

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:

- 1 **Section 1.** Chapter 174 of NRS is hereby amended by adding
2 thereto a new section to read as follows:
3 1. *A defendant who is charged with murder of the first degree*
4 *in a case in which the death penalty is sought may, not less than*
5 *10 days before the date set for trial, file a motion to declare that he*
6 *is mentally retarded.*
7 2. *If a defendant files a motion pursuant to this section, the*
8 *court must:*
9 (a) *Stay the proceedings pending a decision on the issue of*
10 *mental retardation; and*
11 (b) *Hold a hearing within a reasonable time before the trial to*
12 *determine whether the defendant is mentally retarded.*
13 3. *The court shall order the defendant to:*



* A B 1 5 R 1 *

1 (a) Provide evidence which demonstrates that the defendant is
2 mentally retarded not less than 30 days before the date set for a
3 hearing conducted pursuant to subsection 2; and

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

8 4. For the purpose of the hearing conducted pursuant to
9 subsection 2, there is no privilege for any information or evidence
10 provided to the prosecution or obtained by the prosecution
11 pursuant to subsection 3.

12 5. At a hearing conducted pursuant to subsection 2:

13 (a) The court must allow the defendant and the prosecution to
14 present evidence and conduct a cross-examination of any witness
15 concerning whether the defendant is mentally retarded; and

16 (b) The defendant has the burden of proving by a
17 preponderance of the evidence that he is mentally retarded.

18 6. If the court determines based on the evidence presented at
19 a hearing conducted pursuant to subsection 2 that the defendant is
20 mentally retarded, the court must make a finding that a sentence
21 of death may not be imposed upon the defendant. Such a finding
22 may be appealed to the Supreme Court.

23 7. For the purposes of this section, "mentally retarded"
24 means significant subaverage general intellectual functioning
25 which exists concurrently with deficits in adaptive behavior and
26 manifested during the developmental period.

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

28 175.552 1. Except as otherwise provided in subsection 2, in
29 every case in which there is a finding that a defendant is guilty of
30 murder of the first degree, whether or not the death penalty is
31 sought, the court shall conduct a separate penalty hearing. The
32 separate penalty hearing must be conducted as follows:

33 (a) If the finding is made by a jury, the separate penalty hearing
34 must be conducted in the trial court before the trial jury, as soon as
35 practicable.

36 (b) If the finding is made upon a plea of guilty or guilty but
37 mentally ill or a trial without a jury and the death penalty is sought,
38 the separate penalty hearing must be conducted before a panel of
39 three district judges, as soon as practicable.

40 (c) If the finding is made upon a plea of guilty or guilty but
41 mentally ill or a trial without a jury and the death penalty is not
42 sought, the separate penalty hearing must be conducted before the
43 judge who conducted the trial or who accepted the plea, as soon as
44 practicable.



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

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

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

28 **Sec. 3.** NRS 175.554 is hereby amended to read as follows:

29 175.554 In cases in which the death penalty is sought:

30 1. If the penalty hearing is conducted before a jury, the court
31 shall instruct the jury at the end of the hearing, and shall include in
32 its instructions the aggravating circumstances alleged by the
33 prosecution upon which evidence has been presented during the trial
34 or at the hearing. The court shall also instruct the jury as to the
35 mitigating circumstances alleged by the defense upon which
36 evidence has been presented during the trial or at the hearing.

37 2. The jury or the panel of judges shall determine:

38 (a) Whether an aggravating circumstance or circumstances are
39 found to exist;

40 (b) Whether a mitigating circumstance or circumstances are
41 found to exist; and

42 (c) Based upon these findings, whether the defendant should be
43 sentenced to life imprisonment with the possibility of parole, life
44 imprisonment without the possibility of parole or death.



1 3. The jury or the panel of judges may impose a sentence of
2 death only if it finds at least one aggravating circumstance and
3 further finds that there are no mitigating circumstances sufficient to
4 outweigh the aggravating circumstance or circumstances found.

5 4. If a jury or a panel of judges imposes a sentence of death,
6 the court shall enter its finding in the record, or the jury shall render
7 a written verdict signed by the foreman. The finding or verdict must
8 designate the aggravating circumstance or circumstances which
9 were found beyond a reasonable doubt, and must state that there are
10 no mitigating circumstances sufficient to outweigh the aggravating
11 circumstance or circumstances found.

12 *5. If a sentence of death is imposed, the defendant may file a*
13 *motion to set aside the penalty on the grounds that the defendant*
14 *is mentally retarded. If such a motion is filed, the court shall*
15 *conduct a hearing on that issue in the manner set forth in section*
16 *1 of this act. If the court determines pursuant to such a hearing*
17 *that the defendant is mentally retarded, it shall set aside the*
18 *sentence of death and order a new penalty hearing to be*
19 *conducted. Either party may appeal such a determination to the*
20 *Supreme Court.*

21 **Sec. 4.** NRS 176.415 is hereby amended to read as follows:

22 176.415 The execution of a judgment of death must be stayed
23 only:

24 1. By the State Board of Pardons Commissioners as authorized
25 in Sections 13 and 14 of Article 5 of the Constitution of the State of
26 Nevada;

27 2. When a direct appeal from the judgment of conviction and
28 sentence is taken to the Supreme Court;

29 3. By a judge of the district court of the county in which the
30 state prison is situated, for the purpose of an investigation of sanity
31 or pregnancy as provided in NRS 176.425 to 176.485, inclusive;

32 ~~or~~
33 4. *By a judge of the district court in which a motion is filed*
34 *pursuant to subsection 5 of NRS 175.554, for the purpose of*
35 *determining whether the defendant is mentally retarded; or*

36 5. Pursuant to the provisions of NRS 176.486 to 176.492,
37 inclusive.

38 **Sec. 5.** NRS 177.015 is hereby amended to read as follows:

39 177.015 The party aggrieved in a criminal action may appeal
40 only as follows:

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

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



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

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

10 2. The State may, upon good cause shown, appeal to the
11 Supreme Court from a pretrial order of the district court granting or
12 denying a motion to suppress evidence made pursuant to NRS
13 174.125. Notice of the appeal must be filed with the clerk of the
14 district court within 2 judicial days and with the Clerk of the
15 Supreme Court within 5 judicial days after the ruling by the district
16 court. The clerk of the district court shall notify counsel for the
17 defendant or, in the case of a defendant without counsel, the
18 defendant within 2 judicial days after the filing of the notice of
19 appeal. The Supreme Court may establish such procedures as it
20 determines proper in requiring the appellant to make a preliminary
21 showing of the propriety of the appeal and whether there may be a
22 miscarriage of justice if the appeal is not entertained. If the Supreme
23 Court entertains the appeal, or if it otherwise appears necessary, it
24 may enter an order staying the trial for such time as may be
25 required.

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

28 4. Except as otherwise provided in subsection 3 of NRS
29 174.035, the defendant in a criminal case shall not appeal a final
30 judgment or verdict resulting from a plea of guilty, guilty but
31 mentally ill or nolo contendere that the defendant entered into
32 voluntarily and with a full understanding of the nature of the charge
33 and the consequences of the plea, unless the appeal is based upon
34 reasonable constitutional, jurisdictional or other grounds that
35 challenge the legality of the proceedings. The Supreme Court may
36 establish procedures to require the defendant to make a preliminary
37 showing of the propriety of the appeal.

38 **Sec. 6.** NRS 177.055 is hereby amended to read as follows:

39 177.055 1. When upon a plea of not guilty a judgment of
40 death is entered, an appeal is deemed automatically taken by the
41 defendant without any action by him or his counsel, unless the
42 defendant or his counsel affirmatively waives the appeal within 30
43 days after the rendition of the judgment.

44 2. Whether or not the defendant or his counsel affirmatively
45 waives the appeal, the sentence must be reviewed on the record by



1 the Supreme Court, which shall consider, in a single proceeding , if
2 an appeal is taken:

- 3 (a) Any errors enumerated by way of appeal;
- 4 (b) *If a court determined that the defendant is not mentally*
5 *retarded during a hearing held pursuant to section 1 of this act,*
6 *whether that determination was correct;*
- 7 (c) Whether the evidence supports the finding of an aggravating
8 circumstance or circumstances;
- 9 ~~[(e)]~~ (d) Whether the sentence of death was imposed under the
10 influence of passion, prejudice or any arbitrary factor; and
- 11 ~~[(d)]~~ (e) Whether the sentence of death is excessive, considering
12 both the crime and the defendant.

13 3. The Supreme Court, when reviewing a death sentence, may:

- 14 (a) Affirm the sentence of death;
- 15 (b) Set the sentence aside and remand the case for a new penalty
16 hearing:
 - 17 (1) If the original penalty hearing was before a jury, before a
18 newly impaneled jury; or
 - 19 (2) If the original penalty hearing was before a panel of
20 judges, before a panel of three district judges which must consist,
21 insofar as possible, of the members of the original panel; or
 - 22 (c) Set aside the sentence of death and impose the sentence of
23 imprisonment for life without possibility of parole.

24 **Sec. 7.** NRS 200.030 is hereby amended to read as follows:

25 200.030 1. Murder of the first degree is murder which is:

- 26 (a) Perpetrated by means of poison, lying in wait or torture, or
27 by any other kind of willful, deliberate and premeditated killing;
- 28 (b) Committed in the perpetration or attempted perpetration of
29 sexual assault, kidnapping, arson, robbery, burglary, invasion of the
30 home, sexual abuse of a child, sexual molestation of a child under
31 the age of 14 years or child abuse;
- 32 (c) Committed to avoid or prevent the lawful arrest of any
33 person by a peace officer or to effect the escape of any person from
34 legal custody; or
- 35 (d) Committed on the property of a public or private school, at
36 an activity sponsored by a public or private school or on a school
37 bus while the bus was engaged in its official duties by a person who
38 intended to create a great risk of death or substantial bodily harm to
39 more than one person by means of a weapon, device or course of
40 action that would normally be hazardous to the lives of more than
41 one person.

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

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



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

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

9 (b) By imprisonment in the state prison:

10 (1) For life without the possibility of parole;

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

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

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

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

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

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

25 6. As used in this section:

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

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

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

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

