U.S. 668 (1984)) standard for ineffective assistance of counsel (which requires the defendant to show both that counsel’s performance was deficient and that the deficient performance undermined the reliability of the conviction or sentence) with the current NLADA standards (outlined under Option A).

Chairwoman Leslie said this clearly falls under the authority of the Nevada Supreme Court. Recommendation No. 12 could be added to the letter previously discussed.

Senator McGinness said Recommendation No. 12 was a good idea but was concerned about how it could be put into legislation that someone be “zealously committed . . . and possess adequate time and resources to prepare.”

Chairwoman Leslie acknowledged there was no interest to proceed with Recommendation No. 12.

***RECOMMENDATION NO. 13—Adopt requirements for a defense team for capital cases that are not handled by a public defender’s office. (Proposed by Willard Ewing)***

***OPTION A—Draft legislation to require that a defense team on a capital case not handled by a public defender’s office include: (1) two attorneys (in compliance with Nevada Supreme Court Rule 250); (2) an investigator; (3) a mitigation specialist or reasonable equivalent; (4) a forensic psychiatrist or forensic psychologist; and (5) other defense team members as deemed necessary, upon motion of defense counsel.***

***OPTION B—Draft a resolution urging the Nevada Supreme Court to adopt a Supreme Court rule to require that a defense team on a capital case not handled by a public defender’s office include the above (OPTION A) requirements.***

***OPTION C—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to adopt a Supreme Court rule to require that a defense team on a capital case not handled by a public defender’s office include the above (OPTION A) requirements.***

### **Background Information for Recommendation No. 13**

**Fiscal Note** — It can be presumed that the proposed recommendation will have a fiscal impact, which has not been determined. If the bill is introduced, a fiscal note will be requested.

Mr. Anthony noted that this recommendation might affect subsection 2(f) of SCR 250, which would require the defense teams on capital cases to include additional staff as necessary for the defense of the case.

***RECOMMENDATION NO. 14—Draft legislation to amend the presumptive limits on attorney fees and ancillary expenses prescribed by NRS 7.125 and 7.135 so that they do not apply to capital cases. Current Nevada law under NRS 7.125 limits the fees for appointed counsel in matters where the most serious crime is a felony punishable by death to \$12,000. Similarly, compensation to any investigative expert or other provider of services for the defense is limited to \$300 under NRS 7.135. (Proposed by Willard Ewing)***

### **Background Information for Recommendation No. 14**

Current Nevada law under NRS 7.125 limits the fees for appointed counsel in matters where the most serious crime is a felony punishable by death to \$12,000. Similarly, compensation to any investigative expert or other provider of services for the defense is limited to \$300 under NRS 7.135.

**Fiscal Note** — It can be presumed that the proposed recommendation will have a fiscal impact, which has not been determined. If the bill is introduced, a fiscal note will be requested.

**Tab R** — NRS 7.125 and 7.135.

Mr. Anthony noted copies of the current NRS sections are included under Tab R of the Appendix (Exhibit C).

Assemblyman Anderson said the question of funding needs to be addressed at some time. Having a larger team would be helpful to a defendant. When those defense attorneys are not compensated adequately now, Mr. Anderson expressed his opinion that underpaying a larger group of people is not an appropriate recommendation.

Assemblyman Ocegüera agreed with Mr. Anderson. The fiscal impact of Recommendation No. 13 would be huge and would place a burden on the rural counties. However, if the fees and expenses are increased, as proposed in Recommendation No. 14, that might provide an opportunity to better perform that function.

Chairwoman Leslie concurred on Recommendation No. 14. She noted that staff was directed to research when the Legislature last raised those fees. She informed the subcommittee that the last increase was enacted in 1991 when the cap had been \$6,000 and it was doubled to \$12,000. Chairwoman Leslie remarked that the current specified caps are not sufficient.

Senator Neal said these recommendations attempt to provide the best representation for the defendant eligible for a sentence of death. That particular process should provide those individuals with the best counsel possible including the funds necessary to function properly. Senator Neal said those individuals under discussion are in the public defenders' offices. The Legislature needs to ensure that they are adequately paid and get the necessary information and investigations completed to aid the person under their care in terms of capital charges. In his opinion, apparently \$12,000 is inadequate compensation for death penalty cases, which might lead to further issues of underrepresentation. If the subcommittee does not address this issue, then all other recommendations by this subcommittee would be for naught. Senator Neal said that the subcommittee would do a disservice to this whole process if it did not consider this particular change.

Chairwoman Leslie agreed the subcommittee should take a stand. Even knowing that the counties that pay these fees will view this as an unfunded mandate, clearly \$12,000 for appointed counsel is insufficient to represent a defendant on a capital crime.

Senator Neal said that once a person is charged with a capital crime, that person is charged in the name of the State of Nevada, not the county. It is a crime against the State of Nevada. The State has an obligation to see that those attorneys who represent these defendants are paid adequately.

Chairwoman Leslie asked if there might be an interest to combine Recommendation Nos. 13 and 14. If the subcommittee submits a BDR to the Legislature regarding raising the fees in Recommendation No. 14, then perhaps it makes sense to consider Recommendation No. 13.

Assemblyman Anderson remarked that Recommendation No. 14 does not address public defenders but outside counsel. A relationship between Recommendation Nos. 13 and 14 can clearly be drawn. Since the Nevada Supreme Court has already adopted in SCR 250 that public defenders should be two attorneys, the subcommittee would not be encroaching on the separation of powers doctrine with these recommendations.

Ms. Lang said this would not be a direct conflict with SCR 250. The Nevada Supreme Court has authority over the attorneys of Nevada. She could not state with any certainty whether the Court would view Recommendation Nos. 13 and 14 as stepping into its territory.

Assemblyman Anderson asked if it was possible to draft legislation or a resolution that would agree with SCR 250 (Recommendation No. 13, Option B) increasing the number of staff on a defense team and raise the funding amounts. Ms. Lang said it would require two separate pieces of legislation. Mr. Anderson emphasized that salaries need to be increased to \$20,000.

Chairwoman Leslie entertained a motion on Recommendation Nos. 13 and 14.

**ASSEMBLYMAN ANDERSON MOVED TO DRAFT LEGISLATION TO REQUIRE THAT A DEFENSE TEAM ON A CAPITAL CASE NOT HANDLED BY A PUBLIC DEFENDER'S OFFICE INCLUDE DEFENSE TEAM MEMBERS AS DEEMED NECESSARY IN ACCORDANCE WITH SCR 250. THE LEGISLATION IS ALSO DIRECTED TO AMEND THE PRESUMPTIVE LIMITS ON ATTORNEY FEES PRESCRIBED BY NRS 7.125 TO \$20,000 AND TO RAISE THE LIMIT ON ANCILLARY EXPENSES UNDER NRS 7.135 TO \$500. SENATOR NEAL SECONDED THE MOTION.**

Senator Neal said he wanted to ensure that the language indicated the attorney fees would be increased from \$12,000 up to \$20,000, depending on the judge making a determination on the quality of the defense. Chairwoman Leslie emphasized that the current law sets the fee as a cap. Counsel would bill hourly to reach that cap. Personally, Assemblywoman Leslie opined that the cap should be higher than \$20,000. Senator Neal suggested \$24,000 as a cap, doubling the existing amount.

Assemblyman Nolan disclosed that he has acted as an expert witness on a number of cases. The cost to obtain an expert witness to testify usually exceeds \$500. While there was little debate on this issue during the subcommittee hearings, Mr. Nolan said whatever amount is determined will be debated during session.

Senator Washington stated that these fees are passed onto the counties. Chairwoman Leslie agreed, adding that the State may need to assist. Senator Washington asked how the costs are determined.

Ben Graham, previously identified on page 28 of these minutes, spoke on behalf of the Nevada District Attorneys' Association (NDAA). Sitting with interest as the economic aspect has been reviewed, he wagered that of the dozens of capital cases that go through the counties, no one has ever charged only \$12,000. There are automatic applications for extraordinary attorney's fees, which come in routinely. Fees of \$150,000 to \$300,000 are not unusual for many capital cases, and fees for expert witnesses far exceed the \$300. One unit in his division reviews attorney fee petitions for extraordinary fees. However, sometimes they are approved by the court and nobody reviews them.

Chairwoman Leslie asked if the counties are following NRS 7.125, "Fees of appointed attorney other than public defender." Mr. Graham said the counties are following NRS 7.125, but there are methods to file for extraordinary fees that are routine. When this issue is discussed in the 2003 Legislative Session, these matters will be debated. Mr. Graham suggested reviewing the actual fees that are being charged. Chairwoman Leslie said that as a lawmaker, she did not want to have laws on the books that people are circumventing.

Mr. Graham admitted that NRS 7.125 is a good guideline, and it is being adhered to. If defense of a capital crime could be accomplished for \$12,000 and \$300, it would be done. However, it is not unusual to find extraordinary fees.

Chairwoman Leslie said the statutes are not a guideline. It stipulates that "it must not exceed." Ms. Lang drew attention to NRS 7.125(4), which allows for additional fees under certain conditions if the court deems it appropriate.

Mr. Graham stated that the NDAA has supported increasing the hourly rates for attorneys conducting appeals and other actions based on the same reasoning. Better quality appeals and more experienced counsel will save money in the long run.

Chairwoman Leslie questioned where the hourly rate is set at \$75. Ms. Lang noted that NRS 7.125(1) sets the fee at \$75 per hour. Mr. Graham suggested that the whole fee structure should be discussed and reviewed. He added that the counties would appreciate having the State assist with funding.

Senator McGinness queried how a smaller county would handle expensive capital cases and if it could decline to prosecute. From the prosecution standpoint, Mr. Graham remarked that both Clark and Washoe Counties send deputies to assist the smaller counties, charging only room and board. In the past, counties have had to seek special appropriations to pay the defense attorneys. Senator McGinness noted that even modest fees might be beyond a smaller county's capability to pay.

Assemblyman Nolan stated that the State has a prosecution team of detectives, forensic specialists, and other experts lined up. The defense, with the exception of cross-examination of those prosecution witnesses for their case. Mr. Graham noted that with the discovery process, all available materials are provided to the defense. Under the extraordinary fee provision, motions are made for fees to pay forensic scientists or for other tests of that nature so that the defense can conduct independent examination to corroborate or to refute what the State has submitted. Mr. Graham remarked it is always an issue as to whether that is adequate.

Chairwoman Leslie asked Mr. Graham to share his opinion on the best way to proceed relative to this funding question. Mr. Graham said it would be advantageous for the subcommittee to ascertain what has been paid on court-appointed cases to demonstrate that the defense has not been short-changed. He also considered it would be helpful to determine from the defense standpoint, inadequacies it has experienced and funding suggestions to overcome shortages. In Clark County, Nevada, a significant sum is spent for the Clark County Public Defender's Office, the Office of the Special Public Defender, and the contract and court-appointed attorneys. Chairwoman Leslie noted that if fees in excess of the \$12,000 are being paid, this recommendation to raise the cap would not be viewed as an unfunded mandate. She stated that this requires more study. Mr. Graham agreed it would not be an unfunded mandate. It is a statistical issue; what is being paid needs to be determined.

Assemblyman Anderson asked if past recommendations have come from the state bar association, particularly from the defense segment of the bar association, or from the public defenders' offices. Mr. Graham remarked that recommendations have come from the private bar associations and have been supported by the public defenders. Given the rules of the 120-day session, Assemblyman Anderson voiced concern that the subcommittee needs to raise this question statutorily with a BDR. Mr. Graham agreed this might alert those in the defense area that there is an opportunity to increase their effectiveness.

After reviewing NRS 7.125, Senator Neal said the court already has the ability to expand the fees outside the limits. Consequently, Senator Neal did not see why the subcommittee needed to act upon this recommendation.

Assemblyman Anderson stated that by increasing the cap, it relieves the court from addressing petitions for extraordinary expenses. In later recommendations, training of attorneys to be more diligent in their accounting and billing process is proposed.

Chairwoman Leslie said if the subcommittee does not act on Recommendation No. 14, the question of Recommendation No. 13 remains, which proposes that court-appointed defense teams should follow the criteria set in SCR 250. Ms. Lang emphasized that SCR 250 applies to nonpublic defenders as well. Chairwoman Leslie questioned whether the public defenders' offices are required to follow SCR 250 in that regard.

Maizie W. Pusich, Chief Deputy Public Defender, Washoe County Public Defender's Office, Reno, said the expanded team is attempted in Washoe County but is not required. It is her understanding that many of the smaller counties have not been able to provide it. With respect to SCR 250 in Washoe County, the judges have determined that it was the intent of the Nevada Supreme Court to be applicable to all counsel, but it may not necessarily be applied.

Chairwoman Leslie noted there was a motion on the floor, which includes Recommendation Nos. 13 and 14. Assemblyman Anderson said he would stand by his motion to allow debate during session. Senator McGinness said he would support this recommendation with reservations. Chairwoman Leslie called for the vote.

#### **THE MOTION PASSED UNANIMOUSLY.**

***RECOMMENDATION NO. 15—Adopt a recommendation requesting that payments for attorney fees and ancillary expenses be paid promptly. (Proposed by Michael Pescetta and members of the A.C.R. 3 Subcommittee)***

***OPTION A—Draft a resolution urging the appropriate state and local officials to ensure prompt payment of attorney fees and ancillary expenses.***

***OPTION B—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the appropriate state and local officials requesting that payments for attorney fees and ancillary expenses be paid promptly.***

***RECOMMENDATION NO. 16—Draft legislation to require that appointed counsel in capital cases be trained on the procedures for obtaining adequate funding in capital cases. (Proposed by Willard Ewing)***

Chairwoman Leslie questioned to whom the letter would be sent in regards to Recommendation No. 15, such as the county commissioners. In addition, Senator McGinness suggested the letter be sent to the Nevada Association of Counties (NACO).

Mr. Pescetta, previously identified on page 17 of these minutes, stated that he understood this recommendation pertained to county-paid work that would have to go to the county commission. For the funding that comes out of the State Public Defender fund, this recommendation would have to be addressed by the Office of the State Public Defender, Nevada's Department of Human Resources.

Chairwoman Leslie noted that possibly two letters would be required. She asked for any objections to sending two letters in reference to Recommendation No. 15. There being none, she directed staff to write the letters to the Office of the State Public Defender and NACO.

Referring to Recommendation No. 16, Assemblyman Anderson said it should be included in a letter to the Nevada Supreme Court since the Court directs the attorneys and procedures to obtain adequate funding.

Chairwoman Leslie asked if there were any strong sentiments either way. Senator Washington wondered if action was necessary. Assemblyman Ocegüera noted the recommendation was vague. Without further comments from the subcommittee members, Chairwoman Leslie stated that no action would be taken on Recommendation No. 16.

### ***JURIES AND JURY INSTRUCTIONS***

***RECOMMENDATION NO. 17—Adopt a recommendation requiring individual voir dire and sequestering in capital cases. (Proposed by Michael Pescetta and Philip Kohn, Clark County Special Public Defender)***

***OPTION A—Draft legislation to require individual voir dire and sequestering in capital cases.***

***OPTION B—Draft a resolution urging the Nevada Supreme Court to adopt a rule requiring individual voir dire and sequestering in capital cases.***

***OPTION C—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to adopt a rule requiring individual voir dire and sequestering in capital cases.***

***RECOMMENDATION NO. 18—Adopt a recommendation requiring written jury questionnaires in capital cases. (Proposed by Howard Brooks, Deputy Public Defender, Office of the Clark County Public Defender, and Maizie Pusich, Chief Deputy Public Defender, Office of the Washoe County Public Defender)***

***OPTION A—Draft legislation to require written jury questionnaires in capital cases.***

***OPTION B—Draft a resolution urging the Nevada Supreme Court to adopt a rule requiring written jury questionnaires in capital cases.***

***OPTION C—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to adopt a rule requiring written jury questionnaires in capital cases.***

#### **Background Information for Recommendation No. 18**

The recommendation stated that jury questionnaires are prepared and agreed upon by the prosecution and the defense and submitted to the judge for presentation to the jurors. The purpose of the questionnaires is to obtain information from the jurors regarding their qualifications to sit as jurors in a particular case. The questionnaires are also intended to shorten the process by eliminating certain issues before getting to voir dire. The information

contained in the questionnaires becomes part of the court record but is not distributed to anyone other than the attorneys in the case and the judge.

Chairwoman Leslie noted that both these recommendations lie within the gray area of court rules under the authority of the Nevada Supreme Court. She queried the members relative to what they wanted to do with these recommendations.

Senator Washington suggested that no action be taken.

Senator Neal requested that a letter be drafted, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court urging the Court to consider adopting a rule requiring individual voir dire and sequestering in capital cases. In that same letter, the subcommittee would urge the Court to consider adopting a rule requiring written jury questionnaires in capital cases. Senator McGinness agreed.

Receiving no objection to Senator Neal's request, Chairwoman Leslie directed the staff to write the letter.

### *APPEALS PROCESS*

***RECOMMENDATION NO. 19***—*Draft legislation to eliminate the waiver of appeals by defendants. (Proposed by JoNell Thomas, private attorney)*

#### **Background Information for Recommendation No. 19**

*See TAB D* — Draft language submitted by Michael Pescetta proposes elimination of waiver of appeals under NRS 177.055.

Mr. Anthony remarked that proposed language submitted on waiver of appeals is under Tab D of the Appendix (Exhibit C).

Chairwoman Leslie questioned whether this recommendation would prevent a defendant from waiving his or her appeal of a death sentence.

Assemblyman Nolan voiced uncertainty as to whether he would support the recommendation. When a defendant pleads guilty, counsel explains to him the consequences of waiving his rights. That defendant will also receive instructions from the judge. If the defendant then elects to waive his right to appeal based upon the testimony heard, it was Mr. Nolan's opinion that the defendant had been given enough notification to do that.

Chairwoman Leslie stated the concern is over the high number of inmates in Nevada that have chosen not to appeal, contributing to what might be considered state-assisted suicide.

Senator Washington agreed with his colleague regarding whether it is appropriate to allow inmates to waive their appeal but admitted it should be a matter of choice left to the individuals themselves. Senator Washington expressed hesitancy that the Legislature should be the instrument to take that decision process away from the defendant.

Assemblyman Anderson concurred with the Chairwoman's concern relative to the concept of state-assisted suicide. In his opinion, suicide is wrong. If an inmate would rather commit suicide than be imprisoned and the state is willing to carry out that decision, Mr. Anderson considered that wrong. While he appreciated the reason for this recommendation, Assemblyman Anderson did not consider it worthy of a BDR at this particular point in time. Continuing, Mr. Anderson said there is an automatic review of executions specified within the Nevada Supreme Court rules. When a defendant decides after a number of appeals to abandon the question, the appeal process should not be left open for other outside groups to pursue their particular agenda. The appeal process belongs to the defendant.

Senator Neal stated his understanding related to the changes that are being recommended—removing “upon a plea of

not guilty” and retaining “when a judgment of death is entered, an appeal is deemed automatically.” In effect, the recommendation is not changing too much of the law as it now stands, with the exception of a person who enters a not guilty plea. Reviewing Tab D of the Appendix (Exhibit C), the proposed language states that if the defendant instructs his attorney not to appeal, “the court shall appoint other counsel to appear as amicus curiae and to review the record and to submit briefing on all constitutional claims presented by the record.” Senator Neal concluded that it appeared that the recommendation is attempting to ensure fairness, which is the purpose of this subcommittee.

Senator McGinness agreed with Assemblyman Anderson regarding the timing of the recommendation. After the debate on the death penalty, the general public’s biggest concern is that the cases drag on too long. Senator McGinness stated he did not consider action necessary on this recommendation.

Chairwoman Leslie admitted there did not seem to be any interest to address Recommendation No. 19 at this time.

***RECOMMENDATION NO. 20—Draft legislation to provide for sufficient funding for state habeas proceedings, including prompt and adequate compensation for counsel and sufficient other resources. (Proposed by the Nevada Coalition Against the Death Penalty)***

Chairwoman Leslie asked Mr. Pescetta to provide background information.

Mr. Pescetta, previously identified on page 17 of these minutes, admitted that the discussion relative to Recommendation Nos. 10 and 15 covered the same problems.

Chairwoman Leslie requested that no action be taken on Recommendation No. 20.

### **JUDICIAL FUNCTIONS AND THREE-JUDGE PANELS**

Chairwoman Leslie directed Mr. Anthony to read Recommendation No. 21, which addresses the possible elimination of the three-judge panels.

#### **SENATOR NEAL MOVED TO ELIMINATE THE THREE-JUDGE PANELS.**

***RECOMMENDATION NO. 21 — Draft legislation to eliminate three-judge panels in all capital sentencing decisions. (Proposed by Michael Pescetta, JoNell Thomas, and the Justice Project)***

#### **Background Information for Recommendation No. 21**

Presented testimony recommended that in guilty plea cases, a jury should be impaneled to impose a sentence. In hung jury cases and in guilty plea cases, if the jury cannot reach a unanimous decision in favor of the death penalty, a sentence of life in prison with the possibility of parole or a sentence of life without the possibility of parole should be imposed. If a jury cannot reach a unanimous decision in a capital penalty phase, the parties shall have the right to poll the jurors to determine whether they are split between sentences less than death or a sentence of death and a sentence less than death.

**Tab S** — Draft language (entitled “Proposal 1.”) submitted by Michael Pescetta on the elimination of three-judge panels. This proposal repeals three-judge panels and suggests when a jury is unable to reach a unanimous verdict for a sentence of death, then the court shall impanel a new sentencing jury.

**Tab T** — Draft language (entitled “Proposal 2.”) submitted by Michael Pescetta on the elimination of three-judge panels. This proposal repeals three-judge panels and suggests as an alternative that when a jury is unable to reach a unanimous verdict for a sentence of death, the Court shall enter a sentence of life without the possibility of parole.

**Tab U** — Memorandum by Michael Pescetta on three-judge panel procedure.

**Tab V** — Memorandum by JoNell Thomas on three-judge panels in capital cases.

Mr. Anthony noted that additional background materials are located under Tabs S and T in the Appendix (Exhibit C).

Chairwoman Leslie said Senator Neal’s position is clear; he wishes to eliminate three-judge panels. She concurred. Anytime Nevada is the only state in the union doing something, she questions what makes that special. The

subcommittee heard testimony regarding the problems with three-judge panels and possible racial bias. Judges did not come forward clamoring to remain on three-judge panels, and in fact, almost the opposite was true.

Assemblyman Nolan said it was his understanding that three-judge panels were to replace a second jury. To impose the death penalty, the first jury must reach its decision unanimously. If even one person holds out, it is a hung jury, and the sentencing decision goes to the three-judge panel. Now it is proposed to return to the system that apparently at some point in time the Legislature thought was inadequate.

Chairwoman Leslie stated the different options proposed:

1. Ask for another sentencing jury; or
2. Depending on how the original jury was split, the judge would automatically impose a sentence of life without the possibility of parole (LWOP).

In response to Mr. Nolan's comments, Mr. Pescetta, previously identified on page 17 of these minutes, said there was no other procedure than that of the three-judge panel. This three-judge panel procedure was adopted with the original death penalty legislation in 1977. Essentially, it was viewed as a cost-saving measure instead of impaneling a new jury. The two proposals are both premised on polling the jury and determining if any juror favored death. If none wanted death under either of the proposals, death is removed as an option and the case goes to the judge to impose sentence or to impanel a new jury. There have been cases where nobody supported death; the jury hung on the difference between life with the possibility of parole (LWP) and LWOP. Such is the case in *Daniel v. State*, currently pending in the Nevada Supreme Court relative to two sentences of death imposed by a three-judge panel following a hung jury on punishment. The judge did not allow the jury to be polled, but according to juror interviews afterwards, the jury was hung between sentences of LWP and LWOP. The case went to a three-judge panel that imposed the death sentence. Continuing, Mr. Pescetta said this recommendation proposes the following:

- Determine if any juror favors death or if the jury is hung between lesser sentences.
- If the jury is hung between lesser sentences, the judge can impose sentence as if the death penalty were no longer an option. There is a provision in the statute that if the case is not eligible for the death sentence, the trial judge can render the sentence.
- The alternative proposal relates to cases where a juror favors death and the jury is hung between death and a lesser punishment. In this situation, another jury for a new penalty hearing could be impaneled or the sentence defaults to LWOP.

Chairwoman Leslie asked who would determine whether that last proposal would involve a new jury or a sentence of LWOP. Mr. Pescetta said that is what the subcommittee must decide.

Senator Neal expressed his opinion that the three-judge panel is unconstitutional because defendants are to be judged by their peers. While there might be disagreement as to whether 12 white jurors were Senator Neal's peers, he exclaimed that three judges are not his peers. In addition, two of those judges have not participated in the original trial, but they are making the judgment as to whether that individual would receive life or death. The jury has heard the testimony, sat through the trial, and reached a point of indecision. If those judges are elected by people who favor the death penalty, the judges will impose the death sentence. In closing, Senator Neal said it is time to remove the three-judge panels and return to the jury system.

Chairwoman Leslie asked Senator Neal which proposal he preferred. Senator Neal said he agreed with Mr. Pescetta to poll the jury; if there is one hung juror, another jury should be impaneled. In a situation where the jury is evenly divided on the issue, it is proposed to impanel another jury or create a provision in the statute whereby sentence can be imposed. Senator Neal admitted he did not support that proposal. He expressed his opinion that the jury system in this particular case should be sacrosanct. If the jury cannot reach a decision, either have a new trial should be conducted or the case should be kicked out.

Assemblyman Anderson said he is uncertain whether it would be possible to eliminate the three-judge panel.

Assuming it could be done, he suggested a compromise that the trial judge be given the option of a combination of Proposals 1 and 2—either he has to impanel a new sentencing jury or he must enter a sentence of LWOP.

Chairwoman Leslie commented that the problem pertaining to three-judge panels not sitting through the whole trial would also be a problem for a new sentencing jury. She queried whether the whole case would be retried. Various members of the audience replied it did involve retrying almost the whole case.

Senator Washington said he agreed with Senator Neal's compelling argument that in cases where the jury is hung, a three-judge panel is unconstitutional, and the case should be retried.

Senator McGinness said he agreed with Assemblyman Anderson relative to a combination of proposals.

Assemblyman Ocegüera said he supported the elimination of the three-judge panel with an automatic default to a sentence of LWOP.

Assemblyman Nolan said he supported Assemblyman Anderson's proposal.

Chairwoman Leslie commented that the subcommittee was in favor of eliminating the three-judge panel. Still to be decided is whether: (1) to default to the automatic LWOP sentence; or (2) to give the judge the option of impaneling a new sentencing jury or imposing a sentence of LWOP.

Chairwoman Leslie entertained a motion on Recommendation No. 21.

**ASSEMBLYMAN ANDERSON MOVED TO DRAFT LEGISLATION TO ELIMINATE THE THREE-JUDGE PANEL, AND WHERE A SENTENCING JURY HAD NOT REACHED A DETERMINATION, THE JUDGE WOULD EITHER ENTER A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE OR IMPANEL A SECOND SENTENCING JURY. SENATOR MCGINNESS SECONDED THE MOTION.**

Ms. Lang asked for clarification that the subcommittee wished to adopt a recommendation that was a combination of Proposals 1 and 2. If the trial court found that no one on the jury voted to impose the death penalty, the court would determine the sentence under Option 2, which would mean that the defendant would receive LWP or LWOP but not death. If all of the jurors voted that the defendant should not receive the death sentence, then the court could either impanel a new jury or impose LWOP. Mr. Anderson said that was not the intent. Continuing, Ms. Lang restated her last statement. If some of the jurors voted for death and some voted against it, then the court would have the two options. Assemblyman Anderson agreed.

Senator Neal commented that if a jury has been instructed that it can decide on a death sentence but it has not been explained that it could deliver a lesser sentence, a bifurcated situation has been created whereby the judge can take advantage of a hung jury and render whatever sentence he deems appropriate. That is fraught with serious constitutional consequences. Senator Neal asserted that would not withstand challenge in court. He reiterated his opinion that the judge should impanel a new sentencing jury or declare a hung jury and drop the case.

Chairwoman Leslie noted that the defendant has been found guilty.

Senator Neal said it reverts to the district attorney's office to continue the case or not. By keeping the case in court, the judge is allowed to second-guess what the jury would have done. Senator Neal said he did not support that concept.

Chairwoman Leslie asked if Assemblyman Anderson was satisfied with the existing motion.

Assemblyman Anderson said he was comfortable with the fact that the defendant has been found guilty, in the sentencing phase the jury is not able to find for the death penalty, and that the three-judge panel should be eliminated. He understood that Senator Neal would prefer that there is no three-judge panel and a new sentencing jury would be impaneled. Mr. Anderson said he was uncomfortable with that because the judge could have the option of either calling for a new sentencing jury that would favor the death penalty or putting the person in prison with the options of LWP or LWOP. Of course, those options should have been presented to the jury originally.

Assemblyman Anderson declared he stood by his motion.

Chairwoman Leslie asked for clarification from Mr. Greco as to whether a jury is ever given an instruction of only death. Mr. Greco, previously identified on page 4 of these minutes, said since 1995, there are four possible sentences:

1. Death;
2. Life without the possibility of parole;
3. Life with the possibility of parole; and
4. A term of 50 years with parole eligibility in 20 years.

Further, Mr. Greco explained that juries are instructed to start with the most severe sentence and jurors must unanimously agree on a death sentence. If a jury cannot agree on a death sentence, it is then instructed to examine the alternatives less than death.

Continuing, Mr. Greco noted that the proposal under Tab S of the Appendix (Exhibit C) addresses maybe 10 percent to 15 percent of all three-judge panel cases. Mr. Pescetta's proposal would eliminate three-judge panels altogether, and that would greatly affect the other 85 percent of the cases where the defendant has pled guilty to the crime. Where there is no question as to guilt, the case would change from a few thousand dollars, two-day, three-judge panel into a two-week retrial of guilt that could cost tens of thousands of dollars. So there will be a fiscal problem, and the proposal is not limited to situations where there is a hung jury.

Assemblyman Nolan asked what other states do in this situation. Mr. Greco did not agree that Nevada is the only state with three-judge panels in all situations, but he could only speak to what happens in Nevada. Further, it was his understanding that Nevada was the only state that has judge sentencing in capital cases. Mr. Greco remarked there are mechanisms in a few other states where judges impose sentences in capital cases.

Mr. Pescetta said Nevada is the only state that has the system whereby a case goes to a three-judge panel based upon whether the jury hangs or the defendant pleads guilty. Alabama and Arizona have judge override sentencing. Colorado and Indiana have other kinds of panel sentencing, without the distinction as to whether a defendant pleads guilty or is convicted. Nevada is the only state where the impaneling of a jury or three-judge panel is based on the defendant's plea or hung jury. In response to Senator Neal's comment regarding whether it is constitutional to have judge sentencing, if juries impose sentences, it should not matter whether there is a guilty plea or a conviction. The problems with the impartiality of the three-judge panel exist regardless of whether it is convened after a hung jury or a guilty plea. Mr. Pescetta said the experience of other states is not relevant because Nevada is the only state that has this particular concept.

Continuing, Mr. Pescetta reported that Colorado has three-judge panel sentencing for all cases. Colorado changed to a system of three-judge panel sentencing approximately five years ago, and the number of death penalties imposed increased dramatically. In Alabama, the jury gives an advisory verdict and the judge, who is ultimately responsible for imposing the sentence, can override the jury's recommendation and impose the sentence he or she sees fit. In Arizona, the trial judge makes the findings and renders the sentences on all cases, which is before the U.S. Supreme Court now as to whether that is constitutional under *Apprendi v. New Jersey* (530 U.S. 466, 120 S.Ct. 2348 (2000)).

Chairwoman Leslie queried how other states handle a defendant who pleads guilty. Mr. Pescetta said to his knowledge there is no state that makes a distinction about what kind of sentencer you get based upon whether you plead guilty or are convicted at trial.

Senator Washington asked how often a three-judge panel has been utilized in Nevada capital cases. Mr. Greco said there have been four three-judge panels in Washoe County since 1995, when he started handling murders. Further, Senator Washington asked why the three-judge panels were convened. Mr. Greco shared a number of case histories as they related to the three-judge panels.

Referencing materials submitted in previous hearings, Mr. Pescetta counted 18 inmates on death row as a result of

three-judge panel sentences. The cases that involved guilty pleas and three-judge panels have led to a disproportionate number of volunteers who have been executed. Mr. Pescetta agreed that typically the three-judge panel procedure occurs because of a guilty plea rather than as a result of a hung jury. Mr. Pescetta pointed out that hung juries are definitely a large proportion of those 18 cases. In addition, he remarked that other states use default mechanisms of this sort. For instance, the federal government defaults to LWOP if the penalty jury cannot agree on a death sentence, and California had a period with the same system. So, such a system is not uncommon.

Chairwoman Leslie commented that the subcommittee is concerned that the use of the three-judge panel system may contribute to higher instances of racial bias in our state. Given the discussion today, Chairwoman Leslie asked for Mr. Pescetta's opinion as to which mechanism would work best. Speaking on his own behalf, Mr. Pescetta said the basic problem is eliminating this particular pattern of judge sentencing, which skews the decision in favor of death. He commented on two choices:

1. If a jury cannot reach a unanimous decision, a default sentence of LWOP could be rendered. That is an acceptable alternative that has been adopted by the federal government in its death penalty statute, and it is one that has support.
2. Where a jury must make a determination of the appropriate sentence but the jury hangs, a second jury could be impaneled to preside over another sentencing proceeding. He was unaware of any case that had been tried to more than two penalty juries.

Continuing, Mr. Pescetta stated there is a provision in the Nevada statutes that if one three-judge panel hangs, the case goes to another three-judge panel, which has never happened. Generally speaking, once a case progresses through a jury trial on guilt and/or sentencing, those verdicts are negotiated on the basis of the jury decisions, even if it gets tried to another jury. In his opinion, the costs are modest to impanel a new sentencing jury by comparison to the years of litigation that may result when a three-judge panel imposes a death sentence.

Further, Mr. Pescetta remarked it would be justifiable to remove parts of the proposals about polling the jury and determining whether the jury was split between other sentences. He suggested taking a categorical approach that if the penalty jury cannot reach a decision, a default sentence of LWOP would be rendered.

Assemblyman Anderson asked for clarification of Mr. Greco's comments regarding a case where a defendant has admitted guilt, a possible three-judge panel, or the necessity for a jury. In his experience, Mr. Greco said the total length of most three-judge panels is one or two days, which is not possible with jury sentencing. Jury selection alone may take a day or two. In addition, the numerous legal issues raised do not occur with three-judge panels. The amount of objections is dramatically reduced because the judges are experienced. Less time is spent discussing DNA, foundational, and other types of evidence. Extra care must be taken with a jury, where a three-judge panel could focus on the heart of the matter.

Continuing, Assemblyman Anderson recalled testimony regarding the qualifications of the judges in addressing the legal questions. He questioned the cost to the taxpayers when two other judges leave their courts for two days to sit on a three-judge panel and whether other cases suffer delays.

Chairwoman Leslie noted that it appears that the subcommittee desires to move forward with a BDR on this recommendation since it is such an important issue. The whole Legislature will debate this issue. Chairwoman Leslie restated Assemblyman Ocegueda's position in cases of the hung jury where the judge would render a default sentence of LWOP.

Senator Washington said Mr. Greco's argument regarding the three-judge panel makes sense. He asked when the plea is guilty, a three-judge panel is convened, and the judges determine the sentence. Mr. Greco replied in the affirmative. Continuing, Senator Washington agreed with Senator Neal's comments relative to the *United States Constitution* being the founding framework for the judicial system and its concept of a jury trial or conviction. Mr. Greco stated that the constitutional right is to a trial on the issue of guilt, and that is why the Nevada three-judge panel scheme has been repeatedly upheld. The U.S. Supreme Court has held that a defendant has the right under the *United States Constitution* to a trial on the issue of guilt by a jury. There is absolutely no constitutional right to sentencing by a jury; it is strictly a creature of statute.

Mr. Pescetta repeated that is the issue before the U.S. Supreme Court. The Nevada three-judge panel statute has been upheld repeated by the Nevada Supreme Court, but it has never been addressed by a federal court on the merits. On the fiscal side, it should be recognized that a sentencing proceeding in front of a jury would be truncated as with a three-judge panel by the fact that guilt has been admitted. There is no longer an issue of guilt.

Chairwoman Leslie declared that no action would be taken on Assemblyman Anderson's motion.

**ASSEMBLYMAN ANDERSON WITHDREW HIS MOTION.**

To address Mr. Greco's concern about fiscal issues, Senator McGinness suggested retaining the three-judge panel for those defendants that plead guilty. For those case that go to a jury trial and the jury is unable to reach a decision, the judge would have the option to either enter a sentence of LWOP or impanel a new jury.

In an attempt to clarify the motion, discussion ensued among Ms. Lang and subcommittee members to determine the exact wording of the proposed recommendation.

Chairwoman Leslie entertained a motion on Recommendation No. 21.

**SENATOR MCGINNESS MOVED TO RETAIN THE THREE-JUDGE PANEL FOR THOSE DEFENDANTS WHO INITIALLY PLEAD GUILTY AND DRAFT LEGISLATION TO ELIMINATE THREE-JUDGE PANELS IN CAPITAL CASES WHERE THE SENTENCING JURY IS HUNG. FOR THOSE DEFENDANTS WHOSE GUILT HAS BEEN DETERMINED, IN CASES WHERE THE SENTENCING JURY DOES NOT UNANIMOUSLY VOTE FOR DEATH, THE TRIAL JUDGE SHALL EITHER ENTER A SENTENCE OF LIFE WITHOUT THE POSSIBILITY OF PAROLE OR SHALL IMPANEL A NEW SENTENCING JURY. SENATOR WASHINGTON SECONDED THE MOTION.**

Both Senators McGinness and Washington agreed upon the wording of the recommendation. Chairwoman Leslie repeated the motion and called for the vote.

**THE MOTION PASSED UNANIMOUSLY.**

***RECOMMENDATION NO. 22—Adopt a requirement on continuing legal education for judges presiding over capital cases. (Proposed by Willard Ewing)***

***OPTION A—Draft legislation to require all judges who are going to preside over a death penalty case to receive a minimum of eight hours of continuing legal education on the subject of presiding over death penalty litigation.***

***OPTION B—Draft a resolution urging the Nevada Supreme Court to adopt a rule requiring all judges who are going to preside over a death penalty case to receive a minimum of eight hours of continuing legal education on the subject of presiding over death penalty litigation.***

***OPTION C—Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Supreme Court requesting the Court to adopt a rule requiring all judges who are going to preside over a death penalty case to receive a minimum of eight hours of continuing legal education on the subject of presiding over death penalty litigation.***

Chairwoman Leslie stated that the recommendation presumed to tell the judges how much education they needed.

**SENATOR WASHINGTON MOVED TO ADOPT RECOMMENDATION NO. 22, OPTION C.**

Chairwoman Leslie said a motion was not necessary to draft a letter. She asked the subcommittee if they would favor writing a letter to the Nevada Supreme Court. Upon affirmation from subcommittee members, she directed staff to write a letter.

***RULES OF PROCEDURE AND ARGUMENT***

***RECOMMENDATION NO. 23 — Draft legislation to amend NRS 175.554 to revise the order in which arguments must be presented during the penalty hearing in capital cases. (Proposed by Philip Kohn)***

**Background Information for Recommendation No. 23**

Testimony indicated that proposed legislation would require that the prosecutor open the argument, defense counsel may then respond, the State may then argue in rebuttal, and then defense counsel may conclude the argument in surrebuttal.

**Tab W** — Draft language submitted by Philip Kohn on rules of procedure.

Mr. Anthony noted that draft language is included under Tab W of the Appendix (Exhibit C), and the issue was discussed in the 2001 Legislative Session in Assembly Bill 327, which proposed to revise the “order in which arguments must be presented during penalty hearing in cases where death penalty is sought.”

**ASSEMBLYMAN ANDERSON MOVED TO ADOPT RECOMMENDATION NO. 23.  
SENATOR NEAL SECONDED THE MOTION.**

Assemblyman Nolan said he remembered the debate during session, specifically that the burden of proof is upon the State regarding the guilt of the individual—innocent until proven guilty. More than tradition, having that burden of proof has always given the prosecution the last opportunity to make its case. Apparently, whoever has the last word has an advantage. If this recommendation is enacted, the defense could say it provides an opportunity to prove the innocence of the client. Mr. Nolan remarked that since the State has the burden of proof, it should be given the last opportunity to speak.

Chairwoman Leslie pointed out that A.B. 327 passed the Assembly and was approved by the Senate Judiciary Committee but died on the Senate floor—it almost became law. She commented that she possessed the opposite view as Mr. Nolan. In her opinion, when somebody’s life is on the line, it is appropriate to make this change.

Assemblyman Anderson pointed out that there have been two pieces of legislation addressing who speaks at trial and at which time. Unfortunately, one bill died on the floor. Both pieces of legislation were meritorious. One bill was held up to ensure that the other one would progress. In his opinion, both bills were strong pieces of legislation that covered two different phases of the trial. Mr. Anderson said Recommendation No. 23 would also be good legislation.

Senator Neal said traditionally the prosecuting attorney has always had the last word, but the State’s case should not depend upon that. If the State has a case, it should be based upon the facts that are presented. Particularly in a capital case, the defense should have the ability to rebut whatever argument the State has put forth. The State has an untold number of resources to come to bear on these particular cases. Usually the defendants do not have sufficient funds to actually try these cases. In his opinion, Senator Neal said that last argument should be made by the defense in capital cases.

Senator McGinness agreed with Senator Neal that if the State’s case relies on whether it goes last, it was probably in trouble from the beginning.

Assemblyman Ocegüera asked for clarification on both positions and what other states are doing. He said he would have a difficulty changing the system of jurisprudence.

Mr. Pescetta, previously identified on page 17 of these minutes, agreed with Mr. Nolan’s comments in regard to the guilt phase of the proceeding. Prosecutors have the burden of proof beyond a reasonable doubt of the aggravating factors. The penalty phase is different. The Nevada Supreme Court has repeatedly held that the prosecution does not have to show the propriety of the death penalty beyond a reasonable doubt. Therefore, on the ultimate question of the penalty, there is no burden of proof. The premise of this recommendation is that when a defendant is on trial for his life, he or his counsel should get the last word and plea for his life. This recommendation does not address the guilt phase, where it is clear that the prosecution has the burden of proof beyond a reasonable doubt; that never shifts. Recommendation No. 23 is focused only on the closing argument in the penalty phase where it would change to allow counsel for the defendant to give the last plea for his life and to avoid having a rebuttal to that plea from the

prosecutor.

In response to Mr. Ocegüera, Mr. Greco, previously identified on page 4 of these minutes, said if this recommendation becomes law, Nevada would be the only state that has the defense go last in argument. The prosecution has the burden of proof to prove the aggravators beyond a reasonable doubt; the defense does not have to prove the mitigators. Additionally, even if the prosecution proves the aggravators and they are not outweighed by the mitigators, the defendant does not automatically receive the death sentence; it makes him death eligible. Under the various instructions given to the jury, it is told that it is free to impose any sentence less than death. There is no requirement that the jury render the death penalty. Therefore, the prosecution still has a significant burden and the defense has absolutely no burden. Mr. Greco said he has not heard a compelling reason why Nevada should conduct its penalty phase of a trial differently than is done in the other 49 states.

Mr. Pescetta countered that a review of the other states was submitted during the hearings. It is a mixed situation with no clear majority. In his view, there was a bare majority that allows the prosecution to go last in the penalty phase, but there are other states that allow the defense to make that last plea.

Assemblyman Nolan asked if the common law premise for this procedure related to the prosecution acting as the voice for the victim. In fact, the prosecution is seeking the death penalty on behalf of the victim whose life has been taken. Mr. Greco said it was not common law; it is based on the *United States Constitution* and where the burden of proof is placed. Mr. Greco remarked that nearly all states allow the prosecution to speak last. However, he agreed that by speaking last, it would give the victim's family a say in the final outcome. Chairwoman Leslie noted that the victim's family are allowed to testify during the sentencing hearing. Mr. Greco agreed.

Assemblyman Ocegüera said he was not persuaded either way but noted this issue would be thoroughly debated in the judiciary committees. Chairwoman Leslie agreed and called for the vote.

**THE MOTION PASSED 5 TO 2 WITH SENATOR WASHINGTON AND ASSEMBLYMAN NOLAN VOTING NO.**

### ***DNA EVIDENCE***

***RECOMMENDATION NO. 24*** — *Draft legislation to adopt the Uniform Statute for Obtaining Post-Conviction DNA Testing.* (Proposed by Barry Scheck, Professor of Law, Cardozo School of Law)

#### **Background Information for Recommendation No. 24**

**Fiscal Note** — It can be presumed that the proposed recommendation will have a fiscal impact, which has not been determined. If the bill is introduced, a fiscal note will be requested.

**Tab X** — Uniform Statute for Obtaining Post-Conviction DNA Testing as approved by the National Commission on the Future of DNA Evidence.

**Tab Y** — National Commission's Comments to the Uniform Statute.

**Tab Z** — National Conference of State Legislatures (NCSL) State Legislative Report of States That Have Post-Conviction DNA Statutes.

***RECOMMENDATION NO. 25*** — *Draft legislation to require the preservation of evidence and testing of biological evidence.* (Proposed by Michael Pescetta) *Additionally, the legislation may also include a requirement that biological samples be taken and preserved, with a requirement that the sample not be destroyed or completely consumed during testing so as to assure that future testing may be conducted.* (Proposed by Maizie Pusich)

#### **Background Information for Recommendation No. 25**

Testimony indicated that preservation of evidence was the strongest area of concern during the

hearing on DNA and its uses. The proposed recommendation requires the state to preserve biological evidence for independent testing by the defense. In order to provide a clear incentive to the state to preserve biological evidence adequately (and to gather evidence when it is available to the state but not to the defense, and the defense requests that the evidence be gathered), subsection 1 provides—prospectively only—for a jury instruction stating a rebuttable presumption at trial that the lost or otherwise unavailable evidence, if tested, would have been favorable to the defense.

**Tab AA** — Draft language by Michael Pescetta on preservation of evidence and DNA testing.

Mr. Anthony commented that Recommendation No. 25 also included an incentive for the State to maintain and preserve evidence for future testing. As a side note, during the 2001 Legislative Session, Assembly Bill 354, which would have provided for “genetic marker analysis of certain evidence related to conviction of certain offenders sentenced to death,” addressed DNA testing on the post-conviction level.

In an effort to facilitate discussion, Chairwoman Leslie asked that the subcommittee not focus on the specific proposed language but discuss the concepts. Assemblywoman Leslie expressed her view that DNA laws need to be addressed.

Assemblyman Nolan agreed with the concept and the proposed language. He expressed concern that trace evidence gathered in minute quantities may be completely consumed in one test. The testing process is under the scrutiny of the defense, so they may challenge the procedure itself, but sometimes it is impossible to retain enough of the sample for further testing.

To clarify, Chairwoman Leslie stated that Mr. Nolan agreed with the concept of access to DNA testing post-conviction and that the State should pay. Mr. Nolan agreed for those cases where DNA evidence is available and it could make a difference. She asked for his thoughts on the preservation question. To keep the evidence preserved indefinitely, Mr. Nolan said there would be a storage issue. Ms. Leslie noted that Mr. Pescetta’s proposal provided specific incentives to ensure that evidence would be preserved and was not destroyed. Mr. Nolan said he agreed with that conceptually.

Senator Washington asked whether the National Commission on the Future of DNA Evidence sets the standard for the preservation of DNA evidence. Mr. Anthony replied that to his knowledge, it does not set the standard; rather, it is a group of intellectuals, judges, lawyers, and other people that sit on the Commission that reviews DNA issues and makes recommendations to states. Senator Washington asked if its recommendations provide guidelines for collection and preservation.

Assemblyman Anderson said the National Commission on the Future of DNA Evidence addressed those kinds of issues to provide a standard from state to state. The most recent Uniform Statute has not reached Nevada yet. However, Nevada did have A.B. 354 that addressed collection and preservation of DNA evidence. The subcommittee has the opportunity to request that legislation again. Mr. Anderson noted that Nevada frequently adopts such Uniform Statutes with slight modifications.

Chairwoman Leslie called attention to A.B. 354 (Exhibit F), which is the bill from the 2001 Legislative Session.

Senator Neal said it is necessary to adopt a standard relative to DNA evidence. In his opinion, it cannot be left to each police department to establish its own rules as to how this evidence is preserved. Nevada established the Central Repository for Nevada Records of Criminal History, Nevada Highway Patrol Division, Department of Public Safety, in which fingerprints and charted DNA profiles are held. Recommendation No. 25 addresses the biological evidence and its preservation. Senator Neal noted that legislation would need to determine when evidence is no longer useful and establish a retention period.

Assemblyman Anderson reminded Senator Neal that the Washoe County’s forensic laboratory has been the state-designated holder of this material for some time. In fact, Washoe County conducted one of the early pilot projects in the United States. This is the reason why Washoe County is ahead of Clark County in terms of setting up procedures. Washoe County has the facility to hold these materials. Mr. Anderson disclosed that Washoe County

had the opportunity to be the beneficiary of federal funding that was not available to Clark County earlier.

Senator Washington added that the federal funds were predicated on the advancement of preservation and/or forensic laboratories currently being used. He remarked he was hesitant to set an overall state standard for the operations of law enforcement, district attorneys' offices, and the Office of the Attorney General when procedures already exist. There was an earlier procedure that forced the gathering of large quantities of DNA material to determine the forensics of a crime as opposed to currently where only a small amount is required. Nevada is "ahead of the curve" and is using all available technology. Senator Washington expressed uncertainty whether anything needed to be done immediately.

Chairwoman Leslie disagreed. In her view, action is necessary now.

Assemblyman Anderson agreed something needed to be done to ensure that there is a uniform collection system, but Nevada does not need to reinvent the process. Mr. Anderson suggested asking for the redrafting of A.B. 354 to facilitate a thorough discussion and to determine how the Uniform Statute would match the experience of Nevada.

Senator Washington asked for an explanation of the legislative history of A.B. 354. Assemblyman Anderson said A.B. 354 ended in his cul-de-sac. The legislation came to the Assembly Judiciary Committee, it was examined, and at the time it did not appear to be needed. Assemblyman Donald G. Gustavson addressed a similar question relative to DNA in Assembly Bill 489 (Chapter 383, *Statutes of Nevada 2001*), which "requires genetic marker analysis to be obtained from certain offenders convicted of certain felonies." In discussion with Captain Don L. Means, Commander, Forensic Science Division, Washoe County Sheriff's Office, he indicated that he did not have any objections and admitted that a state standard might be helpful to general operations. Mr. Anderson said this recommendation is worthy of further discussion.

Chairwoman Leslie commented that A.B. 354 relates to post-conviction relief but does not address the question of preservation of evidence. In addition, it only pertains to death row inmates.

Chairwoman Leslie entertained a motion on Recommendation No. 25.

**ASSEMBLYMAN ANDERSON MOVED TO REDRAFT A.B. 354 FROM THE 2001 LEGISLATIVE SESSION. SENATOR WASHINGTON SECONDED THE MOTION.**

Assemblyman Nolan voiced his opinion that a penalty should be included and commented that the rebuttable presumption was excessive. Mr. Nolan remarked that if there is malicious intent involved in not providing the DNA evidence, there should be consequences.

Chairwoman Leslie commented that the issue of preservation should be included in the redrafting of A.B. 354. She restated the motion as amended:

**REDRAFT ASSEMBLY BILL 354 FROM THE 2001 LEGISLATIVE SESSION ALONG WITH THE CONCEPT FOR STATE STANDARDS FOR THE PRESERVATION OF EVIDENCE.**

Ms. Lang asked if subcommittee members would be assigned to assist the legislative bill drafting staff in the redrafting of A.B. 354.

Chairwoman Leslie announced she would work with staff to determine the language for the redrafting of A.B. 354. She called for the vote on the motion.

**THE MOTION PASSED UNANIMOUSLY.**

Chairwoman Leslie accepted a suggestion to take no action on Recommendation Nos. 26, 27, and 28.

- ***DEFENDANTS WITH MENTAL RETARDATION***

- ***RECOMMENDATION NO. 29 — Draft legislation to prohibit the imposition of a death sentence on individuals***

*diagnosed with mental retardation.* (Proposed by Dr. Brian Lahren, Executive Director, Washoe Association for Retarded Citizens; Dr. W. Larry Williams, Associate Professor, Behavior Analysis Program, University of Nevada, Reno; the Nevada Coalition Against the Death Penalty; The Constitution Project; and other individuals and groups during testimony on the issue)

OPTION A — Redraft Assembly Bill 353 from the 2001 Legislative Session. (Proposed by Michael Pescetta)

OPTION B — Draft legislation to adopt the Tennessee model (Tennessee Code Annotated 39-13-203) as recommended by the Illinois Report of the Governor's Commission on Capital Punishment. (Proposed by Dr. Richard Siegel, Professor of Political Science, University of Nevada, Reno)

### **Background Information for Recommendation No. 29**

During testimony, Dr. Siegel suggested that Nevada follow the recommendation of the Illinois Report of the Governor's Commission on Capital Punishment to ban the execution of the mentally retarded. The Illinois recommendation was to adopt a statute modeled after *Tennessee Code Annotated 39-13-203*.

The statutory requirements and definitions of mental retardation in Nevada's Assembly Bill 353 (2001 Session) and the Tennessee statute are similar. The Subcommittee may wish to consider that the Nevada bill contains a rebuttable presumption of mental retardation if the person has an IQ of 70 or below; whereas, the Tennessee statute includes an IQ of 70 or below within the definition of mental retardation.

**Tab BB** — Assembly Bill 353, First Reprint (2001 Session).

**Tab CC** — Memorandum by Michael Pescetta on mental retardation.

**Tab DD** — Summary by Jim Ellis, Professor of Law, University of New Mexico.

**Tab EE**— Recommendation 68 of the Illinois Report of the Governor's Commission on Capital Punishment.

**Tab FF** — *Tennessee Code Annotated 39-13-203*.

Mr. Anthony commented that A.B. 353, which proposed to prohibit the "sentence of death for person who is mentally retarded," contained a rebuttable presumption of mental retardation if the person had an intelligence quotient (IQ) of 70 or below. The Tennessee statute includes an IQ of 70 or below within its definition of mental retardation. Mr. Anthony noted that the same factors of intellectual functioning and substantial impairment are required, but it is just a matter of where the IQ level is placed.

**ASSEMBLYMAN ANDERSON MOVED TO REQUEST THE REDRAFT OF ASSEMBLY BILL 353 IN ITS FIRST REPRINT FROM THE 2001 LEGISLATIVE SESSION. ASSEMBLYMAN OCEGUERA SECONDED THE MOTION.**

Senator Washington asked why A.B. 353 includes a rebuttable presumption while the Tennessee statute does not. Chairwoman Leslie responded that the Tennessee Statute states the person must have an IQ of 70 or below. In A.B. 353, there is the rebuttable presumption utilizing the definition of mental retardation that includes the adaptive behavior, IQ in general (but not tied to 70), and it must be manifested before age 18.

Assemblyman Nolan commented that testimony was heard during the 2001 Legislative Session and the interim study hearings. Both Dr. Richard Siegel, Professor of Political Science, University of Nevada, Reno (UNR), and President of the American Civil Liberties Union-Nevada, and Dr. W. Larry Williams, Associate Professor, Behavior Analysis Program, UNR, concurred on a definition of mental retardation. Mr. Nolan said he was hesitant to use a 70 IQ as a cutoff. He said he supported A.B. 353, which includes the adaptive behavior and the onset at an early age. In closing, Mr. Nolan said nobody wants someone who is truly mentally retarded put to death for a crime when that person was not cognizant of his behavior or actions.

Senator Neal said under the Constitution, “idiots” are not permitted to vote or hold office. For an individual who does not claim to be retarded but might be classified as an idiot, Senator Neal questioned whether that person would have the same rights under this legislation. Chairwoman Leslie responded it would only be applicable with the diagnosis of mental retardation.

Chairwoman Leslie repeated the motion and called for the vote.

**THE MOTION PASSED UNANIMOUSLY.**

***COSTS OF THE CAPITAL PUNISHMENT SYSTEM***

***RECOMMENDATION NO. 30*** — *Adopt a recommendation to investigate and report on the fiscal impact of Nevada’s current death penalty system on state and local budgets. (Proposed by Larry Struve, Religious Alliance in Nevada)*

***OPTION A*** — *Draft legislation to appropriate funding for an independent study of the costs of the death penalty system in Nevada.*

**Background Information for Recommendation No. 30 (OPTION A)**

This study may be undertaken by an independent criminal justice research and consulting firm (such as the Spangenberg Group) or through the University of Nevada system.

**Tab GG** — Memorandum by Larry Struve on the need for accurate assessment of costs to Nevada taxpayers related to death penalty cases.

**Tab HH** — Memorandum by Maizie Pusich on costs.

***OPTION B*** — *Draft legislation to require district attorneys, public defenders, private appointed counsel, and the Office of the Attorney General to record and report to the Administrative Office of the Courts (AOC) the costs of attorney and staff time, investigation, and other resources allocated to death penalty cases. The AOC shall then be required to report to the Nevada Legislature prior to the start of each legislative session on the total costs of the death penalty system.*

**Background Information for Recommendation No. 30 (OPTION B)**

**Fiscal Note** — It can be presumed that the proposed recommendation will have a fiscal impact, which has not been determined. If the bill is introduced, a fiscal note will be requested.

***OPTION C*** — *Draft a resolution urging the AOC to seek a project grant (through the State Justice Institute or similar entity) and to contract with a consulting firm or a university for the study of the costs of processing murder cases and capital cases.*

***OPTION D*** — *Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the AOC requesting the AOC to seek a project grant (through the State Justice Institute or similar entity) and to contract with a consulting firm or a university for the study of the costs of processing murder cases and capital cases.*

**Background Information for Recommendation No. 30 (OPTION C and OPTION D)**

The North Carolina Administrative Office of the Courts received a grant from the State Justice Institute and then contracted with Duke University to prepare “The Costs of Processing Murder Cases in North Carolina” (May 1993).

**Tab II** — Preface and Executive Summary of “The Costs of Processing Murder Cases in

North Carolina” (May 1993).

**Tab JJ** — Information on State Justice Institute project grants.

Assemblyman Anderson suggested writing a letter to the AOC. Chairwoman Leslie supported writing a letter. With no objections from the subcommittee, she directed staff to write a letter.

### *JUVENILE DEFENDANTS*

***RECOMMENDATION NO. 31*** — *Draft legislation to prohibit the imposition of a death sentence on individuals who were under the age of 18 at the time of commission of the crime. (Proposed by Mark Blaskey, Chief Deputy Public Defender, Clark County; Mary Berkheiser, Professor of Law, Boyd School of Law, University of Nevada, Las Vegas; and The Constitution Project)*

#### **Background Information for Recommendation No. 31**

**Tab KK** — Memorandum by Mark Blaskey on juveniles.

**Tab LL** — Testimony of Mary Berkheiser.

**Tab MM** — “The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973—December 31, 2001,” by Victor L. Streib.

Mr. Anthony noted that this recommendation follows Assembly Bill 327, Section 3, which “proposed to amend the age requirement from 16 to 18 years of age.”

Assemblyman Anderson remarked that a person 16 years of age is still required to attend school. In his opinion, it is not unreasonable to place the age at 18. The reality of life is that kids today are more sophisticated and gangs have changed the world in which we live. If Nevada retains its death penalty, the age should be set at 18. Therefore, Mr. Anderson said he supported the recommendation.

Senator Washington said he opposed the recommendation. He concurred with the fact that 16-year-olds are still in school. Continuing, Senator Washington remarked that a 16-year-old who commits a capital offense has an understanding of and needs to be held accountable for that action. Senator Washington concluded if the case is deemed a capital offense and it is adjudicated to an adult crime, then so be it.

Assemblyman Nolan reminded the subcommittee that it had heard excellent testimony from experts in the field. He admitted that no one wants to put children to death but asked at what point does a person develop beyond being a child. The act of murder may define the difference between a child and an adult when that person appears in court. There was discussion regarding when a person develops the cognitive ability to understand the difference between right and wrong and the consequences of their action, especially when causing physical harm to other people. He recalled testimony that the vast majority of children have not developed that cognitive ability in the early teens (13 to 14), development begins at 15 to 16. In his opinion, because each case is subjective on a crime-by-crime basis, a standard cannot be set that presumes every 16- or 17-year-old does not have the ability to understand the consequences of his or her crime. Mr. Nolan opposed the recommendation. He suggested objective testing of the individual’s understanding of the acts that were committed.

Chairwoman Leslie said she was troubled by the fact that in the entire world, only the United States and the Republic of the Congo execute 16- and 17-year-olds. She questioned whether the adolescents of the United States are worse.

Assemblyman Nolan said he did not see any comparison with the government of the Republic of the Congo. The United States, the *United States Constitution*, and the development of its constitutional-based laws are unique in the world in many ways. It was his understanding that most citizens would agree that children should not be put to death, but he questioned at what age does a person stop being a child and become an adult. In his professional capacity, he has seen 15-, 16-, and 17-year-olds commit horrendous actions, knowing exactly what they were doing, and it is occurring more frequently.

Senator McGinness assumed he knew where the majority of Nevadans stand on the death penalty, but he did not know where they stand on this issue. He supported the recommendation in order to take it to the session. Continuing, Senator McGinness commented that Nevada 16- and 17-year-olds cannot purchase, possess, or drink alcohol; buy cigarettes; enter into a contract; be drafted; get married without parental consent; become a police officer; or gamble or even be in a casino. If the subcommittee does not change this law, perhaps the rules should change that would permit 16-year-olds to do these things.

Chairwoman Leslie entertained a motion on Recommendation No. 31.

**ASSEMBLYMAN ANDERSON MOVED TO DRAFT LEGISLATION TO PROHIBIT THE IMPOSITION OF A DEATH SENTENCE ON INDIVIDUALS WHO WERE UNDER THE AGE OF 18 AT THE TIME OF COMMISSION OF THE CRIME. ASSEMBLYMAN OCEGUERA SECONDED THE MOTION.**

Senator Neal announced he would vote against the motion because he was adamantly opposed to the State implementation of the death penalty. To vote on this recommendation would imply that he was in favor of the State executing people between the ages of 16 and 18.

Assemblyman Anderson said he also is against the death penalty, and he appreciated Senator Neal's position in not wanting to see this continue. Mr. Anderson said this question needs to be brought before the Legislature, and that is the reason why he asked for Senator Neal's support for the BDR. Continuing, he remarked many members have voted on possible legislation where they may not agree with the language in its entirety but was aware that it would provide a fair discussion. In closing, Mr. Anderson noted that is the purpose of this subcommittee.

Chairwoman Leslie said she echoed Mr. Anderson's comments and pointed out that the subcommittee would be returning to Recommendation Nos. 1 and 2. She noted it would be a shame if this subcommittee did not forward Recommendation No. 31 for the full Legislature to consider. Chairwoman Leslie called for the vote.

**THE MOTION FAILED FOR LACK OF A MAJORITY OF THE SENATE MEMBERS WITH SENATORS NEAL AND WASHINGTON VOTING NO.**

### *DISCOVERY IN CAPITAL CASES*

***RECOMMENDATION NO. 32*** — *Draft legislation to require the prosecution to maintain “open file discovery” of all relevant evidence in capital cases. (Proposed by Michael Pescetta and The Constitution Project)*

#### **Background Information for Recommendation No. 32**

Submitted draft language proposes to add a new NRS section 174.2955 to include:

- This legislation may define “relevant evidence” explicitly to include any information in the possession of police and investigative agencies and district attorneys, including all information related to other suspects, codefendants, witnesses, and informants;
- A case cannot proceed as a capital prosecution until responsible parties in the district attorney's office and all law enforcement agencies involved have certified under oath that a diligent search has been conducted to identify all such information; and
- Once a capital conviction and sentence are final on direct appeal, the entire prosecution file, including material otherwise subject to the work product doctrine, shall become public record.

In addition, there was a separate proposal to add a new subsection (4) to NRS 174.235 with the following language: “Due diligence includes the affirmative duty of a prosecutor to learn of evidence favorable to the defense known to others acting on behalf of the state, including

the police.”

**Tab NN** — Draft language by Michael Pescetta on discovery to add NRS 174.2955.

**Tab OO** — Memorandum by Michael Pescetta on discovery issues.

**Tab PP** — The Constitution Project recommendation on open file discovery.

Mr. Anthony noted that draft language is included under Tab NN of the Appendix (Exhibit C). There was also a separate proposal to add a new subsection 4 to NRS 174.235, “Disclosure by prosecuting attorney of evidence relating to prosecution; limitations,” with the language, “Due diligence includes the affirmative duty of a prosecutor to learn of evidence favorable to the defense, known to others acting on behalf of the State including the police.”

Chairwoman Leslie recalled that Mr. Greco testified that the Washoe County discovery process is different than that in Clark County.

Senator Neal said this recommendation proposes that the prosecutor should not withhold evidence that could have some bearing upon the guilt or innocence of the person. In Senator Neal’s view, if the prosecutor withheld evidence that would free a person, that is wrong. A method of check and balance would require that all the files be open for review. Senator Neal remarked that if the police and the district attorney are going to build a case, then present the facts and circumstances and let the facts determine the guilt or innocence of a person.

Chairwoman Leslie agreed that the subcommittee wants to improve the discovery process. She questioned whether the subcommittee needed to define in statute an open file and the specific process to be used. In Washoe County, the prosecutor and the defense go through the police file page by page to ensure that nothing is left out. That is not the method used in Clark County. The subcommittee heard testimony that people are fairly satisfied in Washoe County with that process, but that is not the case in Clark County. Chairwoman Leslie questioned the intent of the subcommittee relative to this process.

Senator Neal said that Clark County is the larger section of the state, and it needs rules to govern the equality of the situation. Chairwoman Leslie asked if Senator Neal wanted to see that in statute. Senator Neal answered in the affirmative.

Assemblyman Ocegüera agreed it was a good idea and assumed that it was already occurring. He remarked that the recommendation as written is too broad, and he had a problem with including the work product doctrine, which breaches the attorney-client privilege. Assemblyman Ocegüera said he would not support the recommendation.

Senator Washington said he had a problem with the long arm of the state government reaching down to the county or district attorneys’ offices mandating certain procedures be followed in discovery and disclosure. He noted that each county is unique within itself and to set a certain procedure to be followed throughout Nevada might hamper the process, especially in the rural counties. In conclusion, Senator Washington agreed the recommendation is too broad and too far-reaching.

Assemblyman Anderson said the question of discovery was addressed in 1995, 1997, and 1999. He shared Mr. Ocegüera’s concern relative to the work product documents. He agreed with Senator Neal that full disclosure is necessary and assumed that it was occurring. If anything, the Legislature should remind the district attorneys’ offices that full disclosure is expected not only in capital offenses, but for any felony case. In closing, Mr. Anderson asserted that going to prison places an individual’s life in jeopardy. Chairwoman Leslie said the subcommittee could include a statement in the report to that effect.

Senator Neal said the recommendation stipulates that a capital conviction has taken place, and the defendant has been found guilty. He noted there is nothing wrong with having those records opened to see what occurred. As an example, Senator Neal posed a hypothetical situation where an individual was convicted. An eyewitness was interviewed and a statement was taken that the defendant was in the eyewitness’ presence at a different location at the time the murder took place. That statement was not presented when convicting that defendant. Yet, that statement was in the record. Senator Neal said he would like to have somebody reexamine those records and see what happened. That type of situation has occurred where the prosecution obtained the conviction but did not present all

the evidence. Recommendation No. 32 allows open discovery of the records after that capital conviction has taken place. The district attorneys should have nothing to hide if the conviction is based on the facts. Senator Neal said he supported Recommendation No. 32.

Chairwoman Leslie entertained a motion on Recommendation No. 32. There being none, Chairwoman Leslie announced no action would be taken on this recommendation.

### **GENERAL RECOMMENDATIONS**

Chairwoman Leslie read Recommendation Nos. 1 and 2:

***RECOMMENDATION NO. 1*** — *Draft legislation to abolish the death penalty in Nevada.* (Comprehensive recommendation proposed by numerous individuals and groups throughout the course of the study)

***RECOMMENDATION NO. 2*** — *Draft legislation to impose a moratorium on all executions and to allocate resources to further study the capital punishment system in Nevada.* (Proposed by the Nevada Coalition Against the Death Penalty)

Chairwoman Leslie entertained a motion on Recommendation No. 1.

**SENATOR NEAL MOVED TO ABOLISH THE DEATH PENALTY IN NEVADA. ASSEMBLYMAN ANDERSON SECONDED THE MOTION. THE MOTION FAILED FOR LACK OF A MAJORITY OF THE SENATE MEMBERS WITH SENATORS McGINNESS AND WASHINGTON VOTING NO.**

Chairwoman Leslie entertained a motion on Recommendation No. 2.

**SENATOR NEAL MOVED TO ESTABLISH A MORATORIUM ON ALL EXECUTIONS IN NEVADA. ASSEMBLYMAN ANDERSON SECONDED THE MOTION. THE MOTION FAILED FOR LACK OF A MAJORITY OF THE SENATE MEMBERS WITH SENATORS McGINNESS AND WASHINGTON VOTING NO.**

Chairwoman Leslie asked for a tally of the BDRs requested by the subcommittee. Ms. Lang said she counted seven, but those that are closely related may be combined to result in the required five BDRs.

In her closing remarks, Chairwoman Leslie thanked all the subcommittee members for their hard work. She announced that this has been the hardest working interim subcommittee she has been on. All the members have attended and fully participated in this extremely important and sometimes overwhelming study. She said she was confident that the recommendations would move forward in the upcoming 2003 Legislative Session and generate some spirited discussion. She wanted to thank all those who had participated in the study and the different groups that came forward on both sides of the issue. The subcommittee received a wealth of information and performed well within its time constraints.

Assemblyman Anderson thanked the Chairwoman for her indulgence to speak freely. He thanked his fellow members for addressing the legal, ethical, and emotional issues that surround capital punishment cases, and he recognized the hard work of Chairwoman Leslie and the legislative staff. As the sponsor of the legislation that created this study, he said he was acutely aware of the long list of items set forth for the subcommittee to examine. Chairwoman Leslie, with the support and advice of subcommittee staff Mr. Anthony, skillfully planned the agendas and speakers over the past five meetings. As a result, the subcommittee was able to conduct a thorough examination of the 16 issues set forth in the resolution in a relatively limited time period. Throughout the interim, the subcommittee heard from Nevada's law enforcement, academics, and practitioners in the legal community. In addition, the subcommittee heard from national speakers, including Barry C. Scheck from the Benjamin Cardozo School of Law and the Innocence Project, and James Lieberman, the author of the national study "Broken System—Error Rates in Capital Cases." On behalf of all the members, Mr. Anderson thanked Chairwoman Leslie for her leadership in conducting a well-balanced study and for her patience and forbearance with the members that have a tendency to talk endlessly. He also wanted to thank the legislative staff—Mr. Anthony; Ms. Lang, who now has the unenviable task of drafting the subcommittee's process into legal Nevada-ease; and Ms. Rengler, who attempts to keep the subcommittee on track—for their tremendous efforts to bring the subcommittee together.

Chairwoman Leslie echoed Mr. Anderson's sentiments and thanked the staff.

Senator McGinness said Chairwoman Leslie did a great job and as did the staff.

Senator Neal thanked Chairwoman Leslie for the method in which she conducted the hearings. It was an excellent study, discussing with the experts the many issues brought before the subcommittee. Senator Neal said his position for the 30 years he has been in the Legislature has always been in opposition to the death penalty, and he continues to oppose this type of penalty because it could never be exercised in a fair manner. He said capital punishment would continue to have problems even though the subcommittee has adopted recommendations to minimize some of them, but not all. Senator Neal did not support the State becoming a party to killing people and allowing revenge to become a motivating factor. He surmised that this issue will come before the U.S. Supreme Court again as it did in the early 1970s. He noted that Supreme Court Justice Sandra Day-O'Connor opposes some of the issues regarding this particular penalty and has expressed her opinion regarding the unfairness of the administration of the death sentence. Senator Neal said he could foresee that within the next six or seven years, this issue would be before the Court where this penalty will be judged as being cruel and unusual. Senator Neal expressed his desire to see that come to fruition and that the State of Nevada and other states across the nation would arrive at the position where they would find that this particular penalty is not necessary to enforce criminal laws. He looked forward to being able to carry out these recommendations that the subcommittee has voted upon. Senator Neal informed the members that, of course, he still had a couple of BDRs, and the Legislature would probably address the abolition of the death penalty again in the next session.

Chairwoman Leslie said she appreciated Senator Neal's comments.

### **ADJOURNMENT**

There being no further business, the meeting was adjourned at 5:05 p.m.

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

Respectfully submitted,

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Deborah Rengler  
Senior Research Secretary

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Nicolas C. Anthony  
Senior Research Analyst

APPROVED BY:

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Assemblywoman Sheila Leslie, Chairwoman

Date \_\_\_\_\_

### **LIST OF EXHIBITS**

Exhibit A is an outline of the testimony of Daniel J. Greco, Chief Deputy District Attorney, Office of the Washoe County District Attorney, Reno, Nevada, provided by Mr. Greco.

Exhibit B is a document titled "Work Session Document" dated June 14, 2002, provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit C is a document titled “Appendix to the Work Session Document” dated June 14, 2002, provided by Nicolas C. Anthony, Senior Research Analyst, Research Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit D is a copy of the written remarks of Ron Cornell, President, Families of Murder Victims, Las Vegas, Nevada, provided by Mr. Cornell.

Exhibit E is a letter to Sheila Leslie, Chairwoman, Subcommittee to Study the Death Penalty and Related DNA Testing, dated June 6, 2002, from Nancy Hart, President, Nevada Coalition Against the Death Penalty, Reno, Nevada, together with attached letters and petitions in support of the Nevada Coalition Against the Death Penalty’s recommendations for reforming Nevada’s death penalty, provided by Ms. Hart.

Exhibit F is a copy of Assembly Bill 354 of the 2001 Legislative Session, provided by Risa B. Lang, Principal Deputy Legislative Counsel, Legal Division, Legislative Counsel Bureau, Carson City, Nevada.

Exhibit G 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.