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I. Introduction

Good morning Chairman Anderson and members of the committee. For the record, my name is Risa Lang, I am a principal deputy legislative counsel for the LCB, and committee counsel for this committee. It is my distinct privilege to serve as committee counsel to this committee for the fourth consecutive session and I look forward to working with each of the members of this committee during this Legislative Session.

challenge

II. What I am going to talk about:

Before the beginning of this session, Chairman Anderson requested that I review the case law since the last legislative session and determine the laws of this state which have been held unconstitutional or unenforceable. There were an unusually large number of cases that fell into these categories during this past interim. I have passed out a copy of the summary of cases that I prepared for Mr. Anderson. Mr. Anderson also requested that I summarize these cases for you today which I will do now. You will hear about most of these cases again because many have prompted legislation. Hopefully, this summary will serve to prepare you for those hearings.

III. Disclaimer:

I would like to make the usual disclaimer before I begin, that as staff of the LCB, I serve in a nonpartisan capacity and therefore do not urge or oppose any particular legislation.

Turning now to the handout before you, I have separated the cases by topic. The first is the death penalty. There were three major decisions in this area by the U.S. Supreme Court.

IV. Death Penalty Cases

A. Atkins v. Virginia:

1. This case held that it is an unconstitutional violation of the Eighth Amendment protection against cruel and unusual punishment to execute the “mentally retarded
2. No universal definition of mentally retarded. Thus, the states must determine how to define mentally retarded for purposes of imposing the death penalty.
3. **Nevada Law** currently does not prohibit imposing the death penalty upon a person who is mentally retarded.

a. A.B. 353 of the 2001 Legislative Session proposed a statute prohibiting the imposition of the death penalty on a person who was mentally retarded. That bill died in the Senate.

b. The affect of Atkins on Nevada law is that until the Legislature defines “mentally retarded” the courts must determine who is mentally retarded and because more than one court may have to determine the issue, this could lead to inconsistent results.

B. Ring v. Arizona

1. Aggravating circumstances: This case held that a judge, sitting without a jury, cannot determine aggravating circumstances because it violates 6th Amendment right to trial by jury.
2. Reasoning: The Court found the practice of allowing judges to determine aggravating circumstances to be unconstitutional because that is a factual determination which

is used to impose a higher penalty, and is thus considered the equivalent of an element of a greater offense.

3. **Nevada Law:** 2 situations in statute where the judges currently are charged with determining aggravating circumstances for purposes of imposing the death penalty.

a. Sentencing jury in capital murder case fails to reach a unanimous verdict on the sentence to be imposed.

b. The offender has pleaded guilty and waived his right to a jury trial.

c. Nevada Supreme Court has determined the constitutionality of these provisions of Nevada law in light of the holding of the U.S. Supreme Court

(i) **Colwell v. State:** Addressed the situation where the judge determines the sentence of a person who has pleaded guilty and waived his right to a trial by jury. **Held:**

I. Ring does not apply retroactively to finalized cases.

II. Ring does not apply to cases in which the defendant has waived his right to a trial by jury.

III. Three-judge panel may determine aggravating circumstances and sentence an offender to death where the offender has waived his right to a trial by jury.

(ii) **Johnson v. State:** Addressed the other situation where a person is sentenced to death by a three-judge panel after a jury was unable to reach a unanimous verdict on the sentence. The Nevada Supreme Court held that based on the holding in Ring, this practice is unconstitutional.

d. **Summarize:** Affect of the holding in Ring on Nevada law is that Supreme Court has held that it is okay for a three-judge panel to determine aggravating factors where a person has pleaded guilty and waived his right to a jury trial; but it is not okay for a three judge panel to determine aggravating factors when the jury fails to reach unanimous verdict on the sentence to impose.

Until the Nevada Legislature amends the law to change the procedure, the courts must determine a constitutional manner to proceed in cases in which a jury does not reach a unanimous verdict.

C. ***In re Kevin Nigel Stanford*:** the USSC denied certification to determine whether the 8th Amendment protection against cruel and unusual punishment prohibits the imposition of the death penalty upon a person who commits a crime before the age of 18 years.

1. **Affect on Nevada:** Because certification was denied, the Supreme Court did not consider this issue and therefore, the law concerning the age for imposition of the death penalty has not changed. Thus, each state must decide the appropriate age for imposition of the death penalty.

a. NRS 176.025: Allows death penalty to be imposed upon a person for crime committed when person was 16 years or older.

D. Those were the cases decided regarding the death penalty. If there are no questions, I will move to the next case which dealt with the plea of guilty but mentally ill.

V. **Finger v. State: Guilty but mentally ill**

A. **Guilty but mentally ill** replaced insanity defense in 1995 in S.B. 314.

B. Nevada Supreme Court held that S.B. 314 was an unconstitutional violation of the due process guarantees because it allowed a person to be convicted of a criminal offense under circumstances where the person lacked the mental capacity to form a necessary element of the offense, intent to commit the crime.

C. **Reasoning:** The Court acknowledged that similar statutes have been upheld by the Supreme Courts of three other states: Idaho, Montana and Mississippi. Those courts found no constitutional right to assert an insanity defense. The Court also noted that the USSC has not determined the issue. However, the Nevada Supreme Court disagreed with the Supreme Court of those three states and held that S.B. 314 “should be rejected in its entirety.” The Court further held that all prior versions of statutes amended or repealed by S.B. 314 remain in full force and effect.

D. **Affect of Finger on Nevada:** Statutes do not reflect the current state of the law. Court effectively revived the laws as they existed before the 1995 Legislative Session and the case law interpreting those laws. The Court summarized the law prior to 1995, which is now the law of this state until the Legislature determines otherwise.

1. Reinstated insanity as a complete defense to a criminal act.

2. Applied the “M’Naughten rule” to determine who qualifies as legally insane.

- a. “To qualify as legally insane, a defendant must be in a delusional state such that he cannot know or understand the nature and capacity of his act, or his delusion must be such

that he cannot appreciate the wrongfulness of his act, that is, that the act is not authorized by law.”

b. Delusion can only be grounds for legal insanity according to the Nevada Supreme Court when the facts of the delusion, if true, would justify the commission of the criminal act. Thus, according to our court, when the delusion, if true, would not present a legal defense, then the person may not assert the defense.

Example: Under this application of the rule, if a defendant claims his delusion led him to believe that the person who he killed was attacking him and that he believed that he was acting in self-defense, he could be found innocent by reason of insanity. However, if the defendant claims his delusion led him to believe that the President was conspiring to kill him and so he shoots the President, he would not be excused because even if this were true, it would not entitle him to hunt down the President and it would not allow him to claim self-defense.

3. In addition to reviving the insanity defense, the Court revived the procedural rules applicable to the insanity defense:

a. Insanity is an affirmative defense and must be proved by a preponderance of the evidence

b. If found not guilty by insanity must be committed to mental health facility.

4. M’Naughten rule is very narrow. Not many will qualify as legally insane. However, the Supreme Court held that there was no constitutional reason to expand the definition of legal insanity and left for the Legislature to decide the

appropriate definition of legal insanity. Thus, that will be your task, when this issue comes before this committee.

VI. Unconstitutionally vague cases: The next two cases I will discuss were decided in January of this year and they both held statutes to be unconstitutionally vague.

A. Sheriff v. Burdg: Held the part of NRS 453.322 which makes it a felony to possess a majority of the ingredients required to manufacture a controlled substance other than marijuana is unconstitutionally vague and as such violates the Due Process Clause of the 14th Amendment.

1. Reasoning:

a. No element of intent: Lack of an element of intent to possess for purpose of manufacturing a controlled substance infringes on a persons liberty interest.

b. Doesn't provide fair notice of prohibited conduct because it doesn't list the items that are the ingredients necessary to manufacture a controlled substance.

c. Because of the lack of intent and ambiguity concerning the required ingredients. the Court held that the statute **allows arbitrary and discriminatory enforcement**

d. Void for vagueness.

2. Affect of this case on Nevada: Statute making it a felony to possess the ingredients to manufacture a controlled substance is no longer enforceable. To make the statute constitutional, the Legislature must amend the statute to add

an element of intent and set forth the prohibited ingredients specifically.

B. City of Las Vegas v. District Court: Held that NRS 207.260 which makes it a misdemeanor to annoy or molest a minor is unconstitutionally vague.

1. Reasoning:

a. Does not specify the type of annoying behavior prohibited and does not define the term “molest”.

b. **No fair notice** as to prohibited conduct because it does not say if the offender had to intend to annoy or molest the minor.

c. **Authorizes and encourages arbitrary enforcement** by failing to adequately describe the prohibited conduct.

d. Basically prohibits annoying a minor - one judge noted that every parent of a teenager has routinely violated the provision.

2. Affect of this case on Nevada law: The statute currently is unconstitutional and unenforceable. To ensure constitutionality, the Legislature must amend NRS 207.260 to add an element of intent and set forth the prohibited conduct more specifically.

VII. Investigatory detentions by peace officers: The next two cases involve the constitutionality of requiring a suspect to identify himself during an investigatory detention where there is no probable cause for arrest. The Nevada Supreme Court and the

Ninth Circuit Court of Appeals reached opposite conclusions regarding this issue in two separate cases.

A. Carey v. Nevada Gaming Control Board: 9th Circuit held the provision of NRS 171.123 which requires person to identify himself to be unconstitutional.

1. **1983 civil right action:** This case primarily focused on the liability of the an agent who arrested the plaintiff when the plaintiff refused to identify himself during an investigatory detention. Officers may be sued for monetary damages in a civil rights action in federal court under 42 U.S.C. § 1983, when it is found that the plaintiff has been deprived of federal rights under color of state law.

2. **Qualified immunity** from such liability is sometime available for officers sued in that capacity. In this case, the Ninth Circuit denied qualified immunity to the officer:

a. First, the Ninth Circuit found that the statutes relied on by the officer were unconstitutional.

b. The Court relied on its own precedent in making that determination. The Court stated that it had unambiguously held in 2 other cases that it is a violation of 4th Amendment to compel identification during an investigatory detention because it allows for an arrest in situations where there is no probable cause for the underlying crime for which the stop occurred.

c. Next, the Court found that “although state officials who rely on statutes are presumed to act reasonably, an official may nevertheless be liable for enforcing a statute that is patently violative of fundamental constitutional principles.”

i. Because of the two cases of the Ninth Circuit holding that it is a violation of 4th Amendment to require a person to identify himself during an investigatory detention, the Court found that it was not reasonable for the agent in this case to have relied on those statutes.

ii. No qualified immunity, officer could be sued in his personal capacity for monetary damages.

B. Hiibel v. District Court: Opposite conclusion. Held that NRS 171.123 does not violate the 4th Amendment.

1. Right to wander freely and anonymously without being compelled to divulge information to the government about who we are or what we are doing is not absolute.

a. 4th Amendment protects only against unreasonable invasions of privacy by the government.

b. Noted that issue not decided by USSC and split among federal circuit courts of appeal. Acknowledged that 9th Circuit had held it unconstitutional, but found the reasoning unpersuasive and did not follow it.

c. Court held that requiring identification is a minimal intrusion on the privacy of an individual and the intrusion is outweighed by the benefit to officers and community safety. Court further stated that reasonable people do not expect to withhold their identities from officers.

d. Finally, Court held that the statute was narrowly written and was “good law consistent with the 4th Amendment.”

C. Nevada Law: Enforceability of NRS 171.123 is questionable.

1. If an officer is sued for enforcing the statute, different results are likely to occur depending on the court in which the action is brought: If action is filed in federal court = personal liability. If an action is filed in state court = no liability.

2. Unlikely to be enforced consistently.

3. **Legislative action:** Legislature may choose not to amend NRS 171.123, to indicate endorsement of the Nevada Supreme Court opinion, or may take such other action as it deems appropriate. If unchanged, however, the officers are left in a difficult situation in determining whether or not they may require a person to identify himself during a routine investigative stop.

VIII. Report of misconduct involving peace officers: Eakins v Nevada

A. In this case, the U.S. District Court accepted a facial challenge to constitutionality of NRS 199.325 which makes it a misdemeanor to knowingly file a false report concerning misconduct of a peace officer.

1. Content-based restriction on free speech: criminalizes defamation critical of police officers, but not of other public officials.

a. Presumptively invalid: Must fall within an exception or withstand strict scrutiny.

(i) No exceptions applied

(ii) Applied strict scrutiny: must show that actual means set forth in the statute are necessary to serve a compelling interest. The Court found that the statute failed under strict scrutiny because Court found that there was a content-neutral alternative that would serve to deter people from filing a false report.

2. **Affect of this case on Nevada Law** is that unless appealed and reversed on appeal, NRS 199.325 is unenforceable.

IX. Last case: **Imitation controlled substances - Washington v. State.**

A. Two statutes made it a crime to engage in the same conduct: that is to manufacture, distribute, sell or possess with the intent to distribute or sell an imitation controlled substance. NRS 453.323, enacted in 1977 makes the punishment for that crime a felony. NRS 453.332, enacted in 1983 makes it a misdemeanor.

B. Found that the later statute effectively repealed the earlier statute and thus the **affect on Nevada Law** is that the penalty for selling an imitation controlled substance is now a misdemeanor. If the Legislature agrees with the interpretation of the Nevada Supreme Court, the Legislature may wish to officially repeal the felony statute. Alternatively, the Legislature may amend either statute to impose a different punishment as it deems appropriate.

E. Closing remarks.