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Clark County
District Attorney's
Office

# *Death Penalty Legislation:*
## *Post-Conviction DNA Testing*

SUPPORT WITH

~~*Opposition &*~~ *Amendment*

## *A.B. 16*

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EXHIBIT D Committee on Judiciary
Date: 05/22/03 Page 1 of 3

# *A.B. 16: Post-Conviction DNA Testing*

## OVERVIEW

**Summary:** Creates new post-conviction remedy for DNA testing which could instead track existing procedures; improperly targets district attorney who is not the custodian of any such DNA evidence.

## POSITION

The Clark County District Attorney's Office supports mechanisms, particularly in capital cases, that promote justice by freeing the innocent as well as convicting the guilty. The Clark County District Attorney's Office, however, opposes portions of this legislation as it does not provide a correct remedy and it improperly addresses the district attorney's office directly when the district attorney's office is not the custodian of DNA evidence. Additionally, the finding should be subject to judicial review.

## ANALYSIS

### I. Much Of The Proposed Legislation Is Appropriate

Because the Clark County District Attorney's Office is as concerned with freeing the innocent as convicting the guilty, we do not oppose a mechanism to test DNA to the extent it is helpful in carrying out our task of doing justice.

### II. The Proposed Legislation Incorrectly Focuses On The Prosecutor, Who Is Not The Custodian Of The DNA Evidence

The proposed legislation requires the prosecutor to preserve and inventory any DNA evidence. Unfortunately, the prosecutor is not the custodian of that evidence. The court itself or law enforcement agencies are normally the custodians. Thus, the proposed legislation incorrectly targets prosecutors.

Instead, the legislation should require the court to determine who is the custodian of the evidence and require those persons to prepare any inventory. If the evidence is held by the court, the defendant is free to inspect and prepare his own inventory.

Thus, Section 2, Page 2, Lines 10-22 should be amended to read:

> 3. If a petition is filed pursuant to this section, ***the court shall make inquiry of the parties as to who currently has custody of any evidence that may be subjected to genetic marker analysis. The***

***court then shall order those persons or agencies in actual custody of such evidence to preserve all evidence within its possession or custody and prepare an inventory of all evidence within its possession or custody within 30 days of the court's order.***

***4. The district attorney may file a written response to the petition within 30 days after the inventories are prepared pursuant to this section.***

## III. The Proposed Legislation Does Not Provide An Appropriate Remedy

The proposed legislation creates a new post-conviction procedure regarding DNA testing. However, the result of this new procedure is arrest of judgment pursuant to NRS 176.525, which is inappropriate. The result of arresting judgment is extreme—it treats the defendant as if charges had never been filed against him! This is inappropriate because DNA evidence is not a "magic bullet." It is possible that favorable evidence would not have led to a different result at trial. In essence, the proposed legislation wants to skip over that portion of the analysis.

Instead, if the genetic marker information is favorable to the defendant, the defendant should be excused from the two-year time bar on a motion for new trial and be allowed to bring a motion for new trial based on newly discovered evidence.

Thus, Section 2, Page 3, Lines 18-20 should be amended to read:

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner, the ***petitioner shall be allowed to bring a motion for new trial pursuant to NRS 176.515 for newly discovered evidence and any time restrictions contained in that statute are excused.***

As a result, there is no need to amend current NRS 176.525 and thus Section 4 of the proposed legislation can be stricken.

## IV. There Should Be Judicial Review

The current proposed legislation leaves the decision to the district court and provides no review. However, for an issue of this magnitude, judicial review for both sides should be allowed as it is for a motion for new trial.

Thus, subsection 10 found on Page 3, Lines 27-28, should be stricken and the remaining subsections renumbered.