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ASSEMBLY COMMITTEE ON JUDICIARY

WORK SESSION DOCUMENT

MARCH 5, 2003

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WORK SESSION

ASSEMBLY COMMITTEE ON JUDICIARY

March 5, 2003

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

☐ **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.

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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 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

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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."

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☐ **ASSEMBLY BILL 78** (BDR 15-1031 was requested by Assemblyman Bob McCleary). The bill was heard in Committee on February 20, 2003, and no action was taken.

Assembly Bill 78 revises the penalty for certain sexual offenses committed against children and prohibits suspension of a sentence or granting of probation to a person convicted of lewdness with a child.

Proponents/those testifying in support of the bill: Assemblyman McCleary; Ben Graham and Kristin Erickson, Nevada District Attorneys' Association; and Lucille Lusk, Nevada Concerned Citizens.

Opponents/those testifying in opposition of the bill: None

Discussion: Testimony indicated the measure was requested to enhance penalties for sexual crimes against children in an effort to address offenders who commit such crimes.

Proposed Amendments:

- **Revise the penalty for Lewdness with a Minor**, proposed by the Nevada District Attorneys' Association. The revised penalty for this crime creates a unique penalty structure in statute. No other criminal penalties offer the option of choosing between two different felony categories unless there is something distinguishing the circumstances of the crime (such as substantial bodily harm or the use of a dangerous weapon).

  To provide uniformity with other criminal penalties amend Section 2 of the bill (page 3, lines 8 through 16) to provide that lewdness with a minor is a category A felony and the penalty is either:

  1. Life with the possibility of parole after a minimum of 10 years (as in existing law); or

  2. A definite term of 20 years, with eligibility for parole beginning when a minimum of 2 years has been served.

- **Broaden the Application of the Bill**, proposed by the Nevada District Attorneys Association. Revise the bill as follows:

Page 2, lines 33 through 42:

4. A person who commits a sexual assault against a child under the age of 16 years and who has been previously convicted of:

(a) A sexual assault pursuant to this section; or

(b) An offense committed on a child which is sexual in nature whether in the State of Nevada or in another jurisdiction that, if committed in this state, would constitute a sexual assault pursuant to this section or an offense committed on a child of a sexual nature,

is guilty of a category A felony and shall be punished by imprisonment in the state prison for life without the possibility of parole.

And

Page 3, lines 13 through 25:

3. A person who commits lewdness with a child and who has been previously convicted of:

(a) Lewdness with a child pursuant to this section; or

(b) An offense committed on a child which is sexual in nature whether in the State of Nevada or in another jurisdiction that, if committed in this state, would constitute lewdness with a child pursuant to this sectionor an offense committed on a child of a sexual nature,

is guilty of a category A felony and shall be punished by imprisonment in the state prison for life without the possibility of parole.

STAFF NOTE: The phrase "an offense committed on a child of a sexual nature" appears to be too broad. It is suggested that the proponent of the amendment either provide a list of the crimes targeted or use an existing definition. The definition of a "sexual offense against a child" under Subsection 3 of NRS 179.460 is presented below as an example:

3. As used in this section, "sexual offense against a child" includes any act upon a child constituting:
   (a) Incest pursuant to NRS 201.180;
   (b) Lewdness with a child pursuant to NRS 201.230;
   (c) Annoyance or molestation of a child pursuant to NRS 207.260;
   (d) Sado-masochistic abuse pursuant to NRS 201.262;
   (e) Sexual assault pursuant to NRS 200.366;
   (f) Statutory sexual seduction pursuant to NRS 200.368;
   (g) Open or gross lewdness pursuant to NRS 201.210; or
   (h) Luring a child using a computer, system or network pursuant to NRS 201.560, if punished as a felony.

☐ **ASSEMBLY BILL 95** (BDR 14-284 was requested by the Committee on Judiciary on behalf of the Office of the Attorney General). The bill was heard in Committee on February 24, 2003, and no action was taken.

Assembly Bill 95 makes various changes to the provisions pertaining to the authority and discretion of the court to suspend a sentence and grant probation in cases involving category E felonies.

Proponents/those testifying in support of the bill: Kristin Erickson, Nevada District Attorneys' Association; Leon Aberasturi, Lyon County District Attorney's Office; Arthur Mallory, Churchill County District Attorney; and Mike Ebright, Division of Parole and Probation, Nevada's Department of Public Safety.

Opponents/those testifying in opposition of the bill: Benjamin Blinn, citizen.

Discussion: Testimony indicated the measure was requested to provide judges with the option of sentencing certain persons convicted of a category E felony to prison, as appropriate. Testimony noted that it is important for persons participating in the drug court program to know that if they do not complete the program successfully, the judge may impose a prison sentence.

Proposed Amendments: The following amendment was proposed:

- **Include persons on parole**, proposed by Mike Ebright, District Administrator, Division of Parole and Probation, Nevada's Department of Public Safety. Amend the bill on page 2, lines 8 and 11, to include a reference to people who are on parole, in addition to those on probation who are currently included under the statute.

☐ **ASSEMBLY BILL 151** (BDR 20-580 was requested by the Committee on Judiciary on behalf of Washoe County). The bill was heard in Committee on March 3, 2003, and no action was taken.

Assembly Bill 151 authorizes the public guardian to appoint deputies and revises the provisions relating to the term of office of the appointed public guardian.

Proponents/those testifying in support of the bill: Maddy Shipman, Washoe County; Kay Joslin, Washoe County; Dan Musgrove, Clark County; and Kathleen Buchanan, Clark County.

Opponents/those testifying in opposition of the bill: None

Discussion: Testimony indicated this measure was necessary to provide uniformity to the operation of the office of the public guardian by allowing the public guardian to

appoint deputies. Testimony also indicated that the change deleting the public guardian's 4-year term and providing that the public guardian serves at the pleasure of the Board of County Commissioners makes this office consistent with all other appointed department heads.

Proposed Amendments: None.

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