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Clark County
District Attorney's
Office

Death Penalty Legislation:

Three Judge Panel and Reporting

Support with

Opposition & Amendment

A.B. 13

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May, 2003

EXHIBIT C Committee on Judiciary
Date: 05/22/03 Page 1 of 7

A.B. 13: Three Judge Panel and Reporting

OVERVIEW

Summary: Eliminates the three judge panel entirely; includes a problematic default to life without the possibility of parole; requires record keeping, some of which is improper.

POSITION

The Clark County District Attorney's Office agrees with the need to change to the current three judge panel system to conform with recent United States Supreme Court case law. However, the proposed legislation contains a few problematic provisions that, if removed, would lead to acceptable legislation. Though it would be acceptable to simply do away with the three judge panel system, the Clark County District Attorney's Office also proposes that allowing a capital defendant the choice in all instances between a three judge panel or a jury is the most constitutional provision.

ANALYSIS

I. Changes Regarding Three-Judge Panel and Sentencing

A. Some Changes Are Appropriate

Ring v. Arizona, 536 U.S. 584, 122 S. Ct. 2428 (2002), invalidated judicial fact finding following a capital jury trial that served to increase punishment, calling into doubt Nevada's three judge panel scheme. The Nevada Supreme Court in *Johnson v. State*, 59 P.3d 450 (2002), held our current scheme—at least as it exists following a hung jury after trial—to be unconstitutional under *Ring*. As a result, the changes in Sections 1, 2, 4 and 5 of the current Reprint comport with recent changes to the law and are thus acceptable changes (though note below our proposal regarding defendant's choice).

B. Default To "Life Without" Is Improper

As noted above, our Nevada Supreme The current version of the bill (1st Reprint, page 3, Section 3, line) provides that if a sentencing jury in a capital case fails to reach a verdict then the judge "shall sentence the defendant to life without the possibility of parole."

This is different from and vastly more problematic than the initial proposed legislation which provided that the judge "shall sentence the defendant to life without the possibility of parole or impanel a new jury to determine the sentence."

The Clark County District Attorney strongly suggests either of the following:

- Simply allow for a new jury to hear the sentence by inserting the following language in place of Section 3, Page 3, Line 31-33: *"shall impanel a new jury pursuant to Section 1 of this act to determine the sentence."*

- Or simply use the language from the bill in its original form, replacing the language in Section 3, Page 3, Lines 31-33 with the following: *"shall sentence the defendant to life without the possibility of parole or impanel a new jury to determine the sentence."*

If the proposed legislation is left as it is, while defense attorneys will line up in support of it today, they will criticize its constitutionality tomorrow. It should not be our goal to remedy a now-unconstitutional scheme (the three judge panel) with a replacement scheme that is itself unconstitutional. Defendants will complain that the jury was hung in favor of life without the possibility of parole and that he was thus prejudiced by a default to life without parole.

An example of this is in the recent case of *Dorion Daniel* (still on direct appeal). In that case, the jury hung in the penalty phase. The case then went to a three judge panel and the panel gave the defendant death. Though the record clearly indicates otherwise (there was a group for death, a group for life without and one juror who favored life with at one point during the deliberations), the defense continues to maintain—despite the record—that the jury was hung in favor of life with the possibility of parole. If the current proposed legislation had been in effect, the sentence would have defaulted to life without the possibility of parole. Mr. Daniel would now be arguing that the default provision robbed him of the chance to go to a new jury and argue again for life with the possibility of parole.

Similarly, in the recent case of *Donte Johnson*, the jury hung up 11-1 in favor of death at the penalty phase. The hold out juror changed his mind about whether or not he could impose the death penalty—a change that would have caused his excusal during jury selection. The three judge panel sentenced Mr. Johnson to death for the execution murder of four boys. Under the proposed legislation, the State would have no recourse for the rogue juror.

Thus, the best method is either to allow the penalty phase to be heard by a new jury or, as provided in the original legislation, leave the matter to the discretion of the judge to send to a new jury or default to life without the possibility of parole.

C. "Choice" Is A More Appropriate Solution

While the total dissolution of the three judge panel system is not objectionable to the Clark County District Attorney's Office, the recent case law does not require that extreme of a measure.

For instance, in the recent case of *Colwell v. State*, 59 P.3d 463 (2002), the Nevada Supreme Court held that our three judge panel scheme is constitutional as a sentencing scheme following a guilty plea. This reasoning is, of course, valid since the decision in *Ring* which invalidated judicial sentencing in capital cases was based on the right to trial—a right which is waived in a guilty plea situation.

Thus, there is no requirement that the three judge panel scheme be totally removed.

The following proposal for choice was pro-

posed to the Assembly:

1. Modify Section 1 As Follows:

In place of Section 1, Page 1, Lines 1-6 and Page 2, Lines 1-13, insert the following:

> **NRS 175.552.** 1. Except as otherwise provided in subsection 2, in every case in which there is a finding that a defendant is guilty of murder of the first degree, whether or not the death penalty is sought, the court shall conduct a separate penalty hearing. The separate penalty hearing must be conducted as follows:
>
> (a) If [the finding is made by a jury] ***the death penalty is sought***, the separate penalty hearing must be conducted ***as soon as practicable*** in the trial court before ***either*** the trial jury ***or, if there was no trial jury, before a newly impaneled jury***, as soon as practicable ***or a panel of three district judges, at the election of the defendant.***
>
> (b) [If the finding is made upon a plea of guilty or a trial without a jury and the death penalty is sought, the separate penalty hearing must be conducted before a panel of three district judges, as soon as practicable.] ***If the finding is made by a jury and the death penalty is not sought, the separate penalty hearing must be conducted in the trial court before the trial jury.***
>
> (c) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is not sought, the separate penalty hearing must be conducted before the judge who conducted the trial or who accepted the plea, as soon as practicable.

2. Modify Section 3 As Follows:

Replace the current Section 3 (Page 3, Lines 21-33) with the following:

> **Section 3.** NRS 175.556 is hereby amended to read as follows:
>
> **175.556.** Procedure when jury unable to reach unanimous verdict, ***procedure for constituting three judge panel***
>
> 1. In a case in which the death penalty is sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, ***a new penalty hearing shall be held as soon as practicable in the trial court before either a newly impaneled jury or a panel of three district judges, at the election of the defendant.***
>
> ***2. If the defendant elects to have the penalty hearing conducted in the trial court by a panel of three district judges,*** the supreme court shall appoint two district

judges from judicial districts other than the district in which the plea is made, who shall with the district judge who conducted the trial, or his successor in office, conduct the required penalty hearing to determine the presence of aggravating and mitigating circumstances, and give sentence accordingly. A sentence of death may be given only by unanimous vote of the three judges, but any other sentence may be given by the vote of a majority.

[2.] *3.* In a case in which the death penalty is not sought, if a jury is unable to reach a unanimous verdict upon the sentence to be imposed, the trial judge shall impose the sentence.

3. Modify Section 4 As Follows:

Restore the deleted section at Page 4, Lines 10-14.

4. Modify Section 5 As Follows:

Replace the portion regarding the options of the Supreme Court at Page 4, Lines 32-42 with the following:

3. The supreme court, when reviewing a death sentence, may:

(a) Affirm the sentence of death;

(b) Set the sentence aside and remand the case for a new penalty hearing ***to be held either***

[(1) If the original penalty hearing was before a jury,] before a newly impaneled jury; or

[(2) If the original penalty hearing was before a panel of judges,] before a panel of three district judges which must consist, insofar as possible, of the members of the original panel, ***at the election of the defendant***; or

(c) Set aside the sentence of death and impose the sentence of imprisonment for life without possibility of parole.

II. Changes Regarding Record Keeping

A. To Facilitate Informed Study, Some Record Keeping Is Not Objectionable

As found by the Illinois Commission that studied the death penalty recently, all parties are served by increased information regarding the administration of justice in this important area of the law. To the extent this legislation seeks to facilitate future debate regarding capital punishment by relevant and appropriate information gathering, the Clark County District Attorney's Office does not object.

The Clark County District Attorney's Office does note, however, that record keeping and the statistics generated thereby are open to abuse and manipulation and is mindful of the immortal words of Mark Twain, "There are lies, damn lies and statistics." Despite the fact such statistics will no doubt be abused by anti-death penalty advocates, to the extent the information facilitates relevant discussion there is no objection to gathering such infor-

mation. As a result, the Clark County District Attorney's Office does not object to subsections a, c, d, e, f, g and h of Section 6 of the proposed legislation. The Clark County District Attorney's Office does, as detailed below, object to subsections b (in part), i and j of Section 6 of the proposed legislation.

In addition, it should be noted that such information gathering even in the sections to which there is no opposition is far in excess of anything currently done by the Clark County District Attorney's Office and will require some time to come into complete compliance.

B. The Proposed Record Keeping Need Not Be Done For Manslaughter Charges

The current proposed legislation includes record keeping for all charges of "*murder, voluntary manslaughter or involuntary manslaughter.*" This is overbroad if the idea is to gather information regarding the use of the death penalty.

Instead, Section 3, Page 2, Lines 16-17 should be amended to read:

> ***...that included a charge for murder.***

The reference to "voluntary manslaughter or involuntary manslaughter" should be deleted.

C. Subsection (b) Is Overbroad And Must Be Amended To Be Proper

Subsection (b) requires collection of information on "the age, gender and race of any co-defendant or other person charged or suspected of having participated in the homicide and in any alleged related offense".

The difficulty here is the "or any other person suspected of having participated". This is far too vague to be useful. Certainly, defense attorneys always believe there are many persons who could have done the crime other than their client. Additionally, unless a person is arrested or charged, there will not be relevant data on any such persons.

Instead, the focus could properly be on persons charged ***or arrested***—since there would be data for those persons.

Thus, to be proper, subsection (b) should be amended to read:

> (b) The age, gender or race of any codefendant or other person charged ***or arrested for participation*** in the homicide and in any alleged related offense.

D. Subsection (i) Improperly Requires Information Regarding Jurors

Subsection (i) as proposed requires the district attorney to gather information regarding "The race, ethnicity and gender of each member of the jury, if the case was tried by a jury." This is highly improper.

While it is certainly understandable that persons studying the death penalty might want to gather this information, requiring the district attorney to do it is an impossibility. We do not have access to this information nor would it be proper for us to question the jurors regarding this information. At best, the district court could gather this evidence from juror forms, but even then jurors may object and claim they are being discriminated against.

As a practical and legal matter, the district attorney's office cannot gather this information. This subsection should be stricken from the proposed legislation.

E. Subsection (j) Does Not Serve A True Information Gathering Pur-

pose And Is Instead Designed To Facilitate Nuisance Law Suits By Various Anti-Death Penalty Organizations

Subsection (j) as proposed requires the district attorney's office to provide the names of all persons who participated in the charging decisions, plea negotiations and decision to seek the death penalty. The Clark County District Attorney's Office is firmly opposed to this subsection.

In studying the death penalty—which is the only goal of record keeping—the question is not the actions of the individual prosecutors but is instead the actions of the system and how it affects defendants. This subsection does not advance the debate regarding the statistics of the death penalty. Instead, this subsection is specifically designed to facilitate nuisance law suits by various organizations.

Part of the strategy of the anti-death penalty movement is to make the practice of using the death penalty so burdensome as to be impracticable, thus defeating by Byzantine procedures and requirements what they cannot outright eliminate. This "reporting requirement" is a poorly disguised attempt to facilitate nuisance federal law suits and does not in any way advance the important debate regarding the death penalty and its role in the criminal justice system. This subsection should be stricken from the proposed legislation.