MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
March 1, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:08 a.m., on Thursday, March 1, 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/. In addition, copies of the audio record may be purchased through the Legislative Counsel Bureau's Publications Office (email: publications@lcb.state.nv.us; telephone: 775-684-6835).

COMMITTEE MEMBERS PRESENT:

Assemblyman Bernie Anderson, Chairman
Assemblyman William Horne, Vice Chair
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 John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst
Risa Lang, Committee Counsel
Danielle Mayabb, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

Michael Pescetta, Assistant Federal Public Defender, Las Vegas, Nevada
Cotter Conway, Deputy Public Defender, Washoe County, Nevada
Jason Frierson, Attorney, Public Defender's Office, Clark County, Nevada
Lee Rowland, Staff Attorney, American Civil Liberties Union, Las Vegas, Nevada
Lisa A. Rasmussen, President, Nevada Attorneys for Criminal Justice, Las Vegas
Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association
Robert Daskas, Chief Deputy District Attorney, Clark County, Nevada
David W. Clifton, Chief Deputy District Attorney, Criminal Division, Washoe County, Nevada
David Stanton, Prosecutor, Clark County District Attorney's Office, Las Vegas, Nevada
Christopher Lalli, Assistant District Attorney, Clark County, Nevada
JoNell Thomas, Legislative Advocate, Nevada Attorneys for Criminal Justice, Las Vegas
Dan Silverstein, Nevada Attorneys for Criminal Justice, Las Vegas

Chairman Anderson:
[Meeting called to order. Roll called.] I have a bill draft request (BDR) from the Attorney General—BDR 1-519. It is an act related to expanding the jurisdiction of justice courts in criminal cases in which an arrest was made by a field agent or inspector of the State Department of Agriculture, and provides other matters related thereto.

ASSEMBLYMAN CARPENTER MOVED TO INTRODUCE BDR 1-519.

ASSEMBLYMAN HORNE SECONDED THE MOTION.

MOTION PASSED UNANIMOUSLY.

Let us turn our attention to the agenda of the day, and open the hearing on Assembly Bill 19.

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

When we heard the bill on February 16, 2007, there was not sufficient time left to hear the development of the full argument from those in opposition to the bill.

Michael Pescetta, Assistant Federal Public Defender, Las Vegas, Nevada:
I am here representing myself and not the Federal Public Defender. I sent a brief memo to the Committee (Exhibit C). Assembly Bill 19 is unnecessary. It is not restoring any kind of previously existing Nevada law. The *Bolden* decision was a unanimous decision by the en banc Nevada Supreme Court [*Bolden v. State*, 121 Nev. Adv. Op. 86, 124 P.3d 191 (2005)].

The Pinkerton Rule [*Pinkerton v. United States*, 328 U.S. 640 (1946)] has not been the rule in Nevada. This bill is seeking to impose coconspirator liability for substantive offenses, not just for the offense of conspiracy. There is some confusion in the early cases in the discussion in the proponents' brochure submitted in the previous hearing. The Pinkerton Rule that has been referred to includes two different provisions. One is an evidentiary rule that is the coconspirator's statements are admissible against other conspirators. That is the law in Nevada. Assembly Bill 19 would impose coconspirator liability for any substantive offense that was committed by other members of the conspiracy, whether or not the individual who is being charged had the intent to have that offense committed. It is consistent with the reasoning in *Bolden* and with the modern rule—in all jurisdictions, I think—that we try to focus on individual culpability. In every offense, there are two elements: the actus reus—the evil act—and the mens rea—the evil mind. Assembly Bill 19 disconnects that intent from the offense. That is a matter of bad policy.

Conspiracy, in itself, is not a small offense. The implication left in the last hearing was that if we cannot charge for the substantive offense, we have no charges. That is not true. Conspiracy is punishable under *Nevada Revised Statutes* (NRS) 199.480, depending on the severity of the target offense, from one-to-five to two-to-ten years in prison. That is serious time. It is sufficient to vindicate the public interest in justice when what we are talking about is just the conspiracy—that is, someone who is being punished for the agreement and not for another substantive offense.

I would note parenthetically that, if A.B. 19 becomes law, those individuals who might be punished for the conspiracy are going to be looking at prison sentences that could range up to life in prison. That is something that is going to overburden the Department of Corrections (NDOC).

If you look at the examples cited in the proponents' brochure, every one of them is a case in which the conviction could have been obtained under the

standard aiding and abetting or felony murder rules that are currently in effect. If you look at the *Bolden* case, the Nevada Supreme Court said that if you had just proceeded on the aiding and abetting theory of liability, there would have been ample legal and factual support to uphold those convictions. It was only because of the coconspirator theory, which disengages intent from act, that the Nevada Supreme Court, in *Bolden*, reversed those convictions.

The most problematic part of the bill is an Executive Branch official coming before this body and saying they need more power. Once upon a time, all Americans were more skeptical. I like to think that in Nevada we are still reasonably skeptical of those claims. It says something about the need for this legislation that all of the examples cited are cases that could have been covered by the existing law. Whoever comes and asks for that additional power—in addition to saying they absolutely need it—is always going to say that. Even if this power is broad, extensive, and could easily be abused, they want to use it because they are reasonable people and would not do that.

When you look at the uses that are going to be put to this legislation, one of the most problematic is illustrated by the Donte Johnson case [*Johnson v. State*, 118 Nev. 787, 59 P.3d 450 (2002)], which was referred to by the prosecutors in the last hearing on the bill. The cases of Sikia Smith [*State v. Smith*, Clark County Case Number 98-C-153624 (1998)] and Terrell Young [*State v. Young*, Clark County Case Number 98-C-153461 (1998)] were proceeded against on aiding and abetting and felony murder theories. I have submitted, as part of my memo, excerpts from the prosecutor's final argument to the jury in which they said the jury can find them guilty of felony murder, that is it; they do not have to look at anything else. If they find the robbery, it is first degree murder. In those two cases, they were not sentenced to death by the jury. If they had been, we would now be engaged in extensive and expensive litigation over the fact that, under controlling United States Supreme Court law, you have to have a mental state sufficient under the Eighth Amendment to allow imposition of the death penalty. We would be fighting over whether or not the introduction of this coconspirator theory of liability, under which you do not need any intent to be held liable, was something that would invalidate the sentences imposed. That is something we do not need.

Ms. Rasmussen is going to refer to another case in which those prosecutors—who testified here previously—attempted to prosecute on a theory of coconspirator liability that would make somebody liable for assault against himself. That is not the sort of situation we need. I submit that this is legislation that is going to be both counterproductive and dangerous. I urge the Committee to reject it.

Assemblyman Cobb:
Your testimony today is that a defendant may not be found guilty of a crime unless there is individual culpability?

Michael Pescetta:
In all criminal offenses, except strict liability offenses and offenses in which criminal negligence is adequate to justify conviction, there is a necessity of both the criminal act and the criminal intent.

Assemblyman Cobb:
So, is it your testimony that, in all cases, there should be a requirement of individual culpability?

Michael Pescetta:
Yes.

Assemblyman Cobb:
Are you against the felony murder rule?

Michael Pescetta:
I am opposed to the felony murder rule. If you look at the *McConnell* case [*McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004)], the Nevada Supreme Court has acknowledged that there has been a lot of criticism of the felony murder rule precisely because it distances liability from personal culpability. In most situations where the felony murder rule applies, the aiding and abetting rule would also apply. Although I have problems with the felony murder rule—and it has been written about for years—it is not as problematic as this legislation.

Assemblyman Horne:
Bolden has not taken that away from the prosecution. They have only said there is a limit on which you may use it. Is that your take on *Bolden*?

Michael Pescetta:
Yes. *Bolden* limits the situation to specific intent crimes. It does not cover general intent crimes. For instance, robbery is not subject to this rule. It puts a limit where a specific intent is required for the person who actually commits the offense. Someone who aids and abets or is a coconspirator has to share that intent. It would lead to this anomalous situation where the person who actually commits the offense would need that specific intent, but a coconspirator, under this legislation, who does not have that intent at all, could be convicted of the same offense. The actual perpetrator would need a higher level of intent to be

found guilty than a coconspirator who would not need that level of intent. That would leave our statute seriously out-of-whack.

Assemblyman Horne:
The government has a higher burden in proving the actual actor's guilt. The government would have a lesser burden for the same adjudication of guilt for the accomplice or coconspirator, under this legislation?

Michael Pescetta:
Yes. We have to be careful about the language. The accomplice rule is covered by the aiding and abetting statute. It is the coconspirator who is covered by A.B. 19. That is exactly the situation you described.

Assemblyman Carpenter:
What would be an example of a specific intent crime?

Michael Pescetta:
Attempted murder.

Chairman Anderson:
Any other questions? [There were none.] Mr. Conway?

Cotter Conway, Deputy Public Defender, Washoe County, Nevada:
Last time we were here, I had brought John Petty from my office. Some people had some questions for him, but we had to cut the meeting short. I want to make sure that his brief dated February 16, 2007, is made a part of the record.

Chairman Anderson:
We will be sure it was made part of the record that day.

Jason Frierson, Attorney, Public Defender's Office, Clark County, Nevada:
I would like to share one case involving the Pinkerton Doctrine [*Pinkerton v. United States*, 328 U.S. 640 (1946)] with you because you have been presented with hypotheticals and fact patterns. This case is out of Idaho in 2005, *State v. Nevarez* [*State v. Nevarez*, 130 P.3d 1154 (Idaho Ct. App. 2005)]. In that case, the defendant was charged with conspiracy to traffic cocaine and multiple counts of cocaine trafficking. The evidence against that defendant was comprised of testimony by the codefendants—her son and her husband. Her son testified that she was opposed to drugs, did not allow drugs in her house, and did not use drugs. That was the evidence against her. The son and the father entered guilty pleas. The mother did not, and she was convicted of conspiracy and trafficking cocaine. The sole evidence against her was that she did not use drugs, did not allow them in her home, and that she

did not approve of illegal drugs. On appeal, the Idaho Court of Appeals overturned her conviction and rejected the Pinkerton Doctrine. They cited many of the same principles that the Nevada Supreme Court cited in holding that Pinkerton allows people far removed from the actual intent to be convicted for the same offense.

You were also provided with some information regarding hypotheticals. I want to caution you that when there is a question asked about whether or not a defendant can be held criminally liable, it is a question for a jury. The district attorney charges and the jury determines whether or not that person can be held criminally liable. Whether or not these district attorneys would make that decision is one thing. Given the discretion of prosecutors throughout the State, they have the ability, and it is the jury that determines whether or not they will be held criminally liable. In the Idaho case, without any intent or knowledge, that defendant was held criminally liable. It is our concern that if A.B. 19 were to be adopted, it would happen in the State of Nevada. That would be something that would not be consistent with any principles of proportionality to involvement or to intent.

Chairman Anderson:
You feel that the prosecutor has the opportunity to present these, and this is factual information that is determined by a jury—and should be determined by a jury, rather than to be statutorily excluded. Is that what you are trying to tell us?

Jason Frierson:
To some extent. The jury does, and should, make that determination. Adopting the Pinkerton standard skews that determination. It is not a matter of whether or not, as a matter of law in statute, a person can be held criminally liable. If A.B. 19 is adopted, people will be subjected to liability that they would not otherwise be subjected because they lack the intent. The Idaho case noted that in the case where someone not only was not involved but actually discouraged the criminal activity, they could also be held liable. It would be my concern that, in Nevada, if we adopt A.B. 19, it would be a possibility here. That would not be consistent with concepts of justice in this State.

Chairman Anderson:
In Idaho, then, do they have a similarly structured statute?

Jason Frierson:
Yes, similar to the current state of the law in Nevada.

Chairman Anderson:
But not as proposed in *Bolden*?

Jason Frierson:
They expressly rejected that principle.

Chairman Anderson:
Questions from the Committee? [There were none.] We will turn to Ms. Rowland.

Lee Rowland, Staff Attorney, American Civil Liberties Union, Las Vegas:
From what I see, the proponents of the legislation have given you a number of examples that are covered by existing aiding and abetting statutes. I would like to give you an example of a crime that would be covered by the proposed A.B. 19, but would not be covered by aiding and abetting liability. What this example shows is that A.B. 19 could be fairly referred to as a misdemeanor murder rule.

Let us say two teenagers decided to buy marijuana. They went in their car to purchase this marijuana. One of them got out of the car to, say, enter into a drug deal. This could be a misdemeanor possession of marijuana. He walks up to two people from whom he thinks he is going to purchase marijuana. One of them shoots him. The kid in the car could be held liable for the murder of his friend. There would be no intent. There would be no criminal activity beyond the intent to commit a misdemeanor—the possession of marijuana. Any competent prosecutor could make the argument that violence is a foreseeable consequence of any drug-related activity. This is the kind of crime for which the aiding and abetting statutes are not available, and that A.B. 19 would essentially create an entire world of intent-less liability. It would put us at the far right end of the spectrum across the nation for the way we look at how strongly we want to prosecute people for criminal activity. I cannot see any theory of imprisonment—whether it is rehabilitation or deterrence—that is at all sensible to imprison people for potentially first degree murder crimes for simply intending to engage in a misdemeanor. This A.B. 19 applies to all crimes. There is absolutely no limitation on the degree to which someone can be punished for a misdemeanor.

We are strongly against A.B. 19 because the consequences are extensive. In keeping with that, I hope that you get an accurate fiscal estimate because the impacts on our prison system from this bill alone could be overwhelming. If you have people who are involved in misdemeanors where an unfortunate tragedy occurs, you could have people in prison for life for a misdemeanor intent and activity.

Assemblyman Ohrenschall:
Do you feel that A.B. 19 does not distinguish between general intent crimes and specific intent crimes, in terms of liability?

Lee Rowland:
As far as I read it, it does not. It contains language applying to a crime and any activity that is a foreseeable result of that crime. Any competent prosecutor could say that any violent crime might be a foreseeable consequence of any misdemeanor activity. Mr. Pescetta's testimony is right on in saying that when you do have specific intent, the aiding and abetting liability exists precisely to cover those instances.

Assemblyman Ohrenschall:
If A.B. 19 did distinguish between general and specific intent crimes, would it be more acceptable to you?

Lee Rowland:
Not to us. Every example put before the Committee is covered by existing liability opportunities. I cannot come up with a situation where it would be necessary to expand liability except for the situation where there is a specific intent crime and the person being charged lacked that specific intent. Even if that distinction were made, that would make this bill further unnecessary. That is precisely what aiding and abetting liability is supposed to attack.

Assemblyman Manendo:
Let us say that there are two people in a car and the driver is drunk. The driver hits and kills somebody. Is the passenger liable, too?

Lee Rowland:
I am not usually a criminal lawyer. I do not know if there is an existing misdemeanor crime for being in the car with a drunk driver. If there were, then yes.

Chairman Anderson:
Are there any questions for Ms. Rowland? [There were none.]

Lisa A. Rasmussen, President, Nevada Attorneys for Criminal Justice, Las Vegas:
I have submitted a packet outlining various principles of accomplice and coconspirator liability (Exhibit D). The issues are somewhat complex. I would encourage you to read through the packet.

We have to prove that the person who commits the crime did it, that it was unlawful, and that they intended to commit the crime. For the coconspirator, we do not have those elements. We do not have to prove that they did it. We do not have to prove that they intended to do it. That is what is wrong with A.B. 19. It requires a higher level of proof—that we meet more elements for the person who actually committed the crime versus the person who may not even be there. They need not be present. They do not need any intent whatsoever. It results in a ridiculous scenario where it is easier to get the conviction against the coconspirator than the person who actually committed the offense. It is difficult to understand how that can be just. For exactly those reasons, our Supreme Court has said in *Sharma* [*Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002)] and in *Bolden* that this does not work. For that very narrow class of specific intent crimes, they have made that ruling. I note from the supplementary materials provided today by the District Attorneys Association, they use some hypotheticals, and they use robbery as an example. That is a general intent crime. It is not covered under *Sharma* or *Bolden*. They proposed A.B. 19 to you in response to *Sharma* and *Bolden*. They say this is why we need the statute, but general intent crimes are not implicated by *Sharma* and *Bolden*.

Last, there is an example of why it does not work and why it is not good legislation. In the Laughlin case [*Regas (Sohn) v. District Court*, Docket No. 45183 (Order Granting Petition in Part, and Denying Petition in Part, by the court en banc, March 27, 2006)], there were 25 counts where people were charged with stabbing, shooting, or beating themselves. The victim of the offense was charged with the offense. That is the ridiculous result, and that is what they are asking you to do—give them the authority to charge people when they are the victim in an offense.

Chairman Anderson:
In the case of suicide or attempted suicide, we take that person into custody, charge them, and hold them based on their mental state. Are we not, in effect, charging them with a crime against themselves?

Lisa A. Rasmussen:
We hold them on a mental health basis. I do not know that we charge people with a substantive offense if they have attempted to take their life and no one else is involved. It came about in the case I referenced under the theory that the act of one is the act of all. That is what the proponents of A.B. 19 are telling you. If you are there and are hurt, you are then responsible for hurting yourself. There is no other state that holds that someone could be charged with their own attempted murder, battery, or assault.

I am not sure if I have responded to your question, but I do not know that we charge people for trying to kill themselves.

Chairman Anderson:
We consider that to be an act against society. Their life is of value to society as a whole.

Are there any other questions for Ms. Rasmussen? [There were none.] Is there anyone else who wishes to speak in opposition? [There was no one.] Is there anything that needs to be put on the record that has not already been put on the record?

Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association:
There is a recent Supreme Court decision which was discovered and I would ask for Mr. Daskas to refer the Committee to that.

Robert Daskas, Chief Deputy District Attorney, Clark County, Nevada:
On January 17, 2007, there was a U.S. Supreme Court case, *Gonzales v. Duenas-Alvarez* [*Gonzales v. Duenas-Alvarez*, No. 05-1629, slip. op. 11 (U.S. January 17, 2007)]. In that case, the highest court of the land said as follows: "relatively few jurisdictions have expressly rejected the 'natural and probable consequences doctrine.'" Our Supreme Court cited the *Bolden* decision in Nevada as being one of only ten states that has rejected this doctrine, which we are asking to put in the statute in A.B. 19.

Assemblyman Segerblom:
Could you answer the argument that if this bill were passed, you would be allowed to convict the coconspirator with less evidence than the person who actually perpetrated the intentional crime?

David W. Clifton, Chief Deputy District Attorney, Criminal Division, Washoe County, Nevada:
Absolutely not. I do not know where that is coming from. I have been prosecuting under conspiracy liability for 20 years. In order to get a coconspirator found liable of the substantive crimes that are in addition to what he conspired to commit, we have to prove that the other coconspirator—the perpetrator of those crimes—has committed that crime. If the second coconspirator commits murder and the first coconspirator who agreed with him to commit robbery is tried for that murder on a conspiracy liability basis, we have to prove the elements of the murder, and that each element was committed beyond a reasonable doubt by the first person who committed the murder. I do not know how the defense bar can say we are proving somebody

guilty under a coconspiracy liability theory with less evidence than for the person who committed the murder. In addition, all coconspirators have to have the specific intent to further that conspiracy. That is an intent crime right there. It is not based on negligence. It is the fact that the person intended to commit the conspiracy and further that conspiracy.

Assemblyman Segerblom:
The situation you are describing, I assume, is where both conspirators are in the same trial. Is it possible that you would try the conspirator without having the person who actually did the crime in the trial?

David W. Clifton:
They do not have to be in the same trial.

Assemblyman Segerblom:
In the trial of the conspirator, you would have to prove that the person who did the act intended to do that act before you could show it was foreseeable for the second person?

David W. Clifton:
Yes. The example we give in our newest handout (Exhibit E) exemplifies that—the Phyllis Miller and Bryan Brake case [*State v. Miller*, Washoe County District Court Case No. CR94-0950 (1994) and *State v. Brake*, Washoe County District Court Case No. CR93-2484 (1993)].

Assemblyman Segerblom
The way you describe it is not the language of the bill you are asking us to adopt.

David W. Clifton:
That would be in the case law.

Assemblyman Cobb:
We heard testimony today from the opposition to this bill that, if they had their druthers, they would require individual culpability to be proved for any crime. That would eliminate the felony murder rule, would it not?

Robert Daskas:
Yes, it would.

Assemblyman Cobb:
Are you aware of a single state in this nation that does not have a felony murder rule on the books?

Robert Daskas:
No, I am not.

Assemblyman Cobb:
This bill, which would restore 120 years of jurisprudence in Nevada, would allow for the felony murder rule. The opposition to A.B. 19 is not just opposition to that one single part of jurisprudence, but is also a radical step against any type of non-individual culpability, such as the felony murder rule. Is that correct?

Robert Daskas:
That is correct. The U.S. Supreme Court case we cited is an example that we are the minority if we do not pass A.B. 19.

Chairman Anderson:
Your contention is that we will not have the felony murder opportunity in the State of Nevada? That is not my understanding.

Robert Daskas:
No, that is not my testimony.

Chairman Anderson:
So, the supposition is not that we will not be the only state without a felony murder rule?

Robert Daskas:
Correct. The question was whether every other state has a felony murder rule. My response to that was that it is correct. We have it.

Chairman Anderson:
We are not going to be unique in the entire world of jurisprudence, which seemed to be the assertion.

Robert Daskas:
No. That is not my assertion. We would be in the minority if we did not pass A.B. 19.

Assemblyman Horne:
The government would have a lesser burden of proving the coconspirator's guilt than they would the original actor. *Bolden* deals with specific intent crimes, but even that is what coconspirator liability is. That is what we are talking about here. We are talking about a person who did not actually pull the trigger. You

are not going to have to prove that he intended to pull the trigger; you are only going to have to prove that he entered into a conspiracy that resulted in it. That is a lesser burden. Theoretically, if you have a severed trial, the person who pulled the trigger could be found not guilty by a jury. If this were to pass, you would still be able to find that coconspirator guilty only by showing that the killing happened. Is that not less of a burden?

David W. Clifton:
The lesser burden is the difference between the mens rea and the actus reus. That is what is getting confused. Yes, there is certainly a lesser burden on the actus reus—the act of the crime. The coconspirator you are referring to did not pull the trigger, so I do not have to prove he did have individual culpability of pulling the trigger and committing that murder. As far as the mens rea goes—the actual intent—he had specific intent to enter into that conspiracy to further that conspiracy so that the crime of the conspiracy occurred. Then, if there is another act in furtherance that is foreseeable and a natural and probable consequence of that conspiracy, he can be found guilty of that. The jury would have to look at all the elements to make sure that crime had been committed by perpetrator A before they could convict perpetrator B. The element of mens rea is very similar except we are transferring it from one actor to another.

Assemblyman Horne:
That is a long way of saying that it is different. It is going to be easier for you to put the coconspirator in prison possibly for life for the actual conduct of the triggerman. You just said that you are not going to have to show that he pulled the trigger.

David W. Clifton:
On the act, I agree with you. It is a lesser burden. We still have to prove perpetrator A committed the act. If he did not commit a murder for any reason—the elements are not provable—then I cannot convict perpetrator B on a conspiracy liability. The mens rea is still similar because I still have to prove all of the intent of that murder. I have to prove the murder occurred by a coconspirator.

Assemblyman Horne:
If, in my scenario of a severed trial, the triggerman was found not guilty, would a defense attorney be able to move to dismiss because you cannot prove a murder occurred since he was found not guilty?

David W. Clifton:
I hear you loud and clear. There is actual case law right on point on this. Even if perpetrator A is eventually acquitted and we charged the coconspirator first

and convicted him of the conspiracy and the murder under conspiracy liability, the defense attorney, yes, could make a motion to go back in and review that original case to see what he was acquitted upon. Did the acquittal have to do with him not committing the murder, or was the acquittal based on something else that would not affect perpetrator B? It would be addressed.

Chairman Anderson:
We will close the hearing on A.B. 19 and bring it back to Committee.

Let us open the hearing on Assembly Bill 58.

Assembly Bill 58: Revises provisions governing murder of the first degree. (BDR 15-935)

Assemblyman Oceguera:
This bill proposes to expand the number of offenses that constitute murder of the first degree. Under the current Nevada law, murder that occurs during the commission or attempted commission of another offense such as sexual abuse, sexual molestation, or abuse of a child is murder in the first degree. The bill before you would propose to add the following to the list: child neglect, abuse or neglect of an older person, and abuse or neglect of a vulnerable person.

In my full-time job I have seen many cases—especially with seniors—where we go to the facility and the senior is lying in his own feces and urine. When we peel those sheets away from him, he dies. It is a horrible situation, and people should be held accountable. That is the basis of this bill.

Ben Graham:
I would ask that David Stanton, in Las Vegas, approach the table. From time to time we see neglectful situations where vulnerable people, seniors, and younger people are subject to horrible abuse that may not rise to first degree murder under our current statute. What I have asked Mr. Stanton to do is to take a look and see, if this were the law in the State of Nevada, how this law would be applied to meet some of the concerns. This would add another situation where you could get to a first degree murder charge.

David Stanton, Prosecutor, Clark County District Attorney's Office, Las Vegas, Nevada:
I am here to answer any questions that any member of the Committee would have. Assemblyman Oceguera indicated his experience of encountering elderly people in circumstance of significant neglect, and it is certainly one that has occurred here in Clark County. I was a prosecutor on *State v. Healy* [*State v. Healy*, Clark County District Court Case No. 05-C-209358-C (2005)]

as well as a case involving the substantial neglect of a child who was diabetic, *State v. Botzet* [*State v. Botzet*, Clark County District Court Case No. 04-C-202240-C (2004)]. This legislation is to assess what the community, through their Legislature, wants as the sensibility for those cases, although rare, where the significant neglect of individuals—either children or elderly persons or person who need care—ends up in their death, and whether or not society is going to recognize those offenses as being tantamount to murder. Neglect is not treated in the same language as abuse in the law. You have cases where a parent or guardian is caring for a child, or a facility or an individual is caring for an elderly person. While there is not physical abuse, there is a long-term condition that results in their death. Is that morally the same as murder? This legislation addresses those horrific and rare cases where the most vulnerable in our community are subject to neglect that causes their death.

Chairman Anderson:
What happens if you leave your parent who then soils himself because you have to go to the store? You come back and the fire department is there because the parent has used one of those lifeline devices. What would happen in that kind of a scenario where there is no evidence of prolonged treatment, but something has happened just in trying to run the day-to-day events of a household? Would this leave you open as a caregiver to a new standard of behavior?

David Stanton:
I do not believe it would. You would never, under the facts you mentioned, be able to establish factually that it was neglect. There are certainly accidents that occur in the treatment of children or elderly people. There are circumstances that exist with an elderly person soiling himself in a situation where he is not attended or observed by a caretaker. Those situations that you described would not, under any reasonable circumstance, end in the death of an individual. The circumstances that I am mentioning deal with chronic neglect causing medical conditions that make them susceptible to disease and septic shock. The case I had (*Healy*) was dealing with a woman who was mentally infirm and elderly. She had large and open lesions on her body as a result of mistreatment and neglect over a prolonged period of time. The feces and the urine that were around her accelerated the septic shock. Under the scenario that you gave, I do not believe neglect could even be proven, let alone that the person was exposed to circumstances that would cause their death.

Assemblyman Horne:
What charge and penalty would be applied to the scenario that you painted under today's statute?

David Stanton:
Under today's statute as it relates to children or as it relates to elders?

Assemblyman Horne:
Under this neglect scenario that leads to death, what charges would be brought under the current statute? What penalties come with those charges?

David Stanton:
It would be 1–20 years as a potential punishment in that offense.

Assemblyman Horne:
What would the charge be?

David Stanton:
Elder abuse causing substantial bodily harm or death.

Assemblyman Horne:
What about for child abuse and neglect causing death?

David Stanton:
As the law currently reads, child abuse that causes death in NRS 200.030 is first degree murder. If you were talking about child neglect, that is 1–20 years.

Assemblyman Horne:
Are there other jurisdictions that allow a negligent standard to rise to first degree murder?

David Stanton:
I know a number of states permit it, but I do not know how many.

Assemblyman Horne:
If you could find that out, I would appreciate it.

Chairman Anderson:
When we look at the line in subsection 6(c) where child neglect is described, it means negligent treatment or maltreatment of a child under the age of 18 as set forth in our statute. That says that negligent treatment or maltreatment of a child, if the child has been abandoned, is without proper care or control, and supervision. What about the scenario—which tragically has happened in our community—where a father backs his vehicle out of the driveway and hits the child who is less than two years of age. He thought the child was in the house with the mother. Would there be the potential for them to be charged with negligence for not paying attention to where the child was?

David Stanton:
All these cases come down to what are fact-specific cases as to what the attendant circumstances were of that event. The distinction between negligence and an accident would be based upon those attendant facts. As you articulated with your hypothetical situation, my answer to you would be no, there is no potential because those facts clearly evidence an accident as opposed to a criminal negligence that would arise to a potential charge.

Ben Graham:
There was a prominent case in which a child was found in a dumpster down in Las Vegas [*State v. Perez*, Clark County District Court Case No. 06-C-220720-C (2006)]. I would like to defer to anyone down there who may have information on that case and might elucidate on it.

Christopher Lalli, Assistant District Attorney, Clark County, Nevada:
Marc Colon and Gladys Perez are charged with killing then leaving a very young girl in a dumpster who was found shortly after. The identity of the perpetrators and the fact of the crime were not discovered for some time. In the prosecution, the theories that we are alleging involved first degree murder for child abuse against Marc Colon. In at least one theory that we are presenting in the case, the mother, Gladys Perez, is charged only with second degree murder child neglect because, under the theory, she allowed her child to be beaten to death by the codefendant. You see the inequitable result under current Nevada law in that prosecution. There has been a prolonged neglect of the child evidenced through her physical condition. She suffered from malnourishment which had manifested itself on her body. She was very thin and dehydrated, and the defendant allowed her boyfriend to beat her and abuse her over a prolonged period of time. That is the case that Mr. Graham is referring to.

Assemblyman Horne:
In that case, you said the mother was charged with second degree murder. If convicted, what penalty is she facing?

Christopher Lalli:
She is charged under two theories of the crime. One of them is a first degree murder theory and the other is a second degree murder theory. If she were convicted of second degree murder—premised on the neglect theory—she would face life in the NDOC with a minimum parole eligibility of ten years.

Assemblywoman Gerhardt:
I do not know if you are familiar with the *Snyder* case [*State v. Snyder*, Clark County District Court Case No. 05-C-214701-C (2005)], but would that apply under this proposed statute?

Christopher Lalli:
I am familiar with the case, but I have not read it in some time. The Nevada Supreme Court did look at this issue of neglect in the *Snyder* case. It is based upon that case and another case—the *Collman* case [*Collman v. State*, 116 Nev. 687, 7 P.3d 429 (2000)]. It is my understanding that those cases affected the criminal liability in a negligent situation resulting in first degree murder. Those cases criticized or had a difficulty with first degree murder based upon a negligent theory. I am not sure if that answers your question.

Assemblywoman Gerhardt:
It would be helpful if I could get some research on that.

Assemblyman Segerblom:
Could you explain how, with respect to *Perez*, this law we are considering would change what you are doing?

Christopher Lalli:
What this legislation would do is, under either a direct child abuse or prolonged child neglect theory, allow the child's mother to have been convicted of first degree murder, as opposed to second degree murder.

Assemblyman Segerblom:
But you did say that she has been charged with first degree murder.

Christopher Lalli:
She is charged with first degree murder, but under a theory of child abuse. It is our contention that there was child abuse and child neglect. If the jury believes that the child died as a result of the mother's child abuse, it is first degree murder. If they believe that the child died as a result of the mother's neglect, it is second degree murder.

Assemblyman Segerblom:
Does the jury know that there is a lesser penalty involved when they make that finding?

Christopher Lalli:
In the guilt phase of a case, juries are not to consider penalties. At that phase, they do not know; they are not instructed that second degree murder has a

lesser punishment than first degree murder. From a common-sense point of view, I think a juror would believe that there is a lesser punishment for second degree murder as opposed to first degree murder.

Assemblyman Segerblom:
The point is that the jury would know they could convict for first degree for child abuse and second degree for child neglect.

Christopher Lalli:
That is correct.

Ben Graham:
If this law were changed or adopted, it would have nothing to do with the *Perez* case because of the ex post facto.

Chairman Anderson:
Anyone else testifying in support of the legislation? [There was no one.] We will turn to those who have some concerns about it.

Jason Frierson:
We do not have anything to distribute, but we have individual statements.

Michael Pescetta:
We all recognize these are terrible cases. The problem that I have with this bill is that we are looking at imposing liability for first degree murder—the highest level of murder—on the basis of a negligence standard. Because a conviction of first degree murder, under the proposed statute, would put that person in a situation where a death penalty could be imposed, we need to have a situation where an element of intent is present, not just simple negligence. In the extreme cases that have been described, there is the possibility of going to a jury, litigating the case, and trying to get to the jury to draw an inference of intent to kill from the situation. In order to find an intent to kill, the jury does not have to have evidence where the defendant said that he intended to kill someone. You can look up all of the facts and circumstances and infer from this course of conduct that, in fact, the aim of this abuse or neglect was the death of the victim. Current law would cover that.

In terms of the difference between first and second degree murder, second degree murder can result in a punishment up to 20 years in prison. That is not a de minimus. The range of 1–20 years for second degree murder does allow the sentencing authority to determine—in the wide range of circumstances that are covered by situations of neglect of children and elders—somewhere in that continuum this person's culpability for the fall. The difficulty again is that we

are automatically bumping that up into a first degree murder situation where you can get the death penalty, life without the possibility of parole, life with the possibility of parole, or a 50-year sentence. For something where all we can show is neglect under a negligence standard, that is overkill. What is going to constitute neglect? What is going to constitute a vulnerable person under the statute? Those are all issues that, when you get to first degree murder and potential death penalty liability, are going to result in serious and long-term litigation about questions of unconstitutional vagueness and, ultimately, the standard of the mental state, which is required under the Eighth Amendment to the *U.S. Constitution* for the imposition of a death sentence. Although, I think it is a laudable purpose to protect these vulnerable individuals, at minimum this bill should require abuse and not simply neglect. Those are the problems that I see with the bill.

Chairman Anderson:
Mr. Horne, will you take the Chair? [Chairman Anderson leaves the room.]

Jason Frierson:
I would concur with Mr. Pescetta, and add only a few notes that are of concern to the Clark County Public Defender's Office. It is my understanding that first degree murder typically involves conduct that is intending to kill, or the underlying conduct is so malicious that it is obvious a killing would occur. We are concerned with punishing that kind of conduct. We are interested in sending a message both to them and others that this type of conduct will not be tolerated. That is not necessarily applicable when it involves neglect, when there is no intent. We are not able to teach the same lesson. It is important that we use these statutes to teach a lesson to the individual and to others who might contemplate that kind of conduct.

Mr. Stanton talked about neglect cases that involved drawn out neglect and some extreme circumstances. We have statutes that will send people who take part in that type of conduct to prison for up to 20 years. This does not necessarily limit it to those circumstances. This addresses neglect involving children and elderly people, and it does not necessarily have to involve those extreme circumstances.

It is clear that the spirit of this bill is to protect vulnerable people. I would agree that we need to protect those people. It is our position that it is accomlished in the neglect statutes as they exist.

Cotter Conway:
We also oppose this bill. I am concerned about the inclusion of murder by neglect. It is a slippery slope. The extreme examples that were given by

Assemblyman Oceguera and David Stanton are certainly of concern, but they are addressed in other ways. They can be addressed through the existing intent language in first degree murder. To put the neglect elements in first degree murder will start to incorporate a lot of people who it is not intended to. For example, cases where someone falls asleep and their child drowns in the bathtub. Those cases have been charged as child neglect cases. To move that up into the most serious offense that is covered by our statutes is not appropriate.

Assemblyman Cobb:
This is an important bill in terms of what it is trying to accomplish. I agree with the public defenders here. I think that, absent something like a felony murder situation, you need to have a showing of specific intent to rise to the level of first degree murder. Would it be palatable if it were to read something to the effect of "intentional neglect" as opposed to "negligent neglect"?

Cotter Conway:
That is something we would be willing to consider. Other jurisdictions require aggravated neglect. Looking at those statutes may be a better way to go than just run-of-the-mill neglect. Aggravated or intentional neglect would probably start covering the extreme cases, but I would have to see the language.

Assemblyman Cobb:
Because the thrust of your testimony is that you have a problem with the idea of negligence rising to first degree murder. Is that correct?

Cotter Conway:
Absolutely.

Jason Frierson:
The philosophy of intentional neglect cases does address our concerns; however, I think that would rise to abuse if it was proven that there was some intent involved. There is a distinction between intentional conduct and neglectful conduct, and I do not know if we can bring together in that way.

Assemblyman Carpenter:
We had one of these situations in Elko where a six-year-old child was malnourished for at least a year. The district attorney charged second degree murder and they did get 20 years, but it seems there should be something there for this kind of a situation so that it rises to first degree.

Assemblyman Ohrenschall:
In Nevada law right now, are there any crimes where through neglect or recklessness someone might face a first degree murder conviction without intent?

Michael Pescetta:
Except for the situation of the felony murder rule, in which you do have to have an underlying felony. There are, to my knowledge, no situations in which you get to first degree murder purely on a recklessness theory.

Assemblyman Ohrenschall:
So, if passed, this would be the first?

Michael Pescetta:
I believe so. That is why the distinction between actions that would amount to abuse—and in that sense, intentional—is not something that we would have the same kind of reaction to as opposed to simple neglect.

Assemblyman Ohrenschall:
So, an intent factor might make this more palatable to you?

Michael Pescetta:
I think that limiting it to abuse—which does require intent, as opposed to simple neglect—would take care of the major problems that we are looking at here.

Assemblyman Segerblom:
Then the amendment that is in front us, where it talks about adding abuse of an older person or vulnerable person, is not objectionable?

Michael Pescetta:
My problem is with respect to the definition of vulnerability. That is a separate issue. The major concern is limiting it to abusive situations as opposed to neglectful ones.

JoNell Thomas, Legislative Advocate, Nevada Attorneys for Criminal Justice:
I wanted to speak more in terms of the death penalty and remind the Committee that, pursuant to the United States Supreme Court criteria, states are obligated to narrow the class of persons eligible for the death penalty. That is done two ways—by having a narrow definition of first degree murder and through providing for aggravating circumstances. If the first degree murder statute is enhanced to provide for these offenses, it will be so broad that there will be a challenge to the constitutionality of our death penalty scheme. This is particularly because we have an automatic aggravating circumstance if a child is

under 14 years of age. You would have these neglect cases of children automatically being eligible for the death penalty. I do not believe that would conform with U.S. Supreme Court precedent.

I also note that this fiscal note on this bill is too low. It would be opening up a new class of cases eligible for the death penalty, which have great expense beyond regular murder cases. I would like to correct Mr. Pescetta. He is wrong in saying that the maximum punishment for second degree murder would be 20 years. It is possible to have a sentence up to life in prison with the possibility of parole after 10 years, or 20 years if a weapon is used. There is serious punishment already in place.

I would also like to address the age of 60. I would encourage you to look at that in this context as to whether 60-year-olds are in need of extra protection in society. There are many 60-year-olds who are vibrant, energetic, and self-sufficient. I would urge you to look at that number.

Vice Chair Horne:
You said the fiscal note was too low, but I do not see an amount.

JoNell Thomas:
I did not see a dollar amount, but, as I read the fiscal note, it sounded as if there would not be much of an impact. That would be wrong. There would be a great impact.

Vice Chair Horne:
It does say that the expansion should have a minimal impact on prison population.

JoNell Thomas:
If these become death penalty cases, there will be a significant expense.

Vice Chair Horne:
Any questions for Ms. Thomas? [There were none.] Ms. Rowland.

Lee Rowland:
I agree with what the others have said. I want to give another reason for opposing this bill. This is tantamount to a war on the lower class. Child neglect cases are often linked with income. I urge you to consider this bill in tandem with Senate Bill 8, which would establish a prima facie case of child neglect for repeated intoxication. I know plenty of people with children who go out to nice restaurants and have one too many glasses of wine. No one is going to have their child taken away from them. People who are poor and more

likely to run into the criminal justice system very well could be facing the death penalty if somebody alleged that they had been drunk one too many times—that is if this bill and S.B. 8 were passed. That is an extreme example, but there are many instances where child neglect is linked to the lack of ability to afford medical care, health insurance, and nourishing food for the child. I urge you to take into consideration that we are creating a potential new death penalty crime that will have a disproportionate effect on people of lower means.

Finally, I want to couple my remarks with an apology to Mr. Oceguera. I did not realize that elder abuse was not previously included in the statute. If it were simply elder abuse, I would not be here opposing it. In some ways, that is a suggested amendment. Even though the ACLU opposes enhancements of the death penalty in general, I would not have come out to testify against the bill if it was elder abuse and not neglect. I am suggesting that it be amended to omit any neglect references.

With the extreme cases we are talking about—the Everlyse Cabrera case is certainly a tragedy—most of those rise to the level of child abuse. The final consideration is that, in a case such as the *Cabrera* case, where there is a couple and there is child neglect, there are often domestic violence issues. I urge you to consider that fact, as well. You may have women who are victims of domestic violence now being eligible for the death penalty because they let an abusive boyfriend or husband abuse a child.

Both the issues of class and domestic violence are going to play into the neglect piece of this in an unfortunate way that would expand the death penalty inappropriately.

Assemblywoman Gerhardt:
I think you might have been confusing Adacelli Snyder with Everlyse Cabrera. Everlyse Cabrera is missing.

Lee Rowland:
You are correct.

Vice Chair Horne:
Any other questions? [There were none.] Is there anyone else who needs to get on the record in opposition to A.B. 58?

Dan Silverstein, Nevada Attorneys for Criminal Justice, Las Vegas, Nevada:
I wanted to put out two scenarios for the Assembly. There are two parents. One hates their child. They come home, go under the sink, take out a bottle of Drano, pour it into their child's dinner, the child eats it, and the child dies. Or

the other parent who loves their child—who is working two jobs to make sure the child has food on the table—comes home from a long day working both jobs, falls asleep on the couch, the child goes into the kitchen, the child finds the bottle of Drano, and drinks it.

[Chairman Anderson returns.]

If A.B. 58 becomes a law, both of these parents are guilty of first degree murder. The parent who loves their child and works to support them is treated the same way as the parent who has malice in their heart and who plotted and planned the child's death. Murder, in the State of Nevada, requires malicious intent to take someone's life. Assembly Bill 58 is an extension of the felony murder rule. The reason that felony murder cases are considered to have malice is because the felonious intent involved in the underlying felony is deemed, by law, to supply the malicious intent necessary to characterize the killing as a murder. That is from *State v. Contreras* [*State v. Contreras*, 118 Nev. 332, 46 P.3d 661 (2002)]. In essence, the underlying felony supplies the malice to make the killing a murder. As the law currently stands, the felonies that are part of the felony murder rule are sexual assault, kidnapping, arson, robbery, burglary, invasion of the home, sexual abuse, molestation, and child abuse. All of these felonies involve some sort of malicious intent. If someone dies during the commission of one of them, then the underlying intent to that crime can arguably supply the malice necessary to make it rise to the level of first degree murder. Adding neglect to the felony murder is stretching the rule past the breaking point. Our Nevada Supreme Court has recently said that the weight of authority calls for restricting the felony murder rule; the trend has been to limit its applicability. In *McConnell v. State*, our Supreme Court pointed out that our felony murder rule is broader today than the felony murder rule that existed in Georgia when the death penalty was abolished in 1972. I would urge the Committee to remove the neglect language from the statute.

Vice Chair Horne:
Any questions? [There were none.] Is there anyone neutral on the bill? [There was no one.] We will close the hearing on A.B. 58, and turn the Committee back over to Mr. Anderson.

Chairman Anderson:
Meeting adjourned [at 10:16 a.m.].

RESPECTFULLY SUBMITTED:

Danielle Mayabb
Committee Secretary

APPROVED BY:

Assemblyman Bernie Anderson, Chairman

DATE:

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 1, 2007 **Time of Meeting: 8:00 a.m.**

Bill	Exhibit	Witness / Agency	Description
	A	*********	Agenda
	B	*********	Attendance Roster
AB 19	C	Michael Pescetta, Assistant Federal Public Defender	Memo in opposition to AB 19
AB 19	D	Lisa Rasmussen, Nevada Attorneys for Criminal Justice	Opposition to AB 19
AB 19	E	David Clifton, Clark County District Attorney's Office	Memo in support of AB 19