Death Penalty and Related DNA Testing

Legislative Counsel Bureau
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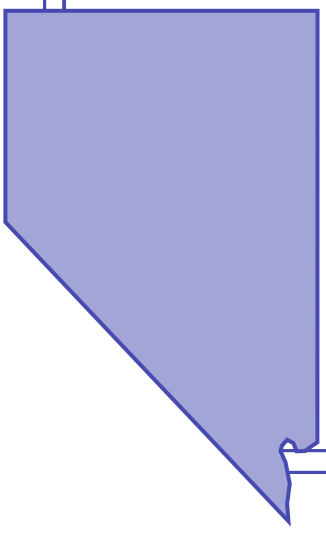

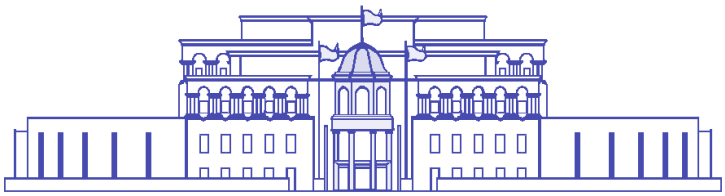

DEATH PENALTY AND RELATED DNA TESTING

BULLETIN NO. 03-5

JANUARY 2003

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SUMMARY OF RECOMMENDATIONS

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*])

Following is a summary of the recommendations adopted by the Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing at its June 14, 2002, meeting. These recommendations will be forwarded to the Legislative Commission and ultimately to the 2003 Session of the Nevada Legislature, as appropriate.

RACIAL/BIAS/GENDER/ECONOMIC DISCRIMINATION

RECOMMENDATION NO. 1 — Draft a letter, on behalf of the Assembly Concurrent Resolution (A.C.R.) 3 Subcommittee, to the Supreme Court of Nevada 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.

RECOMMENDATION NO. 2 — Draft legislation to require reporting of statistical information in all death penalty and homicide cases. This recommendation, adopted in concept form, contains two parts: (1) the first component requires an annual reporting by the district attorney for all non-negligent homicides; and (2) the second component requires that the trial court submit a report in all first-degree murder cases where a penalty hearing is conducted.

AGGRAVATING AND MITIGATING CIRCUMSTANCES

RECOMMENDATION NO. 3 — Draft legislation to eliminate the "great risk of death to more than one person" aggravating circumstance (subsection 3 of *Nevada Revised Statutes* [NRS] 200.033).

RECOMMENDATION NO. 4 — Draft legislation to amend the current list of mitigating factors under NRS 200.035:

- By adding a specific mitigating factor to NRS 200.035 that the defendant suffers from mental illness or has a history of psychological disturbance; and
- By adding a requirement that the court list all of the "other" mitigating factors under NRS 200.035 individually and submit them in writing to the jury.

COMPETENCY AND FUNDING OF COUNSEL

RECOMMENDATION NO. 5 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider creating an independent authority to recruit, select, train, monitor, support, and assist attorneys who represent defendants charged with a capital crime.

RECOMMENDATION NO. 6 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider amending *Supreme Court Rule* (SCR) 250 to increase the 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.

RECOMMENDATION NO. 7 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider amending SCR 250 by adding "Due to the unique severity of capital sentences and the complexity of capital litigation, the Supreme Court of Nevada shall not apply procedural default rules to bar consideration of constitutional issues on direct appeal or in collateral proceedings."

RECOMMENDATION NO. 8 — 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 SCR 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. 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.

RECOMMENDATION NO. 9 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Association of Counties and to the Office of the State Public Defender urging that payments for attorney fees and ancillary expenses be paid promptly.

JURIES AND JURY INSTRUCTIONS

RECOMMENDATION NO. 10 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider adopting a rule requiring individual voir dire and sequestering in capital cases.

RECOMMENDATION NO. 11 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider adopting a rule requiring written jury questionnaires in capital cases.

JUDICIAL FUNCTIONS AND THREE-JUDGE PANELS

RECOMMENDATION NO. 12 — Draft legislation to eliminate three-judge panels in capital cases where the sentencing jury is hung. In cases where the sentencing jury does not unanimously vote for death, the judge shall enter a sentence of life without the possibility of parole or shall empanel a new sentencing jury.

RECOMMENDATION NO. 13 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider adopting a rule 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.

RULES OF PROCEDURE AND ARGUMENT

RECOMMENDATION NO. 14 — Draft legislation to amend NRS 175.554 to revise the order in which arguments must be presented during the penalty hearing in capital cases. The 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.

DNA EVIDENCE

RECOMMENDATION NO. 15 — Redraft Assembly Bill 354 of the 2001 Legislative Session, allowing persons under a sentence of death to file a post-conviction petition requesting genetic marker analysis of evidence within the possession or custody of the state. The legislation should also include additional provisions related to the preservation of evidence.

DEFENDANTS WITH MENTAL RETARDATION

RECOMMENDATION NO. 16 — Redraft Assembly Bill 353 from the 2001 Legislative Session, prohibiting the imposition of a death sentence on individuals diagnosed with mental retardation.

COSTS OF THE CAPITAL PUNISHMENT SYSTEM

RECOMMENDATION NO. 17 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Administrative Office of the Courts (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.

REPORT TO THE 72ND SESSION OF THE NEVADA LEGISLATURE BY 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*])

I. INTRODUCTION

A. General Overview

In recent years, the topic of capital punishment has garnered much social, political, and judicial attention. As media coverage has broadened and begun to permeate the American mindset on issues such as actual innocence and racial bias, a number of bipartisan state and national lawmakers have started to express concern over the fairness and effectiveness of retaining the ultimate penalty.

As of the writing of this report, 38 states and the Federal Government currently authorize the death penalty for individuals found guilty of murder; however, almost every state considered or passed legislation in 2001 to address various procedural and constitutional safeguards in death penalty cases. The nationwide debate has encouraged several states to create and fund studies to more closely examine their own death penalty systems. An alarming number of exonerations from Illinois' death row, recently prompted Governor George Ryan to enact a moratorium on all executions, while the Governor's Commission completed a comprehensive study of the system in Illinois. In addition, the American Bar Association (ABA) adopted a resolution calling for a general moratorium on all executions until serious flaws that the ABA has identified in the capital punishment system are remedied.

Beyond the religious and moral grounds for opposing state sponsored executions, much discussion has centered on whether the current death penalty system is functioning properly, or whether it should be abandoned altogether. Some scholars have suggested that the system is irreparably flawed, and that the death penalty is applied disproportionately and in a discriminatory manner. Some have suggested that there is too much prosecutorial discretion, and that the system arbitrarily biases certain defendants on the basis of race, color, national origin, gender, geographic location of the crime, and/or economic background.

Other critics of the system believe that there are problems with poorly trained or underpaid counsel, while still others assert that the system is ineffective and does not serve as a deterrent. Some have suggested that the system spends more time and taxpayer dollars in lengthy legal proceedings and the numerous levels of appeals than it would cost to incarcerate someone for life without the possibility of parole. Further, with recent advancements in DNA testing and modern technology, questions have more frequently been raised as to whether the system may wrongly condemn innocent people.

These and other significant questions about the functioning of the current death penalty system have raised the level of debate in Nevada. The 2001 Nevada Legislature responded by creating an interim study to conduct an in-depth review of the complex issues and facts surrounding the death penalty.

B. Nevada Overview

Nevada has a long history with the death penalty, extending back prior to the creation of the Nevada Territory. Beginning in 1861, executions by hanging were conducted at the county seats where the person was convicted. Executions continued, by firing squad and lethal gas, through 1961 (no executions were conducted between 1961 and 1979). Then, in 1972 the United States Supreme Court overturned the Georgia death penalty statute (and with it the Nevada statute). For a period of several years there were no executions and the death penalty issue remained silent; however, in 1976, the United States Supreme Court reissued new guidelines for states that wanted to adopt the death penalty.

In accordance with the guidelines set forth in the federal and state court decisions, the 1977 Nevada Legislature enacted Senate Bill 220 (Chapter 585, *Statutes of Nevada 1977*), which prescribed the circumstances in which capital punishment may be imposed for first degree murder. Nevada's current law provides that the death penalty may only be sought where the underlying crime is first-degree murder [under the *Nevada Revised Statutes* (NRS) 200.030] with one or more aggravating circumstances [under NRS 200.033].

Since the reinstatement of the death penalty in Nevada, the death sentence has rarely been carried out against the wishes of the convicted defendant. Since 1977, nine individuals have been executed in Nevada. In eight of the nine cases, the defendant waived at least a portion of his appeals process; yet, Nevada continues to have one of the highest death row populations per capita. As of the writing of this report, there were 83 men and 1 woman on Nevada's death row.

C. Past Studies in Nevada

The issue of studying the procedural aspects of the death penalty is not new to Nevada. In 1995, the Supreme Court of Nevada established a committee to review procedural and due process questions regarding the death penalty. The Fondi Commission on Death Penalty Cases was created to review *Supreme Court Rule* (SCR) 250 (which sets guidelines for trial of capital cases, sets minimum standards for continuing legal education in the area of capital cases, and sets minimum qualifications for lawyers participating in capital cases). In July, 1997, the Fondi Commission issued its final report. Some of the recommendations and findings of the Commission were never adopted, and were again revisited by this study.

Also in 1995, the Death Penalty Task Force was created under the direction of State Senator Mark A. James. The multi-jurisdictional Task Force was comprised of state legislators, judges, district attorneys, defense attorneys, members of law enforcement, representatives

from the Office of the Attorney General of Nevada, and members of Nevada's Congressional Delegation. The Task Force also issued a final report in April of 1997, which was designed to help identify issues affecting death penalty cases and appeals. Copies of both reports are available in the Research Library of the Legislative Counsel Bureau (LCB).

D. 2001 Legislative Session

With the recent nationwide attention drawn to the death penalty, and concerns raised over the effectiveness of Nevada's own system, the 2001 Session of the Nevada Legislature, considered a number of bills aimed at improving the current death penalty system. Assembly Bill (A.B.) 327, sought to revise the order in which arguments are presented during a penalty hearing when the death penalty is sought. In addition, A.B. 327 attempted to raise the minimum age (at the time the crime is committed) for death eligible crimes from 16 to 18 years of age.

Assembly Bill 353 attempted to ban the death penalty for individuals who are mentally retarded. Although the bill passed the Assembly, by a vote of 28 to 11, the bill was not voted out of committee in the Senate. Assembly Bill 354 aimed to provide for genetic marker analysis of evidence related to convictions of persons sentenced to death.

Also during the past Session, a spirited debate occurred in the Senate over Senate Bill (S.B.) 254. The bill sought to abolish the death penalty in Nevada. At one point, S.B. 254 was amended to include a two-year moratorium on all executions while a comprehensive review of the system could be completed.

Ultimately, and in response to the number and complexity of the issues raised during the 2001 Legislative Session, Assembly Concurrent Resolution (A.C.R.) 21 was introduced to create a comprehensive legislative interim study. All of the aforementioned bills were consolidated into the parameters of A.C.R. 21; however, with the time constraints of a 120-day session, A.C.R. 21 was continued into the 17th Special Session and eventually became Assembly Concurrent Resolution 3.

II. CREATION OF AN INTERIM STUDY

The 17th Special Session of the Nevada Legislature adopted A.C.R. 3 (File No. 7, *Statutes of Nevada 2001 Special Session*), which directed the Legislative Commission to appoint a subcommittee to study the death penalty and related DNA testing. Attached as Appendix A is a copy of the resolution creating the study.

The Legislative Commission appointed a Subcommittee of eight legislators (four members of the Senate and four members of the Assembly) to carry out the provisions of A.C.R. 3.

The members of the Subcommittee were:

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

** Senator Mark A. James resigned from office on May 29, 2002, and did not participate in the final work session meeting of the Subcommittee.*

Legislative Counsel Bureau staff services were provided by Nicolas C. Anthony, Senior Research Analyst, Research Division; Risa B. Lang, Principal Deputy Legislative Counsel, Legal Division; and Deborah Rengler, Senior Research Secretary, Research Division.

III. OVERVIEW OF SUBCOMMITTEE PROCEEDINGS

The Subcommittee held six meetings, including a work session, over the course of the 2001-2002 Legislative Interim. Three meetings were held at the Grant Sawyer Building in Las Vegas, and three meetings were held at the Legislative Building in Carson City. During the course of the study, the Subcommittee received extensive expert testimony from both well-known academics and local legal practitioners. The Subcommittee was fortunate to have national experts testify via live videoconference: Professor Bryan Stevenson, New York University School of Law, spoke on race and bias in the system; Professor James Liebman, Columbia University School of Law, testified in response to his recent study *Error Rates in Capital Cases Part II*; Professor Barry Scheck, Cardozo School of Law, a well known trial expert and founder of the Innocence Project testified on the uses of DNA, and; Richard Dieter, Executive Director of the Death Penalty Information Center, testified on the costs of the death penalty system.

In addition, throughout the interim, the Subcommittee received testimony from the Office of the Attorney General; Offices of the Clark and Washoe County District Attorney; Offices of the Clark and Washoe County Public Defender; Office of the Federal Public Defender; Department of Corrections; American Civil Liberties Union; National Association for the Advancement of Colored People; Families of Murder Victims; members of the Nevada judiciary; Offices of the Clark and Washoe County Crime Laboratory; and members of the medical, legal, and religious communities. The Subcommittee also heard from numerous members of the public and interested persons.

It should also be noted that the Subcommittee considered recommendations from the Constitution Project's Death Penalty Initiative, a bipartisan group of former judges,

prosecutors, public officials, victim advocates, defense lawyers, journalists, scholars and other concerned Americans, whose beliefs represent both supporters and opponents of the death penalty. The Constitution Project, housed at Georgetown University, seeks to develop solutions to contemporary constitutional and governance issues by combining high-level scholarship and public education. The Death Penalty Initiative reviewed the death penalty nationwide with an eye on basic constitutional protections (including a competent lawyer, a fair trial, and full judicial review of the conviction and sentence) and issued substantive and procedural recommendations for states to consider. A copy of the Initiative's report entitled "Mandatory Justice: Eighteen Reforms to the Death Penalty" is available on the Constitution Project's Internet Web site at: http://www.constitutionproject.org.

Due to the extensive nature of the subject matter, each Subcommittee meeting was scheduled to address specific agenda topics within the call of the resolution. The first meeting was largely informational and provided a topical overview and outline for the study. The second meeting focused on the impact of race, color, religion, national origin, gender, economic status, and the geographic location of defendants on decisions concerning charging, prosecuting, and sentencing in capital cases. In addition, the Subcommittee reviewed the statutory aggravating and mitigating circumstances for capital offenses, the competency and funding of counsel, and juror issues in capital cases.

The third meeting addressed the appeals process and error rates in capital cases. Other issues on that agenda included judicial functions, the use of three-judge panels, criminal trial procedure, the deterrent effect of the death penalty, and the perspective of victims of violent crime. Meeting four reviewed the potential uses, procedures, costs, and storage of DNA evidence. The fifth substantive meeting focused on the imposition of a death sentence on persons who are mentally retarded or under the age of 18 at the time of the offense. Additionally, the Subcommittee heard testimony on the discovery process and the costs of capital cases.

At the final work session meeting, the Subcommittee considered 32 total recommendations and ultimately adopted 17 recommendations. The approved recommendations address the following major topics:

- Racial bias, gender, and economic discrimination, including statistical reporting in death penalty and homicide cases;
- Aggravating and mitigating circumstances;
- Competency and funding of counsel;
- Juries and jury instructions;
- Judicial functions and three-judge panels;
- Rules of procedure and argument;

- DNA evidence;
- Defendants diagnosed with mental retardation; and
- Costs of the capital punishment system.

General information regarding the meetings of the Subcommittee, including the minutes (without exhibits), and a copy of this report are electronically available on the Legislature's Internet Web site under "Interim Information," available at: http://www.leg.state.nv.us. In addition, all supporting documents and meeting minutes are on file with the LCB's Research Library (775/684-6827).

IV. DISCUSSION OF ISSUES AND RECOMMENDATIONS

This report is intended to provide a concise summary, with relevant background, of each recommendation that the Subcommittee adopted. The outline is organized in topical order and is largely by chronological reference as to how the issues were considered throughout the interim.

A. Racial/Gender/Economic Discrimination

1. Background and Testimony

The Subcommittee received substantial testimony and information from local and national experts on the impact of race, color, religion, national origin, gender, economic status, and the geographic location of defendants on decisions concerning charging, prosecuting, and sentencing in capital cases. Professor Bryan Stevenson, New York University School of Law, and Executive Director of the Equal Justice Initiative of Alabama, testified that because Nevada is one of the nation's leaders in imposing death sentences on a per capita basis, the risk of racial bias affecting these judgments is quite high.

Professor Stevenson went on to discuss the Kentucky Racial Justice Act. The Act, signed into law three years ago, provides that if racial considerations played a significant role in the decision to seek the death sentence, the accused may present evidence of such facts. In essence, the Act shifts the burden of proof to prosecutors to establish that no bias exists. Professor Stevenson suggested that by shifting the burden of proof, Kentucky's Racial Justice Act provides for a direct determination as to whether actual racial bias exists.

In addition, other presenters testified that in Nevada, African Americans comprise 40 percent of the death row population, despite the fact that the African-American population of Nevada has never been greater than approximately 8 percent. Further, despite apparent concerns of disparate minority representation on Nevada's death row, testimony stated that no Nevada political institution has addressed the problem or attempted to gather information on whether there is a problem.

Further, testimony indicated that Nevada should strengthen the mandatory review by the Supreme Court of Nevada and should also require a "proportionality review" by the Court. A proportionality review would inquire specifically whether the death sentence is proportional in light of similar cases in which the death penalty was not sought or was not imposed. Professor Joan Howarth, Boyd School of Law, Las Vegas, asserted one reason that discretion relative to capital offenses is open to unconscious bias is because decision makers are reaching determinations relative to individual criminal proceedings without comparison to similar cases. She also stated that since unconscious racism and gender bias most often occur when comparisons are not made, testing and comparison are the most effective tools for exposing such bias.

Additionally, the Subcommittee considered the Constitution Project recommendation on proportionality review that, "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 that the Fondi Commission proposed that the Supreme Court of Nevada amend SCR 250, to require the reporting of the race of the defendant and the victim in capital charged cases; however, even though the Supreme Court inserted such a provision in SCR 250, apparently that requirement was quickly removed and never enacted in practice. Michael Pescetta, Assistant Federal Public Defender, Office of the Federal Public Defender, testifying as an individual, asserted that there is an apparent and alarming bias in Nevada death cases, yet reliable statistical information on race is currently nonexistent in Nevada. Attached as Appendix B, is a memorandum, by Mr. Pescetta, on racial and economic bias in the imposition of the death penalty.

At the final work session, the Subcommittee reviewed the merits of the Kentucky Racial Justice Act, a mandatory proportionality review, and legislation to require a reporting of statistical information in all death penalty and homicide cases. The Subcommittee ultimately adopted two recommendations in response to concerns over potential and existing bias in the system.

RECOMMENDATION NO. 1 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada 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.

The review of death sentences should examine whether the sentence in the underlying case is excessive with respect to the facts of the case itself, or if the sentence is disproportionate in comparison with other cases in which a death sentence was not sought or imposed.

Attached as Appendix C is a copy of the letter to the Supreme Court of Nevada from the Subcommittee.

RECOMMENDATION NO. 2 — Draft legislation to require reporting of statistical information in all death penalty and homicide cases. (BDR 14-197) This recommendation, adopted in concept form, contains two parts: (1) the first component requires an annual reporting by the district attorney for all nonnegligent homicides; and (2) the second component requires that the trial court submit a report in all first-degree murder cases where a penalty hearing is conducted.

The reporting for homicide cases by the district attorney is similar to the reporting suggested by the Fondi Commission and briefly adopted by the Supreme Court of Nevada in SCR 250. The proposed legislation requires the district attorney for each county to prepare and submit a report to the Supreme Court on February 1 of each year concerning each case in the previous calendar year charged with murder, voluntary manslaughter or involuntary manslaughter. The report must include: (1) the age, sex, and race of the defendant, the victim, and any other codefendants or coparticipants; (2) the date of the homicide and of the filing of the complaint or indictment; (3) 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; (4) the racial and gender composition of the jury; and (5) 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).

In addition, the reporting required by the trial court is modeled after the *Revised Code of Washington Annotated* 10.95.120. The proposed legislation requires the Supreme Court to prepare and supply to all district courts a questionnaire that must be completed by any district court after a sentence is imposed for first-degree murder. The trial court would be required to report within 60 days to the Supreme Court of Nevada, the defendant or 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.

Attached as Appendix D is BDR 14-197.

B. Aggravating and Mitigating Circumstances

1. Background and Testimony

Under Nevada law, a person is only eligible for the death penalty if he is convicted of first-degree murder, with one or more aggravating circumstances. *Nevada Revised Statutes* 200.033 outlines the current 14 statutorily defined aggravating circumstances for first-degree murder.

The Subcommittee heard testimony that the United States Supreme Court has asserted that not all first-degree murders should be eligible for the death penalty, and that states are obligated to narrow the class of such offenders who might be eligible for the death penalty. In addition, the

Constitution Project recommends that the statutory limitation of death-eligible cases be limited to those that are especially heinous, premeditated, and unmitigated.

JoNell Thomas, private attorney, stated that there may be less leeway for prosecutorial discretion and bias in the system if the aggravating circumstances were limited. Attached as Appendix E is a memorandum, by JoNell Thomas, on aggravating and mitigating circumstances.

During hearings, prosecutors and defense attorneys, along with members of the judiciary, debated which of the 14 statutory aggravating circumstances are currently the most vague and ambiguous. A large portion of the testimony questioned the appropriateness of the following two aggravators: (1) murder committed by a person who knowingly created a great risk of death to more than one person [NRS 200.033(3)] and; (2) murder committed upon one or more persons at random and without apparent motive [NRS 200.033(9)].

The Subcommittee also reviewed the current statutory scheme allowing for evidence of mitigating circumstances. Under current NRS 200.030(4)(a), a person convicted of murder in the first degree may be punished by death, "only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances." The jury considers mitigating circumstances when they are determining the appropriate sentence at the penalty hearing. The current list of mitigating circumstances is identified within NRS 200.035.

Much discussion on mitigating circumstances centered on whether the Subcommittee should adopt a recommendation for a mitigating factor of lingering doubt. This recommendation was made by the Constitution Project, and allows for a juror to consider 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 the jury found the defendant guilty. A lingering doubt would allow the juror to consider that evidence as a mitigating circumstance in the sentencing phase of trial.

After considering the recommendation on lingering doubt, the Subcommittee chose not to proceed with a new mitigating circumstance in that area, as that mitigating circumstance is aimed at the juror's state of mind and not to the defendant's. The Subcommittee did recommend two changes concerning mitigating circumstances.

RECOMMENDATION NO. 3 — Draft legislation to eliminate the "great risk of death to more than one person" aggravating circumstance (subsection 3 of NRS 200.033). (BDR 14-198)

After much discussion at the work session, the Subcommittee chose to delete the aggravating circumstance that they felt was the most ambiguous, with the understanding that the full issue would again be debated by the legislature during the 2003 Session.

This draft legislation proposes to eliminate the circumstance aggravating first-degree murder by deleting NRS 200.033(3) "that the murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person."

Attached as Appendix F is a copy of BDR 14-198.

RECOMMENDATION NO. 4 — Draft legislation to amend the current list of mitigating factors under NRS 200.035:

- By adding a specific mitigating factor to NRS 200.035 that the defendant suffers from mental illness or has a history of psychological disturbance; and
- By adding a requirement that the court list all of the "other" mitigating factors under NRS 200.035 individually and submit them in writing to the jury. (BDR 14-198)

The Subcommittee voted to recommend legislation to amend the current list of mitigating circumstances to allow for a mitigating factor related to a defendant who suffers from mental illness or has a history of psychological disturbance. Testimony indicated this new mitigating circumstance is different than extreme mental or emotional disturbance under NRS 200.035(2), in that a prolonged history is unlike an isolated or one time occurrence of a mental impairment.

Further, testimony proffered that the court should list as part of the verdict form to be submitted to the jury, all "other" potentially mitigating circumstances as an aide to jurors. The proposed language would clarify that the court would create a list so that anybody reviewing that particular case would know what mitigating circumstances the jury considered.

Attached as Appendix F is a copy of BDR 14-198.

C. Competency and Funding of Counsel

1. Background and Testimony

Throughout the course of the study, the Subcommittee heard testimony regarding the competency and funding of defense counsel in capital cases. Presenters suggested that while Nevada has the largest per capita death row population in the nation, the state also has one of the smallest practicing bars in the nation and the smallest ratio of licensed attorneys to handle death penalty cases. It was also suggested that higher remuneration rates and prompt payments might encourage more attorneys to enter the area of capital trial and appellate practice.

Further, it was noted that there is a notable difference in the outcome of a proceeding when a defendant is represented by court-appointed counsel versus a fully funded private attorney. Testimony stated that none of the nine individuals that have been executed in Nevada had the

benefit of a fully funded private attorney, and that very few, if any, persons currently on Nevada's death row were able to afford a private attorney.

RECOMMENDATION NO. 5 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider creating an independent authority to recruit, select, train, monitor, support, and assist attorneys who represent defendants charged with a capital crime.

This recommendation was offered by the Constitution Project and is similar to recommendations made by the ABA and the National Legal Aid Defender Association. The recommendation states that an 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 would meet the definition of a central appointing authority.

Attached within Appendix C is a copy of the letter to the Supreme Court of Nevada.

RECOMMENDATION NO. 6 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider amending SCR 250 to increase the 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.

The Subcommittee heard testimony that in 1995 the Fondi Death Penalty Commission was created to review SCR 250 (which sets guidelines for trial of capital cases, sets minimum standards for continuing legal education in the area of capital cases, and sets minimum qualifications for lawyers participating in capital cases). The above recommendation, urging the court to amend SCR 250, in regards to qualifications of counsel in death cases, was originally proposed by the Fondi Commission; however, it was ultimately reduced in the final amended version of SCR 250.

Attached within Appendix C is a copy of the letter to the Supreme Court of Nevada.

RECOMMENDATION NO. 7 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider amending SCR 250 by adding "Due to the unique severity of capital sentences and the complexity of capital litigation, the Supreme Court of Nevada shall not apply procedural default rules to bar consideration of constitutional issues on direct appeal or in collateral proceedings."

The Subcommittee was apprised that during the debates of the Fondi Commission, a minority report was submitted to the Commission, which proposed to eliminate putative procedural default rules in capital cases. Testimony indicated that procedural technicalities (e.g., time limitations) should not stand in the way of a defendant's constitutional rights. In addition, the review of constitutional claims, including actual innocence, should not be barred merely because the defendant had a bad lawyer.

The minority report also asserted that the Supreme Court of Nevada has a practice of applying procedural default rules inconsistently, and that the imposition of a procedural bar to avoid consideration of the merits of a constitutional claim may be an exercise of unfettered discretion. The above recommendation suggests that the court consider amending SCR 250.

Attached within Appendix C is a copy of the letter to the Supreme Court of Nevada.

RECOMMENDATION NO. 8 — 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 SCR 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. 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. (BDR 1-201)

During testimony, proponents argued that to provide adequate resources to court appointed defense counsel, more resources must be allocated to the defense team. Testimony indicated that oftentimes the defense is not privy to the number of attorneys and resources that the prosecution (the state) has at its discretion. This disparity often creates an unequal situation, which may ultimately bias the system in favor of death.

Further, the Subcommittee heard that the last time the fees for appointed counsel (other than a public defender) were raised was in 1991, when the fees were raised from $6,000 to the current level of $12,000. It was also noted that under NRS 7.125(4), the law provides for the awarding of additional fees if the appointing court finds that the complexity, severity, time necessary to provide an adequate defense, or other special circumstance warrants a sum in excess of the statutory maximum. Some contested that often the court does exceed the maximum statutory limit, and that a discussion of fees actually paid should be more thoroughly examined during the 2003 Legislative Session.

Attached as Appendix G is BDR 1-201.

RECOMMENDATION NO. 9 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Nevada Association of Counties (NACO) and to the Office of the State Public Defender urging that payments for attorney fees and ancillary expenses be paid promptly.

Testimony from practitioners stated that oftentimes payments may be several months late, and that many attorneys are unable to keep their law practice running or are discouraged from entering this type of practice altogether.

Attached as Appendix H is a copy of the letter to the NACO and the Office of the State Public Defender.

D. Juries and Jury Instructions

RECOMMENDATION NO. 10 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider adopting a rule requiring individual voir dire and sequestering in capital cases.

Phillip Kohn, Special Public Defender, Clark County Special Public Defender's Office, testified that it has been his experience that the only way to determine whether prospective jurors are biased is through the voir dire process. Mr. Kohn stated that judges often strive to complete the voir dire process in one day, and no judge in Clark County allows either the defense or prosecution to conduct individual voir dire. Therefore, Mr. Kohn recommended that the Subcommittee consider allowing individual voir dire in capital punishment proceedings. He also noted that certain judges do not permit questionnaires, and prospective jurors are not allowed to answer questions in the privacy of the jury room or at home, and that in addition, some judges do not allow open-ended questions or permit counsel to ask jurors factual questions. Further, he surmised that some judges will not allow the defense or prosecutor to ask jurors individualized questions; rather, they require that each prospective juror be asked the same questions.

At the work session, the Subcommittee noted that jury issues might be more appropriately addressed within the purview of the judicial branch. As such, the Subcommittee recommended drafting a letter to the Supreme Court, urging the court to consider individual voir dire and

sequestering in capital cases. Attached within Appendix C is a copy of the letter to the Supreme Court of Nevada.

RECOMMENDATION NO. 11 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider adopting a rule requiring written jury questionnaires in capital cases.

Testimony indicated that jury questionnaires are generally prepared and agreed upon by the prosecution and the defense, and are then 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. Testimony further stated that 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.

Again, the Subcommittee felt that this recommendation may be more appropriately effectuated by the judicial branch, and recommended that a letter be drafted urging the Supreme Court to adopt a rule requiring written jury questionnaires.

Attached as Appendix C is a copy of the letter to the Supreme Court of Nevada.

E. Judicial Functions and Three-Judge Panels

1. Background and Testimony

The Subcommittee heard testimony that use of three-judge panels in sentencing decisions is unique to Nevada. Under the current Nevada statutory scheme, if a defendant in a death eligible case enters a guilty plea or the sentencing jury is hung (not unanimous), then the case proceeds to a three judge panel (NRS 175.552 and 175.556). The panel is composed of the underlying trial judge and two district court judges selected from two other judicial districts throughout the state.

Several presenters suggested that the three-judge panel system is biased and may be unconstitutional. Testimony indicated that it is impossible to have an African-American jurist participate on a three-judge panel in Clark County unless he has presided over the trial. Questions concerning Nevada's judiciary revealed that there are only two African-American judges sitting in Nevada's District Court system and both are in Clark County. Testimony further pointed out that since the law requires two jurists from other districts to serve on the three-judge panel along with the original trial judge, most cases would undoubtedly be heard by all-white panels.

Michael Pescetta (previously identified in this report) opined that when two of the three jurists on the three-judge panels are from outside the judicial district in which a case was tried, it might be difficult for this body to express the conscience of the community. When a penalty

jury chosen from the Las Vegas community cannot reach a unanimous verdict and a three-judge panel with rural jurists makes that decision, it was Mr. Pescetta's opinion that the results in these cases are skewed in favor of a death sentence. In his view, the decisions of three-judge panels regarding offenses committed in urban areas are affected by the participation of possibly more conservative judges from rural counties. Attached as Appendix I, is a memorandum on three-judge panel procedure by Mr. Pescetta.

The Subcommittee expressed concern that the use of the three-judge panel system may contribute to higher instances of racial bias in our state. At the final work session, the Subcommittee was presented with several options to repeal three-judge panels; however the Subcommittee chose to keep the three-judge panels in guilty plea cases, as it provides a cost savings and procedural resource issue for the courts. In the area of three-judge panels for hung juries, the Subcommittee voted to recommend that the trial judge should have the option to either impose a default sentence less than death (life without the possibility of parole), or to empanel a new sentencing jury.

It should be noted that on June 24, 2002, ten days after the Subcommittee considered and adopted its final recommendations, the U.S. Supreme Court decided *Ring v. Arizona*. The case centered on whether a judge, rather than a jury, may decide the critical sentencing issues in death penalty cases. The recommendations by the Subcommittee were not made with consideration or in response to the *Ring* decision.

RECOMMENDATION NO. 12 — Draft legislation to eliminate three-judge panels in capital cases where the sentencing jury is hung. In cases where the sentencing jury does not unanimously vote for death, the judge shall enter a sentence of life without the possibility of parole or shall empanel a new sentencing jury. (BDR 14-197)

After receiving much testimony, the Subcommittee voted to keep the three-judge panels in death eligible cases where the defendant pleads guilty; however, the Subcommittee voted to eliminate the three-judge panels in cases where the sentencing jury is hung. In cases where the death penalty is sought and the jury is unable to reach a unanimous verdict the judge shall sentence the defendant to life without the possibility of parole or shall impanel a new jury to determine the sentence.

Attached as Appendix D is a copy of BDR 14-197.

RECOMMENDATION NO. 13 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Supreme Court of Nevada urging the Court to consider adopting a rule 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.

The Subcommittee heard testimony that due to the complex nature of capital cases, both counsel and judges should be required to undergo more training. In response, the

Subcommittee voted to send a letter to the Supreme Court urging the Court to consider requiring additional judicial training for capital cases. Attached as Appendix C is a copy of the letter to the Supreme Court of Nevada.

F. Rules of Procedure and Argument

1. Background and Testimony

Philip J. Kohn (previously identified in this report) stated that Assembly Bill 327 of the 2001 Legislative Session, which failed to pass, proposed to revise the order in which arguments must be presented during the penalty hearing in cases where the death penalty is sought. Mr. Kohn then presented proposed amending language for NRS 175.554; which as it is now written requires the district attorney or attorney for the state in a criminal trial to open and conclude oral arguments.

Mr. Kohn had no dispute with the statute in the trial stage where the entire burden of proof is on the government. In his opinion, the penalty phase of a death penalty trial is different in that the rules of evidence are lax, hearsay is admissible, and there are two burdens of proof: (1) the state must prove the existence of one or more aggravators; and (2) the defense must show that mitigation outweighs aggravation. Mr. Kohn noted that the evidence of mitigation is not placed before the jury until the penalty phase. He asserted that the prosecution uses NRS 175.141 to its advantage, making a short opening statement and then final argument after the defense has made its closing remarks. Mr. Kohn also stated that oftentimes the prosecution raises issues never mentioned in prior arguments, knowing the defense will not have an opportunity to offer a rebuttal. The proposed amendment would simply allow for rebuttals by the defense. *Nevada Revised Statutes* 175.141 applies to arguments of counsel, and he stated that it would not conflict with previous legislation that permits victims to make final remarks during the sentencing hearing in a criminal case.

RECOMMENDATION NO. 14 — Draft legislation to amend NRS 175.554 to revise the order in which arguments must be presented during the penalty hearing in capital cases. (BDR 14-198) The 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.

Attached as Appendix F is a copy of BDR 14-198.

G. DNA Evidence

1. Background and Testimony

Barry Scheck, Professor of Law, Benjamin Cardozo School of Law, and founder of the Innocence Project, testified before the Subcommittee via videoconference from New York. Professor Scheck stated the most critical point related to post-conviction DNA testing is that it

is simply good law enforcement. Every time an innocent person is arrested, brought to trial, convicted, and/or executed, the guilty party remains free to commit more crimes. The post-conviction DNA testing process leads to the apprehension of serial killers and rapists, as well as exonerating the innocent.

The Innocence Project, established in 1992 by Professor Scheck and his colleague, Peter Neufeld, has either assisted or served as lead counsel in over 60 of the 104 post-conviction exonerations in the U.S. Eleven of the 104 cases involved individuals on death row. Professor Scheck said these exonerations were possibly due to the passage of post-conviction DNA legislation. Initially, only New York and Illinois passed post-conviction DNA bills, and those states continue to have the greatest number of post-conviction DNA exonerations. It was Professor Scheck's opinion that the passage of such legislation has a direct relationship to the number of innocent people exonerated.

Further, testimony indicated that at least 26 states currently allow for post-conviction DNA testing. Additionally, many states have expanded their post-conviction laws to allow all convicted felons to file a motion for post-conviction DNA testing.

Maizie Pusich, Chief Deputy Public Defender, Washoe County Public Defenders' Office, testified that one of the most important issues in the area of DNA testing is the preservation of evidence. She stressed the importance of DNA testing and collecting and preserving sufficient amounts of biological materials from crime scenes for future retesting. Ms. Pusich commented that the proposed legislation should require sufficient genetic material be collected and preserved so that subsequent tests could confirm the accuracy of the original analysis. Further, Ms. Pusich asked that the proposed legislation include a provision that genetic material not be destroyed or completely consumed in testing without the consent of the parties and an order of the court.

RECOMMENDATION NO. 15 — Redraft A.B. 354 of the 2001 Legislative Session, allowing persons under a sentence of death to file a post-conviction petition requesting genetic marker analysis of evidence within the possession or custody of the state. The legislation should also include additional provisions related to the preservation of evidence. (BDR 14-200)

Assembly Bill 354, an act providing for post-conviction genetic market analysis for certain offenders sentenced to death, was introduced during the 2001 Legislative Session. The bill was heard in the Assembly Committee on Judiciary, but the topic was ultimately combined into the A.C.R. 3 interim study so the issue could be more thoroughly examined. During the work session, the Subcommittee voted to redraft A.B. 354, but to include provisions on the preservation and storage of DNA evidence.

The proposed legislation, as drafted, allows for persons who have been convicted and sentenced to death, to file a post-conviction petition requesting genetic marker analysis of evidence within the possession of the state. The court, at its discretion, may then order a

hearing on the petition. The court must order a genetic marker analysis if the court finds that: (1) a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained; (2) the evidence is in a condition that allows it to be tested; and (3) the evidence was not previously subjected to genetic marker analysis involving the petitioner or the method of additional analysis may resolve an issue not previously resolved. If the results of the petition are favorable to the petitioner, the court shall restore the petitioner to his pretrial status.

Attached as Appendix J is a copy of BDR 14-200.

H. Defendants with Mental Retardation

1. Background and Testimony

The Subcommittee heard testimony from a number of individuals and experts within the professional and medical community that expressed concern with allowing individuals diagnosed with mental retardation to be executed. Suggestions were advanced that a majority of the states now prohibit the execution of individuals with mental retardation, and that public opinion strongly disfavors execution of such persons.

An overview of the states indicated that eighteen states plus the Federal Government do not allow the execution of those with mental retardation: AZ, AR, CO, CT, FL, GA, IN, KS, KY, MD, MO, NC, NE, NM, NY, SD, TN, WA, and the United States (federal cases). Additionally, 12 states do not allow for the death penalty in any circumstance, which raises the total to 30 states that do not execute individuals with mental retardation.

Testimony from medical experts indicated that mental retardation compromises legal defense, people with mental retardation try and mask their disability, and determining mental retardation may be accomplished by professionals, as there will be a history of special education services and poor academic and social performance. Further, testimony indicated that mental retardation manifests itself before a person reaches adulthood, usually before age 18, and that the condition differs from mental illness.

During the hearings, discussion centered on the intelligent quotient (IQ) level of 70 as the level for determining mental retardation. Testimony indicated that both at the state and federal levels, a person with an IQ below 70 would be considered mentally retarded for the purposes of receiving social services. It was evidenced though that professionals do not solely rely on IQ, and that they generally look at the person's overall functioning and history of disability over the course of his lifetime, thus the statutory definition should not be based solely on an individuals' IQ score. Attached as Appendix K is a memorandum by Michael Pescetta (previously identified) discussing mental retardation. Also attached as Appendix L is a summary on mental retardation and the death penalty by Jim Ellis, Professor of Law, University of New Mexico and past President of the American Association on Mental Retardation.

It should also be noted that the Subcommittee voted on the final recommendations on June 14, 2002, and just days later on June 20, 2002, the Unites States Supreme Court issued a landmark ruling ending the execution of those with mental retardation. In *Atkins v. Virginia*, the Court held that it is a violation of the Eighth Amendment prohibition on cruel and unusual punishment to execute death row inmates with mental retardation. It should be noted that the Subcommittee's recommendation was prior to the *Atkins* ruling and any potential legislation was not in response to the Supreme Court decision.

RECOMMENDATION NO. 16 — Redraft A.B. 353 from the 2001 Legislative Session, prohibiting the imposition of a death sentence on individuals diagnosed with mental retardation. (BDR 14-199)

Assembly Bill 353, an act prohibiting a sentence of death for persons diagnosed with mental retardation, was introduced during the 2001 Legislative Session. The bill passed the Assembly, but was not voted out of committee in the Senate. During the session, it was decided that the issues raised by A.B. 353 should be included with the interim study, so that they could be more fully examined during the interim.

This proposed redraft of A.B. 353 prohibits the imposition of a sentence of death for a person who is determined by the court to be mentally retarded. Specifically, the bill outlines the procedural steps whereby a defendant who is charged with first-degree murder may file a motion to declare he is mentally retarded. The court shall then hold a hearing, where the defendant has the burden to prove by a preponderance of evidence that he is mentally retarded. For purposes of this bill, a person is deemed "mentally retarded" if, before the age of 18 years, he manifests: (1) intellectual functioning that is significantly substandard; and (2) substantial impairment of his adaptive behavior. A rebuttable presumption of mental retardation is also raised if the person's IQ is 70 or below. A defendant who proves that he is mentally retarded may not be sentenced to death.

It should be noted that as A.B. 353 was originally drafted, the bill reviewed other jurisdictions that prohibit the execution of individuals with mental retardation, and incorporated those procedural and definitional aspects.

Attached as Appendix M is a copy of BDR 14-199.

I. Costs of the Capital Punishment System

1. Background and Testimony

The Subcommittee heard testimony that the costs of the death penalty system are excessive, and that often it costs more to try and appeal capital cases than it would to incarcerate someone for life without the possibility of parole. Further, testimony indicated that 133 death sentences have been imposed in Nevada and only 9 executions, or roughly 10 percent of death sentences,

result in executions. So, for 90 percent of the cases, the state has paid the extra expense of seeking the death penalty, in court and attorney time, both at trial and through the numerous levels of appeal; yet the state still pays for the costs of life imprisonment when the sentence is not carried out.

The most comprehensive study conducted on the subject was prepared by the North Carolina Administrative Office of the Courts, with the assistance of Duke University. The study was conducted in large part with the assistance of a grant from the State Justice Institute. The North Carolina study found that the death penalty costs North Carolina $2.16 million per execution above the cost of a non-death penalty system imposing a maximum sentence of imprisonment for life based on the number of executions actually carried out. Further, the study concluded that if every death sentence resulted in an execution, the extra costs to the taxpayers would still amount to $216,000 per execution.

RECOMMENDATION NO. 17 — Draft a letter, on behalf of the A.C.R. 3 Subcommittee, to the Administrative Office of the Courts (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.

Attached as Appendix N is a copy of the letter to the Nevada Administrative Office of the Courts. The letter includes attachments identified as the executive summary of the North Carolina Administrative Office of the Courts report, and information on grant funding from the State Justice Institute.

V. CONCLUSION

Throughout the interim, the focus of the Subcommittee was to effectively and consciously evaluate the current system of capital punishment in Nevada. Although, as some stated, the extensive nature of the subject matter could warrant extended study and review, the Subcommittee addressed the topics in the call of the enabling resolution within the confines of time and budgetary constraints. It is hoped that the study serves as not a final conclusion, but rather as a starting point to carry forward meaningful discussion of the issues raised.

The Subcommittee wishes to thank all of those who testified throughout the interim and submitted comments and recommendations. It is the goal of the Subcommittee to forward these recommendations to the 2003 Nevada Legislature, and to prospectively enact meaningful reforms that are beneficial to the legal system and to the State of Nevada.

VII. Appendices

APPENDIX A

Assembly Concurrent Resolution 3
(File No. 7, *Statutes of Nevada 2001 Special Session)*

Assembly Concurrent Resolution No. 3–Joint Rules Committee

FILE NUMBER.....

ASSEMBLY CONCURRENT RESOLUTION—Directing the Legislative Commission to conduct an interim study of issues regarding the death penalty and related DNA testing.

WHEREAS, It has been 25 years since the United States Supreme Court allowed the death penalty to resume in the United States under certain circumstances; and

WHEREAS, There have been almost 700 executions in the United States since the reinstatement of the death penalty, eight of those have been in Nevada; and

WHEREAS, The death row population in this country has continued to grow, reaching over 3,700 prisoners in the year 2000; and

WHEREAS, Recent national studies have found that capital trials and sentences cost more than noncapital ones and the time and expense involved in curing errors in capital cases imposes a terrible cost on taxpayers, victims' families, the judicial system and persons wrongly condemned; and

WHEREAS, The determination of genetic markers, commonly referred to as "DNA testing," was not widely available in criminal cases tried before 1994; and

WHEREAS, In the last several years, DNA testing has emerged as the most reliable forensic technique for identifying criminals when biological material is left at a crime scene; and

WHEREAS, Post-conviction exoneration of more than 75 innocent men and women, including some incarcerated under a sentence of death, has been achieved through DNA testing; and

WHEREAS, Because collection of a DNA sample from an inmate consists simply of obtaining a swab of saliva and costs approximately $100, it is now less costly and less burdensome to make DNA testing available to inmates in appropriate cases; now, therefore, be it

RESOLVED BY THE ASSEMBLY OF THE STATE OF NEVADA, THE SENATE CONCURRING, That the Legislative Commission is hereby directed to appoint a committee to conduct an interim study of issues regarding the death penalty and related DNA testing; and be it further

RESOLVED, That the committee to conduct the study consists of eight members of the 71st Legislative Session to be appointed by the Legislative Commission as follows:

1. Four members of the Assembly, at least two of whom are members of the Assembly Standing Committee on Judiciary; and

2. Four members from the Senate, at least two of whom are members of the Senate Standing Committee on Judiciary; and be it further

RESOLVED, That the chairman of the committee may appoint a technical advisory committee to assist the committee in carrying out the study; and be it further

RESOLVED, That the interim study must include, without limitation, consideration of the following issues regarding the death penalty:

1. The costs in Nevada of prosecuting capital cases and incarcerating a person under the death penalty versus the cost of prosecuting a noncapital case and sentencing a person for life without the possibility of parole;

2. The number of prisoners actually executed compared with the number of those who were sentenced to death;

3. The impact of race, color, religion, national origin, gender, economic status and geographic location of defendants in capital cases with respect to decisions concerning charging, prosecuting and sentencing;

4. Whether defendants who are under 18 years of age or who are mentally retarded at the time of committing an offense should be sentenced to death;

5. The competency and expertise of counsel to defendants in capital cases;

6. The adequacy of resources provided to defendants in capital cases;

7. Whether jurors have a proper and adequate understanding of the application of the law and of jury instructions in capital cases;

8. Whether rules pertaining to arguments during any phase of a trial are an impediment in capital cases;

9. Whether capital punishment serves as an effective deterrent against the commission of murder;

10. The expertise of judges that hear capital cases; and

11. The process of appealing a sentence of death; and be it further

RESOLVED, That the study must also include, without limitation, consideration of the following issues concerning DNA testing:

1. The availability, cost and extent of its use, both in Nevada and in the rest of the country;

2. Current policies regarding the use of DNA testing in Nevada compared with policies in the remainder of the states;

3. The manner for storing and using such DNA information;

4. Post-conviction DNA testing, criteria for requests by prisoners and procedures for handling those requests; and

5. Any Fifth Amendment or other constitutional issues related to the use of DNA evidence in capital cases; and be it further

RESOLVED, That 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; and be it further

RESOLVED, That the Legislative Commission shall submit a report of the results of the study and any recommendations for legislation to the 72nd session of the Nevada Legislature.

APPENDIX B

Memorandum dated January 22, 2002,
to the Legislative Commission's Subcommittee to Study the Death Penalty
from Michael Pescetta

MEMORANDUM

Date: 1/22/02
To: Legislative Commission's Subcommittee to Study the Death Penalty
From: Michael Pescetta
Re: Racial and Economic Bias in Imposition of the Death Penalty

The effect of racial and economic bias on the administration of the criminal law, and in particular on the administration of the death penalty, has produced significant controversy but little in the way of action. Demonstrations of gross disparities in the imposition of death sentences on minority defendants, and in cases involving white victims, have not resulted in corrective action under the federal constitution. McCleskey v. Kemp, 481 U.S. 279 (1987) (statewide statistical evidence showing, inter alia, black defendants convicted of killing white victims are 22 times more likely to receive death penalty insufficient to justify relief without evidence of discrimination in individual cases and nothing "inevitable" disparities in sentencing). The disparate imposition of the death penalty on members of minority groups continues unabated. See Death Row USA 3 (Fall 2001) (national statistics on population of all death rows in United States, showing African-Americans 43% of death row population and all minorities 54%.)

The situation in Nevada presents the same problems. According to the reports prepared by the attorney general, since the mid-1990's, Nevada has had a death row population in which members of minority groups are in the majority. African-Americans make up 40% of the death row population, and that proportion has existed over almost the past decade, despite the fact that the African-American population of Nevada has never been greater than about 8%. Everyone on

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Nevada's death row is also poor. As far as we can determine, there is no one on death row who was represented by fully-funded retained counsel, and there is only one person who was represented by counsel who was retained by his family, which could not fully fund the defense.

One likely cause of the racial disparity in the imposition of the death penalty is that the decisionmakers at all stages of capital cases are virtually all white. The prosecutors who determine whether a case will be prosecuted as a capital one, or whether plea negotiations will be conducted, are all white in all of Nevada. The district attorneys in all Nevada counties, who have the ultimate authority to make charging decisions, are white; and in those counties that have some process for assisting in making that decision, the prosecutors involved ally all white.[1] As far as we can determine, there is no case in which an African-American prosecutor has actually tried a capital case. Since the scope of the statutory aggravating factors is so broad that virtually every homicide could be charged capitally, these prosecutors have virtually unlimited discretion to make a homicide case a capital one or not.

On the other side, the criminal defense bar in Nevada is extraordinarily small, and virtually all white. We have been able to identify only four cases in which an African-American defense lawyer has participated in trying a case resulting in a death row sentence.

There has been no systematic collection of data on the composition of juries in capital cases. What evidence we have been able to gather indicates that even in Clark County, the county with the largest minority population, and even in the 1990's, there are few capital juries

[1]For a period from 1995 to 1998, Circuit Judge Johnnie Rawlinson, who was then a Clark County Chief Assistant District Attorney, was the lone minority representative on a committee that advised the District Attorney in capital charging decisions.

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with more than one minority member, and all white juries are still to impose death sentences on African-Americans.

On the bench, the district court judges before whom capital cases are tried, are virtually all white. There are two African-American judges on the Eighth Judicial District Court, and there are none in any other district. There has never been a minority member of the Nevada Supreme Court, which reviews all capital cases and which has the statutory responsibility to review capital sentences to determine if they are affected by "passion, prejudice or any arbitrary factor." Nev. Rev. Stat. § 177.055(2)(C).

It is generally accepted that the chances of avoiding imposition of a death sentence increase if the defense can "humanize" a defendant, that is, to make the decisionmakers see the defendant as a fully human being rather than as only the perpetrator of a murder. See Welch S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 361; Gary Goodpaster, The Trial For Life: Effective Assistance of Counsel in Death Penalty Case, 58 N.Y.U.L. Rev. 299, 335 (1983). When all the decisionmakers are white, their ability to see the full humanity of a defendant whose background is alien to them is likely to be limited, even if there is no conscious racial discrimination. In contrast, the presence of minority decisionmakers, who have some experience of conditions other than those experienced by members of the white majority, may result in greater understanding of minority defendants or all defendants from disadvantaged backgrounds.

Anecdotal evidence strongly suggests inconsistent charging and plea decisions in capital cases. Two examples are the recent Strohmeyer case, in which a young white man was allowed

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to plead to a sentence less than death for killing an African-American child, and in which at least three aggravating circumstances were charged; and the Ted Binion case, in which an aggressive prosecutor could have pursued three aggravating circumstances, and in which the death penalty was not even sought. If the defendants in those cases had been young indigent African-American men, it is assumed by many that the charging and plea decisions – which the district attorney of Clark County has openly stated are based in part on the likelihood of obtaining a death sentence – would have been different.

While the sample of cases is too small to draw statistically significant conclusions, one type of case is revealing. Three judge panels impose sentence in capital cases when the defendant pleads guilty or the penalty jury cannot agree unanimously on a penalty. Nev. Rev. Stat. §§ 175.556, 175.558. Because of the composition of the district court bench, three judge panels are almost always all white. There have been only five cases in which three judge panels have had an African-American member. The all white panels have imposed death sentences in 72% of the cases and lesser sentences in 28%. When the panel has an African-American member, however, that proportion is reversed; those panels imposed sentences less than death in 80% of the cases and death in only 20%.

Despite the persistence of disparate minority representation on Nevada's death row, no Nevada political institution had addressed the problem or tried to gather information on this aspect of the system. In 1997, the Fondi Commission proposed that the Nevada Supreme Court require prosecutors to submit reports identifying at least the race of the defendant and of the victim in capitally charged cases. The Supreme Court inserted a reporting requirement in the

1999 amendment to Supreme Court Rule 250, but that provision was removed by the court at the insistence of prosecutors before any report was made. In 1999, the Nevada State Task Force drew attention to the problem of apparent racial disparities in imposition of the death penalty and recommended, at minimum, gathering information on the issue. Nevada Supreme Court Task Force for the Elimination of Racial, Economic and Gender Bias in the Justice System, 1999 Interim Report, Appendix L at 8-9. The Task Force is no longer in operation, however, due to the lack of funding. No action has been taken on any of the Task Force's recommendations with respect to the death penalty.

The only existing institutional responsibility for considering this issue is the Nevada Supreme Court's statutory responsibility to review death sentences for the influence of "passion [or] prejudice." Nev. Rev. Stat. § 177.055(2)(c). Case by case examination of this issue is usually inadequate to address systematic problems, which must include consideration of cases in which the death penalty was not sought. Further, the Nevada Supreme Court's review has not been aggressive on issues of racial discrimination. The Court has reversed one capital case in which the prosecutor argued the African-American defendant's "preference for white women" in the penalty phase. Dawson v. State, 103 Nev. 76, 79, 734 P.2d 221 (1987). The Court has never reversed a sentence under its mandatory review for prejudice; it has never sought additional information or briefing on that issue; and it has never enunciated any standards for what information or argument would be considered in that review. See Harris ex rel. Ramseyer v. Blodgett, 857 F. Supp 1239, 1286-1291 (W.D. Wa. 1994) (due process violated by lack of notice and standards by which proportionality review of capital sentences conducted); cf. Campbell v.

Blodgett, 997 F.2d 512, 522-523 (9th Cir. 1993) (due process satisfied where state court review for influence of passion or prejudice complied with requirement of state reporting statute.)

When the Supreme Court has been presented with issues of racial discrimination, it has shown itself almost completely insensitive to the problem. For instance, in White v. State, 112 Nev. 1261, 926 P.2d 291 (1996), a case tried as a capital one in which a sentence of life without possibility of parole was imposed, the court was faced with evidence that jurors referred to the defendant as a "tribesman" and compared him to a gorilla and a non-human. Over a vigorous dissent by Justice Rose, the court affirmed the conviction and sentence because the African-American judge believed the defendant received a fair trial, despite the obvious racial bias of one or more of the jurors. 112 Nev. at 1263; id. at 1268-1269 (Rose, J., dissenting).

Another obvious instance of this insensitivity is Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997). In Jones, the defendant was African-American; the two defense lawyers, the two prosecutors, the judge, and the entire jury were white. In closing argument in the penalty phase, the white woman prosecutor called the black defendant a "rabid animal," who was not part of "our human race" and who had a "special death penalty quality." On the appeal the (white) defense lawyer raised the "animal" comment as prosecutorial misconduct, and raised, without explanation, the "special death penalty quality" comment. The court affirmed, finding the "animal" argument in the penalty phase harmless because of the overwhelming evidence in the guilt phase, and declined to consider the "special death penalty quality" argument because defense counsel had not explained why it would be prejudicial. 113 Nev. at 468-469. Neither counsel nor the court addressed the "not part of our human race" argument.

The racial impact of a white woman calling a black man an "animal," who is not "part of our human race," and who has a "special death penalty quality," in front of an all-white jury, a white judge, two white defense lawyers, and another white prosecutor, must be obvious to anyone. The court's failure to consider this issue fully demonstrates that the current structure is not adequate to address the problems of race in the administration of the death penalty.[2] The Committee should therefore consider other ways to address this issue.

Proposals:

1. Because of the small size of minority populations in Nevada (and the resulting difficulty in obtaining minority representation on juries) the virtually all white composition of the official decisionmakers in the Nevada criminal justice system, and the significant potential for racial discrimination (conscious or unconscious) to affect capital sentencing decisions, the only practical way to ensure that race does not affect imposition of the death penalty is to eliminate the death penalty itself. Given that the death penalty adds significant costs to the criminal justice system, and it has no demonstrable effect on the homicide rate or the crime rate in general, there is no utilitarian argument against eliminating the intractable problem of racial impact on capital sentencing decisions by eliminating capital sentences in favor of life imprisonment without the possibility of parole.

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[2]Recently, the Supreme Court indicated its willingness to impose sanctions on a prosecutor who mischaracterized proof beyond a reasonable doubt as a "gut feeling," even though the conviction was affirmed. Randolph v. State, 117 Nev. ___, 36 P.3d 424, 432 n. 16 (2001). No such action was taken in Jones.

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2. A less complete measure to address this problem would be to enact a Racial Justice Act, on the model of the Kentucky statute, Ky. Rev. Stat. Ann. §532.300, a copy of which is attached. This act would allow a defendant to present statistical evidence as well as other kinds of evidence to establish that the death penalty is being sought or imposed in a discriminatory manner.

3. Another less complete measure to address the issue would be to strengthen the mandatory review of capital sentences for the influence of prejudice. That review should include requiring the court to identify and address explicitly the race of the defendant and the victim; the identity and race of all the individuals involved in making the capital charging decision, including any police officers, victim's family members, or others consulted by prosecutors in making that decision; the racial composition of the jury, including the effect of peremptory challenges (whether or not the exercise of peremptory challenges would violate Batson v. Kentucky, 476 U.S. 79 (1986)) on the composition of the jury; and evidence of other homicide cases comparable to the instant case in which the death penalty was or was not sought. This proposal would also require review to determine explicitly whether the death sentence is proportional in light of similar cases in which the death penalty was not sought or was not imposed. Copies of the Washington statutes dealing with these issues, Rev. Code Wash. Ann. §§ 10.95.120, 10.95.130, are attached.

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4. The absolute minimum action that this Committee should consider is requiring reporting of statistical information on all homicide cases, so that the legislature and the public could attempt to understand why some homicide cases result in capital charges and others do not. Filling out a simple form as to all homicides could satisfy this need, reporting the race, gender and age of the victim and the defendant; the identities of the prosecutors making the charging and subsequent decisions in pursuing the case; the identities of all individuals with whom the prosecutors or their agents discussed the appropriate charge or potential evidence in the case; the racial composition of the jury, including the race of any individuals challenged by the prosecutors; and the final result of the prosecution. This reporting requirement would impose an insignificant burden on prosecution officers, and it would provide at least some basis for analyzing whether prosecutors' constant claims that race is not a factor in capital cases are accurate or not.

APPENDIX C

Letter dated December 8, 2002,
to the Honorable A. William Maupin, Chief Justice of the Nevada Supreme Court
from Sheila Leslie, Nevada State Assemblywoman

SHEILA LESLIE
ASSEMBLYWOMAN
District No. 27

ASSISTANT MAJORITY WHIP

COMMITTEES:
Member
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December 8, 2002

The Honorable A. William Maupin
Chief Justice of the Nevada Supreme Court
Supreme Court Building
201 South Carson Street, Suite 300
Carson City, Nevada 89701-4702

Dear Chief Justice Maupin:

As you are aware, the 2001-2002 legislative interim is drawing to a close and many statutory and interim study committees are distributing their correspondence and preparing final reports. A copy of the final report for the Nevada Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (A.C.R. 3) will be forwarded to you in the coming weeks.

During the course of the A.C.R. 3 interim study, the Subcommittee identified several areas of concern with the function of our current death penalty system in Nevada. At its final work session meeting, the Subcommittee voted to recommend five bill draft requests. In addition, the Subcommittee voted to send a letter to the Supreme Court, in support of several other issues where the Subcommittee felt that the judicial branch may be the most suited to implement changes in death penalty procedures for Nevada. The following recommendations are now being forwarded for your consideration:

- The A.C.R. 3 Subcommittee urges the Supreme Court to adopt a review of prejudice and economic bias in capital cases, and consider adopting a proportionality review of cases in which the death penalty was and was not sought.

- The A.C.R. 3 Subcommittee urges the Supreme Court to create an independent authority to recruit, select, train, monitor, support, and assist attorneys who represent defendants charged with a capital crime.

- The A.C.R. 3 Subcommittee urges the Supreme Court to amend Supreme Court Rule 250 to increase the 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 co-counsel 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 co-counsel 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.

- The A.C.R. 3 Subcommittee urges the 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".

- The A.C.R. 3 Subcommittee urges the Supreme Court to adopt a Supreme Court Rule requiring individual voir dire and sequestering in capital cases.

- The A.C.R. 3 Subcommittee urges the Supreme Court to adopt a Supreme Court Rule requiring written jury questionnaires in capital cases.

- The A.C.R. 3 Subcommittee urges the Supreme Court to adopt a Supreme Court 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.

As the Chair of the A.C.R 3 Subcommittee, I appreciate your sincere consideration of these important issues. If the Subcommittee's legislative staff or I can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

Sheila Leslie

Sheila Leslie
Nevada State Assemblywoman

SL/k:L31
cc: Members of the A.C.R. 3 Subcommittee

APPENDIX D

Bill Draft Request No. 14-197

SUMMARY—Eliminates panel of judges in certain penalty hearings in which death penalty is sought and requires district attorneys and district courts to report certain information concerning certain homicides to Supreme Court. (BDR 14-197)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: Yes.

AN ACT relating to criminal procedure; eliminating the panel of judges that conducts the penalty hearing in certain cases in which the death penalty is sought; requiring district courts and district attorneys to submit certain information to the Supreme Court concerning cases involving homicide; requiring the Supreme Court to prepare and submit an annual report providing a summary and analysis of that information to the Legislature; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 175.556 is hereby amended to read as follows:

175.556 1. In a case in which the death penalty is sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, ~~[the Supreme Court shall appoint two district judges from judicial districts other than the district in which the plea is made, who shall~~

~~with~~] the district judge who conducted the trial ~~[, or his successor in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority.]~~ ***shall sentence the defendant to life without the possibility of parole or impanel a new jury to determine the sentence.***

2. In a case in which the death penalty is not sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the trial judge shall impose the sentence.

Sec. 2. Chapter 178 of NRS is hereby amended by adding thereto the provisions set forth as sections 3 and 4 of this act.

Sec. 3. ***1. The district attorney for each county shall prepare and submit a report to the Supreme Court not later than February 1 of each year concerning each case filed during the previous calendar year that included a charge for murder, voluntary manslaughter or involuntary manslaughter. The district attorney shall exclude from the report any charge for manslaughter that resulted from a death in an accident or collision involving a motor vehicle.***

2. The report required pursuant to subsection 1 must include, without limitation:

(a) The age, gender and race of the defendant;

(b) The age, gender and race of any codefendant or other person charged or suspected of having participated in the homicide and in any alleged related offense;

(c) The age, gender and race of the victim of the homicide and any alleged related offense;

(d) The date of the homicide and of any alleged related offense;

(e) The date of filing of the information or indictment;

(f) The name of each court in which the case was prosecuted;

(g) Whether or not the prosecutor filed a notice of intent to seek the death penalty and, if so, when the prosecutor filed the notice;

(h) The final disposition of the case and whether or not the case was tried before a jury;

(i) The race, ethnicity and gender of each member of the jury, if the case was tried by a jury; and

(j) The identity of:

(1) Each prosecuting attorney who participated in the decision to file the initial charges against the defendant;

(2) Each prosecuting attorney who participated in the decision to offer or accept a plea, if applicable;

(3) Each prosecuting attorney who participated in the decision to seek the death penalty, if applicable; and

(4) Each person outside the office of the district attorney who was consulted in determining whether to seek the death penalty or to accept or reject a plea, if any.

3. If all the information required pursuant to subsection 1 cannot be provided because the case is still in progress, an additional report must be filed with the Supreme Court each time a subsequent report is filed until all the information, to the extent available, has been provided.

Sec. 4. *1. Not later than 60 days after a sentence is imposed for a defendant convicted of murder of the first degree, the district court shall complete and submit the questionnaire supplied by the Supreme Court pursuant to section 6 of this act to:*

(a) The Clerk of the Supreme Court;

(b) The defendant or the attorney for the defendant; and

(c) The prosecuting attorney.

2. The district court shall obtain information from the prosecuting attorney and the attorney for the defendant as necessary to complete the questionnaire.

3. The trial judge shall sign and date the questionnaire when completed.

Sec. 5. Chapter 2 of NRS is hereby amended by adding thereto the provisions set forth as sections 6 and 7 of this act.

Sec. 6. *1. The Supreme Court shall prepare a questionnaire to be supplied to and completed by each district court concerning each case that was tried in the district court that resulted in a conviction for murder of the first degree, as required pursuant to section 4 of this act.*

2. The questionnaire required pursuant to subsection 1 must ask the district court to provide information about the defendant, including, without limitation:

(a) The name, date of birth, gender, marital status, race and ethnicity of the defendant;

(b) The number of children and age of each such child of the defendant, if any;

(c) Whether either of the parents of the defendant are living and, if not, the date of death;

(d) The number of siblings of the defendant, if any;

(e) The educational background and level of intelligence of the defendant;

(f) Whether a psychiatric evaluation was performed on the defendant and, if so, whether the evaluation indicated that the defendant is capable of:

(1) Distinguishing right from wrong;

(2) Perceiving the nature and quality of his actions; and

(3) Cooperating intelligently with his defense;

(g) Whether the defendant suffers from a behavioral disorder and any other pertinent psychiatric or psychological information concerning the defendant;

(h) The record of employment of the defendant;

(i) A list of any prior conviction of the defendant, including, without limitation, the offense, the date of the offense, the sentence imposed and the date of the sentence imposed;

(j) Whether the defendant is a resident of the State of Nevada and, if so, how long the defendant has resided in this state; and

(k) Whether the defendant is a resident of the county where he was convicted and, if so, how long the defendant has resided in that county.

3. The questionnaire required pursuant to subsection 1 must ask the district court to provide certain information about the trial, including, without limitation:

(a) Whether the defendant entered a plea and, if so, the nature of the plea;

(b) Whether the defendant was represented by counsel;

(c) Whether any defense was introduced and whether the court gave instructions to the jury regarding the defenses to murder of the first degree;

(d) Any other offenses for which the defendant was convicted during the trial for murder of the first degree;

(e) Any aggravating circumstance alleged against the defendant which was found to be applicable; and

(f) The name and charges filed against any other defendant who was tried during the same trial and the disposition of those charges.

4. The questionnaire required pursuant to subsection 1 must ask the district court to provide certain information concerning the penalty hearing, including, without limitation:

(a) The date on which the defendant was convicted and the date on which the penalty hearing was commenced;

(b) Whether the jury that served during the trial also served as the jury for the penalty hearing;

(c) Any evidence of mitigating circumstances provided during the penalty hearing;

(d) Whether evidence of any mitigating circumstances was submitted to the jury as provided in NRS 175.554; and

(e) The sentence imposed.

5. The questionnaire required pursuant to subsection 1 must ask the district court to provide certain information about the victim, including, without limitation:

(a) Whether the victim was related to the defendant by blood or marriage;

(b) The occupation of the victim and whether the defendant employed the victim;

(c) How well the victim was acquainted with the defendant;

(d) The length of time that the victim had resided or had been present in this state;

(e) Whether the victim was of the same race and ethnicity as the defendant and, if not, the race and ethnicity of the victim;

(f) Whether the victim was of the same gender as the defendant;

(g) Whether the victim was held hostage during the commission of the crime and, if so, for how long;

(h) The nature and extent of any physical harm or torture inflicted upon the victim by the defendant before the death of the victim;

(i) The age of the victim; and

(j) The type of weapon used during the crime, if any.

6. The questionnaire required pursuant to subsection 1 must ask the district court to provide certain information concerning the legal counsel of the defendant, including, without limitation:

(a) The date on which legal counsel was secured by the defendant;

(b) Whether the legal counsel was appointed and, if so, the reason for appointment;

(c) The length of time that the legal counsel has practiced law and the nature of that practice; and

(d) Whether the same legal counsel represented the defendant during the trial and penalty hearing, and, if not, the reasons why the defendant was not represented by the same counsel.

7. The questionnaire required pursuant to subsection 1 must ask the district court to provide information concerning general inquiries, including, without limitation:

(a) Whether the race and ethnicity of the defendant, victim or any witness was an apparent factor at trial;

(b) The percentage of the population in the county where the crime occurred that is of the same race and ethnicity as the defendant;

(c) Whether members of the same race and ethnicity of the defendant or the victim were represented on the jury;

(d) The race and ethnicity of each member of the jury and each member of the group of persons from among whom the jurors were chosen;

(e) Whether the sexual orientation of the defendant, victim or any witness was an apparent factor during the trial;

(f) Whether the jury was specifically instructed not to consider the race, ethnicity or sexual orientation of the defendant;

(g) Whether there was extensive publicity concerning the case in the community and whether the judge instructed the jury to disregard any such publicity;

(h) Whether the jury was instructed to avoid any influence of passion, prejudice or any other arbitrary factor when considering its verdict or findings;

(i) The reason for any specific instructions to the jury; and

(j) General comments of the district judge concerning the appropriateness of the sentence considering the crime, defendant and other relevant factors.

8. The questionnaire required pursuant to subsection 1 must ask the district court to provide information concerning the chronology of the case, including, without limitation, the date on which:

(a) The defendant was arrested;

(b) The trial commenced;

(c) The jury returned the verdict;

(d) The court ruled on any posttrial motions;

(e) The penalty hearing commenced;

(f) The sentence was imposed; and

(g) The trial judge filed the questionnaire.

Sec. 7. *Not later than March 1 of each odd-numbered year, the Supreme Court shall prepare and submit to the Director of the Legislative Counsel Bureau for distribution to each regular session of the Legislature a report which provides a summary and analysis of the information submitted to the Supreme Court by the district courts and district attorneys during the preceding biennium pursuant to sections 3 and 4 of this act.*

APPENDIX E

Memorandum dated January 24, 2002,
to the Legislative Commission's Subcommittee to Study the Death Penalty
and Related DNA Testing
from JoNell Thomas

MEMORANDUM

To: The Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (A.C.R. 3 of the 17th Special Session)

From: JoNell Thomas, attorney in private practice and representative of the Nevada Attorneys for Criminal Justice and American Civil Liberties Union of Nevada

Date: January 24, 2002

Re: Aggravating and Mitigating Circumstances

Introduction

> *"Under contemporary standards of decency, death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers."*

Woodson v. North Carolina, 428 U.S. 280, 296 (1976). Despite this clear statement by the United States Supreme Court, Nevada law permits imposition of the death penalty for virtually any and all first-degree murderers. As a result, Nevada has the highest per capita rate for the death penalty in the country. Nevada's death penalty scheme fails to satisfy the United States Supreme Court's mandate that a "state's capital sentencing scheme . . . must 'genuinely narrow the class of persons eligible for the death penalty.'" Arave v. Creech, 507 U.S. 463, 474 (1993) (quoting Zant v. Stephens, 462 U.S. 862, 877 (1983)). The fault for this scheme lies both with the statutes defining aggravating circumstances and the Nevada Supreme Court's interpretation of those statutes.

Nevada Has The Highest Per Capita Rate For The Death Penalty In The Country

It is undisputed that Nevada has more persons on death row per capita than any other state in this country - by far:

Rank	State	1996 Population	1996 Inmates on Death Row	Persons on Death Row Per 100,000 Residents
1.	Nevada	1,603,000	81	5.05
2.	Oklahoma	3,301,000	133	4.02
3.	Alabama	4,279,000	151	3.52
4.	Arizona	4,428,000	121	2.73
5.	Florida	14,400,000	373	2.59
6.	Texas	19,128,000	438	2.28
7.	North Carolina	7,323,000	161	2.19
8.	South Carolina	3,699,000	68	1.83
9.	Missouri	5,359,000	93	1.73
10.	Tennessee	5,320,000	91	1.71

The statistics are even more disturbing when a comparison is made of the western states:

Rank	Western State	1996 Population	1996 Inmates on Death Row	Persons on Death Row Per 100,000 Residents
1.	Nevada	1,603,000	81	5.05
2.	Arizona	4,428,000	121	2.73
3.	Idaho	1,189,000	19	1.59
4.	California	31,878,000	454	1.42
5.	Montana	879,000	6	.68
6.	Oregon	3,204,000	20	.62
7.	Utah	2,000,000	10	.50
8.	New Mexico	1,713,000	3	.17
9.	Washington	5,533,000	9	.16
10.	Colorado	3,823,000	4	.10
11.	Wyoming	481,000	0	0

See U.S. Department of Justice, Bureau of Justice Statistics Bulletin, Capital Punishment 1996, originally published in December 1997, revised February 27, 1998; U.S. Census Bureau Press Release CB96-224, which is entitled "Rankings of States Based on Current Population Estimate, Population Change and Demographic Components of Population Change: July 1, 1995 to July 1,

1996. See also A Broken System: Error Rates in Capital Cases, 1973-1995, James S. Liebman, Columbia University School of Law, June 12, 2000, www.TheJusticeProject.org. Professor Liebman found that from 1973 through 1995, the national average of death sentences per 100,000 population, in states that have the death penalty, was 3.90. Id. at App. E-11. The states with the highest rate for the death penalty for this period were as follows: Nevada -- 10.91 death sentences per 100,000 population; Arizona - 7.82; Alabama - 7.75; Florida - 7.74; Oklahoma - 7.06; Mississippi - 6.47; Wyoming - 6.44; Georgia - 5.44; Texas - 4.55. Id. Thus, Nevada's death penalty rate is nearly three times the national average and nearly 40% higher than the next highest state. The explanation for this great disparity exists in the fact that neither the Nevada statutes defining eligibility for the death penalty nor the case law interpreting these statutes sufficiently narrows the class of persons eligible for the death penalty in this state.

Nevada's Statutory Scheme Does Not Narrow The Death Penalty Class

For over ninety years courts have affirmatively considered the constitutionality, under federal law, of punishments adopted by the legislative branch, and have struck down those punishments deemed unconstitutional. See Weems v. United States, 217 U.S. 349 (1910). By 1947, eight members of the Supreme Court considered the law well established that state criminal penalties must pass muster under federal constitutional standards. Louisiana v. Resweber, 329 U.S. 459 (1947). Furthermore, because the constitutional prohibition against cruel and unusual punishment is "not a static concept, but one that must be continually re-examined in the light of contemporary human knowledge," Robinson v. California, 370 U.S. 660 (1962), this committee should not defer to historic rulings of constitutionality, but should conduct a fresh appraisal of the validity of Nevada's law. "A penalty that was permissible at one time in our... history is not necessarily permissible today."

Furman v. Georgia, 408 U.S. 238, 329 (1972). "[S]tare decisis" should "bow to changing values, and the question of the constitutionality of capital punishment at a given moment" should always "remain open." Id. at 330.

In 1972, the Supreme Court declared Georgia's death penalty statutory scheme to be unconstitutional. Furman v. Georgia, 408 U.S. 238 (1972). In Furman, two justices wrote that the death penalty always violated the Eighth Amendment; four justices declared that the death penalty was not per se unconstitutional under the Eighth Amendment; and three justices wrote that the death penalty statute in question in that particular case violated the Eighth Amendment. Four years later, in Gregg v. Georgia, the Supreme Court upheld Georgia's revised death penalty statutory scheme. 428 U.S. 153 (1976). The most important concept in Furman and Gregg is that the sentencing jury's discretion must be limited because a jury "will have had little, if any, previous experience in sentencing," 428 U.S. at 192, and therefore any murder may seem horrendous to a group of people not experienced in evaluating killings. Realistically, the only way that the jury's discretion can be "limited," as clearly required by the Constitution pursuant to Furman and Gregg, is for aggravators to be interpreted in a genuinely restrictive way.

Since 1976, the requirements of Furman and Gregg have provided the chief test for determining whether state death penalty statutory schemes are constitutional. In Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court struck down a Georgia death sentence because the aggravator was vague and failed to guide a jury in distinguishing which cases deserved the death penalty. The Court noted that under Georgia law, "[t]here is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. In Zant v. Stephens, 462 U.S. 862 (1983), the Supreme Court reaffirmed that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must

reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." 462 U.S. at 877. Furman and Gregg express concern about the freakish and inconsistent imposition of capital punishment. These cases seek to make the death penalty less arbitrary by requiring states to implement carefully drafted statutes that direct the discretion of juries and limit that discretion in such a way that the majority of murder cases, where the death penalty is not appropriate, can be identified and separated from the small minority of murder cases where the death penalty is appropriate.

NRS 200.033 specifies fourteen "aggravating circumstances" that may be considered in determining whether a person convicted of first degree murder in Nevada is eligible for the death penalty:

> 1. The murder was committed by a person under sentence of imprisonment.
> 2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:
> (a) Another murder and the provisions of subsection 12 do not otherwise apply to that other murder; or
> (b) A felony involving the use or threat of violence to the person of another and the provisions of subsection 4 do not otherwise apply to that felony.
> For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.
> 3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.
> 4. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnaping in the first degree, and the person charged:
> (a) Killed or attempted to kill the person murdered; or
> (b) Knew or had reason to know that life would be taken or lethal force used.
> 5. The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.
> 6. The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.

7. The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or fireman. For the purposes of this subsection, "peace officer" means:

(a) An employee of the department of prisons who does not exercise general control over offenders imprisoned within the institutions and facilities of the department but whose normal duties require him to come into contact with those offenders, when carrying out the duties prescribed by the director of the department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

8. The murder involved torture or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

10. The murder was committed upon a person less than 14 years of age.

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.

12. The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

13. The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

14. The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than

one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

Even if these aggravators are applied with the most restrictive interpretation possible, they fail to honor the spirit of Furman and Gregg by not channeling the jury's discretion in such a way as to separate "compellingly bad" murder cases from those that are less offensive. Nevada's statutory scheme is so arbitrary and freakish that it serves no useful purpose in channeling a jury's discretion to distinguish the few cases where the penalty is appropriate from the many cases where the death penalty is not appropriate. Under this statutory scheme, virtually all people who kill are eligible for the death penalty. The final decision regarding who should die and who should live is therefore arbitrary and capricious.

Nevada's System Is Not Identical To The Systems Of Other States Which Have Been Approved By The United States Supreme Court

The State has argued in cases before the Nevada Supreme Court that Nevada system is "virtually identical" to the statutory schemes enacted by Georgia and Florida that have been approved of by the Supreme Court. This argument is without merit. The statute at issue in Gregg v. Georgia provided for the following aggravating circumstances:

> (1) The offense of murder, rape, armed robbery, or kidnaping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnaping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
>
> (3) The offender by his act of murder, armed robbery, or kidnaping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

428 U.S. at 165-166. Nevada's statutory aggravating circumstances are not identical, or as narrowly defined, as those established by the Georgia Legislature. Specifically, while Georgia's aggravator is limited to those who escaped from custody, Nevada's aggravator applies to all person who are under sentence of imprisonment, including those who are on parole or probation and who have not escaped or attempted to escape their imprisonment (NRS 200.033(1)); while Georgia's aggravator is limited to persons with prior records of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions, Nevada's aggravator includes all persons who have committed another murder at any time before the penalty hearing of the instant case and those who have committed any single violent felony, without regard to a "substantial history" of prior offenses (NRS 200.033(2)); while Georgia's aggravator of "great risk of death to more than one person" is limited to public places, Nevada's similar aggravator contains no such limitation (NRS 200.033(3)); and perhaps most critically, while Georgia's statutory scheme does not include an aggravator of "random and motiveless," Nevada's statutory scheme does

include such an aggravator (NRS 200.033(9)). In addition, Nevada's scheme contains several additional aggravating circumstances that are not found in the Georgia scheme. There is no merit to the State's argument that Nevada's death penalty scheme is identical, or even substantially similar, to the scheme described in Gregg v. Georgia.

Likewise, Nevada's statutory scheme contains many aggravating circumstances that are not found the Florida statute at issue in Proffitt v. Florida, 428 U.S. 242 (1976). The Florida aggravating circumstances at issue in that case were the following:

> (a) The capital felony was committed by a person under sentence of imprisonment.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) The defendant knowingly created a great risk of death to many persons.
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> (f) The capital felony was committed for pecuniary gain.
>
> (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
>
> (h) The capital felony was especially heinous, atrocious, or cruel.

428 U.S. at 248 n.6 (citing Florida Statute Ann. §§ 921.141(5)). Nevada's statutory aggravating circumstances are not identical, or as narrowly defined, as those established by the Florida Legislature. Specifically, while Florida's aggravator requires that a defendant create a great risk of death to many persons, Nevada's aggravator requires that a defendant create a great risk of death to only more than one person. Moreover, Nevada's statutory scheme includes six aggravating circumstances which are not found in the Florida scheme.

The United States Supreme Court has not considered the constitutionality of Nevada's death

penalty scheme. The Nevada Supreme Court has been presented with this issue, but has not taken the opportunity to conduct a thorough and comprehensive review of Nevada's death penalty scheme. There is no merit to the argument that Nevada's system is constitutional simply because the statutory schemes in Georgia and Florida have satisfied the United States Supreme Court's scrutiny.

The Nevada Supreme Court Has Not Narrowly Interpreted Nevada's Statute

When the United States Supreme Court upheld Georgia's death penalty in Gregg, 428 U.S. at 202, it relied on Georgia's statute, which limited a jury's discretion in imposing the death penalty, and it relied on the fact that the Supreme Court of Georgia interpreted its aggravators in a narrow fashion. Justice Stewart cited with approval a specific example of Georgia's Supreme Court acting in a very conservative way to maintain the integrity and restrictiveness of an aggravator's definition. Id. Based on the reasoning of Gregg, any analysis of whether Nevada's statutory scheme is constitutional must take into account how the Nevada Supreme Court has interpreted the statutory aggravators. To comply with the spirit of Gregg and Furman, the Nevada Supreme Court must take a restrictive view of the aggravators. Unfortunately the Nevada Supreme Court has ignored Furman and Gregg, and interpreted the aggravators expansively, thereby rendering the aggravators meaningless in limiting the scope and applicability of Nevada's death penalty. The interpretations by the Nevada Supreme Court guarantee that Nevada's death penalty statutory scheme does not accomplish what it was intended to accomplish, and is therefore unconstitutional.

Examples of the Nevada Supreme Court's expansive interpretation of aggravators abound. For instance, NRS 200.033(1) provides for an aggravator if "the murder was committed by a person under sentence of imprisonment." Although this aggravator is common among states that have the death penalty, the Nevada Supreme Court's interpretation of the statutory language exceeds that of

other states. The purpose of the aggravator is to discourage acts of violence by inmates of jails and prisons against other inmates or the personnel of the state who work at the institutions. State v. Libberton, 685 P.2d 1284 (Ariz. 1984) (finding that this aggravator did not apply where the defendant was on a secured work furlough status from a correctional facility, and therefore not incarcerated, when he allegedly murdered someone). One commentator has noted that these provisions appear designed to deter homicidal violence against persons especially important to the protection of society, such as correctional officers, or persons unusually at risk from murder, including prisoners as well as their guards, on the assumption that individuals with a motive to kill such persons already face severe sanctions for past criminality and might otherwise have little to lose by the act. Ledowitz, "The New Role of Statutory Aggravating Circumstances in American Death Penalty Law," 32 Duquesne L. Rev. 317 (1984) cited in Annotation, "Sufficiency of Evidence, for Purposes of Death Penalty, To Establish Statutory Aggravating Circumstance that Defendant Committed Murder While Under Sentence of Imprisonment, In Confinement Or Correctional Custody, and the Like--Post-Gregg Cases," 67 A.L.R. 4th 943 (1989). The "Under Sentence of Imprisonment" aggravator could conceivably be applied to five circumstances: a defendant who is incarcerated in prison or jail; a defendant who should be incarcerated with the department of prisons, but has escaped; a defendant who is incarcerated with the department of prisons, but who has been released to a work camp or halfway house; a defendant who has been released on parole; or a person who has been sentenced to prison, but the sentence has been suspended and the defendant placed on probation. A restrictive reading of the aggravator, in the spirit of Furman and Gregg, should limit the aggravator to individuals who are incarcerated, whether it be in jails, prisons, or work camps, see Leonard v. State, 114 Nev. 639, 958 P.2d 1220 (1998), and to those who have escaped, see Sonner v. State, 114 Nev. 321, 955 P.2d 673 (1998). A restrictive reading of the aggravator would certainly

exempt persons who are on probation, Peek v. State, 395 So. 2d 492 (Fla. 1980); Kaplan v. Hecht, 24 F.2d 664 (2d Cir. 1928). Despite the clear opportunity to interpret this aggravator in a restrictive manner, the Nevada Supreme Court has chosen to read this aggravator expansively by concluding that it applies to a person on probation, Parker v. State, 109 Nev. 383, 393, 849 P.2d 1062 (1993) (citing Adams v. Warden, 97 Nev. 171, 626 P.2d 259 (1981), those on parole, Geary v. State, 110 Nev.261, 871 P.2d 927 (1994), aff'd in relevant part, 114 Nev. 100, 952 P.2d 431 (1998); McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995); Jones v. State, 107 Nev. 632, 817 P.2d 1179 (1991), and those who have walked away from a juvenile facility, Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985).

The Nevada Supreme Court expansively construes NRS 200.033(2) by finding that the aggravator for a defendant with a violent criminal history may be applied even if the crime that is the basis of the aggravator occurs after the instant offense, Calambro v. State, 114 Nev. 106, 952 P.2d 946 (1998); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985). The Nevada Supreme Court permits multiple aggravators based upon this single aggravator in cases where the defendant's criminal history involves more than one relevant offense. Riley v. State, 107 Nev. 205, 808 P.2d 551 (1991) (a defendant with multiple prior felonies involving violence is subject to one aggravator per each prior incident of violence). States with statutes like Nevada's generally use this aggravator one time, even if the defendant has multiple prior violent felonies. See State v. Steelman, 612 P.2d 475 (Ariz. 1980); State v. Tison, 633 P.2d 335 (Ariz. 1981); People v. Hendricks, 737 P.2d 1350 (Cal. 1987). Likewise, the Nevada Supreme Court's interpretation of this aggravator fails to limit the number of persons eligible for the death penalty because there is no time limitation on its application. See Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997) (affirming application of this aggravator to a conviction that occurred 18 years prior).

The Nevada Supreme Court expansively construes NRS 200.044(3) (risk of harm to more than one person) by finding that it applies in absurd situations. See e.g. Lisle v. State, 113 Nev. 540, 937 P.2d 473 (1997) (aggravator affirmed whether defendant fired his gun at the driver of another vehicle from a fairly close range while the two vehicles were moving); Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987) (firing a gun at the victim with another person nearby); Nevius v. State, 101 Nev. 238, 669 P.2d 1053 (1985) (defendant fired shot at victim with victim's wife in the same room). The analysis and application by the Nevada Supreme Court is far too general and ignores the essential issue of who is in the actual zone of danger. See State v. Smith, 707 P.2d 289 (Ariz. 1985) (firing a gun in a public place does not necessarily equate to risk of harm to more than one person -- the mere fact that other persons could have been shot is not sufficient as the murderous act itself must actually put others in the zone of danger). Most courts considering the issue have focused on the nature of the murderous act, the actual proximity of other people to the victim, the actual zone of danger, the defendant's intent to harm one person or more than one person, the defendant's knowledge of other people nearby, whether other people were actually hurt, or whether other people were threatened. Annotation, "Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance that in Committing Murder, Defendant Created Risk of Death or Injury to More than One Person, to Many Persons, and the Like-Post-Gregg Cases" 64 ALR 4th 837, 847 (1988). In Gregg, Justice Stewart expressed concern that Georgia's aggravator of creating a risk of harm to more than one person, might be subject to overly broad interpretations. But in affirming Georgia's scheme, he noted that Georgia's Supreme Court construed this aggravator narrowly, and it was therefore constitutional. In contrast, the Nevada Supreme Court's interpretation of this aggravator has expanded rather than limited its reach.

The Nevada Supreme Court expansively construes NRS 200.033(4) (murder committed

during commission of felony) by finding that each enumerated crime committed during a murder constitutes a separate aggravator and that when the defendant is convicted of felony-murder, the underlying felony does not merge and can be used as an aggravator. Farmer v. State, 101 Nev. 419, 421, 705 P.2d 149 (1985); Miranda v. State, 101 Nev. 562, 569, 707 P.2d 1121 (1985). It has also held that it may apply even if a defendant is not charged with or convicted of one of the enumerated felonies. Rippo v. State, 113 Nev. 1239, 946 P.2d 1017 (1997). Under Nevada law, all murder that occurs in the perpetration of robbery or another enumerated felony is murder of the first degree. Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992). Accordingly, this aggravator permits imposition of the death penalty on defendants who did not premeditate, deliberate, or intend the death of the victim. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). The result of this expansive interpretation is to make every felony murder situation eligible for the death penalty. The expansive interpretation combined with the fact that most killings in Nevada are alleged as felony murder, especially due to the Nevada Supreme Court's definition of "burglary," renders Nevada's scheme meaningless for restricting a jury's discretion in imposing death.

The Court further construes the aggravators expansively by interpreting NRS 200.033(5) (avoiding arrest) to mean that the aggravator applies if the murder was committed to avoid some eventual, theoretical arrest. The "arrest" need not be "imminent" and the person murdered need not be "effectuating the arrest" in order for the aggravator to apply. Cavanaugh v. State, 102 Nev. 478, 486, 729 P.2d 481 (1986); Williams v. State, 103 Nev. 227, 232, 737 P.2d 508 (1987) (avoiding arrest aggravator applies to killing of sleeping victim who was unaware that defendant was burglarizing house); Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993).

The Nevada Supreme Court broadly construes NRS 200.033(6) (killing for pecuniary gain), by failing to limit this aggravator to cases of murder for hire, and instead finding that it also applies

to murders committed during the course of a robbery or burglary, or other killing involving a financial motive. See Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998) (aggravator applies if the defendant can be charged with two offenses based on the facts, but not in limited circumstances where the defendant commits robbery and receives money directly from the robbery); Guy v. State, 108 Nev. 770, 839 P.2d 578 (1992) (evidentiary basis existed for both the robbery and receiving money aggravators); Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990) (if both aggravators can be charged as separate crimes, then each can be used as an aggravator). As such, this aggravator provides no meaningful basis for distinguishing the few murder cases in which the death penalty is imposed from the many in which it is not.

NRS 200.033(8) (torture and mutilation) has been construed in a variety of ways by the Nevada Supreme Court. On the one hand, it has ruled that torture exists only if there is a specific intent to inflict pain for pain's sake or for punishment or sadistic pleasure. Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996); Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998). Mutilation has been defined as the cutting off or permanently destroying a limb or essential part of the body or to cut off or alter radically so as to make imperfect. Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997); Smith v. State, 114 Nev. 33, 953 P.2d 264 (1998). However, the court took the plain language of the statute for this aggravator and expanded it in Robbins v. State, 106 Nev.611, 798 P.2d 558 (1990). In Robbins, the court construed NRS 200.033(8) to require "torture, mutilation or other serious and depraved physical abuse beyond the act of killing itself." Factually, the court has applied this aggravator to cases not involving torture and mutilation. See e.g., Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997) (majority affirms application of aggravator based upon multiple stab wounds); Browne v. State, 113 Nev. 305, 933 P.2d 187 (1997) (blunt trauma which destroys the brain sufficient to support finding of mutilation); Wesley v. State, 112 Nev. 503, 916 P.2d 793 (1996) (the aggravator

exists where the victim's skull was chipped by the stabbing).

The most troublesome of the aggravators is NRS 200.033(9) (random and motiveless). There is little question that this aggravator has been greatly expanded in its application by the Nevada Supreme Court. Indeed, it routinely applies this aggravator to numerous situations where it is obvious that the murder is neither random nor without apparent motive. Because of the expansive interpretation of this aggravator, it could be applied to every case in which the murder is not deemed necessary, or in other words, to every murder. The Nevada Supreme Court has held that this aggravator applies where the defendant is also convicted of robbery of the victim, thus establishing a motive for the murder. Moran v. State, 103 Nev. 138, 734 P.2d 712 (1987); Lane v. State, 114 Nev. 299, 956 P.2d 88 (1998); Calambro v. State, 114 Nev. 106, 952 P.2d 946 (1998); Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998). See also Nika v. State, 113 Nev. 1424, 951 P.2d 1047 (1997) (affirming aggravator where defendant was angry with victim and where defendant incapacitated victim with blows from a crowbar and did not have to a fire fatal shot in order to take the victim's car). This aggravator has been interpreted by the Nevada Supreme Court as applying whenever the killing is "not necessary" to accomplish the defendant's purpose. Bennett v. State, 106 Nev. 135, 143, 787 P.2d 797 (1990). This interpretation makes every murder a capital one, except those in which the killing of the victim is a necessary precondition to the accomplishment of the defendant's purpose, such as killing for insurance benefits. Nevada appears to be the only state in the country that employs this aggravator. See Nika, 951 P.2d at1058 n.1 (Springer, C.J. dissenting). This aggravator alone is sufficient to find that Nevada's death penalty scheme is unconstitutional.

The Nevada Supreme Court Has Not Used Its Statutory and Inherent Authority To Remove People From Death Row

In opinions holding that Nevada's death penalty scheme is constitutional, the Nevada Supreme Court has considered the statutory scheme presented by the legislature, but has not reviewed its own opinions which have broadly construed the aggravators set forth by the legislature. See e.g., Colwell v. State, 112 Nev. 807, 919 P.2d 403, 407 (1996); Ybarra v. State, 100 Nev. 167, 174, 679 P.2d 797, 801 (1984). In each of these cases, the Nevada Supreme Court has cited to Proffitt v. Florida, 428 U.S. 242 (1976) as support for its conclusion that the Nevada statutory scheme is constitutional. A review of the Proffit decision, however, reveals that Nevada's scheme does not perform the narrowing function in a constitutional manner.

In Proffitt, the United States Supreme Court concluded that a Florida scheme, which provided for eight aggravators, was constitutional, but only because the Florida Supreme Court has consistently construed the aggravators in a narrow manner and has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Id. at 252. The Supreme Court found it significant that the Florida Supreme Court had vacated 8 of the 21 death sentences it reviewed prior to the Proffitt decision. Id.

A review of the Nevada Supreme Court's opinions on direct appeal since the enactment of our current death penalty statute reveals that the Nevada Supreme Court does hesitate in vacating death sentences. In fact of the Nevada Supreme Court's 104 opinions on direct appeal in death penalty cases, the Nevada Supreme Court has affirmed the judgment of conviction and sentence of death 92 times. The Nevada Supreme Court has used its statutory and inherent authority to vacate the sentences of death and impose a sentence of life without the possibility of parole only 5 times. In the remaining 7 cases, the Court remanded the matter for a new penalty hearing where the State was

free to seek the death penalty again. Thus, the Nevada Supreme Court's record stands in stark contrast to that of the Florida Supreme Court – where the Florida Supreme Court carefully reviewed the record and assured that the death penalty was appropriate by vacating the death penalty in 38% of its cases, the Nevada Supreme Court has vacated the death penalty without remand in less than 5% of its capital cases on direct appeal.

An overwhelming majority of capital cases are affirmed by the Nevada Supreme Court on direct appeal. Rhyne v. State, 118 Nev. __, __ P.3d __ (1/16/02); Randolph v. State, 117 Nev. __, 36 P.3d 424 (2001); Rodriguez v. State, 117 Nev. __, 32 P.3d 773 (2001); Gallego v. State, 117 Nev. __, 23 P.3d 227 (2001); Vanisi v. State, 117 Nev. __, 22 P.2d 1164 (2001); Leonard v. State, 117 Nev. __, 17 P.3d 397 (2001); Harte v. State, 116 Nev. __, 13 P.3d 420 (2000); Dennis v. State, 116 Nev. __, 13 P.3d 434 (2000); Collman v. State, 116 Nev. __, 7 P.3d 426 (2000); Bridges v. State, 116 Nev. __, 6 P.3d 1000 (2000); Byford v. State, 116 Nev. __, 994 P.2d 700 (2000); Mulder v. State, 116 Nev. __, 992 P.2d 845 (2000); Geary v. State, 115 Nev. __, 977 P.2d 344 (1999); Chappell v. State, 114 Nev. 1403, 972 P.2d 838 (1998); Leonard v. State, 114 Nev. 1196, 969 P.2d 288 (1998); Thomas v. State, 114 Nev. 1127, 967 P.2d 1111 (1998); Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998); McKenna v. State, 114 Nev. 1044, 968 P.2d 739 (1998); Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998); Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998); Hill v. State, 114 Nev. 169, 953 P.2d 1077 (1998); Calambro v. State, 114 Nev. 106, 952 P.2d 946 (1998); Smith v. State, 114 Nev. 33, 953 P.2d 264 (1998) (affirming death penalty based on conviction for one victim and imposing sentence of life without parole based on conviction for second victim); Leslie v. State, 114 Nev. 8, 952 P.2d 966 (1998); Nika v. State, 113 Nev. 1047, 951 P.2d 1047 (1997); Abeyta v. State, 113 Nev. 1070, 944 P.2d 849 (1997); Lisle v. State, 113 Nev. 679, 941 P.2d 459 (1997); Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997); Rippo v. State, 113 Nev. 1239, 946

P.2d 1017 (1997); Williams v. State, 113 Nev. 1008, 945 P.2d 438 (1997); Jones v. State, 113 Nev. 454, 937 P.2d 55 (1997); Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996); Colwell v. State, 112 Nev. 807, 919 P.2d 403 (1996); Domingues v. State, 112 Nev. 683, 917 P.2d 1364 (1996); Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996); Flanagan and Moore v. State, 112 Nev. 1409, 930 P.2d 691 (1996); Gutierrez v. State, 112 Nev. 788, 920 P.2d 987 (1996); Doyle v. State, 112 Nev. 879, 921 P.2d 901 (1996); Riker v. State, 111 Nev. 1316, 905 P.2d 706 (1995); McNelton v. State, 111 Nev. 900, 900 P.2d 934 (1995); Paine v. State, 110 Nev. 609, 877 P.2d 1025 (1994); Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993); Libby v. State, 109 Nev. 905, 859 P.2d 1050 (1993); Parker v. State, 109 Nev. 383, 849 P.2d 1062 91993); Echavarria v. State, 108 Nev. 734, 839 P.2d 589 (1992); Leonard v. State, 108 Nev. 79, 824 P.2d 287 (1992); Redmen v. State, 108 Nev. 227, 828 P.2d 395 (1992); Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992), vacated 511 U.S. 79 (1994); Riggins v. State, 109 Nev. 178, 808 P.2d 535 (1991), reversed, 504 U.S. 127 (1992); Beets v. State, 107 Nev. 957, 821 P.2d 1044 (1991); Kirksey v. State, 107 Nev. 499, 814 P.2d 1008 (1991); Doleman v. State, 107 Nev. 409, 812 P.2d 1287 (1991); Riley v. State, 107 Nev. 220, 808 P.2d 560 (1991); Emmons v. State, 107 Nev. 53, 807 P.2d 718 (1991); Baal v. State, 106 Nev. 69, 787 P.2d 391 (1990); Jimenez v. State, 106 Nev. 769, 801 P.2d 1366 (1990); DePasquale v. State, 106 Nev. 843, 803 P.2d 218 (1990); Bennett v. State, 106 Nev. 135, 787 P.2d 797 (1990); Harris v. State, 106 Nev. 667, 799 P.2d 1104 (1990); Flanagan v. State, 105 Nev. 135, 771 P.2d 588 (1989); Lopez v. State, 105 Nev. 68, 769 P.2d 1276 (1989); Haberstroh v. State, 105 Nev. 739, 782 P.2d 1343 (1989); Pertgen v. State, 105 Nev. 282, 774 P.2d 429 (1989); Pellegrini v. State, 104 Nev. 625, 764 P.2d 484 (1988); Browning v. State, 104 Nev. 269, 757 P.2d 351 (1988); Bejarano v. State, 104 Nev. 851, 809 P.2d 598 (1988) (unpublished order dismissing appeal), cited in, 106 Nev. 840, 801 P.2d 1388 (1990); Dawson v. State, 104 Nev. 855, 809 P.2d 601 (1988) (unpublished order dismissing appeal),

cited in, 108 Nev. 112, 825 P.2d 593 (1992); Valerio v. State, Docket 19008 (order dismissing appeal, September 6, 1989), cited in, 112 Nev. 383, 915 P.2d 874 (1996); Collier v. State, 103 Nev. 563, 747 P.2d 225 (1987); Mazzan v. State, 103 Nev. 69, 733 P.2d 850 (1987); Hogan v. State, 103 Nev. 21, 732 P.2d 422 (1987); Williams v. State, 103 Nev. 227, 737 P.2d 508 (1997); Howard v. State, 102 Nev. 572, 729 P.2d 1341 (1986); Cavanaugh v. State, 102 Nev. 478, 729 P.2d 481 (1986); Hill v. State, 102 Nev. 377, 724 P.2d 734 (1986); Thompson v. State, 102 Nev. 348, 721 P.2d 1290 (1986); Ford v. State, 102 Nev. 126, 717 P.2d 27 (1986); Crump v. State, 102 Nev. 158, 716 P.2d 1387 (1986); Sechrest v. State, 101 Nev. 360, 705 P.2d 626 (1985); Snow v. State, 101 Nev. 439, 705 P.2d 632 (1985); Milligan v. State, 101 Nev. 627, 708 P.2d 289 (1985); Cole v. State, 101 Nev. 585, 707 P.2d 545 (1985); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), sentence vacated, 124 F.3d 1065 (9th Cir. 1997); Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985); Neuschafer v. State, 101 Nev. 331, 705 P.2d 609 (1985); McKenna v. State, 101 Nev. 338, 705 P.2d 614 (1985); McKague v. State, 101 Nev. 327, 705 P.2d 127 (1985); Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985); Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1994); Wilson v. State, 99 Nev. 362, 664 P.2d 328 (1983); Deutscher v. State, 95 Nev. 669, 601 P.2d 407 (1979); Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979).

The Nevada Supreme Court has used its statutory and inherent authority to reduce a death sentence of a life sentence in only a few cases during the last twenty-five years. See Servin v. State, 117 Nev. __, 32 P.3d 1277 (2001); Chambers v. State, 113 Nev. 974, 944 P.2d 805 (1997); Haynes v. State, 103 Nev. 309, 739 P.2d 497 (1987); Biondi v. State, 101 Nev. 252, 699 P.2d 1062 (1985); Harvey v. State, 100 Nev. 340, 682 P.2d 1384 (1984). In a few other cases, the Nevada Supreme Court has vacated and death sentence and remanded the proceedings for a new penalty hearing in the district court. See Hollaway v. State, 116 Nev. __, 6 P.3d 987 (2000), Manley v. State,

115 Nev. __, 979 P.2d 703 (1999); Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996), clarified on rehearing, 114 Nev. 100, 952 P.2d 431 (1998); Lane v. State, 110 Nev. 1156, 881 P.2d 1358 (1994), vacated on rehearing, in part, 114 Nev. 299, 956 P.2d 88 (1998); D'Agostino v. State, 108 Nev. 1001, 823 P.2d 283 (1992); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991); Allen v. State, 99 Nev. 485, 665 P.2d 238 (1983). In the latter group of cases the State remained free to seek the death penalty on remand.

Unlike this Georgia and Florida courts, the Nevada Supreme Court has not used its supervisory power to assure that the death penalty is applied in a truly selective narrow class of cases.

Nevada's Death Penalty Scheme Is Further Expanded By The Incredibly Large Percentage of First-Degree Murder Convictions In Comparison To Second-Degree Murder Convictions

As set forth above, the United States Supreme Court has declared that states which have the death penalty must narrow the class of persons convicted of *first degree murder* who are eligible for the death penalty. In addition to the reasons set forth above, Nevada's scheme also fails to meet requirement because the vast majority of murder cases in this state are determined to be first-degree murder rather than second-degree murder. This fact remains true even after the Nevada Supreme Court clarified the elements of first-degree murder in Byford v. State, 116 Nev. __, 994 P.2d 700 (2000).

Attorney Howard Brooks compiled the following data concerning first and second degree murder convictions in Clark County. Relying on a log maintained by the Jury Commissioner, Clark County, and the Blackstone Computer System, he checked each murder case in Clark County from January 1, 1998 through February 28, 2001:

Year 2000 and First Two Months of 2001 (Generally Post-Byford)

Total Convictions for Murder.....41

First Degree Murder Convictions.....37 (90%)

Second Degree Murder Convictions.....4 (10%)

Year 1999 (Pre-Byford)

Total Counts of Murder.....29

First Degree Murder Counts.....26 (90%)

Second Degree Murder Counts.....3 (10%)

Year 1998 (Pre-Byford)

Total Counts of Murder.....31

First Degree Murder Counts.....27 (87%)

Second Degree Murder Counts.....4 (13%)

Explanation of How These Numbers Determined

Mr. Brooks took the murder cases noted below (the raw data), and eliminated all hung juries, all mistrials, all manslaughter convictions, all not guilty verdicts. What remains are murder convictions. Only murder convictions are noted in the summaries listed above.

Some cases involve multiple counts. A case with a jury verdict of four counts of first degree murder is counted as four first degree murder convictions. Similarly, if a multiple verdict exists for second degree murder, then that result is counted according to the number of guilty counts.

The Raw Data

2001 Murder Trials (Clark Co) Through February 20001

C161986	Jacquin Webb	Guilty	First
C155791	John Butler	Guilty	First
C155791	John Butler	Guilty	First
C156542	Deangelo Mitchell	Guilty	First
C166099	Desmond Fleming	Guilty	First
C167771	Juan Tadeo	Guilty	First

2000 Murder Trials (Clark County)

C166156	Brent Sheridan	Mistrial	
C156542	Shauntay Wheaton	Guilty	First
C156542	Shauntay Wheaton	Guilty	First
C153144	Terrill McBride	Not Guilty	
C147763	Anthony Petty	Guilty	First
C148936	Richard Powell	Guilty	First
C148936	Richard Powell	Guilty	First
C148936	Richard Powell	Guilty	First
C148936	Richard Powell	Guilty	First
C156975	Kathleen Carter	Guilty	Second
C145855	Scott Bedard	Guilty	First
C166430	Gregg LaCedra	Not Guilty	
C165025	Ronald Collins	Guilty	First
C160156	Eric Adams	Not Guilty	
C158760	Keith Shanley	Guilty	First
C159897	Zane Floyd	Guilty	First
C159897	Zane Floyd	Guilty	First
C159897	Zane Floyd	Guilty	First
C159897	Zane Floyd	Guilty	First
C162952	Hernandez	Guilty	First
C153154	Donte Johnson	Guilty	First
C153154	Donte Johnson	Guilty	First
C153154	Donte Johnson	Guilty	First
C153154	Donte Johnson	Guilty	First
C161227	Joel Marks	Guilty	First
C157632	Geovanni Torres	Guilty	First
C149087	Kevin Camp	Guilty	First
C161663	Rick Tabish	Guilty	First
C161663	Sandra Murphy	Guilty	First
C152271	Victor Vargas	Hung Jury	
C139801	Darris Taylor	Guilty	First
C155652	Guy Banks	Hung Jury	
C164221	Charles VonLewis	Not Guilty	
C160106	Leroy Tower	Guilty	Second

C149242	Johnny Walker	Guilty	First
C157036	Richard Barrientos	Guilty	First
C149459	Jack Getz	Guilty	Second (Charged With Second Degree)
C161125	Michael Cu	Guilty	First
C161125	Joseph Sanchez	Guilty	First
C149242	Christian Walker	Guilty	Second
C150872	Charles Randolph	Guilty	First

1999 Murder Trials (Clark County)

C146961	Anthony Amati	Guilty	First
C146961	Anthony Amati	Not Guilty	
C146961	Anthony Amati	Not Guilty	
C137479	Jeremy Kelley	Guilty	First
C158153	Steven Houston	Not Guilty	
C150932	Marcus Dixon	Guilty	First
C150962	Calvin Dixon	Guilty	First
C106115	Michael Silva	Guilty	First
C129708	Kevin Holmes	Guilty	First
C156382	Gilbert Sanchez	Guilty	Second
C153461	Terrill Young	Guilty	First
C153461	Terrill Young	Guilty	First
C153461	Terrill Young	Guilty	First
C153461	Terrill Young	Guilty	First
C153688	Anthony Bagley	Guilty	First
C135092	Arthur Robles	Guilty	First
C137463	Dennis Kieren	Guilty	First
C158391	James Burks	Guilty	Second
C153624	Sikia Smith	Guilty	First
C153624	Sikia Smith	Guilty	First
C153624	Sikia Smith	Guilty	First
C153624	Sikia Smith	Guilty	First
C141241	Bryan Robinson	Guilty	Second
C148755	Steven Sanchez	Guilty	First
C155674	Joseph Balignasa	Mistrial	
C157260	Levenral Polk	Guilty	First
C153809	Juan Valenzuela	Guilty	First
C150872	Tyrone Garner	Guilty	First
C149285	Emery Slayden	Guilty	First
C144578	Lonnie Dennis	Guilty	First
C144578	Lonnie Dennis	Guilty	First
C151122	Artis Moore	Guilty	First
C151122	Artis Moore	Guilty	First

1998 Murder Trials (Clark County)

C152005	Alicia Wegner	Guilty	First
C151826	Tony Smith	Guilty	First
C109922	Vincent Turner	Guilty	First
C126427	Gregory Leonard	Guilty	First
C126427	Gregory Leonard	Guilty	First
C150572	Tam Nguyen	Guilty	First
C147772	Carlos Escobar	Guilty	First
C140633	Brian Robinson	Guilty	First
C140633	Brian Robinson	Guilty	First
C143171	Anthony Burriola	Guilty	Second
C146848	Steve Norwood	Mistrial	
C146848	Joey Chadwick	Mistrial	
C144162	James Nellums	Undetermined-Sealed	
C145409	Amy DeChant	Guilty	First
C145409	Robert Jones	Not Guilty	
C142132	Clarence Elliot	Guilty	First
C147772	Jose Flores	Not Guilty	
C146889	Sebastion Bridges	Guilty	First
C143342	Dawn Mathiason	Guilty	Second
C143342	Brandon Parish	Guilty	First
C143524	Linda Carbary	Guilty	First
C141455	Rudiberto Guerro	Guilty	First
C141455	Alberto Guerro	Guilty	First
C141776	Miguel Sprinana	Guilty	Second
C138790	Michael Mulder	Guilty	First
C146878	Alexander Thrower	Not Guilty	
C108502	Robert Byford	Guilty	First
C108502	Williams	Guilty	First
C147763	Anthony Petty	Guilty	First
C139370	Kendrick Collier	Guilty	First
C128262	Robert Smith	Guilty	Second
C140453	Trevis Runion	Guilty	First
C132314	George Luster	Guilty	First
C146562	Charles Chavez	Guilty	First
C138418	Lavor Sparks	Guilty	First
C142208	Adryan Medina	Guilty	First
C136992	Marty Horne	Hung Jury	
C141063	Waylon Raski	Not Guilty	
C139330	James Cross	Guilty	First
C138064	Kevin Lewis	Hung Jury	

In most states, second-degree murder is often charged instead of first- degree murder and juries in those states routinely return second-degree murder verdicts rather than first-degree murder

verdicts. As a result, the defendants in those states are not eligible for the death penalty. In contrast, in Nevada most murders are charged as first-degree murders and approximately 90% of the verdicts returned are for first-degree rather than second-degree murder. Under these circumstances, a disproportionate number of defendants are eligible for the death penalty.

Conclusion

The Nevada Attorneys for Criminal Justice and American Civil Liberties Union of Nevada respectfully submit that Nevada's death penalty scheme is unconstitutional because it fails to narrow the class of persons convicted of first degree murder who are eligible for the death penalty. NRS 200.033, which defines aggravating circumstances, provides for a large number of aggravating circumstances and the language of the statute is broad in scope. The problems with the statutory aggravators are exaggerated by the Nevada Supreme Court's broad interpretation of the statute and its failure to recognize its inherent and statutory authority to reverse death sentences which are excessive.

APPENDIX F

Bill Draft Request No. 14-198

SUMMARY—Makes various changes to penalty hearing when death penalty is sought and revises aggravating and mitigating circumstances for murder of first degree. (BDR 14-198)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: No.

AN ACT relating to crimes; revising the order in which the arguments are presented during the penalty hearing when the death penalty is sought; revising the aggravating circumstances for murder of the first degree; revising provisions concerning mitigating circumstances in cases of murder of the first degree; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 175.141 is hereby amended to read as follows:

175.141 The jury having been impaneled and sworn, the trial ~~[shall]~~ ***must*** proceed in the following order:

1. If the indictment or information be for a felony, the clerk must read it and state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.

2. The district attorney, or other counsel for the State, must open the cause. The defendant or his counsel may then either make his opening statement or reserve it to be made immediately ~~[prior to]~~ ***before*** the presentation of evidence in his behalf.

3. The State must then offer its evidence in support of the charge, and the defendant may then offer evidence in his defense.

4. The parties may then respectively offer rebutting testimony only, unless the court, for good reasons, in furtherance of justice, ~~[permit]~~ ***permits*** them to offer evidence upon their original cause.

5. ~~[When]~~ ***Except as otherwise provided in NRS 175.554, when*** the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the district attorney, or other counsel for the State, must open and must conclude the argument.

Sec. 2. NRS 175.151 is hereby amended to read as follows:

175.151 If the indictment or information be for an offense punishable with death, two counsel on each side may argue the case to the jury, but in such case, as well as in all others, ***except as otherwise provided in NRS 175.554,*** the counsel for the State must open and conclude the argument. If it be for any other offense, the court may, in its discretion, restrict the argument to one counsel on each side.

Sec. 3. NRS 175.554 is hereby amended to read as follows:

175.554 In cases in which the death penalty is sought:

1. ***The penalty hearing must proceed in the following order:***

(a) The district attorney, or other counsel for the State, shall open the argument;

(b) The defendant or his counsel may then respond;

(c) The district attorney, or other counsel for the State, may then argue in rebuttal; and

(d) The defendant or his counsel may then conclude the argument in surrebuttal.

2. If the penalty hearing is conducted before a jury, the court shall instruct the jury at the end of the hearing, and shall include in its instructions the aggravating circumstances alleged by the prosecution upon which evidence has been presented during the trial or at the hearing. The court shall also instruct the jury as to the mitigating circumstances alleged by the defense upon which evidence has been presented during the trial or at the hearing ~~[.~~

~~2.]~~ ***and shall specifically identify in writing any mitigating circumstance which is applicable pursuant to subsection 8 of NRS 200.035.***

3. The jury or the panel of judges shall determine:

(a) Whether an aggravating circumstance or circumstances are found to exist;

(b) Whether a mitigating circumstance or circumstances are found to exist; and

(c) Based upon these findings, whether the defendant should be sentenced to life imprisonment with the possibility of parole, life imprisonment without the possibility of parole or death.

~~[3.]~~ ***4.*** The jury or the panel of judges may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

~~[4.]~~ ***5.*** If a jury or a panel of judges imposes a sentence of death, the court shall enter its finding in the record, or the jury shall render a written verdict signed by the foreman. The finding or verdict must designate the aggravating circumstance or circumstances which were found beyond a reasonable doubt, and must state that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found.

Sec. 4. NRS 200.033 is hereby amended to read as follows:

200.033 The only circumstances by which murder of the first degree may be aggravated are:

1. The murder was committed by a person under sentence of imprisonment.

2. The murder was committed by a person who, at any time before a penalty hearing is conducted for the murder pursuant to NRS 175.552, is or has been convicted of:

(a) Another murder and the provisions of subsection ~~[12]~~ ***11*** do not otherwise apply to that other murder; or

(b) A felony involving the use or threat of violence to the person of another and the provisions of subsection ~~[4]~~ ***3*** do not otherwise apply to that felony.

FLUSH For the purposes of this subsection, a person shall be deemed to have been convicted at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

3. ~~[The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.~~

~~4.~~] The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, arson in the first degree, burglary, invasion of the home or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

~~[5.]~~ ***4.*** The murder was committed to avoid or prevent a lawful arrest or to effect an escape from custody.

~~[6.]~~ ***5.*** The murder was committed by a person, for himself or another, to receive money or any other thing of monetary value.

~~[7.]~~ ***6.*** The murder was committed upon a peace officer or ~~[fireman]~~ ***firefighter*** who was killed while engaged in the performance of his official duty or because of an act performed in his official capacity, and the defendant knew or reasonably should have known that the victim was a peace officer or ~~[fireman.]~~ ***firefighter.*** For the purposes of this subsection, "peace officer" means:

(a) An employee of the Department of Corrections who does not exercise general control over offenders imprisoned within the institutions and facilities of the Department but whose normal duties require him to come into contact with those offenders, when carrying out the duties prescribed by the Director of the Department.

(b) Any person upon whom some or all of the powers of a peace officer are conferred pursuant to NRS 289.150 to 289.360, inclusive, when carrying out those powers.

~~[8.]~~ *7.* The murder involved torture or the mutilation of the victim.

~~[9.]~~ *8.* The murder was committed upon one or more persons at random and without apparent motive.

~~[10.]~~ *9.* The murder was committed upon a person less than 14 years of age.

~~[11.]~~ *10.* 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.

~~[12.]~~ *11.* The defendant has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree. For the purposes of this subsection, a person shall be deemed to have been convicted of a murder at the time the jury verdict of guilt is rendered or upon pronouncement of guilt by a judge or judges sitting without a jury.

~~[13.]~~ *12.* The person, alone or with others, subjected or attempted to subject the victim of the murder to nonconsensual sexual penetration immediately before, during or immediately after the commission of the murder. For the purposes of this subsection:

(a) "Nonconsensual" means against the victim's will or under conditions in which the person knows or reasonably should know that the victim is mentally or physically incapable of resisting, consenting or understanding the nature of his conduct, including, but not limited to, conditions in which the person knows or reasonably should know that the victim is dead.

(b) "Sexual penetration" means cunnilingus, fellatio or any intrusion, however slight, of any part of the victim's body or any object manipulated or inserted by a person, alone or with others, into the genital or anal openings of the body of the victim, whether or not the victim is alive. The

term includes, but is not limited to, anal intercourse and sexual intercourse in what would be its ordinary meaning.

~~[14.]~~ *13.* The murder was committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person. For the purposes of this subsection, "school bus" has the meaning ascribed to it in NRS 483.160.

Sec. 5. NRS 200.035 is hereby amended to read as follows:

200.035 Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.

2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

3. The victim was a participant in the defendant's criminal conduct or consented to the act.

4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.

5. The defendant acted under duress or under the domination of another person.

6. The youth of the defendant at the time of the crime.

7. ***The defendant suffers from a mental illness or has a history of psychological disturbance.***

8. Any other mitigating circumstance.

APPENDIX G

Bill Draft Request No. 1-201

Includes Unfunded Mandate - §§ 1, 2, 3
(Not Requested by Affected Local Government)

SUMMARY—Makes various changes concerning defense in cases involving first degree murder. (BDR 1-201)

FISCAL NOTE: Effect on Local Government: Yes.

Effect on the State: No.

AN ACT relating to criminal procedure; increasing the presumptive limits for attorneys' fees in first degree murder cases; increasing the presumptive limits for ancillary expenses in criminal proceedings; requiring the court to appoint certain persons to assist in the defense of a person in certain cases involving murder of the first degree; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 7.125 is hereby amended to read as follows:

7.125 1. Except as limited by subsections 2, 3 and 4, an attorney **,** other than a public defender **,** ***who is*** appointed by a magistrate or a district court to represent or defend a defendant at any stage of the criminal proceedings from the defendant's initial appearance before the magistrate or the district court through the appeal, if any, is entitled to receive a fee for court appearances and other time reasonably spent on the matter to which the appointment is made ~~[.]~~

of $75 per hour. Except for cases in which the most serious crime is a felony punishable by death or by imprisonment for life with or without possibility of parole, this subsection does not preclude a governmental entity from contracting with a private attorney who agrees to provide such services for a lesser rate of compensation.

2. ~~[The]~~ ***Except as otherwise provided in subsection 4, the*** total fee for each attorney in any matter regardless of the number of offenses charged or ancillary matters pursued must not exceed:

(a) If the most serious crime is a felony punishable by death or by imprisonment for life with or without possibility of parole, ~~[$12,000;]~~ ***$20,000;***

(b) If the most serious crime is a felony other than a felony included in paragraph (a) or is a gross misdemeanor, $2,500;

(c) If the most serious crime is a misdemeanor, $750;

(d) For an appeal of one or more misdemeanor convictions, $750; or

(e) For an appeal of one or more gross misdemeanor or felony convictions, $2,500.

3. ~~[An]~~ ***Except as otherwise provided in subsection 4, an*** attorney appointed by a district court to represent an indigent petitioner for a writ of habeas corpus or other postconviction relief, if the petitioner is imprisoned pursuant to a judgment of conviction of a gross misdemeanor or felony, is entitled to be paid a fee not to exceed $750.

4. If the appointing court because of:

(a) The complexity of a case or the number of its factual or legal issues;

(b) The severity of the offense;

(c) The time necessary to provide an adequate defense; or

(d) Other special circumstances,

FLUSH deems it appropriate to grant a fee in excess of the applicable maximum, the payment must be made, but only if the court in which the representation was rendered certifies that the amount of the excess payment is both reasonable and necessary and the payment is approved by the presiding judge of the judicial district in which the attorney was appointed, or if there is no such presiding judge or if he presided over the court in which the representation was rendered, then by the district judge who holds seniority in years of service in office.

5. The magistrate, the district court or the Supreme Court may, in the interests of justice, substitute one appointed attorney for another at any stage of the proceedings, but the total amount of fees granted ***to*** all appointed attorneys must not exceed those allowable if but one attorney represented or defended the defendant at all stages of the criminal proceeding.

Sec. 2. NRS 7.135 is hereby amended to read as follows:

7.135 The attorney appointed by a magistrate or district court to represent a defendant is entitled, in addition to the fee provided by NRS 7.125 for his services, to be reimbursed for expenses reasonably incurred by him in representing the defendant and may employ, subject to the prior approval of the magistrate or the district court in an ex parte application, such investigative, expert or other services as may be necessary for an adequate defense. Compensation to any person furnishing such investigative, expert or other services must not exceed ~~[$300,]~~ ***$500,*** exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is:

1. Certified by the trial judge of the court, or by the magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration; and

2. Approved by the presiding judge of the judicial district in which the attorney was appointed ~~[,]~~ or , if there is no presiding judge, by the district judge who holds seniority in years of service in office.

Sec. 3. Chapter 178 of NRS is hereby amended by adding thereto a new section to read as follows:

If a magistrate or district court appoints an attorney, other than a public defender, to represent a defendant accused of murder of the first degree, the magistrate or court must appoint a team to defend the accused person that includes:

1. Two attorneys;

2. An investigator;

3. A mitigation specialist or reasonable equivalent;

4. A forensic psychiatrist or forensic psychologist; and

5. Any other person as deemed necessary by the court, upon motion of an attorney representing the defendant.

Sec. 4. The provisions of subsection 1 of NRS 354.599 do not apply to any additional expenses of a local government that are related to the provisions of this act.

APPENDIX H

Letter dated December 8, 2002,
to Robert Hadfield, Executive Director, Nevada Association of Counties,
and Steven G. McGuire, State Public Defender,
from Sheila Leslie, Nevada State Assemblywoman

SHEILA LESLIE
ASSEMBLYWOMAN
District No. 27

ASSISTANT MAJORITY WHIP

COMMITTEES:
Member
Commerce and Labor
Health and Human Services
Ways and Means

State of Nevada
Assembly

Seventy-First Session

December 8, 2002

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Steven G. McGuire
State Public Defender
Office of the State Public Defender
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Carson City, Nevada 89701-4880

Dear Mr. Hadfield and Mr. McGuire:

As you are aware, the 2001-2002 legislative interim is drawing to a close and many statutory and interim study committees are distributing their correspondence and completing their final reports. A copy of the final report for the Nevada Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (A.C.R. 3) will be forwarded to you in the coming weeks.

As Chair of the A.C.R. 3 Subcommittee, I am writing to you today to convey the Subcommittee's concerns that payments for defense attorney fees and ancillary expenses in capital cases be paid promptly. During the course of the Subcommittee's interim study, the Subcommittee heard testimony that oftentimes payments from the counties (county commissioners) and from the State Public Defender may be delayed as much as several months. At its final work session meeting, the Subcommittee voted unanimously to draft a letter to both of you urging that payments be made in a timely manner.

I thank you for your consideration of this important matter, and if the Subcommittee's legislative staff or I can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

Sheila Leslie

Sheila Leslie
Nevada State Assemblywoman

SL/k:L30
cc: Members of the A.C.R. 3 Subcommittee

APPENDIX I

Memorandum dated February 20, 2002,
to the Legislative Commission's Subcommittee to Study the Death Penalty
from Michael Pescetta

MEMORANDUM

Date: February 20, 2002
To: Legislative Commission's Subcommittee to Study the Death Penalty
From: Michael Pescetta
Re: Three Judge-Panel Procedure

On January 22, 2002, we submitted a memorandum relating to issues of racial bias which referred to the problems arising from the use of three-judge panels for capital sentencing. Currently, eighteen men are on Nevada's death row due to sentences imposed by three-judge panels. The three-judge panel procedure presents a number of constitutional problems.

Under our statutory scheme, a three-judge panel is convened to impose sentence if the penalty jury is unable to agree unanimously on a verdict or if a defendant pleads guilty to an offense for which the state is seeking the death penalty. The panel is composed of the trial judge and two district judges from two other judicial districts selected by the Nevada Supreme Court. Nev. Rev. Stat. §§ 175.552(1)(b); 175.556(1).[1] In theory, three-judge

[1] The Nevada Supreme Court has distributed an explanation of the current process for selecting panel members. The Court has not disclosed when this procedure was adopted, despite an explicit request for that information. See Attachment A. There is no information as to what the selection procedure was prior to the adoption of the alphabetical selection method; and the Court seems to have relied on volunteer judges (who appear to be more likely to impose a death sentence) which has rendered these panels less than impartial. Since the Supreme Court has precluded any inquiry into the personal or political views of panel members, e.g., Paine v. State, 110 Nev. 609, 618, 877 P.2d 1025 (1994), defendants have no ability to confirm their impartiality. Some judges have been appointed to several panels (which would certainly not occur with jurors) and the ability of some of these judges to consider mitigating evidence fully, see Morgan v. Illinois, 504 U.S. 719 (continued...)

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panels should find it difficult impose death sentences, since a panel can impose a sentence less than death by a majority vote, while a jury must agree on a sentence unanimously. Nev. Rev. Stat. §175.556(1). Nevertheless, panels have historically over-imposed the death penalty, ranging from a rate of about 90%, see Beets v. State, 107 Nev. 957,1056-1057, 821 P.2d 1044 (1991) (Young, J., dissenting), to over two-thirds of the cases currently. There is no clear explanation for this situation, but there are several theories about it that cast doubt on the constitutionality of the process, and we recommend that it be eliminated.

We attach a copy of a trial brief filed in State v. Daniel, Clark County No. C144983, which argues the constitutional issues at length. Attachment B. The major problems are these:

1. Under the Supreme Court's decision in Apprendi v. New Jersey, 530 U.S. 466 (2000), due process and the right to jury trial require that a jury find any fact that increases the potential range of punishment for a criminal offense. Under Nevada law, first degree murder is not punishable by death unless aggravating factors are found. Nev. Rev. Stat. § 200.030(4)(a). Accordingly, imposition of the death penalty based on findings of aggravating factors made by a three-judge panel appears to be impermissible. The Supreme

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[1](...continued)
(1992), and to adequately consider imposing punishments less than death, is open to question: for instance, one district judge has served on four panels and voted to impose death every time; two others have served on three panels and voted to impose death every time; and one has served on five panels and voted to impose death in four out of the five cases. See Attachment C.

Court has just granted certiorari in a case to decide whether Apprendi requires disapproval of the decision in Walton v. Arizona, 497 U.S. 639 (1990), which upheld the Arizona scheme of judge sentencing. Ring v. Arizona, No. 01-488, cert. granted 122 S.Ct. 865 (2002).[2]

2. The sentencer in a capital case is supposed to express the "conscience of the community" in deciding whether to impose the death penalty. E.g., Witherspoon v. Illinois, 391 U.S. 510, 519 (1968). The use of judges from other districts, who answer to the electorates in other counties, makes it impossible for the panel to express the conscience of the community in which the offense took place. In particular, the state's most urban and populous county, Clark County, is the source of the most homicides, the most three-judge panel sentences, and the most death penalties in the state. The statutory rule for selecting the three-judge panels ensures that the predominantly rural judges will impose sentences in Clark County panels, and the views of those jurists are likely to be quite different (and significantly more pro-death penalty) from those of Clark County residents.

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[2] Even if the Arizona scheme is upheld again in Ring, the Nevada system remains vulnerable. In Arizona, death is the maximum potential penalty for first degree murder, and the trial judge's consideration of aggravating and mitigating factors is the procedure for choosing between the maximum penalty of death and a lesser penalty. In Nevada, the maximum penalty for first degree murder, without more, is not death: a death sentence can be imposed "only if" additional aggravating factors are found and the aggravating factors are not outweighed by mitigating factors. Nev. Rev. Stat. § 200.030(4)(a). Thus Apprendi will continue to cast doubt on the validity of the Nevada statutory scheme until that issue is decided by the federal courts in a Nevada case.

3. The composition of the Nevada district court bench ensures that minority defendants, and particularly African-American defendants, will almost never see members of their own group on a three-judge panel. There are currently two African-American district judges, both in Clark County. At the same time, Clark County has the greatest minority population in Nevada and the greatest number of minority defendants charged with capital offenses. If an African-American defendant does not have his case initially assigned to one of the African-American district judges for trial, that defendant can never have an African-American judge on his sentencing body, because there are no African-American district judges in any other district who could be appointed to a three-judge panel.[3] The statistics show the value of diversity on a three-judge panel, regardless of the race of the defendant: all-white panels impose death sentences in 73% of the cases and lesser sentences in 27%; panels with one African-American judge impose death 20% of the time and lesser sentences 80%. This does not mean that African-American judges are unduly lenient; rather, it means that the diversity of viewpoints on a sentencing body (whether a panel or a jury), which results from a diversity of backgrounds and personal experiences, is more effective

[3] The Nevada Supreme Court also has a published "policy," which does not have any constitutional or statutory basis, of appointing district judges to replace disqualified justices of the Supreme Court only from districts other than the one from which the case arises. The Supreme Court is all white; and under this policy, a defendant from Clark County (where the most cases involving African-American defendants arise) can never have his case reviewed by an African-American judge, even if a justice of the Supreme Court is disqualified, because the only African-American district judges are also from Clark County.

at separating "the few cases in which the death penalty is imposed from the many in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (emphasis supplied). Since the composition of the bench is not likely to change, the predominance of all white sentencing panels is likely to persist and to give rise to constitutional litigation.

4. The United States Supreme Court has held that the practice at the time of the adoption of the Constitution in 1791 is the benchmark for the protections afforded by the due process clause. E.g., Apprendi v. New Jersey, 530 U.S. at 477-483. At the time the Constitution was adopted, the English judges empowered to impose a death sentence were appointed during good behavior.[4] Nevada district judges are subject to popular contested

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[4] The tenure during good behavior of judges who were qualified to try capital cases was firmly entrenched by the time of the adoption of the constitution. Act of Settlement, 12, 13 Will. III c.2 (1700), in W. Stubbs, Select Charters 531 (5th ed. 1884); 1 Geo. III c.23 (1760), in 1 W. Holdsworth, History of English Law 195 (7th ed. A. Goodhart and H. Hanbury rev. 1956); 1 William Blackstone, Commentaries on the Laws of England,* 258 (1765). The grievance that the king had made the colonial "judges dependent upon his will alone, for the tenure of their offices" was one of the reasons assigned as justification for the revolution. Declaration of Independence ¶ 11 (1776); see Smith, An Independent Judiciary: The Colonial Background, 124 U.Pa.L.Rev. 1104, 1112-1152 (1976). The political pressure on elected judges is one of the reasons cited by the Constitution Project for minimizing judicial involvement in capital cases. Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty, 40 (2001); see also Bright, Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases, 75 Boston U.L.Rev. 759, 776-780, 784-792, 822-825 (1995); Bright, Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U.L. Rev. 308, 312-14, 316-26, 329 (1997); John and Urbis, Judicial Selection in Texas: A Gathering Storm, 23 Tex. Tech. L. Rev. 525, 555 (1992); Note, Disqualifying Elected Judges from Cases Involving Campaign Contributors, 40 Stan.L.Rev. 449, 478-83 (1988); Note, Safeguarding the Litigant's Right to a Fair and Impartial Forum: A Due Process Approach to Improprieties Arising from Judicial Campaign Contributions from Lawyers, 86 Mich.L.Rev. 382, (continued...)

election, and the ability of a judge facing an election to decide impartially that a death sentence should not be imposed, particularly in a high profile case, is open to doubt. See Notes 1, 4, above.

Because of these problems, we recommend that the three judge panel process be eliminated. The Constitution Project also recommends that judge sentencing be minimized. Mandatory Justice at 39-40. A jury should be empaneled to impose sentence in guilty plea cases as well as trial cases. If the jury cannot agree unanimously on a penalty, a sentence of life without possibility of parole could be imposed. An alternative would be to provide for empaneling a new jury in that situation. Specific statutory language will be drafted for the Subcommittee's consideration before the work session.

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[4](...continued)
399-400, 407-08 (1987).

APPENDIX J

Bill Draft Request No. 14-200

SUMMARY—Provides for genetic marker analysis of certain evidence related to conviction of certain offenders sentenced to death. (BDR 14-200)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: Contains Appropriation not included in Executive Budget.

AN ACT relating to crimes; providing for genetic marker analysis of certain evidence relating to the conviction of certain offenders who have been sentenced to death; providing for a stay of execution pending the results of the analysis; requiring a court to arrest judgment if such an analysis is favorable to the petitioner; making an appropriation; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 176 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. ***1. A person convicted of a crime and under sentence of death who meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment***

of conviction and sentence of death. The petition must include, without limitation, the date scheduled for the execution, if it has been scheduled.

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by registered mail upon:

(a) The Attorney General; and

(b) The district attorney in the county in which the petitioner was convicted.

3. If a petition is filed pursuant to this section, the court shall immediately issue an order requiring, during the pendency of the proceeding, the prosecuting attorney to preserve all evidence within the possession or custody of the State that may be subjected to genetic marker analysis pursuant to this section.

4. Within 30 days after receiving notice of a petition pursuant to this section, the prosecuting attorney:

(a) Shall prepare an inventory of the evidence within the possession or custody of the State that may be subjected to analysis pursuant to this section;

(b) Shall submit a copy of the inventory to the petitioner and the court; and

(c) May file a written response to the petition with the court.

5. The court, in its sole discretion, may order a hearing on the petition.

6. The court shall order a genetic marker analysis if the court finds that:

(a) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(b) The evidence to be analyzed exists and is in a condition that allows genetic marker analysis to be conducted as requested in the petition; and

(c) The evidence was not previously subjected to:

(1) A genetic marker analysis involving the petitioner; or

(2) The method of analysis requested in the petition, and the method of additional analysis may resolve an issue not resolved by a previous analysis.

7. If the court orders a genetic marker analysis pursuant to subsection 6, the court shall:

(a) Order the analysis to be conducted promptly under reasonable conditions designed to protect the interest of the State in the integrity of the evidence and the analysis process.

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions; and

(2) Satisfy or exceed the standards for quality assurance that are established by the Federal Bureau of Investigation for participation in CODIS. As used in this subparagraph, "CODIS" has the meaning ascribed to it in NRS 176.0911.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

(d) Order the production of any reports that are prepared by a forensic laboratory in connection with the analysis and any data and notes upon which the report is based.

(e) Order the preservation of evidence used in a genetic marker analysis performed pursuant to this section for purposes of a subsequent proceeding or analysis, if any.

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner, the court shall arrest judgment as provided in NRS 176.525.

9. The court shall dismiss a petition filed pursuant to this section if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.

10. An order of a court granting or dismissing a petition pursuant to this section is final and not subject to judicial review.

11. For the purposes of a genetic marker analysis pursuant to this section, a person under sentence of death who files a petition pursuant to this section shall be deemed to consent to the:

(a) Extraction of a specimen, including, without limitation, a sample of blood, from him to determine his genetic marker information; and

(b) Release and use of genetic marker information concerning the petitioner.

12. The expense of an analysis ordered pursuant to this section is a charge against the Department of Corrections and must be paid upon approval by the Board of State Prison Commissioners as other claims against the State are paid.

Sec. 3. *1. After a judge grants a petition requesting a genetic marker analysis pursuant to section 2 of this act, if a judge determines that the genetic marker analysis cannot be completed before the date of the execution of the petitioner, the judge shall stay the execution of the judgment of death pending the results of the analysis.*

2. If the results of an analysis ordered and conducted pursuant to section 2 of this act are not favorable to the petitioner:

(a) Except as otherwise provided in paragraph (b), the Director of the Department of Corrections shall, in due course, execute the judgment of death.

(b) If the judgment of death has been stayed pursuant to subsection 1, the judge shall cause a certified copy of his order staying the execution of the judgment and a certified copy of the report of genetic marker analysis that indicates results which are not favorable to the petitioner to be immediately forwarded by the clerk of the court to the district attorney. Upon receipt, the district attorney shall pursue the issuance of a new warrant of execution of the judgment of death in the manner provided in NRS 176.495.

Sec. 4. NRS 176.525 is hereby amended to read as follows:

176.525 The court shall arrest judgment if the indictment, information or complaint does not charge an offense *,* ~~[or]~~ if the court was without jurisdiction of the offense charged ~~[. The]~~ *or if*

the results of a genetic marker analysis performed pursuant to section 2 of this act are favorable to the petitioner. Except when the motion is based upon the results of a genetic marker analysis performed pursuant to section 2 of this act, the motion in arrest of judgment ~~[shall]~~ ***must*** be made within 7 days after determination of guilt or within such further time as the court may fix during the 7-day period.

Sec. 5. 1. There is hereby appropriated from the State General Fund to the Department of Corrections the sum of $6,250 for the expense of genetic marker analyses performed pursuant to section 2 of this act.

2. Any remaining balance of the appropriation made by subsection 1 must not be committed for expenditure after June 30, 2005, and reverts to the State General Fund as soon as all payments of money committed have been made.

Sec. 6. The Department of Corrections, in consultation with the Attorney General, shall, on or before August 1, 2003:

1. Prescribe the form for a petition requesting the genetic marker analysis of evidence pursuant to section 2 of this act; and

2. Provide a copy of the form and a copy of the provisions of section 2 of this act to each person in the custody of the Department who is under a sentence of death.

Sec. 7. This act becomes effective upon passage and approval.

APPENDIX K

Memorandum dated April 15, 2002,
to the Legislative Commission's Subcommittee to Study the Death Penalty
from Michael Pescetta

MEMORANDUM

Date: April 15, 2002
To: Legislative Commission's Subcommittee to Study the Death Penalty
From: Michael Pescetta
Re: Mental Retardation

Recommendation: Exclude people with mental retardation from eligibility for the death penalty. See Constitution Project, Mandatory Justice: Eighteen Reforms to the Death Penalty 12-13 (2001).

The Legislature received substantial testimony in the 2001 session on the issue of prohibiting imposition of the death penalty upon people who suffer from mental retardation, in connection with A.B. 353. Significant information, summarized in the report of the Human Rights Watch, Beyond Reason: The Death Penalty and Offenders with Mental Retardation (2001), focused upon the impropriety of imposing the ultimate punishment on people whose ability to understand and control their actions is impaired to the point that they fall into the retarded population - - two standard deviations from the mean, equivalent to a 70 IQ, the lowest 1-2% of the population in terms of intellectual capacity. Id. at 8-15, 29-31. We do not propose that the reduction in culpability resulting from retardation justifies imposition of no punishment at all: retardation is not the same as insanity (which results in civil commitment but no possibility of criminal liability, see Finger v. State, ___ Nev. ___, 27 P.3d 66 (2001)) or incompetence (which prevents an individual from standing trial. Nev. Rev. Stats. §§ 178.400 et seq.; see Nev. Rev. Stat. § 435.340 (finding of retardation for institutional commitment does not establish incompetence for other purposes).) We propose only that the ultimate penalty of death not be available in cases involving the retarded, while

the other punishments of life imprisonment with or without the possibility of parole, or imprisonment for a term of years, remain permissible.

In terms of culpability, people who suffer from retardation are normally easily led and therefore are virtually always followers of others rather than instigators of criminal activity. Beyond Reason at 14-16. People with retardation normally know the rudimentary difference between right and wrong; but their ability to understand the effects of their actions, and to control their behavior under stress, is sufficiently impaired that the ultimate punishment of death cannot be appropriate. Id. at 11-17, 30-31.

Retarded people also present difficult problems in the criminal justice system in general and in capital cases in particular. It is difficult for non-professionals to recognize the existence and extent of the impairments of people with retardation. People with retardation devote much of their energy to masking their impairments, so that their own lawyers, as well as judges and juries often do not appreciate the extent of their impairment and this puts them at a fundamental disadvantage at all stages of the criminal process. Beyond Reason at 11-14. For instance, these characteristics make individuals prone to agree with inculpatory statements suggested by interrogators in order to please them, even if the information is false: The Human Rights Watch report documents instances of retarded defendants giving false confessions. Beyond Reason at 9, 24-26, 45-46, 48-50. The ability of people with mental retardation to cooperate rationally with counsel, or to understand legal concepts such as Miranda warnings, is also significantly compromised, even if the defendant

meets the very low standard of competence to proceed. Id. at 21-28.

The limited Nevada experience reflects these problems. The Federal Public Defender has identified three cases of individuals on death row who fall in the retarded range. In two of those cases, the impairment was not recognized at trial at all; and in one of those, the impairment was not recognized until the defendant had been in the Nevada system for fourteen years, despite the fact that the defendant had been tested and identified as retarded when he was thirteen years old. In the third case, the defendant's retardation was tested and diagnosed; but the three judge panel that imposed the death sentence refused to find retardation as a mitigating factor despite the uncontradicted expert testimony of its existence. See Beyond Reason at 30. Thus the possibility of considering retardation as a mitigating factor does not give adequate weight to the seriousness of the impairment: retardation fundamentally alters the individual's ability to understand and control behavior in an unstructured setting, see Diagnostic and Statistical Manual of Mental Disorders 46 (4th ed. 1994), but it also tends to make those individuals generally model inmates in the structured setting of a prison.

The ability of professionals to identify and measure this impairment was questioned by the Attorney General's Office in the debate over AB 353, but in fact it is well established. For instance, Nevada law authorizes expending funds for services for people who suffer from mental retardation based on the same definition of retardation that was proposed in the 2001 legislation (which tracks the DSM-IV definition). Nev. Rev. Stat. § 433.174. State

law also provides for the testing of individuals who may have retardation by professionals "experienced in the diagnosis of mental retardation" to establish the existence of that condition. Nev. Rev. Stat. §§ 435.123, 435.125. Thus state law already recognizes the reliability of this sort of testing. The attorney general has not offered evidence of a single instance of an individual successfully faking retardation, and to our knowledge there is no such instance.

Nevada should therefore join the other nineteen jurisdictions with capital punishments systems that do not allow the execution of people with retardation. This reform is recommended by the Constitution Project, see Mandatory Justice at 12-13, and it is consistent with international law. See Beyond Reason at 18-19. The United States Supreme Court is currently considering the issue whether the federal constitution prohibits execution of the retarded. Atkins v. Virginia, No. 00-8452 (argued February 20, 2002). Even if the Supreme Court holds that the federal constitution does not absolutely prohibit execution of the retarded, Nevada should join the emerging consensus of states that establish that prohibition under state law.[1] In any event, we propose that the Subcommittee recommend that the legislature pass a bill substantially similar to the one considered in the 2001 session.

[1] Of course, if the Supreme Court does outlaw execution of the retarded, Nevada would still have to adopt procedures for implementing that rule.

APPENDIX L

Summary "Mental Retardation and the Death Penalty"
submitted by
Professor Jim Ellis

MENTAL RETARDATION AND THE DEATH PENALTY

SUMMARY

Nevada currently allows the execution of persons with mental retardation. I urge this committee to review this policy in light of sweeping changes across the country in other legislatures and in public opinion. Persons with mental retardation who commit crimes should be held legally accountable, but receive a punishment that is proportionate to the seriousness of the crime and their degree of moral culpability.

FREQUENTLY ASKED QUESTIONS

Why prevent the execution of people with mental retardation? Only a very small percentage (one or two percent) of the persons convicted of murder are sentenced to death, and far fewer are ever executed. The Supreme Court has made clear that the only criteria that can be used in selecting those few individuals are the personal culpability and blameworthiness of the individual, including his level of understanding of his crime. A person with mental retardation, who by definition has a measured intelligence in the lowest 3% of the population, is *never* in the top 1% or 2% in understanding and blameworthiness. The execution of such an individual would be manifestly unjust.

In addition, there is growing concern that cases involving mental retardation involve an unacceptable risk of wrongful conviction and death sentence for innocent individuals, such as the recent cases of Anthony Porter in Illinois and Earl Washington in Virginia.

Is there a consensus against executing people with mental retardation? Yes. We now have public opinion polling at the national level and in fifteen different states. Every state and national poll shows that a substantial majority of the American people opposes the execution of individuals with mental retardation. These polls also make clear that a clear majority of those people who *support* the death penalty *oppose* its use in cases involving mental retardation.

Do professional organizations reflect the same consensus? Yes. The American Association on Mental Retardation, the oldest and largest professional organization in the field, opposes the execution of individuals with mental retardation. So do the American Psychological Association, the American Psychiatric Association, and the American Bar Association. The Arc (previously known as the Association for Retarded Citizens) has taken leadership in opposing such executions at both the state and national levels.

Have other legislatures enacted legislation to ban the practice? Yes. Congress has passed such protection twice (in 1988 and 1994) for Federal prosecutions, and those provisions were signed into law by Presidents Reagan and Clinton. In addition, eighteen states have passed such legislation. The first state law was enacted by Georgia following the execution of Jerome Bowden, an individual with mental retardation. Georgia has since been joined by the legislatures of Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Washington, Colorado, Indiana, Kansas, New York, Nebraska, South Dakota, Connecticut, Missouri, Arizona, Florida, and North Carolina.

Is such a law really needed in Nevada? Yes. Without such a law, there can be no guarantee that individuals with mental retardation will not be sentenced to death and executed.

Aren't there sufficient protections in our laws on incompetence and the insanity defense? No. *Every* state that has executed a person with mental retardation has had the same "protections" in their laws. There have been more than a dozen such executions in this country since 1976, with the most recent being in Texas in 2000.

Can't we just leave this question to the jury and trust them not to sentence anyone with mental retardation to death? Unfortunately, no. For a variety of reasons, the jury sentencing process does not and cannot adequately protect people with mental retardation. Nevada law needs a statutory protection.

Isn't the definition vague? No. Mental retardation is a substantial mental disability, and does not include people who are "somewhat slow" or "slow learners." There is the standard clinical definition, which includes only the lowest 3% of the population in measured intelligence. It should follow the approach of other Nevada statutory definitions of mental retardation.

Could a defendant successfully "pretend" to have mental retardation? No. There is *no* recorded case in the clinical or legal literature of any person successfully "faking" mental retardation by intentionally doing poorly on IQ tests. Proposed legislation can require that the condition must have manifested at birth or during childhood, so most defendants with mental retardation leave a "paper trail" of special education and social service records. The legislation therefore would place the burden of persuasion on the defendant. Malingering has not proven to be a problem in any of the states that have adopted this legislation.

Wouldn't this create a "battle of the experts" at trials? No. Unlike the insanity defense, mental retardation is measured by objective psychometric tests. Clinical assessment of mental retardation does not involve the subjective judgments that some states have encountered surrounding the insanity defense.

Hasn't the U.S. Supreme Court said that it is acceptable to execute people with mental retardation? No. In 1989, the Court observed that the national consensus against executing people with mental retardation would constitute the basis for a constitutional prohibition on the practice if sufficient state legislatures passed protective laws. Since 1989, the number of such laws has grown nine-fold. The Court heard argument in February in *Atkins v. Virginia*, No. 00-8452, on the question of whether that consensus has now emerged.

FOR MORE INFORMATION: Contact *Professor Jim Ellis*, Dickason Professor of Law, University of New Mexico and Past President of the American Association on Mental Retardation: (505) 277-4830 (office) or (505) 268-7457 (home) or at ellis@law.unm.edu.

APPENDIX M

Bill Draft Request No. 14-199

SUMMARY—Prohibits sentence of death for person who is mentally retarded. (BDR 14-199)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: Yes.

AN ACT relating to crimes; prohibiting a sentence of death for a person who is mentally retarded; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 174 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A defendant who is charged with murder of the first degree may, before his trial, file a motion to declare that he is mentally retarded.

2. If a defendant files a motion pursuant to this section, the court must hold a hearing within a reasonable time before the trial to determine whether the defendant is mentally retarded.

3. Not less than 45 days before the date set for a hearing conducted pursuant to subsection 2, the court shall hold an ex parte hearing in camera with the defendant and his counsel present to:

(a) Review the evidence of the defendant concerning whether the defendant is mentally retarded, including, without limitation, psychological, psychiatric and other reports, school records of the defendant and statements by witnesses; and

(b) Determine what evidence is material to a determination of whether the defendant is mentally retarded and should be provided to the prosecution.

4. The court shall order the defendant to:

(a) Provide the evidence declared material pursuant to subsection 3 to the prosecution at least 30 days before the date set for a hearing conducted pursuant to subsection 2; and

(b) Undergo an examination by an expert selected by the prosecution on the issue of whether the defendant is mentally retarded at least 15 days before the date set for a hearing pursuant to subsection 2.

5. For the purpose of the hearing conducted pursuant to subsection 2, there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution pursuant to subsection 4.

6. At a hearing conducted pursuant to subsection 2:

(a) The court must allow the defendant and the prosecution to present evidence concerning whether the defendant is mentally retarded;

(b) The defendant has the burden of proving by a preponderance of the evidence that he is mentally retarded; and

(c) The results of a reliably administered intelligence quotient test indicating that the defendant has quotient of 70 or below creates a rebuttable presumption that the defendant is mentally retarded.

7. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is mentally retarded, the court must make a finding that a sentence of death may not be imposed upon the defendant.

8. For the purposes of this section, a person is "mentally retarded" if, before the age of 18 years, he manifests:

(a) Intellectual functioning that is significantly substandard; and

(b) Substantial impairment of his adaptive behavior.

Sec. 2. NRS 175.552 is hereby amended to read as follows:

175.552 1. Except as otherwise provided in subsection 2, in every case in which there is a finding that a defendant is guilty of murder of the first degree, whether or not the death penalty is sought, the court shall conduct a separate penalty hearing. The separate penalty hearing must be conducted as follows:

(a) If the finding is made by a jury, the separate penalty hearing must be conducted in the trial court before the trial jury, as soon as practicable.

(b) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is sought, the separate penalty hearing must be conducted before a panel of three district judges, as soon as practicable.

(c) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is not sought, the separate penalty hearing must be conducted before the judge who conducted the trial or who accepted the plea, as soon as practicable.

2. In a case in which the death penalty is not sought ~~[,]~~ ***or in which a court has made a finding that a sentence of death may not be imposed pursuant to section 1 of this act,*** the parties may by stipulation waive the separate penalty hearing required in subsection 1. When stipulating to such a waiver, the parties may also include an agreement to have the sentence, if any, imposed by the trial judge. Any stipulation pursuant to this subsection must be in writing and signed by the defendant, his attorney, if any, and the prosecuting attorney.

3. ~~[In]~~ ***During*** the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

4. In a case in which the death penalty is not sought ~~[,]~~ ***or in which a court has found pursuant to section 1 of this act that the defendant may not receive a sentence of death,*** the jury or the trial judge shall determine whether the defendant should be sentenced to life with the possibility of parole or life without the possibility of parole.

Sec. 3. NRS 177.015 is hereby amended to read as follows:

177.015 The party aggrieved in a criminal action may appeal only as follows:

1. Whether that party is the State or the defendant:

(a) To the district court of the county from a final judgment of the justice's court.

(b) To the Supreme Court from an order of the district court granting a motion to dismiss, a motion for acquittal or a motion in arrest of judgment, or granting or refusing a new trial.

(c) To the Supreme Court from a determination of the district court about whether a defendant is mentally retarded that is made as a result of a hearing held pursuant to section 1 of this act. If the Supreme Court entertains the appeal, it shall enter an order staying the criminal proceedings against the defendant for such time as may be required.

2. The State may, upon good cause shown, appeal to the Supreme Court from a pretrial order of the district court granting or denying a motion to suppress evidence made pursuant to NRS 174.125. Notice of the appeal must be filed with the clerk of the district court within 2 judicial days and with the Clerk of the Supreme Court within 5 judicial days after the ruling by the district court. The clerk of the district court shall notify counsel for the defendant or, in the case of a defendant without counsel, the defendant within 2 judicial days after the filing of the notice of appeal. The Supreme Court may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained. If the Supreme Court entertains the appeal, or if it otherwise appears necessary, it may enter an order staying the trial for such time as may be required.

3. The defendant only may appeal from a final judgment or verdict in a criminal case.

4. Except as otherwise provided in subsection 3 of NRS 174.035, the defendant in a criminal case shall not appeal a final judgment or verdict resulting from a plea of guilty, guilty but mentally ill or nolo contendere that the defendant entered into voluntarily and with a full understanding of the nature of the charge and the consequences of the plea, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings. The Supreme Court may establish procedures to require the defendant to make a preliminary showing of the propriety of the appeal.

Sec. 4. NRS 177.055 is hereby amended to read as follows:

177.055 1. When upon a plea of not guilty a judgment of death is entered, an appeal is deemed automatically taken by the defendant without any action by him or his counsel, unless the defendant or his counsel affirmatively waives the appeal within 30 days after the rendition of the judgment.

2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the Supreme Court, which shall consider, in a single proceeding**,** if an appeal is taken:

(a) Any errors enumerated by way of appeal;

(b) ***If a court determined that the defendant is not mentally retarded during a hearing held pursuant to section 1 of this act, whether that determination was correct;***

(c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;

~~[(c)]~~ *(d)* Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and

~~[(d)]~~ *(e)* Whether the sentence of death is excessive, considering both the crime and the defendant.

3. The Supreme Court, when reviewing a death sentence, may:

(a) Affirm the sentence of death;

(b) Set the sentence aside and remand the case for a new penalty hearing:

(1) If the original penalty hearing was before a jury, before a newly impaneled jury; or

(2) If the original penalty hearing was before a panel of judges, before a panel of three district judges which must consist, insofar as possible, of the members of the original panel; or

(c) Set aside the sentence of death and impose the sentence of imprisonment for life without possibility of parole.

Sec. 5. NRS 200.030 is hereby amended to read as follows:

200.030 1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse;

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody; or

(d) Committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person.

2. Murder of the second degree is all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find him guilty thereof, designate by their verdict whether he is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances ~~[;]~~ ***, unless a court has made a finding pursuant to section 1 of this act that a sentence of death may not be imposed upon the defendant;*** or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

FLUSH A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

6. As used in this section:

(a) "Child abuse" means physical injury of a nonaccidental nature to a child under the age of 18 years;

(b) "School bus" has the meaning ascribed to it in NRS 483.160;

(c) "Sexual abuse of a child" means any of the acts described in NRS 432B.100; and

(d) "Sexual molestation" means any willful and lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.

APPENDIX N

Letter dated December 8, 2002,
to Ron Titus, Deputy Director, Administrative Office of the Courts,
from Sheila Leslie, Nevada State Assemblywoman

SHEILA LESLIE
ASSEMBLYWOMAN
District No. 27

ASSISTANT MAJORITY WHIP

COMMITTEES:
Member
Commerce and Labor
Health and Human Services
Ways and Means

State of Nevada Assembly

Seventy-First Session

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December 8, 2002

Ron Titus
Deputy Director
Administrative Office of the Courts
Supreme Court Building
201 South Carson Street, Suite 250
Carson City, Nevada 89701-4702

Dear Mr. Titus:

As you are aware, the 2001-2002 legislative interim is drawing to a close and many statutory and interim study committees are distributing their correspondence and preparing final reports. A copy of the final report for the Nevada Legislative Commission's Subcommittee to Study the Death Penalty and Related DNA Testing (A.C.R. 3) will be forwarded to you in the coming weeks.

During the course of the A.C.R. 3 interim study, the Subcommittee identified several areas of concern with the workings of our current death penalty system in Nevada. At its final work session meeting, the Subcommittee voted unanimously to send a letter urging the Administrative Office of the Courts to consider seeking a project grant (through the State Justice Institute or other similar entity) and to contract with a consulting firm or a university for the study of the costs of processing murder and capital cases.

Throughout the course of the study, the Subcommittee heard testimony that a number of other states have undertaken similar studies. For your information, enclosed is an executive summary of "The Costs of Processing Murder Cases in North Carolina", a study done by the North Carolina Administrative Office of the Courts. Also enclosed is an information sheet on State Justice Institute project grants.

Thank you for your consideration of this important matter. If the Subcommittee's legislative staff or I can be of any assistance to you, please do not hesitate to contact me.

Very truly yours,

Sheila Leslie

Sheila Leslie
Nevada State Assemblywoman

SL/k:L29
cc: Members of the A.C.R. 3 Subcommittee

PREFACE

The motivation and background for the research reported here are explained in a proposal prepared by the National Center for State Courts in conjunction with the American Bar Association's Ad Hoc Committee to Assess the Cost and Impact of the Death Penalty on the Criminal Justice System. That document [1] noted that the "super due process" accorded in potential death cases has the effect of making the typical capital case more expensive at every stage of adjudication than the typical noncapital murder case, and proposed that these costs be documented by a systematic study conducted in North Carolina. The State Justice Institute agreed to fund a limited version of this proposed study, and awarded a grant to the North Carolina Administrative Office of the Courts (AOC) in 1991. The AOC in turn contracted with Duke University to perform the research and prepare a report.

Our work commenced in September 1991. Philip Cook has served as the principal investigator, and Donna Slawson as project director. In September, 1992 Lori Gries joined the project, and has been responsible for much of the coding, data entry, and programming for data analysis.

During the course of our work we have been assisted by a number of students -undergraduate, graduate, and professional -- who have provided crucial assistance for minimal remuneration. We especially thank Seth Blum, Ken Pettit, Rosalie Pacula, Adam Spilker, Nick Djuric, Melissa Bowden, and Siegmund Shyu. Elaine Lamb provided able clerical assistance in the first year of the project.

The data collection effort for this report required the cooperation and time of a number of public officials. We are very grateful to all those officials who answered our questions, filled out our questionnaires, provided us with data from their files, and generally made this project possible. The list is long, and includes a number of Clerks of Superior Court and individuals in the Judicial Department, the Office of the Attorney General, and the Department of Correction. We also acknowledge with gratitude all those members of the private bar who responded to our requests.

Several colleagues have provided us with useful suggestions and comments on earlier drafts of this report. We especially thank Jack Boger, Stevens Clarke, Jim Coleman, Harry C. Martin, Ann Petersen, and Elizabeth Rapaport. An advisory committee appointed by the AOC provided suggestions during a meeting at the beginning of the project, and has been provided with drafts of this report.

Finally, we greatly appreciate Kathy Kunst's help in managing the contract and providing us with much-needed office space and PCs.

PJC & DBS, April 1993

1. National Center for State Courts, "A Proposal to Determine the Additional Costs, if any, Imposed on the North Carolina Criminal Justice System by the Death Penalty" (Arlington, VA, July 1987).

1. EXECUTIVE SUMMARY

In this report we compare the resource costs of adjudicating murder cases capitally and noncapitally in North Carolina. Our analysis is based on an extensive data collection effort by which we were able to develop estimates for costs stemming from murder trials, appeals, and imprisonment. One conclusion is that the extra costs to the North Carolina public of adjudicating a case capitally through to execution, as compared with a noncapital adjudication that results in conviction for first degree murder and a 20-year prison term, is about $329 thousand, substantially more than the savings in prison costs, which we estimate to be $166 thousand. We note that a complete account must also include the extra costs of cases that were adjudicated capitally but did not result in the execution of the defendant. All told, the extra cost *per death penalty imposed is* over a quarter million dollars, and *per execution* exceeds $2 million. This last estimate is quite sensitive to our assumption that ten percent of death-sentenced defendants are ultimately executed. These and other assumptions and qualifications are included throughout the report.

A section-by-section summary follows.

2. *Objectives.* Our objective is to provide estimates of the cost of capital adjudication that will be useful to legislators and criminal justice officials. The law and practice of capital punishment change from year to year as a result of new case law, amendments to existing statutes, and revisions in standard operating procedures by district attorneys and other officials. Our estimates are intended to help inform these decisions and predict their consequences for the utilization of resources in the criminal justice system. There have been a handful of other studies that have attempted to cost out the death penalty, but ours is the most complete and the first to utilize direct observation of a number of cases at each stage of the process.

3. *Constitutional and Statutory Framework* The legal doctrine that as a punishment "death is different" is reflected in the fact that capital cases tend to be litigated more thoroughly than other serious murder cases. For example, in capital trials indigent defendants are entitled to two court-appointed attorneys, the jury must be "death qualified," and in most states the jury rather than the judge is responsible for making the decision whether to sentence the defendant to life imprisonment or death. These and other protections stem from constitutional and statutory provisions at both the state and federal level, as well as the especially diligent effort ordinarily expected of practitioners in these cases.

4. *Accounting Rules.* "Cost" in this report is defined as the *opportunity -cost of* the extra resources required to adjudicate capital cases, and more specifically as the value *of* the additional resources consumed by these cases. Our study is limited to the costs borne by the state and county government agencies, omitting consideration *of* private costs and costs to the federal government. It should be emphasized that this report is not an evaluation of the death penalty, since our focus is almost exclusively on the cost side; the only benefit we measure is the savings in imprisonment cost. (We also consider the possibility that the death penalty serves to encourage some murder defendants to plead guilty and thus saves the state the cost *of* the trial. This is a real possibility, but it is somewhat unusual in North Carolina for a district attorney to accept a guilty plea after prosecuting a case capitally, in part because of the ban on sentence bargaining in first degree murder cases.)

5. *Unit Costs.* We use standard accounting procedures to estimate the unit costs of key resources, including the time of attorneys in the offices *of* the district attorneys, public defenders, the Appellate Defender, and the Attorney General. The value *of* an hour of an attorney's time includes the prorated

position cost, together with the appropriate "load" from support staff and general administration. We also estimate the unit cost for a day in Superior Court, and for the time of the justices and law clerks of the Supreme Court *of* North Carolina.

6. Trial Court Costs. To estimate the costs *of* murder trials, we collected data on a large sample *of* such cases in six prosecutorial districts, supplemented with data on specific cases in other districts. We found that the average cost *of* a bifurcated capital trial is $84 thousand, and of a capital trial that ends with the guilt phase, *$57* thousand. The average for noncapital murder trials is just $17 thousand.. Using regression analysis to adjust for other differences among these cases, we conclude that a bifurcated trial costs about *$55* thousand more than a noncapital murder trial. We then go on to estimate the extra costs in the trial courts *per death penalty imposed,* which works out to $194 thousand. This figure includes the extra costs of capital prosecutions that do not result in the imposition of the death penalty, as well as the extra costs resulting from the fact that capital cases are more likely than other murder cases to be remanded to the trial courts for resentencing or retrial.

7. Appellate and Postconviction Costs. At our request, the justices and law clerks *of* the Supreme Court of North Carolina kept records for 12 months on the amount of time they devoted to direct appeals *of* murder cases. Based on these data, and interviews with attorneys in the offices of the Appellate Defender and Attorney General, we conclude that a direct appeal in a death case is about $7 thousand more costly than in a life case. For postconviction proceedings, we focused on two capital cases, *Gardner* and *Maynard,* both of which concluded in 1992 after being fully litigated. The average postconviction cost to the state of these two cases was $255 thousand.

8. Prison Costs. The operating cost of a year in prison ranges from $16 thousand per inmate for minimum security to $23 thousand per inmate for close security. Facility costs are about $750 per inmate annually. An inmate who serves ten years on death row and is then executed costs the Department of Corrections $166 thousand less (in present value terms) than an inmate who serves a "life" term and is paroled after 20 years.

9. Summing Up. "The" cost of the death penalty depends on the definition. Comparing two hypothetical cases, one of which concludes with the defendant's execution after ten years on death row, and the other with the defendant serving 20 years in prison, yields an answer of $163 thousand as the extra cost for the capital case. Of greater relevance to policy is an estimate that includes the costs of cases that are adjudicated capitally but the defendant is not executed. This more complete measure of cost can be reported either as a ratio to the number of death sentences imposed, or as a ratio to the number of executions. The latter is perhaps the most meaningful, and also the most uncertain, given our uncertainty concerning the fraction of death sentences that will ultimately be carried out.

It is possible to use our data to make a rough estimate of the statewide costs incurred over a particular time period. Over the two-year period 1991 and 1992 there were a total of 94 defendants tried capitally (excluding retrials and resentencing hearings). Of these, 29 were sentenced to death. These capital trials would have cost the state and counties about $4.3 million less if they had proceeded noncapitally. If the death-sentenced cases follow a postconviction track similar to that of cases from previous years, the cost to the state will total about $2.8 minion for appeals and postconviction proceedings, and $1.4 million for retrials and resentencing proceedings ordered by the appellate courts. Recent history suggests that approximately 10 percent of the death-sentenced defendants will be executed, at a savings in imprisonment costs of $0.5 million.. Combining all these figures gives an overall extra cost on the order of $8 million, or an average of $4 million per year.

The extra costs of adjudicating murder cases capitally outweigh the savings in imprisonment costs. As it is currently implemented, the death penalty cannot be justified solely on the grounds of economy. The death penalty is usually justified on the basis that it offers public benefits in the form of greater deterrent and retributive value than life imprisonment; these benefits, if they exist, are not free, but rather come at a substantial cost to the public.

SJI State Justice Institute

The State Justice Institute (SJI) was established by Federal law in 1984 to award grants to improve the quality of justice in State courts, facilitate better coordination between State and Federal courts, and foster innovative, efficient solutions to common problems faced by all courts. Since becoming operational in 1987, SJI has awarded over $125 million to support more than 1,000 projects benefiting the nation's judicial system and the public it serves. Institute matching requirements have also enabled these projects to benefit from more than $40 million in support from other public and private sources.

The Institute is unique both in its mission and how it seeks to fulfill it. Only SJI has the authority to assist all State courts — criminal, civil, juvenile, family, and appellate — and the mandate to share the success of one State's innovations with every State court system as well as the Federal courts. Key areas of interest include responding to the needs of children and families in court, family violence, applications of technology in the court, improving public confidence in the courts, and judicial branch education.

The Institute carries out its mission in a variety of ways that maximize the impact of its funding, including:

- Placing practical products in the hands of the judges and court staff who can most benefit from them
- Maintaining information clearinghouses to assure that effective new judicial approaches in one State are quickly and economically shared with other courts nationwide
- Establishing national resource centers where judges and court staff obtain expert guidance, test new technologies, and learn from each other
- Convening national, regional, and in-State educational programs to speed the transfer of solutions to problems confronting courts across the country
- Delivering national technical assistance targeted at specific jurisdictions' specific problems.

SJI is a non-profit corporation governed by an 11-member Board of Directors appointed by the President and confirmed by the Senate. By law, the President must appoint six State court judges, one State court administrator, and four members of the public (no more than two of whom may be of the same political party).

More information about the Institute is available on the SJI web site (www.statejustice.org), including:

- The Institute's annual Grant Guideline, SJI News (the Institute's quarterly newsletter), and other publications
- Tutorials, forms and instructions for all grant programs, including Project Grants, Technical Assistance Grants, Curriculum Adaptation Grants, and Scholarships
- Searchable databases of all SJI grants and grant products

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9/01

SJI Project Grants

Project grants are available to support a broad variety of programs to improve the quality of justice in State courts, including judicial branch education, demonstrations of new applications of technology, evaluations of new court procedures, and national or regional technical assistance. They may address a topic listed in one of the Board of Directors' "Special Interest" project categories (located in Section II.B. of the Institute's annual Grant Guideline), or other issues important to the administration of justice in State courts.

The Special Interest categories in this year's Guideline include Improving Public Confidence in the Courts; Application of Technology; Children and Families in Court; Substance Abuse and the Courts; Improving the Courts' Response to Gender-Related Violent Crime; Dispute Resolution and the Courts; Enhancing Court Management Through Collaboration; Education and Training for Judges and Key Court Personnel; and the Relationship Between State and Federal Courts.

Project grants are awarded on a competitive basis. Award criteria include the State courts' need for the project; the soundness and innovativeness of the approach proposed; the benefits to be derived from the project; the reasonableness of the proposed budget; the project's relationship to a Special Interest category; and the project's replicability. Project grants may be made for up to $200,000 but grants over $150,000 are infrequent. The project period is ordinarily up to 15 months long.

In order to obtain a project grant, an applicant must submit a concept paper (no longer than eight double-spaced pages) by the annual deadline, which for FY 2002 is November 21, 2002. The Executive Director of the Institute may waive the deadline for good cause, e.g., the proposed project could provide a significant benefit for State courts or the opportunity to conduct the project did not arise until after the deadline. The format for concept papers is set forth in Section VI. of the Grant Guideline.

The Board of Directors meets early the following March to invite formal applications based on the most promising concept papers. When an applicant submits a concept paper that requests less than $40,000 for a project that is thoroughly described in the paper, the Board may approve a grant on the basis of the concept paper alone. Applications, which may not exceed 25 pages, are due in May. The Board meets in late July to review the applications and approve grants.

Recommendations for Grantwriters may be found in the Guideline. More information about the Institute is available on the SJI web site (http://www.statejustice.org), including:

- The Guideline, SJI News (the Institute's quarterly newsletter), and other publications
- Tutorials, forms and instructions for all grant programs, including Project Grants, Technical Assistance Grants, Judicial Branch Education Technical Assistance Grants, and Scholarships
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