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MEMORANDUM

Date:	February 24, 2003
To:	Honorable Bernie Anderson Chair, Assembly Committee on Judiciary
From:	Michael Pescetta
Re:	AB 17

In the course of the Committee hearing on AB17, Assemblyman Brown asked whether there are any Nevada statistics on the rates of reversal due to ineffective assistance in capital cases. As I indicated at the time, there is no institutional mechanism for compiling these statistics. Any statistics I generate are based only on the information available to me, which may not be complete.

The most far-reaching examination of reversal rates in capital cases nationwide is the Columbia University study, James S. Liebman, et al., A Broken System: Error Rates in Capital Cases, 1973-1995 (2000). The study found that, nationwide, 68% of capital cases are reversed at some stage of the process, and more than half of those reversals (37% of the total) were due to ineffective assistance of counsel issues.

Nevada cases present a somewhat complicated picture, and demonstrate some of the problems in analyzing these data. Only five Nevada capital cases (arising under the 1977 statute) have been finally adjudicated in the Court of Appeals for the Ninth Circuit. Three death sentences were reversed (Gallego v. McDaniel, 124 F.3d 1065 (9th Cir. 1997); McKenna v. McDaniel, 65 F.3d 1483, 1487 (9th Cir. 1995); Deutscher v. Angelone, 15 F.3d 981, 984 (9th Cir. 1994)); and two affirmed (Nevius v. McDaniel, 218 F.3d 940, 945 (9th Cir. 2000); Moran v. McDaniel, 80 F.3d 1261, 1270 (9th Cir. 1996)). One of the three cases was reversed on ineffective assistance grounds (Deutscher), but another case (McKenna) was reversed on the basis of an unconstitutional instruction on the depravity aggravating factor, to which neither trial nor appellate counsel objected. Thus while the overt basis of the reversal in McKenna was the jury instruction error, the failure to object to it also implicated ineffectiveness issues. It is also of note that in the two affirmed cases (Nevius and Moran), the court refused to review any ineffectiveness claims: the petitions before the court raising such claims were second petitions; and the first petitions in those cases were litigated by trial and appellate counsel for the defendant, who did not raise any claims of their own ineffectiveness (but also did not advise the defendant of this problem). Thus, depending on how the data are analyzed, 60% of the Nevada cases litigated to a final decision in the Ninth Circuit have been reversed, and either 33% or 66% of those reversals were due to or involved ineffective assistance.

Cases in the Nevada courts present similar difficulties. By my count, 27 death sentences and/or convictions have been reversed by the Nevada courts since 1990.[1] Two of those cases (DePasquale and Padilla) resulted from the state's confessions of error on unspecified grounds, so that no ground for reversal can be identified (although substantial claims of ineffective assistance were raised in both cases). Of the remaining 25, 6 (Browne, Hardison, Miranda, Doleman, and Evans) were reversed on simple ineffective assistance grounds, 24%. One other (Pertgen) was reversed due to an unconstitutional instruction on the depravity aggravator, which was reached by the court due to ineffective assistance in failing to raise the issue, which raises the rate to 28%. A further four cases (Servin, Lane, Geary, and D'Agostino) were reversed on grounds that were not raised at trial and/or on appeal. Normally, failure to object would bar appellate review unless the Supreme Court found ineffective assistance or simply disregarded the failure to object.[2] If these cases are counted, the rate of ineffectiveness reversals would be 44%.[3]

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[1]This count includes one case (Miranda) in which the trial court granted relief and the defendant was released, and the state did not appeal.

[2]The Nevada Supreme Court does review claims without acknowledging that they have not previously been raised in a proper manner. E.g., Powell v. State, 108 Nev. 700, 838 P.2d 921 (1992) (reviewing federal constitutional issue not raised by counsel at trial or on appeal), reversed Powell v. Nevada, 511 U.S. 79, 84 (1994), on remand Powell v. State, 113 Nev. 41, 44n. 4, 930 P.2d 1123 (1997).

[3] It may also be worth noting that in two other cases that were reversed (Riggins and Flanagan), the Nevada Supreme Court refused to review claims that counsel did not adequately preserve (failure to object to instructions in Flanagan; failure to include jury voir dire in appellate record to allow review of jury selection issues on appeal in Riggins) that would have been raised later as ineffectiveness claims if the sentences had not been reversed.