

ASSEMBLY BILL 13: MAKING THE DEATH PENALTY MORE FAIR¹

Statutes Affected: NEV. REV. STAT. 175.552; 175.554; 175.556; 176.495; 177.095.

Adds a new section to NEV. REV. STAT. Chapter 178.

Statutes of Nevada: Assemb. B. 13, 72d Sess. (Nev. 2003) (Judiciary);
2003 Nev. Stat. 366.

I. Introduction

The most controversial punishment currently allowed by Nevada, and many other states, is the death penalty. The United States Supreme Court has recently modified the application of the death penalty in cases like *Atkins v. Virginia*² and *Ring v. Arizona*.³ Many people are morally reluctant to recognize the government's right to kill people, and a large segment of the population is concerned that innocent people will be executed. There is also some alarming statistical evidence indicating that, when put into practice, the death penalty is a manifestation of the institutionalization of racism.

Statistical evidence raises inferences of racism in the system. For example, in Nevada, forty percent of the inmates on death row are African-American; that is "seven times the proportionate state population."⁴ Of the eighty-three prisoners awaiting execution, only five of them had killed African-Americans, despite the fact that African-Americans constitute the second-largest group of murder victims in Nevada.⁵ Thus, the majority of those who kill African-Americans do not end up on death row; this fact indicates racial disparity in the system. Nevada Assembly Bill 13 ("AB 13") represents an effort in the state legislature to fix some of the procedural mistakes associated with this harsh sentence.

II. Legal Background

Prior to AB 13, if a defendant pled guilty to first-degree murder, or was found guilty of first-degree murder, but the sentencing jury was hung, a three-judge panel decided if the defendant would be sentenced to death.⁶ The three-judge panel is composed of the "trial judge and two judges from other districts in the state."⁷ The only two African-

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² 536 U.S. 304 (2002) (holding that the execution of a mentally retarded defendant violated the Eight Amendment).

³ 536 U.S. 584 (2002) (holding that, pursuant to the Sixth Amendment, the requisite determination of an aggravating factor in a death penalty sentence must be made by a jury, not a sentencing judge).

⁴ *Minutes of Assemb. Comm. on Judiciary for Feb. 12, 2003: Hearing on Assemb. B. 13 Before the Assemb. Comm. on Judiciary*, 2003 Leg., 72d Sess. 18 (Nev. 2003) (statement of Elmer Rusco, representing the Nevada Coalition Against the Death Penalty).

⁵ *Id.* at 15 (statement of Michael Pescetta).

⁶ *Id.* at 14-15 (statement of Michael Pescetta).

⁷ *Id.* at 14 (statement of Michael Pescetta).

American judges in Nevada preside in Clark County.⁸ Accordingly, defendants convicted of murder in Clark County would be guaranteed an all-white panel unless the trial judge happened to be one of the African-American judges.⁹ Similarly, defendants in other counties would be guaranteed that at least two of the judges would be white, and there was high probability that the entire panel would be white.¹⁰

The composition of the panel made an enormous difference. The all-white three-judge panels sentenced the defendant to death seventy-five to eighty percent of the time, whereas the mixed-racial panels only sentenced the defendant to death twenty percent of the time.¹¹ Despite the clear indications of racism, no statistics were kept regarding the race of the victims, the race of the defendants, and the decision process used to charge the defendant with the death penalty.¹²

III. The Amendment

AB 13 eliminated the three-judge panel, mandating that a jury make all death sentence determinations.¹³ If the jury cannot make a unanimous determination, the district court judge has the discretion to either dole out a life sentence or to impanel a new jury.¹⁴

Finally, in order to facilitate studies of possible racism, the district attorney must furnish reports for all voluntary manslaughters or murders.¹⁵ The statistics include information such as:

- (a) The age, gender and race of the defendant;
- (b) The age, gender and race of any codefendant . . . ;
- (c) The age, gender and race of the victim of the homicide and any alleged related offense;
- (d) The date of the homicide and of any alleged related offense;
- (e) The date of filing of the information or indictment;
- (f) The name of each court in which the case was prosecuted;
- (g) Whether or not the prosecutor filed a notice of intent to seek the death penalty and, if so, when the prosecutor filed the notice;
- (h) The final disposition of the case and whether or not the case was tried before a jury;
- (i) The race, ethnicity and gender of each member of the jury if the case was tried by a jury; and
- (j) The identity of: [each person who participated in the decision-making process from charging to sentencing].¹⁶

The Nevada Supreme Court must compile the information every other year, and submit its report to the legislature.¹⁷

⁸ *Id.* at 16 (statement of Michael Pescatta).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Minutes of S. Comm. on Judiciary for May 22, 2003: Hearing on Assemb. B. 13 Before the S. Comm. on Judiciary*, 2003 Leg., 72d Sess. 3-4 (Nev. 2003) (statement of Michael Pescatta).

¹³ 2003 Nev. Stat. 366 §§ 1, 3.

¹⁴ *Id.* § 3.

¹⁵ *Id.* § 6.

¹⁶ *Id.*

¹⁷ *Id.* at § 7.

IV. Similar Legislation Enacted in Other States

Nevada was the only state that provided for a three-judge panel in cases of hung juries and guilty pleas.¹⁸ However, it is now clear that any state that takes the determination of aggravating factors from a jury will have to change its laws. In a recent decision, the United States Supreme Court held that:

[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt. . . . A defendant may not be "exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."¹⁸

The Court further stated that “[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. . . . the Sixth Amendment applies to both.”¹⁹ Therefore, any remaining state statute that allows judges to determine aggravating factors for purposes of the death penalty is in violation of the Sixth Amendment.

V. Analysis

The State Assembly had the foresight to propose AB 13 prior to the United States Supreme Court’s decision in *Ring*.²⁰ The amendment is essential because prior state law violated the Sixth Amendment of the United States Constitution as interpreted by the United States Supreme Court. It is also beneficial that the state legislature passed AB 13 expeditiously after the United States Supreme Court’s ruling. Because the three-judge panel was the only sentencing mechanism available to a defendant who pled guilty to first-degree murder, and that sentencing mechanism had been ruled unconstitutional, a clever defense attorney could exploit the system by instructing his client to plead guilty and then raise a constitutional challenge if the panel imposed a death sentence.²¹ In that respect, the Nevada law created a loophole.

There was considerable debate over allowing the trial judge to impanel a new jury when the first one could not reach a verdict.²² The bill originally had a “one and done”

¹⁸ *Minutes of Assemb. Comm. on Judiciary for Feb. 12, 2003: Hearing on Assemb. B. 13 Before the Assemb. Comm. on Judiciary*, 2003 Leg., 72d Sess. 17 (Nev. 2003) (statement of Michael Pescetto). Other states have similar judicial determinations, but with respect to all types of crimes, not just first-degree murder.

¹⁸ *Ring v. Ariz.*, 536 U.S. 584, 602 (2002) (quoting *Apprendi v. N. J.*, 530 U.S. 466, 482-83 (2000)).

¹⁹ *Id.* at 609.

²⁰ *Minutes of Assemb. Comm. on Judiciary for Feb. 12, 2003: Hearing on Assemb. B. 13 Before the Assemb. Comm. on Judiciary*, 2003 Leg., 72d Sess. 14 (Nev. 2003) (statement of Chairman Bernie Anderson).

²¹ In fact, this is what a defendant by the name of Dodson did. *Id.* at 16 (statement of Michael Pescatta). The judge rejected the guilty plea in order to force Dodson to go to trial. *Id.* at 16-17. The case has not been determined. *Id.* at 17.

²² *See generally id.*

provision that would automatically invoke a default life sentence in the event of a hung jury during the penalty phase of the trial.²³ The Clark County District Attorney argued, through Clark Peterson, that such a provision would permit one rogue juror to interfere with a sentence that probably should have been death.²⁴ Peterson pointed to the highly publicized case of Dante Johnson, who was sentenced to life because one juror did not want to sentence him to death.²⁵

One must also consider, however, that sentencing juries are given special voir dire and are “primed to accept the imposition of a death penalty.”²⁶ If that group of people cannot unanimously sentence someone to death, perhaps it is not the appropriate penalty and the state should not incur additional costs trying to get a similar jury to convict the defendant.²⁷

In addition to bringing Nevada law within the scope of the United States Supreme Court’s constitutional interpretation, AB 13 gives Nevada a mechanism for identifying and combating racism. There is no conclusive proof that the disparity in sentencing between African-Americans and Caucasians is due to sanctioned racism. Perhaps African-Americans commit a disproportionate number of brutal murders. If so, the statistics collected pursuant to the Bill’s provisions will prove that racism is not a factor in death sentencing in Nevada.

The more likely result is that future legislative committees will be able to determine what steps in the process are disadvantaging Nevada minorities. The wide range of information that must be provided will allow interested parties to analyze the statistics from different aspects of the trial. Racist results could be due to the race of the defendant, the race of the victim, or those involved in prosecuting the case. When that information is available, the legislature can enact provisions to provide more safeguards in the system.

VI. Conclusion

Some people consider the death penalty to be the most offensive aspect of the collective penal codes of the United States. The moral qualms of death are magnified by human error in the process. Mistakes, racism, and the denial of Constitutional rights fuel the arguments of those wishing to abolish the death penalty. Nevada Assembly Bill 13 is an attempt to reduce the risk of mistake. It brings Nevada law into conformity with the Sixth Amendment, making juries the only entity permitted to impose the harsh sentence of death. Further, the gathering of statistics will allow the legislature to identify and remedy any flaws in the process that lead to racial disparity in punishment.

²³ *Id.* at 18 (statement of Clark Peterson, on behalf of the Clark County District Attorney).

²⁴ *Id.* at 19.

²⁵ *Id.*

²⁶ *Minutes of S. Comm. on Judiciary for May 22, 2003: Hearing on Assemb. B.13 Before the S. Comm. on Judiciary*, 2003 Leg., 72d Sess. 8 (Nev. 2003) (statement of Michael Pescetta).

²⁷ *Id.*