DISCLAIMER

Electronic versions of the exhibits in these minutes may not be complete.

This information is supplied as an informational service only and should not be relied upon as an official record.

Original exhibits are on file at the Legislative Counsel Bureau Research Library in Carson City.

Contact the Library at (775) 684-6827 or library@lcb.state.nv.us.

ASSEMBLY COMMITTEE ON JUDICIARY

WORK SESSION DOCUMENT

FEBRUARY 25, 2003

ORIGINALS ARE ON FILE IN
THE RESEARCH LIBRARY

ASSEMBLY JUDICIARY
DATE: 2/25/03 ROOM 3138 EXHIBIT C
SUBMITTED BY: ALLISON COMBS

WORK SESSION

ASSEMBLY COMMITTEE ON JUDICIARY

February 25, 2003

The following measures will be considered for action during the work session:

☐ ASSEMBLY BILL 11 (BDR 15-191 was requested by the Assembly Committee on Judiciary on behalf of the Legislative Committee to Study Categories of Misdemeanors). The bill was heard in Committee on February 11, 2003, and no action was taken.

Assembly Bill 11 provides an increased penalty for certain repeat offenses involving vandalism.

Proponents/those testifying in support of the bill: Assemblyman Mark Manendo; Jim Nadeau and Stan Olsen, Nevada Sheriffs and Chiefs Association; Kami Dempsey and Karen Coyne, City of Las Vegas; Susan Fisher, City of Reno; Mary Lau, Retail Association of Nevada; Rose McKenny James, Clark County School District; and Michael Pagni, National Council to Prevent Delinquency.

Opponents/those testifying in opposition of the bill: Howard Brooks, Nevada Attorneys for Criminal Justice.

Those who testified with a neutral position on the bill: Lucille Lusk, Nevada Concerned Citizens.

Discussion: Testimony indicated that the cost of the damage from vandalism and graffiti is increasing dramatically, and the measure is needed to address the problem and impose stronger penalties on the offenders. Concerns were raised regarding the propriety of raising the crime to the level of a felony for a second offense and any possible impact of the increased penalties on juveniles who commit offenses such as the breaking of a window. Opinions were also expressed that justice court is a more effective venue for enforcing penalties for vandalism and graffiti (such as community service), but if the penalty is raised to a felony for most of these crimes, the district court (not justice court) will have the responsibility for enforcement in the majority of cases.

Proposed Amendments: The following amendments have been proposed:

1. **Revisions Concerning "Protected Property"**

   a. **Add libraries to definition of protected property,** proposed by Assemblyman Manendo. Amend the definition of "protected property" on page 3 of the bill (new subsection 3) to include libraries.

   b. **Add parks to definition of protected property,** proposed by Kami Dempsey and Karen Coyne, City of Las Vegas.

   c. **Eliminate protected property provisions,** proposed by Lucille Lusk, Nevada Concerned Citizens. Eliminate the language in the bill concerning "protected property" so that all property is treated equally. (Note: This language is imported directly from NRS 206.125, which is repealed under the bill, because its language is included on pages 6 and 7 of the bill.)

2. **Restitution and repair of property,** proposed by Assemblyman John C. Carpenter. Specifically include restitution and repair of damage as penalties for vandalizing, placing graffiti on property, defacing property, or otherwise damaging property. (Note: The existing statute requires community service and specifies that, if possible, such service must be related to "the abatement of graffiti." See page 2, line 27.)

3. **Expand authorized use of Graffiti Reward Fund**, proposed Kami Dempsey and Karen Coyne, City of Las Vegas. Amend the bill to authorize use of the Graffiti Reward Fund for the purposes of "abatement" of the vandalism, graffiti, and damage to property.

4. **Allow aggregation of the value of the loss from multiple offenses,** proposed by Susan Fisher, City of Reno. Allow aggregation of the value of the loss when a person commits multiple offenses.

   In her testimony, Ms. Fisher indicated that the City of Reno had requested a bill draft on this issue. Since the time of the hearing on Assembly Bill 11, a measure was introduced in the Senate on behalf of the City of Reno to amend NRS 202.330 to add the following new section to NRS 206.330:

   For purposes of determining the grade of the public offense prescribed in NRS 193.155, the value of the property damaged or destroyed from the commission of multiple offenses may be aggregated if one or more persons commit the offenses pursuant to a scheme or continuing course of conduct.

☐ ASSEMBLY BILL 27 (BDR 11-244 was requested by the Assembly Committee on Judiciary. The bill was heard in Committee on February 20, 2003, and no action was taken.

Assembly Bill 27 revises the method for adjusting the presumptive maximum amounts of child support owed by noncustodial parents.

Proponents/those testifying in support of the bill: Elana Hatch, Clark County District Attorney's Office; Todd Torvinen, Nevada Trial Lawyers Association; Marshall Willick, attorney; Leland Sullivan, Welfare Division, Nevada's Department of Human Resources.

Opponents/those testifying in opposition of the bill: None.

Discussion: Testimony indicated the measure was requested to avoid "unintended consequences" relating to the requirement to adjust annually the income ranges relating to the presumptive maximum amounts of child support. The unintended consequences involve a parent moving from one presumptive maximum amount to another when his or her income does not change, but the income range is adjusted based upon the Consumer Price Index.

Proposed Amendments: The following amendment was proposed:

- **Calculation of Interest**—Elana Hatch, Clark County District Attorney's Office and Leland Sullivan, Welfare Division. Amend NRS 125B.140 (Enforcement of order for support) to delete the provisions requiring the court to determine and include in its order the interest upon arrearages and the attorney's fee for the proceeding. A copy of the proposed amendment is attached on blue paper.

☐ ASSEMBLY BILL 33 (BDR 40-817 was requested by Assemblyman William C. Horne). The bill was heard in Committee on February 14, 2003, and no action was taken.

Assembly Bill 33 provides an additional penalty for manufacturing methamphetamines in certain circumstances.

Proponents/those testifying in support of the bill: Assemblyman Horne; representatives of Nevada Sheriff's and Chief's Association; representatives of the Nevada District Attorney's Association.

Opponents/those testifying in opposition of the bill: None.

Discussion: Testimony indicated that methamphetamine labs pose a grave danger to persons and property in the vicinity of the labs, and the increased penalty is necessary to punish and deter such activity, particularly in the areas listed in the bill. Discussion also focused on the penalties for the crimes involving manufacturing of controlled substances which are referenced in the bill on page 5, line 1.

Proposed Amendments: None.

Background Information for Assembly Bill 33: As there was much discussion of the penalties that would be enhanced under the bill, following are the current penalties under the three underlying statutes for which a person must be convicted in order for Assembly Bill 33 to apply:

Statute	Crime	Penalty	Fine
453.322	Offer, attempt, or commission of unauthorized act relating to manufacture or compounding controlled substances.	**Category B felony**. Minimum of 3 years and maximum of 15 years. Probation prohibited.	Fine authorized of not more than $100,000.
453.3385	Sell, manufacture, deliver, or bring into the State Schedule I substances, flunitrazepam, or gamma-hydroxybutyrate.	4 to 14 grams: **Category B felony**. Minimum of 1 year and maximum of 6 years. 14 to 28 grams: **Category B felony**. Minimum of 2 years and maximum of 15 years. 28 grams or more: **Category A felony**. Life with a 10-year minimum for parole or 25 years with a 10-year minimum for parole. Probation prohibited. Exception provided if person renders substantial assistance in the investigation.	4 to 14 grams: Mandatory fine of not more than $50,000. 14 to 28 grams: Mandatory fine of not more than $100,000. 28 grams or more: Mandatory fine of not more than $500,000
453.3395	Sell, manufacture, deliver, or bring into the State Schedule II substances.	28 to 200 grams: **Category C felony**. Minimum of 1 year and maximum of 5 years. 200 to 400 grams: **Category B felony**. Minimum of 2 years and maximum of 10 years. 400 grams of more: **Category A felony**. Life with a 5-year minimum for parole or 15 years with a 5-year minimum for parole. Probation prohibited. Exception provided if person renders substantial assistance in the investigation.	28 to 200 grams: Mandatory fine of not more than $50,000. 200 to 400 grams: Mandatory fine of not more than $100,000. 400 grams or more: Mandatory fine of not more than $250,000

☐ ASSEMBLY BILL 40 (BDR 2-769 was requested by Assemblyman John Oceguera). The bill was heard in Committee on February 13, 2003, and no action was taken.

Assembly Bill 40 extends the period of limitations for commencing a civil action after the action has been dismissed under certain circumstances.

Proponents/those testifying in support of the bill: Assemblyman Oceguera, and Daniel D. Ebihara, Clark County Legal Services Program, Inc.

Opponents/those testifying in opposition of the bill: Jeff Parker, Solicitor General, Nevada Attorney General's Office; Ernie Adler, Washoe County; Michael Pagni, attorney; and Scott Craigie, Nevada State Medical Association.

Discussion: Testimony indicated that the bill was requested to address situations in which cases filed in federal court, asserting both federal and state causes of action, are dismissed for reasons unrelated to the merits. In many of these cases, the state statute of limitations has expired, thus prohibiting the case from being refiled in state court. Concern was raised for extending the statute of limitations. Testimony noted that federal law currently tolls the state statute of limitations and allows a 30-day window for refilling the case after it has been dismissed by the federal court (28 U.S.C. 1367).

Proposed Amendments: The following amendments have been proposed:

1. **Narrow scope of the bill,** proposed by Jeff Parker, Solicitor General. A copy of the proposed amendment is attached on green paper, and the three amendments are outlined below:

    a. Replace the language "***by a court on any ground other than on the merits***" (page 1, lines 5 and 6) with "**based on lack of subject matter jurisdiction.**"

    b. Specify that the action may be recommended on **in the proper court**.

    c. Add the following new language: **No action may be recommended pursuant to paragraph (b) of subsection 1, beyond 5 years from the date the original action was commenced.**

2. **Exclude government entities,** proposed by Ernie Adler. Amend the bill to provide that it does not apply to the State of Nevada or its political subdivisions.

☐ ASSEMBLY BILL 42 (BDR 43-109 was requested by the Assembly Committee on Judiciary). The bill was heard in Committee on February 17, 2003, and no action was taken.

Assembly Bill 42 requires drivers of motor vehicles to stop in obedience to the direction or a traffic-control signal of a school crossing guard and not proceed until the highway is clear of all persons.

Proponents/those testifying in support of the bill: David McKenna, Henderson Police Department; Jim Nadeau, Washoe County Sheriff's Office; and Bob Roshak, Las Vegas Metropolitan Police Department and Nevada Sheriff's and Chief's Association.

Opponents/those testifying in opposition of the bill: None.

Discussion: Testimony indicated there is no current law requiring vehicles to stop for school crossing laws and the only applicable law under NRS 484.325 (Right of way in crosswalk; obedience to signals and other devices for control of traffic) is inadequate.

Proposed Amendments: The following amendment has been proposed:

- **Authorize use of cones in middle lanes in designated school zones**, proposed by Assemblyman Bernie Anderson. Amend *Nevada Revised Statutes* to allow schools to place portable signs (including cones) designating school zones in the ***middle lane line*** during school hours to indicate the presence of a school zone.

  As noted in the E-mail Assemblyman Anderson received from Washoe County, (attached on pink paper), existing law under subsection 2 of NRS 484.3665 only authorizes portable signs to be placed "***beside*** a roadway." Following is a copy of NRS 484.3665, as it currently exists.

  NRS 484.3665 School zone or school crossing zone: Requirements for signs; placement of portable signs.

  1. Each permanent sign which designates a school zone or school crossing zone and the speed limit in that zone must be uniform in size and color and must clearly designate the hours during which the speed limit applies.

  2. Each portable sign designating a school zone or school crossing zone and the speed limit in the zone must be uniform in size and color. A portable sign may be placed beside a roadway only during those hours when pupils are arriving at and leaving regularly scheduled school sessions.

☐ ASSEMBLY BILL 53 (BDR 15-826 was requested by Assemblyman John Oceguera. The bill was heard in Committee on February 21, 2003, and no action was taken.

Assembly Bill 53 enhances the criminal penalty for committing an assault upon certain providers of health care.

Proponents/those testifying in support of the bill: Assemblyman Oceguera; Doreen Begley, Nevada Hospital Association; Larry Matheis, Nevada State Medical Association; Lisa Black, Nevada Nurses Association; Bobbie Gang, National Association of Social Workers; Nick Mateis, Nevada Podiatric Medicine Association; Sandy Rush, Nevada Organization of Nurse Leaders; Fred Hillerby; and James J. Vilt, Nevada Disability Advocacy and Law Center.

Opponents/those testifying in opposition of the bill: None.

Discussion: Testimony indicated the measure was requested protect health care workers from the frequent assault suffered while performing their duties.

Proposed Amendments: The following amendments were proposed:

1. **Revise definition of "provider of health care."**

    a. **Clarify "social worker,"** proposed by Bobbie Gang, National Association of Social Workers, Nevada Chapter. Revise "clinical social worker" under the referenced definition (page 2, line 13) to only reference "social worker."

    Ms. Gang noted the following levels of licensed social work practiced in Nevada: Clinical Social Worker (NRS 641B.240); Independent Social Worker (NRS 641B.230); Social Worker (NRS 641B.220); and Associate in Social Work (NRS 641B. 210).

    b. **Add lab technicians**, proposed by Fred Hillerby.

2. **Revise the battery statute to add providers of health care to the list of individuals for whom penalties are enhanced,** proposed by Assemblyman Oceguera. The battery statute (NRS 200.481) mirrors the assault statute under A.B. 53 with regard to the list of individuals for whom penalties may be enhanced. The amendment would continue the consistency between the two statutes.

☐ ASSEMBLY BILL 63 (BDR 4-317 was requested by the Assembly Committee on Judiciary on behalf of the Nevada Sheriffs and Chiefs Association). The bill was heard in Committee on February 19, 2003, and no action was taken.

Assembly Bill 63 creates an exception to the hearsay rule for certain testimony of a law enforcement officer offered at a preliminary hearing.

Proponents/those testifying in support of the bill: Ben Graham and Kristin Erickson, Nevada District Attorney's Association; and Jim Nadeau, Nevada Sheriff's and Chief's Association.

Opponents/those testifying in opposition of the bill: Richard Wright, private attorney; and Scott Coffee, Clark County Public Defender's Office.

Discussion: Testimony indicated that this measure is designed to save the large expense of paying for witnesses to attend preliminary hearings, ninety percent of which are ultimately waived. Testimony also indicated that the bill is appropriate because the constitutional right to confrontation does not apply to preliminary hearings. Concerns were raised that the measure would cause difficulties in the preliminary hearings that do proceed if the only witness who appears for examination is a law enforcement officer with no "firsthand" knowledge of the events involved.

Proposed Amendments: None.

☐ ASSEMBLY BILL 73 (BDR 15-357 was requested by Assemblywoman Kathy McClain). The bill was heard in Committee on February 21, 2003, and no action was taken.

Assembly Bill 73 revises provisions concerning certain crimes committed against older persons.

Proponents/those testifying in support of the bill: Assemblywoman McClain; Mark Kimberling, Nevada Attorney General's Office; Bonnie Parnell; and Larry Spitler, American Association of Retired Persons.

Opponents/those testifying in opposition of the bill: None.

Discussion: Testimony noted the importance of lowering the age from 65 to 60 years in Sections 1 and 6 of the bill to make the ages consistent with the age specified under the laws governing elder abuse crimes. Concerns were raised regarding the provisions authorizing a court to require persons convicted of elder abuse crimes to pay for the cost of the investigation or prosecuting of the crime.

Proposed Amendments: The following amendments were proposed:

1. **Effective date of Age Change for Habitually Fraudulent Felons**, proposed by Mr. Kimberling. To avoid court challenges, provide that the change of age on page 8, line 33 (relating to prior convictions for charging a person as a habitually fraudulent felon) only applies to crimes for which the person was convicted after the effective date of the bill. The present language (age 65) would then apply to crimes for which the person was convicted prior to the effective date.

2. **Order of Payment for Restitution**, Assemblywoman Barbara Buckley. Amend the bill to ensure that a person pays restitution owed to the victim before paying any court-ordered amounts for the cost of the investigation or the prosecution of the crime.

AJWS-02-25-03

ASSEMBLY COMMITTEE ON JUDICIARY

WORK SESSION DOCUMENT

FEBRUARY 25, 2003

MEASURES RECOMMENDED BY THE LEGISLATIVE COMMITTEE TO STUDY THE DEATH PENALTY AND RELATED DNA TESTING

11 of 22

WORK SESSION

ASSEMBLY COMMITTEE ON JUDICIARY

February 25, 2003

MEASURES RECOMMENDED BY THE LEGISLATIVE COMMITTEE TO STUDY THE DEATH PENALTY AND RELATED DNA TESTING

☐ ASSEMBLY BILL 13 (BDR 14-197 was requested by the Assembly Committee on Judiciary on behalf of the Legislative Committee to Study the Death Penalty and Related DNA Testing). The bill was heard in Committee on February 12, 2003, and no action was taken.

Assembly Bill 13 eliminates the panel of judges in certain penalty hearings in which the death penalty is sought and requires district attorneys and district courts to report certain information concerning certain homicides to Nevada's Supreme Court.

Proponents/those testifying in support of the bill: Michael Pescetta, attorney; Mark Nichols, Nevada Chapter of the National Association of Social Workers; and Howard Brooks, Nevada Attorneys for Criminal Justice.

Opponents/those testifying in opposition of the bill: Clark Peterson, Clark County District Attorney's Office.

Discussion: Testimony indicated that the changes to Nevada's three-judge panel in death penalty cases are necessitated by the recent decision of the United States Supreme Court in Ring v. Arizona and a subsequent decision by the Nevada Supreme Court in Johnson v. State. Discussion focused on the procedures to replace or revise the existing three-judge panel. Testimony also noted the importance of new procedures for collecting data relating to the death penalty.

Proposed Amendments: The following amendments have been proposed:

1. **Clarify Existing Sentencing Options for a Jury**—In amendments submitted after the hearing on the bill (attached on blue paper), Mr. Pescetta notes that, under NRS 175.554, a reference is not included to one of the four sentencing options that currently exist for a finding of guilty of first-degree murder—the option of a sentence of a definite term of 50 years with the possibility of parole after 20 years.

Explanation: In cases in which the death penalty is sought, NRS 175.554 requires the jury to determine, based upon its findings concerning aggravating and mitigating circumstances, whether a defendant should be sentenced to one of the following:

- Life imprisonment with the possibility of parole;
- Life imprisonment without the possibility of parole; or
- Death.

The statute does not reference the fourth sentencing option, which exists under current statutes, of a definite term of 50 years of imprisonment with the possibility of parole after 20 years.

2. **Revise Data Collection Requirements for the District Court and Supreme Court**: Sections 4 and 6 of the bill require the Supreme Court to prepare and supply questionnaires to which each district court must respond concerning each conviction of murder in the first degree.

   In his written proposals submitted after the hearing (attached on blue paper), Mr. Pescetta notes the Committee may wish to consider "deferring consideration" of these two sections until the Supreme Court acts on the legislative interim study's recommendation that the Court conduct a "proportionality review in capital cases and require collection of data in homicide cases by trial courts." In making this recommendation, Mr. Pescetta notes the fiscal note submitted by the Supreme Court ($68,884 in the first year of the biennium and $64,987 each subsequent year).

3. **Changes Involving the Use of Three-Judge Panels in Penalty Hearings**—The following three scenarios are proposed:

   A. **Current Language of the Bill**—In cases in which the death penalty is sought, the bill eliminates the use of three-judge panels after the ***trial jury*** is unable to reach a unanimous verdict in the ***initial*** penalty hearing. In place of the three-judge panel, the bill requires the trial judge to sentence the defendant to life without the possibility of parole ***or*** impanel a new jury for a second penalty hearing.

   B. **Michael Pescetta, Attorney**—During the hearing on the bill, Mr. Pescetta suggested an amendment to address the current use of a three-judge panel in penalty hearings following a plea of guilty to first-degree murder. Mr. Pescetta submitted the following procedural changes in writing after the hearing. A copy of Mr. Pescetta's explanation and proposed language is attached on blue paper:

      1. **Penalty hearing following the jury trial: Procedure when trial jury is unable to reach a *unanimous verdict* in the *initial* penalty hearing in cases in which the death penalty is sought:**

a. Retain the language of the bill eliminating the three-judge panel, and require the trial judge to sentence the defendant to life without the possibility of parole.

b. Delete the option under the bill's new language of impaneling a new jury for a second penalty hearing. (**Note:** This same amendment was proposed by Amy Coffee, Clark County Public Defender's Office.)

2. **Penalty hearing following a guilty plea:** Under existing law, if death penalty is sought, the penalty hearing is before a three -judge panel. If death penalty is not sought, the judge who accepted the plea or conducted the trial without a jury also conducts penalty hearing. The following change is proposed to eliminate the use of a three-judge panel:

   a. **Entity to conduct the *initial* penalty hearing:**

      i. If death penalty is sought, eliminate the three-judge panel, and impanel a new jury to conduct the ***initial*** penalty hearing.

      ii. If the death penalty is not sought, keep existing law under which the judge who accepted the plea conducts the penalty hearing.

   b. **If the newly impaneled jury *is unable to reach a unanimous verdict* in the *initial* penalty hearing when the death penalty is sought:**

      Require the trial judge to sentence defendant to life without possibility of parole.

C. **Nevada District Attorney's Association**—The following procedural changes throughout the penalty hearing phase were offered by the Nevada District Attorney's Association. The amendment is attached on green paper. In summary, this proposal offers the option of using ***either*** a jury or the three-judge panel throughout the penalty hearing phase.

1. **Penalty hearing following a jury trial and a finding of guilty:**

   a. **Entity to conduct *initial* penalty hearing:**

      i. If death penalty is sought, allow the defendant the option of conducting the ***initial*** penalty hearing before trial jury or a three-judge panel.

ii. If death penalty is not sought, the penalty hearing conducted before trial jury, as under existing law.

(Under existing law, the ***initial*** penalty hearing is conducted by the trial jury whether or not the death penalty is sought.)

b. **If defendant selects option of using the trial jury in the initial penalty hearing, and the trial jury *is unable to reach a unanimous verdict* in the penalty hearing when the death penalty is sought:**

The defendant may elect to have the second penalty hearing conducted before either a newly impaneled jury ***or*** a three-judge panel.

2. **Penalty hearing following a guilty plea:**

a. **Entity to conduct the *initial* penalty hearing:**

i. If death penalty is sought, allow defendant option of conducting the ***initial*** penalty hearing before a newly impaneled jury or three-judge panel.

ii. If the death penalty is not sought, the judge who accepted the plea conducts the penalty hearing, as under existing law.

b. **If defendant selects option of using the trial jury in the initial penalty hearing, and the trial jury *is unable to reach a unanimous verdict* in the penalty hearing when the death penalty is sought:**

The defendant may elect to have the second penalty hearing conducted before either a newly impaneled jury **or** a three-judge panel for second penalty hearing.

3. **Appeal from judgment of death after a plea of not guilty and Supreme Court sets sentence aside and remands for a new penalty hearing:**

Allow the defendant the option of conducting the new penalty hearing before a newly impaneled jury **or** a three-judge panel.

(Under existing law, if the original penalty hearing was before a jury, a new jury is impaneled. If the original penalty hearing was before a three-judge panel, the new penalty hearing is conducted before the original three-judge panel, insofar as possible.)

ASSEMBLY BILL 14 (BDR 14-198 was requested by the Assembly Committee on Judiciary on behalf of the Legislative Committee to Study the Death Penalty and Related DNA Testing). The bill was heard in Committee on February 18, 2003, and no action was taken.

Assembly Bill 14 makes various changes to the penalty hearing when the death penalty is sought and revises the aggravating and mitigating circumstances for murder of the first degree.

Proponents/those testifying in support of the bill: Philip Kohn, Nevada Attorneys for Criminal Justice; Michael Pescetta, attorney; JoNell Thomas, attorney, Nevada Attorneys for Criminal Justice, American Civil Liberties Union; Scott Coffee, Clark County Public Defender's Office; and Nancy Lemcke, Clark County Public Defender's Office.

Opponents/those testifying in opposition of the bill: Ron Cornell, Families of Murder Victims; and Dan Greco, Washoe County District Attorney's Office.

Discussion: Testimony in support of the bill emphasized the importance of allowing the defense to argue last in the penalty hearings in which the death penalty is sought. An emphasis was also placed on the need to eliminate one of the aggravating factors, which was argued to be too broad. Supporters also noted that the original circumstances they believed to be targeted by this aggravator (throwing a bomb into a group, for example) would be covered under the aggravator regarding a murder "committed upon one or more persons at random and without apparent motive." Testimony in opposition to the measure supporting retaining the aggravating factor, noted that the last mitigating factor ("Any other mitigating circumstances") eliminated the need to add another mitigating factor, and stated the order of arguments at the penalty hearing should not be changed because of the State has all of the burden of proving aggravating circumstances beyond a reasonable doubt.

Proposed Amendments: The following amendment has been proposed:

- **Eliminate or Revise Additional Aggravating Factors**—proposed by Michael Pescetta, attorney. Two versions of an amendment eliminating or revising other aggravating factors under Section 4 of the bill are proposed. Mr. Pescetta's arguments in favor of these revisions and his proposed amendments are attached on pink paper. Following is a brief overview of the two versions of the attached amendments:

  1. **Version I—Eliminate additional aggravating factors**—In addition to the aggravating factor eliminated under the bill, eliminate other aggravating factors under NRS 200.033 (Section 4, pages 3 through 5 of the bill), which, Mr. Pescetta argues, "have been given extremely broad interpretations by the courts and prosecutors." Following is the list proposed by Mr. Pescetta,

with his description of the circumstances under which the murder was committed:

a. Under sentence of imprisonment (subsection 1 of NRS 200.033);

b. Felony-murder (subsection 4 of NRS 200.033, which is revised as subsection 3 under the bill);

c. Trying to avoid arrest (subsection 5 of NRS 200.033, which is revised as subsection 4 under the bill);

d. Torture or mutilation (subsection 8 of NRS 200.033, which is revised as subsection 7 under the bill); and

e. Random and without apparent motive (subsection 9 of NRS 200.033, which is revised as subsection 8 under the bill).

f. On school property, creating great risk of death or substantial bodily harm to more than one person (subsection 14 of NRS 200.033, which is reversed as subsection 13 under the bill).

2. **Version II—Revise the aggravating factors**—As an alternative to the above amendment, revise the aggravating factors listed above (and proposed for elimination) to reduce the amount of expense and delay arising from constitutional litigation over the breadth of the factors and . . . promote fairness by making the intended application of the factors clear."

☐ ASSEMBLY BILL 15 (BDR 14-199 was requested by the Assembly Committee on Judiciary on behalf of the Legislative Committee to Study the Death Penalty and Related DNA Testing). The bill was heard in Committee on February 12, 2003, and no action was taken.

Assembly Bill 15 prohibits a sentence of death for a person who is mentally retarded.

Proponents/those testifying in support of the bill: Assemblywoman Sheila Leslie; Michael Pescetta, attorney; W. Larry Williams, Ph.D., Associate Professor, Department of Psychology, University of Nevada, Reno, representing the American Civil Liberties Union (ACLU); Dr. Richard Siegel, University of Nevada, Reno, representing the ACLU; Larry Struve, Religions Alliance in Nevada (RAIN); Father Chuck Durante, Roman Catholic Diocese of Reno; and V. Robert Payant, Nevada Catholic Conference.

Opponents/those testifying in opposition of the bill: Clark Peterson, Clark County District Attorney's Office.

Discussion: Testimony referenced the recent United States Supreme Court decision (Atkins v. Virginia) in which the court held that executing a mentally retarded person is excessive punishment prohibited by the Eighth Amendment to the United States Constitution. Testimony also focused on proposals for the definition of mental retardation and the procedures involved in determining whether a person is mentally retarded.

Proposed Amendments: The following amendments have been proposed:

1. **Definition of "mentally retarded."** The following amendments were proposed to revise the definition of "mentally retarded," which is defined in the bill in Section 1, subsection 8 (page 2, lines 34 through 38) of the bill.

    a. **Use definition of the American Association on Mental Retardation:** Assemblywoman Leslie referenced a letter from James W. Ellis, Regents Professor of Law at the University of New Mexico School of Law, in which Professor Ellis recommends that states use the definition of mental retardation recently adopted by the American Association on Mental Retardation. This definition is as follows:

        Mental retardation is a disability characterized by significant limitations both in intellectual function and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. The disability originates before age 18.

b. **Alternative language:** W. Larry Williams, Ph.D., Associate Professor, Department of Psychology, University of Nevada, Reno, representing the ACLU. Dr. Williams proposed to replace the definition of mental retardation with the following:

> *A diagnosis of mental retardation from a licensed, qualified professional with extensive experience in mental retardation.*

c. **Adopt existing definition under NRS 433.174:** [redacted]. (Mr. Peterson's proposed amendments are attached on yellow paper. Mr. Pescetta's proposed amendments, which were submitted after the hearing, are attached on lilac paper).

The referenced statute (NRS 433.174) defines "mental retardation" for the purpose of Title 39 of NRS (Mental Health) as follows:

> *Mental retardation means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period.*

2. **Procedures for Cases Involving Issue of Mental Retardation**—Following is a comparison of the amendments proposed by Mr. Peterson (language attached on yellow paper) and Mr. Pescetta (language attached on lilac paper) regarding the procedures for such cases:

a. **Limit to cases in a notice of intent to seek the death penalty has been filed.** [redacted]

b. **Require motions declaring defendant is mentally retarded to be filed no less than 10 days before the trial date.** [redacted]

c. **Holding a hearing to determine if defendant is mentally retarded when a motion is filed**—Two options presented:

i. If such a motion is filed, the court ***must*** hold a hearing within a reasonable time before the trial. (Existing language of bill under Section 1, subsection 2.)

ii. Provide that "***if the defendant in his motion satisfies the court that there is doubt as to whether the defendant is mentally retarded, the court shall suspend the proceedings until the question of mental retardation is determined.***" (Mr. Peterson.)

d. **Eliminate the "ex parte" hearing under Section 1, subsection 3 of the bill.** [redacted]

e. **Examination by Experts**—2 options presented:

   i. **Examination by Expert Selected by Prosecution**—Defendant must undergo examination by an expert selected by the prosecution on the issue of whether the defendant is mentally retarded at least 15 days before the hearing date. (Existing language of the bill.)

   ii. **Examination by Multiple Experts**—Require the court to appoint two psychiatrists, two psychologists, or one psychiatrist and one psychologist to examine the defendant. If the appointed experts disagree on whether the defendant is mentally retarded, the court may appoint a third expert. The results of the examinations must be provided to the State and the defendant and received in "open court" by the judge who must permit both sides to examine the appointed experts. (Mr. Peterson.)

f. **Introduction of evidence**—2 options presented:

   i. The court must allow the defendant and the prosecution to present evidence. (Existing language of the bill.)

   ii. The defendant and prosecuting attorney may introduce evidence and "cross examine one another's witnesses." (Mr. Peterson.)

g. **Eliminate the rebuttable presumption of retardation at an IQ of 70.** [redacted]

h. **Appeal of court's determination concerning whether a defendant is mentally retarded**—3 options presented:

   i. Determination of "whether a defendant is mentally retarded" may be appealed to the Supreme Court. (Existing language of the bill.)

   ii. Determination that a defendant ***is*** mentally retarded may be appealed to the Supreme Court. (Mr. Pescetta.)

   iii. Provide that the State "may appeal a finding of mental retardation." (Mr. Peterson.)

i. **Post-conviction inquiry when death penalty is imposed**—2 options presented:

i. **Trial court must hold a hearing if there was no previous finding regarding mental retardation**—If no previous finding has been made regarding mental retardation prior to trial, trial court ***must*** appoint doctors to examine defendant and hold a hearing, unless defendant knowingly and intelligently waives the examination on the record.

If the court finds the defendant is mentally retarded, the court must set aside sentence of death and impose sentence of life without the possibility of parole. (Mr. Peterson.)

ii. **If a motion is filed, the court must conduct a hearing**—If the death penalty is imposed, a defendant may move to set aside death penalty on grounds he is mentally retarded. If the motion is filed, the court ***must*** conduct a hearing.

If the court finds the defendant is mentally retarded, the court must set aside the sentence of death and conduct a new sentencing proceeding. (Mr. Pescetta.)

3. **Retroactive Application**, proposed by Mr. Peterson. Add a new section to the bill specifying the following:

Inmates currently under a sentence of death have one year from the effective date of this section to bring a new petition for writ of habeas corpus in the district court raising issues regarding mental retardation.

☐ **ASSEMBLY BILL 17** (BDR 1-201 was requested by the Assembly Committee on Judiciary on behalf of the Legislative Committee to Study the Death Penalty and Related DNA Testing). The bill was heard in Committee on February 10, 2003, and February 12, 2003. No action was taken.

Assembly Bill 17 makes various changes concerning defense in cases involving first-degree murder.

Proponents/those testifying in support of the bill: Assemblywoman Sheila Leslie.

Opponents/those testifying in opposition of the bill: Kristin Erickson, Washoe County District Attorney's Office.

Discussion: Testimony emphasized the need to increase fees to ensure qualified attorneys represent individuals accused of first-degree murder and decrease the number of cases overturned on appeal on the issue of lack of representation by a qualified attorney. Testimony also supported the appointment of a "team" to serve individuals represented by court-appointed counsel, which would mirror the resources available to a defendant represented by a public defender or private counsel. Concerns were raised that the proposed members of the "team" either exceeded the resources often used by the public defender or could not be readily defined (such as "mitigation specialist"). With regard to this concern, testimony indicated that judges currently have the authority to make any necessary appointments to assist with the defense of a person accused of first-degree murder.

Proposed Amendments: The following amendments have been proposed:

1. **Limit cases in which the team is appointed to death penalty cases**, proposed by Assemblywoman Barbara Buckley. Amend Section 3 of the bill (page 3) to limit the appointment of a team to cases in which the death penalty is sought.

2. **Raise hourly rate for all appointed counsel**, proposed by Jo Nell Thomas, attorney. Raise the hourly fee for appointed attorneys ***in capital cases*** from $75 to $125. (See page 1, line 9 for the $75 fee for all appointed counsel.) A copy of the proposed amendment is attached to the work session document on salmon paper.