

**MINUTES OF THE MEETING  
OF THE  
ASSEMBLY COMMITTEE ON JUDICIARY**

**Seventy-Fourth Session  
February 16, 2007**

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:04 a.m., on Friday, February 16, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4401 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Copies of the minutes, including the Agenda ([Exhibit A](#)), the Attendance Roster ([Exhibit B](#)), and other substantive exhibits are available and on file in the Research Library of the Legislative Counsel Bureau and on the Nevada Legislature's website at [www.leg.state.nv.us/74th/committees/](http://www.leg.state.nv.us/74th/committees/). In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: [publications@lcb.state.nv.us](mailto:publications@lcb.state.nv.us); telephone: 775-684-6835).

**COMMITTEE MEMBERS PRESENT:**

Assemblyman Bernie Anderson, Chairman  
Assemblyman William Horne, Vice Chairman  
Assemblywoman Francis Allen  
Assemblyman John C. Carpenter  
Assemblyman Ty Cobb  
Assemblyman Marcus Conklin  
Assemblywoman Susan Gerhardt  
Assemblyman Ed Goedhart  
Assemblyman Garn Mabey  
Assemblyman Mark Manendo  
Assemblyman Harry Mortenson  
Assemblyman James Ohrenschall  
Assemblyman Tick Segerblom

**COMMITTEE MEMBERS ABSENT:**

Assemblyman John Ocegura (Excused)

**STAFF MEMBERS PRESENT:**

Jennifer M. Chisel, Committee Policy Analyst  
Risa Lang, Committee Counsel  
Doreen Avila, Committee Secretary



Matt Mowbray, Committee Assistant

**OTHERS PRESENT:**

Christopher Perry, Chief, Nevada Highway Patrol, Department of Public Safety  
Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association  
Sandy Heverly, Executive Director, Victim Advocate, Stop DUI  
Jim Holmes, Chairman, Northern Nevada DUI Task Force  
Annie Holmes, Legislative Representative, D.J. Benardis Memorial Foundation  
Cotter C. Conway, Deputy Public Defender, Washoe County, Nevada  
Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association  
Chris Owens, Clark County District Attorney, Nevada District Attorneys Association  
Robert Daskas, Chief Deputy District Attorney, Clark County, Nevada  
Christopher Lalli, Assistant District Attorney, Clark County, Nevada  
JoNell Thomas, Legislative Representative, Nevada Attorneys for Criminal Justice  
Howard Brooks, Criminal Defense Attorney, Nevada Attorneys for Criminal Justice  
John Reese Petty, Chief Deputy Public Defender, Washoe County, Nevada

**Chairman Anderson:**

[Meeting called to order. Roll called.] I will open the hearing on Assembly Bill 8.

**Assembly Bill 8:** Prohibits a person from being admitted to bail for at least 12 hours after his arrest for driving a vehicle or operating a vessel under the influence of intoxicating liquor or a controlled substance. (BDR 14-704)

**Assemblyman Mark A. Manendo, District No. 18:**

I have one exhibit that I would like in the record. It is from a constituent of mine named Bill Parker, and he wanted to share a story that just recently happened in Boulder City ([Exhibit C](#)).

**Chairman Anderson:**

Would you like this entered into the record?

**Assemblyman Manendo:**

Yes.

**Chairman Anderson:**

Madam Secretary, please include in the official record for today the e-mail that was sent to Mr. Manendo on Thursday, February 8, 2007, from his constituent Bill Parker.

**Assemblyman Manendo:**

Thank you, Mr. Chairman. I would like to read a letter into the record. It is from Judge George Assad from the Las Vegas Municipal Court at the Regional Justice Center. If you like I can also have that entered into the record. The contact information is also on this letter.

[Read from prepared statement ([Exhibit D](#)).]

**Chairman Anderson:**

We will make it part of the record for the day.

Jail overcrowding is a big issue in the smaller counties particularly in the Second and Eighth Judiciary Districts. We have a process where on request of the courts and the sheriffs, a senior judge can release people from jail because of overcrowding. Is this going to increase the overcrowding problem? There is also a question of public safety in keeping beds for people who are a threat to society. Whether you are caught or not, you are a threat to society when you are on the road drunk. How would we address that issue for the sheriffs? Do you think the bill will take care of that?

**Assemblyman Manendo:**

I do not know if the bill actually addresses that and how the jails determine who should be released or not and who is a public safety threat. I would assume that somebody who is intoxicated would not be released. Maybe there are folks who are arrested for numerous violations, and they are released fairly quickly. Somebody who is under the influence of alcohol or drugs would not be the choice of release. I would hope that would be the case, so there may not be more overcrowding than there already is.

**Assemblyman Horne:**

We all know how to determine a possible intoxication of somebody who has been drinking alcohol: failed breathalyzer or blood test, et cetera. In instances of someone possibly driving under the influence (DUI) of a controlled substance, there is not always an immediate way of determining it and this bill covers that. An arrest can be made a DUI, but it is not determined until after the tests. How would you resolve that?

**Christopher Perry, Chief, Highway Patrol, Department of Public Safety, Nevada,  
Carson City:**

When we arrest an individual on a DUI of a controlled substance we go through a battery of tests. Not unlike what we do for somebody who is arrested for DUI alcohol, we make a determination in the field that the individual is under the influence of a controlled substance. Although we do not have a quantitative way of analyzing what that might be or what the level is at that time, we still make the arrest. From the Department of Public Safety's (DPS) and my perspective, what

we are trying to get across at this meeting is that our job is to arrest and to remove the hazard from the roadway. We take them to a jail where they are processed and go through their normal bail course. We would like to see everybody sober when they walk out the door. I know many jails already utilize a breathalyzer to determine what somebody's blood alcohol may be. I am not sure what the answer might be other than to have a drug recognition expert say, yes, that individual is no longer under the influence. That is a touchy area and we use experts to make that determination.

**Assemblyman Horne:**

The typical presumption that you are innocent until proven guilty is set aside when you have a breathalyzer. If you exceed the blood alcohol limit, 0.08 percent, that eliminates the presumption. But, you do not really have presumption for a controlled substance. Maybe the mandatory 12-hour hold may in fact override the presumption of innocence.

**Assemblyman Manendo:**

That is a good point. In cases of domestic violence an officer is often not a witness to what happened, but somebody goes to jail. There is a presumption of who the aggressor is and he will be held for 12 hours.

**Assemblyman Carpenter:**

I do support this bill. I often thought maybe we should hold them for 24 hours. Regardless of the situation in the jail, it is important when they release the offenders because the bail people are right there waiting to assist them. There have been some who certainly leave the jail intoxicated, especially with a 0.08. We need to find out how that is handled, so we can better make a determination on this legislation.

**Assemblyman Mabey:**

I have never been in a jail, so I do not understand. What is the difference with what goes on now and what will happen if this bill is passed? Will they just wait longer in the same place or are there other things that will happen?

**Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs' Association, Las Vegas:**

All of my sheriffs have booking facilities, as required by the Nevada Constitution, and a number of the city police departments also have jail facilities. Generally, the practice is as follows: the offender is arrested, brought to jail, and led through a booking process which includes documenting information. He is fingerprinted, and then held in a general holding cell. At that time bail is made, or if he cannot make bail, then he will be placed in a jail cell. A practice in many of the jails throughout the State is to administer a breath test to determine if a person is underneath the legal limit before he is released. That is not a practice in every jail, but in the major jails they do that, such as Washoe County and Clark County. I do not see,

according to the bill here, that our practice would be any different other than holding that person for 12 hours.

**Assemblywoman Allen:**

Upon arresting somebody for DUI, do the police usually impound the vehicle? If so, after release from jail one would have to go through the process to acquire his car again, and how long on average does that take?

**Chris Perry:**

Typically that is the process. We impound vehicles; however, we give our officers the discretion, if they are in an area where a vehicle can be legally parked, to choose to leave it there. As far as the process to recover a vehicle from an impound yard, it takes the travel time from the jail to the impound yard, and they are usually open 24 hours a day, at least in the Las Vegas area. So, a person can conceivably get his car back at any point in time.

**Assemblyman Manendo:**

In some cases you will have two people in the vehicle and the driver gets arrested for DUI. The friend is waiting and they hop right back in the car after a few hours.

**Assemblyman Mabey:**

How long does it take the alcohol to clear from a person? If they are in the jail, would most of it be cleared by several hours?

**Chris Perry:**

Typically it is 0.02 per hour. That is the standard rate for dissipation. So, you would have to extrapolate that, depending on the individual's blood alcohol at the time that you brought them in. Conceivably, if somebody is a 0.20 they could go 10 hours before they are sober again, or until they are 0.00.

**Chairman Anderson:**

Of course the metabolism rate is different for each individual.

**Sandy Heverly, Executive Director, Victim Advocate, Stop DUI, Clark County, Nevada:**

I have been involved in the anti-drunk driving movement now for more than 23 years, working with thousands of victims throughout Nevada and across the nation. I am here today on behalf of Stop DUI to ask for your support of A.B. 8. The good news about this bill is that it is being presented to you in the spirit of a proactive measure rather than a reactive measure. By that I mean this bill does not have a death victim or an injury victim attached to it, as we normally have when we talk about passing DUI legislation. However, the potential for that tragedy is very real, but so far we have been very lucky. The bill is a reasonable and common sense approach to help ensure the public safety as much as possible. It simply mandates all persons, and I emphasize *all persons*, arrested for DUI to be held for a

period of 12 hours before being released on bail or given the privilege of an ROR (released on their own recognizance). A medical emergency would be the exception.

Assembly Bill 8 mirrors the language of the 12-hour hold for those arrested for domestic violence. We believe a person arrested for DUI is equally as dangerous in every respect, and certain precautionary measures to protect the public, such as a mandatory 12-hour, should be enacted. Since most DUI blood alcohol contents (BAC) are above the legal limit, a 12-hour hold would provide time for a person's body to metabolize a significant amount of alcohol. When other drugs are on board, which is not uncommon, the 12 hours will help the body dissipate those drugs to some degree as well.

Most people, including Stop DUI, assume that anyone who is arrested for DUI would be detained until a safe measure of sobriety was reached. It seems like common sense would dictate such action, but that is just not the case. Even when a jurisdiction has a judicial order that requires a 12-hour hold for DUIs, some judges choose to ignore the order depending on who submits the ROR request form. This is where the preferential treatment comes into play. The fact of the matter is certain privileged DUI offenders are being released back on the street within a very short period of time. This is done before the officer completes the arrest report, and sometimes even when an officer requests that a DUI be detained for 12 hours based on his or her law enforcement experience, training, and expertise in determining the extent of intoxication.

These are the situations that undermine and disrespect the efforts of our law enforcement officers, and pose a danger to your family and mine. These are the situations that cause our law enforcement officers frustration, and can possibly lead to complacencies. Some recent examples of early release are Ron Montoya, owner of American Shooters, released after 3 hours and 25 minutes, and just last week, Boulder City Councilwoman Carla Burton released after two hours. It disgusts me to say that the revolving jail door is well oiled for those who have the right phone number to call. Assembly Bill 8 will help reduce the potential for tragedy and will prevent preferential treatment to those who have personal and political connections within our judicial system. It will send a message to everyone that no matter whom you are or who you think you are no matter what jurisdiction you are in, if you are arrested for DUI you will be detained for 12 hours. We must never forget that these people are potential killers.

In closing, I think equal justice should be the mantra for Nevada's judicial system—not juice for justice—as the *Los Angeles Times* exposé recently revealed.

**Assemblyman Horne:**

Could this not be accomplished by somebody at the jail administering a breathalyzer, for instance? Somebody is arrested at midnight, and at 3 a.m. he is

tested but still has a 0.09; he is not going anywhere. At 5 a.m. he tests at 0.06 and is still intoxicated; he will not be released. But, if he is not intoxicated, he may be released; would that not accomplish the same thing? Some people are twice over the limit or more, and sometimes after a 12-hour hold they are still intoxicated, yet they have been released. This is a suggestion, but do you think that this bill may be a way to prevent us from releasing somebody who is still intoxicated?

**Sandy Heverly:**

Yes. I think that could be a possibility. Again, the only problem that I see is agreeing on the level. At what level is this person safe to be back out on the street—is it going to be 0.02, 0.04?

**Chairman Anderson:**

I guess that would be a question for the Committee.

**Assemblyman Segerblom:**

It seems to me that your concern is over the preferential treatment. I wonder if we could say that it is illegal to give preferential treatment. My experience in Clark County is that nobody gets out before 12 hours or 24 hours, really.

**Sandy Heverly:**

That has not been our experience, and I can cite many other cases as well. The predominant factor seems to be that is some people, as stated in my testimony, have a personal or political connection within the judicial system. Those are the ones that are getting preferential treatment. The average DUI offender generally does spend a longer period of time in there because they do not have access to call a judge at 7 a.m. through their attorney. This is happening.

**Jim Holmes, Chairman, Northern Nevada DUI Task Force, Reno:**

For those of you who are new to this Committee, this is my fifth legislative testimony and support of proposed DUI legislation that we think would help protect the citizens of the State of Nevada. The Task Force is responsible for conducting the victim impact panels required by the Nevada statutes. We are made up of law enforcement agencies in northwest Nevada and Nevada Highway Patrol representatives. We have approximately two dozen members. I have been Chairman since my son D.J. was killed. We present the victim impact panel to DUI offenders, and we have talked to over 30,000 DUI offenders in Washoe County Commission Chambers in Reno. That is enough people to fill the Lawler Event Center two and one half times and is half the size of Carson City. As we say at the Task Force, "You do not have to go to Iraq to find the terrorist because they are amongst us," and they are DUI drivers. Without reservation we support this proposed legislation and ask for your support.

**Chairman Anderson:**

We are aware in northern Nevada of the dedication of you and your wife to make people who are driving under the influence more aware of the consequences and the personal loss that families suffer. Ms. Heverly also has that fight in the south. We appreciate that.

**Chris Perry:**

The job of the DPS is to arrest and remove the hazard from the roadway. We would like to see legislation passed that would hold a person in jail until he is sober enough to walk back out on the street and not be a threat to the public.

**Chairman Anderson:**

When you pull somebody over, do you place them under arrest at that point?

**Chris Perry:**

That is correct.

**Chairman Anderson:**

Now, the offender is transported, the vehicle has been impounded, and you have to sit and wait for the vehicle to be taken under control. After an hour the tow truck comes and picks up the vehicle so you can now proceed to the nearest jail where this individual will eventually appear in justice court. You release him into the custody of that sheriff's office. Would you say there is a time lapse?

**Chris Perry:**

I would say that our average time lapse on a DUI, starting from the time that we stop a person until the time that we give a blood or breath test and have the booking completed, is roughly an hour to two hours.

**Chairman Anderson:**

So we have a lapse of two hours. When you arrested him, I am sure that you would have informed the sheriffs' office so that there is somebody at the jail for you?

**Chris Perry:**

Typically there are people at the jail in most counties who are available 24 hours a day.

**Chairman Anderson:**

Okay, but you would probably call that in right away or try to as soon as you took this person into custody? Just to make the office aware, so you know that there is enough room at the hotel?



**Chris Perry:**

That depends on where you are. In instances that I have personally been involved in, we do not call ahead to reserve a space.

**Chairman Anderson:**

The reason I ask the question is because if a bail bondsman was paying attention to the scanner, he might go to the jail. You arrive at the Iron Bar Hotel and if a bail bondsman has to be contacted, he will have to be woken up in the middle of the night so he can come down. You, of course, have gone back to work.

**Chris Perry:**

Yes, back on the road.

**Chairman Anderson:**

Okay. There is a time lapse here of perhaps three or four hours, because of the process of fingerprinting, booking, et cetera. The amount of time can conceivably be 12 hours, is that unreasonable? If I am correct, all of these time factors will have to be figured in.

**Chris Perry:**

That is correct.

**Assemblyman Cobb:**

Colonel, under your current procedures, is there ever a situation where you are releasing somebody who is over the legal limit?

**Chris Perry:**

Are you talking about out on the field?

**Assemblyman Cobb:**

After you book them into a jail and you have charged them with an offense, at that point do you test them and do you ever allow them to leave the jail if they are over the legal limit?

**Chris Perry:**

The DPS does not run the jail. We rely upon the jail that we bring the individual to. After the booking procedures are complete we typically leave. Anything that occurs after that fact is a matter of course with the local jurisdiction.

**Annie Holmes, Legislative Representative, D.J. Benardis Memorial Foundation,  
Reno, Nevada:**

I am the mother of D.J. Benardis and the reason we have a Memorial Foundation. We wholeheartedly support this bill and we hope you do as well.

**Cotter C. Conway, Deputy Public Defender, Washoe County, Nevada:**

Although I support the sentiment of the bill, my concerns are echoed in some of the questions that have been asked by the Assemblyman Cobb. I would support, possibly, an amendment that would require a holding facility to check the blood alcohol content before release. Certainly, I do not want to see people who are intoxicated or impaired driving, but I think to have a blanket prohibition is not the way to go on this bill.

**Chairman Anderson:**

I see that David Roger, the Clark County District Attorney, has specifically signed in on behalf of the bill.

**Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association, Las Vegas:**

Mr. Roger was primarily present for our presentation on A.B. 19. I do not believe he intended to speak on this bill.

**Frank Adams:**

I am in opposition to this bill. As a young patrol officer in North Las Vegas, I experienced some of the same frustration that has been expressed because we are truly concerned with the safety of our citizens, too. We do have an issue with the crowding in our urban center jails. We feel that running a jail is a difficult situation. This would burden us by not being able to manage that population. I feel that Mr. Horne's recommendation on a limit before you put the person out is a great idea. That is done at many of our institutions. I am told that in Washoe County when they get a court order from a judge to release a person with a DUI, there is a caveat to that order that the person be breath tested before they are released. There are two good avenues that we could take here. We could have a caveat before anybody is released on bail that includes a breath test, which would determine if they are under the legal limit; perhaps the test would not be used as evidence in any type of court proceedings or just to be sure that person can be let out on the street again. Part of the judge's order could be to make sure that the person is tested before they are released.

**Chairman Anderson:**

Does that put an undue burden on the jail?

**Frank Adams:**

Yes. There are cases, especially in our urban jails, where they are at capacity. There is a situation in southern Nevada where we are looking at a federal order to reduce the population in the jail. That means somebody comes in, so somebody comes out, and that could be a difficult situation.

**Assemblyman Mabey:**

Are there ever cases where a mistake was made in the arrest? If this bill passed, then that person who was arrested would have to stay in jail for the 12 hours.

**Frank Adams:**

Are you speaking in regard to DUI arrests?

**Assemblyman Mabey:**

Yes.

**Frank Adams:**

Perhaps there are certain circumstances where the individual may come in, take a breath test, and be under the legal limit. But, the arrest will stand based on the observation of the field officers. If there were legal issues, they would be solved in court and we would continue with the booking process. He would then remain in custody until bail is made or he is released by a judge.

**Assemblyman Carpenter:**

Do jails have a holding place where people could be held for a short period of time without increasing the population?

**Frank Adams:**

That is correct. Most jails do have a holding facility where they hold an individual temporarily if they know he is going to bail out soon. Sometimes the holding facility in the Clark County jail is a 24-hour to 30-hour stay. Oftentimes, a person will not be moved into a bed facility until it is known that he is going to be there for an extended period of time.

**Assemblyman Cobb:**

This bill references other statutes in the *Nevada Revised Statutes* (NRS)—484.379, 484.3795, et cetera. These offenses, I assume, include alcohol, but do they also include controlled substances?

**Frank Adams:**

Unfortunately, over the years I have not memorized all the statutes in the NRS, but I would venture to say that it probably deals with an under-the-influence-of-a-controlled-substance, also.

**Assemblyman Cobb:**

Mr. Chairman, is there somebody who can clarify that for us?

**Chairman Anderson:**

Sure, we will get you a book.

**Assemblyman Cobb:**

The reason I am asking is because the proposed middle ground they are discussing is to test people before they are released from jail, and to ensure they are not above the legal limit when they leave, regardless of how long they need to stay in jail. If this proposed amendment actually addresses not only intoxicating liquors, but also controlled substances, will you have tests available to make sure that the individual is not still under the influence of controlled substances as well as alcohol?

**Frank Adams:**

I do not believe that there is an ability to determine the level of a person's intoxication under a controlled substance in that short period of time. The only thing that we can do is rely on our Drug Recognition Experts (DRE) to tell us if a person meets those criteria for being under the influence or not. Many of the departments do have DRE, and that would only be an opinion of the expert. There is no way that we could come forward with a blood test or some other chemical test to tell you that they are no longer under the influence.

**Assemblyman Cobb:**

So as the law states now, you could release somebody who is still under the influence of a controlled substance?

**Frank Adams:**

Yes, if they make bail.

**Assemblyman Cobb:**

But you do have procedures in place to deal with alcohol?

**Frank Adams:**

Most of the jails will test that person before he is released.

**Assemblyman Cobb:**

But it is not mandatory?

**Frank Adams:**

That is correct. It is a jail policy.

**Assemblyman Manendo:**

You said there is a "one in, one out" type of issue because the jails are overcrowded? What type of individual would be released to make room for this person who has been arrested for DUI?

**Frank Adams:**

Fortunately, we are not in that circumstance in any of the jails right now, but it is my understanding that the Clark County jails are very close to that situation. There was an effort in southern Nevada to enlarge the ability to house individuals, but

apparently that was not passed. What they would do is take a look at the type of offender through our classification program. A person who is the least threatening to the community, a nonviolent criminal, would be the first one to be released. Probably if a DUI offender is capable of taking care of himself then he would be one of those who would be released early.

**Assemblyman Manendo:**

In your expertise, at what level should a nonviolent DUI offender, who is no longer a threat to society, be before being released?

**Frank Adams:**

That falls back on the jail and the processes that they have now. If that person is tested and he is below the legal limit, then he is no longer a threat. That is the statute you folks have set and we would have to take a hard look at that.

**Assemblyman Manendo:**

I wonder if you would presume someone who has been arrested for domestic violence to be a non-threat, say after four hours.

**Frank Adams:**

We are required to hold those for a 12-hour period.

**Assemblyman Manendo:**

I understand that, but what is your personal view?

**Frank Adams:**

I would agree with the 12-hour view because there is a specific threat in that circumstance.

**Assemblyman Manendo:**

A cooling off period?

**Frank Adams:**

Yes.

**Assemblyman Manendo:**

Right, that is what this bill does.

**Chairman Anderson:**

When we set the cooling off period for domestic violence we recognized the chance of it reoccurring are very high. This period of time gives the victim an opportunity to get away from the abusive situation, whereas in a DUI we do not want to put somebody back on the street that is known to be under a controlled substance. These are two different scenarios. That is the reason we have a third-time DUI statute. We increase the penalty until we identify a person with a problem and

try to get him treatment. It is an arguable question, but I do think comparing DUI to domestic violence is strange.

Mr. Cobb, controlled substances are also covered under NRS 484.379.

**Frank Adams:**

One more point to Mr. Manendo: It is my understanding that those persons who are already processed will be the first ones that are moved out. If a person is in the process of being booked then they would not be considered for release.

**Chairman Anderson:**

We will close the hearing on A.B. 8. I will now open the hearing on A.B. 19.

**Assembly Bill 19:** Revises the provisions pertaining to the criminal liability of parties to crimes. (BDR 15-320)

**Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association, Las Vegas:**

The legislation that is in front of you is in response to judicial holdings of recent origin. You have heard this several times as we prepared it for this session. Essentially what we are asking of this Committee is to look at what the law has historically been with regard to criminal liability for people who participate together in criminal acts. Bad things happen, which is logically the natural and probable consequence of a criminal act or participation in a criminal act. This legislation is also aimed at getting the gang mentality that we find in our casinos, with regard to jewelry store robberies and heists. The circumstances were similar in the beating at the MGM Grand Hotel and Casino [Las Vegas] with regard to the fellow out on the service cart. We are seeking to reestablish accountability that had been the law of Nevada for more than 100 years. The amendments that you see on the back of A.B. 19 are to put into statutory form what had been held in the courts for a number of years. More than 30 states hold this position and that is what we are seeking this Body to affirm. I have asked the participants from our Clark County office to show this Committee what we are really talking about. As indicated, there is a document in front of you ([Exhibit E](#)).

**Chris Owens, Clark County District Attorney, Nevada District Attorneys Association, Las Vegas, Nevada:**

The legislation targets some areas that were addressed by Mr. Graham that are important to Nevada. The particular type of businesses that we have, the casinos, have been vulnerable from time to time to certain types of gang crimes, crimes involving a number of individuals like we recently saw in the MGM video footage. We have had groups come over from other states to rob jewelry stores inside casino shopping areas. A continuing problem has been robberies of casino cages, and those always involve the use of firearms and sometimes even death. Because

of that, we have relied upon coconspirator liability as a means of assessing liability proportionally among all the people who are involved.

Conspiracies are unique in the criminal law for many reasons; one of which is the dangerousness that they pose. It is so severe that courts have historically applied special rules of liability recognizing that particular danger when people get together to commit crimes. We have had the ability in Nevada and, for decades, it has been used to protect the citizens from those types of crimes. The Nevada Supreme Court, in *Bolden v. State* [121 Nev. Adv. Op. 86, 124 P.3d 191 (2005)], shifted the responsibility for that principle of liability to the Legislature. The Court more narrowly construed this tool, which we have had for decades, in a manner that makes it virtually unavailable to prosecutors in some of the most violent offenses. It has created a circumstance where there is some disparity in law between the acts of a person and the penalty that is attached to them. Sometimes people who are bad shots are rewarded over people who are better shots, and in some crimes you can be liable for what are more serious crimes and not liable for less serious crimes because of the philosophy. In the *Bolden* case they changed this tool and said they looked to the Legislature for guidance in this area.

What we are seeking is the restoration of this protection, this tool that we had for so long to protect for these particular kinds of violent crimes. When you have one person acting, he relies only on himself, but when you have more people, they are assigned different roles. Violence is foreseeable in a group crime and somebody can get hurt. This law imposes liability towards the entire group on the violence that they intend. Just because a person did not necessarily stick a gun in somebody's face, he may have picked up the money, made the threat, fired the firearm, or displayed a knife, but he would be held liable *if* it was found that he knew this was a foreseeable and probable outcome of the group's planning.

Why A.B. 19? Three major reasons are the protection of the public, the 130-year tradition of applying this doctrine through case authority, and its use by all federal courts. A majority of state courts show the importance and the necessity of this, especially in protecting the public. They have identified certain areas that are unique and dangerous based upon group crimes over crimes that are committed by individuals. Gangs, organized crime, and criminal syndicates have greater chances of criminal success because of the resources available to them. There is a pattern of groups committing additional crimes more than a single person would. Therefore, group crimes present a greater menace to the populous and a number of special rules and statutes have been created to protect the public from this increased danger. We have a quote here from our U.S. Supreme Court case [United States v. Rabinowich, 238 U.S. 78, at p. 88 (1915)]:

For two or more to confederate and combine together to commit or cause to be committed a breach of criminal laws is an offense of the

gravest character sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime.

**Robert Daskas, Chief Deputy District Attorney, Clark County, Nevada:**

In 11 years of prosecuting homicide cases, the majority of those prosecutions involved multiple defendants. This conspiracy liability is an avenue by which we are able to hold all members of a conspiracy responsible for the crimes committed. Perhaps the *Bolden* case illustrates the concepts, which were just alluded to, that are unique to criminal conspiracies. The likelihood of success is greater when you have multiple criminals; harm to victims increases as the number of criminals increase, and certainly the likelihood of additional crimes increases as does the number of people who participate in that conspiracy. In the *Bolden* case, Bolden and four other young men agreed to commit the crime of robbery. They entered into a home in hopes of finding drugs and money. In fact, they were misled and went to the wrong home. These five criminals put masks over their faces at 2 a.m., kicked in the door to a young woman's home, and entered with knives, box cutters, and other weapons. The young woman, Silvia Rascon, was home with her three young kids and an adult friend. Some members of the conspiracy held the mother and her adult friend at bay with a knife while other members led a 16-year-old girl to a back room at knife point where they sexually molested her. What is important to understand about this legislation is that had they not had five members of the conspiracy, many of these crimes could not have been completed.

A second case, *Johnson v. State* [118 Nev. 787, 59 P.3d 450 (2002)] illustrates the same concept. It was a quadruple homicide case, and was somewhat infamous in Clark County. Donte Johnson, Sikia Smith, and Terrell Young got together and agreed to commit a robbery. They armed themselves with an arsenal of weapons and entered into a home in east Las Vegas that was occupied by four young men; the youngest victim was 17 and the oldest was 20. The three criminals were able to hold these four young men at bay; they taped them up and put them face down while they ransacked their home for drugs and money. They did not find drugs, but what they did find was a VCR, a couple of video games, and less than \$200. As the criminals walked out of the home with the four victims duct-taped and defenseless, one of the criminals executed each young man.

The point is, without a group of criminals participating, this crime could not have been completed. You can see from the graphic photographs that the number of criminals increased the risk of harm to these young men, certainly increased the success to this conspiracy, and enabled them to accomplish their goal. Our position with the legislation is that when a crime is foreseeable and a natural and probable consequence from a conspiracy, everybody should be held responsible. If it is not foreseeable and probable, then those people will not be held guilty for the crimes they did not participate in.



**Christopher Lalli, Assistant District Attorney, Clark County, Nevada:**

I oversee our Criminal Division. I echo my colleagues' support of this important legislation. I would like to begin with another example of how important this is to us and what an important tool it is for us in the area of prosecution. *Bradford v. State*, [Docket No. 43446, Order of Reversal and Remand (April 18, 2006)] was a case that occurred in Clark County in 2003. The victim, Benito Zambrano-Lopez, was heading home from the market when he was confronted by three gang members; one of those was Bradford, the defendant. They circled him with the intent to rob him when suddenly Julius Bradford yelled "smoke him." One of the other gang members pulled out a gun and shot him dead right on the street. We tried Mr. Bradford for the murder and he was convicted. This occurred prior to the *Bolden* decision. While that case was pending on appeal, the *Bolden* decision was announced. The Supreme Court then looked at the *Bradford* case and said in light of *Bolden* they are reversing the conviction of Mr. Bradford. If you look at the scenario, in all likelihood there would not have been a murder that day, but for the defendant Julius Bradford saying "smoke him." I think it emphasizes the dangerousness of criminal conspiracies in our communities.

One of the important issues to emphasize to the Committee, is this is nothing new. We are not asking for a new rule of law or procedure. We have a list of cases that begins in the 1800s. It is a very old and quaint legal tradition. When you look at some of the cases where this doctrine of conspiracy was first articulated you will find the theft of horses, a saddle, and a blanket, which is the case *State v. Ward* [19 Nev. 297 (1886)]. You will see that the development of this doctrine has firmly rooted our jurisprudence. There was a theft of a steer and the murder of a saloon keeper for railroad payroll—this is Nevada-type stuff.

The other issue that is important to understand is something that is present in most of the other states and universally in the federal courts. *Pinkerton v United States* [328 U.S. 640 (1946)] is the law of the land in federal courts and was the pre-*Bolden* state of conspiracy liability in the State of Nevada. On page 8 of our materials we list the other states that share the theory of criminal responsibility that we had pre-*Bolden*. What we are asking from this Committee is to keep the status quo that existed before the *Bolden* decision.

**Chris Owens:**

*Bolden* was convicted by a jury for his direct participation of crime and that was carried, derived by the court as being direct. But, it was reversed by the Supreme Court and sent back for a new trial based upon their decision and change in the law, which they said had to be applied retroactively to Mr. *Bolden*'s situation, and that is pending a new trial right now.

Another case that has had a lot of notoriety was the Hells Angels and Mongols brawl in a Laughlin casino—it only lasted 90 seconds. There was taunting of the

Hells Angels by the Mongols for several days leading up to that event. A supporter of the Hells Angels was beat up at the Golden Nugget in Laughlin. One hour later the Mongols went back to Harrah's Casino and the Hells Angels, followed them there, entered, and both squared off in front of the cantina right next to the gaming pit area. They began shooting and stabbing. There were about 100 Mongols, 60 Hells Angels, 100 knives that were recovered by the police, and additional bludgeoning instruments of every kind of description, and six handguns, but more were later recovered. Six weapons were fired numerous times that resulted in the deaths of three individuals and injuring many more. It is amazing that the violence did not spread too far beyond the individuals of that group.

James Matson is a former corpsman in the U.S. Navy, who was gambling with his wife and friends when they heard shots. He was worried about his wife, so he started running through the area looking for her. In doing so, he stumbled across one of the Mongols that had been shot in the stomach on the floor. Because of his medical training he bent down and began to give him medical attention and the Mongol eventually recovered. Mr. Matson did find his wife sometime later, and of course people were running all over, hiding under tables, trying to get back to their rooms, and hiding underneath the bar. When he located her she was okay, but he was told that he had a hole in his shirt. He looked down and had a bullet hole—he had been shot as he was giving medical attention to the Mongol. We were fortunate with this case. Though we still had three murders, the amount of damage could have been so much more.

The issue that we are discussing was actually briefed and litigated in the Hells Angels case. But the change in the way that the Supreme Court viewed this law did not occur in that opinion. While delivering arguments, they found the *Bolden* case. The courts announced this change in the law, and then applied it retroactively to the Hells Angels and Mongols case. It resulted in the dismissal of many counts in both cases, which were pending at the time. This is critical to prosecutors in protecting the public. Right now we have a gap since 2005 in our ability to assess liability for certain types of crimes—we just cannot do it. Consequently, there are individuals who are avoiding liability, and unfortunately it is frequently in the most violent areas and with the most dangerous multiple defendants. I was arguing the issue a few months ago. There has been a suggestion from the Supreme Court to apply this retroactively, which may result in the dismissal of cases that are 10 years old, or even later. This legislation would, we believe, cure that potential problem.

**Chairman Anderson:**

The question of intent always perplexes me in this particular area, along with the question of judicial discretion. In 1995, we toured the Southern Nevada Correctional Center (SNCC). There was a 15-year-old inmate who, because of his age, was being protected by some of the other inmates. He ended up in SNCC, because as an underage driver, he drove a car to a 7-11 where his passenger held

up using a firearm and killed somebody. Clearly, he was an underage driver who had stolen a vehicle, but he had no idea that the person had a firearm and did not know that he was going to be holding up 7-11 but because he was there it fell under the Pinkerton rule. What is the question of judicial discretion? Where is the fairness intent? Clearly, all those people who showed up with shotguns, knives, and firearms in Laughlin knew what they were doing. There was intent; they brought weapons with them for an intended purpose, and they knew this was going to be a gang fight. I am sure that this was not the first fight that they had ever been in. Those are two different scenarios and I am having a difficulty in drawing the parallel. The examples that were given had clear intent. When a person breaks into a house knowing that he will be holding up somebody and he sees the other person take a 16-year-old into the other room, he has a pretty good idea of what is about to happen. It may be helpful if you could address that for me and the Committee.

**Robert Daskas:**

That is and should be a concern, but it is not a concern with the way this legislation is drafted. In the scenario that you just mentioned, the 15 year old did not know that his partner had a gun and perhaps did not know that a robbery was going to occur.

Under this legislation, that 15-year-old would never be convicted of the murder of the store clerk. I will give you a number of reasons why that is the case. In order to find somebody liable under this conspiracy theory, we would have to prove to a jury unanimously and beyond a reasonable doubt that the defendant agreed to commit the underlying crime. In your example, that would be the robbery. We would have to prove to a jury that the young man committed an act in furtherance of the conspiracy and a jury has to believe that unanimously and beyond a reasonable doubt. The subsequent crime—in your example, the murder—would have to be a reasonably foreseeable consequence of the robbery, and 12 jurists would have to find that unanimously before they can convict that young man of murder. As you can see, there are a number of safety valves built into this legislation to prevent somebody, like this young man, from being unfairly held accountable for something he never intended, and at least something he never reasonably saw as a consequence to what he agreed to do.

**Chairman Anderson:**

The conspiracy would have to be held as one element to prove the group's relationship. However, a specific intent of the highest crime that was committed does not extend to all of the conspirators, but only to a specific one.

**Robert Daskas:**

Correct. We would first have to prove to a jury beyond a reasonable doubt that the people, like the young man in your example, agreed to commit an underlying crime—a robbery, for example. Then we would have to prove, under this

legislation, not that he specifically intended to commit murder, but that it was reasonably foreseeable as a natural and probable consequence of the robbery. In your example, if this young man had no idea his partner had a gun, then certainly it is not reasonably foreseeable that somebody would have been murdered; hence, we could not hold that young man accountable for something his partner did on his own.

**Chairman Anderson:**

The jury decision would be equally predicated upon the conspiracy theory that was initially proven. The jury would have to determine if conspiracy was a reasonable inference that could be drawn from the first crime. The judge would have no discretion to discriminate between the four sitting out there—a known group of conspirators.

**Robert Daskas:**

That is an excellent point because the other built-in safety valve is when we have to present a felony case to a probable cause determination before a justice of the peace or a grand jury, and they would have to also believe the subsequent crime, in this case, the murder was a natural and probable consequence of the conspiracy that young man entered. If at a probable cause determination the justice of the peace did not believe that, that count could be dismissed. In addition, the members of the Supreme Court, on appellate review, would also have to find that the subsequent crime, the murder in your example, was reasonably foreseeable as a natural and probable consequence of the original agreement to commit a crime. If on an appellate review the justices did not believe that, it would not survive the appellate review. That is another built-in safety valve under A.B.19.

**Assemblyman Horne:**

First, I want to make a disclosure that I have not made to date but is known: I am a criminal defense attorney. While this legislation may not impact the clients that I currently have, I believe that disclosure is important. It was brought to my attention when Mr. Graham mentioned a case pending in which I have a defendant.

**Chairman Anderson:**

Secretary, if you please, note specifically Mr. Horne's disclosure that he is a defense attorney in the criminal area. While this legislation does not potentially affect him, his clients do fall under this category. Is that sufficient?

**Assemblyman Horne:**

Yes, Mr. Chairman, and I will be able to participate in the debate regarding this bill unless I receive an opinion from Legal that my participation would be inappropriate.

One concern is that the bill changes a standard. The language in Section 2, subsection 3, refers to the reasonably foreseeable aspect of a crime—that is tort language. We are taking tort language and we are putting it into a criminal statute.

In part of your testimony about *Bolden*, you state that tools are taken from you and you would not be able to prosecute a coconspirator, but I do not read *Bolden* that way. It makes a distinction between general intent crimes and specific intent crimes. The Chairman pointed out examples where you can show the intent of the coconspirator. But, Mr. Daskas said that the example of the 15-year-old that he could not be convicted as a coconspirator at a trial. It is my belief that the district attorney's office is going to file those charges, and it puts this 15-year-old at jeopardy because the defense is that he did not know that his codefendant had a gun. Where is the burden, on you the prosecutor to show that he had a gun, or on him to show he did not have the gun? The only way he can do that is if he takes the stand and says, "I did not know he had the gun." That concerns me, yet he is probably sitting beside the shooter, in front of a jury, and that is a dangerous shift we would be making.

I am also concerned about a statement that Mr. Lalli made—that this is done in the vast majority of states. In *Bolden*, they actually state the natural and probable consequence doctrine "is harshly criticized by most commentators...as both incongruous and unjust because it imposes accomplice liability upon proof of foreseeability and negligence." Is this what we would be doing? Putting tort language into a criminal statute? The coconspirator entered into a conspiracy and acts happened that he had no intention of occurring. He could have been at home where his coconspirator says, "Hey I am going to rob a store, you wait here, and I will come back, then we are leaving." He says, "Great idea." He could have gone further and said, "You do not have a weapon though, right? You are just going to go in there..." "Yep, absolutely." Then the guy goes to the store, kills the clerk, comes back with his money, and will now be charged with murder. The guy at the house will be charged as a coconspirator of the robbery, and it would be an unjust conviction to charge him also with felony murder; he could be given a life or death sentence.

**Chris Owens:**

This is something that is not thought about a lot, but there is an area of prosecutorial discretion in these cases. I would hope that we do not have the kind of mentality in our offices and our prosecutors where someone would be prosecuted simply because the police say so. There are cases where the police say there is not enough evidence. There are many cases every day where we just do not think there is enough evidence. Last month I tried a case that involved a get-away driver. One has to look at the facts; if the car is just parked near the crime scene, we probably will not have the evidence needed and we may very well not prosecute that person in the car. We may try to use them as a witness. In my case, it is typical that get-away drivers park in an odd way, they stand and case the place, they move the car for better position, leave the engine running, and you usually have a lot of facts, other than that person just thinking somebody is going in for cigarettes and the next thing he knows, he is charged with murder. We have to prove it. Hopefully, we exercise good discretion in those types of cases.

The court mentioned some of the authority that was brought out in *Bolden*. *Bolden* spun off of *Sharma v. State*, [118 Nev. 648, 56 P.3d 868 (2002)], I am sure you are aware of that. I think your analysis of the *Bolden* case was right on. The court took a little different position than ours and that is why we are here. We think it is the Legislature that should address these kinds of public policy issues regarding liability and not necessarily because there is a majority of votes on the courts that sends them in a different direction. The authority they relied on largely was the Wayne R. LaFare and Austin W. Scott, Jr. article, *Criminal Law*, which was mentioned in *Sharma*. This 20-year-old book and many of the articles that they cited from as commentary were largely older articles as well. The current trend of the law that we mention in one of the footnotes in our handout suggests that states are shifting to an area of criminal and gross recklessness.

**Assemblyman Horne:**

The *Bolden* decision did not suggest that the statute be changed. It was the Supreme Court's opinion that in order to codify your position today they were bound because it was not in the statute.

**Chris Owens:**

That is absolutely correct. It is unusual when they make a reference to the Legislature and it stands out when they do that in the decision. They were not saying that the Legislature should do this. They went a different direction. They said that they would look to the Legislature for guidance on the issue.

**Assemblyman Horne:**

Mr. Lalli, in the *Bradford* case, you mentioned it was reversed in light of *Bolden*. Was it reversed and set for retrial because you have not proven the standard to show intent? Before the decision was wrapped up in the previous holdings, and now with *Bolden*, the court will have to show specific intent. The fact pattern that you stated looks like you will be able to show specific intent in that case.

**Christopher Lalli:**

Similar to what the court ruled in *Bolden* is that there are three theories of criminal responsibility: directly committing the offenses, committing them through theories of aiding and abetting, or through conspiracy. What the court in *Bolden* said was unless the jury articulates which theory they are relying on, all three theories must be legally viable. In applying this to *Bradford*, what the Nevada Supreme Court had was a similar holding because the theory of conspiracy was legally viable in light of *Bolden*. For that reason they did reverse the conviction. So we are in the position to retry that case now.

**Assemblyman Carpenter:**

In one of these cases, you said that you were going to bring new charges or a new trial. What kind of charges or theory would you go on in this new situation?

**Chris Owens:**

Right now, we are just doing the best we can. On the retrials we had to change our instructions and there are gaps where we simply cannot assess liability. We have this anomaly now where a gang goes in with guns and they do something violent. If somebody gets killed, we still have the tools to hold them liable, but if they just injure the person—maybe maim them for life—we may not be able to prosecute the participants in that crime, unless he was the person who actually pulled the trigger. In those cases we may not be able to go forward on those charges. There was a case that was sent back this week based upon a similar liability issue that came out of *Sharma*, and the court did not allow us a chance for a retrial. That was sent back with instructions from the court to vacate the sentence previously given to this individual. It was a take-down robbery of a casino where this particular perpetrator jumped over the counter and put a gun to the face of the cashier and took the money. While his confederates were taking money and threatening patrons and employees, one of them fired shots at a security guard. He was originally found guilty by a jury in *Mitchell v. State* [114 Nev. 1417, 971 P.2d 813 (1998)] years ago of the attempted murder of a security guard. Being armed himself, the jury felt it was reasonably foreseeable that violence could occur. That has been set aside now and we have no options on that case.

**Assemblyman Carpenter:**

I am interested in the part that was not changed in subsection 3 where it states "could not or did not entertain a criminal intent shall not be a defense." What does that mean?

**Robert Daskas:**

Subsection 3 actually addresses a completely different theory of responsibility when aiding and abetting. This is existing language from the statute we seek to amend. What it essentially says is in a situation of aiding and abetting, if the aider and abettor has the intent to commit a crime, but his partner does not, we can still hold the aider and abettor responsible because his intent is that the crime be committed. It is a legal technicality and not something we deal with on a regular basis. It is not even a change in the law that we seek in A.B. 19.

**Assemblyman Segerblom:**

Two people, a driver and a passenger of a car, drive to a 7-11. The passenger gets out, goes inside, and robs the place. There is a scuffle with the clerk and the clerk is killed. Now, the people who went inside and committed the crime—what do you have to show to convict him of murder?

**Robert Daskas:**

In order to prove first degree murder by the triggerman, we would have to prove either he premeditated and acted willfully and deliberately, or that he was

responsible, perhaps under the theory of felony murder—during the course of the robbery he killed somebody.

**Assemblyman Segerblom:**

As far as the driver, what do you have to show to convict him?

**Robert Daskas:**

We would have to prove that either he was a member of a conspiracy to commit a robbery or that he committed an act in furtherance of the conspiracy. What is important to keep in mind in this situation is that mere knowledge that a crime is being committed, and this may also go to Mr. Horne's concern, is not enough to hold somebody responsible. Mere acquiescence in the crime is not sufficient. We have to prove that the get-away driver in that case committed an act in furtherance of the conspiracy, and that the murder was a natural and probable consequence of the conspiracy. Otherwise, he will not be held responsible for something that he did not do.

**Assemblyman Segerblom:**

Based on the current Supreme Court decision, what would you have to prove to have the driver guilty of the murder?

**Robert Daskas:**

Under the state law as it exists post-*Bolden*, we would have to prove that the driver of the car entertained the specific intent that his partner go in and kill that clerk. As you can imagine, getting into somebody's mind and proving to 12 people on a jury what somebody was thinking is virtually impossible.

**Assemblyman Segerblom:**

But in the first instance, you said it could be a conviction of murder in relation to a felony theft, right?

**Robert Daskas:**

For the shooter in your scenario, one theory of liability could be that during the commission of the robbery somebody was killed.

**Assemblyman Segerblom:**

But that would not apply to both the driver and the passenger? If the driver knew the man went in with a gun, would that not also apply?

**Robert Daskas:**

That is a possibility. If we could prove the driver agreed to become a member of the conspiracy, committed an act in furtherance of the conspiracy—the robbery—and during the robbery somebody was killed, then potentially the driver could be held responsible under a theory of felony murder as well. That is correct.



**Assemblyman Segerblom:**

That is the current law?

**Robert Daskas:**

Yes.

**Assemblyman Cobb:**

I think it is important to state that this crime of conspiracy is absolutely crucial for law enforcement and it has done a lot of good in our society. We, as a society, have said that you must have personal responsibility for your actions. You assume a certain amount of risks when you enter into a conspiracy to commit a crime—an additional crime may be committed in furtherance or in foreseeable action when you enter that conspiracy. So, it is important to understand that everybody enters these conspiracies knowingly and intentionally. That is also a great deterrent to crime.

We received emails suggesting that if specific intent were not in existence to convict the principal actor, you could still get a coconspirator for that specific intent crime, just through the conspiracy or the felony murder rules, or some other type of action through the conspiracy. Is that the case?

**Chris Owens:**

Even if you have felony murder, under the current law you can meet the criteria for that. The anomaly that is happening right now is if a perpetrator shoots a person during the robbery, but the victim does not die. Then we do not have a liability means, we do not have conspiratorial liability, and we do not have aider and abettor as a specific intent crime. We would have to show that the person in the car actually intended to kill that person, yet his intent is towards the robbery. It is unclear whether it is liable or not under the current law. If the victim lives, the criminal is not liable. If the victim dies, he could potentially be liable under felony murder.

**Assemblyman Cobb:**

The point here is that you are talking about a crime such as attempted murder, where you will not need to prove that specific intent for the principal actor. However, you will be able to apply this amendment to the other individuals and the coconspiracy theory, and not have them escape justice.

**Chris Owens:**

Correct, but there are other areas that are sometimes associated with other kinds of crimes, short of murder and kidnappings—other foreseeable crimes that occur short of the death, where there is really no liability.

**Chairman Anderson:**

That kind of comes back to my question of intent and the mental state of the individual, the guilty mind, mens rea. It has to be present in order for you to prove those standards.

**Assemblyman Horne:**

You have less burden of proof for the coconspirator than you would for the principal, but yet that coconspirator ends up receiving the same conviction and the exact same penalty without having to show the same burden of proof.

**Robert Daskas:**

My response would depend on the facts of the case. If there is a get-away driver who knows his partner is going to commit a robbery with a gun, then both, assuming that we can prove these issues, could be held responsible under a conspiracy theory of liability. It is also possible the shooter himself could be held responsible under a felony murder theory, as would the get-away driver, if we could prove he agreed to commit the felony and somebody died during the course of that robbery. I certainly appreciate yours and the Committees concern, and I think the overriding concern is, is this fair? The built-in safety valve we discussed earlier. We must prove that somebody agreed to be part of the conspiracy and did act in furtherance of the conspiracy. The case law states repeatedly, including in *Bolden*, that mere knowledge of or acquiescence in the conspiracy is never enough. If somebody is at home and knows that his buddy is going to commit the robbery, we cannot hold that person at the house responsible. We have to prove that he participated in and committed an act in furtherance of that conspiracy; so that is a built-in safety valve, and of course we have to prove that to 12 people on a jury beyond a reasonable doubt.

**Assemblyman Horne:**

Coconspirators are still being convicted of the conspiracy and maybe another crime in which they cannot be convicted of. But they are not escaping prosecution or a penalty for their conduct. Coconspirators are not walking free—there are other additional crimes you want to now charge them with, correct?

**Robert Daskas:**

Correct. Because *Bolden* is such a new case, we do not know the full impact of it yet. There are certainly going to be serious crimes committed by multiple defendants in which some will escape liability for crimes that were foreseeable and could not have been committed without the additional criminals present. In my example, where you have multiple victims, those crimes cannot be committed unless you have enough defendants to hold everybody at bay. The legislation simply imposes liability in our position where it should be imposed.

**Chairman Anderson:**

Not only the criminal with proven intent, mens rea being satisfied, then any extending circumstances that might enhance that penalty also transfer simultaneously once the underlying issues are determined?

**Ben Graham:**

Yes.

**Chairman Anderson:**

What makes this legislation difficult to deal with are the potential consequences, as we heard earlier relative to the way the judges are concerned about how we mandate the law. Although that is not one of the issues this particular Committee is dealing with, we need to be very careful of this legislation because of that. I think you need to recognize that.

**JoNell Thomas, Legislative Representative, Nevada Attorneys for Criminal Justice, Las Vegas:**

I sent an email yesterday, but I would like to note that the prosecutor has an arsenal of tools for these types of situations. There are many general intent offenses: robbery, battery causing substantial bodily harm, racketeering offenses, or gang enhancements. We are not talking about people escaping liability. We are talking about a very narrow category of offenses, which requires a specific mental state and whether the State should be allowed to avoid its obligation of proving a specific mental state for those offenses. In the example that was previously given about the attempted murder at a gas station, the person in the parking lot, who had no intention that a person be killed, shot, or anything of the sort, would still be held responsible for a battery with substantial bodily harm with use of a deadly weapon, which carries a very serious prison sentence. This bill addresses this question: Should a person be held responsible for intending the murder of another person if he in fact did not? We believe that the law as set forth in *Bolden* is correct, that it follows the model penal code, and it is the right direction for this Body to take. Finally, this will potentially increase a great number of prison sentences, and I believe that the fiscal note should be attached.

**Chairman Anderson:**

We will allow your email ([Exhibit F](#)) dated February 15, 2007 at 5:46 p.m., to the members of the Committee to be entered into today's record.

**Assemblyman Cobb:**

You would prefer not to give the prosecutors the opportunity to prove each and every element of the conspiracy crime beyond a reasonable doubt, and therefore, also show that there is another crime committed, that was either foreseeable or in furtherance of this conspiracy because you are worried about the rights of the individuals who knowingly entered that conspiracy where this furtherance or foreseeable crime occurred.

**JoNell Thomas:**

My position is that people who join a conspiracy are absolutely liable for the conspiracy, for the crimes, and for any general intending offense that is committed in furtherance of that conspiracy. But, for the narrow category of cases that require a specific mental state, the State must prove that.

**Howard Brooks, Criminal Defense Attorney, Nevada Attorneys for Criminal Justice, Las Vegas:**

I have a great deal of respect for the four prosecutors who testified; nevertheless, I would first like to correct some misstatements made by them. Mr. Daskas testified that the majority of cases involve multiple defendants—not true. I have worked on more than 100 murder cases and I would estimate that between 20 to 30 percent of murder cases involve multiple defendants. Mr. Owens discussed the liability factors that were discussed in *Bolden*. He spoke of cases where people are making threats, committing robberies, and the take-down robbery that was recently vacated. *Bolden* does not apply to robbery cases and to any general intent case—it only applies to specific intent cases that were affected by the lack of natural and probable consequence doctrine. In other words, a great majority of cases are not affected by this. In fact, in *Bolden*, there were eight crimes charged, and only two were affected by the language regarding the probable and natural consequences doctrine. Most general intent crimes are completely unaffected by this. We still have conspiracy liability—it is just that this affects a small number of specific intent crimes where we are asking the jury to decide if the coconspirator, the person who did not actually do the act, had the same specific intent as for the person who actually did the act. That is only fair. If we look at *Bolden*, the Nevada Supreme Court states two things: the statute does not have this language, and we should not have the natural and probable consequence doctrine. But, the Supreme Court also does something else. They declare this doctrine is unfair and point out that states which considered it are now pulling away from this doctrine. The fact is, the natural and probable consequence doctrine is vague and unfair. It allows a lesser mens rea to be applied to people who are not actually doing the act. The Nevada Supreme Court got it absolutely right in *Bolden*. We are asking this Committee and the Legislature in general, to standby the Nevada Supreme Court, which is doing an excellent job of analyzing this decision.

**Chairman Anderson:**

I will allow your email directed to me to be entered into the record for the day ([Exhibit G](#)).

**Assemblyman Cobb:**

What happens if the prosecutors cannot figure out who acted as the principal within a conspiracy where a specific intent crime occurs? Do all those coconspirators just walk on that part of the case?

**Howard Brooks:**

Absolutely not. Generally, the prosecutors would charge everyone, and then an incredibly difficult situation would materialize where the people involved in the case are pointing their fingers at each other. Eventually, one or more defendants would take deals and plea to lesser offenses and wind up testifying against the others. Also remember, in a situation where you have a violent act you generally have a number of crimes charged. Some of the crimes will be general or specific intent. This doctrine is generally not going to preclude the prosecution from proceeding against everybody they believe is involved.

**John Reese Petty, Chief Deputy Public Defender, Washoe County, Nevada:**

I have submitted to this Committee a paper explaining our position on this bill ([Exhibit H](#)). We find that A.B. 19 is not important. The Supreme Court noted in *Bolden* that there is no comprehensive statutory scheme with regard to conspiracy. In 1998 they made the similar observation in a case called *Garner v. State* [116 Nev. 770, 779 6 P.3d 1013, 1019 (2000)]. There have been no legislative answers to what the Supreme Court said in 1998 and law of conspiracy in the State of Nevada did not come to a complete halt. Cases were not precluded from being prosecuted. *Bolden* does not change that analysis, as Ms. Thomas said. *Bolden* speaks to coconspiracy liability where specific intent crimes alone. It does not preclude prosecution for those crimes if the State can prove the specific intent required. This bill eviscerates *Bolden* and if you read it carefully, it is actually internally inconsistent because it was based on an earlier case that was *Sharma*. We strongly oppose this bill. It is not necessary and it is not responsive to anything that the Supreme Court was doing, and we think there are better uses of this Committee's time.

**Assemblyman Carpenter:**

How many bad guys are going to get away if this decision of the Supreme Court does not stand?

**John Reese Petty:**

That is a question that cannot be answered. I do not think bad guys are going to get away by virtue of the *Bolden* decision. However, the prosecution will have to charge carefully and have to prove beyond a reasonable doubt all of the elements of a specific intent as part of an insular event of the conspiracy. I cannot answer your question. Presumably the police, the prosecution, the jury, and the defense counsel will do their jobs, and a jury will reach the correct verdict. That is all that we can ask of that system.

**Assemblyman Cobb:**

Can you describe what this internal inconsistency is that you just mentioned in the bill?

**John Petty:**

The *Sharma* decision was decided in 2000 and it dealt with accomplice liability, aider and abettor. What *Sharma* did was say that the natural and probable consequence doctrine is not applicable for accomplice liability when it involves a specific intent crime. In so doing, they overruled a case called *Mitchell* that held exactly the opposite. Last year, that case finally got back to the Supreme Court and, based on *Sharma*, a different result was reached. In *Bolden*, after a discussion about a significant disfavor that the natural and probable consequence doctrine has garnered in the various states, they did not look to the *Sharma* decision and said that the rationale is equally applicable here, in *Bolden*, to coconspirator liability. They are not going to extend coconspirator liability to specific intent crimes unless specific intent can be shown. We are not going to let it be part of the natural and probable consequence doctrine. The bill as proposed today under subsection 2 (b), deals with aider and abettor liability and does not change anything about the mental state of the perpetrator, so that means *Sharma* has stated law that is still existing good law. But, if you enact this bill, the way *Sharma* has been read by *Bolden*, the bill completely eliminates coconspirator liability. When an individual is charged as an aider and abettor for a crime, as well as a coconspirator, the natural and probable consequence doctrine cannot be used for a specific intent crime, aider and abettor, but it could be used to consider coconspirator liability, and that seems to me to be internally inconsistent.

**Chairman Anderson:**

Ms. Coffee, I have a document from you, which we will submit to the members of the Committee ([Exhibit I](#)). I am going to repost this bill, so that we can hear the other side of the argument. It is much too narrow of a question to be decided in the 80 minutes that we have spent with it.

Close the hearing on A.B. 19 with the recognition that we are going to post it for a second hearing.

Meeting adjourned [at 10:49 a.m.]

RESPECTFULLY SUBMITTED:

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Doreen Avila  
Committee Secretary

APPROVED BY:

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Assemblyman Bernie Anderson, Chairman

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

## EXHIBITS

**Committee Name:** Committee on Judiciary

**Date:** February 16, 2007

**Time of Meeting:** 8:04 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance roster
A.B. 8	C	Assemblyman Manendo, on behalf of Bill Parker, constituent	Written statement
A.B. 8	D	Assemblyman Manendo, on behalf of Judge George Assad	Written statement
A.B. 19	E	Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association, Las Vegas, Nevada	Criminal Liability Legislation: Position and Analysis
A.B. 19	F	JoNell Thomas, Legislative Advocate, Nevada Attorneys for Criminal Justice	Written statement
A.B. 19	G	Howard Brooks, Criminal Defense Attorney, Nevada Attorneys for Criminal Justice	Written statement
A.B. 19	H	John Reese Petty, Chief Deputy Public Defender, Washoe County	Written statement
A.B. 19	I	Amy Coffee, Clark County Public Defender's Office, Nevada Attorneys for Criminal Justice	Written statement