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Assemblyman Bernie Anderson
Assembly Chambers

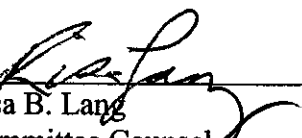
Dear Assemblyman Anderson:

As Chairman of the Assembly Committee on Judiciary, you have asked me to provide a summary of the cases that have been decided since the 2001 Legislative Session which address constitutional issues involving the laws of this state or which affect the enforceability of any law of this state. For your convenience, in the attached document, I have organized the cases by topic. I then provide a summary of the holding of each case within a topic and provide information about the impact of the cases on Nevada law.

Please advise me should you require any additional information or if I can be of further assistance.

Very truly yours,

Brenda J. Erdoes
Legislative Counsel

By 
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I. Death Penalty

A. Mentally Retarded Offenders

1. **Atkins v. Virginia**, 536 U.S. ___, 122 S. Ct. 2242 (2002): In this case, the U.S. Supreme Court held that it is an unconstitutional violation of the Eighth Amendment protection against cruel and unusual punishment to execute a person who is mentally retarded. The Supreme Court, reasoned that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” The Supreme Court then stated that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.” The Supreme Court found that the state legislatures in this country have consistently moved towards eliminating the death penalty as applied to the mentally retarded. “The practice, . . . , has become truly unusual, and it is fair to say that a national consensus has developed against it.” However, the Supreme Court did not provide a universal definition of mentally retarded. Rather, the Supreme Court specifically stated that it “leave[s] to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon its execution of sentences.”

2. **Nevada Law:** Nevada law currently does not prohibit the imposition of the death penalty upon an offender who is mentally retarded. Assembly Bill No. 353 of the 2001 Legislative Session, which was passed by the Assembly and died in the Senate, proposed such a prohibition. The effect of Atkins on Nevada law is that until the Nevada Legislature enacts legislation defining the term “mentally retarded” for the purposes of the death penalty, the courts of this state must determine who is mentally retarded so as to prevent violations of the Eighth Amendment in the application of the death penalty.

B. Determination of Aggravating Circumstances

1. **Ring v. Arizona**, 536 U.S. ___, 122 S. Ct. 2428 (2002): In this case, the U.S. Supreme Court held that the sentencing scheme in Arizona for capital murder was unconstitutional. Arizona law required the judge in a capital murder case to hold a separate sentencing hearing for the purpose of making required factual determinations. At the conclusion of the hearing, Arizona law required the judge to determine the presence or absence of aggravating and mitigating circumstances. The judge would then weigh those factors, if any, and determine the sentence to be imposed, including whether or not to impose the death penalty. In Ring, the question was whether the existence of aggravating factors may be determined by the judge, or whether the right to a trial by jury, which is contained in the Sixth Amendment to the U.S. Constitution and made applicable to the States by the Fourteenth Amendment to the U.S. Constitution, requires the determination of aggravating factors to be made by a jury. Partially overruling prior case law, the Supreme Court held that a sentencing judge, sitting without a jury, may not find an aggravating circumstance necessary for imposition of the death penalty. The Supreme Court found that because the aggravating factors operate as the “functional equivalent of an element of a greater offense,” the Sixth Amendment requires that those factors be determined by a jury.

2. **Colwell v. State**, 118 Nev. Adv. Op. No. 80 (2002): This case involved a post-conviction petition for a writ of habeas corpus which appealed a sentence of death imposed upon the petitioner by a three-judge panel in a case in which the petitioner had pleaded guilty and waived his right to a jury trial. The Nevada Supreme Court considered whether the holding of the U.S. Supreme Court in Ring v. Arizona applied retroactively and whether it applied in cases in which the right to a jury was waived.

The Nevada Supreme Court held that the decision of the U.S. Supreme Court in Ring v. Arizona does not require retroactive application. The Nevada Supreme Court stated that it would not apply a new constitutional rule of criminal procedure to finalized cases unless the rule falls within at least one of two exceptions. The first exception is “if the rule establishes that it is unconstitutional to proscribe certain conduct as criminal or to impose a type of punishment on certain defendants because of their status or offense.” The second exception is “if [the rule] establishes a procedure without which the likelihood of an accurate conviction is seriously diminished.” In this case, the Nevada Supreme Court recognized that the constitutional rule of criminal procedure established in Ring was new. In addition, the conviction of the appellant in the case was final. However, the Nevada Supreme Court did not find that either of the exceptions applied and thus, did not apply the holding of Ring retroactively to overturn the death sentence imposed upon the appellant. The Court stated in support of its holding that “Ring did not forbid either the criminalization of any conduct or the punishment in any way of any class of defendants.” As to the second exception, the Court stated that “Ring is based simply on the Sixth Amendment right to a jury trial, not on a perceived need to enhance accuracy in capital sentencings, and does not throw into doubt the accuracy of death sentences handed down by three-judge panels in this state.”

The Nevada Supreme Court further held that the decision in Ring, which provided that a judge may not determine aggravating circumstances for the purpose of imposing the death penalty without a jury, does not apply in cases in which the defendant has waived his right to a trial by jury. “The Supreme Court has held that the valid entry of a guilty plea in a state criminal court involves the waiver of several federal constitutional rights. Among these ‘is the right to trial by jury.’” Thus, the Nevada Supreme Court held that “the guilty plea of the petitioner included an express waiver of his right to a jury trial and was valid.”

3. **Johnson v. State**, 118 Nev. Adv. Op. No. 79 (2002): This case involved the direct appeal of a person who was sentenced to death by a three-judge panel after a jury was unable to reach a unanimous verdict on the sentence to be imposed. The Nevada Supreme Court held that, in light of the decision of the U.S. Supreme Court in Ring v. Arizona, it is unconstitutional for a three-judge panel to determine the existence of aggravating circumstances and to impose the death penalty after a jury is unable to agree on a sentence. The Nevada Supreme Court ruled that both aggravating and mitigating circumstances must be determined by a jury. The Court quoted the U.S. Supreme Court in support of this stating that “[i]f a State makes an increase in a defendant’s authorized

punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.”

The Nevada Supreme Court further held that the rule pronounced in Ring was applicable in this case because the appeal of the sentence had not yet been decided and thus, the conviction had not yet become final. The Court quoted the U.S. Supreme Court stating that “failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication.” Thus, the death sentence of the appellant was vacated and the Court remanded the case for a new penalty hearing to be held before a new jury.

4. Nevada Law: NRS 175.552 provides the procedure for sentencing in cases in which the death penalty is sought. If the finding of guilt was made by a jury, a separate penalty hearing is held before that jury. If the finding of guilt is upon a plea or a trial without a jury, a separate penalty hearing is held before a panel of three district judges. In the case of a separate penalty hearing which is held before a jury, if the jury is unable to reach a unanimous verdict as to the sentence to be imposed, the Nevada Supreme Court must appoint two district judges who sit with the district judge who presided in the case to determine the presence of aggravating and mitigating circumstances and to sentence the person accordingly. Thus, the laws in this state reflect two situations in which a judge may determine aggravating factors for the imposition of the death penalty. However, the Nevada Supreme Court has ruled on the constitutionality of these provisions in light of the holding in Ring. These holdings provide that 1) Ring will not be applied retroactively to cases which are final; 2) a three-judge panel may determine aggravating circumstances where the offender has waived his right to a trial by jury; and 3) a three-judge panel may not determine aggravating circumstances where the jury is unable to reach a unanimous verdict. Thus, the effect of these cases on Nevada law is that we have a procedure in statute which has been held unconstitutional. Until the Nevada Legislature amends the law to change this procedure, the courts must determine the manner in which to proceed in cases in which a jury does not reach a unanimous verdict which will not violate the constitution.

C. Persons Under the Age of 18 Years

1. *In re Kevin Nigel Stanford*, 537 U.S. __ (2002): The Supreme Court denied certification to decide whether it would be an unconstitutional violation of the Eighth Amendment protection against cruel and unusual punishment to execute a person who committed a crime when he was under the age of 18 years. Because certification of this case was denied, the law concerning the execution of a minor has not changed. Thus, each state must decide the appropriate age for imposition of the death penalty.

2. Nevada Law: NRS 176.025 currently provides that a sentence of death may be imposed upon a person convicted of crime which was committed when the person was 16 years or older.

II. Plea of Guilty but Mentally Ill

A. **Finger v. State**, 27 P.2d 66 (Nev. 2001): In this case, the Nevada Supreme Court held that Senate Bill No. 314 of the 1995 Legislative Session was unconstitutional. S.B. 314 repealed the provisions of Nevada law which provided for insanity as a complete defense to a criminal offense and in its place created the plea of "guilty but mentally ill." The Nevada Supreme Court held that this new statutory scheme was a violation of due process guarantees because it would allow 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, the intent to commit the crime.

The Nevada Supreme Court recognized that the Supreme Courts of three other states, Idaho, Montana and Mississippi, had upheld statutory schemes similar to the statutory scheme in S.B. 314. Those courts found that there is no federal constitutional right to assert a defense of insanity. The Nevada Supreme Court further recognized that the U.S. Supreme Court has not yet determined this issue. However, the Court disagreed with the Supreme Courts of those states and held that:

[L]egal insanity is a well-established and fundamental principle of the law of the United States. It is therefore protected by the Due Process Clauses of both the United States and Nevada Constitutions. The Legislature may not abolish insanity as a complete defense to a criminal offense. Thus the provisions of S.B. 314 abolishing the insanity defense are unconstitutional and unenforceable.

The Legislature is free to decide what method to use in presenting the issue of legal insanity to a trier of fact, *i.e.*, as an affirmative defense or rebuttable presumption of sanity. It may also determine that legal insanity be proven by the defendant by any one of the established standards. But it cannot abolish legal insanity or define it in such a way that it undermines a fundamental principle of our system. . . .[S]o long as a crime requires some additional mental intent, then legal insanity must be a complete defense to that crime.

The Court further held that although the remaining provisions of S.B. 314 might be construed in a constitutional manner, they were "inextricably intertwined with the provisions designed to abolish the insanity defense." To enforce one without the other would broaden the scope of legal insanity, which would contradict the intent of the Legislature in enacting S.B. 314. Thus, the Court held that S.B. 314 "should be rejected in its entirety." The Court then held that "[a]ll prior versions of the statutes amended or repealed by S.B. 314 remain in full force and effect."

B. **Nevada Law**: The Nevada Supreme Court in Finger held the entire statutory scheme which established the plea of guilty but mentally ill unconstitutional. Thus, these statutes no longer reflect the state of the law in Nevada. By stating that prior versions of those statutes became effective, the Court effectively revived the laws as they existed before

the 1995 Legislative Session and the case law interpreting those laws. In its decision, the Nevada Supreme Court explained that before "the 1995 Legislative Session, Nevada's statutes codified the rule that a person cannot be convicted of a criminal offense if [he] lacked the capacity to appreciate the wrongfulness of [his] act." Nevada courts applied the "M'Naughten rule" in determining what constitutes legal insanity. Because of confusion over that rule, the Court in its written opinion in Finger attempted to clarify previous case law interpreting the M'Naughten rule. Under the M'Naughten rule, the Court stated that "[t]o 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." Although the M'Naughten rule appears to provide two alternative ways to assert an insanity defense, in its clarification of the rule, the Court provides that "[d]elusional beliefs can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act." Thus, when the delusion, if true, would not present a legal defense, then the person may not be assert the defense. Under this application of the rule, if a defendant claims his delusion led him to believe 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 he had to kill someone because there was a conspiracy against him, he would not be excused because even in his delusional state he was not acting pursuant to an imminent threat which would allow him to claim self-defense.

In addition to reviving the M'Naughten rule, the Court also revived the procedural rules that applied to the insanity defense as they existed before the 1995 Legislative Session. At that time, Nevada procedurally treated insanity as an affirmative defense which the defendant had to prove by a preponderance of the evidence. Finally, in the very rare instance where a person was found not guilty by reason of insanity, the person was immediately committed to a mental health facility and released only if a judge determined that the person was no longer mentally ill and was not a danger to himself or others.

In conclusion, the current law as summarized by the Nevada Supreme Court is the law that was in effect before the 1995 Legislative Session. Thus, a criminal defendant may assert the affirmative defense of insanity which must be proved by a preponderance of the evidence, the M'Naughten rule applies in determining what constitutes legal insanity and a person who successfully proves his innocence by way of insanity must be immediately committed to a mental health facility where he must remain until he is no longer mentally ill or a danger to himself or others. Noting that very few people would qualify as legally insane under the M'Naughten rule, the Nevada Supreme Court stated that "the adoption of a more expansive definition of legal insanity is not required by the Federal or Nevada Constitutions and is therefore a legislative, not judicial prerogative." Because it is unclear from the Court's opinion whether the M'Naughten rule provides two alternative ways to assert an insanity defense, and because the Court has stated that the Legislature may define the scope of legal insanity, in considering this issue, the Legislature may wish to clarify this point by statute.

III. Manufacturing Controlled Substances

A. **Sheriff v. Burdg**, 118 Nev. Adv. Op. No. 86 (2002): In this case, the Nevada Supreme Court held that paragraph (b) of subsection 1 NRS 453.322, which makes it a felony to possess a majority of the ingredients required to manufacture a controlled substance other than marijuana, violates the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution because it is unconstitutionally vague. "A statute is void for vagueness if it fails to define the criminal offense with sufficient definiteness that a person of ordinary intelligence cannot understand what conduct is prohibited and if it lacks specific standards, encouraging arbitrary and discriminatory enforcement." In addition, a person may challenge a statute on its face if the statute is "impermissibly vague in all of its applications." The Nevada Supreme Court held that paragraph (b) of subsection 1 of NRS 453.322 is vague on its face "because it infringes on constitutionally protected conduct, is incapable of any valid applications, fails to provide sufficient notice of the prohibited conduct, and encourages arbitrary and discriminatory enforcement." The Court explained that the statute does not provide an element of intent to possess for the purpose of manufacturing a controlled substance. This lack of an element of intent infringes on "an individual's liberty interest." The Court also stated that the statute fails to provide a person of ordinary intelligence with fair notice of the prohibited conduct because it does not list the items that might be described as the ingredients necessary to manufacture a controlled substance. Finally, because of the absence of an element of intent and the ambiguities concerning the required ingredients, the statute allows arbitrary and discriminatory enforcement. Thus, the Court held that paragraph (b) of subsection 1 of NRS 453.322 was void for vagueness.

B. **Nevada Law:** Paragraph (b) of subsection 1 of NRS 453.322 is no longer enforceable. If the Legislature decides to amend this provision to make it constitutional, an intent element must be added. With such an amendment, the statute would provide that it is unlawful to possess the ingredients required to manufacture a controlled substance for the purpose of manufacturing a controlled substance. In addition, the ingredients that a person is prohibited from possessing must be set forth specifically in the statute.

IV. Annoying a Minor

A. **City of Las Vegas v. Dist. Ct.**, 118 Nev. Adv. Op. No. 87 (2002): The Nevada Supreme Court held that NRS 207.260, as it existed prior to the 2001 Legislative Session, which provided that "a person who annoys or molests a minor is guilty of a misdemeanor," is unconstitutionally vague. The Court explained that the "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." The Court held that the statute was subject to facial attack because it failed to provide sufficient notice to enable ordinary people to understand the conduct that is prohibited and it authorized and encouraged arbitrary enforcement. The Court stated that the language in the statute did not specify the type of annoying behavior that is prohibited and it did not

define the term "molest." It also did not specify whether the person had to intend to annoy or molest the minor. Thus, fair notice was not provided as to the prohibited conduct. The Court also concluded that the statute authorized and encouraged arbitrary enforcement because it failed to adequately set forth the conduct proscribed.

B. Nevada Law: The Nevada Supreme Court specifically stated that its decision applied to NRS 207.260 as that statute existed prior to the 2001 Legislative Session. However, the statute, as amended in 2001, does not define the terms "annoy" or "molest" and does not include an element of intent. Thus, if the Legislature decides to take action to ensure the constitutionality of this section of NRS, an element of intent must be included and the proscribed conduct must be set forth with more specificity.

V. Investigative Detentions

A. Carey v. Nevada Gaming Control Bd., 279 F.3d 873 (Nev. 2002): The Ninth Circuit Court of Appeals held that two provisions of Nevada law which require a person to identify himself to an officer during an investigative stop were unconstitutional. The first provision was subsection 3 of NRS 171.123, which requires a person to identify himself when an officer detains him upon a reasonable suspicion that the person has engaged in criminal activity or that he is violating his parole or probation. The second provision was NRS 197.190, which makes it a misdemeanor to refuse to provide certain information to a public officer or to delay or obstruct a public officer from carrying out his duties. The plaintiff, Carey, in this case was searched and arrested pursuant to those statutes when he refused to identify himself during an investigative detention. Carey then brought a civil rights action in federal court against the State of Nevada, the Nevada Gaming Control Board, and the agent of the Gaming Control Board who searched and arrested him claiming a violation of his rights pursuant to the Fourth and Fifth Amendments to the U.S. Constitution. Carey asserted that he could not be compelled to identify himself to the police, even during a lawful investigatory detention. The action included various claims which the Court held were barred because the State and the Board were immune from suit in federal court under the Eleventh Amendment.

With respect to the agent of the Gaming Control Board, the Ninth Circuit Court of Appeals held that to the extent that the agent was sued in his official capacity, the suit failed because monetary damages are not available against state officers sued in their official capacities. However, state officers may be sued for damages in their personal capacities in a civil rights action pursuant to 42 U.S.C. § 1983, which provides a cause of action for persons deprived of federal rights under color of state law. An officer sued in such an action may sometimes assert the affirmative defense of qualified immunity. To determine whether the agent in this case was entitled to qualified immunity, the Court first considered whether Carey alleged a violation of a constitutional right. The Court found that if the statutes which the agent relied on to arrest Carey were unconstitutional, then Carey suffered constitutional injury by being searched and arrested pursuant to the authority in those statutes. The Court found that although the U.S. Supreme Court has not addressed this issue directly, this Ninth Circuit Court of Appeals has itself held in two prior cases that it was a violation of the Fourth Amendment to the U.S. Constitution to

compel identification during an investigatory detention. The Court explained that compelling identification during an investigatory detention violates the Fourth Amendment because “as a result of the demand for identification, the statutes bootstrap the authority to arrest on less than probable cause, and [because] the serious intrusion on personal security outweighs the mere possibility that identification might provide a link leading to arrest.” In other words, the Court found that it was unconstitutional to arrest a person for failing to identify himself during an investigative stop when there was no probable cause for the underlying crime for which the stop occurred.

The next question in determining whether the agent was entitled to qualified immunity was whether a person’s right not to identify himself during an investigatory stop was so clearly established that it rendered the agent’s reliance on the state statutes unreasonable. The Ninth Circuit Court of Appeals stated that if a reasonable official in the agent’s position would have understood that searching and arresting Carey under the circumstances would violate his rights, then the agent would not be entitled to qualified immunity. “Although state officials who rely on statutes are generally presumed to act reasonably, an official may nevertheless be liable for enforcing a statute that is ‘patently violative of fundamental constitutional principles.’” Because the Ninth Circuit Court of Appeals had decided two cases that were directly on point, which “unambiguously held that compelling an individual to identify himself during an [investigative] stop violates the Fourth Amendment,” the Court held that “a reasonable officer in [the agent’s] position would have known that Carey had a clearly established Fourth Amendment right not to identify himself, and that the Nevada statutes at issue . . . were unconstitutional to the extent they allowed Carey to be arrested for exercising his rights.” Thus, Ninth Circuit Court of Appeals held that the agent was not entitled to qualified immunity and could be sued in his individual capacity.

B. Hiibel v. Dist. Ct., 118 Nev. Adv. Op. 88 (2002): In contrast to the decision of the Ninth Circuit Court of Appeals in Carey, the Nevada Supreme Court held in this case that subsection 3 of NRS 171.123, which requires a person to identify himself to an officer during an investigative stop, does not violate the Fourth Amendment of the U.S. Constitution. The Nevada Supreme Court noted that the Fourth Amendment right to be able 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. Rather, the “Fourth Amendment only protects against ‘unreasonable’ invasions of privacy, or searches and seizures, by the government.” The Court further noted that the U.S. Supreme Court has not decided this issue, that there is a split of authority among the federal circuit courts of appeals on this issue and that the Ninth Circuit Court of Appeals, to which Nevada belongs, held in Carey, supra, that this statutory requirement violates the Fourth Amendment. However, the Nevada Supreme Court found that the reasoning of the Ninth Circuit Court of Appeals was unpersuasive and therefore did not follow the holding in that case. The Nevada Supreme Court concluded that “any intrusion on privacy caused by [subsection 3 of] NRS 171.123 is outweighed by the benefits to officers and community safety.” The Court found the public interest in requiring identification during an investigatory stop to be “overwhelming.” Among those interests, the Court noted that knowing the identity of a suspect allows officers to evaluate and

predict potential dangers more accurately. The Court noted the difficulty an officer may encounter in enforcing restraining orders and the possibility that an officer would be unable to identify a wanted terrorist or sniper if he could not ascertain identity and there was no probable cause for an arrest. The Court further stated that the requirements of subsection 3 of NRS 171.123 "are reasonable and involve a minimal invasion of personal privacy. Reasonable people do not expect their identities--their names--to be withheld from officers." The Court also stated that the statute is narrowly written. For all of those reasons, the Nevada Supreme Court held that subsection 3 of NRS 171.123 "is good law consistent with the Fourth Amendment."

C. Nevada Law: The validity of subsection 3 of NRS 171.123 is questionable now that there are two conflicting court opinions. If an officer enforces the provision and he is sued in a civil rights action in federal court, he will not be entitled to qualified immunity and thus may be held personally liable. If instead, the action is brought in state court, the Nevada Supreme Court has held that the provision does not violate the Constitution. Because of these conflicting cases and the likelihood that a plaintiff would bring such an action in federal court, it is unlikely that this provision will be enforced consistently in this state. The Legislature may choose not to amend the statute to indicate that the Legislature endorses the opinion of the Nevada Supreme Court, or may take any other action it deems appropriate to clarify this issue. If the statute remains unchanged, the officers of this state will have to exercise their judgment in determining the manner in which to enforce the statute.

VI. False Allegations of Misconduct Against a Peace Officer

A. Eakins v. Nevada, 219 F. Supp. 2d 1113 (D. Nev. 2002): In this case the U.S. District Court for the District of Nevada accepted a facial challenge to the constitutionality of NRS 199.325, which makes it a misdemeanor to knowingly file a false report concerning misconduct of a peace officer. The plaintiff asserted that the statute violated the right to free speech guaranteed by the First Amendment to the U.S. Constitution and was overbroad. The District Court held that the statute was a content-based restriction on speech because it criminalized defamation that is critical of police officers, but did not criminalize such defamation of other public officials. The District Court noted that content-based regulations are presumptively invalid and may stand only if an exception applies or if the statute can withstand a strict scrutiny review. The Court first addressed the three applicable exceptions. First, the District Court found no reason to distinguish between defamation as it relates to peace officers and other public officials. Second, the District Court did not find any legitimate secondary effect to justify the content-based distinction. Third, the District Court found that there is a realistic probability that the statute may deter legitimate complaints against peace officers. Therefore, no exception applied. Because the statute was a content-based restriction of free speech, the District Court applied a strict scrutiny review which is the toughest standard of review that is applied. To withstand strict scrutiny, the means set forth in the statute must be necessary to serve a compelling interest. The District Court held that the statute failed under this review because there was a content-neutral alternative to deter people from filing a false report. The District Court noted that the plaintiff had identified

one less restrictive alternative. Under that alternative the statute could have provided that if a report was required to be made under oath, then the perjury statutes would apply and could serve to deter false reports. Because no exception applied and the statute could not pass strict scrutiny, the District Court held that NRS 199.325 is unconstitutional.

B. Nevada Law: NRS 199.325 has been held unconstitutional. Thus, unless appealed and reversed on appeal, that statute may not be enforced.

VII. Sale of an Imitation Controlled Substance

A. Washington v. State, 117 Nev. Adv. Op. No. 62 (2001): In this case, the Nevada Supreme Court considered whether the enactment of NRS 453.332 in 1983, which made it a misdemeanor to manufacture, distribute, sell or possess with the intent to distribute or sell an imitation controlled substance, repealed by implication NRS 453.323 which was enacted in 1977, and makes it a felony to engage in the same conduct. The Court noted that although some of the words of the statutes differ, the “only true difference [between the statutes] is the penalty.” Thus, the Court held that this indicated “a legislative intent that the earlier statute, NRS 453.323, would be repealed by implication since its entire substance is covered by NRS 453.332.”

B. Nevada Law: This case deems NRS 453.323 to be repealed. Therefore, a person who sells an imitation controlled substance stating that it is a controlled substance may be charged only with a misdemeanor pursuant to NRS 453.332. If the Legislature agrees with the interpretation of the Nevada Supreme Court, it may wish to officially repeal NRS 453.323. Alternatively, if the Legislature believes a greater punishment should be imposed, it may wish to repeal either NRS 453.332 so that only the felony provision of NRS 453.323 remains, or it may amend either statute as it deems appropriate.