

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

**Seventy-Fourth Session  
March 9, 2007**

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:08 a.m., on Friday, March 9, 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 John Ocegura  
Assemblyman James Ohrenschall  
Assemblyman Tick Segerblom

**STAFF MEMBERS PRESENT:**

Jennifer M. Chisel, Committee Policy Analyst  
Risa Lang, Committee Counsel  
Judith Maddock, Committee Secretary  
Matt Mowbray, Committee Assistant

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**OTHERS PRESENT:**

Robert Roshak, Sergeant, Las Vegas Metropolitan Police Department  
Ray Flynn, Las Vegas Metropolitan Police Department, Nevada Sheriffs'  
and Chiefs' Association  
Ben Graham, Representing, Nevada District Attorneys Association  
Cotter C. Conway, Deputy Public Defender, Washoe County  
The Honorable Jerome Polaha, Chief Judge, Second Judicial District,  
Washoe County  
The Honorable Kathy Hardcastle, Chief District Judge, Eighth Judicial  
District, Clark County  
Jason Frierson, Attorney at Law, Office of the Public Defender,  
Clark County  
Lee Rowland, Staff Attorney, American Civil Liberties Union, Las Vegas  
Richard Gammick, District Attorney, Washoe County  
Frank Adams, Executive Director, Nevada Sheriffs' and Chiefs'  
Association  
David Mowen, Private Citizen, Las Vegas  
Ron Cornell, Active Member, Families of Murder Victims, Las Vegas

**Chairman Anderson, Assembly District No. 16:**  
[Meeting called to order. Roll called.]

We will begin by looking at Assembly Bill 137.

**Assembly Bill 137:**      **Revises provisions concerning acts of terrorism.**  
**(BDR 15-934)**

**Assemblyman John Ocegüera, Clark County Assembly, District No. 16:**

Assembly Bill 137 has been brought forward to expand upon the worthwhile legislation passed in 2003 to address the threat of terrorism in a post-9/11 world. Not only do we need to deal with the real threat of terrorism, but also the false threats. False threats can cause as much panic, intimidation, and interference as a real threat. A.B. 137 criminalizes false threats of terrorism in the same manner as provided in law for other terrorist threats.

A "hoax substance" is defined by A.B. 137 as any item that can be perceived as a weapon of mass destruction, biological agent, radioactive agent, or other lethal agent, any toxin or delivery system for use as a weapon. A.B. 137 makes it a category B felony to deliver a hoax substance with the intent to injure, intimidate, profit, or cause panic or fear of contamination. This is a crime even if the intended effects never occur. The punishment which is outlined in A.B. 137 is a 2-year minimum, a 20-year maximum sentence in the State Prison, and a fine up to \$5,000. A.B. 137 increases the penalty provided by existing statute, *Nevada Revised Statutes* (NRS) 202.448.

Let me give you an example from my own personal experience, followed by some hypothetical theories. I was on a call on Interstate 15 where a man had a fake hand grenade in a bus. He threatened to blow up the bus. We closed Interstate 15 for about 15 hours and held traffic in both directions. In the end, one or two people were slightly injured, and there was economic loss. Because this was merely a hoax, he could only be sentenced for the one year. Hypothetically, take it a step further and think about the kind of things you could do with these substances at McCarran Airport or a judicial building. People could really cause injury, panic, and financial damage, and consider it just a hoax.

**Chairman Anderson:**

This bill raises the penalty from 1–20 years to 2–20 years. Does this also necessitate changing all of the related category B felonies to the 2–20 year sentence, as outlined in Section 5?

**Assemblyman Ocegueda:**

Correct.

**Chairman Anderson:**

What is the reason for this?

**Assemblyman Ocegueda:**

Are you asking about the initial or the overall?

**Chairman Anderson:**

Both, the overall and the initial.

**Assemblyman Ocegueda:**

I did not feel that the punishment fit the crime.

**Assemblyman Horne:**

Are you aware that the category B felonies typically carry a 1 to 20-year sentence? You are changing the bottom end to a 2 to 20. I do not know if that is the same line you were referring to?

**Assemblyman Ocegüera:**

Yes, I am aware of that.

**Chairman Anderson:**

Currently, a person who commits this crime is in a 1–6 sentencing range. In Section 5, we are going to raise this to 2–20 for all category B felonies. This is a large step.

**Assemblyman Mabey:**

Are there any instances where there was not actually a hoax substance, but was believed to be, causing us to accidentally accuse somebody of doing something that was not intended?

**Assemblyman Ocegüera:**

You must prove intent.

**Assemblywoman Gerhardt:**

Thank you for bringing this bill forward. I have personally witnessed such a situation and feel this is necessary. I was in an airplane between Las Vegas and California when somebody said that they had a bomb on the plane. There was extreme panic on the passengers' faces, and others were injured trying to subdue the individual. There was not a hoax substance, but he claimed that there was a bomb.

**Robert Roshak, Sergeant, Las Vegas Metropolitan Police Department, Nevada Sheriffs' and Chiefs' Association:**

I would also like to thank Mr. Ocegüera for bringing this legislation forward. The issues he spoke of do occur in the Las Vegas area. The people who respond to these calls probably average 10–15 hoaxes per year. This requires an entire call out of a team. That team has to suit up, come out, isolate the area, and get and analyze the substance. They then have to send the substance off to be tested, decontaminate themselves and the area. It takes a day to find out if the substance was actually harmful or merely the vanilla Cream of Wheat I have actually seen used in the past. The cost of such hoaxes is exorbitant. We are in support of this legislation.

**Ray Flynn, Nevada Metropolitan Police Department, Sheriffs' and Chiefs' Association:**

I wanted to add, through training and intelligence, we know that terrorist groups use hoaxes to test public safety and response, and to improve their tactics. This bill would be an added tool for us.

**Ben Graham, Representing, Nevada District Attorneys Association:**

Anytime I see a piece of legislation, I try to find something in our existing structure that can help bring home what we are talking about. If a threat or hoax was narrowly confined to the perpetrator and the victim, that is one thing. I worry that in these situations, a hoax invites rescue. As referred to in the airplane incident, and as the officer testified, this ignites a whole series of events. Danger occurs then inviting rescue. Hopefully, it is a hoax substance, and the ultimate harm is not the outcome. The consequences will hopefully deter such actions.

**Chairman Anderson:**

What is the methodology to proving this crime? I have a paperweight at home that looks a great deal like a hand grenade. It weighs a considerable pound. It is not a grenade, but looks like one. It does not happen to have a spoon in it. Anybody knowledgeable about a grenade would not anticipate that it is going to go off. How does that differ? It is not a gag gift or something that somebody sends off.

**Ben Graham:**

What you are referring to is Section 2 that states that an item or substance appears to be harmful. That is the first threshold. Section 3 says that the item must be delivered to elevate the situation to a potential threat with the intent to be harmful, intimidate, injure, alarm, or cause mental anguish. We know that there is direct evidence which involves our five senses, and there is circumstantial evidence which we would have to use to prove that harm was the probable intent. A reasonable person standard is applied. It would be similar to a situation in which the real substance was introduced.

**Chairman Anderson:**

I think that was the key point. In most of these scenarios, somebody had reacted to it and the emergency system had felt the threat was real enough that it had to take precautionary steps. The view of the substance appeared to be real. Obviously, my grenade would not fit because it is lacking the spoon. A person without the knowledge of grenades may panic.

**Ben Graham:**

Sitting in your room or office is completely different than bringing it here and tossing it on the floor.

**Assemblyman Carpenter:**

Does this bill apply to situations in schools, or are there currently other statutes that apply to that type of situation?

**Ben Graham:**

This would apply to schools. I am not aware of other statutes that provide for schools and hoax items. A reasonable standard should be applied, but if necessary this bill would apply.

**Assemblyman Segerblom:**

Is there federal legislation that covers the same thing? If so, what are the penalties?

**Ben Graham:**

There is probably a federal law for everything, but getting the feds to move is difficult.

**Chairman Anderson:**

State laws in certain areas can give district attorneys the opportunity to move more rapidly than the response anticipated by the federal government.

**Assemblyman Segerblom:**

It seemed like the issue of the penalty might cause the feds to step in and add their penalty to it all. It was just a thought.

**Chairman Anderson:**

Maybe if it is a federal facility. Usually they try to leave us alone. Are there any questions from the Committee? I see some people are neutral on the bill. Mr. Conway, I see you as neutral on A.B. 137.

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

I do not have a concern. I am in favor of the hoax language. I agree that a hoax substance can cause just as much damage as the real substance. The reason I remain neutral is due to the increase in penalty. I did not want to take a position in support of the increase in penalty.

**Chairman Anderson:**

Are there any questions for Mr. Conway? [There were none] Is there anyone who would like to speak in opposition of the bill? Close the hearing on

A.B. 137, and bring it back to Committee. I am a little concerned about the minimum. I am not as concerned about the 20 years as I am about the two. There are not any problems with the bill, but changing that is always a concern.

**Assemblyman Carpenter:**

I think it is a good piece of legislation. Something needs to be done and we need to send the message that if somebody does this, they deserve the penalty that is in the bill.

ASSEMBLYMAN CARPENTER MOVED TO DO PASS  
ASSEMBLY BILL 137.

ASSEMBLYMAN CONKLIN SECONDED THE MOTION.

**Chairman Anderson:**

Is there any discussion?

**Assemblyman Segerblom:**

Do I understand correctly that this bill not only raises the punishment for category B felony in this case, but in every category B felony case?

**Chairman Anderson:**

It would raise it where there is a threat or the actual crime involves...Let me let Legal answer. That would be better.

**Risa Lang, Committee Counsel:**

This only changes the felonies that are specified in this bill.

**Chairman Anderson:**

Would that also raise the penalty for those people who are found guilty of using an actual instrument of terror such as a bomb? Whether or not it is a hoax substance or a real substance, the minimum penalty would now be two years.

**Risa Lang:**

Correct.

THE MOTION PASSED UNANIMOUSLY.

**Chairman Anderson:**

Mr. Ocegüera, this is your bill. I anticipate that you will take care of it on the Floor.

Mr. Horne, please present Assembly Bill 63.

[Chairman Anderson leaves the room; Mr. Ocegüera takes over as chairman.]

**Assembly Bill 63: Revises provisions governing the additional penalty for the use of certain weapons in the commission of crime. (BDR 15-151)**

**Assemblyman William C. Horne, Assembly District No. 34:**

Assembly Bill 63 is a bill draft that came out of the Assembly Concurrent Resolution No. 17 of the 73rd Session Interim Committee that I chaired. Chairman Anderson and Mr. Carpenter also sat on the Committee. This bill changes the weapons enhancement statute currently in place. Currently, if a person is found guilty of a crime using a deadly weapon, they receive an equal consecutive sentence. For example, robbery with use of a deadly weapon carries a sentence of 2–15 years. Once found guilty, the judge will impose a sentence within that range. If the judge imposes a 2 to 15—year sentence, then an automatic consecutive sentence is also imposed. The person will then begin to serve the sentence and not be eligible for parole until 2 years have passed, but they have to term out on that 15 year before they start serving that second enhancement sentence of again 2–15 years.

This bill is an attempt to bring in a sentencing structure that can be more in line with the crime that was committed. During our Interim Committee, there was testimony from many judges, including Chief Justice Rose of the Nevada Supreme Court. Chief Justice Rose believes that Nevada could make an improvement in assessing penalties that fit the crime through legislation, as well as to further define Nevada's deadly weapon enhancement. He also believes that there should be an advisory guideline that a judge could completely depart from if he had reason to.

[Chairman Anderson returns.]

Judges should have more discretion in sentencing. In our current statute, the weapon enhancement does not specify deadly weapons. Most think of a gun, a knife, a baseball bat, et cetera. Items such as shoelaces and pillows have been used as deadly weapons. Any item used, particularly in the case of murder, can be charged as murder with a deadly weapon. By statute, judges have to give this same enhancement sentence no matter the difference in heinousness of different crimes. This is a departure from what this enhancement was meant to do. This bill, depending on the heinousness of the crime, will give judges the discretion to give a 1 to 10-year consecutive enhancement to be served once the original sentence has been served.



The reason for the 1 to 10-year enhancement is the Subcommittee's response to better use the prison system's money in housing inmates and providing more efficient ways of supervision, et cetera. This bill helps to provide this and streamline the system by helping to free up beds for more dangerous criminal offenders. There was some discussion to change the definition of a deadly weapon; however, we decided to take this route instead. There was also a concern brought to me regarding the length of the weapon enhancement sentence being longer than the sentence for the initial crime. For example, in my earlier scenario on robbery with a 2–15-year sentence, let us say the judge gave a sentence of 2–5 years. If this were to pass, the judge would have to give a consecutive sentence of 1–10. That judge could give a 4–10, so that person ends up getting a 2–5 on the underlying crime, but the enhancement could be higher. That is something that could be worked out, or if the Committee is comfortable, we could move forward. Other than that I have received no opposition. This is good legislation in moving forward to find penalties that fit the crime, as well as providing a mechanism with which we can start moving people from prison—which is extremely costly to supervise—and into alternative areas of supervision.

**Assemblyman Carpenter:**

A judge could give a longer sentence for the use of a deadly weapon than he did for the underlying crime?

**Assemblyman Horne:**

That is correct. As it is written, a judge could make that choice.

**Assemblyman Carpenter:**

Or he could use just a ten, right?

**Assemblyman Horne:**

Typically, it is not usually a fixed determinate sentence. I do not know if there is a prohibition for them to be able to do that.

**Assemblyman Carpenter:**

So you would use 9 to 10?

**Assemblyman Horne:**

There is currently a statute that states that your minimum sentence cannot be more than 40 percent of the maximum.

**Assemblyman Segerblom:**

So you are comfortable with the way it is written now, where the enhancement could be more than the underlying?

**Assemblyman Horne:**

That is correct. The enhancement could possibly be more than the underlying crime.

**Assemblyman Segerblom:**

You are happy with that?

**Assemblyman Horne:**

Yes, this is how we voted. I did not do research on the actual breakdown. For example, the robbery with use as opposed to sexual assault or murder with use. I do not know the numbers, but typically your higher crimes can look upwards to life in prison. Theoretically, you could have a 10-to-life for sexual assault with use of a deadly weapon. Typically, after 25 years you would be paroled. With this bill you would then have an additional 1–10 for the deadly weapon enhancement.

The weapons enhancement could carry a longer sentence. However, I do not think for your more serious crimes that will be the likely outcome. Only with your lower level crimes that carry a shorter sentence is that situation likely.

**Chairman Anderson:**

I appreciate the hard work you did as the Chair for the Interim Committee.

**The Honorable Jerome Polaha, Chief Judge, Second Judicial District, Washoe County:**

Speaking on behalf of the district, we do support this legislation. It gives the judges discretion in meting out the punishments, rather than having it statutorily determined. When assessing punishments we familiarize ourselves with the facts of a crime. We get this from three sources. We have the probation departments' pre-sentence investigative report. We hear from the district attorney. We hear from the defense lawyer. Finally, we address, under the right of allocution, the defendant. By statute the victim has the right to address the court. We have information coming to us from different sources. We base the sentence on those particular facts. This legislation will help with prison overcrowding by reducing the enhancement from a double sentence—a 1 to 10. I do not think you will find a situation where a judge would not want to give an appropriate punishment. I once had a case where a young girl and her 16-year-old brother committed two car-jackings. Because a gun was used in the commission of a crime, a double enhancement was charged. At 16 years old, he was sentenced to 2–10 for the one carjacking. That was doubled for the second car jacking, making it 4–20. Then he got two more consecutive sentences all equaling 8–40 years for a situation that his sister got him involved in. Those were the statutory restraints on that punishment. Yes, you could

argue that he did commit carjacking and drugs were involved, but he was under the influence of his sister. Conceivably, he ends up with a 40-year sentence.

There is a certain point in time when a defendant is young. As he gets older, I thought that they would learn not to mess with the law. In actuality, the physiological change in these people causes their actions to be less antisocial. The older they get, the less they return to court. Using the American Bar Association standards when we do sentence these young people, there is a presumption. Going down through the factors, the last factor is extremely important; will granting a probationary grant or a minimum sentence unduly depreciate the gravity of the crime? Believe me, that is the stopper. We encourage the Legislature to allow the judges to individualize the sentences we are involved with. This should be very effective.

**The Honorable Kathy Hardcastle, Chief Judge, Eighth Judicial District, Clark County:**

The Eighth District is also in support of this bill, as is the Judicial Council for the reasons set forth by Chief Judge Polaha. The strength of our government comes from all three branches of government and their ability to exercise discretion. The discretion of the judiciary to be able to formulate a punishment that fits the crime is very important. Recently, I have witnessed a limit placed on the discretion of judges and there seems to be some suspicion there. We now see injustices created within the system, as well as overcrowding of jails. Part of that is growth, part of that is due to the number of crimes or activities that we have criminalized, and part is due to the inability of the judges to fashion a punishment that fits the crime due to limitation on discretion and the mandatory minimum sentences that are being imposed in a number of cases. We could spend all day sharing anecdotes to illustrate some of this. In regards to robbery with a deadly weapon, you can have a 16-year-old walk into a store full of people, pull out a gun, demand money, and you are looking at robbery with a deadly weapon. That crime requires a mandatory minimum of four years; possibly higher. There is also the situation where you have two 16-year-olds who are fighting over possession of a bicycle, and one picks up a rock, threatens the other, and takes the bicycle. That is also robbery with a deadly weapon. Statutorily this crime would also require a four-year mandatory minimum sentence.

Judge Polaha and I have both been prosecuting attorneys, and defense attorneys. We look at those situations when deciding a case. In my earlier example of the bicycle, it will be very hard for the defendant to take their case all the way to trial when they are looking at a mandatory minimum four-year sentence. Consequently, the defendant may take a plea even though they have a defense to their case. The discretion needs to be built into the system. That

is what makes us strong. You as legislators have discretion to determine what activities should be criminalized. The prosecutor has the discretion to choose which cases should be prosecuted and negotiates the cases. Our strength comes from the ability to fashion that punishment that fits the crime. Because this bill gives us more discretion, we are in favor of it.

**Chairman Anderson:**

Are there any questions for either of the judges? Are there any others to testify?

**Jason Frierson, Attorney at Law, Office of the Public Defender, Clark County:**

I come in support of A.B. 63. This bill simultaneously provides for the additional punishment of individuals who use a deadly weapon in the commission of a crime, while acknowledging that the underlying crime is the reason the case exists, and the use of a deadly weapon is but an enhancement to that underlying crime. This bill also takes into account the issues of prison overcrowding, as well as the ability of our judges to exercise their discretion.

Dealing with individuals is an important component when it comes to this bill and this statute. The legislation highlights the focus on the deadly weapons that were enacted in 1995. When this statute was enacted, there was discussion about the definition of a deadly weapon because it did not previously exist. The Nevada Supreme Court considered a deadly weapon to only be a firearm and certain knives. A concern was raised that there were other items that could be used as a deadly weapon that would not be able to be included in the statute. There was also a concern that the goal of the deadly weapon enhancement was to deter individuals from bringing inherently dangerous items into some type of altercation. This statute is the result of that discussion. However, we have seen individuals charged with a deadly weapon enhancement for items that are not inherently dangerous. These are not items that the average person would believe would increase the potential for injury in an altercation. The deterrent result of defining a deadly weapon is not impacted when some of these items that are not inherently dangerous are included.

It is for these reasons that I have offered an amendment to this bill ([Exhibit C](#)) in order to strengthen, narrow, and tighten the language that defines a deadly weapon. I have seen various items that have been charged as a deadly weapon, including a vacuum cleaner, a can of pumpkin mix, duct tape, zip ties, a candlestick, a pen, the ground, the asphalt on the street, water, a Glade candle, a safety pin, and a television remote control. While we do not condone violence or the threat of violence in any way, we enhance these crimes because involving a deadly weapon increases the potential for harm. We want to send a message that deters individuals from bringing weapons into altercations. Items

that are not typically dangerous are sometimes used in a harmful or deadly way. For example, if someone used the ground in such a forceful way that the State felt like charging it as a component of the crime, they have the option of charging battery causing substantial bodily harm. Battery is typically a misdemeanor. If someone used one of those non-inherently dangerous items to the extent that it caused harm, it could be charged as battery causing substantial bodily harm, and that would elevate that from a misdemeanor to a category C felony. This distinction is worthy of consideration because it distinguishes the inherently dangerous items from those that are not. The State has the option of giving the charge with the deadly weapon enhancement, which can elevate the crime from misdemeanor to a category felony.

**Chairman Anderson:**

You like the bill, but only as a vehicle to again discuss the definition of a deadly weapon? You would place the bill in danger for rediscussion of what a dangerous weapon is?

**Jason Frierson:**

I absolutely would not place the bill in jeopardy for this purpose.

**Chairman Anderson:**

All I am hearing about is the weapon question and not the underlying purpose of the bill. I want to try to focus on the bill first. I see your amendment here. I presume that you have talked to Mr. Horne who was the Chair of the A.C.R. 17 No. of the 73rd Session Subcommittee. The amendment met his criteria?

**Jason Frierson:**

I have spoken with Mr. Horne. I am aware that the bill, as it is, is what came out of the Subcommittee.

**Chairman Anderson:**

Did you have an opportunity to appear in front of that Subcommittee?

**Jason Frierson:**

I did not.

**Chairman Anderson:**

Okay. If you are going to talk to the bill...

**Jason Frierson:**

We would be in support of A.B. 63 as is. I think that it addresses the problems that it was intended to address with respect to sentencing purposes.

**Chairman Anderson:**

If we were to move with the bill, you also want us to focus on the issues that you are bringing up? Those issues are really a separate question.

**Jason Frierson:**

They are a separate question. I would not want to limit this bill for this purpose.

**Chairman Anderson:**

I want to make sure that the Committee understands what your purpose is.

**Jason Frierson:**

I think that we have options for the non-inherently dangerous weapons, which is why I submitted the proposed amendment to A.B. 63 to narrow that. That way we can focus on weapons that are actually inherently dangerous.

**Chairman Anderson:**

Are there any questions for Mr. Frierson? I see none. Mr. Conway is also in support of the legislation.

**Cotter Conway:**

We do stand in support of A.B. 63. I agree with the judges' comments regarding discretion. Although it is not part of the bill, I echo Mr. Frierson's concern regarding breadth of the definition of a deadly weapon. That is the main reason I support this legislation. I want to allow a judge to look at what is being considered in the crime, what is considered a deadly weapon, and then make an appropriate assessment as to what penalties should be imposed.

Once again echoing Mr. Frierson's concerns regarding deadly weapons, I think we should go back to the *Zgombic* standard. [*Zgombic v. State*, 106 Nev. 571, 798 P.2d 548 (1990)] The standard was set in 1990. I think that it was a well-reasoned opinion, and I believe that is what the law should be in the State of Nevada.

**Chairman Anderson:**

We will include the proposed amendment put in by Mr. Frierson. I should have made that more clear. It will be put into the record. We will ask that it go to a work session. We will make sure it is a posted work session so that those who are interested may attend and be available for questioning.

**Assemblywoman Gerhardt:**

Is the sponsor in agreement with this proposed amendment? Is this a friendly amendment?

**Assemblyman Horne:**

I believe it is a friendly amendment. I think my responsibility as the Chair of the Interim Committee is to present the bill as we voted. However, the amendment could be added and the definition could be changed. Then you could still add the enhancement change to allow the judges that discretion. You could do both.

**Chairman Anderson:**

I am trying to limit the discussion to the merits of the original bill. I perceive that the proposed amendment is a broader question. We want to make sure that we repost it with the amendment to be part of the discussion. Today we are more precisely trying to deal with the question of judicial discretion. Let us move on.

**Lee Rowland, Staff Attorney, American Civil Liberties Union, Las Vegas:**

I agree with the comments made, especially by Mr. Frierson and Mr. Horne. We are fully in support of A.B. 63. I think this is a great first step in being mindful. I especially agree with the testimony of both James Austin and the A.C.R. No. 17 of the 73rd Session Committee about how certain crimes and certain enhancements are increasing the population without a foreseeable benefit to the taxpayers. Although I have not seen the text, it sounds as though the American Civil Liberties Union (ACLU) would also be in support of the proposed amendment, however, not at the risk of holding up the bill.

**Chairman Anderson:**

I should indicate that while the faces look the same, it is a different committee. Mr. Austin's presentation is in front of the Select Committee on Sentencing. This Committee has not had presentations from Dr. Austin. The money committees and the Select Committee have.

**Lee Rowland:**

I apologize.

**Chairman Anderson:**

They have been invited to come and some have attended.

**Lee Rowland:**

For the members who have not seen James Austin, he has certainly identified the current deadly weapon enhancement as one of the specific problems in

over-incarcerating certain low-risk offenders. I hope the members of this Committee will get to hear his whole report. If not, he is convinced that changes like this will increase the efficiency monetarily in regards to public safety.

**Chairman Anderson:**

Are there any others in support of A.B. 63? I will move on to those in opposition of the bill.

**Richard A. Gammick, District Attorney, Washoe County:**

I am also representing the Nevada State District Attorneys Association. In my 34-plus years in law enforcement, I cannot think of anyone more dangerous than a person with a gun or other deadly weapon. These are some of the most serious crimes we see in this State. I agree with the judges and Assemblyman Horne when it comes to judicial discretion. I have actually spoken against some laws that took away some of that discretion. I do not believe that this is the area that we need to be doing this in. I have also worked very hard with the Criminal Justice Advisory Committee that Judge Polaha chairs. We have looked at jail and prison overcrowding and other issues. Again I will state that this is not the area for that discussion. We have individuals who have committed some of the worst crimes. This Legislature at one time set that range of punishments to be a consecutive life sentence. In some of the crimes under this law, probation is not even an option. This is a good law to have, and a law we should stay with. We are currently in a weapons epidemic, despite the tough laws in place.

Methamphetamine is at an epidemic level in this State. Hand in hand with that and other drugs are guns and other dangerous weapons. Officers continually expect to find these weapons every time they go on drug raids or execute search warrants in drug investigations. My biggest problem is the message that will be sent out to the criminal sector of our society if we are actually reducing the punishment for using weapons. When you talk to victims who have had a gun or other dangerous weapon stuck in their face, that is one of the most traumatic events they have had or will have in their lives. I encourage the Committee to look at other areas to give the judges back their discretion, and I would work with them to do that. I and the other members of the District Attorneys Association feel strongly that this is the correct area to do that. Guns and other deadly weapons are a big problem. We have formed partnerships with the Alcohol, Tobacco, and Firearms (ATF) folks, with the United States Attorney General folks, and other federal agencies. In our jurisdiction, we have had as much as 20-year sentences for the use of weapons through the federal system. Clark County has even set up a gun unit in conjunction with the federal agencies. They work on nothing but gun violations



and cases. Last I heard, they have five attorneys in that unit and are very busy. I also object to the amendment to redefine deadly weapon again.

**Assemblyman Horne:**

All of your examples seem to deal with firearms and their uses. We have these types of deadly weapons enhancements being used for safety pins and remote controls, et cetera. We all agree that guns and knives are very dangerous and current statutes are being used very broadly. Judges do not have discretion in these other types of cases. Do you disagree that this bill is trying to address the broad application of the enhancement?

**Richard Gammick:**

It was previously tried to be narrowly defined. This was done by the Supreme Court in a case called *Zgombic*. They said that basically guns and some knives were considered deadly weapons. We were running into cases where baseball bats, lead pipes, and other instruments were being used. When you look at a victim's family and tell them that is not a deadly weapon, they disagree. The *Zgombic* case involved steel-toed boots used to stomp another man to death. Convincing the family in that case that the boots were not a deadly weapon was impossible. We came back to the Legislature after that case. The Legislature did expand it and make the definition broad again. That is not without limits.

The Nevada Supreme Court in *Hernandez v. State* [*Hernandez v. State*, 118 Nev. 513, 50 P.3d 1100 (2002)] talked about the inherently dangerous deadly weapon definition as well as the functional definition. They commented that the definition was extremely broad, but that is what the Legislature wanted. They also said that the definition is not without limit. It requires an instrument to be readily capable of causing death as used, not that it simply caused death. The other thing that was done in *Zgombic* is that the Nevada Supreme Court said:

Finally, in a few close cases where the court cannot determine as a matter of law whether the weapon is or is not a deadly weapon, the judge will need to submit the entire issue to the jury after instructing it on the previously stated definition of a deadly weapon. In these close cases, the jury must specifically and separately find the instrumentality at issue to be a deadly weapon and that it was used in the commission of the offense before the enhancement can be imposed.

In Washoe County, we do go to the jury with a question of whether it is a deadly weapon and whether it was used in this case. The jury makes the call on whether it was or was not.

**Assemblyman Horne:**

I question the definition of readily capable of causing death, not the fact that it actually caused death. How do we get to where we are having charges of weapon enhancements for remote controls or safety pins?

**Richard Gammick:**

I would suggest that defense counsel can make a motion to the court that the deadly weapon enhancement be dismissed and not be used if the court feels it is too far outside its definition on *Hernandez*. I have not seen that done often. There is also the negotiation process that can be used with district attorney's offices. In our jurisdiction we will not negotiate guns or firearms. We will not do it. Other jurisdictions will. When we are talking about other types of deadly weapons that have been charged, then we handle it on a case-by-case basis. I use examples of guns or firearms a lot because that is predominately what we see. Yes, there have been other types of weapons charged, but those are not nearly as common. Weapons, guns, and knives are the most predominate.

**Assemblyman Horne:**

How would you address the hypothetical situation of two kids fighting over a bicycle, and one uses a rock as a weapon? Currently we do not have judges having the discretion to impose a different sentence on that. Is it your testimony today that the District Attorneys Association is comfortable with capturing these individuals, as well as the ones that are committing sexual assaults using a gun or knife? Are you comfortable applying the same rules to both situations?

**Richard Gammick:**

I would like to let Ben Graham answer that.

**Ben Graham:**

We all have stories about rocks used as burglar tools, potentially deadly weapons. I hesitate to question the fact pattern that the judges have brought up because I think that they are probably very isolated situations. I would be curious to see Mr. Frierson's staff going through reports trying to find ridiculous deadly weapons like a safety pin. However, for those of you who remember your days in the gym locker, those big safety pins that came from the launderers were five or six inches long. I do not know what type of safety pins was involved. There is a difference. The courts and district attorneys have the

discretion. To comment on these cases, I would have to see the file. If there is an area where there is abuse, I will get the file and we can go over it together.

**Richard Gammick:**

It is not a perfect system. We do not claim it to be. There may have been some abuse by district attorneys over the years. They have to use discretion too and be reasonable about this. In our Clark County office, if that type of situation develops, then the defense attorney has every right to go to the supervisor of the district attorney who is involved. They may even wind up in my office if need be. We have staff cases when issues are raised to see if we feel that a reasonable use of our discretion has been used. We have withdrawn and pursued these cases. There are a lot of built-in safeguards within our system before we even get to the court system.

**Chairman Anderson:**

After sitting on the A.C.R. No. 17 of the 73rd Session Committee, had there only been one or two instances that were brought forward, we would agree with you that there are sufficient safeguards in place. This is why the Committee moved forward with the issue itself. It came out of Committee with a unanimous vote. I think we are trying to address the issue of what is going to be happening in the prison system and what kind of discretion we are giving judges. The question of what operates as a weapon has the potential to open a "Pandora's Box" that I am reluctant to deal with. In a previous bill, we heard about weapons. I am mindful of a highway patrolman who had a snake put in his mailbox. I think this is like opening up a mailbox with a snake in it. I realize that district attorneys practice with a great deal of discretion. I think the judges need a little bit of opportunity here.

**Richard Gammick:**

First of all, the children with the rock should never be charged as a deadly weapon. If it is charged as a deadly weapon, then the other safeguards can be implemented. If that does not work, there could be a motion filed by the defense to dismiss the deadly weapon enhancement and argue that out in front of the court. As far as the other example brought up by Judge Polaha regarding the 16-year-old pulling two carjackings, we would argue for the maximum sentence. You are sitting in your car, and someone jumps in with a gun. That is one of the most traumatizing things that could happen to you. I agree with doing other things to return judges' discretion: I agree with managing jail and prison population. However, we do not feel that this is the area to do this in. I ask the Committee to leave the law as stated on the books.

**Chairman Anderson:**

I will now turn to Mr. Flynn and Mr. Adams.

**Ray Flynn, Las Vegas Metropolitan Police Department, Nevada Sheriffs' and Chiefs Association:**

Our concerns have been addressed.

**Chairman Anderson:**

Las Vegas Metro likes the statute as it is now and has a comfort level with it.

**Ray Flynn:**

Obviously, our concerns had to do with the firearms as well as having the most violent people go away to prison. We were concerned that this bill would not address that. Based on testimony from all parties we are okay.

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

Many of our concerns with regard to explanation of the bill and how it would be approached were answered this morning. Our concerns are the violent criminals and the weapons, such as knives and guns. There are 101 officers on our memorial wall out here in the Capitol Building. Sixty of those were murdered, and none with shoelaces or safety pins. We are also concerned about the safety of our citizens, and making sure we get violent criminals off the street.

**Chairman Anderson:**

Are there any questions for the gentlemen from law enforcement? I see no questions. David Mowen from Clark County is next.

**David Mowen, Private Citizen, Las Vegas:**

I am the father of a murder victim, Mathew Mowen, from August 14, 1998. I have seen a lot of different scenarios played out here and want to share a quick situation with regard to my son.

In August of 1998, my son and three of his friends were robbed, burglarized, kidnapped, duct taped, and executed. We have been through about six trials in the last eight years. The perpetrator of these crimes was convicted of robbery when he was 16 years old. He robbed a bank, was convicted of that crime, and then let out in 22 months. Had he been convicted plus had the deadly weapon enhancement, we probably would not be where we are right now. I do not want criminals to have more advantages. New York City made a big difference in its crime rate by getting tough on crime and not allowing criminals back out on the streets. We have got to stay tough on crime.

**Chairman Anderson:**

I am very sorry for your loss. Was the young perpetrator's first arrest in the State of Nevada?

**David Mowen:**

I am not sure. He was age 16 and in California at the time. He and two of his friends were convicted of armed robbery of a bank. I simply want to point out that had that happened in Nevada and he had been convicted of the charge plus the deadly weapon enhancement, we would not be here with our four boys gone. In addition to our four boys is Derek Simpson, who was also killed by the perpetrator. He had also killed another man named Darnell Johnson. Three months ago the young man who discovered our four boys committed suicide over this. These may seem like small things, but they end up being quite large in the long run.

**Chairman Anderson:**

We do not take them as small things. I assure you that if that had happened here in Nevada in 1998, there would have been a different outcome. Nevada is the third toughest state on incarceration. I do not think we will be changing that, even with judicial discretion. The intent of the Committee was to try to see where judges could use some discretion rather than the flat, mandatory, statute-imposed sentence.

**Ron Cornell, Active Member of Families of Murder Victims, Private Citizen, Las Vegas,:**

I am a victim. I lost my 16-year-old son to a man who used a gun and shot him in the back. I oppose this bill. I agree with Mr. Mowen. Crime is not an area we can get weak on. When we take deterrents away, we lessen our strength and ability in the judicial system. We need to get stronger on crime instead of taking away our deterrents.

**Chairman Anderson:**

Is your son's murderer in the Nevada State Prison?

**Ron Cornell:**

Yes. There was a plea bargain, but he was found guilty of second-degree murder. He also shot two other people and the weapons enhancement was used. Without that enhancement he would have gotten 10 years to life; he now has a 20 to life. Twenty years still is not long enough, but it is easier to swallow. I do not believe that a violent criminal deserves to be put back out on the street after 10 years.

**Chairman Anderson:**

Thank you for your testimony and your important volunteer services. If there are no more questions, I will close the hearing on A.B. 63. I have a feeling the issue of the deadly weapon definition will come up again. Should we move with the bill as it is or have more discussion on the bill? Mr. Horne?

**Assemblyman Horne:**

I am okay with trying to move the bill. If you want to hold the bill and see if the issue comes up, that is okay too. I do not know the pleasure of the Committee.

**Assemblyman Carpenter:**

I do not want to have the deadly weapon definition come up later. I would like to think about this bill a little bit before deciding.

**Chairman Anderson:**

We already have plans for our next work session on Wednesday. However, we will get to it soon.

Meeting adjourned [at 9:49 a.m.].

RESPECTFULLY SUBMITTED:

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Judith Maddock  
Committee Secretary

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Janie Novi  
Transcribing Secretary

APPROVED BY:

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Assemblyman Bernie Anderson, Chair

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

**EXHIBITS**

**Committee Name:** Committee on Judiciary

**Date:** March 9, 2007

**Time of Meeting:** 8:00 a.m.

<b>Bill</b>	<b>Exhibit</b>	<b>Witness / Agency</b>	<b>Description</b>
	A		Agenda
	B		Attendance Roster
<u>AB 63</u>	C	Jason Frierson, Attorney at Law, Office of the Public Defender, Clark County, Nevada	Proposed amendment to <u>AB 63</u>