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MEMORANDUM

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TO: Ben Graham, Chief Deputy District Attorney

FROM: Robert W. Teuton

RE: AB 60 - Appeal by Prosecution of Denial of Certification

DATE: February 13, 2003

The impetus for this bill stems from an unpublished decision by the State Supreme Court which, while acknowledging that the defense may appeal to the Supreme Court decisions to certify children, held that the State has no right to appeal and must accept the outcome that the child will remain in the juvenile system without recourse. The decision of the State Supreme Court seems to be totally unfair to the State and victims of juvenile crimes. This bill is merely designed to address this inequity in treatment and to bring Nevada in line with other states, as well as Federal Courts, which provide that the State can appeal from the decision to deny certification.

CURRENT LAW:

NRS 62.291 provides:

> Appeals from the orders of the court may be taken to the supreme court in the same manner as appeals in civil cases are taken.

This language is consistent with the historical philosophy that the juvenile court is a civil court. Indeed, other sections of Chapter 62 specifically state that the disposition of matters in the juvenile court is not criminal in nature, e.g., NRS 62.295 (adjudication is not conviction and does not impose civil disabilities). The general rule of law in civil cases is that an appeal may not be taken from interim orders, but only from final decisions which dispose of the case. The Supreme Court applied this reasoning when it found that the decision to certify a child for adult prosecution was a "final decision" of the Juvenile Court and therefore could be immediately appealed to the Supreme Court. Castillo v. State, 106 Nev. 249 (1990).

In 1990 we had a number of cases in which the Juvenile Judge refused to certify juvenile's charged with serious offenses. For example, one juvenile (Shawn K), at the age of 15, was arrested and charged with multiple counts of Grand Larceny Auto, Burglary, and Possession of Stolen Property. He was ordered held in detention because he had a lengthy record, including having previously been on probation for Burglary and Possession of Stolen Property and having previously been committed to the Spring Mountain Youth Camp. He escaped from detention and, in the course of the escape, broke a probation officer's jaw. He locked the probation officer in a room and took her purse and car keys, and was charged with the additional offenses of Kidnaping, Robbery, Escape and Battery on a Peace Officer with Substantial Bodily Harm. The State moved to certify him to adult status and our motion was denied. Later that same year the same District Court judge denied another certification, this time involving a 17 year old (Brian L) who was charged with Burglary, Robbery with use of a Firearm and Attempted Robbery with use of a Firearm. It was the 10th petition against this juvenile. His prior record included commitments to Spring Mountain Youth Camp and the Nevada Youth Training Center at Elko, Nevada. His prior record included multiple counts of Burglary, Possession of Stolen Property, Obstructing a Police Officer, and Under the Influence of Controlled Substance. When our motion to certify was denied, we filed an appeal to the Nevada Supreme Court. The Supreme Court denied the appeal, stating that the decision to deny certification was not a "final" order of the Juvenile Court and therefore, under the rules of civil procedure, was not appealable.

The only problem with waiting until there is a "final order" under the rules of civil procedure is that the "final order" requires either an admission by the juvenile or the taking of evidence at trial. An appeal from this "final order" would be meaningless as we are barred, both by our state statute and by the United States Constitution, from retrying the juvenile.

NRS 62.195(2) provides

> Criminal proceedings and other juvenile proceedings based upon the offense alleged in the petition alleging delinquency or an offense based upon the same conduct are barred if the court has begun taking evidence or has accepted a child's admission of the facts alleged in the petition. No child may be prosecuted first as a juvenile and later as an adult, or in two juvenile court hearings for the same offense.

This statute follows the dictates of the United States Supreme Court in Breed v. Jones, 95 S.Ct. 1779 (1975) which held that the Double Jeopardy Clause of the 5th Amendment prevented a juvenile from being tried as an adult after a finding was made in the juvenile court that he had committed the delinquent act.

Other States and Federal Courts have recognized the fundamental unfairness in allowing a juvenile to appeal the decision to certify him for adult prosecution while not allowing, based on the literal reading of rules of civil procedure, the State to appeal the decision not to certify the

juvenile.

In In Interest of McCord, 664 A.2d 1046(Pa.Super 1995), the Pennsylvania court noted:

> [t]he practical effect of not allowing the Commonwealth to immediately appeal the transfer order would be to render the trial court's "interlocutory order," a final order without any right of appeal. Thus, we conclude that an order denying certification of the juvenile defendant as an adult effectively terminates the criminal prosecution of the juvenile.

The Tenth Circuit Court of Appeals stated the problem this way:

> The government ... has an important interest in trying as adults those individuals under the age of eighteen who meet the standards for adult status under the Federal Delinquency Act ... Because the Double Jeopardy Clause prohibits a second prosecution for the same offense ... the government will forever lose the opportunity to try a particular defendant as an adult if it cannot immediately appeal the denial of a motion to transfer.

United States v. Leon, 132 F.3d 583, 589 (10th Cir. 1997). The Tenth Circuit concluded that the decision to deny certification was, for all practical purposes, a final order of the juvenile court and should therefore be subject to immediate appeal. The Second and Ninth Circuit Courts of Appeal have also concluded that the decision to deny certification is immediately appealable. United States v. Juvenile Male No. 1, 47 F.3d 68 (2d. Cir. 1995); United States v. Doe, 94 F.3d 532 (9th Cir. 1996).

The proposed amendment to NRS 62.291 contained in **AB 60**, simply applies the logic of these cases to certification proceedings in the State of Nevada:

> ***For the purposes of this section, a decision to deny certification of a child for criminal proceedings as an adult is a final judgement from which an appeal may be taken.***