

1                                   **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2  
3       DAVID BURNS,

4                                   Petitioner,

5       vs.

6  
7       THE HONORABLE JUDGE JEROME T.  
8       TAO, EIGHTH JUDICIAL DISTRICT  
9       COURT OF THE STATE OF NEVADA

10                                  Respondent.

Supreme Court Electronically Filed  
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Clerk of Supreme Court

11                                  **APPENDIX TO PETITION FOR**  
12                                  **WRIT OF MANDAMUS OR**  
13                                  **WRIT OF PROHIBITION**  
14                                  **VOLUME V**  
15                                  **(PA 633- PA 743)**

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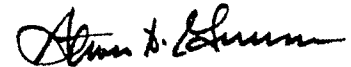
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CLERK OF THE COURT

1 RTRAN

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA

5 THE STATE OF NEVADA,

6 Plaintiff,

7 vs.

8 DAVID BURNS

9 Defendants.

CASE NO. C267882-2

DEPT. NO. XX

10 BEFORE THE HONORABLE JEROME T. TAO, DISTRICT COURT JUDGE

11 THURSDAY, SEPTEMBER 12, 2013

12  
13 **RECORDER'S TRANSCRIPT OF**  
14 **DEFENDANT'S MOTION TO STRIKE THE STATE'S NOTICE OF INTENT TO**  
15 **SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL**  
16 **PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE**  
17 **ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE**  
18 **OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444**

19 APPEARANCES:

20 For the State:

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Chief Deputies District Attorney

21 For Defendant Burns:

CHRISTOPHER R. ORAM, ESQ.  
ANTHONY P. SGRO, ESQ.  
MEREDITH WEINER, ESQ.

22 Also present for Codefendant Mason:

SUSAN D. BURKE, ESQ.

23 RECORDED BY: SARA RICHARDSON, COURT RECORDER

1 LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 12, 2013, 10:45 A.M.

2 \* \* \* \* \*

3 THE COURT: State versus David Burns, C267882. Hang on one second --  
4 do you guys need a break?

5 THE RECORDER: Yes.

6 THE COURT: Let's take a short break, my staff needs just a quick restroom  
7 break, all right?

8 [Proceeding trailed until 10:51 a.m.]

9 THE COURT: -- is present in custody. Did they not move Mr. Alonso out?  
10 Do you guys care if he's here or not? He's the --

11 All right, this is on for the defendant's motion to strike the State's notice  
12 of intent to seek the death penalty. You can go ahead and have a seat Mr. Burns,  
13 apparently we're going to be here for a few minutes, there's no reason to have you  
14 stand the entire time.

15 All right, on behalf of your client?

16 MR. SGRO: Thank you, good morning, Your Honor. Anthony Sgro on behalf  
17 of Mr. Burns.

18 THE RECORDER: Can I ask one more thing? Will you move that  
19 microphone, it's behind the computer, can you move it --

20 THE COURT: Oh, yeah, you're getting blocked, right.

21 THE MARSHAL: Just move it over in front of the sign.

22 THE RECORDER: That's perfect, thank you.

23 THE MARSHAL: There you go.

24 MR. SGRO: Is that okay?

25 THE RECORDER: Perfect. Yes.

1 MS. BURKE: And, Your Honor, if I might, Susan Burke on behalf of  
2 Mr. Mason. Because Mr. Mason is subject to death-qualification of the jury and that  
3 sort of thing to that standpoint, we would -- would join in the motion, although we're  
4 not officially joined in the motion.

5 THE COURT: Okay. Mr. Sgro, let me, you know, start by, maybe I can focus  
6 you a little bit. I -- in this binder of materials that were exhibits to your motion you  
7 have all this stuff from other states.

8 MR. SGRO: Yes, sir.

9 THE COURT: But why does that matter to me what other states do or don't  
10 do?

11 MR. SGRO: Only as a -- as a template for what the legislators in Nevada  
12 have done, we have oftentimes, "we" being the legislature, has oftentimes looked to  
13 guidance from other states. We do it in our jurisprudence, and we do it when it  
14 comes to making law. We look to federal authority. We look to the federal --

15 THE COURT: But, I mean, of all the states in the country Nevada is the one  
16 that on certain things we don't care. Forty-nine other states have outlawed  
17 prostitution, not us. Until about ten years ago, 48 other states, other than  
18 New Jersey, had outlawed gambling. So this is the one state where we have a  
19 history of really not giving a damn of what the other 49 states are up to. So why  
20 should that matter in what -- on this issue what other states are doing?

21 MR. SGRO: Well, I will tell you, Your Honor, the legislative history that the  
22 Court's going to be asked to consider when we conclude today's proceedings,  
23 includes comments on what did happen in other states. So from a legislative history  
24 standpoint, the other states were relevant at the time testimony was taken, when  
25 the -- prior to the bill being drafted. So I think, while Nevada may or may not care,



1 Nevada also affords its individual citizens additional rights beyond those afforded to  
2 its citizens via the federal constitution. So, Nevada --

3 THE COURT: Right. We're one of the few states that you do actually, where  
4 the rules of evidence apply to prelims, for example. California doesn't do that --  
5 most states you just allow hearsay in, police officer comes in he just reads a police  
6 report. We're one of the few states that chose to do it differently. So, I guess, you  
7 know, the question again is, we're the one state that really doesn't care what  
8 everyone else does.

9 MR. SGRO: If the legislators had talked about it, I would absolutely see your  
10 point and most likely this presentation would be a lot shorter. However, the call of  
11 the question today, Your Honor, is we're going to ask you to interpret legislative  
12 history a certain way, and inherent in that will be the -- will be the perspective  
13 relative to what other states have done.

14 Also, Your Honor, it is going to show a consistency in what we believe  
15 the audit will demonstrate relative to the fiscal impact.

16 THE COURT: Well, but, okay, essentially let me just -- it seem -- what you  
17 want me to do is you want me to strike the notice of death penalty or stay the case  
18 because the legislature might do something in the future, right? I mean, that's  
19 essentially what you're asking for. So you want me to predict what the legislature --  
20 which, you know, and here's the other thing, okay, we have a biennial legislature. It  
21 doesn't sit again until 2015. There's an election between now and then which  
22 means we don't even know who the legislature is going to be and we don't even  
23 know in theory who the governor is going to be in the next legislative session. But  
24 you want me to sort of guess what this unelected legislature, this unelected,  
25 unknown governor might do in the next session is kind of what you're asking me to

1 do.

2 MR. SGRO: No. No, I'm not, Your Honor. I'm not asking you to guess as to  
3 any of that. I think that there are signs there. I think the call today deals with a  
4 statute that we don't have to guess about. We have a bill that was passed in May of  
5 this year. The bill that was passed calls upon the State of Nevada representatives  
6 to determine the fiscal impact of the cost of the death penalty. The bill is silent as to  
7 what happens to the cases that are pending insofar -- during the time within which  
8 the audit is taking place and until the time that conclusions are being made.

9 So, I'm not asking the Court to guess what they're going to do, I think I  
10 know what they're going to do. But my guess is only as good as a guess. What the  
11 Court has to do is determine legislatively, based on the legislative history, what is  
12 the most probable policy outcome that the legislators intended insofar as the statute  
13 is silent. That's why we're here today.

14 THE COURT: Well, I'm not sure -- legislative history, okay, typically when  
15 courts look at legislative history, they're looking at it for a specific purpose, there's  
16 an ambiguity in the statute.

17 MR. SGRO: That's correct.

18 THE COURT: It's a statute that's, you know, I'm not sure how to apply it, so I  
19 have to look at the history to see what the legislature intended.

20 MR. SGRO: Correct.

21 THE COURT: There isn't actually a law that says the death penalty is no  
22 longer the law in Nevada and we're trying to sort it out. You want me to take  
23 legislative history and use that to predict what the legislature, which again has not  
24 yet been elected and the governor whose not yet been elected, might do in 2015,  
25 maybe not even 2015, I don't know what the legislature's going to do, maybe 2017.

1 So we're talking a whole different legislature with term limits and that kind of stuff. I  
2 mean, what's the focus of -- what I'm -- you know, legislative history, you look at it  
3 for a specific purpose to interpret something. What's the point of just looking at this?  
4 To determine what? To determine what the legislature might do in two years?

5 MR. SGRO: No, no, Your Honor. I think, perhaps I'm being inartful in what  
6 I'm trying to communicate to the Court. Here's the situation, and I do have the  
7 presentation which -- which I would like to develop for purposes of the record,  
8 Your Honor. But the bottom-line is this, the legislature has taken a look to see if we  
9 can still afford the death penalty in the State of Nevada. It is a luxury, that's the  
10 word that has been used -- it's a luxury which we are start -- we need to determine  
11 whether or not we can still afford. So we don't know if we have the money to pay for  
12 it any more.

13 And I would tell Your Honor that we have already in our state a de facto  
14 moratorium. And those are the words that were used by the -- by the assemblyman  
15 who chaired this committee who is Assemblyman Ohrenschall who was present on  
16 Tuesday when we presented this in front of Judge Herndon and who told me that he  
17 didn't know if he could make it here today, but is available by phone if we need to  
18 contact him. The bottom-line is this, Your Honor, we don't have money in our state  
19 to continue to pay for this is my view.

20 The legislature has to move initially by audit, like many other states did  
21 as we provided to you in the pleadings. That audit will reveal what everyone in this  
22 knows -- in this room already knows to be true. The audit will reveal that the death  
23 penalty is inordinately more expensive to prosecute than a non-capital case. So my  
24 position is that the State can proceed on every case that they have currently in the  
25 system on a non-capital basis as opposed to proceeding now capitally because

1 here's what -- here's what I think --

2 THE COURT: But here's the problem, let's say we do that, I strike the death  
3 penalty now because of what I think the legislature's going to do and I'm wrong, they  
4 get this audit back whenever it comes back, next year or whatever it is, and they  
5 never do a thing with it, ever, you know, a lot of legislative reports just go in to  
6 committee and they die there. That's just the reality of the legislative process. So  
7 what, we never proceed on the death ever because the legislature at some point in  
8 the near future might or might not do something?

9 MR. SGRO: I don't know, Your Honor. But what's worse proceeding in that  
10 fashion where we maybe save our community 20, 30, 40, \$50 million? Or  
11 proceeding in a fashion where we proceed with full force on every capital litigation in  
12 our community only to have it be unwound later and we do it twice? So not only can  
13 we not afford it, let's do it twice so we can flush even more money down the drain.

14 The difficulty with that type of analysis from my standpoint, Your Honor,  
15 is that we have been told that the legislator's going to do -- that the legislature's  
16 going to do a study. Now, it's been publicized that they're going to do this study,  
17 they've commissioned people, they're spending money on it. I don't think it makes  
18 sense to assume that after all the work they went through to get the bill passed, to  
19 commission people and pay people to do a study, that they're going to come back  
20 and say, you know what, the death penalty's really expensive and Nevada can't  
21 afford it. Okay, great, what do you have next? I just don't --

22 THE COURT: Well --

23 MR. SGRO: -- think that that's the outcome, and I think you've got to balance  
24 between -- between doing this twice and the alternative would be staying -- staying  
25 proceedings relative to the imposition of capital punishment. The worst thing that

1 happens, Your Honor, is there is a slight delay. And I say slight delay because quite  
2 frankly, I know that you have a case in front of you with us that is a little older, but  
3 two years in the realm of capital litigation is not that much time. And in the grand  
4 scheme of things, this is -- this is an issue that is more global than it is case-specific.  
5 And I know the Court recognizes that. But I'm asking you, Judge, in this case do  
6 you want to continue to have us pay for the mitigation experts, for the mitigation  
7 specialists, for the protracted trial proceedings to have two lawyers here instead of  
8 one, et cetera, et cetera.

9 THE COURT: Well, I mean, cost -- all right, let's -- you know what else is  
10 expensive? The war on drugs is expensive and something like 19 or 20 states have  
11 legalized marijuana, the Justice Department just announced they're no longer in the  
12 business of prosecuting marijuana even though under federal law it's still illegal. So  
13 the trend is pretty clear. Should I just start dismissing every marijuana case in order  
14 to save money? Because it's still illegal in Nevada, I mean, should I just do that?

15 MR. SGRO: We can have -- we can have that conversation on another day.  
16 But the trend for death penalty cases is also clear. In the last ten years,  
17 Your Honor, six states have eliminated the death penalty. Every one of those states  
18 found cost is a factor. Some of them found cost to be the only factor. Some of them  
19 commented on a broken system where they had one execution in 52 years and they  
20 spent \$200 million to get it.

21 THE COURT: Right. I understand that. But here is the question, we don't  
22 know if Nevada's going to do that, and if they do that, then obviously I'm, you know,  
23 striking the death penalty notice if they do it. But we don't know that they're going to  
24 do that.

25 MR. SGRO: So then here's your record, Your Honor, here's the record in this

1 case. And again, I still want to do the presentation because I want to -- I want to  
2 perfect the record in this case. And I understand the Court's view, but at the end of  
3 the day, you're going to have two equally unpalatable decisions, okay. Decision  
4 one, delay this case if the State insists on proceeding in this case as a capital case,  
5 okay, that's decision one. Decision two, try the case, and then what you're doing is  
6 you're making the assumption that nothing is going to change. When I have had  
7 assurances from the assemblyman who wrote this bill and maybe -- maybe he sees  
8 the glass as half-full --

9 THE COURT: Who, because there's an election next year, may or may not  
10 be in office four years from now.

11 MR. SGRO: Maybe he's not, but maybe he is, Your Honor. I guess, I would  
12 take a more careful approach when I'm trifling with people's lives, and I'm trifling with  
13 the money that we have -- that we don't have that we continue to spend. The  
14 difficulty in this case, Your Honor, is this is supposed to be a dispassionate, logical  
15 analysis. So no matter who's in office, the commission's already been put into play  
16 to do the audit. Okay. So we're spending money as we speak to find out how much  
17 money we're spending on the imposition of capital punishment.

18 We've had one person in our state executed in 35 years. We've spent  
19 hundreds of millions of dollars to get that one execution. We today don't have a  
20 functioning death chamber, and so even if we go forward with the trial in this case  
21 and we get the death penalty and so that is equated by the legislatures who do this  
22 as a dispassionate analysis, a success. They successfully got the death penalty in  
23 this case. So what? Where's he going?

24 And that is the -- not -- that is the gravamen of what the audit's  
25 supposed to study. We don't have anything to do with the person convicted of death

1 row and put on death row other than we've got to -- we get to pay a lot more to keep  
2 him housed in a much more expensive facility. We get to pay a lot more for a  
3 decade-plus worth of appeals. We get to pay a lot more for mandatory review all the  
4 way to the United States Supreme Court. That's the only thing we're going to  
5 accomplish if we continue to move forward.

6 Our position is a much more conservative view which, by the way, you  
7 as a judge, Your Honor, have to decide public-policy issues. It's no different than  
8 me just taking \$20 out of your pocket and throwing it in the trash because all we're  
9 doing right now is we're wasting money.

10 THE COURT: Well, the problem is, I don't get to just rewrite laws or ignore  
11 them because I think the legislature might do something about them. I mean, I deal  
12 with statutes all day long in the criminal world, in the civil world, at any given  
13 moment, at any given legislative session the legislature could change any law that  
14 they want to choose, that's what they do. Their job is to write laws, to rewrite laws.  
15 But you don't take every case on my docket and say, well, this law could be  
16 rewritten, that law could be changed, this law could be repealed. I don't know what  
17 they're going to do and you just don't do that. The law is what the law is now, and  
18 because, you know, I mean, sort of extrapolating your argument to the -- to the, you  
19 know, to the logical extreme, I would stay every case on my docket because at any  
20 given moment, the legislature might repeal that law.

21 MR. SGRO: Yes.

22 THE COURT: I mean, we -- in theory the legislature could repeal, you know,  
23 literally anything, right? They can make robbery not a crime. Well, do I stay every  
24 robbery case because they might?

25 MR. SGRO: Judge, the difference is, the difference is is that if you had a bill

1 in front of you that said in 2015 we may not have robbery as a crime any more,  
2 okay --

3 THE COURT: But that doesn't say that, We're studying whether to have it,  
4 that doesn't mean they're going to.

5 MR. SGRO: And this is what every state did, you asked me the relevancy of  
6 other states that were -- and I told you that they were spoken of in the testimony  
7 prior to the bill being passed -- every other state started somewhere down this road.  
8 Every -- every state had some audit process prior to the abolition of the death  
9 penalty in the last decade, the six states that abolished it. Every state came to the  
10 same conclusion, the death penalty costs more money. Every state found, you  
11 know what, for the bang we're getting for our buck, we can use money in different  
12 ways.

13 Victim advocacy group -- victim family members, victim family members  
14 drafted a letter to the legislators in Connecticut -- if I could have just a second,  
15 Your Honor -- the letter -- the letter says, "The reality of the death penalty is that it  
16 drags out the legal process for decades. In Connecticut the death penalty is a false  
17 promise that goes unfulfilled leaving victim's families frustrated and angry after years  
18 of fighting the legal system. As the State hangs on to this broken system it wastes  
19 millions of dollars that could go towards much needed victim services." And  
20 Connecticut's not alone on that front.

21 And I think it was Maryland that after they abolished the death penalty,  
22 they struck the -- they abolished the death penalty, then they put a special provision  
23 in their statute that the money saved from striking the death penalty went back into  
24 resources for victim family members. Do you know, Your Honor, that if you are the  
25 victim family member of someone who suffered a homicide you get \$5500 for



1 counseling, that's what you get in the state of Nevada. And as I said on the other  
2 day when we did this, I have two small children victim survivors in a case, not this  
3 one, who were witnesses to their entire family being killed. That's the State's  
4 allegation. Those two little kids get 5500 bucks.

5           What I'm telling you is, we're in an economy right now where our  
6 unemployment rate is three times the national average. There's an article in today's  
7 paper, in today's paper, the headline of the business section says, "Local  
8 foreclosure starts surge." They expect more filings in the state of Nevada for  
9 foreclosed homes in the next 45 days than they've had in the last year. This cannot  
10 be tunnel-vision-type of issue, this has got to be an issue where you as a jurist have  
11 to look at a bill and say, listen, here -- here's how my argument doesn't make sense,  
12 Your Honor, my argument doesn't make sense if in that bill they said, Pending cases  
13 need to move forward. Okay, you know what happened --

14           THE COURT: But they don't say pending cases should be stayed while we  
15 do this study, right?

16           MR. SGRO: Exactly, that's why we're here because they don't say either.  
17 And I -- let me point out one other thing, Your Honor.

18           THE COURT: But here's the thing, I mean, this is my concern as you can  
19 probably guess from my questions, all of this is just a policy argument and I'm not a  
20 legislator, I'm not writing laws, I'm not --

21           MR. SGRO: The cases --

22           THE COURT: -- you know, hang on, courts have a very limited role in  
23 government, okay, we don't write laws except as to common law perhaps.

24           MR. SGRO: Right.

25           THE COURT: But as to statute law, when the legislature acts to draw -- to

1 draft up a statute, we defer to the legislature because they have things that -- they  
2 can do things that we can't. I can't have a committee hearing. I can't have public  
3 comments. I can't have legislative studies done. I don't make findings on legislative  
4 facts.

5 MR. SGRO: But you have the obligation, the absolute obligation --

6 THE COURT: Based upon -- here's the problem --

7 MR. SGRO: -- to interpret -- to interpret the law.

8 THE COURT: -- this is why, I'm just telling you, this is why philosophically  
9 courts don't do policymaking, based on what? Based on information that you, one  
10 person in the world, gave to me. I can't do a neighborhood meeting and have a  
11 million people come in here and give me their opinions. I can't do broad studies. I  
12 don't have committee hearings. I can't subpoena a million people like the legislature  
13 can on both sides of the issue and have them present both sides of the issue. What  
14 this is is this a case --

15 MR. SGRO: Well, Rosa Park was --

16 THE COURT: Hang on. There's one lawyer here, there's one lawyer there,  
17 that's all I'm hearing from.

18 MR. SGRO: Okay. Then this lawyer here --

19 THE COURT: That's the diff -- that's the difference between me and the  
20 legislature is that's why the legislature does broad decisions because they can have  
21 broad evidence brought before them and I can't. This is a case.

22 MR. SGRO: I would like --

23 THE COURT: Everything in this case is subject to rules of evidence. And the  
24 evidence -- rules of evidence don't allow me to hear, for example, what Joe Schmoe  
25 on the street thinks about the death penalty or what every advocacy group here,

1 what their position is on the death penalty or, frankly, there's a reason why the  
2 legislature did this study, I can't even order that study. We don't have the resources  
3 in the judiciary to do studies like that. That's not what we do in the court system.

4 And that's why, on decisions based on that study we defer to the  
5 legislature because they have tools that we don't have.

6 MR. SGRO: We cite --

7 THE COURT: And in fact, that we're prohibited from doing. I just can't do that  
8 stuff, I can't hear hearsay testimony from a bunch of neighborhood people, but the  
9 legislature can. And that's why they're the ones who make that decision.

10 MR. SGRO: I think you can have an evidentiary hearing. I think you can --  
11 we can subpoena witnesses.

12 THE COURT: From who? It's a bunch of hearsay under the rules of  
13 evidence, that's the --

14 MR. SGRO: Your Honor, when it comes to --

15 THE COURT: -- that's the problem, the tools that we have don't fit with broad  
16 policy decisions. A guy comes in here and -- say some lobbyist wants to come in  
17 and tell me his opinion about the death penalty, how is that even admissible under  
18 the rules of evidence? It's just some guy's opinion.

19 MR. SGRO: That --

20 THE COURT: It's technically speaking, if they raise an objection, sustained, I  
21 don't get to hear that. But the legislature can.

22 MR. SGRO: Assemblyman Ohrenschall, what was your intention when you  
23 crafted this bill relative to the death penalty?

24 THE COURT: Objection. Sustained. You know why? Because the  
25 subjective intention of any individual legislature is not relevant.

1 MR. SGRO: Okay, then --

2 THE COURT: Only the legislative history as printed is. Objection sustained.

3 MR. SGRO: Okay. Here's -- here's -- here's an issue for the Court,

4 Your Honor, we gave you three cases in our brief. And it's and I'm just going to pick  
5 one. This one is *State versus Lucero*.

6 THE COURT: But do you understand my point? The problem is you're  
7 making arguments here that I -- not just me individually, but as the court system,  
8 we're not equipped to deal with them. We don't have the tools. The legislature  
9 does, we don't. They could subpoena a million people, you know, you've seen it if  
10 you've been up to Carson City, a whole table full of ten people who are experts in  
11 their field just offer their opinions and there's a discussion.

12 MR. SGRO: Judge, this --

13 THE COURT: We don't do that here.

14 MR. SGRO: -- this is not a symposium on the right or wrongs of the death  
15 penalty. I came to you because you, according to the *State versus Lucero* case and  
16 the *Catanio* case and the *Matamoros* case, here's what the stat -- here's what the  
17 case law says from the Nevada Supreme Court, "When interpreting a statute,  
18 legislative intent is the controlling factor," and I'm asking you to interpret a statute.  
19 The case goes on, "the starting point for determining legislative intent is a statute's  
20 plain meaning," okay, I'm going to continue on, "when a statute is clear on its face a  
21 court cannot go beyond the statute in determining legislative intent. We must  
22 attribute the plain meaning to a statute that is not ambiguous. But when the  
23 statutory language lends itself to two or more reasonable interpretations a statute is  
24 ambiguous and we may then look beyond the statute in determining legislative  
25 intent. To interpret an ambiguous statute, we look to the legislative history and

1 construe the statute in a manner that is consistent with reason and public policy."

2 THE COURT: Right. And the statute we're talking about here is a statute  
3 ordering a study. Okay. I find based on the legislative history, it's very clear what  
4 the legislature is doing, they're ordering a study. So what?

5 MR. SGRO: Okay. I -- I don't mean to interrupt, but I want to make one point  
6 before we move on, Your Honor. The legislative history relative to a study in our  
7 view is an over-simplified view of the -- of the context within which this bill was  
8 passed. I will tell you attached to our brief was the -- were the minutes that  
9 pre-dated the passage of the bill. And inquiry was made relative to a remodel, it's  
10 called Project 13-C02, Remodel Administration Building to Accommodate Execution  
11 Chamber, Ely State Prison. That was the funding that was sought. Assembly Bill  
12 444 requires that a legislative audit be conducted on the death penalty in the state  
13 which would include a review of facilities to carry out a death sentence. In other  
14 words, we're going to see if it's even necessary.

15 What they do, Judge, Senator Smith moved to not approve capital  
16 improvement project 13-C02. Assemblywoman Carlton seconded the motion, the  
17 motion carried. Now, if that's not indicative of legislative history of where they think  
18 they're going, I don't know what else would be. They specifically took a vote on  
19 whether or not to fund the death chamber and that vote was -- or that motion to fund  
20 was denied. So they think in the legislature more than this is just a study, we may  
21 not even be back here in a couple years, they actually think this is a sign of things  
22 that are going to come down in the future.

23 I just read to you one of three cases that imposes upon you,  
24 Your Honor, the obligation to look at the legislative history to make a  
25 determination -- now if your -- if your finding is that the leg --

1 THE COURT: But here's the thing, the rules, yeah, there are a -- there's a  
2 whole body of rules that go back 100 years on how you interpret a statute. But  
3 there's a purpose --

4 MR. SGRO: The case I read from is 2011.

5 THE COURT: There's a purpose to that. You use those rules of legislative  
6 history in order to determine what a statute says. You don't use the rules of  
7 legislative history in order to project out what you think the legislature might do in the  
8 future. That's not what those rules are for. Those rules are eye of a statute that  
9 applies to some case, say it's a validity of a foreclosure, an illegal foreclosure, well,  
10 there's a foreclosure statute, somebody says, well, this statute might permit that. So  
11 I look at the statute, does it permit that? Yes, it does; or no, it doesn't based on the  
12 legislative history.

13 What I don't do is say, well, the legislative history, you know, says this;  
14 therefore, I'm going to predict that the legislature in five years is going to change this  
15 law; therefore, I'm dismissing this case. You absolutely don't do that. And that's not  
16 what the rules of statutory interpretation are for.

17 MR. SGRO: Your Honor, I think in that -- in that scenario, presupposes that  
18 we don't have a snapshot of what's to come. You're presupposing that nothing may  
19 occur.

20 THE COURT: Well, let me ask you this --

21 MR. SGRO: In the face of a bill --

22 THE COURT: -- if what you're saying is true, if what you're saying is true, why  
23 even do a study? Why didn't they just outlaw the death penalty last session? If  
24 that's -- if you're so sure that's where they're going, they could have done that, right?  
25 They're the legislature --

1 MR. SGRO: Because -- because --

2 THE COURT: -- why didn't they?

3 MR. SGRO: -- in my humble opinion, and I have no evidence of this, but I  
4 would suggest that there are a body of D.A.s that cavalierly say, well, we don't know  
5 how much more it costs.

6 THE COURT: Because here's why I ask that question, there's a rule of  
7 statutory interpretation that says this, you look at what the legislature did, you also  
8 look at what they had the opportunity to do and didn't do, that's a settled rule of  
9 statutory interpretation.

10 MR. SGRO: What didn't they do, Your Honor?

11 THE COURT: They didn't abolish the death penalty.

12 MR. SGRO: That's not true. I disagree with you. They -- they absolutely -- is  
13 anyone going to get executed between now and 2015 when they go back?

14 THE COURT: That's not the question. That's a question of practicality. The  
15 question is they could have abolished --

16 MR. SGRO: Judge --

17 THE COURT: -- the death penalty. They didn't. So if you're going to apply  
18 the rules of statutory interpretation, which first of all you can't because we're out of  
19 the context of interpreting a statute for a purpose. But if you're going to interpret it  
20 that way, there is a rule that says if the legislature had the opportunity to do  
21 something and didn't, you must presume that that was an intentional, conscious, and  
22 deliberate decision.

23 MR. SGRO: Then why isn't the intentional, conscious, deliberate decision, the  
24 opportunity for the legislature to say all the pending cases need to move forward,  
25 regardless of this study? They didn't do that either.

1 THE COURT: Because that's not a law. Cases move forward anyway.  
2 That's not even a thing.

3 MR. SGRO: Your Honor --

4 THE COURT: That's not a bill that they -- how is that even a statute they can  
5 enact? We hereby rule that all cases in the court system should be handled in the  
6 normal course --

7 MR. SGRO: They did --

8 THE COURT: -- of things? That's not even a law.

9 MR. SGRO: -- they did it in the state of New York. They did it in the state of  
10 New York via Supreme Court. They actually said in their opinion, all cases currently  
11 pending in the system are hereby now going to proceed as life-without cases. So  
12 they could have done that, Your Honor, because we don't have the guidance. And  
13 what I'm telling you, Your Honor, is the reason they didn't do what you think they  
14 could have or should have done is because they didn't need to. They had the  
15 de facto moratorium in place already. Why bother with additional language when  
16 you've already told the persons at the prison they're not going to get funding for the  
17 death chamber?

18 THE COURT: Well, why bother with a study if you're so sure they're going to  
19 abolish it?

20 MR. SGRO: Because --

21 THE COURT: Why not just abolish it?

22 MR. SGRO: -- because that's the way it works, because I don't think public,  
23 the public is aware of how much it costs. I don't think the public knows that one of  
24 the reasons we have more kids in our classrooms than they do in other states is  
25 because we don't have the money. And I don't know if they know that if we had



1 additional money from another source that we could have smaller class sizes or  
2 maybe have music programs back in high schools or maybe get 2,000 teachers, get  
3 some of them back on the payroll.

4 THE COURT: Right, again --

5 MR. SGRO: We have been cutting, cutting, cutting.

6 THE COURT: -- here's the problem, none of that has anything to do with me.  
7 I -- just because I don't think music classes are -- are being run well enough, I can't  
8 just manipulate the statute to do that, that's a policy decision.

9 MR. SGRO: They're not being --

10 THE COURT: But that's essentially what you're asking me to do is, I --  
11 because I --

12 MR. SGRO: That's exactly right.

13 THE COURT: -- because you think the death penalty is going to be too  
14 expensive, and by the way, we don't have -- actually have the results of the study,  
15 but we're just guessing that's what it's going to say.

16 MR. SGRO: We know what other states have done.

17 THE COURT: And you're probably right because it probably is going to be  
18 more expensive, but let's assume for a second you're right, you want me to  
19 manipulate the statutes to say, well, this is what I think the legislature should do as a  
20 matter of public policy; and therefore, I'm just going to do it before they do it is  
21 essentially what you're saying.

22 MR. SGRO: No. No, I'm not, Your Honor. I'm not saying music programs are  
23 run well or run bad. I'm saying they don't exist because they got cut for funding.

24 THE COURT: But I can't order them to just exist because I like them.

25 MR. SGRO: No, of course.

1 THE COURT: I'm not a legislature.

2 MR. SGRO: Your Honor, again, I'm maybe not communicating the point  
3 effectively, the point of the matter is this, we have year by year by year, especially  
4 since the crash in late 2007 through 2008, we have cut everything in our state. We  
5 have fewer teachers, we have more kids in the classrooms, we have fewer  
6 programs in the school, we have a ceiling on victim-witness monies, and it goes on  
7 and on and on what -- where we have cut. And we're looking now at projections of  
8 hundreds of millions of dollars over the next couple of decades and whether or not  
9 that money could be spent elsewhere. Those are policy decisions which you are  
10 called upon to consider in determining legislative intent. We have a legislature --

11 THE COURT: Well, here's the other thing, how --

12 MR. SGRO: -- Your Honor, please, I would like to make my record.

13 THE COURT: -- hang on, how do we know that if the study comes back the  
14 way that you say, that the death penalty as it is is too expensive, how do you know  
15 the legislature's not going to say, okay, there's an easy way to make it cheaper?  
16 Let's just execute everybody right now. We're going to abolish the post-conviction  
17 process in the state of Nevada, that would save a million dollars, how do you know  
18 they're not going to do that?

19 MR. SGRO: Because that would be phenomenally realistic -- unrealistic, I  
20 mean, to say let's just --

21 THE COURT: Well, I mean --

22 MR. SGRO: -- kill 'em all.

23 THE COURT: -- here's my -- here's my --

24 MR. SGRO: I understand 200 years of jurisprudence, but now let's just  
25 execute them all.

1 THE COURT: -- once we're in -- here's the thing is, once we're in the realm of  
2 speculating on what they might do, why is that not something that's a possibility?  
3 Because as long as we're speculating, let's just speculate, right?

4 MR. SGRO: Because the level -- the level at which that last hypothetical is  
5 based is based on a speculation that I'm going to walk outside and fly out to the  
6 moon and have lunch with my kids and then come back for dinner. That's the level  
7 of speculation. The level of speculation that exists in the study is based on concrete  
8 evidence that we have a couple things that have taken place. One, the bill was  
9 passed; two, there's no funding for the death chamber, they accomplished their  
10 moratorium in the legislature; three, they're going to come back and I don't think  
11 anyone with a straight face is going to say the death penalty doesn't cost more  
12 money than a non-death case. I'll tell you right now as soon as Burns, if Mr. Burns's  
13 case was not death any more, I don't remember if Chris got this case or I did, but  
14 one of us is gone.

15 THE COURT: Sure. Because you're --

16 MR. SGRO: Okay?

17 THE COURT: -- of course, look --

18 MR. SGRO: There's no, I know that that's going to happen.

19 THE COURT: I'm accepting that it's probably -- the study is probably going to  
20 reveal that death penalty's more expensive.

21 MR. SGRO: You keep saying probably, I don't understand where probably's  
22 coming -- there's no mandatory -- there's no mandatory review to the U.S. Supreme  
23 Court any more.

24 THE COURT: I say probably because the study has not been done, period.

25 MR. SGRO: But you're a jurist.

1 THE COURT: Is that not clear?

2 MR. SGRO: But you're a jurist, Your Honor, you see these cases in your  
3 courtroom all the time. When's the last time you had a mitigation specialist come in  
4 and testify at a life-without case? Or you heard of a life-without case getting  
5 mandatory review on a petition for certiorari to the U.S. Supreme Court? That  
6 doesn't happen. We know that. We know that the decades of frustration that these  
7 victim's family member feels -- feel are due to the protracted federal litigation  
8 proceedings. And here -- let me give you another example, Your Honor, you said  
9 what if changes. What if, Judge, the legislature said, you know what, we're going to  
10 keep the death penalty but the D.A. now has to take three cases a year and that's all  
11 they're allowed to prosecute. You know what happens? Now -- now the D.A.  
12 actually has to pick, quote, unquote, "the worst of the worst." Instead of hearing in  
13 every case that I ever have, I always end up with the worst of the worst guy  
14 apparently because I always hear that argument in every case and we all know it's  
15 not true.

16 The other thing that could happen is they might eliminate some of the  
17 aggravators. Defense attorneys have been banging the drum for years that the  
18 aggravators that we have in our statutory scheme are overbroad and are  
19 theoretically inclusive of everyone. What happens if they knock out some  
20 aggravators that Mr. Burns has? What I'm suggesting, Your Honor, is that there's  
21 going to be a change that happens. We are in a fiscal state where a dispassionate  
22 analysis is going to say we spend more money on death cases, we need to change  
23 something, so it may not be unfettered discretion of the death penalty committee  
24 that changes, it may be the lessening of aggravators. But I'll tell you, you have an  
25 attorney in this one case, this one guy in the world as you put it earlier that's saying

1 his client is going to potentially benefit from what's going to happen in 2015. Now  
2 what happens? Before -- between now and 2015, we're forced to go to trial. He  
3 gets convicted and then the death penalty. Then what? Then an aggravator  
4 changes and we're all back here again.

5 THE COURT: But the problem is we don't know if it's 2015 or 2017 or the  
6 year 3000. We have no idea. But the problem is you want me to just say that what  
7 the legislature's going to do, who the legislature even is, who the governor is, and  
8 when they're going to do it are so clear and they're going to happen so imminently  
9 that it's going to affect this case as opposed to them doing it 10 years from now, 20  
10 years from now, 30 years from now, 100 years from now. That's --

11 MR. SGRO: I'm saying --

12 THE COURT: -- kind of what you're saying is that's why you want a stay. A  
13 stay suggests that you think something's going to happen reasonably imminently as  
14 opposed to ten years from now.

15 MR. SGRO: Right. And Judge --

16 THE COURT: And I'm asking you, given the fact that we haven't even had  
17 the election, we don't even know who the legislature is, what makes you think that?

18 MR. SGRO: Judge, why don't we then revisit it in 2015 if that's the concern?  
19 If you're going to agree with me that if the same incumbents are going to win that  
20 are there now that sponsored this bill and that the extreme majority -- this bill passed  
21 38 to 1, by the way, 38 to 1.

22 THE COURT: And all --

23 MR. SGRO: So the level of change --

24 THE COURT: -- and every assemblyperson is up next year, every single one.

25 MR. SGRO: Okay. The level of change --

1 THE COURT: Now, granted -- granted, there hasn't --

2 MR. SGRO: -- would have to be pretty dramatic.

3 THE COURT: -- granted, there's most of the time, most incumbents win, but  
4 we don't know that all of them are going to win. But my point is what this is is  
5 essentially it's speculation on speculation on speculation. It's prediction on  
6 prediction on prediction. I understand exactly what you're saying and you may be  
7 right. From looking at this study, looking at the legislative history, it looks like they're  
8 at least seriously considering abolishing the death penalty. But that's not what  
9 judges do. We don't sit here and say, this is what I think they're going to do in the  
10 future. I took an oath to administer the law as it is today.

11 MR. SGRO: I think --

12 THE COURT: And as we stand here today, the death penalty's on the table  
13 with the aggravators and mitigators that we have. And in fact what you're asking me  
14 to do is because I think the legislature may change the law, you are actually asking  
15 me to violate the law because I think it's going to be different.

16 MR. SGRO: No, I'm not, Your Honor. Staying the case, how does that violate  
17 the law? I'm asking you to stay --

18 THE COURT: Because there's no legal grounds for a stay. The law provides  
19 the grounds that -- on which you can grant a stay. And speculating on what the  
20 legislature might do is not one of them.

21 MR. SGRO: Okay.

22 THE COURT: Unless you can cite me a case that says that, it's not one of  
23 them.

24 MR. SGRO: But we have an affirmative obligation to defend against the  
25 death penalty. Our obligation right now is to make sure we find out what the study

1 says. You may be right, Judge, out of 30 -- 38 out of 39 legislators voted to approve  
2 that bill --

3 THE COURT: No, here's the thing, look, this is what I'm saying, you're  
4 probably right. Most of the legislators -- I'm, you know, obviously, I'm not a political  
5 professional. My guess would be Brian Sandoval's going to be reelected. My guess  
6 would be the vast majority of the legislators are going to be reelected, that's just the  
7 way it works, right? You're probably right in that at least in 2015 they're going to  
8 consider abolishing the death penalty. I don't know if they're going to do anything in  
9 2015 because, you know, every session has relevancy and they have -- you know,  
10 they spend half of it on the must-pass bills, the budgeting and appropriations and all  
11 that kind of stuff. On a death penalty case they may want to take more than one  
12 session, they may want to have working group studies, committees, that's what they  
13 do. So I don't know if it's 2015, 2017.

14 You're probably right in that the -- in fact, you're definitely right in that  
15 the legislature obviously is thinking about this issue, I don't know what they're going  
16 to do with it. Maybe they abolish the death penalty. Maybe it comes up for a vote  
17 and it's a really, really close vote and everybody's weighing in, lobbyists are  
18 everywhere, and then we have no way of knowing where it's going.

19 But I would probably put the odds in the neighborhood of about 50  
20 percent that they might abolish it sometime in the next couple of sessions, not sure  
21 when, but because as I said, I'm, honestly, between you and me, I'm not sure they  
22 can do it in one session because you know everybody's going to jump out there, the  
23 press, you know, everybody with an opinion is going to jump out there. And they're  
24 probably going to at least want to hear from everybody. So I'm going to guess what  
25 they're going to do is during one of the off sessions, they're going to have a million

1 of these neighborhood meetings because that's what they do on controversial bills.

2 But let's even grant for a second that I think you're right that in the -- it's  
3 probably in the neighborhood of 50 percent, that the legislature may abolish the  
4 death penalty some time in the next five years, let's say. Okay, but even if that is  
5 true, I can't just stay things because I think that's what might happen because I can  
6 list you, you know, I know you don't probably do a lot of civil, I can list you at least a  
7 dozen civil laws that I think they need to change and they're probably going to  
8 change. But I can't just not follow the law because I think that's what they're going  
9 to do.

10 MR. SGRO: Right, but the difference is --

11 THE COURT: That's the problem with your whole argument.

12 MR. SGRO: And I do do my fair share of civil, and I always say the same  
13 thing.

14 THE COURT: Okay. I didn't know that. But, yeah.

15 MR. SGRO: I will say this, that's over money and they'll figure that out later.  
16 If we do something here it's going to have a much more permanent consequence  
17 where we're talking about the death penalty, number one. And I will tell you,  
18 Your Honor, I'm old enough, sadly, to have been practiced during the time of  
19 depravity of mind is no longer an aggravator.

20 THE COURT: Right.

21 MR. SGRO: Okay, I'm old enough to remember when felony murder rule was  
22 enough to be an aggravator then the case called *McConnell* came down. And now  
23 we have special verdict forms.

24 THE COURT: Right.

25 MR. SGRO: And the felony that's the underpinning of the felony murder rule



1 can no longer be used as an aggravator to enhance the death penalty. I'm old  
2 enough to remember when we had a three-judge panel when the jury was hung on a  
3 sentence and that three-judge panel was stricken as a violation of Sixth Amendment  
4 right to counsel. Now, here's the thing --

5 THE COURT: Or I'll even throw in, like, last year's Supreme Court case when  
6 they said that a jury has to decide the death penalty. You know, in some states they  
7 have the judge do it and they said you can't do that. But that almost hurts you  
8 because then the argument is, look, stuff changes all the time.

9 MR. SGRO: No, it doesn't, but here's the difference, I'm in front of you as one  
10 lawyer on one case on one client telling you I'm predicting a change. Now, look at  
11 the record in this case, let's do it strictly from outsiders looking in. Do we want a  
12 record in this case where we're coming to you saying, look, we read this bill, as a  
13 result of reading this bill, we're in front of you saying -- and you agree there's a  
14 chance that the death penalty gets abolished, why then, why then, from a policy  
15 standpoint do we continue to want to put the foot on the accelerator to spend money  
16 to accomplish a result which, number one, we know right now, it cannot be carried  
17 out? The death sentence can't be carried out. Assuming, for example, that  
18 Mr. Burns caught lightning in a bottle and was up and down to the Nevada Supreme  
19 Court after getting -- to the U.S. Supreme Court, I'm sorry, he got the death penalty,  
20 he was up and down in two years, for whatever theoretical reason, time for him to  
21 get executed. Yeah, we can't do it.

22 There's 83 people right now, 83, Your Honor, on death row that are just  
23 sitting there. And that is part and parcel of what the study's going to bear out. So  
24 you're going to have a record in this case, Judge, where the defense attorneys came  
25 to you and said, why are we proceeding forward, we don't want a capital jury in our

1 case. We don't want to deal with the bifurcated penalty hearing where death is an  
2 option. We don't want to do any of those things. We want to have a clean  
3 life-without case.

4 Now you're going to say, well, I can't do anything about it. So the  
5 change, as you put it that may be affected is going to be coupled with a precursor of  
6 this record which says we anticipate the change. So in other words, if I'd've been  
7 one of the lawyers that said you can't -- my guy's not more death eligible because of  
8 the felony murder conviction which, by the way, I did have an opportunity to argue  
9 that issue in the Nevada Supreme Court, *McConnell* came down, guess what  
10 happened with the record in that case because the record was made in advance?

11 Again, all we're doing, Your Honor, is we're trying to repeat doing things  
12 twice. I say things oftentimes in different motion hearings in an abundance of  
13 caution, I always ask courts to consider whether or not this is the kind of thing that's  
14 worth doing it twice. Okay.

15 The notion of, you know, what do I tell the victims and all those sorts of  
16 things, seem to be -- even those issues seems to be waning with more victim family  
17 member groups being on the side of we'd rather have the money for something else.  
18 Sometimes the cost of the clean up of a homicide scene exhausts the available  
19 funds that a citizen in our state gets for everything, just to clean up their home. So I  
20 think that is waning. And I think victims, the surviving victim family members would  
21 rather at least only do it once. There is no straight-faced way for anyone to tell the  
22 victims in this case that they're going to get closure after this trial. Impossible.  
23 Impossible because we don't know what the legislature will do.

24 I can tell you what I think the signs are, I think it's pretty telling that they  
25 didn't fund the death chamber and cited this note -- the bill as the reason. But you

1 can't tell me that you can tell a victim's family members, hey, we're going to do this  
2 case, whatever happens happens and it's done.

3           And I know there's always this theoretical conversation that may occur  
4 relative to appeal, this and that. You never know what someone's going to do ten  
5 years down the road, but we're not talking about that. We're talking about action in  
6 our state that's changing the law. And we're here before you before the law is  
7 changed saying, we think the law's going to change a certain way and we are asking  
8 for the benefit of that change. There's all sorts of constitutional provisions for that  
9 starting with the rule of lenity going all the way down to the 14<sup>th</sup> Amendment, equal  
10 protection clause, due process, Article 1, Section 8 of the Nevada Constitution,  
11 et cetera, et cetera.

12           So this isn't some hypothetical. We're saying David Burns has come to  
13 you, Your Honor, because he knows this bill exists and he knows what the  
14 legislative intent appears to be insofar as nothing's moving forward on death cases  
15 between now and 2015. Why then are we going to spend money unnecessarily in  
16 order to jam a square peg in a round hole? Let's get this death penalty case rolling.  
17 And then only to potentially face reversal down the road when -- if this bill changes  
18 anything relative to the imposition of capital punishment.

19           If it changes a single aggravator on David Burns's case, we're going to  
20 be right back here again. If it changes the scheme of how many they get to give in a  
21 year, we're back here again because we're going to argue that in 2013 instead of  
22 the two or three that we're allowed, and I'm just pulling that number out of the air,  
23 that there were 25. Judge Herndon told me on Tuesday I think he had 14 capital  
24 cases pending just in his courtroom.

25           THE COURT: Yeah, I think I have, like, it's like nine or something like that, I

1 don't even remember, but --

2 MR. SGRO: Okay. So, nine, and I know I'm here just on David Burns and the  
3 other eight defendants you have may think this is all a pile of garbage and may not  
4 have any attitude on this. But I'll tell you from my view, if you have nine capital  
5 cases and we wait and see the outcome and things come out my way, what did we  
6 save the State, 10 million, \$12 million? And that money can be going to some other  
7 program that might actually help somebody instead of flushing it down the toilet.  
8 And not only do we waste that 10 or \$12 million -- and I use that because the  
9 average cost from the other states was in excess of a million dollars per death  
10 notice. That doesn't include the cost of appeals, post-conviction relief, et cetera, just  
11 to get the conviction.

12 Okay. So we save 10, \$15 million, that's the worst thing that happens.  
13 And -- and you, Your Honor, have a policy obligation to determine the legislative  
14 intent as a jurist. I'm not asking you to speculate, rewrite the laws, infuse your  
15 opinion as to the rights or wrongs of the death penalty. I'm asking you to consider  
16 the policy of what -- what's the -- what's the message policy-wise of moving forward  
17 on a case like this when we know the risk of reversal, in the Court's opinion, is  
18 50 percent? If 50 percent is the right number for abolition of the death penalty. So  
19 we've got a 50-50 shot we're doing this all over again anyway.

20 In my opinion that number's higher, obviously I'm an advocate. The  
21 Court is not. And reasonable minds can agree to disagree. I'm going to guess the  
22 State's opinion is going to be zero

23 THE COURT: Sure.

24 MR. SGRO: Okay, so maybe --

25 THE COURT: But, whatever. I'm making a prediction because -- which is, as

1 I said at the very beginning, may not be based on anything because I'm assuming a  
2 whole bunch of things.

3 MR. SGRO: Of course.

4 THE COURT: I'm assuming I know who the governor's going to be. I'm  
5 assuming I know who the legislature's going to be, which -- and, you know,  
6 obviously in -- if the elections next year change the composition, then that --  
7 whatever predictions you and I are making -- they don't mean anything anyway. But  
8 they mean a lot less if, for example, some other guy becomes governor next year  
9 let's say.

10 MR. SGRO: Fair enough, Your Honor, but --

11 THE COURT: But the point of this, look, here's the problem, okay, lots of  
12 things are probably going to change in the next couple years, okay. As we sit here  
13 right now same-sex marriage is illegal in Nevada. Now, we know for a fact the State  
14 Senate is moving forward to change that. And it's going to take a couple sessions  
15 because you have to go through two consecutive sessions to change the  
16 Constitution. Probably nationwide, and again, I, you know, I'm not going to say this  
17 is any kind of judicial finding, probably in about, I would say within ten years,  
18 marijuana is just going to be legal nationwide, it -- that's the way things are looking, I  
19 could be wrong.

20 But that doesn't mean I sit here now and say, well, I'm just going to go  
21 ahead and just do a bunch of same-sex marriages in Nevada because I think it's  
22 going to be legal next year, I'm going to dismiss every marijuana case because I  
23 think it's going to be legal in ten years. We don't do that -- that's not -- my -- my job  
24 is --

25 MR. SGRO: No --

1 THE COURT: -- to enforce the law as it is and follow the law as it is and the  
2 legislature can do what the legislature does. And if they do change all these things,  
3 same-sex marriage, marijuana, the death penalty, I'm very happy to follow what they  
4 do. But to sit here and say that, well, I think I know where things are going; and  
5 therefore, I'm just going to jump ahead of them, that's really not -- it's not what courts  
6 do.

7 MR. SGRO: And understand, the remedy we seek is very, very specific. The  
8 remedy we seek is one of two options. If this is a non-capital case, we're ready to  
9 go, right? I want -- I want to make sure, I'm not asking the Court to unwind anything.  
10 If this is a non-capital case, everyone's ready to go. If this is a capital -- if this is  
11 going to continue to be a capital case, then -- then these issues become relevant,  
12 and all I'm asking is for a stay. I'm not asking you to violate anything. I'm not asking  
13 you to impose your judgment anywhere other than --

14 THE COURT: Well, here's the problem with the stay even just as a legal  
15 principle, what you're kind of asking for, because we don't know, first of all, we don't  
16 know what the legislature's going to do, and we certainly don't know when they're  
17 going to do it. It's kind of an open-ended stay that could last a decade. And in the  
18 law you just don't do that. Stays usually are for a very specific purpose, stayed until  
19 this transaction is complete. Stayed until -- I'm trying to think of all the different  
20 stays I've issued -- stayed until, you know, stay this foreclosure until we can have a  
21 hearing on the merits 30 days from now.

22 MR. SGRO: I don't --

23 THE COURT: You're asking for an open-ended stay --

24 MR. SGRO: I'm not, Your Honor.

25 THE COURT: -- so that we can see what is being done by some body that

1 I've no control over, that again has not even been elected. So, it's kind of an  
2 open-ended, indefinite, we'll just wait and see when the legislature gets around to it,  
3 it maybe next year, it may be 50 years from now.

4 MR. SGRO: I think we'll know --

5 THE COURT: That's kind of what you're saying.

6 MR. SGRO: No, I'm not, I'm not.

7 THE COURT: And so my point is, I'm not -- my point is just as a principle of  
8 law, just, you know, stays -- there's a body of law that attaches to what -- what kind  
9 of stays you give, the scope of them, the duration of them, and this doesn't really  
10 even follow the law of what you're asking for. You know, forget about -- let's even  
11 forget about the question of whether you're right that the legislature's going to do  
12 something. Under the law as it applies to what a stay is and when you issue it and  
13 the grounds, the findings I have to make, this doesn't even comply because you're  
14 asking for a stay that has no timetable, that has no expiration date.

15 MR. SGRO: I want to make it clear, the whole point of this is is for the  
16 determination relative to what occurs in 2015. I think we will know a lot in 2015.  
17 We'll know from committee meetings, from additional modifications potentially made  
18 to this bill, I think -- or we'll have no bill any more.

19 Okay. Listen, Your Honor, all of us in the room have tried a lot of death  
20 penalty cases, okay, so I'm suggesting to the Court this is an anomaly. This isn't,  
21 you know, I've been -- I'm not coming to you after seven years of prolonged litigation  
22 saying, Judge, I just can't get ready for this trial. That's not this case. This case is  
23 about attorneys that do capital litigation often and regularly and Mr. Oram and I  
24 collectively have done, I think about as much as anyone else in the defense  
25 community has. This is a new day. And what -- all I'm asking the Court to do is at

1 least -- what's the harm in waiting 'til 2015? What would be the harm?

2 THE COURT: Witnesses dying, police officers leaving the state.

3 MR. SGRO: Okay, so let's -- let's balance that, Your Honor, against the harm  
4 of a real fiscal impact analysis here and the price of reversal. The price of reversal  
5 has got to be something you weigh that against. This case, I'm unaware of any  
6 witness issues. I'm unaware of anyone with plans to leave anytime soon.  
7 Obviously, the passing of somebody can never be predicted. But we run that risk on  
8 a case that's in the arraignment on the first floor right now that's starting the  
9 arraignment process today. We run the case -- we run the risk of that. Those risks  
10 are risks we run in every single case. And the State seems to figure out a way to  
11 still prosecute these cases every day.

12 And what I'm suggesting is that level of harm seems to be incidental to  
13 the level harm of getting those same witnesses through the same case twice.  
14 Again, those same witnesses and victim family members through this same ordeal  
15 twice of spending millions of dollars unnecessarily, and I'm talking about just this  
16 case, times it by nine, the cases you have; times it by 14, the cases that  
17 Judge Herndon has, and this matter's also pending in front of Judge Walsh. She  
18 has two just from me in that department.

19 The balance -- the balance of what the legislature's trying to do here to  
20 determine if money can be appropriated in a different -- do we need more judges in  
21 Clark County? Would that -- what would help administer justice better in our  
22 criminal justice system? More judges? Clerks? Bailiffs, et cetera, or -- so we can  
23 move cases quicker? Or more death penalty convictions which all we're going to do  
24 is line more people up in Ely State Prison with no where to go. Is it going to be a  
25 more effective use of the funds to provide funding for mental health programs that



1 have been slashed by as much as 80 percent in the last four years? So maybe we  
2 can get someone with a mental health problem to not commit a capital offense. Or  
3 should we continue to use those funds to do what we're doing now?

4 And I'm telling you, Judge, these -- these numbers from these other  
5 states, we're not talking about a couple hundred thousand dollars, which I know is a  
6 lot of money in a vacuum, but when it comes to capital litigation it's just not.  
7 New York projected \$200 million over the next, it was either 15 or 20 years, to keep  
8 the death penalty just on the books. They thought it was going to take 500 million  
9 by the time they executed two people. They came out to \$200 million per execution.  
10 Can you imagine what they could -- they had a D.A., the District Attorney of  
11 Schenectady County testified in front of the New York Legislature that the D.A.  
12 thought it would be better if the money was spent somewhere else.

13 You know, times change, Your Honor. We're at a point now where  
14 we're on the brink of revisiting seriously the imposition of capital punishment. And it  
15 took the State of Nevada getting broke, we're spoken of nationally, there are articles  
16 I submitted in our brief, NBC, *Wall Street Journal*, we're spoken of nationally as  
17 having a dilapidated economy. We're spoken of nationally on how bad we were hit  
18 in the end of 2007 when the credit market collapsed and where we're at still today,  
19 we're five years down the road and the business section headline today talks about  
20 how many foreclosures we're going to have in the next six weeks.

21 When I tried to hire people in 2006 and 2007, I'd have to wait six  
22 months before I could find someone to fit a job. I put an ad in for a receptionist  
23 today or a week ago, we have 300 resumes. We are in a different day today. And  
24 the Nevada economy cannot support the continued expenditure of these moneys.  
25 I'm getting paid by the hour to try to convince you to kick me off this case.

1           This is something -- I'd rather see my kids have music -- my kids now  
2 have a choice of Spanish, French, or Japanese. Italian's cut out of the curriculum.  
3 I'm a musician. My kids don't have music school any more. They were able to take  
4 lessons all the way through eighth grade. These are real-life things that we all as  
5 citizens have to go through. We all have kids, we're all facing the consequence of  
6 the cuts that are being made to pursue a penalty that we cannot enforce, it doesn't  
7 make any sense.

8           So I think the Court gets where I'm coming from. The only thing -- I  
9 want -- I want to just make the PowerPoint presentation a court exhibit, the  
10 supplemental brief as a court exhibit. Obviously, I'm going to accept whatever ruling  
11 the Court gives and this matter is pending in other departments and at some point  
12 it'll go up, so I want to make sure the record --

13         THE COURT: Right.

14         MR. SGRO: -- is perfected. So if the Court will make the PowerPoint  
15 presentation --

16         THE COURT: Sure, I'd be happy to.

17         MR. SGRO: -- I'd appreciate it.

18         THE COURT: Want to just mark this as a court exhibit then? We'll call it A, I  
19 guess.

20         THE CLERK: Okay.

21         MR. SGRO: So basically, Your Honor, unless the Court has any specific  
22 inquiry, our position very specifically is this, Assembly Bill 444 was passed in May of  
23 2013. Prior -- just a day, literally, one day prior, it was passed on May 23, 2013, one  
24 day prior on May 22, 2013, requests were made of the legislature to fund the death  
25 chamber insofar as it was not constitutionally effective for carrying out the sentence

1 of death. That funding for that death chamber was denied. The funding was denied  
2 based on the fact that we are entering into this audit process where, at least in our  
3 view, the legislators are predicting a change in the death penalty, that change will  
4 range anywhere from abolition of the death penalty to a significant monitoring of the  
5 death penalty. The legislative history of this bill speaks of financial cuts that the  
6 State of Nevada has had to make and whether or not the moneys appropriated  
7 currently for the pursuit of capital punishment justify the pursuit of capital  
8 punishment insofar as there could be no remedy at the end of the case.

9           The specific request being made then is consistent with the legislative  
10 intent. We are asking this Court to interpret what we see ambiguous statute  
11 because it does say whether we can or cannot proceed with capital litigation. We  
12 are asking the Court to interpret what we deem as an ambiguous statute to suggest  
13 that this case, the State of Nevada versus David Burns, should be stayed pending  
14 the outcome of the legislative session in 2015.

15           We are not asking for a decade-long stay at this time. We're asking  
16 only to go to 2015 where we will be much more educated and have much more  
17 knowledge than we have now, all this being done so as to avoid to have to do this  
18 same exact case twice. The Court has seen the litigation in this case and I know I  
19 set aside I think either five or six weeks for the trial in this case. It's been difficult --  
20 and parenthetically, Your Honor, some discovery issues came up within the last two  
21 days which may now affect the trial date even that we have, even after the rigorous  
22 road we've taken to get to the trial date we have now.

23           THE COURT: Even after the, like, two-hour hearing we had on the  
24 discovery? Is this some brand-new thing?

25           MR. SGRO: It is, Your Honor.

1 THE COURT: But, I don't know, okay.

2 MR. SGRO: It is, Your Honor.

3 THE COURT: I don't know what it is so I'm assuming there's a motion out  
4 there that's coming up, but I don't know.

5 MR. SGRO: As I indicated earlier, Mr. DiGiacomo, actually, Ms. Weckerly,  
6 Mr. DiGiacomo, and I were all in court together on Tuesday and my understanding is  
7 that there has been a recent production in the last couple days. But we will get  
8 there when we get there.

9 THE COURT: Right. Okay.

10 MR. SGRO: My only point is this, it's hard enough to get -- I would guess that  
11 between Ms. Weckerly, Mr. DiGiacomo, they've got murder trials stacked from here  
12 through the next 18 months, it's difficult to get all the parties in the same room,  
13 particularly in a multi-defendant case, to do it once. I don't see any policy reason to  
14 try and jam this down everyone's throats when we know the likelihood is we're going  
15 to do it twice. And I'll submit it, Your Honor.

16 THE COURT: All right, State, anything to add?

17 MS. WECKERLY: Just briefly, Your Honor. This is the third time I've heard  
18 this motion in the last month, it was denied by --

19 THE COURT: Well, apparently you're going to hear it again at least one more  
20 time.

21 MS. WECKERLY: Yeah. It was denied by Judge Cadish, and it was denied  
22 by Judge Herndon. This Court's already touched upon the -- the defects in a motion  
23 such as this. The defense is essentially asking you to put language in a statute that  
24 just isn't there. All the bill is is to do an audit on the cost of the death penalty. And  
25 regardless of, you know, whatever that outcome is, respectfully, this Court is not the

1 legislature. This Court doesn't get to supersede Nevada voters or their  
2 representatives and abolish the death penalty. There's no legal mechanism for a  
3 single trial court to do that.

4 And because of those reasons, as the Court's discussed at length with  
5 Mr. Sgro, there's simply no proper legal basis to grant this motion or issue a stay in  
6 this case.

7 THE COURT: All right, here's the thing, Mr. Sgro, nothing you've said here is  
8 wrong. I've read the same studies that you have, I've, you know, seen what  
9 happens in other states, and, you know, I agree with you when the study comes  
10 back, it's probably going to say the death penalty costs, I don't know what the dollar  
11 figures are, but substantially more than any other type of murder prosecution. I  
12 mean, that's just what the reality is.

13 But having said that, that doesn't necessarily mean we know what the  
14 legislature's going to do. You know, even if it comes -- it's probably more likely than  
15 not, in fact, almost to a certainty it's going to come, the study's going to come back  
16 and say the death penalty's more expensive. The question is, is it so much more  
17 expensive that it outweighs any possible benefit that we as a community get from  
18 the death penalty, that's -- that's what we don't know. You know, if it's only ten  
19 percent more expensive than a typical murder case, the legislature may well just  
20 say, well, considering what we get from it, maybe ten percent is not that big a deal.  
21 If it comes back as 10,000 percent more expensive than a typical murder case, then  
22 maybe the legislature is at least more likely to say, yeah, that's not worth what we  
23 get from it, we're going to abolish it, but we don't know that.

24 But let's even say that it does come back and say that it's significantly  
25 more expensive, which based on studies from other states that I've seen and that

1 you've showed me, it probably is going to. I mean, that's just what it is. We all  
2 know, you've got -- like you said, there's two of you here as opposed to one of you,  
3 there's the mandatory appeals, there's all this kind of stuff that you guys get that --  
4 and you bill by the hour for it that the State's got to pay for, and that's just what it is.

5 I know this actually came up a couple years ago during the -- when  
6 Steve Wolfson was appointed as the D.A. there was some discussion in the press in  
7 front of the County Commission about the number of death penalty cases. So more  
8 likely than not you're right that it's going to come back as more expensive. And as I  
9 said, in my personal opinion not as a judicial finding because I don't have any  
10 evidentiary basis for it, just from what I've seen and heard and read in the papers  
11 and I have friends in the legislature, they're seriously thinking about it, so that's why  
12 I say there's probably about a 50 percent chance that some time in the next, maybe  
13 not the next session, but maybe the next session after that, they may just say, okay,  
14 we're either going to get rid of it or narrow it to, like you said, just these, you know,  
15 narrow the mitigators, aggravators so that only -- so that we have fewer death  
16 penalty cases. They -- I would put that 50 percent maybe even higher than that.  
17 But again, I don't -- that's just from what I hear in the community and it's anecdotal. I  
18 don't know every legislator, I haven't polled them, it's just conversations.

19 So that may be where things are going. But the problem is, you know, I  
20 know what you're asking for, and as I said, I don't know that you're wrong. You may  
21 be absolutely right that in five years from now we're sitting here and there is no  
22 death penalty any more. But, you know, people ask me all the time, more often in  
23 civil cases than in criminal cases, to make policy rulings. And, you know, that's not  
24 really what I'm elected to do. I kind of listed -- there's the med mal statute out there  
25 which three of my colleagues have declared unconstitutional. That needs to be

1 rewritten or abolished. I don't know if you do med mal, but you probably know what  
2 statute I'm talking about. It's a ridiculous statute.

3           There's all kinds of statutes that I think are just -- just -- they're -- they  
4 need to be changed, they're probably going to be changed, but unfortunately, until  
5 they -- the legislature changes them, it's the law as it is and my oath is to apply the  
6 law as it is. And I can't just, you know, to you, this -- I don't want to -- I absolutely  
7 don't want to say this in a way that denigrates the importance of this case, this is a  
8 death penalty case, it's the most serious case there is, what I'm trying to say -- and  
9 so I'm not saying that the other examples are comparable to this. A med mal case is  
10 not a death penalty case. A foreclosure case is not a death penalty case.

11           My point is, there's a million laws that need to be changed. There's a  
12 million laws that probably are going to be changed. But until the legislature gets  
13 around to changing them, and that's one of the problems with biennial legislature,  
14 they only have so much time to changes things. So revising old laws is a very, very  
15 low priority every session. It's just the way it is. But I can't just sit here on all those  
16 cases and say, yeah, I think this is going to be changed so I'm not going to follow it  
17 any more. I'm not going to, you know, I can't sit here and say, I think this is going to  
18 be changed so I'm going to stay every single case. I mean, I'd love to, that would  
19 make my job a lot easier. But you can't just do that.

20           And I understand that death penalty cases are in a whole different  
21 class. We're talking about somebody's life and I'm not trying to demean that or  
22 denigrate that in any way. I absolutely am not. So I understand exactly what you're  
23 asking for. I understand, you know, why you're trying to do this, and you may be  
24 right. Maybe the legislature does what it does, and in a couple years the Supreme  
25 Court comes back and says, yeah, you need to -- and this whole five-week trial is a

1 complete waste of time and more taxpayer money. You may be absolutely right  
2 about that, I don't know.

3 But, you know, all I have here is I have a legal motion, I have to look at  
4 it on legal grounds. And as I indicated, you know, there's certain criteria that apply  
5 to a request for a stay. And, you know, unfortunately, although I do understand why  
6 you're asking for it, and as I said, you may be absolutely right, but one of the criteria  
7 in asking for a stay is not do I think the legislature's going to change the law, I mean,  
8 that's just not even a thing that's exists in even a single case I know of. You know, I  
9 get requests for preliminary injunctions, T.R.O.s, all the time, probably ten a week.  
10 And I, you know, I -- I -- there's a whole list of factors and, like I said, one of them is  
11 not do I think this law is going to be changed.

12 So I'm not sure I have legal grounds to even grant your stay even if, as  
13 a matter of sort of policy, I were inclined to do so. So, based on the law as it is  
14 today, I'm denying your motion for a stay. You know, it seems like it could be just --  
15 could be open-ended. You know, the problem -- I know you're always asking for it  
16 for 2015, let's get past the merits of it, but in terms of the scope and duration there's  
17 a whole body of law on that. You're asking for 2015, but let's say in 2015 the  
18 legislature is -- gets this study and says, okay, this is good information, now let's  
19 seriously consider abolishing it, but we're going to do it in 2017, then you're going to  
20 be back here saying, well, let's extend it to 2017. That's what I mean why -- by  
21 saying that it seems like kind of what you're asking for is this kind of open-ended  
22 stay until the legislature does something which could be next year, it could be ten  
23 years from now. And that's not even, you know, that's actually, under the case law,  
24 a grounds to deny a stay if it's going to be an open-ended thing with a million  
25 continuances.



1 I mean, you've probably, if you do civil law, you know the cases I'm  
2 talking about as well as I do.

3 MR. SGRO: Right. And the only -- the only point on that, Your Honor, is that I  
4 believe that the policy then would be affected, we would essentially then put into  
5 play the very policy that we think exists because what would happen is if the State  
6 insisted on proceeding on certain cases as a capital prosecution, if a stay gets  
7 granted, what's going to happen is they're going to go have meetings, and you're  
8 going to find out which cases they actually really believe are the worst of the worst,  
9 and de facto, we're going to save a ton of money just because they're going to  
10 proceed on some cases as non-capital cases, they're going to go and revisit and  
11 they're going to ask themselves, do we really care if this particular defendant gets  
12 life without versus being on death row where that person may not ever be executed.  
13 And I understand that there may be some political reasons, some optics that may be  
14 in play that I have no idea what happens over there when they make those  
15 decisions.

16 THE COURT: Right.

17 MR. SGRO: But I will tell you, if -- if a stay is obtained, you're going to see  
18 these cases move forward any way. I would guess a lot of 'em are going to move  
19 forward just as non-capital litigation. This is -- that's my opinion.

20 THE COURT: Right. Well, I mean, you may be right, but the problem is that's  
21 a maybe. We -- we just don't know what the legislature's going to do in 2015, how  
22 far they're going to get in 2015. So in any event, I guess what I'm trying to do is I'm  
23 trying to make this decision very narrow. I know you're asking me to make a broad  
24 policy decision, but in my view that this is the wrong branch of government to go to,  
25 people ask me that all the time, and that's my standard response is, Look, if you

1 don't like something to talk to the legislature, except on a question of common law,  
2 you know, tort law, that's common law, I look to the law of other states, I can do  
3 what I think is fair, that's what common law is. But this isn't common law, this is a  
4 statute.

5           And my standard response to every lawyer, and you'd be shocked how  
6 many people want me to just rewrite laws because they think it's wrong, look, go talk  
7 to the legislature. And so, so I'm making this decision very narrow, which is just on  
8 the legal grounds for a stay, again, you may be right, maybe in 2015 we have more  
9 clarity, but you may be wrong is the problem, right? We are talking about, and I  
10 don't want to say this in a way that's cynical and denigrates a lot of people in the  
11 legislature, some of whom are my friends, but we're talking about politicians.  
12 They're not exactly known for being speedy, okay, we all know that, right? I mean,  
13 the -- the U.S. Congress, just as an example to get it out of Nevada and talking  
14 about the specific legislature, they've been talking about fixing social security since I  
15 was born and it's still not fixed, we're still facing, whatever, bankruptcy in 20 years.

16           And, you know, and -- I mean, you know what I'm talking about,  
17 there's -- there's -- there's things that they debate in Congress every year that  
18 they've been debating since -- since we were kids, and they still haven't fixed them.  
19 And I know the U.S. Congress is not the legislature. But the reality is you can't put --  
20 make time predictions about the -- what the legislature may or may not do. And so  
21 as -- in the narrow legal grounds of your request for a stay, first of all, there's no real  
22 legal basis for it because you're asking for a stay on policy grounds. And secondly,  
23 as a matter of law, what you're asking for is a stay that may well be open-ended just  
24 kind of indefinite, and, again, you know, in the civil world there's a whole body of  
25 case law on stays, and that's actually a ground not to stay if the stay's going to be

1 an indefinite stay there's a bunch of cases that say you don't grant that stay because  
2 then that's just basically terminating the case.

3 So on narrow legal grounds getting away from whether you're right or  
4 wrong on policy grounds, and I've kind of expressed where, you know, I think you  
5 may be right, but that's not even within the realm of consideration, just on legal  
6 grounds, looking at the elements of what's required to stay a case like this, you  
7 haven't met them. And so your request for a stay is denied. But, you know, you're  
8 right -- you may be right, maybe we're back here in two years, we do this trial, we're  
9 back here in two years and I'm, you know, changing the whole penalty, we're doing  
10 another trial. But if that's what the legislature does, that's what they do. But I can't,  
11 you know, sit here and predict.

12 I don't, you know, I understand why you brought the motion, you know,  
13 as I hope you can tell, I gave it some pretty serious thought, I read the whole binder,  
14 it took me days, but -- because it's an important issue, but it's, you know, a lot of  
15 what you're asking for is not within -- you're in the wrong branch of government for it  
16 in my view. But, you know, if you want to appeal this and take it up to the  
17 Supreme Court and take a shot there, you're welcome to, that's totally up to you. I  
18 don't take anything like that personally.

19 But, so you mentioned a second ago, just to cover this, I don't know if  
20 you guys are ready to do anything about this, he mentioned some kind of discovery  
21 issue, is that something that you guys are working on? Or is that something you  
22 actually think may come up again quickly?

23 MS. BURKE: Your Honor --

24 MR. DiGIACOMO: I don't know if it's going to come up or not. When I went  
25 back to my office, Ms. Burke repeatedly sent e-mails saying, Look, we can't find

1 these -- these medical records, so I redropped the medical records for Devonian. I  
2 don't know how that could possibly continue the trial. She was shot in the stomach,  
3 it took a long time for her to get better. I redropped all those and made disks for all  
4 the defense attorneys in the case.

5 We also received, because Ms. Burke said in court, Hey, I don't know  
6 anything about my client being a gang member, we contacted the hard-core gang  
7 unit in San Bernardino saying, Hey, you have anything about Mr. Mason --

8 THE COURT: Because that did come up during the last -- there was some  
9 discussion about that.

10 MR. DiGIACOMO: Right.

11 THE COURT: Right, okay.

12 MR. DiGIACOMO: And I said we would contact them, we have contacted  
13 them about both Mr. Burns and Mr. Mason, we got a PDF with a couple of reports  
14 from the San Bernardino Police Department related to Mr. Mason and I e-mailed  
15 those immediately on over to Ms. Burke, but nothing related to any guilt phase issue  
16 that -- that I could think of. So, that's I think what Mr. Sgro's talking about unless  
17 there's some other discovery I don't know about, but --

18 THE COURT: Was that what you're talking about or was there something  
19 different? I mean, obviously, look, I don't --

20 MS. BURKE: And, Your Honor --

21 THE COURT: Sorry.

22 MS. BURKE: -- the medical records apparently were not sent to anyone  
23 before and there are 3,619 pages. And she was in the hospital for almost three  
24 months.

25 THE COURT: This is for which victim? The deceased or for one of the kids?

1 This is --

2 MS. BURKE: Pardon?

3 THE COURT: Whose --

4 MR. DiGIACOMO: The 12-year-old that was shot in the stomach. I mean, I --

5 THE COURT: The 12-year-old, okay. Gotcha. She -- she survived, right, as  
6 I -- I don't remember the name --

7 MR. DiGIACOMO: She survived, she's gonna testify.

8 THE COURT: Okay.

9 MR. DiGIACOMO: They're -- I can't imagine the fact that you -- other than  
10 page one that says she was shot in the stomach, what else is in those medical  
11 records that are -- that are relevant. I mean, I'd ask not to address that issue without  
12 a motion for them to continue in which they actually elicit --

13 THE COURT: No, I'm not addressing it because I'm not -- I don't have the  
14 motion. I was just curious.

15 MR. DiGIACOMO: -- what -- what prejudice could possibly be here.

16 THE COURT: Since you threw it out there, I was curious what you were  
17 talking about, but --

18 MR. SGRO: Here's what happened, Your Honor, we were in court -- we had  
19 a long day Tuesday because aside from this motion, there are many legal issues,  
20 and we ended up staying in court 'til past 5:00, we got there at 10:30. Somewhere  
21 during the course of the day, I don't even remember what time it was, frankly,  
22 Mr. DiGiacomo comes up to me and he says, Listen, I may have said something to  
23 the Court that wasn't accurate relative to these medical records, okay. And  
24 obviously we're focused on that case. So in passing he says I -- I don't -- I didn't  
25 produce them or words to that effect.

1 MR. DiGIACOMO: Well, actually, I didn't say that, what I said is I can't find  
2 electronically where the -- where the file is saved on my computer, so I don't know if  
3 I produced them or not, so I'm going to reproduce them to all of you.

4 THE COURT: Okay.

5 MR. SGRO: Right, so he says that to me and then he says, And also the file  
6 that Ms. Burke -- or the information relevant to the gang stuff that Ms. Burke had  
7 been seeking, I'm also sending over today.

8 THE COURT: Okay.

9 MR. SGRO: So, it was a comment, we were clearly on another case, he -- he  
10 says these things to me and then, you know, I haven't obviously -- I got ready for  
11 today's hearing. I haven't gone through the 3600 pages. But as you know,  
12 Your Honor, from doing the civil things, the medical records bear out a lot more than  
13 just the nature of the injury, there's going to be conversations about the event  
14 potentially in there.

15 THE COURT: Right.

16 MR. SGRO: Et cetera, et cetera, so it's --

17 THE COURT: I can see theoretically how it could be, you know, maybe chain  
18 of custody on the bullet. I don't -- I'm just throwing -- I don't know if that's an issue or  
19 not, but --

20 MR. SGRO: Well, I think a lot --

21 THE COURT: -- right, conceivably.

22 MR. SGRO: -- a lot's going to be born out in terms of her conversations with  
23 her health care provider which are exceptions to the hearsay rule, et cetera.

24 THE COURT: Right.

25 MR. SGRO: So this wouldn't be the first time we learned information relevant

1 to the case by examining medical records that had nothing to do with the treatment  
2 but had everything to do with statements. So it is somewhat overbroad to suggest  
3 all we have to look is page one to see that she was shot.

4 THE COURT: No, I understand. I'm not -- I'm not making a ruling. I was just  
5 curious --

6 MR. SGRO: Okay.

7 THE COURT: -- where this was going because I don't technically have a  
8 motion in front of me.

9 MR. SGRO: You don't --

10 THE COURT: But I just wanted to get a sense of what the issue was. But,  
11 okay.

12 MR. SGRO: I'd like the op --

13 THE COURT: I mean, I can -- no, I understand what you're saying, like,  
14 maybe she's maybe she said, Oh, it was some other dude who shot me, well, that's  
15 pretty important for you to know, right? But, okay.

16 MR. SGRO: We have an obligation to comb through the 4,000 pages.

17 THE COURT: Right.

18 MR. SGRO: And I will tell you, I haven't even begun because I've been  
19 getting ready -- we did the Herndon thing on Tuesday and then yesterday I tweaked  
20 the presentation a little bit. We haven't even started getting into the 4,000 pages.  
21 I'd ask the Court to give us enough time to at least flip through it to get an idea of  
22 what's in there and present a motion, if you'd give us a week or two to get something  
23 in front of you.

24 THE COURT: Yeah, that's fine. I mean, in the criminal world it only takes you  
25 about 48 hours to get something on calendar in here.

1 MR. SGRO: Okay.

2 THE COURT: So, you know, if you need to file a motion you can certainly,  
3 obviously you're welcome to file a motion so I can at least know what's going on.

4 MR. SGRO: And also to be completely transparent, Your Honor, I spoke to  
5 Mr. DiGiacomo about this as well, we've all dealt with writs before, sometimes a writ  
6 takes a day, sometimes a writ takes months and months.

7 THE COURT: Right.

8 MR. SGRO: So to be completely transparent I've also invited the State to  
9 consider whether or not they want to ramp up and get everybody ready because as  
10 soon as the argument is finished with -- in Judge Walsh's department and she has  
11 two of our defendants, so she'll hear it once, I don't know what I'm going to do for  
12 the second defendant to perfect that individual's record. But I doubt she's going to  
13 want to hear the same exact thing twice on something she's just heard. With that  
14 having been said, there is a plan to take the matter up and get some guidance from  
15 the Nevada Supreme Court just so we know whether or not we're moving forward.  
16 So, again, in the spirit of being transparent --

17 THE COURT: Right.

18 MR. SGRO: -- I want to put that out there. I can't -- I don't know if I can or I  
19 can't, but my intention was to conclude the arguments in the trial court level and  
20 then determine the best mechanism by which to consolidate the matters so that we  
21 don't have to file 'em in each of the different departments. So, with --

22 THE COURT: I don't -- well, that might be -- just from my knowledge of the  
23 Supreme Court rules, I don't know that you can file a consolidated writ or appeal off  
24 of three cases that aren't actually consolidated, but the Supreme Court can certainly  
25 consolidate them up there, they do that all the time when they have appeals on



1 different cases on the same legal issue.

2 MR. SGRO: And we're --

3 THE COURT: But I don't know that you can -- I don't know that you can do  
4 that here. I can't consolidate my case, for example, with Doug Herndon's case  
5 when they're not factually --

6 MR. SGRO: No, just on the issue.

7 THE COURT: Right.

8 MR. SGRO: Just on the issue. And I understand, these are --

9 THE COURT: There's a way to do that, but I think it's done up at the  
10 Supreme Court, it's not done here, yeah.

11 MR. SGRO: And that may well be, the point of the matter is, I want to make  
12 sure everyone knows that we're currently planning to take this up on a writ, but I  
13 can't do it today. My thought was to conclude the arguments at the trial court level,  
14 there's not going to be a timeliness issue because we'll be within the sufficient time.  
15 But it will hit days before our currently schedule trial date. It's just the mechanics of  
16 the timing of how these things have all been laid out in terms of getting 'em on  
17 calendar, getting people here, parties have conflicts, et cetera. So --

18 THE COURT: Okay. Well, I mean, you, you know, obviously you're welcome  
19 to do whatever you want to do, that's your, you know, you do your job as an  
20 attorney --

21 MR. SGRO: Just for scheduling purposes.

22 THE COURT: Right.

23 MR. SGRO: I don't want any surprises.

24 THE COURT: Right. And -- right. And obviously, you know, I -- the Supreme  
25 Court's going to do what they're going to do, I don't know if they're going to issue a

1 stay or not, that's up to them. But just to be, not to be nit-picky, strictly speaking,  
2 you couldn't do a writ today anyway because there's no order entered. You can't do  
3 it until the order's been entered, which probably will take a couple days anyway.  
4 But -- but I appreciate your letting me know that that's a possibility, and if the  
5 Supreme Court jumps in and says, okay, freeze this trial, then they do that, they do  
6 that every now and then, I, you know, have no control over that. So, but I appreciate  
7 your giving me the heads up.

8 MS. BURKE: And --

9 MR. SGRO: And I would, just for purposes of the record, ask for a stay today  
10 pending the filing of the writ.

11 THE COURT: Well, strictly speaking, I have to deny that because you haven't  
12 even shown me what the writ is. You're supposed to at least make some  
13 presentation to me of what the grounds are and dah, dah, dah. So strictly speak --  
14 so what I'm going to do on your verbal request is deny it without prejudice until you  
15 actually file the proper paperwork requesting a stay, all right?

16 MR. SGRO: Fair enough, Your Honor. Thank you.

17 MS. BURKE: And, Your Honor, the -- the 16<sup>th</sup> is Monday, I think.

18 THE COURT: Yes, it is.

19 MS. BURKE: Which is the 21<sup>st</sup> day, now on the -- the hearing on the 28<sup>th</sup> of  
20 July there was a bunch of language about 14 days --

21 THE COURT: Well, it couldn't be, the 28<sup>th</sup> of July was a Sunday. But I  
22 don't -- which hearing are you talking about?

23 MS. BURKE: Okay.

24 THE COURT: Are you talking about the discovery motion?

25 MS. BURKE: Well, the 21<sup>st</sup> day before trial is the 16<sup>th</sup>.

1 THE COURT: Okay.

2 MS. BURKE: And that's ordinarily when everything would have to, I mean,  
3 the expert info and everything else, I read when I was reading through the transcript  
4 from July, I read that they were talking about 14 days. I don't -- I just wanted to get  
5 that clear as to whether -- what -- what the situation was --

6 THE COURT: For what? What are you talking about, 14 days for what?  
7 What were you talking about?

8 MS. BURKE: To get expert information in and other stuff that would ordinarily  
9 be timed by the 21-day.

10 MR. DiGIACOMO: I don't recall that conversation, Your Honor, at all. I mean,  
11 I assume the statute applies.

12 THE COURT: No, I do. Actually, during the motion, hang on, because during  
13 that whole argument there were a couple of deadlines that I adjusted based upon  
14 some discussion, that I do specifically remember. I just -- I don't have the order in  
15 front of me, so I don't remember what I did. I do remember giving somebody more  
16 time on something and somebody a couple days less time because there was some  
17 specific reason. Do you remember this? There was a specific discussion about can  
18 we do this on such-and-such day instead, and I said, yeah, and so there was one  
19 date that I did change, but I don't -- I just don't remember what it is.

20 MS. BURKE: It came up about --

21 THE COURT: Because I, you know, I didn't have time to look at it.

22 MS. BURKE: -- it came up about three times, I think it was -- and it was 14  
23 days every time. And obviously, with this whole -- I do intend to file a motion to  
24 continue. I hope I will try to get it in tomorrow and -- and see what's up. But, for  
25 example, this girl was in the hospital for almost three months and most of that was

1 due to the fact that she got an infection. Now, whether that infection was due to the  
2 actions of whoever shot her or somebody at the hospital goes to -- to things as well.  
3 So I mean, these records are --

4 THE COURT: Goes to what? To substantial bodily harm? I'm -- goes to  
5 what?

6 MS. BURKE: Well, it goes -- goes to what the jury might think.

7 THE COURT: Okay, well. I'm not sure you're asking me to do anything, but I,  
8 now that you mention it, I do remember, maybe you should go back and look, there  
9 was a -- there was at least one deadline that I do specifically remember after that  
10 discussion, I did change a deadline to -- I don't remember why, I just remember it  
11 happening. You might want to look at the order.

12 MR. DiGIACOMO: The only thing I can think of is that there was a big  
13 argument over reciprocal discovery, and I believe instead of 21 days it may be the  
14 14 days we're talking about is the defense has to provide us the underlying data of  
15 their expert including their mitigation experts 14 days before trial.

16 THE COURT: Yeah, I think it was something like that. I just don't remember.

17 MR. DiGIACOMO: As it relates to the guilt phase, I don't believe you changed  
18 anything, but as it related to the penalty phase, I think you gave them an extra week  
19 but the -- at that point there -- they had to provide us the information that they  
20 normally object to providing us, that was the one date I recall being changed.

21 THE COURT: Do you recall, Mr. Sgro? I recall doing it, I just don't remember  
22 what it was that I did.

23 MR. SGRO: You know what, Your Honor, I -- I don't. And here's -- here's --  
24 the thing is we have many cases in common. And so I can't remember --

25 THE COURT: Yeah.

1 MR. SGRO: -- if we've yet fought about the -- because the mitigation issue is  
2 something near and dear to me.

3 THE COURT: Right.

4 MR. SGRO: As Mr. DiGiacomo well knows, and so we've had this fight  
5 numerous times, and I frankly can't remember if we did it here. So I'd like to  
6 check --

7 THE COURT: I did. There was -- there was a deadline that I think I gave you  
8 more time on, and I think I gave them more time on one. It was like two different  
9 things. Now that I'm -- it's sort of slowly back to me, there's no -- to make it more -  
10 there was some discussion, you guys didn't have any objection to that, so there  
11 were some manipulation of the deadlines. I just don't remember what it is. But in  
12 any event, I mean, right now there's no actual motion, you're just sort of -- I gather  
13 you're just sort of telling me that there may be a motion coming, right?

14 MS. BURKE: Well, yes, but the other problem is with the deadline being  
15 Monday currently and we've only got one day before Monday, I -- I will get the  
16 motion done and filed like tomorrow, but I don't know what to do about Monday  
17 because I -- I just don't think it's right to file anything when we've got these kinds of  
18 issues going on.

19 MR. DIGIACOMO: In other words, she wants you to change your previous  
20 order. I'd request that your previous order stand, Judge.

21 THE COURT: I don't even, you know, the problem is because it's just  
22 happening verbally, I don't even remember what the specific dates of my previous  
23 order were, I'd have to go back and look at 'em. So I'm not sure what we're even, I'd  
24 just have to go back and check.

25 Well, I mean, the best I can tell you is as things stand now because,

1 you know, if someone had mentioned this, I could have gone back and pulled out  
2 the previous order, but I don't have it with me. So what is it you want? You want  
3 more time to file your motion? Is that what you're asking for?

4 MS. BURKE: No, I will get the motion filed right away. I -- I just want to hold  
5 off on stuff that's due 21 days ahead of time because I think there's good basis for  
6 the motion to continue for one thing. And I just don't want to give up stuff that I don't  
7 think should be given up yet.

8 THE COURT: Okay. Well, I mean, I don't have a, you know, it's just a verbal  
9 motion and as I said, I wish I had a chance to look at it, but, I mean, as of right now,  
10 I'm denying your request without prejudice. All the deadlines stand. But, I mean, I  
11 don't know what motion -- your basis for your motion is going to be. I don't even  
12 remember what's due on Monday honestly, because I know I did change some of  
13 the dates, so I can't --

14 MR. DiGIACOMO: Twenty-one days would be the normal expert for the State.  
15 The State's filed.

16 THE COURT: Okay.

17 MR. DiGIACOMO: But I don't --

18 THE COURT: But what do they have to do in 21 days? I don't remember.

19 MR. DiGIACOMO: I think you made it --

20 MS. WECKERLY: They have the same expert --

21 MR. DiGIACOMO: -- I think it was their expert, but I can't remember if you  
22 changed the date of their expert or not.

23 THE COURT: I -- okay.

24 MR. DiGIACOMO: And it may be that it went to 14 days instead of 21.

25 THE COURT: Do you remember? I don't.

1 MR. SGRO: I just want time to flip through it just because I just don't have  
2 any recollection on that in this particular case.

3 MS. BURKE: And I couldn't tell from reviewing the record exactly what it was.

4 THE COURT: Okay. Well, and the problem is nobody seems to really  
5 remember. I know this happened months ago. But so what I'll do is I'm denying  
6 your request without prejudice. Let me take a look at it, if you want to file  
7 something, you know, and if they want to file something and have me to reconsider  
8 those deadlines, I can look at it, but I'm really not prepared to do anything about it  
9 right now. Okay?

10 MR. DiGIACOMO: Thank you, Your Honor.

11 MR. SGRO: Thank you, Your Honor.

12 THE COURT: All right, thanks, guys.

13 MR. ORAM: Thank you, Your Honor.

14 PROCEEDING CONCLUDED AT 12:14 P.M.

15 \* \* \* \* \*

16

17

18 ATTEST: I do hereby certify that I have truly and correctly transcribed the audio-  
19 video recording of this proceeding in the above-entitled case.

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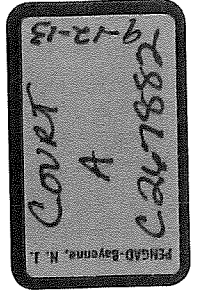
25

  
SARA RICHARDSON  
Court Recorder/Transcriber

# The Price of the Death Penalty



“Death is a different kind of punishment from any other which may be imposed in this country.” *Gardner v. Florida*, 430 U.S. 349, 357 (1977).





# Death Penalty Moratorium (1967)

- By 1967, 41 states had laws authorizing capital punishment.
- 1967-1972- States voluntarily instituted a moratorium on executions while the United States Supreme Court debated the death penalty.

## *Furman v. Georgia*

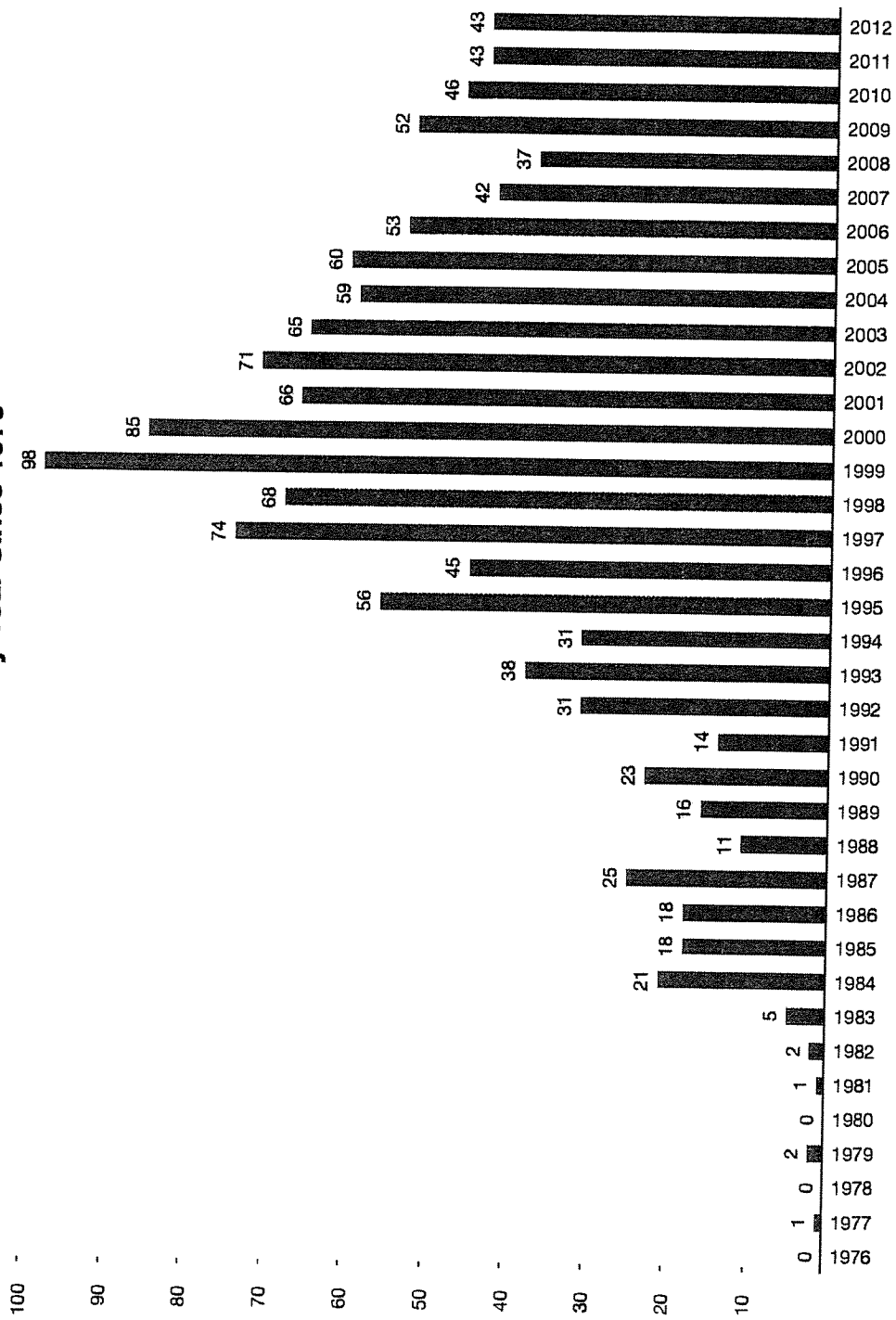
...limited so as to minimize the risk of  
*wholly arbitrary and capricious action.*  
408 US 238(1972).

Moratorium lifted in 1976 –

United States Supreme Court upheld  
bifurcated Death Penalty procedure

*Gregg v. Georgia*, 428 US 153 (1976)

# Executions by Year Since 1976



<http://www.deathpenaltyinfo.org/executions-year>

# States Without the Death Penalty

Death Penalty Abolished  
Prior to *Furman v. Georgia*

Michigan (1846)  
Wisconsin (1853)  
Maine (1887)  
Minnesota (1911)  
Hawaii (1957)  
Alaska (1957)  
Vermont (1964)  
West Virginia (1965)  
Iowa (1965)  
North Dakota (1973)  
Rhode Island (1984)  
Massachusetts (1984)

Death Penalty Abolished following  
*Furman v. Georgia*

Recent States to Abolish  
Death Penalty

New York (2004)  
New Jersey (2007)  
New Mexico (2009)  
Illinois (2011)  
Connecticut (2012)  
Maryland (2013)

# Assembly Bill 444

Assembly Amendment No. 604 to Assembly Bill No. 444

Page 2

## ASSEMBLY BILL NO. 444—COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

MARCH 25, 2013

Referred to Committee on Legislative Operations and Elections

SUMMARY—Provides for an audit of the fiscal costs of the death penalty.  
(BDR S-817)

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

EXPLANATION -- Matter in *bolded italics* is new; matter between brackets ~~formatting material~~ is material to be omitted

# Assembly Bill 444

**77th (2013) Session**  
**Vote on AB444 (1st Reprint) on Assembly Final Passage**  
**May 17, 2013 at 8:04 PM**

| 38 Yea | 1 Nay | 3 Excused | 0 Not Voting | 0 Absent |

# Assembly Bill 444 Scope

- 1) Cost of Legal Counsel for Both Prosecution and Defense for:
  - Pretrial
  - Trial
  - Appellate
  - Post-Conviction
- 2) Procedural Costs:
  - The Processing of Bonds
  - Investigation by Prosecutors, Police, and Other Staff
  - Investigation Costs Prior to a Person being Charged
  - Pre-trial Motions
  - Extradition
  - Psychiatric and Medical Evaluation
  - Expert Witnesses
  - Juries
  - Sentencing Proceedings
  - Appellate and Post-Conviction Proceedings (both State and Federal)
  - Incarceration
  - Requests for Clemency
  - The Cost of Execution (Facilities and Staff)

Costs of the Death Penalty

Increased Safeguards in Post *Furman*  
America

Risk of Wrongful Convictions

Risk of Botched Executions

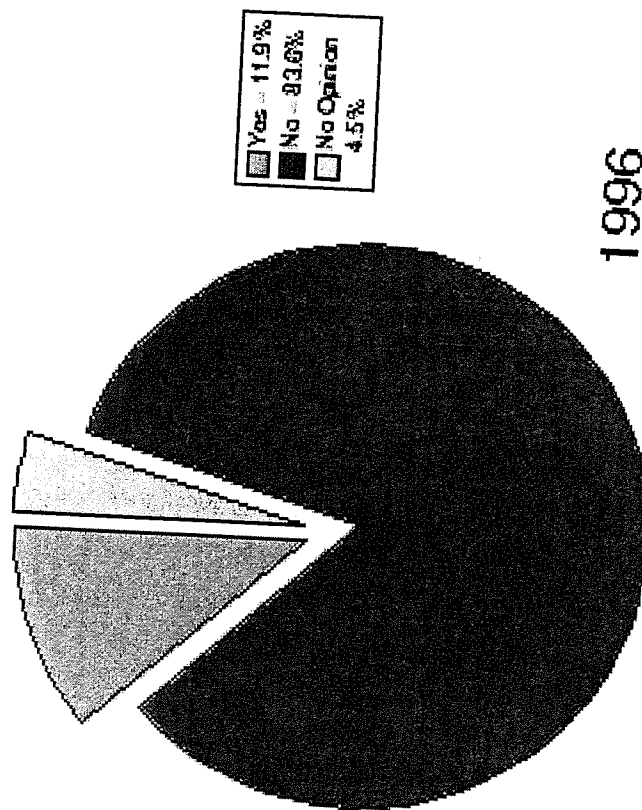
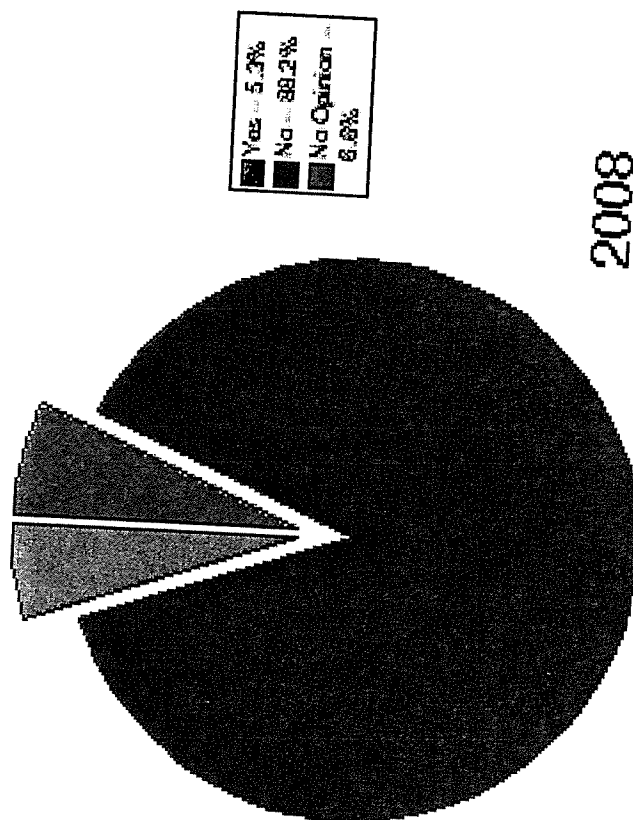


# Costs - Increased Safeguards in Post *Furman* America

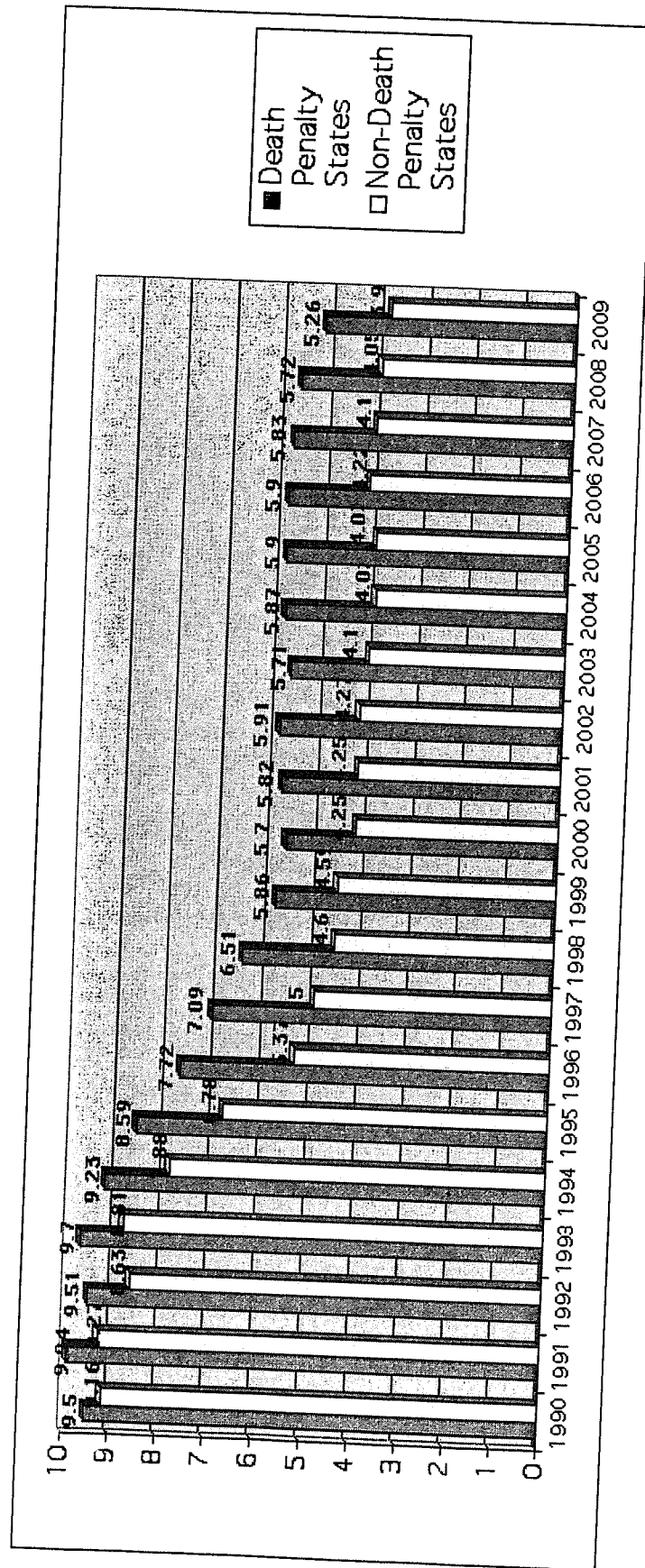
- *Gregg v. Georgia*- 428 US 153 (1976) – requires mandatory appellate review of all death sentences
- *Lockett v. Ohio*- 438 US 586 (1978)- sentencing court has discretion to consider mitigating factors

# Cost v. Benefit analysis

Is the death penalty a deterrent?



# Deterrent Effect?

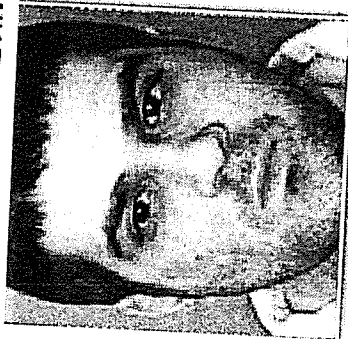


# Costs – settlements resulting from Wrongful Execution

## Lawyers for executed man's family ask for hearing in Travis County

Judge asked to review whether man was wrongly convicted of arson murder in deaths of daughters in Corsicana.

The Willingham family's 62-page suit was filed with hundreds of pages of exhibits and indicates that copies have been delivered to Perry's office, the state fire marshal's office, the Navarro County district attorney's office and the office of the state prosecuting attorney, which represents the state in cases at the Court of Criminal Appeals.



Cameron Todd Willingham was executed in 2004 for 1991 deaths.

for relatives of Cameron Todd Willingham, put to death for the 1991 arson murder of his three young daughters in Corsicana, on Friday petitioned a judge in Travis County to hold a hearing on whether Willingham was wrongly convicted.

The lawsuit was filed with state District Judge Charlie Baird, who last year issued the state's first posthumous DNA exoneration in a rape case originally tried in Lubbock. Baird is a trial judge who previously had nothing to do with the Lubbock or Willingham cases.

Willingham's execution six years ago has received national attention. Several arson experts in recent years have rejected the science that the investigators who testified at Willingham's trial used to determine that the fire that killed his daughters was intentionally set.

# statesman.com

# Costs – lawsuits over Botched Executions

## Family sues over botched Ohio execution

BY ERICA BLAKE  
BLADE STAFF WRITER

# THE BLADE

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Toledo attorney Alan Konop left, listens as Michael Manning, speaks about the execution of Joseph Clark last year. With them are Clark's brother Dennis Clark and mother, Erma Clark.

When Michael Manning arrived to witness the May, 2006, execution of Joseph Lewis Clark, he was intent on watching justice served against his brother's killer.

Yesterday, Mr. Manning stood shoulder to shoulder with Clark's brother to speak out against the lengthy and seemingly painful execution.

Mr. Manning joined members of the Clark family as they spoke about a lawsuit filed early yesterday in U.S. District Court in Cincinnati. Filed by Clark's mother, Irma Clark, the lawsuit asks for monetary damages. But those involved said that the larger goal is to achieve change.

# Jurisdictional Trends – Last 10 years

- New York - Death Penalty Statute Invalidated in 2004.
- New Jersey – Legislature Repealed Death Penalty in 2007.
- New Mexico – Legislature Repealed Death Penalty in 2009.
- Illinois – Legislature Repealed Death Penalty in 2011.
- Connecticut – Legislature Repealed Death Penalty in 2012.
- Maryland – Legislature Repealed Death Penalty in 2013.

# New York

After the New York Court of Appeals invalidated the death penalty statute in *People v. La Valle* in 2004, the New York Assembly held five public hearings on capital punishment to determine whether to reinstate the death penalty from 2004 to 2005

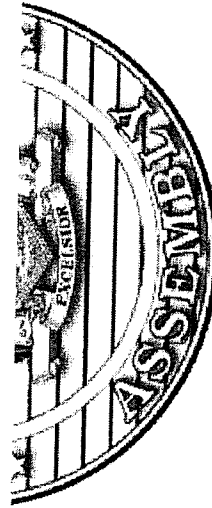
Among the factors considered in determining whether to reinstate the death penalty were the costs involved.

# New York

## The Death Penalty In New York



Schenectady County District Attorney Robert Carney noted that expenditures for death penalty prosecution and defense have cost New Yorkers as much as \$200 million since 1995. "There are," he said, "many criminal justice initiatives that are effective in reducing crime that could be enhanced for a fraction of this money."



A report on five public hearings on the death penalty in New York  
conducted by the Assembly standing committees on Codes,  
Judiciary and Correction, December 15, 2004 - February 11, 2005

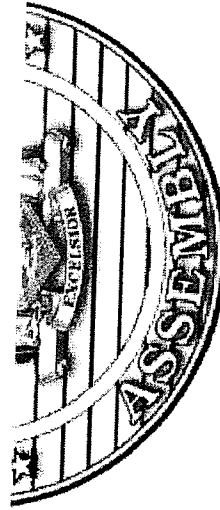


# New York

## The Death Penalty In New York



Mr. Gradess said conservative estimates are that New York has spent \$170 million in the past decade on death penalty prosecution and defense. With seven death sentences imposed, he said, the 1995 death penalty law has thus far cost taxpayers approximately \$24 million per death sentence.



A report on five public hearings on the death penalty in New York  
conducted by the Assembly standing committees on Codes,  
Judiciary and Correction, December 15, 2004 - February 11, 2005

# New York

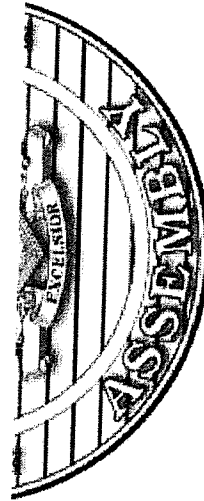
Several witnesses asserted that capital punishment is more expensive than life imprisonment without parole. Mr. Sullivan of the Illinois Commission offered several reasons why, in his view, the cost of capital prosecutions is greater than the cost of non-capital LWOP prosecutions, including:

- Investigations are longer and more costly;
- Representation costs are higher;
- Every procedural phase is longer, involving more experts;
- Many jurisdictions require a separate sentencing phase;
- Appeals are generally automatic;
- There are usually extensive post-conviction proceedings in state and federal court; and
- Death row cells are more expensive and death row inmates require greater security.

# New York

## The Death Penalty In New York

James Liebman, a Columbia University Law School professor, predicted that reinstatement of the death penalty, over a term of about twenty years, would cost New York taxpayers approximately \$500 million, likely with only two or three executions during that time. This, he calculates, means the added cost to taxpayers of each New York capital case that results in execution would be approximately \$200 million per execution.



A report on five public hearings on the death penalty in New York  
conducted by the Assembly standing committees on Codes,  
Judiciary and Correction, December 15, 2004 - February 11, 2005

# New Jersey



*Commission's Finding: The costs of the death penalty are greater than the costs of life in prison without parole, but it is not possible to measure these costs with any degree of precision.*

## DEATH PENALTY STUDY COMMISSION REPORT

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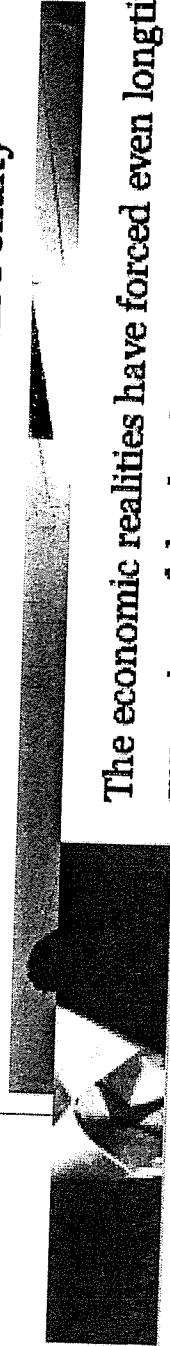
JANUARY 2007

# New Jersey Governor Jon Corzine Signs On December 17, 2007



# New Mexico

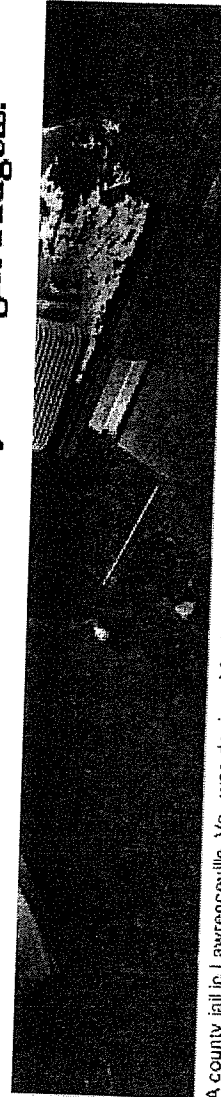
## Citing Cost, States Consider End to Death Penalty



Gov. Martin O'Malley

The economic realities have forced even longtime supporters of the death penalty, like Gov. Bill Richardson of New Mexico, to rethink their positions.

Mr. Richardson, a Democrat, has said he may sign a bill repealing capital punishment that passed the House last week and is pending in a Senate committee. He cited growing concerns about miscarriages of justice, but he added that cost was a factor in his shifting views and was “a valid reason in this era of austerity and tight budgets.”



A county jail in Lawrenceville, Va., was designed for half as many inmates as it houses. Many states are trying to cut prison costs.

By IAN URBINA

Published: February 24, 2009

TWITTER

The New York Times

# Illinois

## Chicago Tribune What killed Illinois' death penalty

**It wasn't the question of morality but the question of accuracy that led state to abolish capital punishment**

Ultimately, supporters of abolition in the General Assembly — frustrated that sufficient reform had not been enacted and stung by the costs of trials and appeals — voted to abolish the death penalty. On Wednesday, Quinn signed abolition into law and commuted the sentences of 15 inmates who had been sentenced to death since the moratorium. when a man named Anthony Porter walked out of jail a free man.

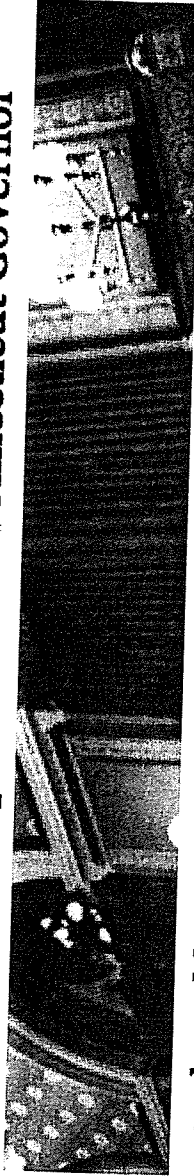
Sitting in the governor's mansion, George Ryan watched Porter's release on television and wondered how a man could come within 50 hours of being executed, only to be set free by the efforts of a journalism professor, his students and a private investigator.

Ads By Google

# Connecticut

The New York Times

## Death Penalty Repeal Goes to Connecticut Governor



In a statement released late Wednesday night, Governor Malloy said the repeal put Connecticut in the same position as nearly every other industrialized nation on the death penalty.

“For decades, we have not had a workable death penalty,” he said, noting that only one person has been executed in Connecticut in the last 52 years. “Going forward, we will have a system that allows us to put these people away for life, in living conditions none of us would want to experience. Let’s throw away the key and have them spend the rest of their natural lives in jail.”

Representative Patricia M. Widlitz was for the repeal bill.

By PETER APPLEBOME

Published: April 11, 2012

41 Comments

Andrew Sullivan for The New York Times



# Maryland

RESEARCH

The results can be summed across all cases. That is, because cases in the sample were weighted in these analyses to reflect the full sample of 1,136. In total, the 162 cases with a death notice cost Maryland taxpayers an additional \$186 million or more than \$1 million per death notice over and above the costs where there was no death notice. Of this total, cases where the death penalty was sought, but that did not result in a death sentence cost Maryland taxpayers an additional \$70.9

Aaron Sundquist  
Carly Knight  
Askar Darnenov

March 2008



URBAN INSTITUTE  
Justice Policy Center

# Maryland

MARTIN O'MALLEY, Governor

Ch. 156

## Chapter 156

(Senate Bill 276)

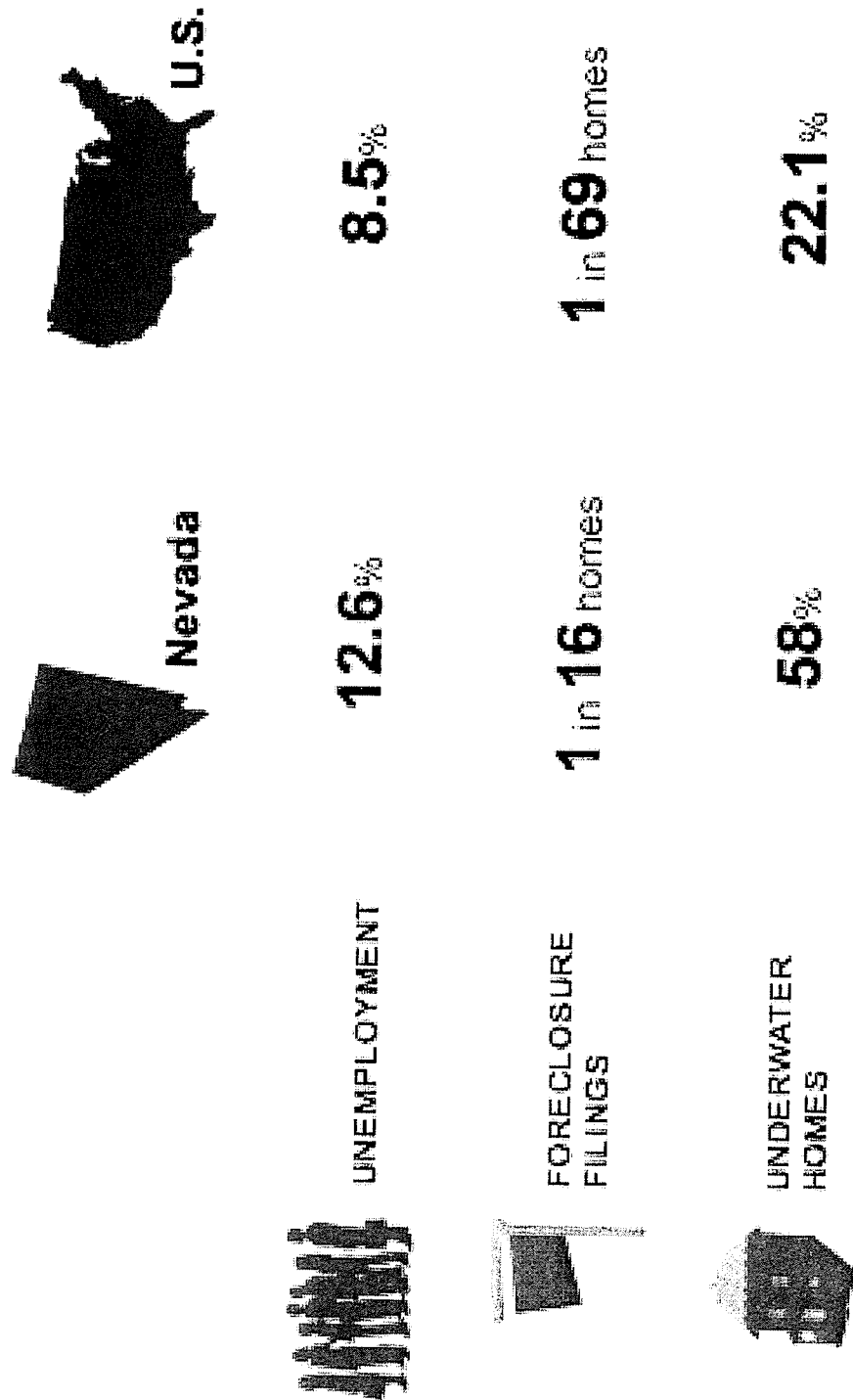
AN ACT concerning

**Death Penalty Repeal and Appropriation from Savings to Aid Survivors of  
Homicide Victims – Substitution of Life Without the Possibility of Parole**

WHEREAS, The Commission, in its final report to the General Assembly, recommended that the savings from repealing the death penalty be used to “increase the services and resources already provided to families of victims”; and

# Money well spent?

NEVADA VS. THE NATION



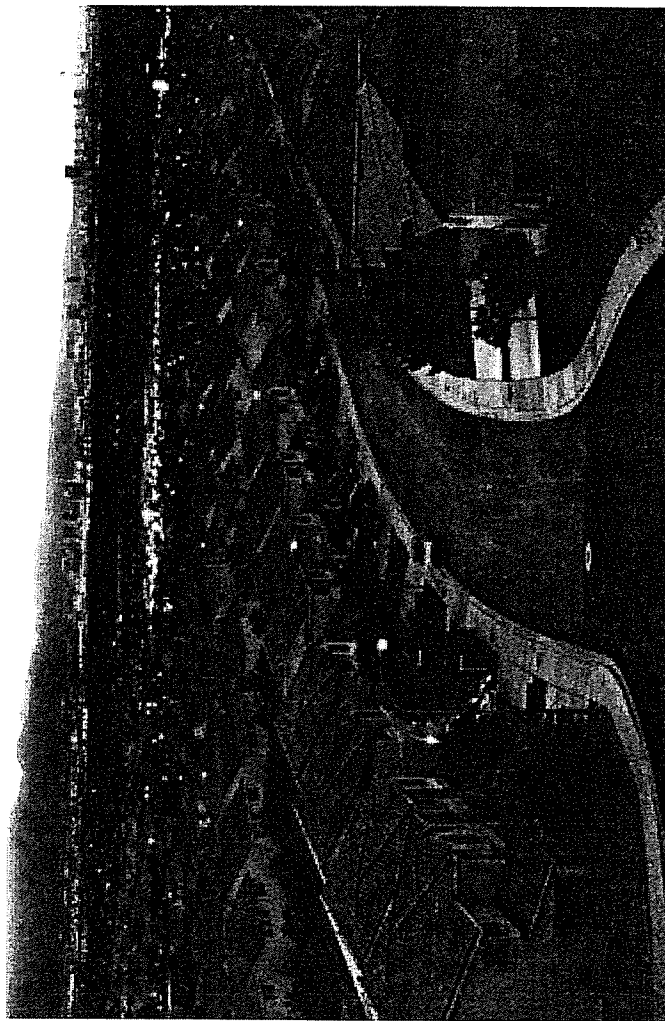
SOURCE: BUREAU OF LABOR STATISTICS, REALTYTRAC, CORELOGIC

<http://financialpress.com/2012/02/04/nevadas-triple-economic-whammy/>, as of September 1, 2013

## Nevada, Illinois among states that can't pay their bills

**Bottom Line,**

Jan. 18, 2012 at 10:47 AM ET



AP /

Nevada is among the states most stung by the downturn. Between 2006 and 2010, home values plummeted a staggering 44.5 percent.

<http://www.nbcnews.com/business/nevada-illinois-among-states-cant-pay-their-bills-1C7100799>, as of September 3, 2013

# Recent Budget Cuts



# WNC chief resigns over Nevada budget cuts

Carol Lucey: Legislature too painful to repeat

2:00 AM, Jul. 10, 2013

Recommend 2

Recommend 2

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+1 0

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- A A +

Written by  
**Ray Hagar**  
rhagar@rgj.com

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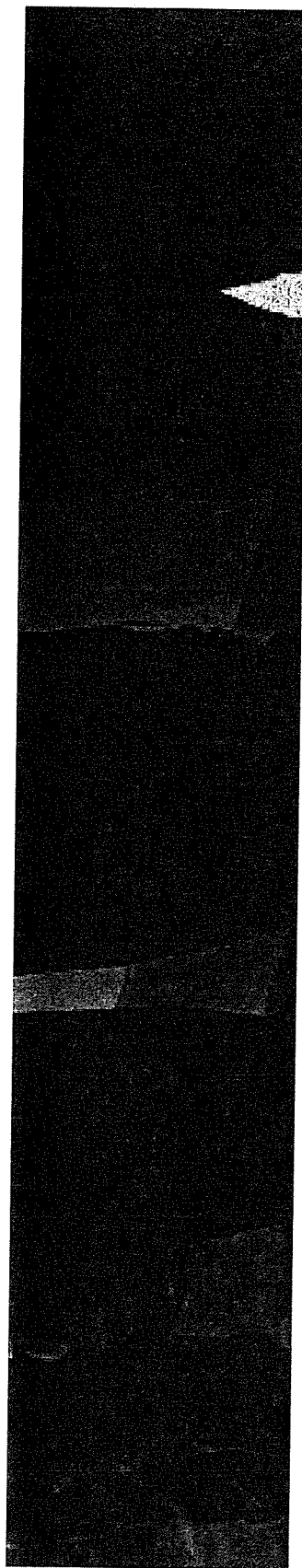
Local News  
Education

Carol Lucey, after suffering through budget cuts in the past three sessions of the Legislature, said Tuesday that she will resign as president of Western Nevada College in Carson City.

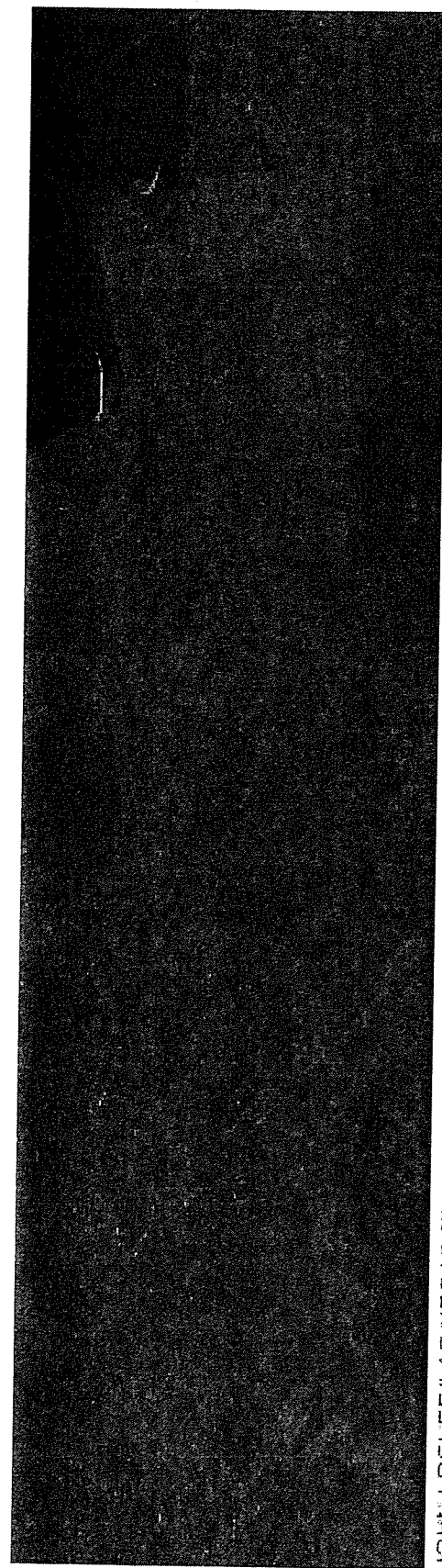
The announcement comes about a month after the end of the 2013 Legislature, which slashed the WNC budget by 11 percent over the next two years.

For Western Nevada, that means a \$1.7 million cut in 2014 and \$2.1 million in 2015, according to the appropriations bill from the 2013 Legislature. ...

## 'Broken' mental health system overwhelms Nevada



Norheim, who has heard commitment cases for 17 years for Clark County District Court, said he has seen some people dozens of times, and some predate his time on the job. He blames a lack of funding, housing, case managers, treatment facilities and intense supervision programs for the repeats.





JOHN LOCHER/LAS VEGAS REVIEW-JOURNAL




# Tentative CCSD budget shows a \$64 million deficit

By Jessica Janner

CREATED APR. 11, 2012

 Tweet < 5

 Recommend 34

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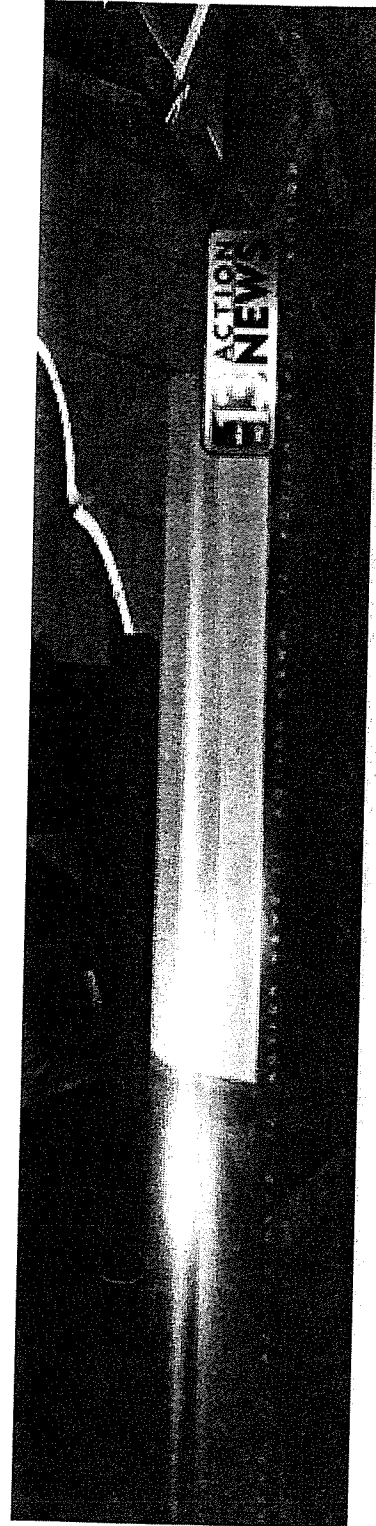


## RELATED ARTICLES

School district's tentative budget cuts nearly 2,000 jobs  
Teacher speaks out about receiving pink slip

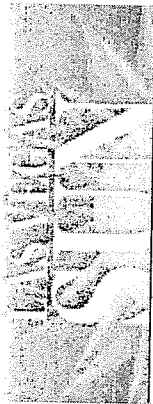
**Las Vegas, NV (KTNV) –** A tentative budget for the 2012-2013 fiscal year was approved by the Clark County School District Board of Trustees Wednesday.

The slightly more than \$2 billion budget shows \$35 million in federal budget cuts.

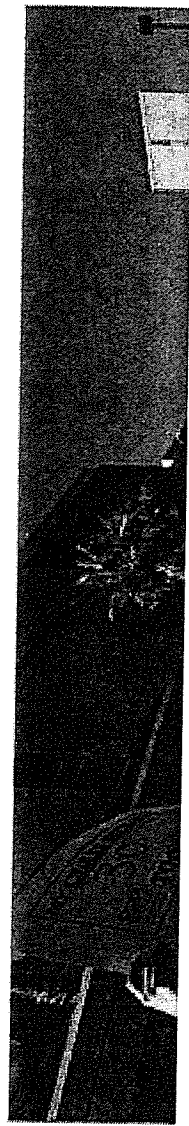


A tentative budget for the 2012-2012 fiscal year was approved by the Clark County School District Board of Trustees Wednesday. Video by ktnv.com






## Clark County teachers rally in campaign for smaller class sizes



Although Nevada has a class-size reduction program in the first to third grades, cash-strapped school districts were forced to increase class sizes during the recession to balance their budgets.



STEVE MARCUS  
Clark County School District teachers rally for smaller class sizes during a news conference outside the Sawyer State Building Wednesday, March 13, 2013. Teachers, parents and union members held the rally as legislators were meeting in a joint assembly and senate committee meeting to discuss education issues.

By Paul Takahashi (contact)   
Wednesday, March 13, 2013 | 8:30 a.m.

# Costs - Nevada Supreme Court Rule 250

- Requires two (2) counsel to be appointed to indigent defendants
- Mandatory Appellate and Post-Conviction Review
- Court Shall Provide for Experts and Investigators
- Mandatory Transcription and Priority of Transcripts
- Mandatory Mitigation Investigation

# Costs: Attorney Time and Money

Table 1: Median Time Estimates (In hours) as Lead Attorney and Second Chair Attorney by Type of Murder Case				
A. Lead Attorney Estimates:				
Stage	Capital Cases	Non-Capital Cases	Difference	
Pretrial	1,075	461	+ 614	
Trial	168	110	+ 58	
Penalty	56	12	+ 44	
Post-Conviction	48	18	+ 30	
TOTAL:	1,347 hours	601 hours	+ 746 hours	
B. Second Chair Attorney Estimates:				
Stage	Capital Cases	Non-Capital Cases	Difference	
Pretrial	685	351	+ 334	
Trial	180	110	+ 70	
Penalty	58	12	+ 46	
Post-Conviction	28	13	+ 15	
TOTAL:	951 hours	486 hours	+ 465 hours	
C. Both Lead Attorney and Second Chair Attorney Estimates Combined:				
Stage	Capital Cases	Non-Capital Cases	Difference	
Pretrial	1,760	812	+ 948	
Trial	348	220	+ 128	
Penalty	114	24	+ 90	
Post-Conviction	76	31	+ 45	
TOTAL:	2,298 hours	1,087 hours	+ 1,211 hours	

# Costs: Attorney Time and Money

Table 3: Estimated Costs for Defense Attorneys in Capital and Non-Capital Murder Cases (per case and projected cost savings for pending cases)	
1. Defense Attorney Costs Per Case:	
A. Defense Attorney (Public Defender): Capital Murder Case [Formula = Hours as Lead + Hours as 2 <sup>nd</sup> Chair] x \$100 per hr] = (1,347 + 951) x \$100 = <b>\$229,800 per capital case.</b>	
B. Private Defense Attorney (Office of Assigned Counsel): Capital Murder Case [Formula = Hours as Lead + Hours as 2 <sup>nd</sup> Chair] x \$125 per hr] = (1,347 + 951) x \$125 = <b>\$287,250 per capital case.</b>	
C. Defense Attorney (Public Defender): Non-Capital Murder Case [Formula = Hours as Lead Attorney] x \$100 per hr.] = (601) x \$100 = <b>\$60,100 per non-capital case.</b>	
D. Private Defense Attorney (Office of Assigned Counsel): Non-Capital Murder Case [Formula = Hours as Lead Attorney] x \$125 per hr.] = (601) x \$125 = <b>\$75,125 per non-capital case.</b>	
2. Difference in Costs Per Capital and Non-Capital Case: [Formula = costs per capital case - costs per noncapital case]	

# Costs v. Outcome

**Table 4: Average Court Processing Outcomes in 127 Murder Cases Resulting in Conviction by Type of Sentence (Clark County, 2009-2011)**

<b>Case Outcome</b>	<b>Years*</b>	<b>Life With</b>	<b>Life W/O</b>	<b>Death</b>	<b>All Cases</b>
% Convicted by Trial versus Guilty Plea:	5.9 %	22.7 %	47.6 %	100 %	21.0 %
# of Days between Initial Filing and Sentencing:	387 days	732 days	887 days	1,107 days	599 days
# of Separate Court Appearances/Meetings:	9.3	20.9	27.9	35.2	16.8
# of Separate Orders Filed to the Court:	3.6	10.1	12.6	20.0	7.6
# of Separate Motion Filed to the Court:	5.4	16.6	24.4	30.0	12.8
Total # of Cases with this Sentence:	68	44	21	5	138

**Note: \* Years include any sentence in which a specific maximum number of years of imprisonment was pronounced (excluding life and death sentences).**

# Cost v. "Success Rate"

**Table 5: Final Disposition of Murder Cases in which a "Notice of Intent to Seek the Death Penalty" was Filed (Clark County, 2009-2011)**

<b>Case Outcome</b>	<b>Number of Cases</b>	<b>Percent Distribution</b>
Charges Dismissed	1	2.8 %
Specific Number of Years Given*	5	14.3 %
Life <u>With</u> Possibility of Parole	7	20.0 %
Life <u>Without</u> Possibility of Parole	17	48.6 %
Death Sentence	5	14.3 %
Total	35	100.0 %

**Note: \* Years include any sentence in which a specific number or range of years of imprisonment was pronounced (excluding life and death sentences).**

Vernell Ray EVANS, Appellant,

v.

The State of Nevada, Respondent.

No. 10-1000  
 Criminal Law  
 Nevada  
 July 1, 1968

Criminal Law §-1653

A defendant is not entitled to an evidentiary hearing on a motion for post-conviction relief if the allegations are belied or repelled by the record.

3. Habeas Corpus §-386(1)

Defendant's claim of ineffective assistance of counsel is repelled by the record. See U.S.C.A. Const. Amend. 6.

Criminal Law §-1440(1)

Defendant's claim of ineffective assistance of counsel does not constitute a waiver of the claim for pur-

Petitioner was convicted in the Eighth Judicial District Court, Clark County, Nevada, of first-degree murder, and sentenced to death. The Supreme Court, 112 Nev. 1172, 938 P.2d 285, affirmed. Petitioner sought writ of habeas corpus. The District Court, Jeffrey D. Sobel, J., denied

# Affirmed in part, reversed in part, and remanded.

the death penalty was improper; (4) attorneys rendered ineffective assistance and prejudiced the petitioner by not challenging the arguments; (5) erroneous admission of prosecution witnesses' irrelevant testimony about their fears did not require reversal; (6) closing argument in guilt phase did not require reversal; and (7) attorneys' failure to object to inadmissible evidence and inadequate indictment did not prejudice the petitioner.

Affirmed in part, reversed in part, and remanded.

Maupin, C.J., concurred in part, dissented in part, and file opinion joined by Leavitt, J.

1. Criminal Law §-1575

A defendant seeking post-conviction relief cannot rely on conclusory claims for re-

"Deficient performance" by an attorney is representation that falls below an objective standard of reasonableness. U.S.C.A. Const. Amend. 6.

See U.S.C.A. Const. Amend. 6.

7. Criminal Law §-641.13(1)

To show prejudice from attorney's alleged ineffective assistance, the applicant must show a reasonable probability that, but for counsel's error, the result of the trial would have been different. U.S.C.A. Const. Amend. 6.

8. Criminal Law §-641.13(1)

Judicial review of a lawyer's representation is highly deferential, and a defendant must overcome the presumption that counsel's representation was sound and strategy. U.S.C.A. Const. Amend. 6.

# Reversal Rate on Capital Convictions

# Nevada Executions Since 1978

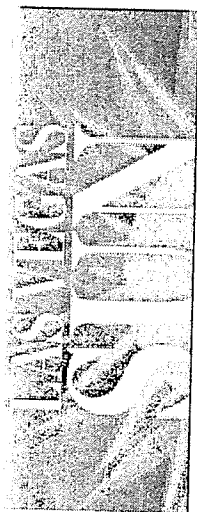
#	Name	Date	Method	County
12	<u>Darryll Linnie Mack</u>	April 26, 2006	Lethal Injection	Washoe
11	<u>Terry Jess Dennis</u>	August 12, 2004	Lethal Injection	Washoe
10	<u>Lawrence Colwell Jr.</u>	March 26, 2004	Lethal Injection	Clark
9	<u>Sebastian Stephanus Bridges</u>	April 21, 2001	Lethal Injection	Clark
8	<u>Alvaro Calambro</u>	April 5, 1999	Lethal Injection	Washoe
7	<u>Roderick Abeyta</u>	October 5, 1998	Lethal Injection	Clark
6	<u>Richard Allen Moran</u>	March 30, 1996	Lethal Injection	Clark
5	<u>Thomas E. Baal</u>	June 3, 1990	Lethal Injection	Clark
4	<u>Sean Patrick Flanagan</u>	June 23, 1989	Lethal Injection	Clark
3	<u>William Paul Thompson</u>	June 19, 1989	Lethal Injection	Washoe
2	<u>Carroll Edward Cole</u>	December 6, 1985	Lethal Injection	Clark
1	<u>Jesse Walter Bishop</u>	October 22, 1979	Gas Chamber	Clark

<http://deathpenaltyusa.org/usa/state/nevada.htm>, September 1, 2013

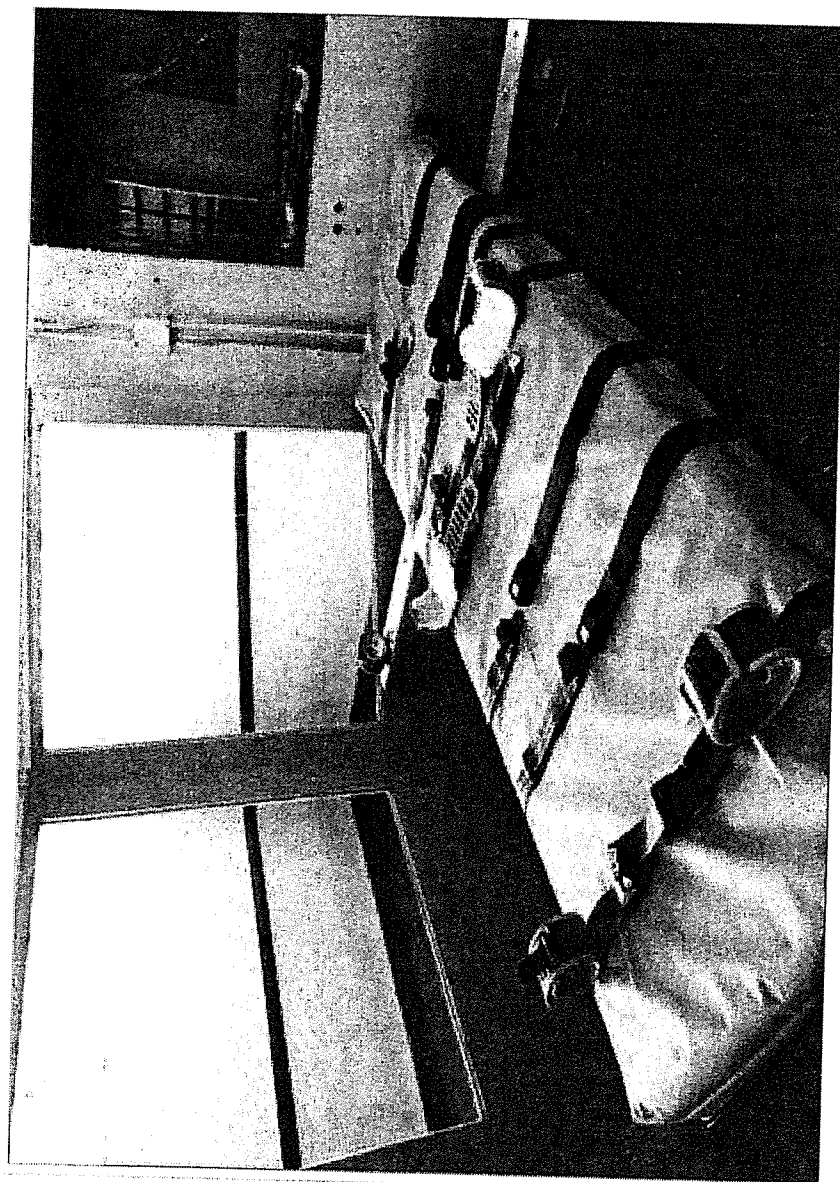


83

Inmates  
Currently  
Awaiting  
Execution



## Door to clang shut on ancient state prison

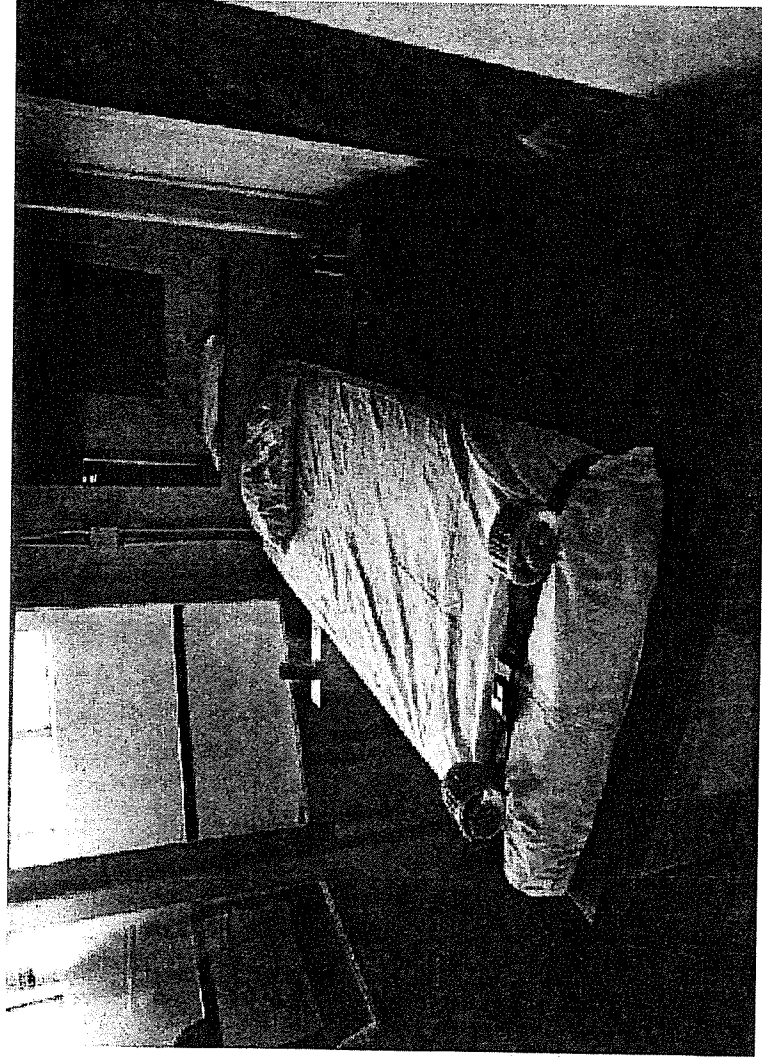


The execution chamber at Nevada State Prison in Carson City is rarely used, partly because many on death row die of natural causes before appeals are through.

CATHLEEN ALLISON / ASSOCIATED PRESS FILE

<http://www.lasvegassun.com/news/2011/may/14/ancient-state-prison-close/>, as of September 1, 2013

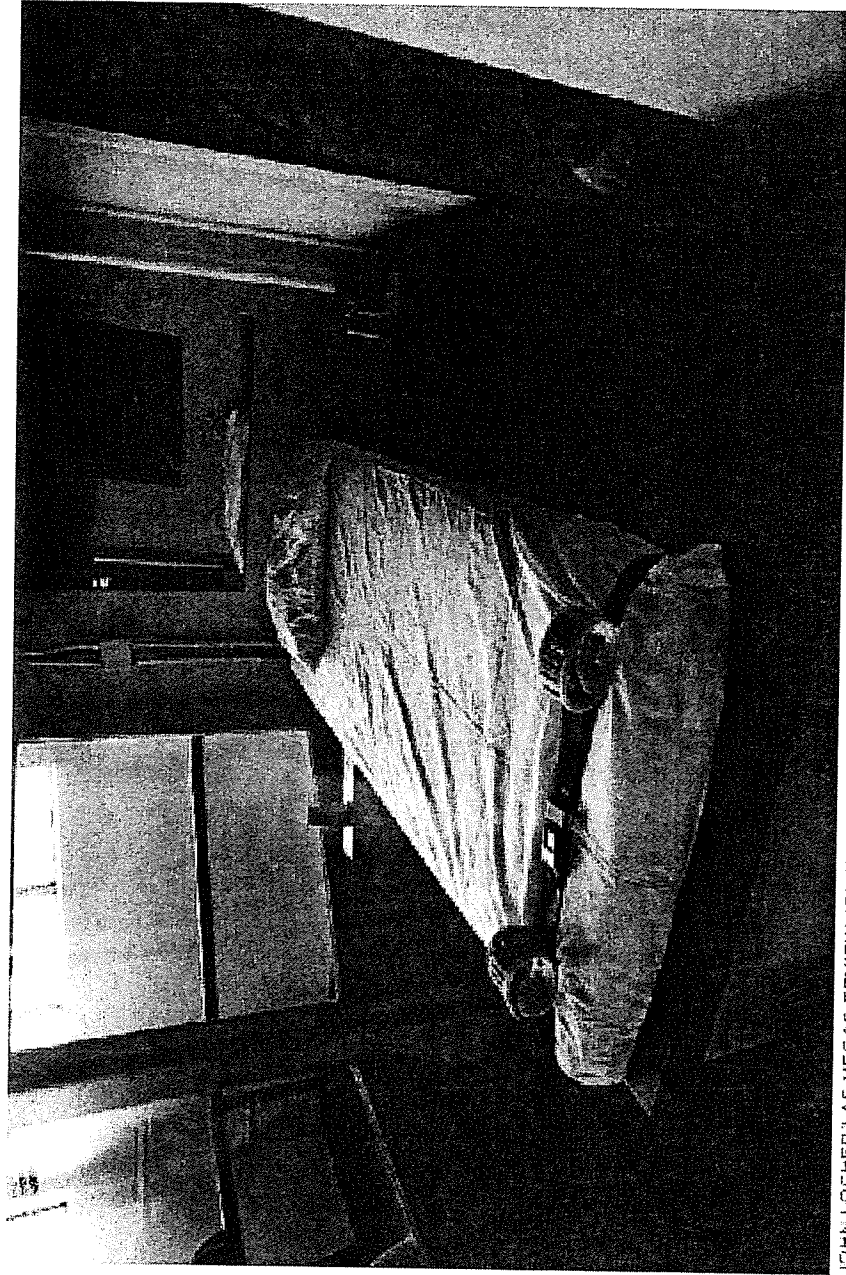
# The Death Chamber



Corrections Department  
Director Greg Cox - old  
gas chamber is not  
compliant with the  
Americans With  
Disabilities Act.

Posted May 22, 2013 - 10:07am Updated May 23, 2013 - 12:41am

## Panel rejects construction of a new Nevada execution chamber



JOHN LOCHER/LAS VEGAS REVIEW-JOURNAL

The execution chamber at the now-closed Nevada State Prison in Carson City is shown here in 2005. Lawmakers have decided to not fund construction of a new execution chamber at Ely State Prison.

# Lethal Injection Drug Shortage

## Danish Company Blocks Sale of Drug for U.S. Executions

“We were completely shocked and outraged” to learn that the drug was being used for executions, Mr. Kronborg said. “States and prisons never asked. We only found about it from the media. If they had asked, we would have said no.”

would stop shipping a powerful drug to American prisons that carry out the death penalty by lethal injection because some states began using it as a substitute for another compound that was taken off the market.

*The New York Times*

## Nevada Victims of Crime Compensation Program

- The total award amount currently cannot exceed \$35,000 per victim/dependent of victim.
- Compensation can include:
  - Medical Expenses—up to \$35,000
  - Counseling Bills—up to \$5,500
  - Funeral Expenses—up to \$3,500

## Clark County Victim Witness Assistance

- The total award amount currently cannot exceed \$15,000 per victim/dependent of victim.

# 76

## Family Members of Murder Victims Signed this letter to the Connecticut Legislature



### SIGN-ON LETTER for Victims' Families

We are individuals and families who have lost loved ones to murder. At a moment none of us could have predicted or prepared for, tragedy robbed from us children, parents, spouses, brothers and sisters, and other family members. Our direct experiences with the criminal justice system and struggling with grief have led us all to the same conclusion: Connecticut's death penalty fails victims' families.

Our view on the death penalty may come as a surprise. Supporters of ending the death penalty often face the question: "What if it were your loved one who was murdered?" For each one of us, that question has ceased to be hypothetical and become a reality.

We never asked to be in this position, and would do anything to change it. We realize, however, that nothing can erase the kiss that a senseless act of violence brought into our lives. But we can honor the memory of our loved ones and other families who may face tragedy by working for effective responses to violence. The death penalty, rather than preventing violence, only perpetuates it and inflicts further pain on survivors.

The reality of the death penalty is that it drags out the legal process for decades. In Connecticut, the death penalty is a false promise that goes unfulfilled, leaving victims' families frustrated and angry after years of fighting the legal system. And as the state hangs onto this broken system, it wastes millions of dollars that could go toward much needed victims' services.

Some believe that they stand with victims' families by supporting the death penalty for "particularly heinous murders." We have difficulty understanding this position. The implication is that other murders are ordinary and do not merit the death penalty. From experience, we can tell you that every murder is heinous, a tragedy for the lost one's family. The death penalty has the effect of elevating certain victims' families above others. Connecticut should be better than that.

The reality of the death penalty is that it drags out the legal process for decades. In Connecticut, the death penalty is a false promise that goes unfulfilled, leaving victims' families frustrated and angry after years of fighting the legal system. And as the state hangs onto this broken system, it wastes millions of dollars that could go toward much needed victims' services.

UPSTATE ATTORNEY AT LAW

*Cousin of Nancy Bishop Langert, Richard Langert, and their unborn child*

*Hennetta Beckman of Hartford  
Son Randy Beckman was murdered*

# Court's Authority to Rule in favor of motion

The Nevada Supreme Court has repeatedly held that courts shall look to reason and public policy to discern legislative intent. *Langon v. Matamoros*, 121 Nev. 142, 144, 111 P.3d 1077, 1078 (2005); *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).



Assembly Committee on Ways and Means  
Subcommittee on K-12/Higher Education/CIP  
Senate Committee on Finance  
Subcommittee on K-12/Higher Education/CIP  
May 22, 2013  
Page 24

## De facto Moratorium?

Senator Denis asked members if they had questions or concerns regarding any of the six projects that required separate action by the Subcommittees. Hearing none, he called for a vote on the first item, Project 13-C02.

- Project 13-C02: Remodel Administration Building to Accommodate Execution Chamber—Ely State Prison. Assembly Bill 444 required that a legislative audit be conducted on the death penalty in the state, which would include a review of facilities to carry out a death sentence.

SENATOR SMITH MOVED TO NOT APPROVE CAPITAL  
IMPROVEMENT PROJECT 13-C02.

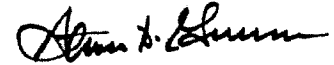
ASSEMBLYWOMAN CARLTON SECONDED THE MOTION.

THE MOTION CARRIED. (Senator Roberson was not present for  
the vote.)

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*[T]he study outlined in Assembly Bill 444 is meant to be dispassionate, rational, and logical.*

James Ohrenschall at May 2, 2013 Assembly Committee  
on Operations and Elections



CLERK OF THE COURT

**ORDR**

STEVEN B. WOLFSON  
Clark County District Attorney  
Nevada Bar #001565  
PAMELA WECKERLY  
Chief Deputy District Attorney  
Nevada Bar #006163  
200 Lewis Avenue  
Las Vegas, NV 89155-2212  
(702) 671-2500  
Attorney for Plaintiff

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

THE STATE OF NEVADA,

Plaintiff,

-vs-

DAVID JAMES BURNS, aka  
D-SHOT,  
#2757610

Defendant.

CASE NO: C-10-267882-2

DEPT NO: XX

**ORDER DENYING DEFENDANT'S MOTION TO STRIKE THE STATE'S NOTICE OF  
INTENT TO SEEK THE DEATH PENALTY BASED ON THE COST OF CAPITAL  
PUNISHMENT AND ATTENDANT POLICY CONSIDERATIONS, OR IN THE  
ALTERNATIVE, MOTION TO STAY CAPITAL PROCEEDINGS PENDING THE  
OUTCOME OF THE AUDIT RELATED TO ASSEMBLY BILL 444**

DATE OF HEARING: 9/12/13  
TIME OF HEARING: 8:30 A.M.

THIS MATTER having come on for hearing before the above entitled Court on the  
12th day of September, 2013, the Defendant being present, represented by CHRISTOPHER  
R. ORAM ESQ., and ANTHONY PATRICK SGRO, ESQ., the Plaintiff being represented  
by STEVEN B. WOLFSON, District Attorney, through PAMELA WECKERLY, Chief  
Deputy District Attorney, and the Court having heard the arguments of counsel and good  
cause appearing therefor,

///

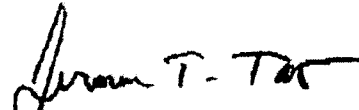

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SEP 23 2013


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1 IT IS HEREBY ORDERED that the Defendant's Motion to Strike the State's Notice  
2 of Intent to Seek the Death Penalty Based on the Cost of Capital Punishment and Attendant  
3 Policy Considerations, or in the Alternative, Motion to Stay Capital Proceedings Pending the  
4 Outcome of the Audit Related to Assembly Bill 444, shall be, based on the law today and it  
5 is denied.

6 DATED this 3 <sup>October</sup> day of ~~September~~, 2013.

7  
8   
9 DISTRICT JUDGE 

10 STEVEN B. WOLFSON  
11 Clark County District Attorney  
Nevada Bar #001565

12  
13 BY   
14 PAMELA WECKERLY  
15 Chief Deputy District Attorney  
Nevada Bar #006163

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## LAS VEGAS SUN

### OTHER VOICES:

# Why Nevada needs a new appellate court

**Sens. Tick Segerblom and Mark Hutchison**

Friday, March 22, 2013 | 2:02 a.m.

Article 6 of the Nevada Constitution currently provides for one appellate court — the Supreme Court. Every single appeal from decisions rendered by Nevada's 82 District Courts must be reviewed by the Supreme Court. This two-tier court structure has resulted in a staggering caseload for the Nevada Supreme Court, and the delay of justice — sometimes by years — for Nevada citizens.

An appellate court, commonly called an appeals court or a court of appeals, is a court empowered to hear an appeal of a trial court or other lower court. In most states, the court system is divided into at least three levels: the trial court, which initially hears cases and reviews evidence and testimony to determine the facts of the case; at least one intermediate appellate court; and a Supreme Court (or court of last resort), which primarily reviews the decisions of the intermediate appellate courts. Forty of the 50 states have an intermediate appellate court. The 10 states that do not are Delaware, Maine, Montana, Nevada, New Hampshire, Rhode Island, South Dakota, Vermont, West Virginia and Wyoming.

The Nevada Supreme Court has a crushing caseload, one of the heaviest in the nation. Seven justices have handled more than 2,250 cases in each of the past three years. To fully appreciate the burden of this caseload, consider a report published by the National Center for State Courts titled, "Court Statistics Project, 2012." This report concludes that of the 10 states with no intermediate appellate court, Nevada has the highest number of incoming cases at 2,288. When considering the number of incoming cases per 100,000 total population, West Virginia is first with 90 cases per 100,000, Delaware is second with 86 cases and Nevada is third with 85 cases.

Comparing the caseload in Nevada's Supreme Court (85 per 100,000 people) with the caseloads of the 40 states with one or more intermediate appellate courts, 17 of the states have a higher caseload per 100,000 (ranging from 86 cases to 234 cases) and 22 states have a lower caseload per 100,000 (ranging from 31 cases to 84 cases).

The number of cases each justice individually handles is likewise staggering. The American Bar Association's suggested caseload for an appellate judge is 100 cases. In fiscal year 2011-12, the average caseload per justice of the Nevada Supreme Court was 357 cases. This large caseload means Nevada justices have less time to carefully consider and write opinions, which clarify state law and thereby benefit the public. Based on the Court Statistics Project report concerning court opinions, of the reporting states with no appellate court, Nevada had the highest decided dispositions at 1,679 and the lowest number of opinions per judge at nine.

The bar association's standard for the review and resolution of appellate cases is one year. Based on data from the Nevada Supreme Court, for calendar year 2012, the court will resolve approximately 73 percent of the cases within the one-year standard. With the current caseload of 2,500 appeals, the Nevada Supreme Court would have to dispose of nearly seven cases each calendar day to meet the association's time standards. Senate Joint Resolution 14, which is pending before the 2013 Legislature, proposes to amend the Nevada Constitution to create a court of appeals, which would be composed of

three judges. Based on the business plan submitted by Nevada's Supreme Court, the cost for the court would be approximately \$1.5 million annually to cover the salaries of judges and staff. There would be no facility costs because the new court would reside in the Regional Justice Center in Las Vegas within existing Nevada Supreme Court space.

The new court would work under a "push down" model. Using this model, all appeals would be filed in the Supreme Court, which would assign certain types of cases to the court of appeals. The type of cases that would fall under the court of appeals currently comprise the largest portion of the appeals filed in the Nevada Supreme Court. This system would provide for a speedy disposition of typical case types, such as divorces, personal injury claims and foreclosures. In addition, this system would provide the Supreme Court with cases calling for greater review, including cases presenting constitutional issues, and development of opinions. This process would provide for greater and most efficient access to justice for Nevada's citizens.

Sen. Tick Segerblom, D-Las Vegas, is chairman of the Senate Judiciary Committee. Sen. Mark Hutchison, R-Las Vegas, is a member of the committee. Both are attorneys.

**MINUTES OF THE  
SENATE COMMITTEE ON JUDICIARY**

**Seventy-Seventh Session  
February 5, 2013**

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:01 a.m. on Tuesday, February 5, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412E of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

**COMMITTEE MEMBERS PRESENT:**

Senator Tick Segerblom, Chair  
Senator Ruben J. Kihuen, Vice Chair  
Senator Aaron D. Ford  
Senator Justin C. Jones  
Senator Greg Brower  
Senator Scott Hammond  
Senator Mark Hutchison

**STAFF MEMBERS PRESENT:**

Mindy Martini, Policy Analyst  
Nick Anthony, Counsel  
Lynn Hendricks, Committee Secretary

**OTHERS PRESENT:**

The Honorable Kristina Pickering, Chief Justice, Nevada Supreme Court  
John R. McCormick, Rural Courts Coordinator, Administrative Office of the Courts  
The Honorable James W. Hardesty, Justice, Nevada Supreme Court  
Seth Floyd, Appellate Litigation Section, State Bar of Nevada  
Lucas Foletta, General Counsel and Policy Director, Office of the Governor  
Gerald Gardner, Chief of Staff, Office of the Governor

**Chair Segerblom:**

I will hand out the Committee Rules (Exhibit C). As you can see, the only change is in item 8: If you want to make a motion to reconsider a measure, you do not need to be on the side that won the vote at the measure's first action.

SENATOR KIHUEN MOVED TO ADOPT THE COMMITTEE RULES.

SENATOR BROWER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

\* \* \* \* \*

**Mindy Martini (Policy Analyst):**

I have prepared a Committee Brief (Exhibit D). This large document contains many items that may be helpful, including the Committee's jurisdiction, anticipated topics and relevant publications from the Research Division. With regard to the anticipated workload, this is the busiest policy committee in the Senate. During the 76th Legislative Session, 152 bills came before the Committee; the next busiest committee was the Senate Committee on Commerce, Labor and Energy with 142 bills. The workload tends to be steady throughout the session. Of the 152 bills considered last Session, 83 were referred by the Senate and 69 by the Assembly, which meant the workload was much the same before and after the deadline for committee passage by the first House.

**Chair Segerblom:**

For those who are new to the process, the workload is the same because we have less time to consider bills after that crossover deadline.

**Ms. Martini:**

Yes. The Committee has 9 weeks to consider bills before the crossover, but only 4 weeks after the crossover before the deadline for committee passage by the second House. This is mitigated by the fact that the second group of bills will have been heard and amended by the Assembly before they come to this Committee, so they may have some of the problems ironed out. It is still a lot of work to finish in 4 weeks.



In the 76th Session, the Committee passed 84 percent of bills heard; of the 127 bills passed, 100 were eventually signed into law or reported to the Secretary of State. Overall, the Committee had a pass rate of about 80 percent.

**Nick Anthony (Counsel):**

I am nonpartisan staff. I provide legal counsel to both parties, and I can neither represent, urge passage nor oppose any legislation.

I have compiled a list of cases decided in the interim relating to the jurisdiction of the Committee (Exhibit E) titled "Summary of Court Decisions of Importance to Senate Judiciary." It contains five cases. One is a decision from the Eighth Judicial District Court, three are Nevada Supreme Court cases and one is a federal court case from the Ninth Circuit Court. I will give a brief overview of each case; Exhibit E contains more information on these cases for your review, including the written decisions as available.

The first case in Exhibit E is *State v. Hamilton and Schwingdorf*. The two defendants, Hamilton and Schwingdorf, were charged with possession and other criminal offenses relating to the medical use of marijuana. They appealed their sentence on the grounds that chapter 453A of the *Nevada Revised Statutes* (NRS), the medical marijuana statutory scheme, is unconstitutionally vague and overbroad. They were successful at the Eighth Judicial District Court, and the case is now pending before the Nevada Supreme Court. The most recent action in this case is a grant of extra time to file a reply brief. District Judge Donald M. Mosley of the Eighth Judicial District Court declared the statutory scheme unconstitutional. Since this is a district court opinion, it is persuasive; however, the Legislature can choose to amend the law, wait for the Nevada Supreme Court ruling or let the statutory scheme stand as written.

The first Nevada Supreme Court case is *State v. Lucero*. In that case, the defendant was charged with a drug-trafficking offense. He was given a reduced sentence because he provided substantial assistance. He was then picked up on a probation violation and brought for a probation revocation hearing, at which time his counsel argued that based on the substantial assistance provided by the defendant, his sentence should be further reduced. The court agreed, and the State appealed that decision. The Nevada Supreme Court looked at NRS 176A.630 and NRS 453 and upheld the decision, finding that the District Court had the power to reduce the sentence at the probation revocation hearing. The Legislature can either let the ruling of the Nevada Supreme Court

stand as precedent and become law or revise NRS 176A to specify that when a sentence is reduced for substantial assistance at the initial sentencing hearing, it cannot be further reduced below the statutory minimum sentence at a subsequent hearing.

**Chair Segerblom:**

Has a bill draft request (BDR) been submitted on that topic?

**Mr. Anthony:**

I am not aware of one, no.

The next Nevada Supreme Court case is *State v. Hughes*. This case deals with NRS 200.700 and NRS 200.710, Nevada's child pornography statutes. The defendant was charged with a child pornography offense wherein the victim was 17 years of age. The defendant argued that the statute was unconstitutionally broad and vague because it did not define the term "minor." He argued that the term "minor" could mean a person aged 16 years or less. The Nevada Supreme Court held that although the statute does not specifically define "minor," it is clearly defined throughout the NRS as a person aged 18 years and younger, and the defendant's conviction was upheld. The Legislature could revise NRS 200 to define "minor," but the Nevada Supreme Court decision makes it clear that our child pornography laws apply to any victim less than 18 years of age.

**Chair Segerblom:**

I seem to recall a bill last Session to clarify the definition of "minor."

**Mr. Anthony:**

There have been a number of bills over the years relating to crimes against minors. You might be thinking of a bill that gave victims of child pornography the right to file a civil suit.

**Chair Segerblom:**

Have any BDRs been filed on this topic this Session?

**Mr. Anthony:**

To my knowledge, there have been no BDRs to further clarify the definition of "minor."

The last Nevada Supreme Court decision is *Sheriff v. Andrews*, which relates to NRS 212.093 and NRS 212.165. In this case, the defendant was found to have a cell phone in his possession while he was incarcerated in the Pershing County jail. He was charged with possessing an instrument that might be used to escape from jail. The case went to the Nevada Supreme Court, which found that the statute covering county jail inmates, NRS 212.093, lists specific prohibited items that might be used to escape, and this list does not include cell phones. The statute covering the State prisons, NRS 212.165, specifically states that inmates are not allowed to use or possess cell phones. There is a bill forthcoming this Session that may address this issue.

Finally, Exhibit E includes an update on the status of *ACLU of Nevada v. Masto*, about which our office receives many queries. This is a federal decision dealing with the Adam Walsh Child Protection and Safety Act of 2006 and sex offender legislation. In 2007, the Legislature passed A.B. No. 579 of the 74th Session and S.B. No. 471 of the 74th Session in relation to the federal Adam Walsh Child Protection and Safety Act of 2006. That Act was immediately enjoined by the federal district court. The case was then appealed to the Ninth Circuit Court of Appeals. During this last interim, the court issued a three-judge opinion in which they reversed in part and remanded and then dismissed as moot in part that particular case from the federal district court.

What does that mean? At one point, our opinion was that A.B. No. 579 of the 74th Session and S.B. No. 471 of the 74th Session were unenforceable because they were enjoined. They are now codified in Nevada law. The Attorney General's Office informs me that the case has been remanded for an agreement as to how to enforce A.B. No. 579 of the 74th Session. That is the latest on that case.

**Chair Segerblom:**

If that law goes into effect now, it will be an incredible burden on law enforcement. Perhaps we can tweak the law so it will not be so burdensome. It is my intention to have some kind of hearing on this issue, though I do not know if we will have proposed legislation.

We will now have a presentation on the Judicial Branch by the Honorable Kristina Pickering, Chief Justice of the Nevada Supreme Court.

**The Honorable Kristina Pickering (Chief Justice, Nevada Supreme Court):**

I have been asked to give you a brief overview of the judicial system in Nevada, and the best information is in the *Annual Report of the Nevada Judiciary* (Exhibit F). This report contains backup detail for the items on the presentation we will give you this morning (Exhibit G).

Page 2 of Exhibit G shows the constitutional origins of the court system in Nevada. When we come before the money committees, we are treated as an agency, when in fact we are a separate branch of government equal to the Legislative and Executive Branches. We like to bring the constitutional provisions forward because they are significant in terms of how you think about the Judicial Branch and how this Committee does its work.

Page 3 of Exhibit G shows the organization of the Judicial Branch. It also lists the sections of the Nevada Constitution and the NRS that cover the different types of courts. Some justice court judges also serve as municipal court judges; in other jurisdictions, these positions are separate.

Page 4 of Exhibit G shows the sources and distribution of the funding for the Judicial Branch. When I joined the Nevada Supreme Court, I was surprised by the extent to which the Court is not funded by the General Fund. It is primarily funded by administrative assessments, which in turn are taken largely from traffic ticket revenues. A significant portion of the revenue that supports the court system, and indeed all the specialty court funding, comes through administrative assessments. That is significant because administrative assessments have been on the decline. The share of the courts' funding from them was further jeopardized by a special session enactment that took \$5 off the top of the administrative assessments and dedicated it to the special fund. That has cut into our ability to live within our means and to remit substantial portions of our General Fund allocations as a result of our effort to run lean.

The Judicial Branch General Fund appropriation is just 1 percent of the total General Fund appropriation in the State. That is a staggering statistic. When you look at all funding sources in the State, our portion is 0.6 percent.

**Senator Brower:**

The chart on page 4 of Exhibit G shows that \$824,538 is received from federal funding over the biennium. Can you describe that?

**John R. McCormick (Rural Courts Coordinator, Administrative Office of the Courts):**

The primary federal funding we receive is for the Court Improvement Program, which is designed to help the State courts improve outcomes for children engaged in dependency proceedings. We use those funds to support judicial training. We are developing uniform court-ordered templates for child neglect cases and that type of activity.

**Senator Brower:**

Has that funding increased or decreased over the years, or was that a one-time funding?

**Mr. McCormick:**

That funding is recurrent. It is given to all state supreme courts to do that type of thing. Right now, we do not know if we will receive another year of funding, but it has been going on for a few years.

**Chief Justice Pickering:**

Page 5 of Exhibit G lists the duties of the Nevada Supreme Court. We decide all civil and criminal cases appealed from district courts. Unlike most state supreme courts, we hear these cases directly, and our jurisdiction is mandatory. We do not have the ability to refuse to consider an appeal. We do have extraordinary writ review, and there we can exercise a modicum of discretion. Those are writs of mandamus, certiorari, prohibition, *quo warranto* and habeas corpus. We exercise both original and appellate jurisdiction in that arena. Our exercise of original jurisdiction is discretionary, and it is established by clearly stated legal guidelines.

Page 6 of Exhibit G tracks the number of Nevada Supreme Court cases filed, resolved and pending starting in 2010 and projected through 2015. You will note that while the number of cases filed and pending rises steadily through that period, the number of cases resolved is projected to stay the same. This is because the seven human beings on the Nevada Supreme Court are only capable of putting out so much work in an effective, judicially appropriate way. If the caseload continues to increase, we will lose ground on dispositions, as we already are. We have implemented every available efficiency we can think of. We have an active Supreme Court Settlement Program, which routes civil cases to mandatory settlement with some exceptions. We have 15 criminal attorneys

and 13 civil attorneys on staff, and we rely on them. We work in panels of three rather than the full court panel of seven, achieving some economy there.

We are producing fewer published dispositions as a function of our total docket than has historically been the case. Why does that matter? Because people who bring their disputes to a judicial resolution are entitled to understand that their cases were decided in the same way and under the same law that applied to the case before them and the case after them. That is how judicial law grows; it is incremental. It is not passing statutes of broad, policy-based components; it is deciding one case at a time. Each case changes the situation a little from the case before it, and you have to address each case individually and in writing. A large number of our cases are so-called unpublished cases; that is, they are publicly available, but they are not precedential. That is a price of this system where we have so many cases before us.

**Senator Hutchison:**

Has serious consideration ever been given to allowing the Nevada Supreme Court to use discretion in accepting appeals? That would certainly cut down on the caseload.

**Chief Justice Pickering:**

People have a right to get a second opinion on their cases. We would be eliminating the chance to do any error correction of district court decisions and vesting all the decision-making authority in one person. That would be truly anomalous in our system of government. The Nevada Supreme Court is constitutionally given the obligation of direct appellate review in criminal and civil cases.

**Senator Hutchison:**

Would that still apply if we had a court of appeals?

**Chief Justice Pickering:**

No. With a court of appeals, we could achieve discretionary review, and many cases would end at the court of appeals.

**Senator Hutchison:**

In those states where there is discretionary review at the supreme court level, they always have a court of appeals to take those direct appeals the Nevada Supreme Court does not hear. Is that correct?

**Chief Justice Pickering:**

Yes.

**Senator Brower:**

As I understand it, that is exactly what Senate Joint Resolution (S.J.R.) 14 of the 76th Session would do. With the creation of an intermediate court, the Nevada Supreme Court would have discretion rather like a writ of certiorari process. Is that correct?

**SENATE JOINT RESOLUTION 14 of the 76th Session:** Proposes to amend the Nevada Constitution to create an intermediate appellate court. (BDR C-1013)

**Chief Justice Pickering:**

Yes. With an appellate court, every case would be reviewed. The chief benefit of that system is that many cases would end at the court of appeals. There would be discretionary review in the Nevada Supreme Court, and in some instances there would be direct review to the Nevada Supreme Court without going through the intermediate court.

**Senator Brower:**

Thank you. I have received some emails from constituents who think creating an intermediate court will just give every litigant yet another layer of automatic appeal. I do not see that S.J.R. 14 of the 76th Session provides for that, and you confirm that it does not.

**Chief Justice Pickering:**

It does not. That argument is fallacious.

Page 6 of Exhibit G also includes statistics regarding the rate of increase in cases in the recent past. It took 112 years, from 1864 to 1977, for the first 10,000 cases to be filed with the Nevada Supreme Court; the next 40,000 cases only took 30 years. The 60,000th case was filed in January 2012, and we now receive cases at the rate of 10,000 every 4.5 years.

Page 7 of Exhibit G demonstrates our backlog and the age of cases at the time they are disposed of by the Nevada Supreme Court. We work very hard to render timely dispositions of the cases that come before us, but it is not

possible to do so in every case. As the caseload marches on, we will see increases in the number of older cases, and justice delayed is justice denied.

Page 8 of Exhibit G compares the caseload of the supreme courts of several states. Nevada leads the group, with the highest number of cases per justice per year—357. That number is somewhat misleading, since we do not act on cases singly but only in groups of three or seven. The number was arrived at by taking the 2,500 cases filed per year and dividing it by the seven justices. If we decided all cases in three-justice panels, that would be three cases per justice per day every day in the year, and it is not humanly possible to give careful consideration to the cases in that situation. It is even worse when you consider the serious cases we have. Nevada has 79 inmates on death row. Substantial death penalty and capital litigation and substantial serious civil matters come before the Court. We also have easy cases with jurisdictional issues that are readily dismissed, so the number is weighted. But the total caseload is the largest in the Nation.

Page 9 of Exhibit G covers the caseload of the district courts. Assembly Bill No. 64 of the 75th Session added new judges in Clark County and Washoe County, which allowed for a total of 131,506 case dispositions in 2012. That has given us some breathing space. We look forward to more progress now that the third floor in the Regional Justice Center has been fully built out and the judges in Las Vegas are no longer sharing courtrooms. That should make a big difference in their efficiency.

Page 10 of Exhibit G concerns the Senior Judge Program. The 22 senior judges step in when there are permanent or temporary vacancies on the bench. They assist the specialty courts and conduct mass mediations in medical malpractice and family court matters, which are enormously beneficial. Last year in Clark County, 94 family law cases were put into the settlement program, and 71 of those settled thanks to the mediation efforts of the senior judges who presided over them. That is a success rate of 75 percent.

Page 11 of Exhibit G covers the justice courts. As you can see, there was a slight increase in the number of traffic cases filed with these courts over the biennium. I do not know how this translates into administrative assessments. However, administrative assessment revenues are declining overall, perhaps due to negotiated resolutions with people working off fines rather than paying them outright.



Page 12 of Exhibit G concerns municipal courts, and page 13 covers specialty courts. Nevada has been a leader in the area of specialty courts. This is attributed to the judicial officers who had the vision to make the program work. Specialty courts take people out of the system; they redeem people who are leading lives of addiction, who are in a cycle of domestic violence and incarceration. They do not have a 100 percent success rate, but for those who succeed, they are enormously successful. This saves the State a great deal of money because it breaks the cycle of addiction and incarceration. The specialty courts are completely funded by special assessments. They also get 12 percent of the Nevada Supreme Court administrative assessment funds.

Page 14 of Exhibit G lists the locations of the specialty courts. This demonstrates the depth and range of coverage provided by our specialty courts. They are not limited to the two main population centers in the State. Serving the rural areas takes a lot of effort for the judges who must travel to the various courts, and we are truly in their debt for the services they provide.

Page 15 of Exhibit G concerns the business courts.

**Chair Segerblom:**

When we initially created the business courts, we talked about having them publish opinions to develop a base, as is done in Delaware and other states. Are we anywhere close to accomplishing that?

**The Honorable James W. Hardesty (Justice, Nevada Supreme Court):**

We made a commitment to examine that by rule, and we did. We held off on formalizing the rules dealing with district court opinions for three reasons. First, we were looking at the court of appeals to provide a relief to the Nevada Supreme Court, where those opinions should properly come from. Second, the business court judges are too busy to write published opinions. Third, they lack the financial resources to hire law clerks who would provide adequate data and research necessary for those published opinions. We have examined the rule process. We are hoping that if S.J.R. 14 of the 76th Session passes, we will be in a position to facilitate those opinions at the Nevada Supreme Court, where they more properly belong.

**Chief Justice Pickering:**

Pages 16 through 18 of Exhibit G concern the Administrative Office of the Courts (AOC), which performs a variety of functions. When I was elected to the

Nevada Supreme Court, the AOC was something of a mystery to me; now I have a much greater understanding of the depth and extent of the services it provides. I want to highlight particularly the AOC's work in the area of information technology (IT). The Nevada court system has a strong IT department. Our Nevada Supreme Court Website has a public portal that allows free access to the briefs and cases that are filed. The appendices are not on the public portal, but you can see all the briefs and orders as they are filed. Lawyers and jurists in other states consider it a model of an appropriate public forum. We also provide simultaneous podcasts of oral arguments in the Nevada Supreme Court on the Website. We are proud of the superb work of our IT department.

Page 19 of Exhibit G talks about the Foreclosure Mediation Program (FMP). It is included in this overview because NRS 107.086, subsection 8, tasks the Nevada Supreme Court with creating the rules by which the FMP would be administered. We have done that. However, page 20 demonstrates something we called to the attention of the Interim Finance Committee in August 2012, and that is a precipitous drop in the number of Notices of Default (NODs). In fiscal year (FY) 2010-2011, there were 54,191; in FY 2011-2012, there were 16,818; and in FY 2012-2013, there were 8,528 through December 2012. The stunning thing about the number of NODs in FY 2011-2012 is that 13,121 of them happened in the first quarter. There were only 3,697 NODs in the following three quarters. This sharp drop-off seems to have been coincident with A.B. No. 284 of the 76th Session, which went into effect on October 1, 2011.

**Chair Segerblom:**

Do you see that as also being related to people going to judicial foreclosures?

**Chief Justice Pickering:**

No. That has been rumored, but I have not seen the statistics to support it.

**Chair Segerblom:**

Do you support extending the program to judicial foreclosures?

**Chief Justice Pickering:**

I do not have a position on that.

Pages 21 and 22 of Exhibit G raise a policy question regarding the expenses of the FMP. In response to the precipitous decline of NODs in FY 2011-2012, we advised the Interim Finance Committee that our income was less than our expenditures and we needed to change course. We went from 21 employees to 9 employees. We are the stewards of the FMP, and we are trying to make sure it continues to function as mandated. By the same token, I do not know if the program can operate effectively with fewer than nine employees. Program expenses for FY 2013-2014 will be \$1,141,356, and that is a trimmed-down version of the expenses, but the projected income for that same period is only \$404,100. The shortfall is even greater for FY 2014-2015. The approximate \$1 million overhead of the program is essentially irreducible.

I call this to your attention, as we did to the Interim Finance Committee and the money committees, because it presents the Legislature with a policy decision: to continue the FMP as is or change course. I express no opinion on this, but I do bring it to your attention.

**Senator Hutchison:**

If there is a relationship between A.B. No. 284 of the 76th Session and the number of foreclosures in Nevada, would changing the provisions enacted by that bill solve the problem?

**Chief Justice Pickering:**

There is a relationship between A.B. No. 284 of the 76th Session and the precipitous decline in NODs. Beyond that, I do not know what changes will be made this Session, so it is hard for me to project that in any realistic way. We are the stewards of the program, not its architects, and there is a case pending before the Nevada Supreme Court challenging our stewardship on the grounds of separation of powers.

Page 23 of Exhibit G addresses the Judicial Council of the State of Nevada. The Council does important work, and you can find further information on this body in Exhibit F. Page 24 of Exhibit G lists the special commissions and committees of the Nevada Supreme Court. Each of them deserves your attention and applause. They do phenomenal work, and much of it is volunteer work.

I would like to close my presentation with a reference to the Judicial Summit held this past year in Las Vegas. We were fortunate to have Justice Anthony M. Kennedy of the Supreme Court of the United States as the keynote speaker.

During the course of the Summit, Justice Kennedy said: "A functioning legal system is part of the capital infrastructure. It's as important as roads, bridges, schools ... You have to have an efficient, fair, decent, transparent, open legal system." I agree with that.

**Chair Segerblom:**

I will open the hearing on S.J.R. 14 of the 76th Session.

**SENATE JOINT RESOLUTION 14 of the 76th Session:** Proposes to amend the Nevada Constitution to create an intermediate appellate court. (BDR C-1013)

**Justice Hardesty:**

Senate Joint Resolution No. 14 of the 76th Session would amend Nevada's Constitution to create a court of appeals. I have a presentation describing the need for this change, how the court of appeals would operate and how it would be funded (Exhibit H). Page 6 lists projections of the number of cases to be filed with and disposed by the Nevada Supreme Court for the next biennium. These numbers are based on a 5 percent increase in case filings, though I believe that figure to be low as demonstrated by our experience this year.

As Chief Justice Pickering noted, we have kept the number of cases resolved the same for the future. This is because the members of the court are genuinely concerned that increasing the number of dispositions may result in mistakes made at the appellate level. No one wants to make mistakes, but it is even more crucial when you are the only appellate court. If the workload is increased, we are at risk of making mistakes.

Finally, the need for published opinions from the Nevada Supreme Court is great, as all of you who are lawyers know. We have seen a static level of published opinions at about 65 to 72 per year. Given the number of issues of first impression we hear, that number is too low. The members of the Nevada Supreme Court are frequently faced with this question: Do we decide the case by order, which is a quicker resolution of the case for the benefit of the parties before it, or do we, as many cases require, publish the opinion, which is a lengthy process that involves extensive research, numerous edits and substantial writing? That is the process we hope will be improved by the establishment of a court of appeals.

Page 8 of Exhibit H shows the proposed plan contained in S.J.R. 14 of the 76th Session. Since this plan was proposed, we have made it clear that the court of appeals would not involve capital costs. It is intended that the court of appeals would operate in the Regional Justice Center in southern Nevada, utilizing the courtroom and offices currently housing Justice Michael L. Douglas and Chief Justice Pickering. It is our contention that there is adequate space for remodeling should those justices remain there, or the court can establish separate rented facilities in Clark County at a cost much reduced from that we are currently paying in rent at the Regional Justice Center. We are projecting the operating cost at \$1,746,583 in 2015. That covers judges, staff and law clerks.

The structure of the court of appeals we are proposing is different from that in many other states. We developed what is called a push-down model. We did not want to change the staffing of the Nevada Supreme Court or the method by which cases are processed. We have an effective and efficient processing and case management system. Lawyers and *propria persona* parties throughout the State would continue to file their appeals with the Nevada Supreme Court's clerk's office, which is located in Carson City and at the Regional Justice Center in Las Vegas. Under S.J.R. 14 of the 76th Session, the Nevada Supreme Court would establish by rule those cases that are to be transferred to the court of appeals. For example, the Nevada Supreme Court's docket might include a *propria persona* inmate case, a case in which an individual seeks a judicial review of the revocation of a driver's license, and a case that requires review of evidentiary errors made by the district court during the trial. Those are types of cases that might be deserving of an appeal but are more appropriately considered by a court of appeals. We estimate those types of cases account for about 700 to 800 of the 2,500 cases filed with the Nevada Supreme Court every year. As you can see, the Nevada Supreme Court's caseload will still be substantial and will amount to 1,600 to 1,800 cases per year. However, we believe the case management systems we have in place will allow better and more efficient processing of those cases.

Senator Brower made a perceptive comment earlier about S.J.R. 14 of the 76th Session adding to judicial bureaucracy. We recognize that neither litigants nor lawyers want to go through a duplicative appellate process. It is costly and wastes time. Our plan eliminates that. Cases assigned to the court of appeals would only be reviewed by the Nevada Supreme Court by certiorari. In the Supreme Court of the United States, less than 1 percent of those cases are considered for review. The Nevada Supreme Court currently hears either

petitions for rehearing en banc or petitions for reconsideration en banc, and we consider 1 percent or less of those petitions. The cases that would be heard by the Nevada Supreme Court and not by the court of appeals would undergo only one appeal and one review.

There is no judicial bureaucracy in this plan, which is why we adopted the push-down plan in the first place. There is no need for new court clerks or for additional or separate central legal staff, and the plan does not incur a judicial bureaucracy that duplicates appellate effort.

We have been asked how the court of appeals would be structured, and page 10 of Exhibit H lays it out specifically. The court of appeals will initially consist of three judges, with the first three being appointed by the Governor through the judicial selection process. After they serve for 2 years, the judges would be elected for 6-year terms.

The key to this plan is on page 11 of Exhibit H, which quotes section 4 of S.J.R. 14 of the 76th Session. Chair Segerblom's comment about the business court brings up precisely one of the things we want to target. Business court cases, which are seriously in need of jurisprudence in Nevada, would go directly to the Nevada Supreme Court for published opinions. We could increase the number of published opinions if many of the other cases on our docket could be heard by a court of appeals. From a business standpoint, if Nevada intends to compete effectively with Delaware or other states, it needs to have published opinions with precedential value from the highest court rather than from district courts. A number of cases have come to us in the last 4 years that have substantial business court precedent, and I see many more of them emerging over the next 10 years.

**Senator Hutchison:**

It seems that it would be necessary for business court judges to produce a written opinion on any cases they send to the Nevada Supreme Court. Given the crushing caseload in the business courts, getting those opinions seems like a pipedream.

**Justice Hardesty:**

I am optimistic that we can make some real headway in reducing the caseload of the business courts. I advocated for A.B. No. 65 of the 75th Session when I was the Chief Justice of the Nevada Supreme Court. That plan added

nine judges in Clark County and one in Washoe County. A key component of that plan was how to pay for those judicial resources, both staff and courtrooms, without resorting to the General Fund. The Eighth Judicial District opened those courtrooms after 18 months of construction. Assembly Bill No. 65 of the 75th Session was an incredible success, and I am hopeful that it will either add an additional business court judge in that district or reduce the number of business court cases assigned to the three judges currently hearing them.

The business court judges write orders, not publishable opinions. They write orders that provide us with tremendous guidance in business court issues. We would like to see that expanded. The key component, though, is giving them additional law clerks so they can do the research necessary to make real contributions in those areas.

**Senator Hutchison:**

What is the status of getting those additional law clerks? Is that something we need to deal with, or is it a matter of court rules?

**Justice Hardesty:**

It is not a matter of court rules; it is a matter of resources. As Chief Justice Pickering's presentation showed, we have a judicial system weighted down with an enormous caseload from top to bottom that is operating on spare and reduced resources. Administrative assessments represent a large portion of our operations, and they are declining. That hurts our staff. We have made proposals this Session to try to stabilize that. We lost nine central staff lawyers in the last biennium to other agencies within the State because of the pay restrictions under which the Nevada Supreme Court must operate. At the local level, as long as counties are operating under the same kind of limited resources and are not redirecting those resources to the judicial system, we cannot get law clerks to do this kind of work. It is a matter of establishing priority, and that comes from the Legislature.

**Senator Ford:**

On page 3 of S.J.R. 14 of the 76th Session, lines 8 through 11 state, "The Supreme Court shall fix by rule the jurisdiction of the court of appeals and shall provide for the review, where appropriate, of appeals decided by the court of appeals." Do you take that to give the Nevada Supreme Court the discretionary

ability to take appeals from the district court as opposed to a direct required appeal?

**Justice Hardesty:**

Yes. We would establish by rule those cases that will be automatically transferred by the clerk's office to the court of appeals. All others will remain with the Nevada Supreme Court under a separate section of the Constitution that mandates us to hear all appeals.

Page 12 of Exhibit H adds one more point to the fiscal issue. Beginning in 2007, the Nevada Supreme Court was reverting substantial sums of its budget back to the General Fund. The amount reverted was nearly \$2,500,000 in FY 2008-2009, \$872,571 in FY 2009-2010 and \$1,287,378 in FY 2010-2011. We have recommended two tweaks to the revenue issues in our budget. With those adjustments, the operating costs of the court of appeals will be paid for and the Nevada Supreme Court will be funded at the same level as in 2007.

Page 13 of Exhibit H lists the benefits of establishing a court of appeals.

I would like to go back to page 6 of Exhibit H, which gives the number of Nevada Supreme Court cases filed and resolved. When I joined the Nevada Supreme Court in January 2005, there were 1,515 cases pending. At the end of FY 2011-2012, there were 1,919 cases pending. We have lost ground. If these numbers are even close to accurate, by the end of 2015 we will have a pending caseload of 3,384 cases, and that will be a disaster for judicial processing of cases in Nevada.

**Senator Jones:**

If this measure goes on the ballot in 2014 and is approved by the voters, when would the court of appeals start operating?

**Justice Hardesty:**

The three new members of the court would be appointed in November and December 2014 and would take office in January 2015.

**Senator Hutchison:**

We have tried to get this measure passed before, and it has not worked. Tell us why it has not worked with the voters and what we can do to help voters understand the pressing need for a court of appeals.



**Justice Hardesty:**

The last time the public had an opportunity to vote on this, it was much better received than it had been in the past. However, there was an absence of a public education campaign. As you recall, it was on the ballot at the same time as merit selection, which was a much more controversial matter. Some opine that when two measures dealing with major changes in the judicial system are on the ballot at the same time, they will both lose. That is what occurred in this case. Every major newspaper in Nevada endorsed the measure establishing a court of appeals.

I would also add that many contributed money to the education campaign for the judicial merit selection proposal. The consequence was that there was no money for the court of appeals proposal campaign. If we do not have a competing judicial amendment on the ballot, we will have the opportunity to raise the funds and conduct the public education campaign this time around. There has been a growing interest in and support for the court of appeals in the past 2 years. Many lawyers who practice before the Nevada Supreme Court see the workload under which we operate, and many litigants express concern. The plan has the support of the State Bar of Nevada, all of the county bar associations and other individual bar associations. We are hopeful that we can be more effective at communicating the need and benefit of the program, the absence of judicial bureaucracy and the limited cost.

**Senator Hutchison:**

What have been the joint efforts between the Court and the Legislature to educate the public in the past? Can you suggest any practical ways the Legislature can work with the Nevada Supreme Court to see a successful passage of this measure?

**Justice Hardesty:**

One important thing in any education campaign is that the message should be uniform. We have developed a uniform PowerPoint presentation that describes the function and operation of the court of appeals, its cost and so forth. It would be of enormous assistance to the Nevada Supreme Court if the Legislature and the Executive Branch would join in the public education campaign. You are all very astute in the law, and you are also astute in representing your constituents, helping them understand the benefits of this measure and answering their questions about how it would operate. The more we can do in cooperation with you as Legislators, the more beneficial the

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education campaign will be. My hope is that the Legislators who vote for this measure will support it beyond their votes. We have also approached Governor Brian Sandoval to ask for his support, which I do not think the Nevada Supreme Court did last time the measure came up.

**Seth Floyd (Appellate Litigation Section, State Bar of Nevada):**

We support S.J.R. 14 of the 76th Session. It goes without saying that attorneys recognize the need for this legislation. The State Bar of Nevada has taken an official position that it supports this measure. In addition, S.J.R. 14 of the 76th Session has been a primary topic of discussion at the State Bar's newly formed Appellate Litigation Section, and we recognize the need for a court of appeals. When the Court issues an unpublished order, that really does not help the Bar. What we need are published dispositions we can rely on. Clients ask us what the law is, and we need something we can look to.

**Lucas Foletta (General Counsel and Policy Director, Office of the Governor):**

Governor Sandoval supports S.J.R. 14 of the 76th Session. The Governor recognizes that Nevada has one of the busiest supreme courts in the U.S., and the workload of the Nevada Supreme Court complicates its work and makes it difficult to lead the development of the law in our State. This proposal is essentially budget neutral, when you take into account the reversion referred to by Justice Hardesty. The Governor is happy to support this measure, and he believes it advances the responsiveness of the judicial system and folds into his strategic priority for the State, which is to have a responsive, efficient State government.

**Gerald Gardner (Chief of Staff, Office of the Governor):**

We support S.J.R. 14 of the 76th Session. I have written testimony explaining Governor Sandoval's support for this measure (Exhibit I).

**Chair Segerblom:**

I will close the hearing on S.J.R. 14 of the 76th Session.

SENATOR BROWER MOVED TO DO PASS S.J.R. 14 OF THE 76TH SESSION.

SENATOR FORD SECONDED THE MOTION.

**Senator Brower:**

Let me express my support for S.J.R. 14 of the 76th Session. I voted for it last Session and am happy to do so again. As we heard, there is a compelling need for this measure; that goes without saying, and we have heard no opposition to it. I thank the Nevada Supreme Court for articulating the need, and I thank the Chair for sensing the urgency of this matter and bringing it up today.

During the course of the Legislative Session, we hear a lot of what we think of as Chicken Little testimony. Witnesses tell us that the sky will fall and civilization as we know it will end if we do this or do not do that. This is not that. This is a very important measure. I appreciate the Court's understated but clear point about the importance of S.J.R. 14 of the 76th Session. From my experience as a practitioner before the courts and as a citizen, I say we could not take up a more important measure this Session.

I am happy to support this measure.

**Chair Segerblom:**

I echo Senator Brower's comments. The key to the success of this measure is for us to get behind it once it is on the ballot and make sure there is a united voice explaining to the citizens of Nevada that this matter is critical. Nevada is at a turning point where voters are starting to realize we are no longer that little State we all grew up in. We have to move into the twenty-first century, and S.J.R. 14 of the 76th Session will be a major part of that.

**Senator Ford:**

I know S.J.R. 14 of the 76th Session was not developed for the purpose of economic development, but it will have an economic impact. The American Bar Association's Business Law Section met in Las Vegas in March 2012. At that event, I heard from many colleagues whom I respect that they were afraid to operate in Nevada because of the lack of written judicial opinions. If we want to be the "Delaware of the West," we need to give the Nevada Supreme Court the ability to write opinions that can be relied upon and justified. I look forward to supporting this measure.

**Senator Hutchison:**

I thank the Chair for recognizing the need to address the pressing need of the judicial caseload, and to do so in a bipartisan manner. Our constituents have asked us to look at issues and solve problems in a bipartisan manner. This

measure is a symbolic and appropriate way for us to begin this Committee and this Session.

**Senator Jones:**

Having been through the appellate process myself on many occasions, I cannot overemphasize the importance of passage of this bill. Like my colleagues, I enthusiastically support S.J.R. 14 of the 76th Session and look forward to working with my colleagues and the Executive Branch to ensure the passage of this legislation in 2014.

THE MOTION PASSED UNANIMOUSLY.

\* \* \* \* \*

**Chair Segerblom:**

If there is no further business to come before this Committee, we are adjourned at 10:52 a.m.

RESPECTFULLY SUBMITTED:

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Lynn Hendricks,  
Committee Secretary

APPROVED BY:

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Senator Tick Segerblom, Chair

DATE: \_\_\_\_\_

<b><u>EXHIBITS</u></b>			
<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A 1		Agenda
	B 3		Attendance Roster
	C 2		Committee Rules
	D 151	Mindy Martini	Committee Brief
	E 62	Nick Anthony	Summary of Court Decisions of Importance to Senate Judiciary
	F 60	Kristina Pickering	<i>Annual Report of the Nevada Judiciary</i> booklet
	G 24	Kristina Pickering	Judicial Branch Overview presentation
S.J.R. 14 of the 76th Session	H 13	James W. Hardesty	The Need for a Court of Appeals presentation
S.J.R. 14 of the 76th Session	I 1	Gerald Gardner	Written testimony