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MEMORANDUM

Date:	March 12, 2003
To:	Honorable Bernie Anderson Chair, Assembly Committee on Judiciary Honorable Sheila Leslie Chair, Legislative Commission's Subcommittee to Study the Death Penalty
From:	Michael Pescetta
Re:	AB 16 (DNA Testing)

AB 16 has been scheduled for a hearing in the Assembly Judiciary Committee on March 17, 2003. There are some concerns about the current draft of the bill which should be addressed.

1. Section 2(1) of the proposed bill limits the availability of the procedure to inmates under death sentences. Many of the DNA exonerations in cases across the country that are documented in the Department of Justice Report, Conners et al., Convicted by Juries, Exonerated by Science: Case Studies on the Use of DNA Evidence to Establish Innocence After Trial (1996), involved non-capital cases, particularly sexual assault cases. Limiting the availability of the proposed procedure to capital cases would exclude many of the cases in which DNA exoneration would be possible.

If the Committee concludes that the specific proposed procedure should be limited to capital cases, it should be made clear that the procedure is not exclusive, that is, that it does not prevent use of existing methods in non-capital cases to obtain testing through other legal proceedings, which is currently possible under NRS 34.780(2) (discovery available in habeas corpus proceedings); see Jones v. Wood, 114 F.3d 1002, 1009-1010 (9th Cir. 1997) (ordering testing of physical evidence in discovery in habeas proceeding), or NRS 176.515(3) (motion for new trial based on newly discovered evidence). Attached to this memorandum is a proposed draft of the existing bill, with language inserted in Section (2)1 to make this clear.

2. Section 2(5) of the proposed bill provides that a court can hold a hearing on the request for testing "in its sole discretion." Since the decision whether testing is going to be authorized or not is practically the most important one in the whole proceeding, a hearing should be mandatory, in which the parties can present their arguments in the traditional adversary manner. Similarly, Section 2(10) of the proposed bill currently provides that the decision whether or not to conduct testing is immune from any appellate review. Again, since this decision will determine whether or not testing will even be allowed, it should be subject to appellate scrutiny, as are virtually all decisions of the district courts. Language is provided in the attached version of the bill on both of these points.

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ASSEMBLY JUDICIARY
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SUBMITTED BY: Michael Pescetta

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3. Section 2(6)(a) of the bill provides that testing will be ordered if the court finds that "a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition." The attached version changes that language to a "reasonable possibility." All of the cases involving post-conviction DNA analysis necessarily include a jury finding of guilt beyond a reasonable doubt. The Department of Justice DNA Report (at Ex. 3) includes numerous instances of "positive" eyewitness identifications, strong circumstantial evidence, and even false confessions. The point of DNA testing is that it cuts through the other evidence and establishes innocence even if the other evidence appears compelling. Because of this, testing ought to be permitted if there is any possibility of an exculpatory finding, rather than allowing the court to deny testing because the other evidence does not make it "probable" that an exculpatory result would be obtained.

AB 16
Proposed Amendments

Proposed additions are underlined and deletions are lined through.

Amend NRS 16 as follows:

Section 1. Chapter 176 of NRS is hereby amended by adding thereto the provisions set forth as sections 2 and 3 of this act.

Sec. 2. *1. A person convicted of a crime and under sentence of death who meets the requirements of this section may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction and sentence of death. The petition must include, without limitation, the date scheduled for the execution, if it has been scheduled. The remedy provided by this section is in addition to any remedy the inmate may have under other provisions of law to obtain testing of evidence for genetic marker analysis.*

2. Such a petition must be filed with the clerk of the district court for the county in which the petitioner was convicted on a form prescribed by the Department of Corrections. A copy of the petition must be served by ~~registered~~ mail upon:

(a) The Attorney General; and

(b) The district attorney in the county in which the petitioner was convicted.

3. If a petition is filed pursuant to this section, the court shall immediately issue an order requiring, during the pendency of the proceeding, the prosecuting attorney to preserve all evidence within the possession or custody of the State that may be subjected to genetic marker analysis pursuant to this section.

4. Within 30 days after receiving notice of a petition pursuant to this section, the prosecuting attorney:

(a) Shall prepare an inventory of the evidence within the possession or custody of the State that may be subjected to analysis pursuant to this section;

(b) Shall submit a copy of the inventory to the petitioner and the court; and

(c) May file a written response to the petition with the court.

5. The court [~~,~~] ~~in it sole discretion, may~~ shall order a hearing on the petition.

6. The court shall order a genetic marker analysis if the court finds that:

(a) A reasonable ~~probability~~ possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of the evidence identified in the petition;

(b) The evidence to be analyzed exists and is in a condition that allows genetic marker analysis may resolve an issue not resolved by a previous analysis.

(c) The evidence was not previously subjected to:

(1) A genetic marker analysis involving the petitioner; or

(2) The method of analysis requested in the petition, and the method of additional analysis may resolve an issue not resolved by a previous analysis.

7. If the court orders a genetic marker analysis pursuant to subsection 6, the court shall:

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(a) Order the analysis to be conducted promptly under reasonable conditions designed to protect the interest of the State in the integrity of the evidence and the analysis process.

(b) Select a forensic laboratory to conduct or oversee the analysis. The forensic laboratory selected by the court must:

(1) Be operated by this state or one of its political subdivisions; and

(2) Satisfy or exceed the standards for quality assurance that are established by the Federal Bureau of Investigation for participation in CODIS. As used in this subparagraph, "CODIS" has the meaning ascribed to it in NRS 176.0911.

(c) Order the forensic laboratory selected pursuant to paragraph (b) to perform a genetic marker analysis of evidence. The analysis to be performed and evidence to be analyzed must:

(1) Be specified in the order; and

(2) Include such analysis, testing and comparison of genetic marker information contained in the evidence and the genetic marker information of the petitioner as the court determines appropriate under the circumstances.

(d) Order the production of any reports that are prepared by a forensic laboratory in connection with the analysis and any data and notes upon which the report is based.

(e) Order the preservation of evidence used in a genetic marker analysis performed pursuant to this section for purposes of a subsequent proceeding or analysis, if any.

8. If the results of a genetic marker analysis performed pursuant to this section are favorable to the petitioner, the court shall arrest judgment as provided in NRS 176.525.

9. The court shall dismiss a petition filed pursuant to this section if:

(a) The requirements for ordering a genetic marker analysis pursuant to this section are not satisfied; or

(b) The results of a genetic marker analysis performed pursuant to this section are not favorable to the petitioner.

10. An order of a court granting or dismissing a petition pursuant to this section is ~~final and not~~ subject to judicial review pursuant to NRS 177.015(1)(b).

11. For the purposes of a genetic marker analysis pursuant to this section, a person under sentence of death who files a petition pursuant to this section shall be deemed to consent to the:

(a) Extraction of a specimen, including, without limitation, a sample of blood, from him to determine his genetic marker information; and

(b) Release and use of genetic marker information concerning the petitioner.

12. The expense of an analysis ordered pursuant to this section is a charge against the Department of Corrections and must be paid upon approval by the Board of State Prison Commissioners as other claims against the State are paid.

Sec. 3. *1. After a judge grants a petition requesting a genetic marker analysis pursuant to section 2 of this act, if a judge determines that the genetic marker analysis cannot be completed before the date of the execution of the petitioner, the judge shall stay the execution of the judgment of death pending th results of the analysis.*

2. If the results of an analysis ordered and conducted pursuant to section 2 of this act are not favorable to the petitioner:

(a) Except as otherwise provided in paragraph (b), the Director of the Department of Corrections shall, in due course, execute the judgment of death.

(b) If the judgment of death has been stayed pursuant to subsection 1, the judge shall

cause a certified copy of his order staying the execution of the judgment and a certified copy of the report of genetic marker analysis that indicates results which are not favorable to the petitioner to be immediately forwarded by the clerk of the court to the district attorney. Upon receipt, the district attorney shall pursue the issuance of anew warrant of execution of the judgment of death in the manner provided in NRS 176.495.

Sec. 4 NRS 176.525 is hereby amended to read as follows:

176.525 The court shall arrest judgment if the indictment, information or complaint does not charge an offense, ~~[or]~~ if the court was without jurisdiction of the offense charged ~~[. The]~~ ***or if the results of a genetic marker analysis performed pursuant to section 2 of this act are favorable to the petitioner. Except when the motion is based upon the results of a genetic marker analysis performed pursuant to section 2 of this act, the*** motion in arrest of judgment ~~[shall]~~ ***must*** be made within 7 days after determination of guilt or within such further time as the court may fix during the 7-day period.

Sec. 5. 1. There is hereby appropriated from the State General Fund to the Department of Corrections the sum of $6,250 for the expense of genetic marker analyses performed pursuant to section 2 of this act.

2. Any remaining balance of the appropriation made by subsection 1 must not be committed for expenditure after June 30, 2005, and reverts to the State General Fund as soon as all payments of money committed have been made.

Sec. 6. The Department of Corrections, in consultation with the Attorney General, shall on or before August 1, 2003:

1. Prescribe the form for a petition requesting the genetic marker analysis of evidence pursuant to section 2 of this act; and

2. Provide a copy of the form and a copy of the provisions of section 2 of this act to each person in the custody of the Department who is under a sentence of death.

Sec. 7. This act becomes effective upon passage and approval.