MINUTES OF THE MEETING
OF THE
ASSEMBLY COMMITTEE ON JUDICIARY

Seventy-Fourth Session
March 28, 2007

The Committee on Judiciary was called to order by Chairman Bernie Anderson at 8:10 a.m., on Wednesday, March 28, 2007, in Room 3138 of the Legislative Building, 401 South Carson Street, Carson City, Nevada. The meeting was videoconferenced to Room 4406 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 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 John Oceguera
Assemblyman James Ohrenschall
Assemblyman Tick Segerblom

COMMITTEE MEMBERS ABSENT:

Assemblyman Harry Mortenson (Excused)

STAFF MEMBERS PRESENT:

Jennifer M. Chisel, Committee Policy Analyst

Risa Lang, Committee Counsel
Kaci Kerfeld, Committee Secretary
Matt Mowbray, Committee Assistant

OTHERS PRESENT:

Bob Faiss, Adjunct Professor for Gaming Law at the William S. Boyd School of Law, Nevada
Lauren Pena, Gaming Law Policy Seminar, William S. Boyd School of Law, Nevada
William Devine II, Student, William S. Boyd School of Law, Nevada
Charles Rainey, Student, William S. Boyd School of Law, Nevada
Vinson W. Guthreau, Government Affairs Coordinator, Nevada Association of Counties (NACO)
Alfredo Alonso, representing the Peppermill Casinos
Elizabeth Neighbors, Director, Mental Health Developmental Services, Lake's Crossing Center, Sparks
Ben Graham, Legislative Representative, Clark County District Attorney and the Nevada District Attorneys Association
Christopher Lalli, representing Nevada District Attorneys Association
Tim Fattig, Deputy District Attorney, Clark County
Robbin Trowbridge-Benko, Private Citizen, Las Vegas, Nevada
Richard L. Siegel, Ph.D.; President, American Civil Liberties Union of Nevada
Scott Coffee, representing Nevada Attorneys for Criminal Justice

Chairman Anderson:
[Meeting called to order and roll called.]

I will open the hearing on Assembly Bill 179.

Assembly Bill 179: Revises the provisions governing the terms of office of members of the State Gaming Control Board. (BDR 41-104)

Bob Faiss, Adjunct Professor for Gaming Law at the William S. Boyd School of Law, Nevada:
[Read from prepared testimony (Exhibit C).]

Lauren Pena, Gaming Law Policy Seminar, William S. Boyd School of Law, Nevada:
[Read from prepared testimony (Exhibit D).]

William Devine II, Student, William S. Boyd School of Law, Nevada:
[Read from prepared testimony (Exhibit E).]

Charles Rainey, Student, William S. Boyd School of Law, Nevada:
[Read from prepared testimony (Exhibit F).]

Assemblyman Ohrenschall:
I want to disclose that I am a classmate and friend of Charles Rainey, William Devine II, and Lauren Pena, and I want to commend them on the excellent presentation. Usually, after the election in the Executive Branch, the officials that the executive appoints are the spoils of the office of victory. This bill would be in keeping with the way the Executive Branch of government works throughout the 50 states and in the federal government.

Charles Rainey:
The entering Governor would have the opportunity to appoint Gaming Control members that are coming up at that term.

Chairman Anderson:
The term "spoils" was utilized, as in the Jacksonian concept of victory. The Gaming Control Board is supposed to be above that, however. It is supposed to be a very thoughtful decision. Are you of the opinion that by doing this we will maintain that standard?

Bob Faiss:
The Gaming Control Board is beyond politics. In 1959, Governor Sawyer took the Governor out of the process in the first act of what became the Nevada Gaming Control Act through the Legislature. The only affect the Governor has is his choice of the men and women who will carry out that program. Thereafter, by recognized and honored policy, the Governor does not seek to be involved or influence the decisions of those bodies.

The students in the gaming law class realize that the final forum is the voice of the people, which is spoken by the members of the Legislature. I thank you for the lesson you gave in legislative etiquette and procedure in the beginning.

Chairman Anderson:
Thank you for allowing us to have your students bring forth this meaningful piece of legislation.

Let me close the hearing on A. B. 179.

ASSEMBLYMAN HORNE MOVED TO DO PASS ASSEMBLY BILL 179.

ASSEMBLYMAN OCEGUERA SECONDED THE MOTION.

THE MOTION PASSED. (ASSEMBLYMEN MORTENSON AND SEGERBLOM WERE ABSENT FOR THE VOTE.)

Let me assign the bill to Assemblyman Ohrenschall.

Let us turn our attention to Assembly Bill 248.

Assembly Bill 248: Revises provisions relating to approval of nonrestricted gaming licenses in certain counties. (BDR 41-383)

Vinson W. Guthreau, Government Affairs Coordinator, Nevada Association of Counties (NACO):
We strongly support A. B. 248. I have distributed to the Committee an executive summary that provides a straightforward explanation of this bill (Exhibit G). Today we expected to have a representative from West Wendover. It is my understanding that he submitted a letter to this Committee expressing his support for this bill. This bill is straightforward and enables cities and counties with populations of fewer than 100,000 to establish regulations for non-restricted gaming licenses.

[Chairman Anderson left the room.]

Alfredo Alonso, representing the Peppermill Casinos:
We support this bill and believe it clarifies existing law to allow each of the counties and cities to set standards for their own non-restricted gaming licenses. This is a clarification and codifies the statute.

Vice Chairman Horne:
Perhaps you can give us an example of how this is a clarification. I understand this has been the practice, but somebody has challenged whether that practice was valid. What is happening that would cause the need for clarification?

Alfredo Alonso:
In Wendover, for instance, they have set standards that have not been challenged to date, but have been threatened. We believe it is existing law and when the Legislature chose to enact a standard of 200 rooms for both Clark and Washoe Counties by simply excluding the other counties, I do not believe they excluded them from their own ordinances. This simply clarifies that to ensure that they can, in fact, set those standards.

Assemblyman Carpenter:
I have a problem with rural cities and counties setting their own standards. I did not realize until this morning that Wendover had taken actions like this. If they

had taken these types of actions before the large truck stop came in—which has an unrestricted license—they would not have been able to get the truck stop which brings millions of dollars into Wendover and Elko Counties. I can see a need for the clarification of the language in this bill. The rurals need to make sure they know what they are doing before they start setting their own standards. This could really have a chilling effect on development for rural counties.

Alfredo Alonso:
We understand Assemblyman Carpenter's concern, but again this is strictly permissive. Each county and city makes those decisions themselves. With regard to that truck stop, they probably would have made concessions for that because they clearly wanted that type of facility in their town. I think what you will see is that each county and city will set standards that work for them. I do not think there is any intent to cut down on economic development; in fact, I think the intent is to encourage it. By setting standards, people may invest more in those counties and cities and ultimately help the rural counties.

Vice Chairman Horne:
Let us turn to those in opposition. [There were none.]

Let me close the hearing on A. B. 248.

[Assemblyman Oceguera took over Chair.]

Assemblyman Oceguera:
Let us open the hearing on Assembly Bill 369.

Assembly Bill 369: Makes various changes to provisions governing the civil commitment of a person found not guilty by reason of insanity. (BDR 14-1155)

Assemblyman William C. Horne, Assembly District No. 34:
Assembly Bill 369 is brought for the purpose of setting up standards of possible release in cases where persons have been committed after being found not guilty by reason of insanity (NGRI) in a court of law. This deals with how we are going to proceed with conditional release from civil commitment. If you recall the bill last week on the not guilty by reason of insanity (NGRI), and adding into statute "guilty but mentally ill," we spoke about a case that happened in Clark County in which a young man lost his life at the hands of another who was later found NGRI. What proceeded was a finding after he had been admitted to Lake's Crossing that he was no longer "insane." He was not exhibiting the indicia of his mental health issues that got him acquitted.

By statute, Lake's Crossing was mandated to release him after the 6-month period and an evaluation supported a recommendation for his release. If someone is found insane at the time they commit a crime and six or eight months later, they are no longer exhibiting signs of these issues, are they really well enough to be released into society? Are they no longer a threat to themselves or to others? There was a subsequent hearing in district court to make the determination on whether or not this person should have been released. Judge Jennifer Togliatti found that this individual should remain under the care of Lake's Crossing. However, the possibility of release brought to light some of the problems in dealing with these individuals. There comes a point in time when someone may be determined well enough to be sent back out to the community. One of the things missing was a risk assessment in determining whether or not this person was ready for release. Assembly Bill 369 was an attempt to do just that, primarily in Section 2 of the bill. It would provide for the administrator to conduct annual evaluations of this person while they are in custody. The administrator is required to submit a report to the court and include information from the evaluation. Section 1, subsection 3 says that the administrator or designee shall include in the report an opinion concerning whether there is a substantial probability that the person will receive treatment and recover from his mental illness, or prove to such an extent that he is no longer mentally ill in the foreseeable future, and that the person is no longer a danger to himself or society. There is also a provision that states if this person is conditionally released, it would allow the acquitted to petition the court for the conditional release if the acquitted is no longer mentally ill and no longer presents a danger. The court can conditionally release an acquitted if, after the hearing, the court determines that the conditional release is in the best interest of the person and will not be a detriment to society. When a person is conditionally released, the court shall issue an order to the division to conduct the evaluation of the person as often as deemed necessary to determine whether the person has complied with the conditions of their release or whether they present a clear and present danger. We will be able to bring a person back into commitment by the division at Lake's Crossing should they be exhibiting their mental health problems which got them into the problem they were committed for in the first place, but that is a constitutional problem. You have to remember that the person was acquitted of the crime charged. We cannot hold conditions on the person and bring them back at any time in their life to this commitment, but I do believe that we can do this for a short period of time. That is what we need to do, and anything longer than a year or two would not be upheld constitutionally. This bill provides for an evaluation of the person to determine that, once they have been conditionally released, there may need to be some clarification as to how long we want to place those conditions on this person during their conditional release. There is a proposed amendment from the District Attorneys' Association that was presented to me yesterday. After

explaining the concept of my bill to Christopher Lalli, Clark County Assistant District Attorney, I was of the opinion that we would find some common ground in putting in an amendment to cover some of their concerns. However, the proposed amendment I received yesterday asked that you take all of the language out of this bill and put the language of Senate Bill 380 in it. I will let the Committee decide whether or not that is a friendly amendment.

[Chairman Anderson returned to the room.]

Chairman Anderson:
Are you saying that you are not agreeing to the amendment? It has been portrayed as being a solution to some of the problems, but not all of them.

Assemblyman Horne:
There are some provisions in that piece of legislation that would concern me and some that would be okay. I would not support gutting this bill and putting the Senate's bill in here. We have two Houses for a reason.

Assemblyman Cobb:
You mentioned that you were concerned about being able to have someone recommitted at any time over the course of their lives, and therefore wanted to limit the authority of the court. Is there any language in this bill that you feel limits the courts authority over releasing a person?

Assemblyman Horne:
There would have to be some clarification as to the length of time that we could hold a person who had been acquitted, due to their constitutional rights. We cannot detain people indefinitely. Two years would be the maximum time. After that amount of time, I think there could possibly be a legal challenge as to the conditions and restraints on the liberties of the person who had been acquitted. If you want to categorize that as being a constraint on the Judiciary, that is fine. We often times put restraints on the Judiciary, Executive, and the Legislative Branches when we talk about a person's constitutional rights. I do not want to pass a law that would violate those constitutional restraints. I would like to have a good balance, which is why I think two years would be the longest this person could be held accountable, and those conditions of their release would provide for things that they would have to do—submit to evaluations, et cetera—in order for society to determine they are doing everything they are supposed to be doing in order to keep their mental illness in check.

Assemblyman Cobb:
Without reaching the constitutional arguments that you just described, is the two-year timeframe an amendment, or is that in the bill? Is that the intent you had when crafting this legislation?

Assemblyman Horne:
That was my intent. Look at Section 2, paragraph 6: "When a person is conditionally released pursuant to subsection 4, the court shall order the Division to conduct an evaluation of the person as often as deemed necessary to determine whether the person..." This is going to need clarification because it opens it up to an indefinite period of time. I do not know if it would hold up to have someone have to submit to evaluations indefinitely.

Assemblywoman Gerhardt:
First, do we have the personnel to actually do this? Second, regarding those individuals who are on maintenance medication, do the people who actually go out and check them have a means of ensuring that they are following through on their medications? I know from personal experience that is the key to keeping someone in an emotionally sound place.

Assemblyman Horne:
I believe that our existing personnel would follow up on the patients. One of the reasons why I did not put provisions in the bill that evaluations were to be done by a forensic psychiatrist or psychologist was because my research showed that Nevada has a limited number of those professionals in our State. The professionals we do have would be appropriate. You are right about the need to insure the patient is on their medicine regime I have not seen it happen, but sometimes a person is found NGRI because he was deemed to have been insane only at the time of the offense due to overbearing circumstances at that moment, but he is not mentally ill. A person may be treated by medicine to control that. There are people from Lake's Crossing here who could answer your question about their facility's ability to have the staff adequately evaluate and follow up. The bill also calls for them to set up schedules for when a person would come in so that individual could be monitored.

Chairman Anderson:
I saw that there was someone in the audience from Lake's Crossing, but they have not indicated the desire to speak. I am sure they are concerned about what the ramifications are going to be for Lake's Crossing and other institutions that may be affected by this bill.

Assemblyman Horne:
Currently Lake's Crossing is the facility we send these individuals to. I know there has been a desire expressed that we need a similar facility down south, as well. Eventually we are going to have to have one more because of the growth in our State.

Assemblyman Carpenter:
Let us say, for example, that these people are unconditionally released after two years and then something happens. How would we deal with that situation? We might be criticized a great deal for unconditionally letting them go.

Assemblyman Horne:
I will not try to mislead this Committee. That scenario could happen; they could reoffend on conditional release. In your scenario of an unconditional release happening after two years, people would ask why they were not under care and why the State let them go. The answer, which may not give anybody comfort, would be because we did not have the constitutional power to keep that person. If the person is acquitted of a crime, is committed, and is no longer exhibiting signs of the mental illness or is no longer a threat to themselves or others, they cannot continue to be held against their will for an indefinite period of time. In this scenario, they are acquitted. If someone has been civilly acquitted, they could make a valid argument—and would ultimately win—by saying that the constraints the State has placed on them are an indefinite constraint on their liberty, and that they had been found not guilty. We cannot do that; it is the reality in which we live. It would be different if we had someone who was found guilty but mentally ill-where the person has been adjudicated guilty, but we are going to address their mental illness. In that case, we can fashion statutes and conditions to monitor them for an indefinite period time. We do it for sex offenders, for example, who have lifetime supervision. The courts have deemed that is part of the penalty for the crime they were found guilty of, but in the area of NGRI, they have been acquitted. We cannot keep them under those constraints indefinitely. We could try, but I think the Supreme Court would strike the law down on its first challenge.

Assemblywoman Gerhardt:
Typically, how long does the division like to see stable behavior before they consider release?

Assemblyman Horne:
I believe it says six months in statute. They reevaluate after six months and make a report of whether or not their mental health has been stable during that time.

Assemblywoman Gerhardt:
Is that while they are with Lake's Crossing?

Assemblyman Horne:
Yes.

Assemblywoman Gerhardt:
Do you have the staff, tools, and testing equipment available to be sure that the medication that has been prescribed is being taken? Obviously, you would only see them on a periodic basis, but I know from my own experience that it is critical that they continue to take the medications they have been prescribed.

Elizabeth Neighbors, Director, Mental Health Developmental Services, Lake's Crossing Center, Sparks:
In response to Ms. Gerhardt's' first question regarding weather we have adequate staff to oversee a program like this, the answer is no. We have put a fiscal note on this bill. We feel that we would need to develop a program that would have the potential of becoming statewide since these individuals would presumably be returned to the county from which they came. Initially, they would be committed to us and we would treat them as inpatients until it was deemed appropriate for them to be evaluated and appear at a hearing with the division of the court. At the hearing, we would come to an agreement about a program for the individual and come to the conclusion that they had been adequately treated, were not a danger to the community, and could productively be placed in the community for further treatment under supervision. We would need to have staff in the southern and northern parts of the State, and we have proposed positions that would cover supervision of that nature. We have adequate staff to do this now, presuming that the inpatient component of this program did not become too large. It is not anticipated that it would be too large if we are restricting this to individuals who are acquitted, not those who are found NGRI. Looking at other states, it is usually about 1 percent of individuals who are adjudicated who plead NGRI and a much smaller percentage of that which are successful. Since the law was reintroduced in 2002 in *Finger V. State* [Finger v. State, 117 Nev. 548, 27 p.3d 66 (2001)], we have had only two individuals committed to us NGRI. The demands would not be vast in that regard, but we would need to be able to provide the very close supervision in the community for individuals who are still in need of treatment, but not a danger. There are good statistics about the success of these programs, but they do require adequate resources.

In regard to Ms. Gerhardt second question, concerning issue of medication, if it is determined by the treatment staff that medication is necessary for the individual to be asymptomatic or to reduce their symptoms, it is usually a

condition of the release. If the person is observed by their supervisors not to be continuing to use their medication, then the issue would be raised regarding whether they are still safe to be in the community and whether they should be returned or not.

Assemblywoman Gerhardt:
Are they actually tested? Is there a way to do that?

Elizabeth Neighbors:
Treatments are variable because we are talking about multiple diagnoses and multiple types of medications. Some medications you can do that with and others you cannot. For example, you could get a blood level with mood stabilizers and have some idea whether the person was taking their medication appropriately, but that is not true for all medications. I am not a medical doctor, so that question would probably be better for the doctors to answer. Anti-psychotics are a little different.

Chairman Anderson:
Questions were asked regarding the frequency of tests within the institution, and procedural questions on the operation of Lake's Crossing, and the court mandated evaluations that have to take place after six months. Is that the way it is supposed to operate?

Elizabeth Neighbors:
The way the law is presently written, once the person is committed to us NGRI, the same timeframes apply in regard to providing evaluations to the court that apply to individuals who are incompetent to stand trail. We are required to forward a report to the court every six months. The period of time that an individual would need to be stable is also a variable in the perception of the treating clinicians. In the states that have established programs like this, the period of time can be as long as five years or a very short time before someone would be discharged from the inpatient program, depending on their individual pace. I appreciate Assemblyman Horne's characterization of our dilemma because we are working with a specific law in regard to the NGRI acquitted that we presently have. The current procedure is to assess them every six months to see whether or not they continue to be mentally ill. This bill would change the law to include a risk assessment and a broader assessment than what we have been asked to do.

Assemblyman Carpenter:
After they are released, do most of these people require a lifetime of medication, or does that vary too?

Elizabeth Neighbors:
It varies depending on the diagnoses. I would be remiss to say they never get off of medication. In most of the diagnoses we deal with, the perception is that the individual needs to continue to take medication in order to maintain their mental status.

Ben Graham, Legislative Representative, Clark County District Attorney, Nevada District Attorneys Association:
For the last 18 months, a number of us participated with the Legislative Commission's Subcommittee to Study Sentencing and Pardons, and Parole and Probation with regard to these issues. Last fall, we indicated that our office would be assisting in the presentation of an omnibus bill, not only dealing with NGRI and the competency issue, but also with guilty but mentally ill. We submitted a bill draft request (BDR) for that and it came out in the Senate as Senate Bill 380. Contained in that bill are all of the areas being treated, all in one piece of legislation? Currently S. B. 380 is scheduled for hearing in the Senate. There has been further discussion about what is proposed here conceptually, even since this was submitted to the defense bar. Dr. Siegel was kind enough to discuss these issues with us, and we also have Mr. Lalli and others from the District Attorney's Office in the Grant Sawyer Building. I understand that there is some potentially understanding with members of the defense bar who have chimed in on this. We do not have any argument with what Assemblyman Horne and this Committee are trying to do. We want to work together to make sure it is something that serves the needs of the community, and the defendant, keeping in mind the constitutional safeguards that are in place. I am asking Mr. Lalli or the representative from the District Attorneys Office in Las Vegas to present this amendment (Exhibit H).

Christopher Lalli, representing Nevada District Attorneys Association:
I am here this morning with Deputy District Attorney Tim Fattig who was the prosecutor in *State v. Kane* [Clark County District Court Case No. 04-C-200974-C (2004)]. Also here in Las Vegas is Deputy Public Defender Scott.

This is intended to be a friendly amendment. We do not seek to throw out the work that Assemblyman Horne has done. We would like to highlight some issues in the amendment that we as trial lawyers believe are important and should be addressed in the legislation. What we have offered is by no means intended to be the solution, but merely to put some issues on the radar of the Committee. I will briefly go through what some of the issues are that need to be addressed in this legislation. One is how discovery is treated. Under the current makeup of A. B. 369, the discovery goes to the court. This is an issue that we as litigants have had to struggle with on competence issues. It is our position that discovery needs to be disseminated to all of the parties; the

prosecution, the defense, and the court, so that all of us are equipped with the information needed to make the important and difficult decisions related to conditional release. Looking in a more comprehensive manner at the mental health conditions of those found NGRI, the expanded definition of "mental disorder" gives courts more discretion in protecting communities to make a more informed decision when determining when release is appropriate. The amendment we provided also puts a limit on frivolous actions that could be filed-actions of a repeated and non-meritorious nature that could be filed under the current version of A. B. 369. There needs to be a governor or limitation on the amount of actions that are brought. We also examined the idea of conditional release as it applies to a different category of offender who is found incompetent without probability of ever being adjudged. To put that in perspective, a finding of NGRI comes at the end of the adjudication process. For the most part, issues pertaining to competence come at the very beginning of the adjudication process. The *United State Constitution* requires that a person is legally competent before a criminal action can proceed against that person. What do we do with those individuals who pose a clear danger to society but are incompetent without any probability of becoming competent in the foreseeable future? Over the past year in Clark County, we have had to dismiss two cases of murder because the accused were incompetent without probability. I truly believe that those individuals suffered from severe mental illness that prevented them from being competent. The question still remains: what do you do with those people? Those criminal cases have been dismissed and we are working very closely with Dr. Neighbors in finding placement for those individuals. They have now been placed, but at some point they will be among us in an unsupervised manner. That is a scary prospect for us as prosecutors. The conditional release program we offer would apply in various forms to people who have been found NGRI, as well as those who are incompetent without probability of being restored to competence, and therefore cannot be adjudicated. I want to emphasize that these are introduced as discussion points. They are things that we believe are important. We look forward to working with all of the stakeholders—the defense bar, the public defenders offices, and Dr. Neighbors—in addressing these issues and finding the best solutions.

Chairman Anderson:
Why should we do this, to make the bill better? Would that be the conceptual argument that you just completed?

Christopher Lalli:
This amendment provides for the dissemination of discovery to all parties, as opposed to just the court. It expands the definition of "mental disorder," and it also puts a limit on frivolous actions that could be brought by a person who is

committed. It also provides for a conditional release program for people who are incompetent without probability. One of the questions that the Chairman asked was who has this been shared with? I had a very brief discussion with Mr. Coffee from the public defenders office who commented to me that there are many things in this amendment that are good and important improvements.

Chairman Anderson:
Where in the amendment does it limit the ability of the defendant to readdress the issues that might be raised?

Christopher Lalli:
It begins on page 3, line 43, Section 37. It talks about a person who is committed to the custody of the administrator and may petition for discharge no earlier than one year after the initial hearing. Our amendment only allows the division, as opposed to the litigant, to petition within the next one-year period. If the division believes that a person has been restored to competence, is not suffering from a mental disorder, and is not a danger to the community, the division, as opposed to the litigant, can bring that to the court's attention, thereby placing a governor on when these motions can be filed. Under the current scheme, a person who is in Lake's Crossing and subject to this legislation could file a petition every month or every day if they chose to. I am not suggesting that would happen, but repeated petitions are something I could foresee.

Chairman Anderson:
Is that the only place that you perceive frivolous lawsuits and appeals will come forward? Are there other areas relative to the two-year period which would then presumably elapse?

Christopher Lalli:
This section is where I am concerned about frivolous actions coming forward.

Chairman Anderson:
The first year the defendant will have an evaluation. The second year, it is up to the department whether he would or would not be able to bring additional questions forward. At the end of that second year, there would again be another mandatory evaluation?

Christopher Lalli:
That is correct. Under current Nevada law, a person can be in the custody of the division for ten years after a finding of NGRI. With great respect to Assemblyman Horne, we have a different position on whether two years is constitutionally valid or appropriate.

Chairman Anderson:
My initial question was relative to your use of the term "frivolous lawsuits." Secondly, is the evaluation period after the first year and again after the second year optional or up to the decision of the department?

Christopher Lalli:
The division can bring this to the court's attention and ask for release if they believe that a person is not a risk and is no longer suffering from a mental illness. In her capacity as the director, Dr. Neighbors and the division are neutral parties. She is not beholden to the State, to me as a prosecutor, or to the defense. The division is an objective body that is best tasked with bringing a change in circumstance to the court's attention.

Chairman Anderson:
Placing this in statutory language is chiseling it in stone. We want to make sure this will treat people fairly and equitably.

Assemblyman Horne:
There was a reason that I did not mention the *Kane* case or John Trowbridge in my testimony. I did not want there to be an appearance that this is done in an attempt to hold Mr. Kane for any additional time. I want this to be a general policy for the State. As Dr. Neighbors pointed out, there are only a couple of people under this classification of NGRI, but I did not want there to be criticism or a challenge that this Committee passed this law to keep me maintained. At no time did I suggest that their proposed amendment was a sleight of hand or underhanded. I just thought that we were going to find some middle ground. The proposed amendment does not suggest middle ground; it suggests "use our language, not yours." I asked Mr. Lalli about the provision currently in Nevada law, where a person NGRI can be held for ten years. There has to be a continuing finding made that they are mentally ill. Once it has been deemed that they are no longer mentally ill and no longer a danger to themselves or others, there would be constraints on how long we could keep them. Is it your opinion that even though they are no longer listed mentally ill, we would still be able to hold them for ten years?

Christopher Lalli:
Let us assume that an individual is suffering from mental illness after a finding of NGRI, and has that mental illness for a period of 18 months. If he is released at that point, how long does the jurisdiction of the court remain? I do not think the court, under current law, has any jurisdiction. I think the court has the ability to keep him committed to the division for up to ten years after he has been found NGRI and treat him for mental illness. My understanding of Nevada law is that once a person is released, they are forever released. If a person who

ingests methamphetamine should somehow become violent and kill again, there is nothing that any court could do about it, other than initiate a new criminal proceeding for that charge.

Tim Fattig, Deputy District Attorney, Clark County, Nevada:
It is important to expand on what Mr. Lalli said about the proposed amendment regarding the definition of mental disorder, as opposed to the definition of a mentally ill person in current Nevada law. I need to discuss the *Kane* case because it is analogous and it shows the type of problems we have had with the current definition of a mentally ill person.

Mr. Kane was involved in the murder of John Trowbridge in October 2001. During that time period, the evidence at the trial indicated that he was suffering from a psychotic break—in other words a loss of touch with reality, paranoia, and delusions. Prior to the murder, during the period of August 2001, he had ingested various drugs including methamphetamine. After he was arrested for the murder of John Trowbridge, Mr. Kane was incarcerated at Clark County Detention Center. The testimony at trial described him as being "floridly psychotic" during that period. During the spring of 2002, he was self-mutilating, chewing his shoulders, and eating his own flesh. There was overwhelming evidence of a complete psychotic breakdown. He was then sent to Lake's Crossing in 2002 where he was stabilized. He then returned to Clark County Detention Center in 2003, and remained there until the trial in September 2004. Mr. Kane had another psychotic break which occurred in April, May, and June of 2004. Similar circumstances occurred around the time of the murder, in terms of his paranoia and self-mutilation. At the trial in September 2004, there were numerous testimonies from the defense and the State regarding his condition. The consensus at that point in time was that he was schizophrenic. That led to the jury's determination of NGRI. After he received that verdict, he was sent back to Lake's Crossing. On October 27, 2004, he attacked a mentally retarded patient at Lake's Crossing because he thought that person was about to attack him, which was similar reasoning and similar paranoia to what he described when he murdered John Trowbridge. After that occurred, Lake's Crossing doctors had to submit reports on whether he continued to be a mentally ill person. Because of the verdict of the jury, as well as the incident with the mentally retarded person, there were reports from Dr. Neighbors and Dr. Henson that he continued to be mentally ill pursuant to *Nevada Revised Statutes* (NRS) 433A.115, which defines a mentally ill person. Our concern with that statute is that it fails to reflect the reality of mental illness, as reflected in the *Kane* case and in the testimony since the verdict in the six month hearings that have been occurring. When you look at the definition of "mentally ill person," it talks about a clear and present danger of harm. In subsections 2 and 3, it talks about various 30

day tests that need to occur. There are parts in statute that say that if the person presents a clear and present danger—for instance, he is unable to satisfy his need for nourishment, personal and medical care, shelter, and if there exists a reasonable probability that death or serious bodily injury will occur, or if he threatens to commit suicide or if he mutilates himself or attempts to mutilate himself...

The definition of "mental disorder" in our proposed amendment better reflects the realities of a mental illness. When Mr. Kane came up for the next evaluation in June 2005, just six months after the incident with the mentally retarded patient, the Lake's Crossing doctors felt compelled to recommend his release because of the definition of "mentally ill person" under NRS 433A.115. Since October, which was about six months before this evaluation, he had not had any incidents, so they felt compelled to recommend his release under current law. We feel that the definition of "mental disorder" in the proposed amendment better reflects the reality of a situation when you look at evidence presented by various doctors.

Chairman Anderson:
You do not feel that any of those questions were handled in the initial legislation that was introduced without your amendment? How is this a better piece of legislation with this amendment than the initial bill?

Tim Fattig:
The current proposed legislation by Assemblyman Horne keeps the definition of "mentally ill person" under NRS 433A.115 as the standard for determining whether or not a person gets released on the six-month intervals. Assemblyman Horne's legislation suggests that it should be one-year intervals with passage, which is the same as our proposed amendment. So our proposal has a definition of "mental disorder" which replaces the definition of "mentally ill person" under NRS 433A.115.

Robbin Trowbridge-Benko, Private Citizen, Las Vegas, Nevada:
Sitting through the attorneys' attempting to hack out the definition of a mentally ill person, I know there were at least three doctors who were asked to define what this statute means. The judge and the attorneys had great difficulty trying to understand this statute, and therefore had to ask the doctors if they could lend their interpretation. Sometimes the "and" and "or" make a difference, and sometimes they do not. I ask that the legislators allow a "user friendly" definition so that the judge herself is not asking for someone to explain it to her. I am very much in favor of the provisions as provided. It was stated this morning that we look at the constitutionality of the patient in determining whether or not to hold or release them. In the case of *Foucha v. Louisiana*,

[504 U.S. 71 (1992)], the determination, as read by Justice O'Connor, was that each state is afforded the opportunity to hold anybody who has been found NGRI for an undetermined amount of time, as long as there is a component to preserve public safety and there is a risk assessment as to whether or not this person is a danger to themselves or others. Constitutionally, I do not feel that is an issue. If it was an issue, the ten year limitation that is currently in Nevada law would have been previously addressed. I would also like to bring to your attention a study done by *The Journal of the American Academy of Psychiatry and the Law*, which talks about what they believe is an ideal treatment program called Service for Treatment and Abatement of Interpersonal Risk (STAIR). *The Journal of the American Academy of Psychiatry and the Law* says that 61 percent of all NGRIs throughout the country are re-institutionalized after five years due to recidivism of their previous behavior and had not been placed in a conditional release program. There was a 2005 study done in New York which stated that the percentage of those who reverted to their previous behavior dropped from 51.8 percent to 11.2 percent for those who were in a conditional release program.

Richard L. Siegel, Ph.D.; President, American Civil Liberties Union of Nevada:
I have been dealing with mental health law in this State for over 30 years. I am not an attorney; I am simply the American Civil Liberties Union's (ACLU) representative. Assemblyman Horne has put together a very astute bill in many respects, and I want to put on the record our modest amendments to the original bill. In Section 2, 6(a) and 7(a), we would request that the word "or" be replaced by "and." If somebody is to be returned after conditional release, there must be an adjudication of whether they are a danger to themselves or others. By changing "or" to "and," we assure that is the focal point. The idea of considering "best interest of society" is too vague so we ask that phrase be stricken from the bill. The idea that conditional release operates for one or two years seems reasonable to us. We ask that the release time be added to the bill at the judgment of the mental health professionals, as to one or two years. We feel that we can accept that bill with those amendments.

The amendments from the district attorney were given to me this morning. I did not see the immediate problems with them, but as they have been explained this morning, there obviously are some problems. The amendment is focused on somebody who has been deprived and is petitioning for his liberty. With or without an attorney, he must be able to petition for his own liberty. It does not seem unreasonable that the attorneys as well as the court see what comes out of discovery. This is a threshold in terms of the definition of mental disorder. There is an attorney for the mental health division who has been working with that and with issues of conditions for recommitment and involuntary

commitment. That is not something that should be coming from district attorneys; it should be coming from the mental health professionals.

I believe that the idea of conditional release from the point of civil liberties is a positive idea, although I do not know if everybody in our ACLU leadership would agree with me on that. Why not have processes of conditional release in principle? We have a woman who never went on trial and was kept for 13 years until a month ago when she was released.

Assemblyman Horne:
My concern with your proposed amendment that changes "or" to "and" in paragraphs 6 and 7 is that you could have somebody whose mental state may not have violated any of the conditions of their release, but they do pose a clear and present danger to themselves or others. We need the ability to pull them in if that is the case. If you make it "and," that cannot happen.

Richard Siegel:
I agree with you. The point would be, though, that recommitting him for violating the condition of release alone would be a huge change in our involuntary commitment law. He may not have made contact with the assessing person, but he still may not represent a danger to himself or others. If violating a condition of release would generate a jurisdiction, then the jurisdiction would have to demonstrate that there is a danger to themselves or others.

Assemblyman Horne:
I understand that, but I do not think changing "or" to "and" would clarify that.

Scott Coffee, representing Nevada Attorneys for Criminal Justice:
We signed in today in opposition of A. B. 369. We do not have a disagreement with the concept of a conditional release program; in fact, we think it is absolutely vital that something be set into place for a conditional release. The proposed amendment from the district attorney's office may do a better job of that than A. B. 369. I have concerns about what has been tendered by the district attorney's office because it is so broad in scope. It includes addressing issues for people, who are not competent to proceed to trial and the conditional release of those people, which I do not think was in the purview of the bill that is currently before you. When you read the amendments, I would ask you to concentrate on Section 34 which deals with the discharge of persons who are found NGRI. As drafted, A.B. 369 will not pass constitutional muster. Section 2, subsections 3 and 4 talk about what needs to be done and if there needs to be a finding that the person is no longer mentally ill before they may be conditionally released. That is unconstitutional under *Foucha*. A person who is

found NGRI is subject to a civil commitment and is not subject to criminal penalties. What happens if future dangerousness is a condition of release, not taking into consideration whether the person is no longer mentally ill? You are depriving them of their liberty on a civil commitment when there is no basis for the civil commitment. The *Foucha* case came to the conclusion that it is inconsistent to commit insanity acquitted who are not mentally ill for an indefinite detention, irrespective of their dangerousness. The way the bill is currently written, subsections 3 and 4 address a conditional release program, but they also provide for the conditional release of people who are determined by the court to be no longer mentally ill. Constitutionally you cannot do that. Assemblyman Horne suggested that perhaps a two-year period would be appropriate for such people, but I do not think you can keep them for one day. According to the United States Supreme Court, once there is a determination that a person is no longer mentally ill and they have been subject to a NGRI finding, they are finished with their civil commitment. As written, A. B. 369 does not include language which indicates that, which is why the proposed language from the district attorney's amendment, specifically Section 34, appears to be more appropriate. It provides for discharge from commitment if the person proves that he would not be a danger "as the result of any mental disorder." That language is essential because if there is no mental disorder in place, you cannot constitutionally commit, supervise, or make the person subject to conditional release. I do not believe this will even withstand the review of the Nevada District Court, much less a federal court.

Assemblyman Horne:
As you stated, once the determination has been made that the person is no longer mentally ill, they cannot be held for one day. When the division makes the determination that they are no longer mentally ill, they do not let him walk out the door. There will have to be a procedure to see if that is the correct assessment.

Scott Coffee:
There has to be a judicial determination, but after the judicial determination that the person is no longer mentally ill, you cannot hold him under a civil commitment as the result of the *Foucha* verdict.

Assemblyman Horne:
This bill does not seek to civilly commit that person, other than continuing to monitor him upon his conditional release. Are you saying that the conditional release itself is a restriction on their liberty?

Scott Coffee:
The problem is that a conditional release is a restriction on liberty. If a person commits a minor crime like jaywalks, you are saying they would be recommitted to a mental facility when they are not mentally ill. You are putting them under conditions that will potentially restrain their liberty, and you cannot do that if they are no longer mentally ill under *Foucha*. If they are still found to be mentally ill then you have a different situation. I think the bill is well drafted in that regard. When a person is found no longer mentally ill, what do you do with them? When the commitment ends, they can walk the street like you or I was the conclusion of *Foucha*.

Assemblyman Horne:
From your characterization of *Foucha*, the court found that we can indefinitely keep someone who is mentally ill who was found NGRI. I never said that you could not keep them if they still have the indicia of that mental illness and pose a threat. Are you are saying that once they are no longer mentally ill, there is no room to have any type of monitoring of this person afterwards?

Scott Coffee:
That is correct. There has been adjudication of guilt so you cannot impose impunity for an NGRI verdict. When a person has shown that they are no longer mentally ill, you cannot restrain them or put conditional release provisions on them. *Foucha* does not deal specifically with conditional release, but it does deal with a person trying to get out of a custody situation. There was a determination that Terry Foucha was still dangerous and he could not prove that he was not dangerous. The United States Supreme Court came to the conclusion that because he was no longer mentally ill, he could not be held on the basis of being dangerous.

Assemblyman Horne:
In Section 34 of the proposed amendment, the burden is actually placed on the person who is under the commitment to show by preponderance of evidence that he would not be a danger. I feel that the division or the district attorney should have the burden of showing that they should still be committed. I do not think that the person committed should have the burden to show that they are no longer mentally ill. Do you agree or disagree with that?

Scott Coffee:
I agree with your position on that. I do not know if Section 34 is constitutional as drafted; I need to do further research.

Chairman Anderson:
Mr. Coffee, are you going to make yourself available to examine the proposed amendment and to participate in working out the necessary acceptable language?

Scott Coffee:
Absolutely.

Chairman Anderson:
I will close the hearing on A.B. 369.

Meeting adjourned [at 10:35 a.m.].

RESPECTFULLY SUBMITTED:

_____
Kaci Kerfeld
Committee Secretary

APPROVED BY:

_____
Assemblyman Bernie Anderson, Chairman

DATE: _____

EXHIBITS

Committee Name: Committee on Judiciary

Date: March 28, 2007 Time of Meeting: 8:00 a.m.

Bill	Exhibit	Witness / Agency	Description
	A		Agenda
	B		Attendance Roster
A.B. 179	C	Bob Faiss, Adjunct Professor for Gaming Law at the William S. Boyd School of Law	Prepared testimony
A.B. 179	D	Lauren Pena, William S. Boyd School of Law	Prepared testimony
A.B. 179	E	William Devine II, William S. Boyd School of Law,	Prepared testimony
A.B. 179	F	Charles Rainey, William S. Boyd School of Law	Prepared testimony
A.B. 248	G	Vinson Guthreau, Nevada Association of Counties; and Alfredo Alonso, Peppermill Casinos	Bill Draft Executive Summary
A.B. 369	H	Ben Graham and Kristin Erickson, Clark County District Attorney	Proposed Amendment to A. B. 369