ASSEMBLY BILL NO. 15–COMMITTEE ON JUDICIARY

(ON BEHALF OF LEGISLATIVE COMMITTEE TO STUDY DEATH PENALTY AND RELATED DNA TESTING (ACR 3 OF THE 17TH SPECIAL SESSION))

PREFILED JANUARY 27, 2003

Referred to Committee on Judiciary

SUMMARY—Prohibits sentence of death for person who is mentally retarded. (BDR 14-199)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: Yes.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to crimes; prohibiting a sentence of death for a person who is mentally retarded; and providing other matters properly relating thereto.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Chapter 174 of NRS is hereby amended by adding thereto a new section to read as follows:

1. A defendant who is charged with murder of the first degree may, before his trial, file a motion to declare that he is mentally retarded.

2. If a defendant files a motion pursuant to this section, the court must hold a hearing within a reasonable time before the trial to determine whether the defendant is mentally retarded.

3. Not less than 45 days before the date set for a hearing conducted pursuant to subsection 2, the court shall hold an ex parte hearing in camera with the defendant and his counsel present to:

(a) Review the evidence of the defendant concerning whether the defendant is mentally retarded, including, without limitation, psychological, psychiatric and other reports, school records of the defendant and statements by witnesses; and

(b) Determine what evidence is material to a determination of whether the defendant is mentally retarded and should be provided to the prosecution.

4. The court shall order the defendant to:

(a) Provide the evidence declared material pursuant to subsection 3 to the prosecution at least 30 days before the date set for a hearing conducted pursuant to subsection 2; and

(b) Undergo an examination by an expert selected by the prosecution on the issue of whether the defendant is mentally retarded at least 15 days before the date set for a hearing pursuant to subsection 2.

5. For the purpose of the hearing conducted pursuant to subsection 2, there is no privilege for any information or evidence provided to the prosecution or obtained by the prosecution pursuant to subsection 4.

6. At a hearing conducted pursuant to subsection 2:

(a) The court must allow the defendant and the prosecution to present evidence concerning whether the defendant is mentally retarded;

(b) The defendant has the burden of proving by a preponderance of the evidence that he is mentally retarded; and

(c) The results of a reliably administered intelligence quotient test indicating that the defendant has quotient of 70 or below creates a rebuttable presumption that the defendant is mentally retarded.

7. If the court determines based on the evidence presented at a hearing conducted pursuant to subsection 2 that the defendant is mentally retarded, the court must make a finding that a sentence of death may not be imposed upon the defendant.

8. For the purposes of this section, a person is "mentally retarded" if, before the age of 18 years, he manifests:

(a) Intellectual functioning that is significantly substandard; and

(b) Substantial impairment of his adaptive behavior.

Sec. 2. NRS 175.552 is hereby amended to read as follows:

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 separate penalty hearing must be conducted in the trial court before the trial jury, as soon as practicable.

(b) 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 sought, the separate penalty hearing must be conducted before a panel of three district judges, as soon as practicable.

(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. In a case in which the death penalty is not sought ~~[,]~~ ***or in which a court has made a finding that a sentence of death may not be imposed pursuant to section 1 of this act,*** the parties may by stipulation waive the separate penalty hearing required in subsection 1. When stipulating to such a waiver, the parties may also include an agreement to have the sentence, if any, imposed by the trial judge. Any stipulation pursuant to this subsection must be in writing and signed by the defendant, his attorney, if any, and the prosecuting attorney.

3. ~~[In]~~ ***During*** the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the Constitution of the State of Nevada may be introduced. The State may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

4. In a case in which the death penalty is not sought ~~[,]~~ ***or in which a court has found pursuant to section 1 of this act that the defendant may not receive a sentence of death,*** the jury or the trial judge shall determine whether the defendant should be sentenced to life with the possibility of parole or life without the possibility of parole.

Sec. 3. NRS 177.015 is hereby amended to read as follows:

177.015 The party aggrieved in a criminal action may appeal only as follows:

1. Whether that party is the State or the defendant:

(a) To the district court of the county from a final judgment of the justice's court.

(b) To the Supreme Court from an order of the district court granting a motion to dismiss, a motion for acquittal or a motion in arrest of judgment, or granting or refusing a new trial.

(c) To the Supreme Court from a determination of the district court about whether a defendant is mentally retarded that is made as a result of a hearing held pursuant to section 1 of this act. If the Supreme Court entertains the appeal, it shall enter an order staying the criminal proceedings against the defendant for such time as may be required.

2. The State may, upon good cause shown, appeal to the Supreme Court from a pretrial order of the district court granting or denying a motion to suppress evidence made pursuant to NRS 174.125. Notice of the appeal must be filed with the clerk of the district court within 2 judicial days and with the Clerk of the Supreme Court within 5 judicial days after the ruling by the district court. The clerk of the district court shall notify counsel for the defendant or, in the case of a defendant without counsel, the defendant within 2 judicial days after the filing of the notice of appeal. The Supreme Court may establish such procedures as it determines proper in requiring the appellant to make a preliminary showing of the propriety of the appeal and whether there may be a miscarriage of justice if the appeal is not entertained. If the Supreme Court entertains the appeal, or if it otherwise appears necessary, it may enter an order staying the trial for such time as may be required.

3. The defendant only may appeal from a final judgment or verdict in a criminal case.

4. Except as otherwise provided in subsection 3 of NRS 174.035, the defendant in a criminal case shall not appeal a final judgment or verdict resulting from a plea of guilty, guilty but mentally ill or nolo contendere that the defendant entered into voluntarily and with a full understanding of the nature of the charge and the consequences of the plea, unless the appeal is based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings. The Supreme Court may establish procedures to require the defendant to make a preliminary showing of the propriety of the appeal.

Sec. 4. NRS 177.055 is hereby amended to read as follows:

177.055 1. When upon a plea of not guilty a judgment of death is entered, an appeal is deemed automatically taken by the defendant without any action by him or his counsel, unless the defendant or his counsel affirmatively waives the appeal within 30 days after the rendition of the judgment.

2. Whether or not the defendant or his counsel affirmatively waives the appeal, the sentence must be reviewed on the record by the Supreme Court, which shall consider, in a single proceeding **,** if an appeal is taken:

(a) Any errors enumerated by way of appeal;

(b) ***If a court determined that the defendant is not mentally retarded during a hearing held pursuant to section 1 of this act, whether that determination was correct;***

(c) Whether the evidence supports the finding of an aggravating circumstance or circumstances;

~~[(c)]~~ ***(d)*** Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and

~~[(d)]~~ ***(e)*** Whether the sentence of death is excessive, considering both the crime and the defendant.

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:

(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; or

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

Sec. 5. NRS 200.030 is hereby amended to read as follows:

200.030 1. Murder of the first degree is murder which is:

(a) Perpetrated by means of poison, lying in wait or torture, or by any other kind of willful, deliberate and premeditated killing;

(b) Committed in the perpetration or attempted perpetration of sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse of a child, sexual molestation of a child under the age of 14 years or child abuse;

(c) Committed to avoid or prevent the lawful arrest of any person by a peace officer or to effect the escape of any person from legal custody; or

(d) Committed on the property of a public or private school, at an activity sponsored by a public or private school or on a school bus while the bus was engaged in its official duties by a person who intended to create a great risk of death or substantial bodily harm to more than one person by means of a weapon, device or course of action that would normally be hazardous to the lives of more than one person.

2. Murder of the second degree is all other kinds of murder.

3. The jury before whom any person indicted for murder is tried shall, if they find him guilty thereof, designate by their verdict whether he is guilty of murder of the first or second degree.

4. A person convicted of murder of the first degree is guilty of a category A felony and shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances ~~[:]~~ ***, unless a court has made a finding pursuant to section 1 of this act that a sentence of death may not be imposed upon the defendant;*** or

(b) By imprisonment in the state prison:

(1) For life without the possibility of parole;

(2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served; or

(3) For a definite term of 50 years, with eligibility for parole beginning when a minimum of 20 years has been served.

A determination of whether aggravating circumstances exist is not necessary to fix the penalty at imprisonment for life with or without the possibility of parole.

5. A person convicted of murder of the second degree is guilty of a category A felony and shall be punished by imprisonment in the state prison:

(a) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served; or

(b) For a definite term of 25 years, with eligibility for parole beginning when a minimum of 10 years has been served.

6. As used in this section:

(a) "Child abuse" means physical injury of a nonaccidental nature to a child under the age of 18 years;

(b) "School bus" has the meaning ascribed to it in NRS 483.160;

(c) "Sexual abuse of a child" means any of the acts described in NRS 432B.100; and

(d) "Sexual molestation" means any willful and lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the perpetrator or of the child.